Nebraska Law Review

Volume 94 | Issue 2 Article 6

2015

Copyright's Unconsidered Assumption: Statutory Successors to the Termination Interest (and the Unintended Consequences for Estate Planners)

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Note*

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* Katie Joseph, J.D., University of Nebraska College of Law, 2015. Thanks to my better half, Amos Joseph, for his support and tolerance of six months of dinner conversation about copyright law and estate planning. I am also grateful to Professor Robert Denicola for his comments and guidance.

I. INTRODUCTION

Albert Brumley, author of the hit gospel song, *I'll Fly Away*, formed a corporation to hold his copyrights and subsequently sold his interest in the business to two of his six children.[1] Lifetime transfer of assets through a business entity is a well-recognized estate planning technique.[2] With virtually any other type of property, the story would have ended there. Probably unbeknownst to Brumley and those who assisted with his planning, the four Brumley children who were not involved in the business retained a right to terminate the grant from Brumley to the corporation.[3] In 2006, these four delivered a termination notice to the corporation.[4] Litigation ensued, appeal was taken, and a jury eventually found for the four heirs and their descendants.[5] The parties stipulated to the division of post-termination income.[6]

The termination provision of the Copyright Act was intended give authors a chance to renegotiate unremunerative transfers.[7] Though Congress's intent may have been to benefit authors, at least two observers have recognized that the termination provision makes it "difficult, if not impossible, for authors to engage in effective estate planning."[8] The concept of recapture of copyright by authors has been hotly debated at least twice, but there has been no critical examination of Congress's choice to pass the termination interest through a statutory class of successors rather than deferring to the author's will. In the proceedings leading up to the 1909 and 1976 Acts, Congress dealt with a host of new technological developments, wrestled with the constitutional implications of an extended term, and listened to heated debates between authors and publishers. Once agreement was reached on renewal and termination, the debate moved on to other

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1. Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574, 576 (6th Cir. 2013).
2. Robert G. Alexander & Dallas E. Klemmer, *Creative Wealth Planning with Grantor Trusts, Family Limited Partnerships, and Family Limited Liability Companies*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 307, 310 (2010).
3. *See* 17 U.S.C. § 304(c)(2)(B) (2012) (providing that a deceased author's termination interest may be owned by his surviving children); *id.* § 304(c)(3) (declaring the termination window opens for five years beginning at the end of fifty-six years after the date copyright was secured); *id.* § 304(d)(2) (shifting window to a five-year period after the end of seventy-five years from the date the copyright was secured). Copyright to the song was originally secured in 1932. *Brumley*, 727 F.3d at 576. The § 304(d)(2) window for termination ran from 2007 to 2012.
4. *Brumley*, 727 F.3d at 576.
5. Docket Report, Brumley v. Albert E. Brumley & Sons, No. 3:08-CV-01193 (M.D. Tenn. July 9, 2010).
6. Stipulation Regarding Pre- and Post-Judgment Allocation of Post-Termination Monies, *Brumley*, No. 3:08-CV-01193.
7. H.R. REP. NO. 94-1476, at 124 (1976), *in* 17 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 124 (George Grossman ed., 1976) [hereinafter 1976 OMNIBUS].
8. Bridget J. Crawford & Mitchell M. Gans, *Sticky Copyrights: Discriminatory Tax Restraints on the Transfer of Intellectual Property*, 67 WASH. & LEE L. REV. 25, 73 (2010).

pressing matters and the statutory class of successors remained unexamined. This Note briefly examines the termination interest, outlines the legislative history involving the statutory class of heirs, proposes a modest revision that would give authors[9] and publishers[10] greater certainty, and provides some suggestions for planners dealing with the existing termination provision.

