

by Bill Gable

TAKING IT BACK

Terminations of copyright transfers are subject to the exacting statutory framework of the 1976 Copyright Act

In 1938 —long before he or anyone else realized how successful a writer he would become—Nobel Prize winner John Steinbeck sold “sole, exclusive and open-ended publication rights” to *The Grapes of Wrath*, *Of Mice and Men*, *Tortilla Flat*, and 10 other literary works to Viking Press.¹ The agreement was to remain in effect as long as Viking kept the works “in print and for sale.”²

In 2004, Steinbeck’s son and granddaughter served notice on Penguin Books, Viking’s successor-in-interest, that they were terminating the 1938 agreement.³ They did not do so based on any alleged breach or default. They did so under a federal law that entitles authors or their heirs, after a prescribed number of years, to terminate past transfers of copyright interests and to recapture ongoing ownership and control over the affected works, even when the rights were granted “in perpetuity” and regardless of the amount of compensation originally paid to the author. This same law was used just this year by an author’s heirs to recapture ownership and control over rights

to the Superman copyright, which the author had assigned to Detective Comics—also, coincidentally, in 1938—for \$130.⁴

Terminations of copyright transfers present some of the most complicated issues in copyright law. The statute that governs terminations is complex and technical, and what little case law exists leaves many questions unanswered.⁵ For authors and their heirs, however, terminations are the gift that keeps on giving. And for copyright attorneys, terminations of copyright transfers, although potentially fraught with peril, are a highly stimulating practice area at the forefront of the law.

The ability to terminate a copyright transfer is an innovation of the amended 1976 Copyright Act.⁶ While the “termination right” may strike many as an unprecedented restraint on freedom of contract, the right has its origins in a provision of the 1909 Copyright Act. Works first securing copyright under the 1909 Act were entitled to an ini-

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tial 28-year term of protection followed, if timely renewed, by a second 28-year “renewal term,” the rights to which vested automatically in either the author or, if deceased, the author’s “statutory successors.”⁷ The 1909 Act’s renewal term was intended to protect authors and their successors against unremunerative transfers early in the careers of the authors.

Throughout the first part of the twentieth century, rights to the renewal term in 1909 Act works were considered to be unassignable by the author during the initial 28-year term. In a landmark 1943 decision, however, the U.S. Supreme Court held otherwise, Justice Felix Frankfurter reasoning that “[i]f an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need.”⁸ Following this decision, publishers began requiring authors to sign away both the initial and renewal term rights in one transfer, undermining the statutory purpose of the renewal provision.⁹

When enacting the 1976 Copyright Act—which became effective January 1, 1978—Congress responded to this erosion of authors’ rights in several ways. First, it increased the length of the renewal term of 1909 Act works from 28 years to 47 years, for a total copyright term of 75 years (which was later increased by an additional 20 years in 1998).¹⁰ Second, for works originally created on and after January 1, 1978, it abandoned the dual-term concept and provided for a unitary term of U.S. copyright protection equal to the life of the author plus 70 years.¹¹ Third, it created a new termination right that, unlike the 1909 Act renewal right, was inalienable by the author.¹² Although the termination provisions are located entirely within the 1976 Copyright Act, they apply to both 1976 Act works and already existing 1909 Act works.

To counterbalance this extraordinary right, however, Congress did not allow terminations to operate automatically after a specified number of years. Instead, Congress placed the burden on authors and their statutory successors to comply with highly technical provisions in order to effect termination. Those provisions have been described by one authority as “even more complicated than those for filing a renewal application”—the renewal provisions themselves having been “rightly described by the Copyright Office as ‘the source of more confusion and litigation than any other in the copyright law.’”¹³ Failure to comply with the numerous technicalities of the termination provisions and regulations results in forfeiture of the author’s right to terminate an otherwise eligible grant.¹⁴

Determining Whether a Grant Is Terminable

Under the termination provisions, an “exclusive or non-exclusive grant of a transfer or license of a copyright or of any right under a copyright” is subject to termination “notwithstanding any agreement to the contrary.”¹⁵ To be terminable, an original grant must be made by an “author” or an author’s statutory successors, collectively sometimes referred to as the “termination class.”¹⁶ For copyright purposes, “authors” include, without limitation, songwriters, composers, recording artists, novelists, poets, screenwriters, painters, choreographers, software writers, glassblowers, cake decorators, and Internet bloggers—in short, creators of any original work whose subject matter is protectible under U.S. copyright law and fixed in a tangible medium of expression.¹⁷

Under the 1976 Copyright Act, a deceased author’s termination interest—just like his or her renewal rights—passes by operation of law to a series of statutorily defined successors. Copyright grants executed by these statutory successors are also terminable, provided the grants were executed prior to January 1, 1978. The statutory successors and their respective shares of a deceased author’s termination interest are as follows:

- The widow or widower owns the author’s entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns half of the

author’s interest.

