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Protecting Your Musical Copyrights

What is a musical composition? A series of notes and chords? Words and melody? Poetry and rhythm? A musical composition may mean different things to different people, but according to United States copyright law a musical composition is an original work of authorship fixed in a tangible medium of expression.[1] Compositions are a type of intellectual property, protected by copyright. Copyright protection extends to the musical work, including both music and lyrics, but not to the idea that gives rise to or is expressed by the composition. A copyright in a musical composition vests in the owner a myriad of privileges and protections codified in the copyright laws of individual countries as well as international treaties and conventions. This publication focuses primarily on those sections of the United States Copyright Act (the "Copyright Act") most relevant to authors, owners, and licensees of musical compositions.

United States copyright law can be extremely complex; however it is important that those with an interest in a musical composition, including authors, heirs, music publishers, and administrators, have a basic understanding of the key aspects of the law in order to effectively protect and exploit their musical property. This handbook sets forth fundamental guidelines for the safeguarding of your copyrights from creation until the date each composition enters the public domain. The handbook is intended as an overview. For a specific understanding of the application of the principles contained herein to your own catalogue, you should consult with a copyright attorney and review the more detailed information available from the Copyright Office.[2]

Copyright—An Overview

Subject Matter of Copyright

The Copyright Act grants copyright protection to 8 categories of "original works of authorship" including:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.[3]

[1] 17 U.S.C. § 102(a).
[2] Address your inquiries to the Library of Congress, Copyright Office, 101 Independence Ave. S.E., Washington D.C. 20559-6000; telephone (202) 707-3000; website www.copyright.gov.
[3] 17 U.S.C. §102.

Sound Recordings

Sound recordings created before February 15, 1972 are not subject to federal copyright protection. Pre-February 15, 1972 sound recordings are typically protected under state statutes and common law. Sound recordings fixed on or after February 15, 1972 are protected under the Copyright Act. These sound recordings enjoy copyright protection that is distinct from the protection accorded to the individual compositions embodied in the sound recording. A transfer of rights in a sound recording does not convey rights in the compositions or other copyrighted works embodied in the sound recording.[4]

Authors of Copyrighted Works

The term "author" is not expressly defined in the Copyright Act, other than with respect to works made for hire (where the employer is deemed to be the author).[5] While it is generally understood that the author of a book is a person or persons who wrote the words and/or illustrated the book, and the author of a composition is the person or persons who wrote the music and/or lyrics, there is debate over who constitutes the author(s) of a sound recording.

Copyright Ownership

Copyright ownership of a work vests in the author or authors of the work upon its creation.[6] Authors of joint works are co-owners of the copyright. Authors of works contributed to collective works own the copyright only in their contribution, which is distinct from the copyright in the collective work as a whole. In the case of a work made for hire, absent an agreement to the contrary, the employer will own all rights in the work.[7]

Joint Works

In the United States, a composition written by two or more authors is generally deemed to be a "joint work," which is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[8] Ownership of joint works is presumed to be shared equally by the authors, absent an agreement to the contrary. Each author of a joint work is free to enter into a nonexclusive license for the entire work, provided that the author issuing the license accounts to his or her co-author(s). In some cases, co-authors enter into an agreement among themselves, agreeing to work cooperatively in issuing licenses. As a practical matter, licensees of music publishing rights often insist on obtaining approval on behalf of each author of a work even if the grant of rights is non-exclusive.

[4] 17 U.S.C. §202.
[5] 17 U.S.C. §201(b).
[6] 17 U.S.C. §201(a).
[7] 17 U.S.C. §201(b).
[8] 17 U.S.C. § 101.

Scope of Copyright Ownership

Section 106 of the Copyright Act[9] lists six exclusive rights of the copyright owner, which include the rights:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[10]

Transfer of Copyrights

Copyright ownership may be transferred through assignments and contracts made by the original or subsequent copyright owner, or may be bequeathed by will. If an author or current copyright owner passes away leaving an estate that includes works under copyright, ownership will pass either to the beneficiary designated in the author/owner's will or, if there is no will, to the author/owner's legal heirs.

[9] 17 U.S.C. §106.
[10] *Id*.

Works Made For Hire

What Are Works Made For Hire?

Works made for hire are works of authorship that are deemed to be created by an employer (who may be an individual or an entity) although the actual act of creation is done by one or more other individuals. According to case law, pre-1978 works made for hire are works prepared by an employee within the scope of his or her employment. The work made for hire status of works created on or after January 1, 1978 is determined based on the two-prong test outlined in the Copyright Act.[11] In order to qualify as a work made for hire, the work must:

(1) be a work prepared by an employee within the scope of his or her employment; OR
(2) be a work specially commissioned for use as a contribution to one of nine enumerated categories where the parties expressly agree in writing that the work shall be considered a work made for hire.

Works Prepared by An Employee Within the Scope of Employment

The first prong of the work made for hire test has been the subject of judicial review. The case law indicates that the courts will evaluate "the hiring party's right to control the manner and means by which the product is accomplished."[12] In undertaking such an examination, the United States Supreme Court cited the following general agency criteria:

- The skill required;
- The source of the instrumentalities and tools;
- The location of the work;
- The duration of the relationship between the parties;
- Whether the hiring party has the right to assign additional projects to the hired party;
- The extent of the hired party's discretion over when and how long to work;
- The method of payment;
- The hired party's role in hiring and paying assistants;
- Whether the work is part of the regular business of the hiring party;
- Whether the hiring party is in business;
- The provision of employee benefits; and
- The tax treatment of the hired party.

Works Specially Ordered or Commissioned

[11] 17 U.S.C. §101.
[12] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

Under the second prong of the work made for hire test, a work specially commissioned for one of the following uses will be deemed a work made for hire provided that the parties agree in writing that the work is being prepared as such:

- As a contribution to a collective work;
- As part of a motion picture or other audiovisual work;
- As a translation;
- As a supplementary work;
- As a compilation;
- As an instructional text;
- As a test;
- As answer material for a test; or
- As an atlas.[13]

[13] 17 U.S.C. §101.

Music Publishing Rights

What Are Music Publishing Rights?

The broad bundle of rights that are associated with a musical copyright are known as "music publishing rights." These rights are not defined by statute but rather are terms recognized in the music industry. Similarly, the concept of the "writer's share" versus the "publisher's share" is based in practice, not law. Traditionally, 50% of the income derived from the exploitation of a composition is deemed to constitute the publisher's share and 50% the writer's share. Where the author assigns the copyright in the composition to the publisher, the publisher generally collects 100% of the income and, after deducting costs, remits the balance to the author. Other typical types of arrangements between authors and music publishers include co-publishing agreements, under which the copyright ownership is shared by the author (or heir) and publisher; administration agreements, under which the author (or heir) retains the copyright ownership and the publisher administers the rights; and co-administration agreements under which the author (or heir) retains the copyright ownership and co-administers the rights with the publisher. The performing rights societies have subscribed to the distinction between writer and publisher shares and allocate monies accordingly, usually paying the writer's share directly to the author or his/her heirs.

