How to Reclaim Your Copyright Interests: A primer on copyright termination

Prepared by

Shreyanka Mirchandani Changaroth[1] and Lateef Mtima[2] of the Institute for Intellectual Property & Social Justice (IIPSJ), under a grant from The Wikimedia Foundation's Knowledge Equity Fund.

Table of Contents

[1] Wikimedia Race and Knowledge Equity Fellow 2022-23

[2] Professor of Law at the Howard University School of Law, and Founder and Director of the Institute for Intellectual Property and Social Justice

Executive Summary

How creators can reclaim & protect their copyright through termination rights

Copyright law gives creators certain rights in relation to their creations. Creators may exploit these rights directly (e.g. by making copies and selling the work for profit) or indirectly, by entering into agreements that give others permission to engage in those rights (e.g. through a licensing agreement that gives a publisher the right to make copies and sell the work). Typically, however, creators enter into such agreements at the beginning of their careers before they have achieved any considerable success. In such cases, the terms of the agreement tend to overwhelmingly benefit the licensee, as they are often larger entities such as record labels or publishers. See p3.

To address the imbalance in negotiating power, Congress has provided creators with the right to "terminate" (i.e., tear up) such agreements, thereby providing creators with the opportunity to renegotiate these agreements later in their careers when they have more bargaining leverage. The rights of a creator to claw back the rights and interests associated with their copyrighted work are referred to as termination rights and can be found in Sections 203 and 304 of the Copyright Act of 1976. See p3.

Purpose of this primer

This primer is intended to provide creators with information on termination rights, what they are, and how they may be exercised. With greater clarity on these rights and processes, a creator can be better equipped to maximize their economic returns from creative works that continue to generate income, or that hold future promise of income generation.

How do termination rights work?

A copyright owner may terminate a pre-existing existing agreement 35 years after the agreement was entered into (if the agreement was entered into on or *after* January 1, 1978) or 56 years after the agreement was entered into (if the agreement was entered into *before* January 1, 1978). Once the 35 (or 56 years) is up, there is a 5-year window for a creator to exercise their termination rights. See pp 3-4.

Termination rights only apply to independently created works. If the work was created as part of one's employment contract or duties, it is likely to be considered a 'work for hire' – the law on termination rights does not apply to works for hire, as such works are considered the property of the employer not the creator. See p4 .

How to carry out termination

To reclaim the rights under copyright, a creator would need to terminate the agreement by serving a signed, written notice of termination on the grantee (i.e., the other party to the license agreement, such as a publisher or record label). This notice would need to be recorded with the Copyright Office, and the recording of the notice needs to meet certain conditions to be accepted by the Copyright Office. See p5

1. What are termination rights and why do they exist?

a) What are the rights associated with copyrighted works?

Copyright law gives creators certain rights in relation to their creations, such as the right to reproduce, perform, or display their works. These are rights that belong exclusively to the creator (i.e., author of the work). Accordingly, a creator or author has certain control over their work, e.g., how it is used and what the terms of use are, e.g., how much they will be paid for the use of their work.

b) Transferring or licensing copyright interests

Authors sometimes enter into agreements to transfer their copyrights completely, or license agreements which give others the permission to engage in some or all of the rights associated with their copyrighted works. If an author is not yet well known, the price they receive for their transfer or license may be small.

c) Why do termination rights exist?

Budding artists typically enter into transfer and license agreements with major corporate entities (e.g. record companies) at the beginning of their careers, in return for funding and exposure. When negotiating these agreements, there is usually a clear imbalance in the bargaining power of the little-known artist and that of a larger well-resourced entity. This can and has resulted in inequitable arrangements that often benefit the corporate entities but are exploitative of budding artists. Congress recognized this, which led to the enactment of Sections 203 and 304 of the Copyright Act of 1976. The sections provide some protection to authors by allowing them to terminate their transfers or licenses after a certain number of years. Later in their careers, artists may become highly successful, and by terminating their existing agreements, they can enter into new agreements on much better terms.

Termination rights are especially important for historically exploited communities, such as artists of color. It allows them to reclaim the rights to their works and put an end to inequitable contracts and enter into new agreements on more favorable terms.

2. How do termination rights work?

Eligibility for exercising termination rights depends on a few conditions, including the date of the copyright, date of the transfer or license agreement, and the persons who executed the transfer or license agreement. The relevant sections governing eligibility of exercise of termination rights are sections 203, 304(c) and 304(d) of the Copyright Act.

a) Timing - date of initial agreement & window for termination

The ability for the creator to exercise their termination rights depends on when the transfer or license agreement was signed and the timing of the creator's exercise of the termination.