- The author’s surviving children, and the surviving children of any dead child of the author, own the author’s entire termination interest unless there is a widow or widower, in which case the ownership of half of the author’s interest is divided among them.

- The rights of the author’s children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of the author’s children; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

- In the event that the author’s widow or widower, children, and grandchildren are not living, the author’s executor, administrator, personal representative, or trustee will own the author’s entire termination interest.¹⁸

It should be noted, however, that a deceased author’s statutory successors can terminate an author’s prior grant only if they are collectively entitled to exercise more than half of the author’s termination interest.¹⁹ This may sometimes prove impossible. Indeed, the 1938 John Steinbeck grant resisted termination for years due to animosity between his widow, who was his third wife, and his children, who were the offspring of his second wife. Each camp controlled 50 percent of Steinbeck’s interest and could not terminate without the other. Only when Steinbeck’s widow died did his son and granddaughter finally control the majority of his termination interest necessary to terminate. Thus, some grants legally eligible for termination may be nonterminable, temporarily or permanently, solely as a practical matter.

Significantly, several categories of copyright grants are immune from termination altogether. A copyright grant made in a will is not terminable.²⁰ Grants of copyrights in works made for hire are not terminable.²¹ Grants to use a copyrighted work in a derivative work are not terminable.²² Copyright grants made by persons other than the author on or after January 1, 1978, are not terminable.²³ Moreover, only grants of U.S. copyright interests are terminable, leaving non-U.S. rights unaffected.²⁴ While these exceptions represent substantial categorical carve-outs, the impact of terminations remains considerable.

The Effective Date of Termination

The Copyright Act has two parallel provisions governing terminations of copyright transfers: Section 203 and Sections 304(c)-(d), depending on whether the grants were executed before or after the 1976 Copyright Act came into effect. Grants executed prior to January 1, 1978, are governed by Sections 304(c)-(d). Grants executed on or after January 1, 1978, are governed by Section 203. While there are various and sometimes important distinctions between the two termination provisions, they generally mirror one another.

Termination of pre-1978 grants “may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured.”²⁵ If that opportunity is missed, a second opportunity arises 19 years later that “may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.”²⁶

The timing for terminating grants executed on or after January 1, 1978, under Section 203 is calculated very differently. A grant executed by an author on or after January 1, 1978, is terminable at any time during a period of 5 years beginning at the end of 35 years from the date of execution of the grant; or if the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier.²⁷ According to Congress, “This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.”²⁸

The differing treatment of grants executed before and after the 1976 Copyright Act came into effect was necessary to preserve settled expectations in light of the complicated structure of 1909 Act copyrights. Prior to enactment of the 1976 Copyright Act, U.S. copyrights existed for a maximum of 56 years. The 1909 Act provided for an initial 28-year term of copyright protection plus an additional 28-year renewal term of protection, provided the copyright was timely and properly renewed during the 28th year of protection.²⁹

When Congress increased the renewal term of 1909 Act works from 28 years to 47 years in the 1976 Copyright Act, it did so intending that authors and their heirs receive the windfall of the extended



renewal term. At the same time, it wanted original grantees to receive the benefits of their earlier bargains. Thus, for prior grants made for the “life of the copyright,” Congress allowed terminations to occur only following expiration of the original 56-year term of copyright protection. Still, Congress recognized that many authors were likely to fail to properly effect their termination rights after 56 years. So in 1998, when Congress added 20 years to the extended renewal term, it gave authors and other members of the termination class a second bite of the apple after 75 years (that is, upon expiration of the earlier 19-year extension), provided the work was still in its renewal term on October 27, 1998, the date the Sonny Bono Term Extension Act was enacted.