Music publishing rights are generally understood to include the following:

Non-dramatic or "Small" Performance Rights

- ♪ Non-dramatic or "small" performance rights include the rights to authorize non-dramatic performances of compositions over television, radio, and other electronic devices; online transmissions; and non-dramatic live performances.
- ♪ Small performance rights are administered by the performing rights societies. In the United States, these societies are ASCAP, BMI, and SESAC.
- ♪ Small performance royalties are divided equally between the writer and publisher.
- ♪ Royalties derived from the exercise of small performance rights are determined by a formula established by the performing rights society.
- ♪ Traditionally, authors were precluded from assigning or selling their writer's share of small performance rights. This is no longer the case, and in recent years a number of authors and heirs have included the writer's share of income, including public performance income, in the sale of their catalogues.

Dramatic or "Grand" Rights

- ♪ Dramatic or "grand" rights refer to the use of a song in a dramatic context (whether or not the song is originally written for a dramatic musical production). Note that there is no statutory definition of grand rights, and an issue may arise as to whether a particular usage constitutes the exercise of a grand, versus small, right.
- ♪ Grand rights are often withheld from grants of rights to the music publisher and are controlled directly by the author or his/her representatives. The

royalties derived from the exploitation of grand rights are typically in the form of a percentage of gross weekly box-office receipts or a flat per performance fee.

Synchronization Rights

- Synchronization ("synch") rights are the rights to include the composition in an audio-visual production, such as a motion picture, television program, television commercial, home video, and DVD.
- Fees are generally in the form of one-time payments, although the arrangement can be a "stepped" deal (e.g., one fee for motion picture use and an additional payment for video rights). In addition, mechanical royalties will be payable if the song is included in a soundtrack album.

Mechanical Rights

- Mechanical rights are the rights to include a composition in a sound recording. Once a song has been published, anyone can record it as long as the statutory mechanical license is obtained and the statutory fee paid.
- In the United States, many copyright owners authorize the Harry Fox Agency to issue mechanical rights licenses on their behalf.
- As of January 1, 2012, the statutory rate is 9.1 cents per composition or 1.75 cents per minute for songs over 5 minutes. This rate is subject to adjustments by the Copyright Royalty Board.
- Despite the statutory minimum, record companies will often insist on paying a rate that is less than the full statutory rate. A rate equal to 75% of the statutory rate is customary. This is true regardless of whether or not the songwriter has written all the songs on the album. Another common practice of the record companies is to limit the number of songs on a particular album for which the author is paid mechanical license fees even if the album contains a greater number of songs. Both the reduction in the mechanical rate and the limitation on the number of songs respecting which the record company will pay royalties is subject to negotiation.

Print Rights

- Print rights are the rights to issue licenses for printed versions of the compositions, including single-song sheet music and folios.
- Print rights may be included in a general grant of rights to a third-party music publisher or may be licensed separately to a company whose primary business is the printing and sale of music.
- The fees payable to the songwriters for the exercise of print rights are typically based on a percentage of retail list price (12.5% is customary).

Concert Rental Rights

- Concert rental rights are the rights to perform works in public.
- Concert performance rights are generally covered by licenses issued by the performing rights societies. However, the rental of full orchestral scores and parts are typically handled by a concert rental agent.

- It is customary for the concert rental agent to retain between 25% and 50% of the rental fees and remit the balance to the writer.
- Concert rental rights may be included in a general grant of rights to a third-party music publisher or may be licensed directly to a concert rental agent.

New Media Rights

- "New Media" is an evolving category of exploitation of musical copyrights.
- New Media rights include all rights not covered by the traditional modes of exploitation.
- New Media rights include digital performance and digital transmission of musical compositions by a variety of means, including digital downloads, ringtones, and interactive streaming.
- The use of a composition in a permanent digital download is recognized as a mechanical right. The Copyright Royalty Board has established that the current statutory rate for the mechanical reproduction of a composition in a permanent digital download is 9.1 cents per composition or 1.75 cents per minute for compositions over 5 minutes in length (the same statutory rate that applies to mechanical reproduction in physical phonorecords).
- The use of a composition in a ringtone is recognized as a mechanical right. The Copyright Royalty Board has established that the current statutory rate for the mechanical reproduction of a composition in a ringtone is 24 cents.

Copyright Duration

Bifurcated Duration Provisions Under US Copyright Act

The United States copyright law is unique in that the duration of the copyright differs depending on the date of creation of the work, as well as the date the work is initially registered or published.

Pre-1978 Works

Works created and copyrighted (that is, registered or published) prior to January 1, 1978, are protected for 95 years from the date the copyright was originally secured (95 years from the earlier of the registration or publication). The 95-year period is divided into an initial term of 28 years and a renewal term of 67 years.[14]

Works created prior to January 1, 1978, that were neither copyrighted nor fell into the public domain before that date are protected for the life of the author plus 70 years, provided (i) in no event shall the term of the copyright in such a work expire before December 31, 2002, and (ii) if such a work is published on or before December 31, 2002, the term of the copyright shall not expire before December 31, 2047.[15]

Works registered for copyright or published prior to January 1, 1923, are in the public domain in the United States.

Post-1977 Works

Works created on or after January 1, 1978, are protected for the life of the author plus 70 years. In the case of a joint work, protection continues for 70 years after the death of the last surviving author.[16]

Anonymous Works; Pseudonymous Works; Works Made for Hire

The copyright term for an anonymous or pseudonymous work as well as a work made for hire endures for the shorter period of either 95 years from publication or 120 years from creation.[17]

Discrepancy in Duration Provisions

It is generally believed that the term of protection for works registered or published prior to January 1, 1978, is roughly equivalent to the term of protection for works created on or after that date. However, this is often not the case. Imagine, for example, a 20-year-old author who creates a composition and registers it for copyright in 1960. The author

[14] 17 U.S.C.§304(a).
[15] 17 U.S.C.§303.
[16] 17 U.S.C.§302.
[17] 17 U.S.C.§302.

dies at the age of 85 in 2025. The song registered in 1960 will enter the public domain in the United States on January 1, 2056, just 30 years after the author's death. Compare this to a 20-year-old author who creates a composition and registers it for copyright in 1980. The author also dies at the age of 85, in 2045. The song registered in 1980 will enjoy copyright protection until 2116—a full 40 years longer than the song from 1960. Clearly, the bifurcated duration provisions have not accorded the earlier author or his/her heirs protection equivalent to the life-plus-70 protection accorded authors of works created on or after January 1, 1978.

Registration and Renewal of Copyrights

Registering Works

Original works may be registered with the Copyright Office at any time after their creation. Although copyright is now secured automatically upon the creation of a work even if no registration is made, it is advisable to officially register a copyright with the Copyright Office in order to establish priority as well as to document title. To register a musical work, request Application Form PA from the Copyright Office and return it with the requested material. You may also print out and fill in Form CO from the Copyright Office website and send it in with the requested material. The fee for both types of registration by mail is currently $65. In addition to these two methods, the Copyright Office allows you to register works online using the eCO Online System. This option provides the fastest processing times and currently costs $35. For a tutorial on how to use this system and more information about registering works visit the eCO Page of the Copyright Office's website at www.copyright.gov/eco/index.html.

Renewing Copyrights

The process of copyright renewal applies only to works registered or published before January 1, 1978.

Works registered or published prior to January 1, 1964, must have been formally renewed (i.e., a renewal application must have been registered with the Copyright Office during the 28th year of copyright). Failure to renew caused the work to enter the public domain upon the expiration of the initial 28-year term of copyright.

