

FAMILY FEUD IN THE ENTERTAINMENT INDUSTRY: SECTION 304(A) OF THE COPYRIGHT ACT AND ITS IMPACT ON ESTATE DISTRIBUTION

“Section 304(a) remains a highly technical provision which is too difficult for most lawyers to understand. It creates considerable uncertainty in the orderly exploitation of intellectual property because it is inherently unclear who will own the copyright during the renewal period”

—S. REP. NO. 102-194, at 3 (1992).

I. THE STATUTORY INTERPRETATION DILEMMA

Section 304(a) of the Copyright Act was originally enacted in 1909 and was later endorsed by the Copyright Act of 1976.¹ According to the legislative history, Congress created this section to “permit authors, originally in a poor bargaining position, to renegotiate the term of the grant once the value of the work has been tested.”² To provide even more protection to authors, Congress passed the Copyright Renewal Act of 1992 to circumvent unintentional surrendering of rights.³

For works created prior to January 1, 1978, the copyright term lasts twenty-eight years and may then be renewed for an additional sixty-seven years.⁴ If the author dies prior to commencement of the renewal term, then those persons enumerated in §304(a)(1)(C) receive the rights.⁵ If the author dies during the renewal period, the rights vest with the author’s surviving spouse and children.⁶ Although § 304(a)(1)(C)(ii) states that both

¹ See 17 U.S.C. § 24 (1909); 17 U.S.C. § 304(a) (1976).

² H.R. REP. NO. 2222, at 14 (1909); 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02, at 9-23 (1989) (stating that intellectual property such as copyrights cannot be properly evaluated for compensation until after the work has been presented to the public).

³ See Shira Perlmutter, *Copyright Ownership and Transfer*, in ADVANCE SEMINAR ON COPYRIGHT LAW 1994, at 7 (PLI Pat., Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. 388, 1994).

⁴ See 17 U.S.C. § 304(a).

⁵ See *id.* The established statutory succession of renewal term rights cannot be altered by will. See *Saroyan v. William Saroyan Foundation*, 862 F.2d 304 (2d Cir. 1988) (affirming the Southern District of New York decision that an author’s will may not alter the mandatory order of succession determined by Congress); Bruce P. Keller & Jeffrey P. Cunard, *Duration and Renewal Rights*, in COPYRIGHT LAW 2001, at § 7:4.2 (PLI Copyright Law: A Practitioner’s Guide, 2001).

⁶ See 17 U.S.C. § 304(a)(1)(C)(ii).

spouse and children are members of the same class, it does not specify how to determine the amount each member is entitled to receive.

Section 304(c), regarding termination rights, provides a more defined statutory scheme for succession. It states that the spouse receives fifty percent of the rights and the children then receive the remaining fifty percent on a *per stirpes* basis.⁷ When reading § 304 as a whole, either Congress forgot to specify how the class should be divided for purposes of distribution or purposefully remained silent. Although § 304 should be read in context with all of the subsections, the subsections often address diverse subject matters and address technical issues differently. For example, although § 304(a) prohibits will bumping, § 304(c) permits both waiver and assignment of statutory succession.⁸

II. *BROADCAST MUSIC, INC. v. ROGER MILLER MUSIC, INC.*

Until *Broadcast Music, Inc., v. Roger Miller Music, Inc.*⁹ was decided in 2001, no federal court determined how the rights of this class should be apportioned.¹⁰ This decision is currently under appeal. Thus, there is no clear ruling as to how the class is divided. Moreover, until the Supreme Court makes a ruling, there is no guarantee that the Circuit Courts will come to a consensus. In essence, the right of a spouse in Tennessee could be different than in New York or California. To ensure uniformity of the interpretation of the Copyright Act and to avoid forum shopping, it is critical that the federal courts unanimously resolve this legal issue of first impression.

Generally, apportionment of rights among class members is not a pressing issue because often there will only be one spouse and no children, or the spouse is deceased and the rights are equally shared amongst the children.¹¹ Apportionment only becomes controversial when there is both a surviving spouse and numerous children. A court confronted with this scenario may use the state's law of intestate succession, grant fifty percent to the spouse and equally divide the remaining fifty percent among the children, or equally divide the interest among all members of the

⁷ See 17 U.S.C. § 304(c)(2)(C).

⁸ See Perlmutter, *supra* note 3, at 23.

⁹ No. 3-01-0453 (M.D. Tenn. 2001).

¹⁰ See *id.*; David H. Melnick et al., *Intellectual Property Issues in Estate Planning*, in ESTATE PLANNING & ADMINISTRATION 1998, at 371, 378 (PLI Tax L. & Est. Plan. Course, Handbook Series No. D0-001N, 1998); Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 195 (1996).

¹¹ See Rosenbloum, *supra* note 10, at 195.

class.¹²

In 2001, the United States District Court for the Middle District of Tennessee considered this legal question of first impression in *Broadcast Music, Inc.*¹³ Famous songwriter Roger Miller died testate, granting all of his intellectual property rights to his wife.¹⁴ The validity of his will could not trump the statutory succession enumerated in § 304(a) of the Copyright Act. Most of the family members assigned their rights and the litigation followed.