Thus, for a termination of a grant of rights in a 1909 Act work, only the rights in the extended renewal term—the final 39 years of copyright protection—are ever subject to recapture by the termination class when the grant covered was executed prior to 1978. For grants executed on or after January 1, 1978—and even for 1909 Act works covered in those grants—Congress adopted a straightforward termination period of 35 years (or 40 years for a grant covering publication rights). It did so reasoning that termination was within the contemplation of the contracting parties, who were on constructive notice of the termination provisions contained in the 1976 Act.

Regardless of whether a grant is subject to Section 203 or Sections 304(c)-(d), the termination of a copyright grant is subject to a five-year termination window. Termination must be effected within the termination window or the right to terminate the relevant grant is lost.

To effectively terminate a grant, the author (or the appropriate members of the termination class in the case of a deceased author or a grant executed by persons other than the author) must serve a notice of termination on the grantee or the grantee’s successor in title no more than 10 and no less than 2 years prior to the effective date stated in the notice.³⁰ The notice of termination must state the effective date of termination. Perfection of termination requires that a copy of the notice be filed with the U.S. Copyright Office prior to the effective

date of termination.³¹

“The future rights that will revert upon termination of the grant become vested” upon service of the notice on the grantee.³² While there may occasionally be reasons for delaying service—such as when parties are arguing for a reduction in value for estate tax purposes—notices of termination generally should be served as soon as possible. Doing so allows the termination interest to vest in the author’s estate rather than in the author’s statutory successors, thereby avoiding the risk that disputes could arise within the termination class that would prevent the majority consensus required to terminate.

Complicated rules exist concerning precisely which members of

the termination class are entitled to serve any particular notice. Equally complex rules also apply to the termination rights of joint authors and their statutory successors, which are treated differently depending on whether termination occurs under Section 203 or Sections 304(c)-(d).

The Post-Termination Moratorium Period

After the U.S. Supreme Court held that an author’s 1909 Act renewal rights were assignable during the initial term of copyright protection, a market developed for speculators purchasing authors’ contingent renewal rights. This development undermined the purpose of the renewal provisions.³³ Seeking to discourage similar speculation in termination rights when enacting the 1976 terminations provisions, Congress provided that “a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination.”³⁴ As an exception, the statute provides that “an agreement for such a further grant” may be made between the author (or the author’s statutory successors) and the original grantee (or its successor in title) after the notice of termination has been served.³⁵

This introduces a confusing element into the terminations landscape. Although sometimes inaccurately referred to as a “first right of refusal,” the provision does not in fact require the terminating party to ever negotiate with the original grantee.³⁶ But it appears to protect the original grantee from bidding wars, at least prior to the effective date of termination. Moreover, it strongly discourages any grantee or interested third party from advancing funds prior to the effective date of termination under an agreement that a court might later deem to be an unenforceable “agreement to the contrary.”

Attorneys practicing in the terminations area must remain wary of their clients’ entering into an unenforceable or voidable “agreement to the contrary.” Whether executed by the author or another party, these agreements generally may be characterized as violating or compromising the inalienability of an author’s termination interests.

The Ninth Circuit has described the phrase “agreement to the con-

trary” as “unclear,” while the Second Circuit has expressly found the phrase too ambiguous to be interpreted without consulting legislative history.³⁷ The statute provides two examples of “agreements to the contrary”—an agreement to make a will, and an agreement to make any future grant.³⁸ But courts have also found other types of agreements to be forbidden “agreements to the contrary,” including an agreement made subsequent to a work’s creation retroactively characterizing it as a work for hire when the work was never created in that manner,³⁹ and a transfer by one member of a termination class purporting to assign the termination rights of another class member.⁴⁰

Can an original grantee, prior to the author serving a notice of termination, enter into a superseding grant with an author for new consideration, or will a court later find the superseding agreement was an unenforceable “agreement to the contrary,” thereby still allowing the author to terminate the original grant? In *Milne v. Slesinger, Inc.*,⁴¹ the sole published Ninth Circuit terminations case to date, the court considered whether a superseding re-grant of rights to Winnie-the-Pooh by the author’s son in 1983 was an unenforceable “agreement to the contrary,” thus permitting the author’s granddaughter in 2004 to terminate her grandfather’s underlying 1930 grant of those rights.⁴² In *Milne*, the author’s son had never served a notice of termination but had elected to instead use the threat of termination to leverage a more advantageous agreement estimated to be worth hundreds of millions of dollars.⁴³

