THE COPYRIGHT TERM EXTENSION ACT OF 1995: OR HOW PUBLISHERS MANAGED TO STEAL THE BREAD FROM AUTHORS

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I. OVERVIEW

The intention of the congressional sponsors of the Copyright Term Extension Act of 1995 is noble: to create parity between European authors and U.S. authors.[1] Their intention is to create parity between European authors and those who merely purchased the copyright from U.S. authors, leaving U.S. authors empty handed. Unfortunately, as currently drafted, the bill does not cre-

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[1] H.R. 989, 104th Cong., 1st Sess. (1995).

ate parity between U.S. authors and European authors. Instead, because of drafting that statutorily enforces decades old contracts, the bill awards an additional twenty years of copyright protection to purchasers of copyrights rather than to the authors or their families. These purchasers neither bargained nor paid for these additional twenty years.

Who are these purchasers? A very few corporations, like Time Warner, who own by acquisition hundreds of thousands of song copyrights. The music publishers' most recent survey of worldwide revenues totaled $1.10 billion, an increase of 6% from the previous year.[2] Of this figure, $126.36 million came from interest and investment income.[3] Despite this very healthy income, music publishers apparently have let it be known that they would oppose any bill that gives the copyright to authors. This assertion, if true, demonstrates how far the bill as drafted departs from the constitutional goal of protecting authors.

As I detail below,[4] the history of the ancient contracts under which large corporations will wrest copyrights away from authors can be traced back to at least 1919, when lawyers for music publishers began inserting boilerplate language in contracts with songwriters stating that any future extensions of term granted by Congress would automatically vest in the publisher.[5] The Copyright Term Extension Act of 1995 would have the effect of statutorily enforcing this 1919 boilerplate language with the result that, as in the board game "Monopoly," the copyright would go straight to the publisher without even stopping at the author.

The laudable goal of parity for U.S. authors has thus been distorted into an involuntary subsidy for copyright purchasers. This

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2 Irv Lichtman, *Publishing Revenues Hit $5 Billion—1993 Total is up 6%, Worldwide Survey Says*, BILLBOARD MAGAZINE Sept. 16, 1995.

3 *Id.*

4 *See infra* note 71-72 and accompanying text.

5 This practice was candidly noted by Philip B. Wattenberg during 1964 Copyright Office meetings on revising the 1909 Act:

> Since 1919 my firm has represented music publishers, and during those years we've drawn numerous contracts under which the renewal contract was assigned to the publisher. Invariably, these contracts contained the following language: "If the copyright law of the United States now in force shall be changed or amended so as to provide for an extended or longer term of copyright, then the writer hereby sells, assigns, transfers, and sets over unto the publisher, its successors and assigns or designees, all his right, title, and interest in and to said musical compositions covered by this agreement, for such extended or longer term of copyright."

COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW, 88th CONG., 2D Sess. 39 (House Comm. Print 1964). That music publishers were able to force writers to sign such agreements does not mean that music publishers paid for the right and thus should have the benefit of a term of copyright not even in existence until decades later.

subsidy is the difference between the market value of the copyright in today's market and the market value of the copyright when the original contract was signed. The subsidy will be paid by authors and their families, the very people the bill is intended to help. No one has or can give a reason why copyright purchasers should not be required to sit at the table and bargain with authors or their families for the value of the additional twenty years of copyright protection in today's market; after all, the copyright is being exploited in today's market.

The contracts to which I am referring could have been written as long ago as 1920, the very year commercial radio began, at a time before most talking movies, television, cable, videocassettes,[6] audio tape cassettes,[7] compact discs, computers, and foreign markets were important. While the terms of these old contracts vary even within industries, some courts have upheld broadly drafted contracts from the 1920s and 1930s that give the purchaser of the copyright the right to release the author's work in new technological media not in existence at the time of the contract, sometimes with no payment, and *always* at a rate that does not reflect the current market conditions.

Patent and Trademark Office Commissioner Bruce Lehman's recent White Paper on computer network use of copyrighted works notes the increasing importance of on-line computer uses of copyrighted works.[8] Yet, the Copyright Term Extension Act of 1995 takes this most important source of income out of the mouths of authors and their families and gives it to publishers without bargaining. There is no possible justification for forbidding authors who signed contracts in 1950 from negotiating today with the publishers for the fair market value of computer uses of his or her work. Yet, that is exactly what the bill does.

Most countries throughout the world, including those in Europe, do not permit assignments of rights in technologies not in existence at the time the contract was signed.[9] By enforcing these old contracts, the goal of achieving parity between U.S. authors

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[6] It was only in October 1975 that the Sony Corporation introduced its Betamax video recorder at a price of $2,000, "bundled" with a television set.

[7] While reel-to-reel machines were available after World War II, it was not until the 1960s, when the cartridge format was introduced, that audio tape took off as a medium.

[8] INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995) [hereinafter WHITE PAPER].

[9] *See, e.g.*, BIANKA A. KORTLAN, LAW ON COPYRIGHT AND NEIGHBOURING RIGHTS TEXT OF FEBRUARY 4, 1994 43 (Bianka A. Kortlan trans., 1994) (listing the Polish Copyright Act, Feb. 4, 1994, art. 67).

and European authors will not be achieved. Instead, a *dis*parity will be perpetuated.

Moreover, in the past, U.S. musicians have received very few foreign royalties. If that is the case now, it will be the case for the additional twenty years of the new term as well. But this problem is hardly limited to foreign royalties. There are many well-known musicians who were forced to sell their rights for a small one-time lump-sum. These musicians will not receive one penny if the Copyright Term Extension Act of 1995 passes in its current form.

Since its introduction, a number of groups and individuals have had the chance to fully study the bill. They have written to Congress asking that the bill be changed to vest the copyright automatically in authors. These authors make the point better than I can: their families depend upon their ability to receive royalties from their compositions. As Representative Bono stated at a June hearing on the bill in the House (H.R. 989), many musicians sign contracts when they are very young, often without legal (or any) representation, without any knowledge of the copyright law, and with little experience in the music business.[10]

Mr. Bono observed that while songwriters do not have the rights they should because many of them signed contracts when they were very green in the music business,[11] music publishers have, as he put it, "a battalion of lawyers."[12] Although Mr. Bono's comments need no support, articles in *Billboard* magazine, as well as number of biographies and autobiographies of musicians reinforce his comment. For example, Willie Dixon, the most famous and prolific blues composer, put it this way in his autobiography:

> I call it swindling but most people call it smart business when you take advantage of someone who don't know no better. I didn't know anything about copyright laws or anything like that.
>
> I thought I was dealing with honest people and when you trust someone who's dishonest, you get bitten. The law can take care of it if you can get enough money and get a lawyer to get justice. They [Chess Records] felt like if they could keep you poor enough, you wouldn't have nothing to fight with and that's the truth. I didn't have $2 a lot of times to have a copyright paper on a song sent into Congress.[13]

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[10] *Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 1st. Sess. 91 (1995) (Statement of Rep. Bono) [hereinafter *Hearings on H.R. 989*].

[11] *Id.* at 92.

[12] *Id.* at 102.

[13] WILLIE DIXON, I AM THE BLUES 99-100 (1989). Like Muddy Waters, Dixon signed a retroactive work for hire agreement, which he subsequently got overturned with legal help.

Don Snowden, who collaborated with Willie Dixon on the autobiography, explained how the copyright in the musical composition dovetailed with record contracts:

> [T]he chief bone of contention among Chess artists concerned the company's symbiotic relationship with Arc Music, the label's in-house publishing company formed in 1953. The Chess brothers were partners in Arc Music with Gene and Harry Goodman, who ran the publishing company from New York. Ironically, given the number of court claims that have been filed against Arc Music by black blues artists, the Goodmans were the brothers of Benny Goodman, who had effectively broken the color barrier in jazz in 1936 by including pianist Teddy Wilson and later vibes player Lionel Hampton in his group.
>
> It was common practice for the early independent record companies to start up their own publishing wings—and sometimes placing the rights to their songs with the in-house publishing company was a condition of an artist getting recorded. Label owners could, with a stroke of the pen, split songwriting credits [and therefore royalties] by adding names or pseudonyms to the copyright. The most famous example at Chess was "Maybelline," credited to Chuck Berry, rock n'roll deejay Alan Freed and Russ Fratto, the man who was printing up the record labels for Chess at the time.[14]

Chess/Arc Music was hardly alone in this practice; Atlantic Records was also notorious, and even famous composers such as Duke Ellington were forced to share authorship credits and royalties with their music publishers. In his book *Hit Men*, Frederic Dannen stated regarding the independent labels:

> The pioneers deserve praise for their foresight but little for their integrity. Many of them were crooks. Their victims were usually poor blacks, the inventors of rock and roll, though whites did not fare much better. It was a common trick to pay off a black artist with a Cadillac worth a fraction of what he was owed. Special mention is due Herman Lubinsky, owner of Savoy Records in Newark, who recorded a star lineup of jazz, gospel, and rhythm and blues artists and paid scarcely a dime in royalties.[15]

Dannen also quotes Hy Weiss, founder of the Old Town record label, as stating "What were these bums off the street?"[16] and as

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In his autobiography, he also talks about Chess's practice of putting its publisher's or other people's names on composer's songs. *See id.* at 200.