Works originally registered or published between January 1, 1964, and December 31, 1977, benefit from automatic copyright renewal. Although the filing of a renewal application was not mandatory for these works, there were several advantages to filing renewals with the Copyright Office. A renewal registration in the 28th year records the interest of the renewal claimant in the work for the renewal term. Additionally, a renewal certificate can serve as prima facie evidence of copyright and allow the claimant to object to the creation of an unauthorized derivative work. Most significantly, with respect to posthumous renewal, the timely filing of a renewal application by the heirs of the author, where the heirs were not party to a prior renewal term grant, ensures that prior licensees shall not be entitled to continue to

exploit either the original work or derivative works based thereon without the permission of the heirs.

Publication of Copyrighted Works

Publication is defined in the Copyright Act as the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[18] Since January 1, 1978, the inclusion of a composition on a sound recording has constituted publication. The simple public performance of a composition does not constitute publication. The date of publication of a work may be significant in determining the duration, as well as statutory termination windows, of the work.

[18] 17 U.S.C. §101.

Vesting of Renewal Term Rights in Pre-1978 Works

Ownership of Renewal Term Rights When Author Survives the Renewal Term

If an author lives into the renewal term of copyright, the ownership of the renewal term rights rests with the author unless the author has entered into an agreement transferring renewal term rights. If the author conveyed rights to a music publisher for the full term of copyright, including renewals and extensions thereof, the music publisher will continue to own the work in the renewal term subject to the applicable statutory termination provisions. If the author granted rights only for the initial term of copyright, rights will revert to the author on the commencement of the renewal term of copyright.

Effect of Author's Death During the Initial Term of Copyright

If an author dies before the end of the 28th year of copyright, the renewal term rights automatically vest in the author's heirs (which may include the widow/widower or children of the author, the author's executor(s), or the author's next of kin) regardless of whether the author assigned the renewal term of copyright to a third-party prior to his or her death.[19] A limited exception to this rule occurs if the author properly renewed the copyright during the 28th year of copyright, assigned the renewal term rights in the composition during that year, and subsequently died. In this limited circumstance, renewal term rights will remain with the assignee.

In general, when an author dies during the initial term of copyright, an assignee of the author such as a music publishing company may not rightfully claim the copyright during the renewal term unless (i) the author's heirs were party to an initial grant of renewal term rights, or (ii) the author's heirs subsequently assign the copyright for the renewal term to the music publisher.[20] If an heir fails to advise the music publisher that the heirs have secured the renewal copyright and are reclaiming renewal term rights, the publisher may continue to collect on copyrights in the renewal term.

Even when an author's heirs were signatory to a grant of renewal term rights, where an author leaves multiple heirs, it is important to ascertain if all of the heirs were actually party to the grant. For example, if an author's wife and two children signed a renewal term contract, but the author's youngest daughter was not yet born, the youngest child will be able to claim her share of the renewal term rights even though the grant will subsist with respect to her mother and siblings.

While no explicit statutory notice requirements or procedures are prescribed in order to claim a renewal interest, the failure to make a timely claim may limit retroactive recovery. Accordingly, heirs should "claim" their rights in the renewal copyright as soon

[19] Section 304(a)(1)(C) of the U.S. Copyright Act designates the persons entitled to renew a copyright registration in the event that the author has died prior to the commencement of the renewal term: "(ii) the widow, widower, or children of the author, if the author is not living, (iii) the author's executors, if such author, widow, widower, or children are not living, or (iv) the author's next of kin, in the absence of a will of the author." 17 U.S.C. § 304(a)(1)(C).
[20] See Stewart v. Abend, 495 U.S. 207, 219-20 (1990).

as possible by sending letters of notification to the music publisher as well as the applicable performing and mechanical rights organizations. It is important to note that the vesting of renewal term rights in an author's statutory heirs applies only to such rights in the United States. While the statute does not limit the territorial scope of the reversion of rights, custom in the industry limits the scope of the reversion because the notion of a renewal term of copyright is unique to the United States.

The foregoing rules regarding the vesting of renewal term rights in the author's statutory heirs apply with respect to all exclusive and non-exclusive grants of copyright other than works made for hire and grants made by will.

Statutory Termination of Transfers/ "Recapturing Copyrights"

Pre-1978 Grants

Section 304(c) Termination

Under Section 304(c) of the Copyright Act,[21] grants or licenses of pre-1978 copyrights executed before January 1, 1978, by the author or his/her heirs may be terminated during a 5-year period beginning 56 years after the earlier of registration or publication. This 5-year period is commonly referred to as the "termination window." Any exclusive or non-exclusive grant may be terminated, with the exception of a grant of rights in a work made for hire or grants made by will.

A grant may be terminated even if the original contract states that the grantee shall be entitled to retain its rights for the entire term of the copyright, including renewal and extended terms, because the statutory termination right overrides the contract.

If the author dies before exercising the termination right, the termination interest vests in the author's heirs, who are defined by statute to include the author's widow or widower, children, or grandchildren, or, in the event the author's widow or widower, children, or grandchildren are not living, the author's executor, administrator, personal representative, or trustee. Termination may be exercised only by following the procedures for notice and recordation outlined by the Copyright Act and Copyright Office Regulations.

Notice of termination must be served on the grantee or grantee's successor in title no more than 10 nor less than 2 years before the effective date of termination. That is, notice must be served anytime during the period beginning 46 years after the original copyright date and continuing until 59 years after the original copyright date.

It is important to note that while renewal applications may be filed at any time during the calendar year in which the 28th anniversary of copyright occurs, the date of the start and close of the 5-year termination window corresponds with the original month and day of copyright. For example, if the original copyright date is April 29, 1955, then the earliest possible effective date of termination is April 29, 2011. In this case, the earliest possible date for serving notice of termination is April 29, 2001. The latest possible effective date for termination in this example is April 29, 2016, and the latest possible date for serving notice of termination is April 29, 20014. While it is recommended that the author or statutory heir(s) serve notice of termination on the earliest date possible, notice is timely if it is served at any time up until the date 2 years before the end of the 5-year termination window. Absent proper notice of termination, rights in the work will remain with the grantee.

[21] 17 U.S.C. § 304(c).

Terminating Grants Under Section 304(c)

	SERVING NOTICE		RECAPTURE DATES	
	Notice of termination may be served as		Termination will be effective as	
If the copyright date is:	EARLY as TEN years before	LATE as TWO years before	EARLY as copyright date + 56 years	LATE as copyright date + 61 years
1951	1997	2010	2007	2012
1952	1998	2011	2008	2013
1953	1999	2012	2009	2014
1954	2000	2013	2010	2015
1955	2001	2014	2011	2016
1956	2002	2015	2012	2017
1957	2003	2016	2013	2018
1958	2004	2017	2014	2019
1959	2005	2018	2015	2020
1960	2006	2019	2016	2021
1961	2007	2020	2017	2022
1962	2008	2021	2018	2023
1963	2009	2022	2019	2024
1964	2010	2023	2020	2025
1965	2011	2024	2021	2026
1966	2012	2025	2022	2027
1967	2013	2026	2023	2028
1968	2014	2027	2024	2029
1969	2015	2028	2025	2030
1970	2016	2029	2026	2031
1971	2017	2030	2027	2032
1972	2018	2031	2028	2033
1973	2019	2032	2029	2034
1974	2020	2033	2030	2035
1975	2021	2034	2031	2036
1976	2022	2035	2032	2037
1977	2023	2036	2033	2038

Section 304(d) Termination—A Second Bite at the Apple?