II. A BRIEF OVERVIEW OF TERMINATION

The Copyright Act contains three termination provisions. The first, § 203 applies to grants made by the author after January 1, 1978.[11] The second, § 304(c), applies to pre-1978 grants of rights to a work that was still covered by copyright on January 1, 1978, and that were made by the author, her surviving spouse or children, her executors, or failing all of the above, her next-of-kin.[12] The third, § 304(d), applies to grants of copyrights in their renewal terms on October 27, 1998, by the same grantors in § 304(c), and is available only if a § 304(c) termination right has not already been exercised.[13] A grant of rights to a work made for hire is not subject to termination under any of the three provisions.[14]

Once the termination window opens, the holder (or holders) of the termination interest may end a grantee's rights in a work by serving notice within the statutorily prescribed period.[15] Generally, when the termination becomes effective, the rights that were the subject of the grant revert to those who owned a termination interest, whether or not they joined in the termination.[16] For pre-1978 grants executed by persons other than the author, the rights under the grant revert to the surviving person who executed the grant.[17]

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9. The term "author" is used broadly in this Note and refers to producers of copyrightable material. Accordingly, the term embraces writers, visual artists, composers, choreographers, dramatists, audiovisual creators, and architects. 17 U.S.C. § 102(a) (2012). For an in-depth discussion of the meaning of "author" in the context of copyright, see Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323 (1996).
10. The term "publisher" is also used in a broad sense and is intended to encompass any party who purchases or licenses rights covered by copyright.
11. 17 U.S.C. § 203 (2012).
12. *Id.* § 304(c) (2012).
13. *Id.* § 304(d).
14. *Id.* §§ 203(a), 304(c), 304(d) (each addressing works "other than a work made for hire").
15. *Id.* §§ 203(a)(4), 304(c)(3)–(5).
16. *Id.* §§ 203(b), 304(c)(6).
17. *Id.* § 304(c)(6). Pre-1978 grants are terminable by persons other than the author because under the law existing at the time, widows, children, and next of kin of authors had made contingent assignments of renewal terms. H.R. REP. NO. 89-2237, at 137 (1966). Congress wanted to give these statutory beneficiaries an opportunity to terminate and reclaim the benefit of the renewal term. *Id.*

The foregoing is complicated—and controversial—enough, but there is a further curiosity to the Act's termination provisions: Once an author dies, the termination interest does not pass through the author's estate but instead is divided among a class of statutory successors:

> (2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:
>
> (A) 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 one-half of the author's interest.
>
> (B) 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 one-half of the author's interest is divided among them.
>
> (C) 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 such author's children represented; 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.
>
> (D) 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 shall own the author's entire termination interest.[18]

The real difficulty for planners arises from another portion of the statute, which provides, "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."[19] In other words, authors cannot vary ownership of the termination interest by contract, and are thus stuck with Congress's choice.

The statutory successor scheme coupled with the non-alienation provision means that *any lifetime grant* by an author is subject to termination after thirty-five years. From an estate planning perspective, this undermines certainty in property transfers and raises questions about whether the rights under the grant should be included in the author's estate.[20] From a policy perspective, this result is questionable; authors are really in the best place to understand the needs of their survivors, not Congress. If the rationale behind recapture is really to give authors the ability to renegotiate grants of a right that is

18. 17 U.S.C. § 203(a)(2). The same class of successors is used in § 304(c)(2).
19. *Id.* §§ 203(a)(5), 304(c)(5).
20. *See* Crawford & Gans, *supra* note 8.

difficult to value, forced succession is paternalistic and out of place in the statute. Other bodies of federal law place limits on the transfer of property, but these limits are only "default" limits—the owner of the property can override them.[21] Why not copyright?

Though the general concept of recapture of copyright by authors received exacting scrutiny in the proceedings that led to the 1909 and 1976 Copyright Acts, there is little evidence Congress has ever paused to consider the wisdom of vesting inalienable rights in this class of successors. In fact, the legislative history suggests the opposite. Statutory successors first appeared in 1831; since then, the class of successors has been refined, but apparently has never been questioned.

III. LEGISLATIVE HISTORY OF SUCCESSORS IN REVERSION AND TERMINATION

Before 1978, authors did not have the ability to terminate transfers. Instead, authors recaptured copyrights in a renewal term. Because termination has its roots in renewal and reversion,[22] this Part examines the history of statutory successors to reverted rights and how the same concept was imported into the termination provision.