- *Grants before 1978.* If the agreement was entered into before January 1, 1978, an author can exercise termination rights 56 years from the date of the agreement (Section 304). Section 304 only applies to musical compositions.[3]

[3] Note that the last day to serve a notice of termination under Section 304(d) was October 26, 2017.

- *Grants after 1978.* If the agreement was entered into on or after January 1, 1978, the author can exercise termination rights 35 years from the date of the agreement (Section 203).
- *Window for termination.* A notice of termination must state the date that termination will take effect. This 'effective date of termination' must fall within a statutory five-year termination window; in other words, once the 35 or 56 year period begins, **the author has five years** in which to terminate the transfer or license agreement. Once the five-year period ends, the author can no longer terminate the transfer or license agreement.
- *Timing of service of notice.* The notice must be served no less than two years and no more than 10 years before the effective date of termination, and must be recorded with the Copyright Office before the effective date.

b) Who can terminate?[4]

A living author can terminate a grant they made.

Where there is more than one author of a work (i.e. a joint work), if multiple authors were parties to the initial transfer, termination may only happen when a majority of the authors have signed the termination. If a joint author enters into an independent agreement without their co-authors, the joint author may terminate the agreement to the extent of their share.[5]

An author's heir or estate may terminate the grant of a transfer or license by an author.[6]

c) The "work made for hire" exclusion

A work made for hire is a work that was "prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned for use […] if the parties expressly agree [in writing]".[7]

Creating a work during the course of employment with an organization likely means that the work belongs to the employer and not the employee, in which case, the employee does not have termination rights.[8]

d) The "derivative work" exclusion

If a pre-existing work is built upon by another creator, this new work is considered a derivative work and is not eligible for termination by the author of the pre-existing work.[9] For example, a book author enters into a license agreement with a publishing company,

---

[4] 17 U.S.C. § 203(a)(1)

[5] Scorpio Music S.A. v. Victor Willis, 2013 WL 790940 (S.D. Cal 2013)

[6] Unlike other rights under a copyright, termination rights cannot be transferred or licensed to third parties. It is an inalienable right that belongs to the author and the author's heirs.

[7] § 101 Copyright Act – for works created prior to 1978. For works created before 1978, a "work made for hire" is defined in Chapter 2100 of the *Compendium of U.S. Copyright Office Practices*.

[8] The handful of court cases involving termination rights has seen some corporations argue that the works constituted "works made for hire". See e.g., *Horror Inc. v. Miller*, 335 F. Supp. 3d 273 (D. Conn. 2018); *Waite v. UMG Recordings, Inc.*, 477 F. Supp. 3d 265 (S.D.N.Y. 2020); *Scorpio Music (Black Scorpio) S.A. v. Willis*, Case No. 11cv1557 BTM(RBB) (S.D. Cal. Mar. 4, 2013).

[9] 17 U.S.C. § 203(b)(1)

which agreement allows the publisher to license a film studio to make a movie based on the book. Once the 35 or 56-year termination period begins, the author can terminate the license she granted to the publisher, but not the license between the publisher and the film studio.

3. Exercising termination rights – formalities for notice & recordation

To exercise one's termination rights, one needs to meet the conditions relating to sending the notice of termination and recording the notice with the Copyright Office. The formalities for a *notice* to be valid may be found in the Copyright Act[10] and the formalities for the *recording* of the notice to be valid may be found in Copyright Office's regulations[11].

To terminate the grant – a written, signed notice of termination must be served on the grantee no less than two years and no more than 10 years before the effective date of termination; and ii) a copy of the served notice must be recorded with the Copyright Office.

For the Copyright Office to accept the notice for recordation – it must be a true, correct, complete, and legible copy of the notice that was served to the grantee. The copy needs to contain the effective date of termination (which must be later than the date of recordation) and details on how the notice was served on the grantee. Finally, the author needs to pay the correct filing fee.

If the notice is not recorded before the effective date of termination as set out in the notice, then the notice will be invalid, and the author will not be able to terminate the agreement.[12]

4. Conclusion

For termination to be successful, the author (or their heir) needs to ensure compliance with all the statutory requirements for a notice and its recordation to be valid. The termination court cases that have been brought since 2013 (when termination rights first became available to artists) to enforce termination rights have seen mixed results. Most of the cases have settled in private. . That said, courts have recognized the importance of Section 203 for artists as statutory protection against unequal bargaining positions, partly because of "the impossibility of determining a work's value until it has been exploited".[13]

[10] 17 U.S.C. §§ 203, 304(c), 304(d)
[11] 37 C.F.R. § 201.10(f)
[12] See chapter 2300, § 2310 of the Compendium of U.S. Copyright Office Practices.
[13] *Waite v UMG Recordings*, above at n6