Section 304(d) of the Copyright Act affords the author or the author's heirs another opportunity to terminate pre-1978 grants under copyright in the following limited circumstances: (i) the work was originally registered or published on or before October 26, 1939; and (ii) the author or heirs failed to exercise termination rights under Section 304(c). Any exclusive or non-exclusive grant that meets the foregoing criteria may be terminated with the exception of a grant of rights in a work made for hire or a grant made by will. Termination under Section 304(d) may be effected at any time during the 5-year period beginning 75 years after the original copyright date (the "Section 304(d) Termination Window").

Similar to Section 304(c) termination, if the author dies before exercising the termination right, the termination interest vests in the author's heirs, who are defined by statute to include the author's widow or widower, children, or grandchildren, or, in the event the author's widow or widower, children, or grandchildren are not living, the author's executor, administrator, personal representative, or trustee. Termination may be exercised only by following the procedures for notice and recordation outlined by the Copyright Act and Copyright Office Regulations. Included in the Copyright Office Regulations is a provision that the Section 304(d) termination notice must specify that notice of termination was not served pursuant to Section 304(c). This precludes the termination claimants from recapturing rights under Section 304(c), re-conveying the recaptured rights, and then once again serving a notice of termination.

Notice of termination under Section 304(d) must be served on the grantee or the grantee's successor in title no more than 10 nor less than 2 years before the effective date of termination. That is, notice must be served at any time during the period beginning on the date 65 years after the original copyright date and continuing until 78 years after the original copyright date.

As with Section 304(c) terminations, the date of the start and close of the 5-year termination window under Section 304(d) corresponds with the original month and date of copyright. For example, if the original copyright date is June 1, 1935, then the earliest possible effective date of termination is June 1, 2010. In this case, the earliest possible date for serving notice of termination will be June 1, 2000. The latest possible effective date of termination in this example is June 1, 2015, and the latest possible date for serving notice of termination is June 1, 2013.

While it is recommended that the author or statutory heir(s) serve notice of termination on the earliest date possible, notice is timely if it is served at any time up until the date 2 years before the end of the 5-year termination window. Absent proper notice of termination, rights in the work will remain with the grantee.

Terminating Grants Under Section 304(d)

	SERVING NOTICE		RECAPTURE DATES	
	Notice of termination may be served as		Termination will be effective as	
If the copyright date is:	EARLY as TEN years before	LATE as TWO years before	EARLY as copyright date + 75 years	LATE as copyright date + 80 years
1932	1997	2010	2007	2012
1933	1998	2011	2008	2013
1934	1999	2012	2009	2014
1935	2000	2013	2010	2015
1936	2001	2014	2011	2016
1937	2002	2015	2012	2017
1938	2003	2016	2013	2018
1939*	2004	2017	2014	2019

* Provided that the work was originally copyrighted on or before October 26, 1939.

Post-1978 Grants

Section 203 Termination

Grants of works executed by the author on or after January 1, 1978, may be terminated under Section 203 of the Copyright Act under slightly different conditions from those applicable to pre-1978 grants. Unlike termination pursuant to Sections 304(c) and 304(d), Section 203 termination is based on the date of the grant rather than the date of initial registration or publication of the work. Accordingly, Section 203 termination may be available to a work regardless of whether it was initially created or copyrighted before, on, or after January 1, 1978, as long as the grant was executed by the author on or after January 1, 1978. Moreover, the termination provisions of Section 203 are limited to grants executed by the author. This means that any grants or licenses executed by the author's successors on or after January 1, 1978, are not subject to statutory termination. The Section 203 termination right does not apply to a grant of rights in a work made for hire or a grant made under will.

Grants executed by the author on or after January 1, 1978, may be terminated during a 5-year period beginning 35 years after the date the grant was made; or, if the grant includes the right of publication of the work, during the 5-year period beginning on the earlier of (i) 35 years after the date of publication under the grant, or (ii) 40 years after the date of the grant. Note that for grants of rights in subsisting, previously published, copyrights, the date of the grant will generally be contemporaneous with the date of publication under the grant. A different result may occur if the work was out of publication as of the date of the grant.

If the author dies prior to serving notice of termination under Section 203, the termination interest vests in the author's heirs, who are defined by statute to include the author's widow or widower, children, or grandchildren, or, in the event the author's widow or widower, children, or grandchildren are not living, the author's executor, administrator, personal representative, or trustee.

If the composition subject to termination is a joint work and the grant was executed by two or more of its authors, then the termination must be effected by a majority of the authors who executed the grant (in the case of a deceased author, the termination notice may be executed by his/her heirs). This means that in the case of a grant executed by 2 authors of a work, those authors or their heirs must work cooperatively to serve notice of termination. Notice of termination under Section 203 must conform to the procedures for notice and recordation outlined by the Copyright Act and Copyright Office Regulations.

Notice of termination under Section 203 must be served on the grantee or the grantee's successor in interest no more than 10 nor less than 2 years before the effective date of termination. That is, notice must be served any time during the period beginning 25 years after the date of the grant and continuing until 38 years after the date of grant; provided, if the grant includes the right of publication of the work, notice must be served during the earlier to occur of (i) the period beginning 25 years

after the date of publication and continuing until 38 years after the date of publication, or (ii) the period beginning 30 years after the date of the grant and continuing until 43 years after the date of the grant.

The right of termination accorded under Section 203 of the Copyright Act is not limited to circumstances in which an author has failed to exercise the right to terminate a prior grant under Section 304(c). Imagine, for example, an author who registers a song for copyright on March 1, 1930, assigns the right to a music publisher in April of that year, and serves notice of termination on the music publisher pursuant to Section 304(c) effective March 1, 1986. After serving notice of termination, the author reassigns the copyright in the song to the original music publisher.[22] Beginning in April 2011, the author or his heirs may serve notice of termination pursuant to Section 203 on the publisher effective April 1, 2021.

Terminating Grants Under Section 203

	SERVING NOTICE		RECAPTURE DATES	
	Notice of termination may be served as		Termination will be effective as	
If the copyright date is:	EARLY as TEN years before	LATE as TWO years before	EARLY as publication date + 35 years*	LATE as publication date + 40 years*
1978	2003	2016	2013	2018
1979	2004	2017	2014	2019
1980	2005	2018	2015	2020
1981	2006	2019	2016	2021
1982	2007	2020	2017	2022
1983	2008	2021	2018	2023
1984	2009	2022	2019	2024
1985	2010	2023	2020	2025
1986	2011	2024	2021	2026
1987	2012	2025	2022	2027
1988	2013	2026	2023	2028
1989	2014	2027	2024	2029
1990	2015	2028	2025	2030
1991	2016	2029	2026	2031
1992	2017	2030	2027	2032
1993	2018	2031	2028	2033
1994	2019	2032	2029	2034
1995	2020	2033	2030	2035
1996	2021	2034	2031	2036
1997	2022	2035	2032	2037
1998	2023	2036	2033	2038
1999	2024	2037	2034	2039
2000	2025	2038	2035	2040

* In no event will the termination window begin later than 40 years after the date of the grant.