A. 1790–1831

Under the 1790 Copyright Act, an author who survived the first term of copyright was entitled to a renewal term, with rights during that term, once secured by the author, vesting in the author, his "executors, administrators, or assigns."[23] If the author did not survive the first term of copyright, copyright protection ceased at the end of that term and the work entered the public domain. As legislators would later recognize, this limitation denied the benefits of copyright to the

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21. *See, e.g.*, 29 U.S.C. § 1055 (2012) (requiring pension plans to pay an annuity to the surviving spouse of the participant, but permitting participants to designate other beneficiaries with the spouse's consent).

22. *See Copyright Law Revision: Hearing on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. of the H. Comm. on the Judiciary*, 89th Cong. 108 (1965) (statement of Irwin Karp, Authors League of America) ("[T]his [termination] clause would replace the present renewal clause of the 1909 act. [The renewal clause] was specifically designed to permit authors to make grants of rights in their work for a 28-year term and be able to reserve the rights to the second 28 years of copyright because it is not only imprudent but also impossible to bargain sensibly over rates and terms of compensation for literary property on a perpetual basis."), *in* 5 1976 OMNIBUS, pt. 1, at 108.

23. An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, 1 Stat. 124, ch. XV, § 1 (1790) ("[I]f, at the expiration of the said [first] term, the *author or authors*, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years . . . ." (emphasis added)).

author's family at a time when it might be the only means of support available to them.[24]

Beginning in 1826, lexicographer Noah Webster began lobbying Congress for more extensive copyright protection.[25] Webster's entreaties were grounded in "the principle that an author has, by common law, or natural justice, the sole and *permanent* right to make profit by his own labor."[26] Through his son-in-law, William Ellsworth, member of the Representative and Judiciary Committee, Webster sought support for an extension of author's rights by looking to the laws of other countries, including France.[27] Early drafts of the bill did not contain a statutory class of successors.[28] However, when the bill came up for debate, Ellsworth proposed an amendment entitling the author's "widow, child, or children" to renew copyright, in addition to the author.[29] In the final version of the 1831 Act, copyright in the renewal term vested in the author or, if the author was deceased, "the widow and child."[30] The Act also omitted assignees from the class of renewal beneficiaries.[31] As a result, the renewal term was treated by courts as a new interest, separate from the interest under the first term.[32] Where an author assigned his or her rights for the first term, the assignment was not treated as including the second term unless the contract made clear that the parties' agreement encompassed the second term.[33]

24. H.R. REP. NO. 21-3, at 1 (1830) (report of the Committee on the Judiciary), *archived at* http://perma.unl.edu/Q6YN-Z43J.
25. NOAH WEBSTER, *Origin of the Copy-Right Laws in the United States*, *in* A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173, 175–76 (1843) (letter to Daniel Webster, then a member of the House of Representatives).
26. *Id.* at 176.
27. *See* H.R. REP. NO. 21-3, at 2 ("In France, before 1826, a copy-right was secured to the author for life, to his widow for her life, and then to his children for twenty-six years. In 1826, the King appointed a numerous board of commissioners [who] reported a bill extending the period of enjoyment to fifty years after the death of the author, which is now the law of France."); WEBSTER, *supra* note 25, at 178 ("Mr. Ellsworth formed a report, stating the terms of time for which copy-rights are secured to authors in Great Britain, France, Russia, Sweden, Denmark, and . . . Germany.").
28. *See* H.R. 140, 20th Cong. (1828).
29. 7 REG. DEB. 423 (1831), *archived at* http://perma.unl.edu/JXE5-YR5Z.
30. An Act to Amend the Several Acts Respecting Copy Rights, 4 Stat. 436, ch. XVI, § 2 (1831).
31. *Id.*
32. Pierpont v. Fowle, 19 F. Cas. 652, 660 (C.C.D. Mass. 1846).
33. *Compare Pierpont*, 19 F. Cas. at 659–60 ("[N]o one ever dreamed that an assignee could alone take out the second or extended term, unless he has paid for it [and] clearly contracted for it . . . ."), *with* Cowen v. Banks, 6 F. Cas. 669 (C.C.D. N.Y. 1862) (finding that the assignee held copyright for the renewal term where the author testified, "I supposed the book to belong to my assignees as soon as made, including all that was in it," and further noting that the testimony was "wholly