Relying on legislative history, the *Milne* court held that the 1983 re-grant was not an “agreement to the contrary,” reasoning that when enacting the termination provisions Congress specifically stated that it did not intend for the statute to “prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one.” Therefore, according to the court, Congress anticipated that parties may contract, as an alternative to statutory termination, to revoke a prior grant by replacing it with a new one.⁴⁴

Can a similar effective re-grant be made by an author or an author’s heirs to the original grantee after serving a notice of termination and during the moratorium period? While dicta in *Milne* suggests that such a grant might not be deemed an “agreement to the contrary,” the statute, legislative history, and case law are in fact not entirely clear, and practitioners should tread carefully in this area.⁴⁵

Grants Exempt from Termination

Certain categories of grants are not subject to termination. First, a copyright grant in a will

is not terminable—provided the testator/author owns the work being bequeathed when he or she executes the will. The intersection of terminations and trusts and estates law can be especially complicated. If an estate contains 1909 Act works and there are termination issues present, invariably those issues cannot likely be resolved without understanding not only terminations but the renewal term area as well.⁴⁶

In one of the few reported terminations cases, the author had earlier granted renewal term rights to a third party. The author properly renewed the copyright and survived into the renewal term, causing his renewal term expectancy to vest in the third-party grantee.⁴⁷ Thus the author retained no rights in the renewal term copyrights he later attempted to convey in his will at the time he executed the will.⁴⁸

Second, a grant of a genuine work for hire is not terminable. However, in *Community for Creative Non-Violence v. Reid*, the U.S. Supreme Court held that whether a work prepared under the 1976 Act by an employee is a work made for hire depends not on the language of the contract but on “the hiring party’s right to control the manner and means by which the product is accomplished.”⁴⁹ This area of law appears ripe for litigation by authors wishing to terminate grants when the facts indicate no genuine work for hire relationship existed.⁵⁰

Third, rights to derivative works prepared under authority of a grant prior to its termination are not terminable.⁵¹ Those works “may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.”⁵² The legislative history includes unusually expansive language concerning the derivative works exception as it applies to motion pictures. For purposes of terminations, “a motion picture [is] considered as a ‘derivative work’ with respect to every ‘preexisting work’ incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture.”⁵³

Nevertheless, studios and other producers of content are not entirely free from termination risks. Even when a work is largely insulated by work for hire agreements, the chain of title for properties based on preexisting works may somewhere contain a terminable grant. Following termination, the right to create remakes, sequels, merchandising, and other derivative uses of the underlying work will require a new grant from the termination class.

Fourth, termination affects “only the rights covered by the grant that arise under this

title, and in no way affects rights arising under any other Federal, State or foreign laws.”⁵⁴ Because titles are generally not copy-rightable, an original grantee may be able to continue to use a work’s title post-termination; and a grantee who has developed trademark or unfair competition rights in a title may be able to assert those rights against a terminating party’s subsequent grantee. By identifying characters with particular actors, an original grantee may be able to assert trademark, unfair competition, or rights of publicity claims against the terminating party or his or her new grantees.

Finally, because copyright law is generally territorial, only U.S. rights are affected by terminations.⁵⁵ After termination, the grantee of worldwide rights in a work remains entitled to exploit the work outside the United States.⁵⁶ ■

¹ *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395, 400 (S.D. N.Y. 2006).

² *Id.* at 402 n.22.

³ *Id.* at 400.

⁴ See *Siegel v. Warner Bros. Entm’t Inc.*, Case No. CV-04-8400-SGL (RZx), Order Granting in Part and Denying in Part Plaintiffs’ Motion for Partial Summary Judgment; Order Granting in Part and Denying in Part Defendants’ Motion for Partial Summary Judgment (Mar. 26, 2008).

⁵ Is a gift terminable, for example? Note that the definition of “transfer” in §101 of the Copyright Act is quite expansive, including “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” 17 U.S.C. §101.

⁶ See 17 U.S.C. §§203, 304(c) & (d).