[22] In this example, the author may assign the rights to a third-party music publisher but must wait until the effective date of termination has occurred. The grant to the third-party music publisher will be subject to termination under Section 203.

Termination by the Heirs of a Deceased Author

Each of the statutory termination provisions (both pre-1978 and post-1977) stipulates that in the event an author dies before serving notice of termination, the author's right of termination is owned and may be exercised by his/her statutory heirs.

- In the event that the author has a surviving spouse but no surviving children or grandchildren, then the termination right is owned entirely by the author's spouse.
- If the author dies leaving a spouse and children then the termination interest is owned 50% by the author's spouse and 50% by the author's children on a per stirpes basis.
- The shares of a deceased child are owned by that child's children on a per stirpes basis but can be exercised only by a majority of them.

In order to exercise the termination right of a deceased author, a majority of the statutory heirs must be signatory to the notice of termination. As a practical matter, this means that in the event that the author has more than one statutory heir, a certain degree of cooperation is necessary in order to recapture rights. For example, if an author dies leaving a spouse and 3 children, at least the spouse (50%) and 1 child (16.7%) must be signatory to the notice of termination. If an author dies leaving no spouse but 7 children, at least 4 of those children must be signatory to the notice of termination. It is not unheard of for rights to remain with a publisher because the author's statutory heirs are not able or willing to cooperate to recapture rights.

Statutory Termination Provisions Are Limited to the United States

An argument may be made that if a grant of worldwide rights is made in the United States under United States law and the grant is subsequently terminated by the author or his/her heirs pursuant to Section 304(c), 304(d), or 203 of the Copyright Act, then the termination would end the grantee's rights throughout the world. However, the customary understanding is that because the termination right is unique to the United States copyright law, only the grant of rights in the territory of the United States is subject to termination.

Falling Between the Termination Cracks

It is generally believed that any grant under copyright made by an author would be subject to termination under one of the statutory termination provisions. However, there are instances in which such a grant may fall outside the scope of any of the termination provisions, and other instances in which it may not be clear which termination provision applies.

Pre-1978 Grants of Rights in Works Subsisting, but not Registered or Published Until After 1977

The United States Copyright Act accords protection for works created before January 1, 1978 but neither registered nor published prior to that date. The copyright in these works will endure until 70 years after the death of the last author to die (and if published on or before December 31, 2002, will not expire before December 31, 2047). However, grants of rights in such works made prior to January 1, 1978 do not appear to be eligible for statutory termination. Consider the following: In 1972, an author writes a composition entitled “Unsung Melody” and assigns perpetual worldwide rights in the composition to a music publisher. The work is not registered or published. The music publisher publishes the composition in 2005. The author will not be able to terminate the grant of rights to “Unsung Melody” under Section 304(c) of the Copyright Act because the work was neither registered nor published prior to January 1, 1978. The author will not be able to serve notice of termination under Section 203 because the composition was not the subject of a grant made by the author on or after January 1, 1978. A strict construction of the copyright termination provisions reveal that the grant of rights in “Unsung Melody” is not subject to termination.

Gap in Termination Provisions

Under certain circumstances an author may have entered into an agreement prior to January 1, 1978 pursuant to which the author agrees to transfer to the grantee rights in works that the author will create during the course of the agreement. In the event that the agreement applies to works created on or after January 1, 1978 these post-1977 works may fall into what is known in the industry as the “Gap” in the termination provisions. Consider the following: An author enters into a term songwriter agreement with a music publisher in 1977 pursuant to which she grants to the publisher all rights under copyright to every composition she writes during the 5-year period beginning January 1, 1977. The grant is a worldwide grant for the life of copyright in each of the compositions and any renewals or extensions thereof. In 1980, the author writes a composition entitled “Three Years Together” and the publisher publishes the composition in that year. The author is looking forward to terminating her agreement with the music publisher and recapturing this composition. She may not rely upon the Section 304(c) termination right because the composition was not registered or published prior to January 1, 1978. The agreement was executed by the author prior to January 1, 1978, so an argument might be made that the author similarly does not have the right to terminate the grant

under Section 203. However, the better approach is to imply a grant by the author made as of the date that the song was created in 1980 and to find that the author has the right to terminate the grant on the earlier to occur of (i) 35 years after the date of publication of the composition or (ii) 40 years after the date of creation.

In recognition of the Gap in the termination provisions, the United States Copyright Office has amended its regulations to clarify that it will record Section 203 notices of termination for works created after 1977 even when the agreement to make a grant was made before 1978. It should be noted that under these circumstances it may become important to precisely identify the date of creation of a work. According to the Copyright Act, "a work is 'created' when it is fixed in a copy or a phonorecord for the first time."[23] If the exact date of creation is uncertain the parties may look to the initial date of registration or publication, or the date on which a work was delivered to a publisher, record label, or performing rights organization.

[23] 17 U.S.C. §101.

Re-assignment of Terminated Rights

The termination provisions contain a safeguard for the original grantee (or that grantee's successor in title) that prevents the author or his/her heirs from granting the terminated rights to a third-party until after the effective date of termination. An exception is made for a further grant to the original grantee or its successor in title. In effect, this allows the original grantee an exclusive negotiation period that begins on the date notice of termination is served and continues through the effective date of termination. A grant made to a third-party during this period is invalid.

Termination Rights and Sound Recordings

Since the enactment of the Copyright Act, many songwriters, composers and heirs have successfully invoked the statutory termination provisions. However, due to the fact that sound recordings did not come within the scope of federal copyright laws until February 15, 1972, until recently there has been little consideration of the application of the termination provisions to grants of rights in sound recordings.

Which Termination Provisions are Available for Sound Recordings?

Pre-1978 grants of rights in sound recordings fixed on or after February 15, 1972 but before January 1, 1978 may be subject to termination under Section 304(c), provided the sound recording was not created as a work made for hire. Post-1977 grants of rights in sound recordings fixed on or after February 15, 1972 may be subject to termination under Section 203 provided (i) the grant was executed by the author of the sound recording and (ii) the author did not create the sound recording as a work made for hire.

Who Is Entitled to Terminate A Grant of Rights in a Sound Recording?

As discussed above, the termination right is owned by the author of a work, or the statutory heirs of a deceased author. However, the identity of the author of a sound recording is not defined in the Copyright Act, nor has it been the subject of judicial interpretation. Several different approaches have been posed for identifying the author(s) of a sound recording. One position is that the "author" of a sound recording is the artist or artists whose performance is featured thereon, or, in the absence of a featured artist, the producer of the sound recording. A second opinion is that the authors of a sound recording include both the featured artist(s) and the featured producer. A third theory is that the authors of a sound recording include every person (and possibly entity) that had anything to do with the creation of that sound recording, which would include mixers, background singers and session musicians in addition to featured artists and producers. Note that attributing authorship to every person connected to the creation of a sound recording would make it virtually impossible to determine the duration of copyright protection for post-1977 sound recordings because it would necessitate tracking the dates of death of the entire class of potential authors. Further, this position would make it difficult, if not impossible, to determine all potential termination rights claimants and could ultimately result in numerous "owners" of non-exclusive rights in the sound recording.