While Congress's intent to benefit the author's survivors is apparent, its rationale for using a class of statutory successors rather than passing the renewal right through the author's estate is not. In borrowing the mechanics of survivor benefit from French law, the 1831 bill's drafters may have unwittingly imported French law's restrictions on succession of property, which are largely at odds with the American preference for testamentary freedom.[34]

B. The 1909 Copyright Act

1. Conferences

In the years leading up to the passage of the 1909 Act, the Librarian of Congress invited representatives of authors, playwrights, visual artists, composers, and publishers to a series of conferences on copyright.[35] Each conference discussion revolved around a term of copyright based on the author's life plus a term of years for most types of works.[36] This raised the question of who should benefit from the extended term for existing works.

The memorandum draft bill composed by the Register of Copyrights after the first session contemplated that existing copyrights would be automatically extended to the life-plus-fifty term "for the sole use of the author" if the author was living; no extension was available for works by deceased authors.[37] If a work was subject to assign-

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inconsistent and irreconcilable with the idea" that the parties' contract only contemplated rights for the first term).

34. *See* Ray D. Madoff, *A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems*, 37 B.C. INT'L & COMP. L. REV. 333, 342–44 (2014) (describing limitations on testamentary freedom under French law, and noting that laws of succession have been relatively stable in that country since 1804).

35. *See* LIBR. OF CONG. COPYRIGHT OFFICE, STENOGRAPHIC REPORT OF THE PROCEEDINGS AT THE SECOND SESSION OF THE CONFERENCE ON COPYRIGHT, at V–V(b) (1905) [*hereinafter* STENOGRAPHIC REPORT 2D SESS.], *in* 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. D, at V–V(b) (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter 1909 OMNIBUS] (listing those invited for one such session).

36. *See* LIBR. OF CONG. COPYRIGHT OFFICE, STENOGRAPHIC REPORT OF THE PROCEEDINGS AT THE FIRST SESSION OF THE CONFERENCE ON COPYRIGHT, 76–82 (1905), *in* 1 1909 OMNIBUS, pt. C, at 76–82 (discussing the Register of Copyright's proposal for a term of the author's life plus fifty years); LIBR. OF CONG., COPYRIGHT OFFICE BULL. NO. 10, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT § 51(a) (1905), *in* 2 1909 OMNIBUS, pt. D, at XXXVII (using a term of life plus fifty years for fine arts, musical and dramatic compositions, and literary productions); LIBR. OF CONG., COPYRIGHT OFFICE BULL. NO. 10 (2d print), MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT § 56(c) (1906), *in* 3 1909 OMNIBUS, pt. E, at LIII–LIV (creating a life-plus-fifty-year term for original books, lectures, dramatic or musical compositions, or artistic, cartographical, geographical, or other similar works).

37. COPYRIGHT OFFICE BULL. NO. 10 § 53 (1905), *in* 2 1909 OMNIBUS, pt. D, at XXXVIII–XXXIX.

ment, the assignment terminated on the same date it would have under the prior act, with the remainder to revert and vest in the author of the work.[38] The first memorandum draft listed as successors to copyright as "[legal representatives?], administrators, executors, or assigns" of the author.[39] The draft also set forth the following:

> <u>Query:</u>
> After the death of the author, the copyright to pass:
> 1st, to his surviving widow, if any,
> 2d, to his surviving child by marriage or adoption, if any,
> 3d, to his surviving parent, if any,
> 4th to his surviving brother or sister if any.
> Failing any such survivors the copyright to fall into the public domain.