The publisher defendants argued that the spouse is always entitled to at least fifty percent, whereas the children must divide the remaining fifty percent *per stirpes*.¹⁵ The daughter defendant asserted that all members in the class should take equally as suggested by *Nimmer on Copyright*.¹⁶ The District Court granted summary judgment to the daughter defendant holding that the spouse and children are all members of the same class, and therefore the interests should divide equally among them. The District Court recognized that there is no express language in the statute itself and thus the logical solution is to allow class members to take equally, especially since there is no evidence of Congressional intent to the contrary.¹⁷ The decision is currently being appealed to the United States Court of Appeals for the Sixth Circuit.¹⁸

III. THE DIVIDED STATES OF AMERICA: STATE INTESTACY LAW

In an Amicus Brief submitted to the United States Court of Appeals for the Sixth Circuit, spouses of other well-known songwriters argued that the District Court's decision was not logical because the majority of states' intestacy laws provide that the spouse receives a larger portion of the estate than the children.¹⁹ In *Stone*

¹² See *id.* at 195-96.

¹³ *Broadcast Music, Inc.*, No. 3-01-0453 (M.D. Tenn. 2001).

¹⁴ See Statement of Undisputed Material Facts, *Broadcast Music, Inc.*, No. 3-01-0453 (M.D. Tenn. 2001).

¹⁵ Defendant Roger Miller Music, Inc.'s Motion for Oral Argument at 7, *Broadcast Music, Inc.*, No. 3-01-0453 (M.D. Tenn. 2001).

¹⁶ Defendant Shannon Miller's Memorandum of Law in Support of Motion for Summary Judgment at 8-9, *Broadcast Music, Inc.*, No. 3-01-0453 (M.D. Tenn. 2001) (citing MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 9.04 at 9-29 (1999)). The defendant also relied on dicta from *Bartock v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 943 n.2 (2d Cir. 1975), and *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F. Supp. 420, 427 (M.D. Tenn. 1975).

¹⁷ See Defendant Roger Miller Music, Inc.'s Motion for Oral Argument at 9, *Broadcast Music, Inc.*, No. 3-01-0453 (M.D. Tenn. 2001).

¹⁸ See *Broadcast Music, Inc.*, No. 02-5766 (6th Cir. filed Aug. 2002).

¹⁹ See Brief of Amici Curiae Melanie Smith-Howard and Mirriam Johnson Jennings in Support of Defendant-Appellant, *Roger Miller Music, Inc.* at 3, *Broadcast Music, Inc.*, No. 02-5766 (6th Cir. filed Aug. 2002).

v. Williams,²⁰ the Second Circuit held that the definition of "child" should be determined by the appropriate state's laws of intestacy.²¹

In *DeSylva v. Ballentine*,²² the Supreme Court directed federal courts to evaluate a person's right to a copyright renewal by consulting state intestacy law.²³ Although the Court determined how to ascertain whether a person is entitled to a renewal right, it did not consider how such rights should be divided among class members. It is suggested that because the Supreme Court in *DeSylva* relied on state intestacy law, the Court likely would also use state law to determine the proportion of ownership between members of the same class.²⁴

Although allowing states to use their own intestacy law is a viable solution, it poses many potential shortcomings. An important concern is that this solution encourages forum shopping. If a party knows that one state is more beneficial than another, the party might move to the state that will benefit them in court. When numerous parties are involved, it may induce a race among them to file suit first in the state that will be most beneficial to their own interests. Moreover, it requires the court determine which state is the best one for purposes of applying the law.

Most publishing deals occur in California, New York and Tennessee. Thus, if some of the children have assigned their renewal rights to the publisher, the publisher will want the case decided in the state of its incorporation. It is also possible that the deceased author resided in a state other than that of the main music industry hubs. Moreover, it is not uncommon for a successful songwriter to be domiciled in several states.

Questions of changing laws would also pose a problem. The court would then have to determine if the applicable law is the law at the time the publishing agreement was made, at the time the author died, or when the suit was filed. Once the court determines the state with the greatest interest and the appropriate version of the law to apply, it will be faced with interpreting state law and how it will affect the Copyright Act. Although courts deal with choice of

²⁰ 970 F.2d 1043 (2d Cir. 1992).

²¹ See *Stone v. Williams*, 970 F.2d 1043, 1061-62, 1065 (2d Cir. 1992). The court remanded the case to the district court to determine what share the plaintiff is entitled to receive. See *id.* at 1066.

²² 351 U.S. 570 (1956).

²³ See *Stone*, 970 F.2d at 1063; *De Sylva v. Ballentine*, 351 U.S. at 580-82 ("[W]here a statute deals with a familial relationship[,] there is no federal law of domestic relations, which is primarily a matter of state concern This is really a question of the descent of property.").