[14] *Id.* at 185. Freed was indicted in 1960 in a payola scandal and admitted taking $2,500. *See* FREDERIC DANNEN, HIT MEN 43 (1991).

[15] DANNEN, *supra* note 14, at 31.

[16] *Id.* at 49.

defending the practice of giving Cadillacs instead of royalties with reasoning that evokes the memory of Earl Butz, President Nixon's one-time Secretary of Agriculture: "So what, that's what they wanted. You had to have *credit* to buy the Cadillac."[17] Apparently even those songwriters without an appetite for Cadillacs had no choice but to give up their copyright:

> [Levy] saw nothing wrong, for example, in putting his name on other people's songs so that he could get writer's as well as publisher's royalties. When Ritchie Cordell wrote "It's Only Love" for Tommy James and the Shondells, . . . "Morris [Levy]," he [Cordell] said, "gave me back the demo bent in half and told me if his name wasn't on it, the song didn't come out."[18]

Bunk Johnson, a pianist and bandleader, is quoted in Dizzy Gillespie's autobiography *To Be or Not to Bop* as follows:

> A lotta guys who weren't keeping up with what was going on [with copyright law] would get a [recording] date, so the [record company's] A&R man, or some fellow, ofay or whatever, would say "O.K., gimme a riff. You know, just make up a head. We don't need no music; we're gonna record."
>
> So the cats would record, make up something. And they're actually creating the music right on the record date. Now, when it comes out, they wouldn't completely beat them, but usually the guy, the A&R man, had his own publishing firm or his buddy's got one and right away he would stick in all of this material—because you have recorded it and you didn't have it protected—and in order for him, he says, to save the material, he's put it in a publishing company. The publishing company would give you one of them jive contracts, where you'd never get no royalties. So this was a rip-off.[19]

The music industry's historically poor treatment of jazz, blues, and popular musicians led to a recent editorial in the June 10, 1995 issue of *Billboard* magazine, part of which states:[20]

> One of the music industry's best-kept secrets for decades centered on an ugly period of economic injustice often perpetrated by owners of masters and song copyrights against artists and songwriters who mainly made their way (if not much of a living) in the R&B and blues fields.

An article accompanying the editorial notes that:

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17 *Id.*
18 *Id.* at 48-49.
19 DIZZY GILLESPIE, TO BE OR NOT TO BOP 298 (1979).
20 *See Hearings on H.R. 989, supra* note 10, at 351.

> Old recording contracts often saddled unrepresented artists, most of them African-Americans, with royalty rates as low as 3% of wholesale or 1% of retail price. Still other artists accepted no-royalty "buy-outs" of between $50 and $200 per record.[21]

I do not raise these points to disparage the music industry or to suggest that these represent today's practices. But this unfortunate past *is* relevant to the Copyright Term Extension Act of 1995, because as currently drafted, the bill will enforce these very contracts for another twenty years.

Nor am I saying that all publishers are evil or that all contracts are unfair. That is not the case, and some record companies and publishers are revising old contracts to give artists a better deal.[22] Authors need publishers, and publishers need authors. I have an excellent, long term relationship with my publisher, and I am an avid purchaser of both books and sheet music. I appreciate the efforts publishers undertake to get a work to market and make it successful, and I agree they should get the full benefit of their bargain. But I do not agree that contracts entered into decades ago should govern a situation neither side bargained for—a grant in 1995 of a new twenty year term of copyright protection. It is only reasonable and fair to grant the new copyright to authors, thereby permitting them (or their heirs) to sit down in 1996 and say to the purchaser of copyright: "We now have a new right, how do we fairly negotiate a deal in 1996?"

No one can refute Mr. Bono's statement at the House hearing, born of personal experience, that 99% of songwriters or their families would want the copyright back if given the chance. It is my understanding that music publishers may not support a bill that does not give them the copyright. Indeed, music publishers may also seek to delay the termination of transfer provision in section 203 of the 1976 Act for copyrights assigned on or after January 1, 1978.[23] This section says that authors can get their copyrights back thirty-five years after they were assigned.[24] Music publishers are supposedly seeking to make the songwriter wait even longer. But there is no connection between extending the term of copyright and section 203.

This proposal will place songwriters in a worse position than under today's law. For this reason, the Nashville Songwriters Asso-

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21 *Id.*

22 *See id.* at 353.

23 17 U.S.C. § 203 (1994).

24 *Id.*

ciation has said that they would rather have no bill than a bill that includes the music publishers' proposal.

But the unintended negative effects of the bill as drafted are not limited to assignments made since 1978. For works that were first published between 1920 and 1933, and for which a termination of transfer notice under section 304 of the Act has not been filed, the author cannot get his copyright back for the new twenty year term, *even if he wants to,* because the five year window for termination is past.[25] As a lawyer for the American Society of Composers, Authors, and Publishers' ("ASCAP") testified at the House hearing, in response to a question from Congressman Becerra, barring these authors from getting their copyrights back was deliberate.[26] The reason given was that if a work was valuable, its author would already have terminated.[27] This response blames the victim. If a work is commercially valuable for the publisher, it is valuable for the composer. And, of course, how could a composer have known in 1978 that he was supposed to file a notice with the Copyright Office, because seventeen years later Congress was going to grant an additional twenty years of copyright?

Fortunately, the problems with the Copyright Term Extension Act of 1995 can be easily fixed and Congress's good intentions can be fully realized. As discussed below, all that needs to be done is either to vest the proposed extra twenty years automatically in the author (following the approach already taken in the bill) or, alternatively—and this is my preference—by going to a life plus seventy term for all works, regardless of when published.

II. A Brief Review of Term of Protection in the United States

In order to fully understand the provisions of the Copyright Term Extension Act of 1995, a brief review of the history of the term of protection in the United States may be helpful, since the bill reaches back as far as works first published in 1921.

Article I, Section 8, Clause 8 of the Constitution empowers Congress to grant authors the exclusive right to their writings "for Limited Times," but without any guidance as to what the phrase means, other than, obviously, not permitting perpetual copyrights. Congress has not been particularly generous in granting copyright

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25 *See* 17 U.S.C. § 304 (1994).

26 *Hearings on H.R. 989, supra* note 10, at 99-101 (statement of Fred Koenigsberg, Counsel for ASCAP).

27 *Id.*

protection, so the limits of the constitutional power have never been tested.

The first U.S. Copyright Act, the Act of 1790,[28] began the pattern, broken only 186 years later in the 1976 Act,[29] of measuring copyright from an event other than the author's life.[30] From 1790 to 1908, that event was filing a prepublication title page of the work either with the clerk of the district court where the author resided (from 1790 to 1869), or with the Library of Congress (from 1870 to 1908). From 1909 to 1977, copyright was measured from the date of first publication of the work.[31] Beginning in 1978, the basic term was switched to life of the author plus fifty years.[32]

A) *The 1790 Act*

The term set forth in the 1790 Act (like much of that Act) was derived from the 1710 English Statute of Anne:[33] an original term of fourteen years from the date the title of a prepublication copy of the work was filed with the clerk of the United States district court,[34] followed by a second renewal term of fourteen years for the benefit of the author or the author's executor, administrators, and assigns *if* the author was alive at the expiration of the first term *and* the work was again filed with the district court. If the author died during the first term, the work fell into the public domain at the expiration of that term. And if the author lived until the renewal term, but failed to timely renew, the work also fell into the public domain. If the author died during the renewal term (and a

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28 Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124 (1790).