The Register raised the question at second session, asking "whether [the property of the deceased author] should go unconditionally to his widow and children or child."[40] Richard Bowker of the American Authors' Copyright League suggested revising the initial list of successors to include "the executors, administrators, [heirs] or assigns" of the author, but otherwise made no comment on the list of successors.[41] The ABA representative present at the conference noted that in other statutes, "legal representative" was construed by courts to mean the heirs, rather than the executor or administrator—which, in his view, was not the intention of the conference.[42] Perhaps prompted by that comment, a representative of the Print Publisher's Association noted that those at the conference should attempt to agree on "the idea of what we want and not the phraseology," leaving the latter for "the legal gentlemen."[43]

The second memorandum draft, which guided discussion at the third session, limited successors to the author's "[heirs,] executors, and administrators" for purposes of obtaining copyright, and rights to an extended term for an existing copyright.[44] That phrasing proved too broad for publishers, who feared having to deal with large numbers of heirs to obtain the extended term.[45] The publishers' proposal limited rights for any extension term to the author, or his widow or

38. *Id.*
39. *Id.* § 20.
40. STENOGRAPHIC REPORT 2D SESS., *supra* note 35, at 142.
41. *Id.* at 143.
42. *Id.* at 145.
43. *Id.* at 147.
44. LIBR. OF CONG. COPYRIGHT OFFICE, BULL. NO. 10 (2d print), MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT §§ 21, 60, 66(c) (1906), *in* 3 1909 OMNIBUS, pt. E, at XXIX, LII, LIV.
45. LIBR. OF CONG. COPYRIGHT OFFICE, STENOGRAPHIC REPORT OF THE PROCEEDINGS AT THE THIRD SESSION OF THE CONFERENCE ON COPYRIGHT 297–98 (1906), *in* 3

children, with existing assignments of copyright persisting.[46] Even this, the publishers noted, presented the risk that an "obstructing child" would "insist upon securing a bonus" before he would permit a publisher to continue publication.[47] The representative of the American Authors Copyright League found the proposal a "perfectly acceptable" compromise,[48] reflecting the general principle of benefitting living authors and their immediate descendants.[49]

Vesting the extended term in the author or his family was also politically expedient. Arthur Steuart of the ABA found it "highly improbable that Congress [would] be willing to extend copyrights which [were] about to expire for the benefit of the publisher," and would only do it, if at all, to reward the author or his family.[50] Steuart pointed out that the publishers' proposal excluded from the benefit those authors who had assigned their copyright.[51] Ansley Wilcox, a lawyer, suggested that with respect to works for which copyright had been assigned, extension should be available only upon the joint petition of the author (if living, and if not his widow or child) and the assignee.[52] Conference attendees concluded that extension by agreement was the fairest way of ensuring that the publishers' investment in plates was protected, while still giving the author (or his widow or child) the chance to benefit.[53]

2. *Congressional Proceedings*

Congress considered several copyright bills in the years leading up to the 1909 Act. As introduced, the first 1907 bill provided for an initial twenty-eight year term, renewable by "the proprietor" for a further term extending for the life of the author plus thirty years.[54] The class of statutory successors from the 1831 Act is repeated, but only with respect to extension and renewal of copyrights already in existence.[55] The committee report noted the shortcomings of the statutory successors to renewal rights; vesting them in the proprietor was the Committee's apparent solution:

1909 OMNIBUS, pt. E, at 297–98 (statement of George Haven Putnam, secretary of the American Publishers' Copyright League).

46. *Id.* at 299.
47. *Id.*
48. *Id.* at 299–300.
49. *Id.* at 302.
50. *Id.* at 300 (statement of Arthur Steuart, Chairman, American Bar Association Advisory Committee).
51. *Id.*
52. *Id.* at 301–02.
53. *Id.* at 301–04.
54. H.R. 25133, 59th Cong. § 18(c) (1907), *in* 6 1909 OMNIBUS, pt. N, at N19, N31–N32.
55. *Id.* § 19.