While attributing authorship in a sound recording to the featured artist(s) or, in the absence of a featured artist, the featured producer would seem to support a result that is consistent with both industry reality and Congressional intent; until this matter is settled through legislation or litigation it will continue to be a subject of debate. In the interim, featured artists and the heirs of deceased artists should assert their termination rights in a timely manner by serving notice of termination in accordance with the rules set forth in the Copyright Act.

Are Sound Recordings Works Made For Hire?

The grantees of rights in sound recordings (typically, the record labels) frequently take the position that performing artists render their services as employees for hire of the record label and that the grants are outside the scope of the statutory termination provisions. Indeed, the agreements entered into by performing artists and record labels often expressly state that the artist is rendering services as an employee for hire. However, this statement alone is not dispositive. Both the agreements and the artist-record label relationship must be analyzed in order to determine if the artist rendered services as an employee for hire.

Under such an analysis, a pre-1978 recording agreement will constitute work made for hire agreement only if it is found that the artist rendered services as an employee within the scope of his or her employment. Post-1977 recording agreements must be evaluated under the two-prong work made for hire test proscribed in the Copyright Act – (i) did the artist render services as an employee within the scope of his/her employment?; or (ii) were the artist's services specially commissioned as a work for hire for inclusion in one of the nine categories of works enumerated in the Copyright Act?

Did the Artist Render Services as an Employee Within the Scope of His/Her Employment?

Each performing artist – record label relationship must be examined through the lens of the agency criteria to determine whether in fact the artist was the employee of the label at the time the sound recording was made. In most cases, the artist – record label relationship will not be found to create an employee-employer relationship. Importantly, it is rare that a record label will withhold taxes from the monies paid to the artist, or provide the artist with health insurance or other benefits. Note, however, that in cases in which an artist renders services through his or her loan-out corporation, the relationship between the artist and the loan-out company may indeed be deemed to be an employer-employee relationship. In these cases, the loan-out agreement may be enough to prevent the artist from successfully terminating the grant of rights to the record label (as successor in interest to the loan-out company).

Were the Artist's Services Expressly Ordered or Commissioned As a Work Made for Hire for Inclusion in One of the Nine Statutorily Designated Categories?

At the outset, it is important to note that sound recordings are **not** specifically included in the nine categories of commissioned works enumerated in the Copyright Act. In 1999, Congress amended the Copyright Act to add sound recordings as a category of commissioned works as part of an unrelated bill and after virtually no debate.[24] The amendment was repealed the following year "without prejudice" to the debate of whether sound recordings may or may not be

[24] Intellectual Property and Communication Omnibus Reform Act of 1999, Pub. L. 106-113 §1000(a)(9), 113 Stat. 1501 (repealed 2000).

deemed works made for hire.[25] Courts have rejected the argument that a sound recording falls within the category of motion picture or other audiovisual work, thus ruling out one of the nine categories.[26] Services rendered by a performing artist are clearly not commissioned for use in six other categories – translation, supplementary work, instructional text, test, answer material for a test, or an atlas. That leaves two possible applicable categories: contributions to collective works and compilations.

Do the Artist's Services Constitute A Contribution to a Collective Work or a Compilation?

The Copyright Act defines a collective work as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[27] A compilation is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship … [including] collective works."[28]

One can certainly envision situations in which a sound recording will fall within the definition of a compilation (for example, a holiday album comprised of pre-existing master recordings of individual compositions by different artists). However, the record label position is that ALL sound recordings are collective works or compilations, because there are multiple separate contributions made in the creation of a sound recording, and/or because the record label may rearrange the master recordings of individual compositions delivered by the artist. According to this position, if the performing artist agreed in writing that his/her services were being provided as an employee for hire, then the resulting sound recording would be a work made for hire and the grant of rights therein would not be subject to termination.

This position is arguably going outside the plain meaning of the statute. While multiple people may work on the creation of a sound recording, the work that they provide does not necessarily rise to the level of an original work of authorship. The fact that the record label may rearrange the order of compositions on a recording, or even choose to eliminate compositions, no more renders the sound recording a compilation than does the fact that a book publisher edits an author's novel or rearrange's chapters in a book. Finally, with the growing trend toward the digital release of single-song sound recordings, it will be increasingly more difficult to find that a compilation exists.

[25] 146 Cong. Rec. 7,771 (2000); Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (codified as amended at 17 U.S.C. §101 (2000)).
[26] See, e.g. Lulirama Ltd. v. Axcess Broadcast Services, Inc., 128 F.3d 872 (5th Cir. 1997).
[27] 17 U.S.C. §101.
[28] 17 U.S.C. §101.

Conclusion

Whether or not an artist's grant of rights in a sound recording is subject to termination is currently the subject of great debate. Opinion is divided both as to who is entitled to claim authorship of a sound recording, and as to whether an artist's contribution to a sound recording constitutes that of an employee for hire. It is likely that this debate will continue until resolved by a clarifying amendment to the Copyright Act or a ruling of the Supreme Court. In the interim, it is advisable for artists with a colorable claim of authorship to serve notices of termination in a timely manner, so as not lose the opportunity by reason of the applicable notice window closing before notice is served.

Contractual Termination

The statutory termination provisions enable an author or the heirs of a deceased author to terminate perpetual or "life of copyright" grants under copyright. However, in certain cases it may not be necessary to invoke the statutory termination provisions if a contract itself provides for the expiration or termination of the grant. Some contracts provide for early termination in the event that certain events occur (such as breach by, or bankruptcy of, the grantee) or that certain events fail to occur (such as the failure to meet a minimum guaranteed royalty). Other grants are in the form of option agreements under which rights terminate in the event that an option is not exercised. It was not uncommon prior to 1978 for a grant to be limited on its face to the initial 28-year term of copyright, or for a grant to specify that it was to persist for a limited term of years. It is established case law in the United States that a pre-1978 grant will persist in the United States for the initial term of copyright only unless the grant specifically includes a grant of the renewal term of copyright.[29] Note, however, that the general understanding is that the grant will continue to control outside the United States in these instances unless specific provisions are included in the contract that provide for a limited term outside the United States.

During the mid-twentieth century, a series of original and renewal songwriter form agreements were published by the Songwriter's Protection Agency, successor in interest to AGAC and predecessor in interest to the Songwriter's Guild of America. It is worth noting several of the most commonly used of these forms, which contained specific provisions relating to the term of the contract. While the contract must be reviewed in each instance to determine if the parties amended or modified the standard terms, a basic familiarity with these provisions will alert you to a possibility that a grant will terminate at least in some portion of the territory by virtue of the standard language of the agreement.[30]

The 1939 Uniform Popular Songwriters Contract

The 1939 Uniform Popular Songwriter Contract (the "1939 UPSC") provides for the grant of rights in a musical composition and the right to secure copyright in the composition throughout the world, including "the right to have and to hold the said copyright and all rights of whatsoever nature thereunder existing." Since the 1939 UPSC does not specifically grant rights for the renewal and/or extended term of copyright, the form is generally understood to convey rights in the United States for the initial 28-year term of copyright only. With respect to the rest of the territory (the world excluding the United States) the grant is understood to persist for the life of copyright in the song in each country of the territory.