29 The 1976 Act was effective January 1, 1978.

30 By contrast, the first French Act, that of 1793, was based on the life of the author. In 1814, the British went to a term of 28 years plus the remainder of the author's life if he or she was alive at the end of the 28 year period. 53 Geo. III, ch. 156. In 1842, the British switched to a term of 42 years or life of the author plus 7 years, whichever was longer. 5 & 6 Vict., ch. 45 (Eng.). In 1911, England, as a result of its adherence to the Berne Convention, went to life plus 50. The 1908 Berlin Berne Convention had stated a desire for a life plus 50 term, but that term did not become a requirement until the 1948 Brussels Convention. World Intellectual Property Organization, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, (1978) [hereinafter WIPO GUIDE].

31 An exception was provided for so-called "Section 12" works: unpublished works that were typically performed and not sold in copies, such as motion pictures and speeches. Although the statute did not provide a term for these works, the courts held that the term was measured from the date of registration with the Copyright Office.

32 17 U.S.C. § 302 (1994). For works created by corporations, the term cannot be measured by the life of the author, and is instead set at either 75 years from the date of first publication or 100 years from creation, whichever occurs first.

33 Statute of Queen Anne, 1710, 8 Anne, ch. 19 (Eng.).

34 Interestingly, the Statute of Anne and all of the colonial statutes, as well as the Continental Congress's May 2, 1783 resolution urging the states to adopt interim copyright laws measured term from the date of first publication of the work. No evidence has turned up explaining the 1790 Act's departure from this prior practice.

timely renewal had been made) rights were owned according to the author's bequest, or if assigned, according to the assignment.

B) *The 1831 Act*

In 1831, at the request of Noah Webster, Congress doubled the original term of copyright to twenty-eight years.[35] The renewal term stayed at fourteen years. This Act also changed the prior law so that the work did not go into the public domain if the author died during the original term, and limited the renewal right to the author's surviving spouse and children, eliminating executors, administrators, and assignees. The intent of these changes appears to have been to prohibit the author from making a binding *inter vivos* transfer of both the original and renewal term, and to prohibit the author from conveying the renewal term to anyone other than his family.

C) *The 1909 Act*

In the 1909 general revision, Congress doubled the renewal term, so that both the renewal term and the original term were twenty-eight years, for a possible total of fifty-six years.[36] ("Possible" because if a timely, proper renewal was not filed in the final year of the original term, the work went into the public domain after only twenty-eight years). At the same time, the term was switched from the date of filing a prepublication title with the Library of Congress to the date of first publication. Congress had come very close to adopting a term of life of the author plus a fixed number of years, but at the last minute switched to the twenty-eight plus twenty-eight structure, perhaps swayed by Mark Twain's testimony that he had only made money from *Innocents Abroad* because he had retained the copyright in the renewal term.[37] The House Patent Committee[38] report accompanying the 1909 Act explains that it believed it was:

> distinctly to the advantage of the author to preserve the renewal

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[35] Act of February 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436 (1831); W. ELLSWORTH, COPY-RIGHT MANUAL 21-22 (1882). Ellsworth was Webster's son in-law, and a member of the House of Representatives at the time of this Act (including the Judiciary Committee, upon whose behalf he reported the bill). 52 ANNALS OF CONG. Appendix cxix (1830).

[36] Copyright Act of 1909, 35 Stat. 1075 (1909).

[37] If true, this is ironic since Twain had testified in favor of the life plus a fixed term bill, adding that he wished copyright could be perpetual. *See Arguments Before the Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 116-121 (1906) (statement of Mark Twain).

[38] At this time the Patent Committee, rather than Judiciary, had primary jurisdiction over intellectual property.

> period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term . . . .[39]

This passage also indicates Congress's intent that the author should not be able to assign the renewal term until that term vested. This has been the consistent view of the Copyright Office.[40] Nevertheless, in *Fred Fisher Music Publishing Co. v. M. Witmark & Sons*,[41] the Supreme Court, openly rewriting the Copyright Act,[42] held that an assignment of the renewal term made by the author during the original term was binding. In *Miller Music Corp. v. Charles N. Daniels, Inc.*,[43] the Court tempered the *Fred Fisher* holding slightly, by holding that where the author died before the renewal term, the assignment of the renewal term failed as a contingent interest, and the author's statutory successors took the renewal term free and clear of all assignments made during the original term.

D) *The 1976 Act*

Efforts at revising the 1909 Act began in a comprehensive way in 1955 with thirty-six studies issued by the Copyright Office. In 1961, Register of Copyrights Abraham Kaminstein issued a report to Congress containing the Office's preliminary conclusions and recommendations about what a revised law should contain.[44] The Register recommended that for works created after the new law went into effect, the copyright should last for an initial term of twenty-eight years from the first public dissemination of the work,[45] and that at any time during the last five years of this initial term, any person claiming an interest in the copyright could file a renewal application, which would then extend the copyright for

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39 H.R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909).

40 *See* COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., 1ST SESS. 53 (House Comm. Print 1961) [hereinafter REGISTER'S 1961 REPORT].

41 318 U.S. 643 (1943).

42 *See id.* at 647, "if we look only to what the Act says, there can be no doubt as to the answer," the answer being the opposite of what the Court held.

43 362 U.S. 373 (1960). In Stewart v. Abend, 495 U.S. 207 (1990), the Court applied *Miller Music* to cases involving derivative works prepared during the original term, overruling Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir.), *cert. denied*, 431 U.S. 949 (1977).

44 This report was published by the House Judiciary Committee. REGISTER'S 1961 REPORT, *supra* note 40.

45 This differed from the 1909 Act, which measured term from the date of first publication.

forty-eight years, for a total of seventy-six years.[46] Despite this somewhat more liberal approach,[47] as under the 1909 Act, failure to renew would throw the work into the public domain.

For works that had already been published at the time the new law went into effect, the copyrights would be extended for the same period of time.[48] The Register also expressed the view that due to the above-mentioned Supreme Court decisions, Congress's intent in giving the renewal term to authors or their heirs had been thwarted.[49] To cure this problem, the Register proposed that there be a twenty year limit on any assignment of copyright, or at least those assignments that did not provide for continuing royalties, so that authors or their heirs would be "in a position to bargain for remuneration on the basis of the [then present] economic value of their works."[50] This same concern animates my earlier remarks that the current version of the Copyright Term Extension Act of 1995 unintentionally deprives authors and their families from bargaining for the current value of the work.

In meetings with industry groups and others interested in the revision, the Copyright Office heard considerable criticism of its proposals,[51] with the Register later describing the termination of transfer provisions as "the most explosive and difficult issue" in the revision drafting.[52] Some criticized the Office's failure to propose a term of life of the author plus fifty years,[53] while publishers and motion picture companies criticized the author's proposed ability to terminate an assignment after twenty years.[54] Authors' groups and some scholars, such as Melville Nimmer, supported the termi-

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[46] See REGISTER'S 1961 REPORT, *supra* note 40, at 56. The 76 year period came about as a result of a study of 673 authors of English-language books who died between 1930 and 1955, a survey of 61 composers of "serious" music, and a survey of 191 authors of popular music who died between 1930 and 1950. This data showed that the average age at median between the first and last work was 48 years and the average age at death was 68 years, for a span of 20 years. Based on these figures, the Register assumed that a term of 70 years from first publication would approximate the life plus 50 term. But because life expectancies were increasing, a slightly longer term of 76 years was proposed.

[47] Under the 1909 Act, there was only one proper renewal claimant and the renewal application had to be filed within the final year of the first 28 year period of protection.

[48] I do not discuss the separate issue of the treatment of unpublished works. I understand that the Copyright Office is addressing this issue in its statement.

[49] REGISTER'S 1961 REPORT, *supra* note 40, at 53-54.

[50] *Id.* at 93.

[51] *See* COPYRIGHT LAW REVISION PART 2: DISCUSSIONS AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88TH CONG., 1ST SESS. (House Comm. Print 1963).

[52] COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89TH CONG., 1ST SESS. 71 (House Comm. Print 1965).

[53] *Id.* at 77-107, 229, 235-37, 247, 252-54, 376-77. *But see id.* at 263-67, 279, 299-300, 353-56, 370, 375-76, 382-83, 413.

[54] *Id.* at 104, 108, 230, 353, 357-58, 360-62.

nation right,[55] with some arguing it should apply to all assignments (for example, regardless of whether there was a continuing obligation to pay royalties).