⁷ 1909 Copyright Act, §16, 320 Stat. 1080, 1081; see also 17 U.S.C. §304(a)(1)(C) (identifying statutory successors to renewal rights). If the author of a 1909 Act work survived until commencement of the renewal term, renewal term rights vested in the author (unless the author had previously granted them to a third party); but if the author died prior to commencement of the renewal term, the renewal term copyright automatically vested in the author’s statutory successors (who henceforth recaptured any U.S. rights from any prior grantee of the author).

⁸ *Fisher Music Co. v. Witmark*, 318 U.S. 643, 657 (1943).

⁹ *Marvel Characters, Inc. v. Simon*, 310 F. 3d 280, 284 (2d Cir. 2002).

¹⁰ *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395, 397 (S.D. N.Y. 2006).

¹¹ See 17 U.S.C. §302(a).

¹² See 17 U.S.C. §§203, 304(c).

¹³ W. Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 921 (1997); see also S. REP. NO. 102-194, 102d Cong., 1st Sess., at 3, 4 (1991) (describing the renewal provision of the 1909 Act as “a highly technical provision which is too difficult for most lawyers to understand”).

¹⁴ Relevant regulations are codified at 37 C.F.R. §201.10. Indeed, the very first published terminations decision involved a defective termination notice. See *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F. 2d 610 (2d Cir. 1981) (premature and defective termination notice permitted MGM to continue use of Tarzan

character).

¹⁵ See 17 U.S.C. §§203(a), 304(c), 304(c)(5).

¹⁶ 17 U.S.C. §§203(a), 304(c).

¹⁷ See 17 U.S.C. §102.

¹⁸ 17 U.S.C. §§203(a)(2), 304(c)(2).

¹⁹ 17 U.S.C. §§203(a)(1), 304(c)(1).

²⁰ 17 U.S.C. §§203(a), 304(c). Thus, while grants to inter vivos trusts are terminable, a grant through a will to a testamentary trust is not subject to termination. See, e.g., *Larry Spier, Inc. v. Bourne Co.*, 750 F. Supp. 648, 650 (S.D. N.Y. 1990), *rev'd on other grounds*, *Larry Spier, Inc. v. Bourne Co.*, 953 F.2d 774 (2d Cir. 1992).

²¹ 17 U.S.C. §§203(a), 304(c). For the statutory definition of "work made for hire," see 17 U.S.C. §101.

²² See 17 U.S.C. §§203(b)(1), 304(c)(6)(A) (the "derivative works exception"). For the statutory definition of "derivative work," see 17 U.S.C. §101.

²³ Compare 17 U.S.C. §203(a) (making only grants by authors on or after January 1, 1978, terminable) with 17 U.S.C. §304(c) (making grants executed before January 1, 1978, by either authors or their statutory successors terminable).

²⁴ 17 U.S.C. §§203(b)(5), 304(c)(6)(E).

²⁵ 17 U.S.C. §304(c)(3).

²⁶ 17 U.S.C. §304(d)(2).

²⁷ 17 U.S.C. §203(a)(3).

²⁸ H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 127 (1976). *But see* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §11.05[B][1], at 11-40.10 (2003) ("The alternative measure should be limited, however, to the grant of publication rights within a given instrument and the straight thirty-five-years-from-execution measure should be applied to the other rights within the conveyance.").

²⁹ It is critical when dealing with 1909 Act works to confirm whether renewal was properly and timely registered. Throughout much of the twentieth century, failure to timely renew caused the work to enter the public domain in the United States. However, the Copyright Renewal Act of 1992 retroactively made renewal automatic for works that secured copyright protection between January 1, 1964, and December 31, 1977. See 17 U.S.C. §304(a)(3)(B); Pub. L. No. 102-307, 106 Stat. 264, 266 (June 26, 1992). Foreign works once in the public domain in the United States for failure to renew may have had their U.S. copyrights restored under 17 U.S.C. §104A. See B. Gable, *Restoration of Copyrights: Dueling Trolls and Other Oddities under Section 104A of the Copyright Act*, 29 COLUM. J. L. & ARTS (Winter 2005).

³⁰ 17 U.S.C. §§203(a)(4)(A), 304(c)(4)(A).

³¹ *Id.*

³² 17 U.S.C. §§203(b)(2), 304(c)(6)(B).

³³ See H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 127 (1976).

³⁴ 17 U.S.C. §§203(b)(4), 304(c)(6)(D).