²⁴ See Barbara A. Ringer, *Renewal of Copyright*, in *STUDIES ON COPYRIGHT* 503, 568 (Arthur Fisher Memorial ed. 1963).

law questions frequently, especially in federal courts, it is an unwanted step if not required. Courts may dispose of cases more quickly if they do not have to deal with the substantial burden of determining which state law should apply and how it should be interpreted and applied.

IV. *PER STIRPES* DISTRIBUTION AMONG ALL CLASS MEMBERS

Most children argue that the proper rule is the *per stirpes* division among all class members. This too is a feasible solution. It provides national notice to all current and potential copyright owners and allows courts to apply an easy and uniform rule without the added time and expense of considering state intestacy issues. The leading treatise on copyright law states that “[i]n the absence of any statutory language or evidence of Congressional intent to the contrary, § 304(a) class members [should] take in equal shares.”²⁵ Although *Nimmer on Copyrights* asserts that *per stirpes* division among class members is the best alternative, it challenges the fundamental notions of most state intestacy laws.²⁶

While it is not desirable for courts to consider state intestacy laws for each copyright renewal conflict, they should be considered in determining a uniform rule. According to general intestacy laws, spouses and children are not usually entitled to the same distributive class. Generally, under laws of intestate succession, most states allow a widow to receive, at a minimum, fifty percent.²⁷ The establishment of federal common law should be made in light of the public policy adopted by most states allowing the spouse to take more than multiple surviving children.

²⁵ MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 9.04[A][1], at 9-30 (1999).

²⁶ *See id.*

²⁷ *See, e.g.*, ALA. CODE § 43-8-41 (1982); ALASKA STAT. § 13.12.102 (Michie 1996); ARIZ. REV. STAT. § 14-2102 (1994); COLO. REV. STAT. ANN. § 15-11-102 (West 1995); CONN. GEN. STAT. ANN. § 45a-437 (West 1992); DEL. CODE ANN. tit. 12, § 502 (1975); FLA. STAT. ANN. § 732.102 (West 2001); HAW. REV. STAT. § 560:2-102 (1997); IDAHO CODE § 15-2-102 (Michie 1971); 755 ILL. COMP. STAT. 5/2-1 (1999); IND. CODE § 29-1-2-1 (1988); IOWA CODE ANN. § 633.212 (West 1985); KAN. STAT. ANN. § 59-504 (1939); KY. REV. STAT. ANN. § 392.020 (Michie 1056); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (West 1979); MD. CODE ANN., [EST. & TRUSTS] § 3-102 (1991); MASS. GEN. LAWS ANN. ch. 190, § 1 (West 1986); MICH. COMP. LAWS ANN. § 700.2102 (West 1998); MINN. STAT. ANN. § 524.2-102 (West 1985); MO. REV. STAT. § 474.010 (1985); MONT. CODE ANN. § 72-2-112 (1993); NEB. REV. STAT. § 301-2302 (1980); N.H. REV. STAT. ANN. § 561:1 (1998); N.J. STAT. ANN. § 3B:5-3 (West 1982); N.Y. [EST. POWERS & TRUSTS] LAW § 4-1.1 (McKinney 1992); N.D. CENT. CODE § 30.1-04-02 (1995); OHIO REV. CODE ANN. § 2105.06 (West 2000); OKLA. STAT. ANN. tit. 84, § 213 (West 1994); OR. REV. STAT. § 112.025 (1987); 20 PA. CONS. STAT. ANN. § 2102 (West 1980); R.I. GEN. LAWS § 33-1-10 (1957); S.C. CODE ANN. § 62-2-102 (Law. Co-op. 1986); S.D. CODIFIED LAWS § 29A-2-102 (Michie 1995); WASH. REV. CODE § 11.04.015 (1974); W. VA. CODE § 42-1-3 (1993); WIS. STAT. ANN. § 852.01 (West 1997); WYO. STAT. ANN. § 24-101 (Michie 1985).

V. A PLEA FOR A MORE SENSIBLE SOLUTION

The previous analysis illustrates the need for a more sensible approach. The best solution appears to be a national federal common law rule that the spouse take fifty percent and the children equally divide the remaining fifty percent *per stirpes*. This proposal would allow state intestacy law to be reflected in a national federal common law rule without requiring judges to consider each case differently. Moreover, it is consistent with the estate distribution allotted in similar subsections of § 304. Even if this recommendation is not adopted, it is imperative that a national uniform rule be implemented.

CONCLUSION

Federal copyright laws on estate distribution should be clear before the author dies, not after. Estate planning is an integral part of entertainment law and should be given the utmost respect. The only way an attorney can truly represent his or her entertainment clientele is to understand the consequences of the Copyright Act. Knowing how rights will be distributed may affect an author's distribution in his or her will so that the end result will be what the author desires.

The entertainment industry should be greatly appreciative if the parties of *Broadcast Music, Inc.* appeal the Sixth Circuit's forthcoming decision to the United States Supreme Court. Hopefully, the Court will recognize the importance of defining § 304(a) of the Copyright Act, grant certiorari, and thus provide a uniform rule for all federal courts to follow.

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