In 1963, the Copyright Office circulated a preliminary draft bill.[56] As a result of the Office's abandonment of its earlier proposal that copyright vest upon first public dissemination in favor of copyright vesting automatically upon creation and fixation, alternative approaches were offered in sections 20 and 22. Section 20 covered works created after the effective date of the new law. Section 22 covered works created before the effective date of the new law. Alternative A in section 20 provided for a term of seventy-five years from publication or 100 years from creation, whichever occurred first. Alternative B provided for a term of life of the author plus fifty years. Section 22(b) extended the renewal term for forty-seven years, for a total of seventy-five years, a period that was viewed as roughly equivalent on an actuarial basis to life plus fifty.[57] The additional nineteen year period in alternative B was subject in section 22(c) to an important right of the author to terminate the transfer beginning in the first year of the extra nineteen years (year fifty-seven of the copyright).[58]

With respect to terminations of transfer of works created after the effective date of the new law (as well as transfers executed after that date), the Office offered two alternatives in section 16. Alternative A contained an inalienable twenty year limit on transfers. Alternative B permitted authors or their successors to bring suit to recover strikingly disproportionate profits received by the assignee beginning twenty years after the transfer.

For both termination of transfers of "old" and "new" works, the draft provided that a licensed derivative work prepared before termination could continue to be exploited according to the terms of the license after termination, but no new derivative works could be created. This right was particularly important to motion picture companies and encyclopedia publishers, whose works frequently included multiple contributions.

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55 *Id.* at 238-39, 248, 258-59, 317, 370, 374, 379, 385, 392-93, 415.

56 COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (House Comm. Print 1964) [hereinafter COPYRIGHT LAW REVISION PART 3].

57 *See* COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW, 88th CONG., 2D SESS. 17 (House Comm. Print 1964).

58 A written notice of termination had to be served on the transferee six months before the termination became effective, and had to be recorded in the Copyright Office. Unlike the bill passed in 1976, there was, though, no "window" within which the notice had to be served.

In Copyright Office meetings on the draft, then Chief of the Examining Division Barbara Ringer, in discussing section 16, stated that the section had proved to be quite controversial, with strong opposition.[59] At the same time, though, she noted her belief that the support for "the basic principle [that] some sort of time limitation on transfers of copyright ownership may be as strong and deep-seated as the opposition."[60]

Opposition to the section was voiced by the motion picture industry[61] and by book publishers,[62] who argued that contractual freedom and investment should be respected. Music publishers, who were also opposed to the section, argued that the potential value of many compositions is not ascertainable until years after the works are published.[63] Authors' groups ardently supported a termination ("reversion") right.[64]

Authors offered a number of defenses. First, a single, unified term of protection (whether 75 or 100 years or life of the author plus fifty years), would place authors in a worse condition than the existing law unless a termination right was provided,[65] since under the existing law contracts for both the original and renewal term were not supposed to be enforceable. Even though the Supreme Court had thwarted Congress's intent in this respect in the *Fred Fisher* opinion,[66] if the author died before the renewal term, his heirs nevertheless got the copyright back free and clear of all assignments. Second, the only reason that authors sign away their copyrights for long periods of time is the unequal bargaining position in which they find themselves when negotiating with publishers. Finally, "the basic terms of a book contract are the same wherever you go," including a requirement that the author assign

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59 *See* COPYRIGHT LAW REVISION PART 3, *supra* note 56, at 277.

60 *Id. See also id.* at 277-78, explaining various positions.

61 *Id.* at 278-81, 288-89. Motion picture companies favorably remarked on a provision that permitted the owner of a derivative work (such as a motion picture version of a novel) prepared under the authorization of a transfer to continue to exploit the derivative work after termination, but believed that even in cases of non-derivative works (as in an original screenplay), they should be able to continue to exploit the work on a non-exclusive basis after termination. COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW, 88TH CONG., 2D SESS. 40 (House Comm. Print 1964). Although this proposal appears reasonable, in many cases (particularly with motion pictures), a non-exclusive licensee who continues to exploit the work may, as a practical matter, preclude the author from marketing the work to anyone else.

62 *See* COPYRIGHT LAW REVISION PART 3, *supra* note 56, at 281-83, 290-92, 300, 341-43.

63 *Id.* at 283.

64 *Id.* at 286-87, 293-97.

65 *See* COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, 89TH CONG., 1ST SESS. 161 (House Comm. Print 1965) (remarks of Harriet Pilpel) [hereinafter COPYRIGHT LAW REVISION PART 5].

66 *See supra* footnotes 41-43 and accompanying text.

both the original and renewal term.[67] This conclusion was supported by a reputed statement from a book publisher that:

> I have never in my entire publishing experience accepted a grant of rights to publish a book for only one term. I hope I never have to. I know of no other publisher who has ever accepted a grant of only a single term. We all accept grants of only the original and renewal terms.[68]

It was argued that authors, rather than publishers, should benefit from any extension of term (beyond the then-granted fifty-six years) for subsisting copyrights, because publishers had only bargained and paid for a fifty-six year term. The Authors Guild of America declared, referring to the then existing twenty-eight year renewal term and the proposed extension of that term by nineteen years:

> [Book publishers] sit down and carefully estimate what their 50 percent share of those 28 years of earnings will be, and they pay a modest portion of it as an advance.
>
> I don't see how they'd be hurt one iota if they don't get the next 19 years . . . . [T]hey haven't paid for it or bargained for it. They've simply computed the value of a 28-year annuity, and they've had a full and fair opportunity to recover that and a profit as well.[69]

Similarly, the American Guild of Authors and Composers stated that:

> [Music publishers] aren't bargaining for any more than 28 years. They're not giving an advance of $15,000 saying, "Well, $13,000 for 28 years and $2,000 if we get a few more years if [Congress] extend[s] the law." They are bargaining for 28 years, and they have thrown in the other wording on the theory that "if we can get it good; if we can't well then we have lost just a few words. We haven't lost a single dollar."[70]

This reference to "other wording" was to a previous statement by an attorney whose firm had been representing music publishers since 1919, and had inserted the following language in all contracts with songwriters:

> If the copyright law of the United States now in force shall be

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67 *See* COPYRIGHT LAW REVISION PART 5, *supra* note 65, at 287.

68 *Id.* at 155-56.

69 *Id.* at 43. *But see* criticism of this characterization of "advances," and its defense, *id.* at 45.

70 *Id.* at 42.

> changed or amended so as to provide for an extended or longer term of copyright, then the writer hereby sells, assigns, transfers, and sets over unto the publisher, its successors and assigns or designees, all his right, title, and interest in and to said musical compositions covered by this agreement, for such extended or longer term of copyright.[71]

The practice of inserting this clause in contracts was common.[72] These are, however, the very contracts that the Copyright Term Extension Act of 1995 would enforce unless amended: contracts dreamed up by lawyers as early as 1919 (ten years after the 1909 Act) on the off-chance that some time in the distant future Congress might extend the term, and if and when that occurred, maybe, just maybe, Congress would let them get away with boilerplate language assigning publishers all future rights, even though the publishers had not paid for these rights.

E) *The 1964 Revision Bills*

In 1964, the first revision bills were introduced.[73] Section 20(a) of the bills adopted, for new works, the term of life of the author plus fifty years, or, where the work was not created by an individual, seventy-five years from first publication or 100 years from creation, whichever occurred first.[74] For "old Act" works, the bills kept the durational structure of the 1909 Act: an original term of twenty-eight years plus a renewal term of twenty-eight more years (if timely applied for), but as in the 1963 preliminary draft, an extra nineteen years were tacked on to the renewal term for a total of seventy-five years.

Again, as in the 1963 draft, there were termination of transfer provisions both for assignments executed before the effective date of the bills (governing, therefore, the extra nineteen years) and for assignments executed after the effective date (governing, mostly, but not exclusively, works with life plus fifty terms).

For assignments of "old Act" works, authors or their heirs could terminate the extra nineteen years beginning in the first year of the extra nineteen years (for example, in year fifty-seven of the copyright) if they had served a written notice on the assignee one year before the effective date of the termination and recorded a

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71 *Id.* at 39.

72 *See id.* at 41, 45.