³⁵ *Id.*; see also *Bourne Co. v. MPL Communications, Inc.*, 675 F. Supp. 859, 865 (S.D. N.Y. 1987) (suggesting it is permissible to negotiate a grant with someone other than the original grantee—or its successor in title—prior to the effective date of termination, so long as the agreement is not made effective prior to that date).

³⁶ See *Bourne*, 675 F. Supp. at 866.

³⁷ See *Milne v. Slesinger, Inc.*, 430 F.3d 1036, 1045 (9th Cir. 2005).

³⁸ The legislative history suggests Congress intended these as merely exemplary. See S. REP. NO. 473, 94th Cong., 1st Sess. (1975).

³⁹ *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 292 (2d Cir. 2002).

⁴⁰ *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395, 402 (S.D. N.Y. 2006).

⁴¹ *Milne*, 430 F.3d 1036.

⁴² *Id.* at 1041.

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⁴³ *Id.* at 1042.

⁴⁴ *Id.* at 1045-46.

⁴⁵ In a second terminations case now before the Ninth Circuit, the author's daughter has argued, *inter alia*, that a subsequent grant by her of various rights to Lassie was an "agreement to the contrary," entitling her to terminate an earlier 1976 grant. The district court did not reach the issue, finding instead that the two contracts, when viewed together, evidenced her intent to relinquish her termination rights. *Classic Media, Inc. v. Mewborn*, 2006 WL 3333715, at *3 (C.D. Cal. 2006) (stating that while the "termination interest is inalienable pursuant to the language of the statute, such an interest may be waived or relinquished," citing *Milne*); *but see* *Larry Spier, Inc. v. Bourne Co.*, 953 F. 2d 774, 778 (2d Cir. 1992) ("If the author's intent were the paramount concern of the statute, then no termination of any kind would be allowed, because most authors presumably 'intend' to make the assignment that is the very object" of termination.). Like *Milne*, the case does not involve a re-grant during the moratorium period; however, unlike *Milne*, the plaintiff received a mere \$3,000 in consideration for her subsequent re-grant, which may well make this case distinguishable from *Milne*.

⁴⁶ *See, e.g.*, *Spier*, 953 F. 2d 774; *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395 (S.D. N.Y. 2006); *Range Road Music, Inc. v. Music Sales Corp.*, 76 F. Supp. 2d 375 (S.D. N.Y. 1999); *Music Sales Corp. v. Morris*, 73 F. Supp. 2d 364 (S.D. N.Y. 1999); *Bourne Co. v. MPL Communications, Inc.*, 675 F. Supp. 859 (S.D. N.Y. 1987).

⁴⁷ *See supra* note 7.

⁴⁸ *See Spier*, 953 F. 2d at 777-78.

⁴⁹ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (articulating numerous factors relevant to test derived from the general common law of agency).

⁵⁰ The legislative history of the terminations provisions is markedly pro-author: "The principal purpose of the amendments in §304 was to provide added benefits to authors....That general purpose is plainly defined in the legislative history and, indeed, is fairly inferable from the text of §304 itself." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172-73 (1985); *see also* MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §11.01[B], at 11-4 (2003) ("It would seem to follow that the termination procedures therefore, cannot apply to prejudice the interest of authors.").

⁵¹ Moreover, following termination, certain royalties due under licenses issued by the original grantee pre-termination remain payable to that grantee post-termination. *See, e.g.*, *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *Woods v. Bourne*, 60 F. 3d 978 (2d Cir. 1995).

⁵² 17 U.S.C. §§203(b)(1), 304(c)(6)(A).

⁵³ H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 127 (1976).

⁵⁴ 17 U.S.C. §§203(b)(5), 304(c)(6)(E).

⁵⁵ *See* *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F. 3d 17, 20 (2d Cir. 1998) (Only domestic rights revert to an author's heirs after termination.); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F. 3d 1088, 1091 n.6 (9th Cir. 1994) (Copyright Act does not extend to acts taking place outside United States.).

⁵⁶ Reversion of copyrights is available in certain foreign countries as well. The United Kingdom Act of 1911 provides that rights to works created prior to June 1, 1957, automatically revert to the author's heirs, successors, or legal representatives 25 years after the death of the author—provided the author was the original owner of the copyright, made the grant himself or herself, and the grant was executed prior to June 1, 1957. Reversion claims may be made at any time and apply to rights in all countries that were a member of the British Commonwealth as of 1911.

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