The 1947 Revised Uniform Popular Songwriters Contract

[29] See e.g., Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373, 375 (1960); Epoch Producing Corporation v. Killiam Shows, Inc., 522 F.2d 737, 747 (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976); G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469, 471 (2d Cir. 1951), cert. denied, 342 U.S. 849 (1951); White-Smith Music Pub. Co. v. Goff, 187 F. 247, 253 (1st Cir. 1911).

[30] It is important to review each individual agreement in the context of the series of transactions that may occur during the life of a work. For example, a work that reverts to the author in the United States by reason of a contract that terminates at the end of the initial term of copyright may be the subject of a renewal agreement.

The 1947 Revised Uniform Popular Songwriters Contract (the "1947 UPSC") provides for the worldwide grant of copyright in the subject compositions. The agreement provides that rights will revert to the author in the United States and Canada at the end of the initial term of copyright, or 28 years from the date of publication in the United States, whichever is shorter. The 1947 UPSC does not provide for automatic termination and reversion of rights outside the United States and Canada but does provide in Paragraph 8 that if the author intends to offer for sale the rights in the composition outside the United States and Canada, he/she must give the publisher 6 months' prior written notice of such intention. This notice is known in the industry as the "Paragraph 8 Notice." The 1947 UPSC does not specify when the Paragraph 8 Notice may be served. While the position of some music publishers is that the notice must be served 6 months prior to the expiration of the initial term of copyright, this argument is not supported by the language of the contract. The better interpretation is that the Paragraph 8 Notice may be given at any time (after the initial term of copyright) that the author or his/her heirs decide to offer the rights in the song for sale outside the United States and Canada.

The 1950 Uniform Popular Songwriters Renewal Contract

The 1950 Uniform Popular Songwriters Renewal Contract (the "1950 UPSRC") provides for the grant of rights for a period equal to the shorter of (i) the second or renewal period of the United States copyright, or (ii) 28 years after the expiration of the first original term of the United States copyright. The 1950 UPSRC provides, further, that on the expiration of the 28-year term the rights to the composition will revert to the author throughout the world, unless foreign rights were granted to a foreign publisher before 1947. The effect of a grant of renewal rights utilizing the 1950 UPSRC is that even if the original songwriter agreement was construed to convey rights outside the United States for the life of copyright in the composition, the grant may only persist until the date 28 years after the original term of United States copyright.

The Implications of Foreign Copyright Law

While our focus in this publication is United States copyright law, certain provisions of foreign copyright law are particularly relevant to creators and owners of musical copyrights and will be briefly touched on here.

"Joint" or "Collective" Works

In the United States, a song written by two or more authors is deemed to be a "joint" work regardless of whether one author composed the music and one author wrote the lyrics or all authors wrote both music and lyrics. This has historically not been the case in certain major foreign territories including Australia, England, Germany, Japan, the Netherlands, New Zealand, Scandinavia, and South Africa. In these "non-joint" countries where one author writes lyrics and one author composes music, the music and lyrics are each deemed to be an independent contribution to a collective work. The copyright, in this case, runs individually with each of the music and lyrics.

In September 2011, the European Parliament and Council of the European Union adopted a Directive requiring the EU Member States to adhere to a uniform term of protection for musical compositions with words that will expire 70 years after the death of the last to survive of the author of the lyrics or the composer of the musical composition.[31] Each EU Member State is required to pass legislation implementing the Directive, which is to apply to "all such works in protection at the date by which the Member States are required to transpose this Directive."[32] It is not clear whether the Directive requires Member States to retroactively grant copyright protection to the portion of a composition (e.g., the lyrics or the music) which has fallen into the public domain prior to the passage of the implementation legislation. Each country's implementation legislation will need to be analyzed in order to determine the impact on individual compositions.

The status of a work as "joint" or "non-joint" may have implications with regard to duration of copyright, allocation of royalties, and reversionary rights, so it is important to monitor the status of implementation legislation in the EU Member States on this issue.

Duration of Copyright

Outside of the United States the duration of copyright protection is generally measured by a term of years after the death of the author. In countries in which all songs are deemed joint works, the term is based on the date that the last author dies. In countries in which only songs for which all authors both compose and write lyrics are deemed joint works, the term of protection for "non-joint" compositions is measured individually for each of the composer and the lyricist. The following summarizes the current term of copyright protection in several major foreign

[31] Directive 2011/77, 2011 O.J. (L. 265) (EU).
[32] *Id.* at 3.

countries. Note that the term of protection for works currently deemed to be "non-joint" in EU Member States may need to be recalculated once the respective state passes legislation implementing the September 2011 Directive. This list is not complete, and you should check the individual laws of each country.

Australia:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work); provided, however, that if an author died on or before December 31, 1954, then the duration of copyright is the life of the author plus 50 years
Canada:	Life of the last author to die plus 50 years
Denmark:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work)
France:	Life of the last author to die plus 70 years
Germany:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work)
Hong Kong:	Life of the last author to die plus 50 years (measured separately for each author of a "non-joint" work)
Italy:	Life of the last author to die plus 70 years
Japan:	Life of the last author to die plus 50 years (measured separately for each author of a "non-joint" work)
The Netherlands:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work)
New Zealand:	Life of the last author to die plus 50 years (measured separately for each author of a "non-joint" work)
Norway:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work)
South Africa:	Life of the last author to die plus 50 years (measured separately for each author of a "non-joint" work)
Spain:	Life of the last author to die plus 70 years
Sweden:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work)
United Kingdom:	Life of the last author to die plus 70 years (measured separately for each author of a "non-joint" work)

In each instance the copyright subsists through December 31 of the final year of copyright protection.

British Reversionary Right

The service of a notice of termination under the Copyright Act is generally believed to effect a termination of rights in the United States only. While there may be a legal or contractual basis for also reclaiming rights outside the United States, this must be evaluated on a case-by-case basis. In addition, an analysis of the relevant foreign copyright laws is recommended. Particularly with respect to older works, the possible application of foreign copyright laws relating to the posthumous reversion of copyrights should be considered. Many foreign jurisdictions recognize some form of reversionary interests. Foremost among the foreign reversionary laws are the provisions relating to the "British Reversionary Right."

The United Kingdom Copyright Act of 1911 provided that copyrighted works granted to a third-party automatically revert to the author's heirs, successors, or legal representatives 25 years after the death of the author under the following circumstances: (i) the author is the first copyright owner of the work, and (ii) the grant being terminated (e.g., the publishing agreement) was made by the author (grants made by the author's heirs are not terminable under Copyright Act of 1911). The Copyright Act of 1911 applied to all of the so-called "British Reversionary Territories" or "BRTs"– that is, all countries that were part of the British Commonwealth as of 1911.[33]

With the passage of time, the individual countries that made up the British Reversionary Territories adopted their own copyright laws, and those laws have also been amended over time. In most of the major BRTs, the concept of a reversionary right was deleted from the law, and in these countries the right exists only until the date that the respective law changed. Accordingly, in the United Kingdom the reversionary right applies only to grants made by the author on or before June 1, 1957. In New Zealand, the reversionary right is available for grants made by the author on or before April 1, 1963. In South Africa, the right applies to grants made by the author on or before September 10, 1965, and in Australia the right is available for grants made by the author on or before May 1, 1969. The reversionary right exists to this day in Canada.