> The copyright term under existing law is twenty-eight years, with a right of renewal by the author, or his widow or children, if he be dead, for a further term of fourteen years. This renewal right does not extend to a husband, or to grandchildren, if children be dead, or even to parents, so that the death of an unmarried author ends a copyright at the end of twenty-eight years, no matter what its value may be, or how many people may be dependent upon the life of the author.[56]

For new copyrights, a term extending beyond the life of the author was viewed as sufficient "[t]o enable him to provide for his children until they reach the age where they are likely to be self-supporting, or, if daughters, married."[57] If an author was deceased, the proprietor of the work, or the author's executors, administrators, or assigns were entitled to obtain copyright.[58]

None of the early bills contemplated reversion of the renewal term to the author with respect to new works. The concept of reversion only appears with respect to existing works:

> [T]he copyright *subsisting in any work at the time when this Act goes into effect* may, at the expiration of the renewal term provided for under existing law, be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him, for a further period such that the entire term shall be equal to that secured by this Act, and the privileges secured hereunder to the widows of authors shall equally be enjoyed by the widowers of authors, and if such author, widow, widower, or children shall not be living at the passage of this Act, then his or her heirs, executors, or administrators shall be entitled to the privilege of renewal and extension granted under this section . . . .[59]

The Committees on Patents of the House and Senate held a joint hearing on the final House and Senate bills on March 26, 27, and 28, 1908.[60] The latest bills from the House and Senate submitted to the joint committee permitted the author or proprietor, or his executors, administrators, or assigns to obtain copyright.[61] To obtain the full term, the proprietor of the copyright was to record notice with the cop-

56. H.R. Rep. No. 59–7083, at 13 (1907), *in* 6 1909 Omnibus, pt. N, at 13.
57. S. Rep. No. 59-6187, at 6 (1907), *in* 6 1909 Omnibus, pt. Q, at 7.
58. Libr. of Cong. Copyright Office, Bull. No. 12, The Copyright Bill: S. 6330; H.R. 19853 59th Congress Compared with Copyright Statutes Now in Force and Earlier United States Enactments § 8 (1906), *in* 1 1909 Omnibus, pt. B, at 16; H.R. 243, 60th Cong. § 9 (1907), *in* 6 1909 Omnibus, pt. T, at T4–T5; S. 2499, 60th Cong. § 9 (1907), *in* 6 1909 Omnibus, pt. T, at T37–T38; S. 2900, 60th Cong. § 8 (1907), *in* 6 1909 Omnibus, pt. T, at T71; H.R. 11794, 60th Cong. § 8 (1908), *in* 6 1909 Omnibus, pt. T, at T106.
59. S. 2900 § 26 (emphasis added). Earlier bills contained substantially the same language, though S. 2900 added and H.R. 11794 retained the final provision entitling, for existing works, the author's heirs, executors, and administrators to renew in the absence of a widow and children. *See* H.R. 243 § 27; S. 2499 § 27.
60. *Hearings Before the Comms. on Patents of the S. and H.R. on Pending Bills to Amend and Consolidate the Acts Respecting Copyright*, 60th Cong. (1908) [hereinafter *March 1908 Hearings*], *in* 5 1909 Omnibus, Pt. K.
61. S. 2900 § 8; H.R. 11794 § 8.

yright office after the first twenty-eight year term.[62] As in the conference drafts, reversion to a statutory class of successors only operated for renewals of copyright in existing works.[63] The reversion first vested in the author; where the author was dead, his widow (or widower); or the author's children if no spouse survived the author.[64] Where an author was not survived by a spouse or children, the author's "heirs, executors, or administrators" held the privilege of renewal and extension.[65]

George Haven Putnam, representing the American Publishers Copyright League, represented the extension provision as "the consensus of opinion arrived at by the authors and publishers after a discussion extending over some eighteen months."[66] Putnam explained that the principal controversy with respect to extending existing copyrights was that book publishers' business model anticipated an exclusive assignment for a forty-two-year term, after which they could recoup their investment in printing plates by being early to market with the work once it fell into the public domain.[67] If the extended term for existing work was to invest in authors, publishers worried that authors would assign the extended term to another publisher, rendering the first publisher's plates worthless.[68] The conference's conclusion was that a joint application for renewal allowed the benefit of the extended term to go to authors and their families while still protecting publishers' investment in plates.[69]