73 S. 3008, H.R. 11947, H.R. 12354, 88th Cong., 2d Sess. (1964).

74 The bill also provided for a uniform, federal system by protecting all unpublished works.

copy of the notice with the Copyright Office.[75] For assignments of "new Act" works, the assignment could be terminated at any time beginning thirty-five years after the execution of the assignment, but notice of termination had to be made two years before the effective date.[76]

For both termination of transfers of "old" and "new" works, the draft provided that a licensed derivative work prepared before termination could continue to be exploited according to the terms of the license after termination, but no new derivative works could be created.

Discussions on the bills held at the Copyright Office with private sector groups showed strong opposition to the reversion (termination of transfer) provisions by book and music publishers[77] and by the motion picture and television industries, which described the provisions as "at best misguided paternalism."[78] Authors' groups defended the provisions as essential to preserving the status quo authors were supposed to enjoy under the 1909 Act[79] and as protecting authors from the unequal bargaining leverage of copyright purchasers.[80] At the same time, authors' representatives objected to making the author wait thirty-five years before a "new Act" transfer could be terminated, noting that in his 1960 report to Congress, the Register had indicated the period should be twenty years, and that the 1963 draft bill had set the date at twenty-five years.[81]

F) *The 1965 Bills and House Hearings, Register of Copyrights's 1965 Report*

The 1965 revision bills[82] retained the 1964 bills' provisions on duration, but made extensive changes in the termination provisions that greatly complicated them for authors, thus ensuring that

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75 As with the 1963 draft, there was no "window" period within which the notice had to be filed.

76 For new Act (but not old Act) transfers, there were exclusions from the termination right for transfers by will and works made for hire.

77 *See* COPYRIGHT LAW REVISION PART 5, *supra* note 65, at 154-57, 222, 225-26. The book publishers characterized the provisions as "intolerable" and stated their "unequivocal opposition to any form of reversion," claiming that out-of-print clauses vesting the copyright back in the author if the book remained out of print for five years adequately protected authors. The out-of-print argument was plainly ridiculous: publishers were willing to give the copyright back to the author only when they determined the work no longer had any commercial value.

78 *Id.* at 160, 162, 299-300.

79 *See supra* footnotes 36-43 and accompanying text.

80 *See* COPYRIGHT LAW REVISION PART 5, *supra* note 65. at 155-58, 162, 163, 240-50, 257 (making suggestions for amendments).

81 *Id.* at 241.

82 S. 3008, H.R. 11947, 89th Cong., 1st Sess. (1965).

their utility would be greatly diminished. The changes nevertheless (or perhaps predictably) reflected a compromise.[83] With the exception of amendments made in 1966 clarifying who may terminate and specifying the allocation of the terminated interests,[84] the termination provisions in the 1965 bills are identical to those incorporated in the 1976 Act. This fact is significant because it demonstrates that the parties stuck with the compromise for eleven years while the revision process struggled through a number of explosive issues. Indeed, the compromise had been followed by all the parties until June 1995, when music publishers at the Pasadena hearing indicated they would send the Subcommittee a proposed amendment to section 203 further delaying the thirty-five year termination period.

The differences between the 1964 and 1965 bills are as follows: (1) the 1965 bills permitted nonexclusive licenses to be terminated;[85] (2) transfers of copyrights in wills were excluded from the termination right; (3) termination was limited to the author, or if he was deceased, his widow and children;[86] (4) under section 203, termination could be made only during a five year window commencing at the end of thirty-five years from the execution of the transfer;[87] (5) the termination notice could be served not less than two or more than ten years before the effective date of the termination, with recordation made a condition of the termination;[88] (6) where the author was deceased, the termination notice had to be filed by all those entitled to terminate;[89] (7) to ensure that the termination right was inalienable and unwaivable, no agreement to transfer rights after termination would be valid unless entered into after termination had occurred, with the exception that a future agreement between the author and the original transferee would be valid if entered into after the notice of termination had been

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83 *See* COPYRIGHT LAW REVISION: HEARINGS ON H.R. 4347, H.R. 5690, H.R. 6831, H.R. 6835. BEFORE THE SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMM., 89TH CONG., 1ST SESS. 148-149 (1965); Mills Music, Inc. v. Snyder, 469 U.S. 153, 175-76 (1985). The compromise also involved amending the work-for-hire provisions in publishers' favor.

84 *See generally* H.R. 4347 as reported by the House Judiciary Committee, H.R. REP. No. 2237, 89th Cong., 2d Sess. (1966).

85 The 1964 bills were limited to exclusive licenses.

86 The 1964 bills included legal representatives and legatees.

87 The 1964 bills permitted the termination to be filed at any time after the 35 years had elapsed.

88 The 1964 bills had the two year, but not the 10 year provision. They also required recordation with the Copyright Office, but did not state that the failure to record rendered the termination ineffective.

89 By contrast, the 1964 bills more liberally required only a "written notice."

filed; and (8) the proportionate shares between the widow and children were specified.

In preparation for the first congressional hearings on the revision effort, Register of Copyrights Abraham Kaminstein issued a supplementary report.[90] The report traces the origins of the termination of transfer provisions to the failure of the 1909 Act to adequately give authors a second bite at the apple.[91] Although noting the objections of publishers and the motion picture industry, which asserted that authors are not generally in a poor bargaining position, the Register concluded that the Copyright Office "remained committed to the general principle of reversion as one of the most important elements of the copyright law revision program."[92]

At hearings before the House in 1965, the parties noted their individual wishes that the bill had been more favorable to them, but stuck by their compromise on termination, and strongly supported the life plus fifty term.[93]

III. How the Term of Protection Provisions in the 1976 Act Operate

The 1976 Act's treatment of duration may be divided into three parts: (1) works created on or after January 1, 1978; (2) works unpublished and unregistered on January 1, 1978; and (3) works published before January 1, 1978.

A) *Works Created On or After January 1, 1978: Section 302*[94]

For this category of work, the 1976 Act adopted a basic term of life of the author plus fifty years. Where the work is made for hire, anonymous, or pseudonymous, the term is seventy-five years from first publication or 100 years from creation, whichever occurs first.

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90 Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (House Comm. Print 1965).

91 *Id.* at 71-72.

92 *Id.* at 72.

93 *See Copyright Law Revision: Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Judiciary Comm.*, 89th Cong., 1st Sess. 82-84, 92-94, 95-96, 1761-65 (Authors League); 129, 142, 147-48 (book publishers); 162-64 (magazine publishers); 228-34, 239, 242-45 (American Guild of Authors & Composers); 251, 255, 257 (magazine photographers); 996-97, 1010, 1035-37, 1048-49 (motion picture companies); 1866-70 (Copyright Office) (1965).

94 17 U.S.C. § 302 (1994).

B) *Works Unpublished and Unregistered on January 1, 1978: Section 303*[95]

This category encompasses works formerly under perpetual state common law copyright. The 1976 Act preempts that state protection and substitutes a somewhat complicated system. The minimum term of protection for these works is December 31, 2002, but if the work is published before that date, the term is extended until December 31, 2027. Alternatively, if a longer term is possible under the life plus 50 regime, that regime is applied.

C) *Works Published Before January 1, 1978*

These works were formerly governed by the 1909 Act's twenty-eight plus twenty-eight year term: twenty-eight years from first publication, with another twenty-eight year renewal term if a timely renewal was filed. The 1976 Act essentially incorporated the 1909 Act's term structure into the 1976 Act for these works, but added on an additional nineteen years to the renewal term for a possible total of seventy-five years. Where a work was in its first term on January 1, 1978, a timely renewal application still had to be filed.[96] If the renewal application was timely filed, the author was granted a forty-seven year renewal term. If the work was in its renewal term on January 1, 1978, it was automatically granted a forty-seven year term.

D) *Termination of Transfers*

At an August 1964 meeting at the Copyright Office with the private sector on the first revision bills, an in-house lawyer for Time, Inc. expressed an opinion that the termination of transfer provisions would not help authors because they were too complicated and would instead "realistically" only benefit private sector attorneys "who are going to make a lot of money out of it."[97] This comment was made, interestingly, before the provisions became appreciably more onerous for authors in the 1965 bills. Evidence being compiled by the Copyright Office for this hearing bears out the prediction.

There are two termination of transfer provisions in the 1976

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95 17 U.S.C. § 303 (1994).

96 This requirement was finally abandoned in the Automatic Renewal Act of 1992, Pub. L. No. 102-307 (title I), 106 Stat. 264 (1992), but that act only governs works that were first published between 1964 and 1977.