In the "non-joint work" BRTs (all of the major BRTs other than Canada), the actual date of reversion depends on whether or not the work is a joint work. If the work is deemed "joint," then the rights in the song revert on the later of (i) 25 years after the date of death of the first author to die, or (ii) the date of death of the last author to die. In these countries, if the work is deemed "non-joint" then the reversionary date is calculated separately for each author. In Canada, the reversion occurs 25 years after the date of death of the last author to die. While the Copyright Act of 1911 provides for the automatic reversion of rights in the subject works, as a practical matter the music

[33] The British Reversionary Territories are generally believed to include the following: Anguilla, Antigua, Ascension Islands, Australia, Bahamas, Bangladesh, Barbados, Barbuda, Belize, Bermuda, Botswana, British Antarctic Territory, British Virgin Islands, Brunei, Canada, Cayman Islands, Central and Southern Line Islands, Channel Islands, Cyprus, Dominica, Falkland Islands, Federated Malay States, Gambia, Ghana, Gibraltar, Grenada, Guyana, Haiti, Hong Kong, India, Republic of Ireland, Isle of Man, Israel, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, North Borneo, Pakistan, Pitcairn Islands, Rendonda, Republic of South Africa, Sarawak, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Georgia, South Sandwich Islands, Sri Lanka, St. Helena, St. Kitts-Nevis, St. Lucia, St. Vincent, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tristan de Cunha, Turks and Caicos Islands, Tuvalu, Uganda, United Kingdom, Zambia, Zimbabwe.

publisher will continue to claim ownership in the songs (and retain the publisher's share of income) until the author's heirs assert their reversionary rights.

The Copyright Act of 1911 does not require that a particular form of notice be sent in order to claim reversionary rights. To facilitate your claim you should identify the author of the composition, the date of the original composition, the parties to the original contract and their successors in interest, the author's date of death, and the relationship of the reversionary claimants to the author (i.e., heirs, executor, trustee, or legal representative). There is no time limit on claiming reversionary rights; the claim may be made at any time following the 25th anniversary of the author's death. Given the popularity of American musical "standards" in the British territories, the British reversionary rights in these countries can be valuable indeed.

Concluding Thoughts

For Composers and Lyricists

The job of a composer and lyricist is to create. It is very common for creators to leave the business of their creations to managers, agents, and lawyers. These professionals are generally well versed in the specifics of registering works for copyright and handling the transactional matters of licensing and selling copyrights. However, it is critically important for the future of your songs that you yourself have a basic understanding of the workings of the copyright laws and the legacy you are leaving for your heirs. Planning ahead for the ongoing management of your compositions and keeping careful and detailed records of copyright registrations, licenses, and grants will help ensure the smooth ongoing administration of your works. Your compositions are not only your legacy to your children and grandchildren; they are an important part of America's cultural heritage. If you understand the rights and protections afforded to the author and his/her heirs by the copyright laws, you will be able to enhance the economic portfolio of your compositions. Careful safeguarding of musical copyrights helps to prevent the abuse of treasured works and ensures that the compositions receive the honor and appreciation they deserve.

For Heirs

Before you can determine the scope of the rights you have inherited and the potential for expanding the catalogue in the future (including claiming renewal term rights and/or terminating prior grants) you need as much information as possible. In a perfect world, the composer would leave you a file cabinet filled with precise information regarding the status of his or her musical compositions. The file would contain a complete list of songs written in whole or part by the composer, the identity of any co-writers, certified copies of all copyright registrations and renewal registrations, certified copies of all notices of termination served by the composer, an up-to-date copyright search report, and copies of all contracts entered into by the composer relating to the compositions (including agreements with co-writers, music publishers, performing rights organizations, managers, motion picture producers, record producers, and similar documents). However, it is the rare composer who is so attentive to the minutiae of copyright administration. Often, you will have to reconstruct the history of the composer's work before planning for the catalogue's future.

The Future Administration of Your Musical Copyrights

How Do You Administer Your "Recaptured" Compositions

Upon the effective date of termination of a grant, the songwriter or his/her heirs will identify a publisher for purposes of administering the music publishing rights in the song. At the outset, it is customary for this entity to be the songwriter's or heirs' wholly-owned publishing entity (be it a corporation, partnership, or d/b/a for the writer or heirs). The long-term administration of the compositions is generally handled in one of three

ways – the catalogue may continue to be handled by the songwriter or heirs (self-published), the catalogue may be administered by a third-party music publisher, or the catalogue may be sold to a third-party music publisher.

Self-Administered Catalogues

In the event the songwriter or heirs decide to personally administer future exploitation of the catalogue, the copyrights in the compositions will be retained by the songwriter or heirs. The self-publisher will handle all requests for uses of the compositions as well as the marketing and proactive exploitation of the catalogue.

Administration Agreements

Alternatively, the songwriter or heirs and their publishing entity may enter into an administration agreement for a term of years with an unrelated music publisher (either the original publisher or a third-party music publisher). In this case, the copyrights in the compositions will be retained by the songwriter or heirs. The music publisher will be authorized to administer some or all of the music publishing rights in the compositions, subject to contractually established parameters (such as approval rights for the songwriter or heirs), deduct agreed-upon fees, and remit the balance to the songwriter or heirs. The amounts retained by the music publishing administrator, the advance and/or guarantee payable to the songwriter or heirs, and the scope of the rights granted to the music publishing administrator will be established in the negotiations between the parties.

Sale of Catalogue/Co-Publishing Agreements

Finally, the songwriter or heirs and their publishing entity may elect to sell all or a portion of the recaptured copyrights (or an interest therein) to an unrelated music publisher (either the original publisher or a third-party publisher). The sale of a partial interest in the copyrights is known as a “co-publishing” arrangement. While such a sale is usually for the life of copyright, it is possible to negotiate a sale for a limited term of years with a contractually established reversion date. The songwriter or heirs will usually retain the right to receive the writer’s share of the royalties generated from the catalogue and in the co-publishing situation, a portion of the publisher’s share of the royalties. The author or heirs may also elect to sell all or a portion of the writer’s share of the royalties.

Remember, if you sell the copyrights in the songs that you own as a result exercising your Section 304(c) termination right, you will not be entitled to subsequently recapture the rights under Section 304(d). Bear in mind also that a purchase price that seems substantial at the time of sale may prove to be inadequate in hindsight. You should carefully consider the options of self-publishing your catalogue or entering into an administration agreement prior to electing to sell your copyrights.

For Music Publishers

Musical compositions are the key assets owned by a music publisher. Clearly, the business of publishing focuses on the exploitation of these assets. However, it is essential to the long-term vitality of the business that the publisher understands as much as possible about the underlying rights that accompany the assets. The ability to anticipate the possible statutory termination, contractual termination, or reversion of a composition will enable the publisher at a minimum to plan for a possible diminution of its catalogue and provide the publisher with information necessary to maximize the potential for reacquiring rights. Publishers in the market to acquire musical compositions similarly should conduct an in-depth evaluation of the current and future legal status of the catalogue. Legal due diligence is as important as financial due diligence in attributing a value to a potential acquisition.

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