It became apparent at the hearing that the House of Representatives was unlikely to pass a bill extending the term to life plus thirty years.[70] Perhaps as a consolation to authors, Representative Currier raised the fact that the renewal system was a boon to at least some authors.[71] To illustrate his case, Currier recounted a conversation with a famous author: "Mr. Samuel Clemens told me he found [the renewal] of very great importance to him; that he sold the copyright of

62. S. 2900 § 24; H.R. 11794 § 24.

63. S. 2900 § 26; H.R. 11794 § 26.

64. S. 2900 § 26; H.R. 11794 § 26.

65. S. 2900 § 26; H.R. 11794 § 26.

66. *March 1908 Hearings*, *supra* note 60, at 17.

67. *Id.* at 18–19.

68. *Id.*

69. *Id.*

70. *Id.* at 61 (providing statements of Rep. Currier that "there would be a good deal of difficulty, probably, in getting through the House" a term of life plus thirty years, and that it would face "great opposition"); *id.* at 64–65 (providing statement of Sen. Smoot that he would be satisfied with the existing term).

71. *Id.* at 62 (speaking to Mr. Johnson, a representative of the American Authors Copyright League, asked: "Do you not think it would be to the advantage of the authors . . . to [have] a renewal period?").

'Innocents Abroad' for a very small sum, and all her ever got out of it, practically, was the renewal period."[72]

W.B. Hale, representing the American Law Book Company, pointed out that if the bill were to change from a straight term of life to a series of renewals, in order to be consistent with existing law and the extension provision, the renewal provision should go to the author and statutory successors (rather than the proprietor).[73] William Jenner[74] strongly advocated for renewal as a mechanism for renegotiation.[75] After what one imagines as a very emotional anti-publisher statement by Jenner, Chairman Smoot asked him whether publishers would simply contract with authors for any extension period. Jenner replied:

> It is never done, and I have some doubt about whether it legally could be done. But I should be glad to see that so provided for that it could not be done under the law. . . . Put it in the bill itself, and say that it cannot be done, so that the author is certain to have that extension as a provision for his age or a provision for his widow and his children.[76]

Jenner's suggestion was met with applause, the session was adjourned, and renewal-as-renegotiation established a firm foothold in the minds of authors. Thomas Nelson Page, a lawyer and writer, raised the issues of authors who do not leave widows or children, but who may have another relative to support, and who may wish to leave the termination right by will.[77]

The next bill introduced by Currier abandoned the idea of a term based on the author's life, and returned to a single term and a renewal term vesting in the author, the author's surviving spouse, the children in the absence of a surviving spouse, or "the author's heirs, or executors, or administrators" in the absence of a surviving spouse or child.[78] The same structure was retained in the bill that became the Act of

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72. *Id.* at 62.

73. *Id.* at 77.

74. Jenner wrote a book, *The Publisher Against the People*, which portrayed the 1906 legislation as the "wholly selfish" product of publishers, not in the interest of authors or the public, and to be examined "with extreme caution and suspicion." WILLIAM A. JENNER, THE PUBLISHER AGAINST THE PEOPLE 2–3 (1907).

75. *March 1908 Hearings*, *supra* note 60, at 127 ("Why should you not give [the author] an opportunity to make a new bargain with the old publisher, or go to a new one?").

76. *Id.* at 128.

77. *Id.* at 140.

78. *See The New Copyright Drafts*, 73 THE PUBLISHERS WKLY. 1873, 1875 (1908) (discussing H.R. 22183, 60th Cong. § 25 (1908)); COPYRIGHT OFFICE, 86TH CONG., STUDY NO. 31 ON RENEWAL OF COPYRIGHT 122 (Comm. Print 1960) (prepared by Barbara Ringer) (printed for the use by the Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary) [hereinafter 1961 RENEWAL STUDY].