97 *See* COPYRIGHT LAW REVISION PART 5, *supra* note 65, at 166 (remarks of E. Gabriel Perle).

Act, sections 203 and 304(c).[98] They are very similar, but not identical. Section 304(c) governs transfers and licenses executed before January 1, 1978 and thus is limited to 1909 Act works whose term is measured from the date of first publication. Section 203 covers transfers and licenses executed on or after January 1, 1978 and thus covers three categories of works: (1) works that were subject to common law copyright on January 1, 1978; (2) works protected under the 1909 Act that were in their first or renewal term on January 1, 1978, but where the transfer or license was executed on or after that date; and (3) works created on or after January 1, 1978, and thus governed by the term structure of the 1976 Act. The possibility of termination under section 304(c) began on January 1, 1978. Terminations under section 203 cannot begin until January 1, 2013.

i. Termination under Section 304(c)

The termination right under section 304(c) is only for the extra nineteen years added on to the twenty-eight year renewal term of the 1909 Act. The provision is quite complex:

(1) Grants covered
  (a) exclusive or nonexclusive transfers or licenses of renewal rights
  (b) executed before January 1, 1978
  (c) by a renewal claimant covered by the second proviso of section 304(c)
  (d) with respect to a work in its first or renewal term of statutory protection.

(2) Persons who may exercise the right
  (a) as to grants by author(s):
    (i) the author(s) to the extent of the author's interest (§ 304(c)(1));
    (ii) if an author is dead, by owners of more than one half of the author's termination interest, such interest being owned as follows:
      (A) by surviving spouse if no children or grandchildren;
      (B) by children and surviving children of dead child if no surviving spouse, *per stirpes* and by majority action; or
      (C) shared, one half by widow(er) and one half by

[98] 17 U.S.C. §§ 203, 304(c) (1994).

children and deceased child's children (§ 304(c)(1), (4)).

(b) as to grants by others—*all* surviving grantors (§ 304(c)(1), (4)).

(3) Effective date of termination

(a) designated time during five year period commencing on later of:

(i) beginning of fifty-seventh year of copyright or

(ii) January 1, 1978 (§ 304(c)(3)).

(b) upon 2—10 years notice (§ 304(c)(4)).

(4) Manner of Terminating

(a) written and signed notice by required persons or agent's to grantee or grantee's "successor in title"

(b) specification of effective date, within above limits

(c) form, content, and manner of service in accordance with Copyright Office regulation (§ 304(c)(4)(B)); 37 C.F.R. § 201.10)[99]

(d) recordation with the Copyright Office before the effective date (§ 304(c)(4)(A)).

(5) Effect of termination

(a) of grant by author

(i) reversion to that author, or if dead, those owning the author's termination interest (including those who did not join in signing the termination notice) in proportionate shares (§ 304(c)(6), (c)(6)(C))

(b) of grant by others—reversion to all entitled to terminate (§ 304(c)(6))

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[99] These regulations require that the notice be served upon each "grantee" whose rights are being terminated, or "the grantee's successor in title," by personal service, or by first-class mail sent to an address "which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title." 37 C.F.R. § 201.10(d)(1) (1996). The regulation further provides that "a reasonable investigation" includes, but is not limited to, a search of the records in the Copyright Office. *Id.* § 201.10(d)(3). In the case of musical performing rights, a report from a performing rights society identifying the person(s) claiming current ownership of the rights being terminated is sufficient. *Id.* For a discussion of the term "successors in title," see Burroughs v. MGM, 491 F. Supp. 1320 (S.D.N.Y. 1980), 519 F. Supp. 388 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982). One issue in *Burroughs* was the meaning of "successors in title." Is the term limited to transferees of exclusive rights, or does it also include nonexclusive licenses? Although the issue was not reached by the Second Circuit majority, Judge Newman, in a concurring opinion, reasoned that since the Copyright Office regulations speak of providing for a reasonable investigation of "ownership," and since under § 101 of the Act a "transfer of ownership" includes assignments and exclusive licenses but excludes nonexclusive licenses, see 17 U.S.C. § 101, the term must be construed accordingly. This reading of "successor in title" is believed to be correct.

(c) in either case, future rights to revert upon proper service of notice of termination (§ 304)(c)(6)(B)).

(6) Exceptions to termination
   (a) works made for hire are not subject to termination
   (b) dispositions by will are not subject to termination
   (c) derivative works prepared under a transfer or licensee executed prior to termination may continue to be utilized under the terms of the transfer, but with no right to make new derivative rights (§ 304(c)(6)(A))[100]
   (d) rights that arise under any other federal statute or under any state or foreign law are not affected (§ 304(c)(6)(E)).

(7) Further grants of terminated rights
   (a) each owner is regarded as a tenant in common except that a further grant by owners of a particular deceased author's terminated rights must be in the same number and proportion of his or her beneficiaries as required to terminate, but then binds them all, including nonsigners, as to such rights
   (b) must be made after termination, except that, as to original grantee or successor in title, it maybe after notice of termination.

While there is no form for termination notices, Copyright Office regulations specify that the notice must contain a "complete and unambiguous statement of facts . . . without incorporation by reference of information in other documents or records,"[101] and include the following:

> (1) the name of each grantee whose rights are being terminated and each address at which service is made;
> (2) the title and the name of at least one author of, and the date copyright was originally secured in, each work to which the

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100 In Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985), the Supreme Court reversed a lower court opinion construing this provision as granting the author all of the royalties from the exploitation of the sublicensed derivative works after termination of the original grant. Under *Mills Music*, middlemen (transferees who have granted sublicenses) are entitled to share in the royalties from the derivative work's continued exploitation according to the terms of the original contract. *See* former Register of Copyrights Barbara Ringer's criticism of *Mills Music* in *Civil and Criminal Enforcement of the Copyright Laws: Hearing Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 1st Sess. 79-95 (1985); *see generally The Copyright Holder Protection Act: Hearings on S. 1634 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 1st Sess. (1985).

101 37 C.F.R. § 201.10(b)(2).

notice applies (including if available the copyright registration number);
(3) a brief statement reasonably identifying the grant being terminated;
(4) the effective date of the termination;
(5) the name, actual signature, and address of the person executing the termination.[102]

In the case of works consisting of a series or containing characters, special care has to be taken to list separately each and every work in the series or all works in which the character appears.[103] A complete copy of the termination notice must be recorded with the Copyright Office before its effective date of termination, and such recordation must be accompanied by a statement setting forth the date on which the notice of termination was served and the manner of service (unless the information is already contained in the notice)[104] and by the prescribed fee.[105]

The section 304(c) termination right is inalienable and unwaivable,[106] but further grants may be made after termination. An agreement to make a further grant may be made after the notice of termination has been given (but before termination is effective) if that agreement is made between the author or designated statutory successors and the original grantee.[107] This provision, erroneously described sometimes as a "right of first refusal," does not give the original grantee a right to conclude such an agreement; it only means that if such an agreement is made, it will be enforceable.[108]

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102 37 C.F.R. §§ 201.10(b)(1), (c)(1), (c)(4). A duly authorized agent may also sign the notice, but care should be taken to clearly identify the person(s) on whose behalf the agent is acting. 37 C.F.R. § 201.10(c)(3).

103 *See* Burroughs v. MGM, 491 F. Supp. 1320 (S.D.N.Y. 1980), 519 F. Supp. 388 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982) (discussing a notice of termination listing 35 titles including the first "Tarzan" story, but omitting five sequels in which the character Tarzan appeared, found to be ineffective in preventing the grantee's continued use of the Tarzan character). *Cf.* Judge Newman's concurring opinion, agreeing in the result, but disagreeing on the effect of not terminating the five sequels, reasoning that the right to base a motion picture on those sequels would permit uses not derived from the sequels.

104 37 C.F.R. § 201.10(f)(i), (f)(ii).

105 37 C.F.R. § 201.10(f)(2).

106 17 U.S.C. § 304(c)(5): "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."

107 17 U.S.C. § 304(c)(6)(D).

108 Bourne v. MPL Communications, 675 F. Supp. 859 (S.D.N.Y. 1987), *modified*, 678 F. Supp. 70 (S.D.N.Y. 1987).

ii. Termination Under Section 203

Section 203's provisions are similar but not identical to section 304(c), but are equally complex:

(1) Grants covered
  (a) exclusive or nonexclusive transfers or licenses
  (b) executed on or after January 1, 1978
  (c) by an author
  (d) as to any work
    (i) created before or after January 1, 1978;
    (ii) subject to common law copyright (§ 303);
    (iii) in first-term copyright (§ 304(a));
    (iv) in renewal term (§ 304(b)).

(2) Persons who may exercise right
  (a) the author or a majority of the authors who exercised it (§ 203(a)(1));
  (b) if the author is dead, his or her right may be exercised by (or if the author was a joint author,the author's interest may be "voted" by) majority action of the owners of more than one half of author's termination interest, such interest being owned as follows:
    (i) by surviving spouse (if no children or grandchildren)
    (ii) by children and surviving children of deceased child (if no surviving spouse) *per stirpes* and by majority action or
    (iii) shared, one half by widow and one half by children and deceased child's children.

(3) Effective date of termination (§ 203(a)(3))
  (a) designated time during 36th through 40th year after grant or
  (b) if grant covers right of publication, designated time during five year period beginning on the earlier of the following dates:
    (i) 35 years after publication
    (ii) 40 years after grant.

(4) Manner of terminating
  (a) written and signed notice by required persons to "grantee or grantee's successor in title" (§ 203(a)(4))
  (b) specification of effective date, within above limits (§ 203(a)(3))

(c) form, content, and manner of service in accordance with Copyright Office regulations (§ 203(a)(4)(B)); 37 C.F.R. § 201.10)
(d) recordation in Copyright Office before effective date (§ 203(a)(4)(A)).

(5) Effect of termination
Reversion to author, authors, or others owning author's termination interest (including those who did not join in signing termination notice) in proportionate shares (§ 203(b)).

(6) Exceptions to termination
(a) work made for hire are not subject to termination;
(b) dispositions made by will are not subject to termination;[109]
(c) derivative works prepared under a transfer or license executed prior to termination may continue to be utilized, but with no right to make a new derivative work (§ 203(b)(1))
(d) rights that arise under other federal statute or under any state or foreign law are not affected (§ 203(b)(5)).

(7) Further grants of terminated rights (§ 203(b)(3))
(a) must be made by same number and proportion of owners required for termination, then binds all (§ 203(b)(3))
(b) must be made after termination, except, as to original grantee or successor in title, may be made after notice of termination (§203(b)(4)).

The key distinctions between termination rights under sections 304(c) and 203 may be summarized as follows:

109 *See* Larry Spier, Inc. v. Bourne Co., 953 F.2d 774 (2d Cir. 1992) (discussing this provision).

Section 304 (c)	Section 203
Grants covered	
Before January 1, 1978	On or after January 1, 1978
By author or other "second proviso" renewal beneficiary	By author[110]
Of renewal right in statutory copyright	Of any right under copyright
Persons who may exercise	
Author or majority interest of statutory beneficiaries (*per stirpes*) to the extent of that author's share; or In case of grant by others, all surviving grantors	Author or majority of granting authors or majority of their respective beneficiaries, voting as a unit for each author and *per stirpes*
Beginning of five-year termination period	
End of 56 years of copyright or January 1, 1978, whichever is later	End of 35 years from grant of, if covering publication right, either 35 years from publication or 40 years from grant, whichever is earlier
Further grants	
Grantors are generally tenants in common with right to deal separately, except where dead author's rights are shared, then majority action (*per stirpes*) as to that author's share	Requires same number and proportion as required for termination

Section 203 also poses the following conundrum in its interrelation with section 304(a). Works first copyrighted as late as 1977

110 The reason for limiting the § 203 termination right to the author was explained as follows in the Register of Copyrights' 1965 report:

> [A]s a result of the present renewal provisions, a large number of binding transfers and licenses covering renewal rights have been executed by the author's widow, children, and other statutory beneficiaries, as well as the author himself. We believe that, for example, where the author's widow was the proper renewal claimant but had previously executed a transfer of her renewal rights, she should be able to gain the extended term after the present 28-year renewal period is over.

SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89TH CONG., 1ST SESS. 96 (House Comm. Print 1965).

enjoy both a termination right and a renewal right. If the author's renewal contingency does not vest, there may be no termination right at all, since post-1977 grants by other renewal beneficiaries are not terminable under section 203. Moreover, suppose a grant is made in 1978 by an author who later decides to terminate at the earliest possible moment. To exercise the thirty-five year termination right in 2013, the author may give notice ten years earlier, in 2003. Although section 203 provided (as does section 304(c)) that the future rights to be terminated "vest" upon service of such notice, the renewal provision still must be taken into account, since 2003 is only the twenty-fifth year of the first term copyright. If the author dies shortly after service of the termination notice and the author's widow(er) renews two years later, what is the effect of the author's termination notice?[111]

The astonishing complexity of these provisions amply demonstrates why they have not served their purpose of permitting authors and their families to get a second bite at the apple, despite Congress's eighty-six year effort to do so. There is no reason to perpetuate such an obviously flawed system. The solution is simple, obvious, and effective: vest the proposed new twenty years directly in the author or his heirs.

IV. THE COPYRIGHT TERM EXTENSION ACT OF 1995

The Copyright Extension Act of 1995 seeks to extend the term of copyright protection by adding on an extra twenty years for both "old Act" and "new Act" works. New Act works by individuals will go to life of the author plus seventy years. New Act works that are made for hire, anonymous and pseudonymous works, and "old Act" works will go to a term of ninety-five years from first publication, or 120 years from creation, whichever occurs first. The basic rationale for this increase is the reciprocal nature of the European Union's 1993 term directive.

In order to harmonize the various laws of its member countries toward the goal of a single market without (internal) trade barriers, the European Union ("EU") has issued a number of directives establishing a single law for all EU countries.[112] Some of these directives have been in the broader field of intellectual property, including copyright. In the case of term of copyright protection,

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111 *See* REYNA DREBEN, SECTION 203 AND A CALL FOR A HURRIED REVIEW, THE COPYRIGHT ACT OF 1976: DEALING WITH THE NEW REALITIES 229, 232-33 (N.J. Copr. Soc'y 1977).

112 3 WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 2131-64 (1994). The directives are not self-executing: they must be implemented by domestic legislation in each country.

most EU countries have a term of life of the author plus fifty years, the fifty years being intended to benefit the author's children and grandchildren. A few EU countries, however, have terms of copyright longer than life plus fifty, at least for certain categories of works, such as musical compositions. Given these differences in term, the EU had three choices: (1) do nothing, and allow different terms; (2) issue a directive requiring all member countries to follow the predominant life plus fifty term (also found in the Berne Convention and in the GATT agreement); or, (3) issue a directive requiring all member countries to adopt the higher term found in the minority number of countries.

The first option was clearly undesirable because it would perpetuate the very sort of inconsistencies that directives are intended to eliminate. The second option was also viewed as undesirable because it would take away protection from authors in countries that granted a term longer than life plus fifty.[113] Accordingly, the third option, harmonizing the term of protection up was chosen. The EU's October 29, 1993 directive on the term of copyright thus establishes a basic term of copyright of life of the author plus 70 years.[114] The directive was to have been implemented by EU member countries by July 1, 1995. However, like past EU Directives, some member countries will take years after that date to actually implement the directive. France has yet to implement the 1991 computer program directive.[115]

With respect to the question of the term granted works by authors from non-EU countries, Article 7 of the directive essentially states that works from non-EU countries, such as the United States, will be given the term of protection granted by the non-EU country, and not the term granted by the EU. Thus, if the United States grants a term of life of the author plus fifty years, works of U.S. authors will receive that term in the EU and not the life plus seventy term EU authors enjoy. On the other hand, if the United States grants a term of life of the author plus seventy years, works of U.S. authors will receive that term in the EU.

Music publishers, the estates of music composers who published songs in the 1920s and 1930s, and others have argued that U.S. law needs to be changed so that they may take advantage of this extra twenty years protection in the EU. My concern is not so

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[113] European Union Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights, Council Directive 93/98, 1993 O.J. (L 290/9).

[114] *See id.* ¶ 9.

[115] European Community's Directive on the legal Protection of Computer Programs, Council Directive 91/250, 1991 O.J. (L 122).

much with going to a life plus seventy term (aside from the music publishers' section 203 proposal), but with how, for "old Act" works, authors can be better protected than they currently are in the Copyright Term Extension Act of 1995.

As discussed above, the basic term of copyright in the United States for works created *before* January 1, 1978 is seventy-five years from the date of first publication, but it is important to realize that this seventy-five years is not an undifferentiated period, but is instead an aggregation of twenty-eight plus twenty eight plus nineteen years, with the nineteen years having been added by the 1976 Act.[116] Congress, in drafting the 1976 Act, considered converting, retroactively, the 1909 Act's cumbersome twenty-eight plus twenty-eight term to a term of life plus fifty years. It declined to do so because of the argument that this would be unfair to transferees who had purchased both the original and renewal copyright terms by assignment from authors: switching to a life plus fifty term for these already assigned works would, it was said, would deprive them of their bargain, namely the right to exploit the work without the author's further permission during the "full term" of copyright, which was at that time fifty-six years. As a result, for "old Act" works (works published before January 1, 1978), the 1976 Act continued the 1909 Act's structure of measuring the term of protection from publication, rather retroactively providing them a life plus fifty term.[117]

In my opinion, the failure to convert to a life plus fifty term for "old Act" works was a mistake and confused two different issues: the first being how to measure the term of protection, the second being the need to honor a transferee's contract to exploit a work for a maximum of fifty-six years.[118] This unfortunate decision has caused U.S. trade negotiators innumerable difficulties overseas as they attempt to persuade foreign countries that we want them to give our works—old and new—a life plus fifty term, even though we do not give our works (or theirs) that term in the case of "old Act" works. The trade negotiators gamely argue that seventy-five years from first publication is the actuarial equivalent of life plus fifty years, but this is met with skepticism, which was eminently justified before the end of 1992, since before that date the author would only get a twenty-eight year term if a proper renewal application was not filed. I have heard that some foreign countries are

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116 17 U.S.C. § 303.

117 *See* 17 U.S.C. § 304.

118 *See Hearing on H.R. 989, supra* note 10, at 316-55.

refusing, in their GATT retroactivity legislation, to give U.S. works a life plus fifty term, and instead are proposing to give them as little as twenty years based on our failure to give their pre-1978 works a term of life plus fifty. At the end of my statement, I outline an amendment in the nature of a substitute to S. 483 that would take care of this problem by going to a life plus seventy term for pre-1978 works, yet would still honor transferees' contracts.[119]

There are, of course, some authors such as those in the Amsong group, who will benefit domestically and internationally from the Copyright Term Extension Act of 1995 as currently drafted, because they can afford to employ a lawyer to timely file termination notices. But there also are a significant number of authors under the bill as currently drafted who will not fully benefit because they cannot terminate transfers for the twenty years granted under the bill. For these authors, the extended copyright granted in the bill will irrevocably vest in a transferee, even though the transferee did not bargain for the extra term. In fact, all the transferee ever bargained for was a copyright term of fifty-six years.

Here's why this will occur. There is no special termination of transfer right for the new twenty years granted "old Act" works in the Copyright Term Extension Act of 1995. Instead, the bill will apply the existing termination right in section 304, or will it? Because the *time limits* for termination have not been amended, for works first published between 1920 and 1933 (coincidentally important years for the Amsong group), the five-year window for termination has already passed. These authors or their children cannot terminate even if that is what they wish. And with each successive year, authors or their children will lose the ability to terminate for another year's works: as of 1996, authors and their children would no longer be able to terminate for works first published in 1934.

This manifest unfairness can be prevented by vesting the extra twenty years solely and directly in the author or his or her heirs. Purchasers of copyright can then renegotiate contracts and pay for the real value of the extra twenty years, rather than reaping the wholly undeserved windfall of a contract negotiated seventy-five years ago. This can be done either by amending the bill to simply vest the extra twenty years in the author, or, by going to a term of life plus seventy for these "old Act" works (as well as for new act works of course). What follows is my life plus seventy proposal.

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[119] S. 483, 104th Cong., 1st Sess. (1995).

V. PROPOSAL FOR A TERM OF LIFE PLUS SEVENTY FOR ALL WORKS

There are a number of ways to amend the bill to protect authors. One way would be to convert to a term of life of the author plus seventy years (if the decision is made to extend the term) for "old Act" works, while still preserving the ability of the publisher to exploit the work according to the term of the original contract. This should also include the 1976 Act's extra nineteen year term for works for which the author had to terminate the transfer between 1978 and 1995, thereby not disadvantaging transferees. (The author would still have the right to terminate where currently available). This would, importantly, accomplish other objectives: it would prevent authors from outliving their copyrights, it would give the additional twenty years to authors, it would harmonize U.S. law with EU law, and it would help our trade negotiators get a term of at least life plus fifty in foreign countries' GATT retroactivity provisions.

Here's how the proposal would work in practice. Assume that in 1920, an author transferred his rights in both the original and renewal terms to a publisher. The publisher published the author's book in 1920. The author died in 1950.[120] The work was renewed in 1948. Under the current regime, the copyright lasts for seventy-five years, expiring in 1995. Under a life plus fifty regime, the copyright would expire in 2000; under a life plus seventy regime it would expire in 2020.

The original contract between the author and publisher for the fifty-six year term granted in the 1909 Act, as well as the nineteen years added in the 1976 Act, would be honored in the proposal, meaning that the publisher would receive the full benefit of its contract for seventy-five years—until 1995. In 1996, the copyright would vest automatically in the author's heirs for the duration of the copyright—2020 under the life plus seventy year regime. The author's heirs would thus be free to negotiate a contract for the remaining twenty-five years on the copyright.

This approach would give to purchasers of copyright the full benefit of what they had bargained for with the author, plus the windfall they received in 1976. At the same time, it would place

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120 Because in a number of cases, a 75 year term provides a longer term than life plus 50 regime—in the hypothetical given in the text if the author died before 1945—there will need to be a transitional section continuing copyrights presently protected by virtue of existing 75 year term. Otherwise the result would be to place into the public domain works that are currently protected. An alternative to a transitional section would be to provide an "either/or" way of measuring term as in current § 303. Under such an alternative, the author or the author's heirs would receive the longest term possible—either under a life plus 70 or under the current law.

U.S. law in harmony with the rest of the world and would give to the author or the author's heirs the benefit of any extension of term consistent with Congress's power to grant copyright to benefit authors.

A) *Mills Music v. Snyder*

The nineteen year termination right for "old Act" works granted in section 304 of the 1976 Act contained an exception for derivative works created under a grant from the author or transferee before termination.[121] This exception permitted, for example, a record company that had licensed from a music publisher (which had itself been licensed by the composer) the right to make a record of a musical composition to continue to sell the records after termination, provided, of course, that it continued to pay the previously agreed to royalties. These derivative royalties would, however, go 100% to the author after termination. In *Mills Music v. Snyder*,[122] the Supreme Court, in a 5-4 opinion, held that the author does not get 100% of the royalties, but has to share them with the music publisher according to the terms of the original contract.

The Copyright Office, which had drafted the section in question, passionately argued that the Supreme Court was wrong and had cheated songwriters out of an important part of the 1976 Act deal. A bill was introduced by Senator Specter to overturn this erroneous decision, but it was not passed.[123] Senate bill, number 483,[124] which is being pushed by music publishers, should correct *Mills Music* by requiring that the author receive 100% of the royalties. Music publishers should not reap the unfair advantage of *Mills Music* for yet another twenty year term extension. Failure to reverse *Mills Music* will compound the injustice by depriving authors of the derivative royalties Congress intended them to have during the new twenty year term.

B) *Reciprocity*

The Copyright Term Extension Act of 1995 is not reciprocal; that is, it grants a term of life of the author plus seventy years to works of foreign authors without requiring the foreign country to grant U.S. authors the same term. Thus, Japanese authors would

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121 17 U.S.C. § 304.
122 469 U.S. 153 (1985).
123 *See* 2 WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 96 n.358 (1994).
124 S. 483, 104th Cong., 1st Sess. (1995).

enjoy a term of life of the author plus seventy years in the United States, while U.S. authors would only get life of the author plus fifty years in Japan. If the motivating force behind the bill is the reciprocal provisions of the EU term directive, it is perplexing that the bill is not reciprocal too. Reciprocal protection beyond life plus fifty is, moreover, consistent with—even required by—Article 7(8) of the Berne Convention.[125]

[125] Berne Convention for the Protection of Literary and Artistic Works, art. 7(8), Sept. 9, 1886, *as last revised* at Paris, July 24, 1971, 828 U.N.T.S. 221.