1909.[79] Nothing in the record indicates why Congress preferred statutory successors over a will for authors leaving surviving spouses or children. As Barbara Ringer noted in her study of the renewal right, "It is regrettable that, after years of consideration and study, one of the most important provisions of the bill should have been pieced together and hastily enacted without any real analysis of the consequences."[80]

C. The 1976 Act

The consequences became clear in subsequent years.[81] In a report to Congress, the Register of Copyrights stated that the renewal provision "has largely failed to accomplish its primary purpose" to protect the author and his family against unprofitable or improvident dispositions of copyright.[82] "It has also been the source of more confusion and litigation than any other provision in the copyright law."[83] Judicial decisions in the intervening years characterized renewal as *not* the property of the author's estate, but rather a "new, personal grant of a right."[84] Because the author could not assign his family's renewal interest, the renewal provision became "a compulsory bequest of the copyright to the designated persons."[85] The Supreme Court also held that an author could assign his renewal rights in advance, noting that the legislative material revealed no intent to restrain authors' ability

79. H.R. 28192, 60th Cong. § 23 (1909), *in* 6 1909 OMNIBUS, pt. S, at S36–S37. The final bill vested renewal in "the author of such work, if still living, or the widow, widower, or children of the author if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or in the absence of a will, his next of kin . . . ." Act of March 4, 1909, 35 Stat. 1075 § 23 (1909). The provision dealing with subsisting copyrights used the same class of successors. *Id.* § 24. In her history of the renewal provision, Barbara Ringer noted that the final bill was a "crude attempt" to graft portions of the earlier legislation onto H.R. 22183. 1961 RENEWAL STUDY, *supra* note 78, at 122.

80. 1961 RENEWAL STUDY, *supra* note 78, at 122.

81. In hearings leading up to the 1976 Act, the Register of Copyrights noted that the renewal provision had been fraught with difficulties, and had been "one of the few instances in which the Supreme Court has been called upon to decide the meaning of the word 'or' in a statute . . . ." *Copyright Law Revision*, *Hearing on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. of the H. Comm. on the Judiciary*, 89th Cong. 1869 (1965) (statement by Abraham Kaminstein), *in* 7 1976 OMNIBUS 1869.

82. REG. OF COPYRIGHTS, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961) (printed for the use of the House Committee on the Judiciary), *in* 3 1976 OMNIBUS, pt. 1, at 53 [hereinafter REGISTER OF COPYRIGHTS REPORT].

83. *Id.*

84. Ballentine v. De Sylva, 226 F.2d 623, 629 (9th Cir. 1955), *aff'd* 351 U.S. 570 (1956).

85. De Sylva v. Ballentine, 351 U.S. 570, 582 (1956).

to assign.[86] The Court later concluded that such an assignment was valid provided the author was living at the time for renewal.[87]

1. Studies and Conferences on Revision

In 1961, the Copyright Office published a study of the renewal provision, part of a series of studies reexamining the copyright law.[88] The renewal study characterized the statutory beneficiaries as Congress's chosen means to ensure that the renewal benefit went to the natural objects of the author's bounty.[89] The general intention to benefit authors and their survivors is apparent from the legislative history and the constitutional command.[90] The intent underlying the use of statutory successors rather than deferring to the author's will is not so clear. The study goes on to state:

> [S]omething more than a reversion to the author's "executors, administrators, or heirs" had to be provided. If the renewal reverted to the author's estate, it was entirely possible that legatees and creditors might gain the benefits at the expense of the author's family and dependents. Apparently in a deliberate effort to avoid this result, Congress set up a schedule of successive classes of persons who were entitled to take the renewal . . . .[91]

With all respect to the study's esteemed author, there is no evidence of "deliberate effort" in the legislative history of the statutory successors.[92] Additionally, a purported desire to protect authors' estates from creditors seems decidedly paternalistic, and is at odds with the report's general conclusion that reversion is about bargaining power

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86. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S 643, 655–56 (1943).
87. Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373, 375 (1960).
88. 1961 RENEWAL STUDY, *supra* note 78, at III.
89. *Id.* at 125.
90. U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have the power . . . [t]o promote the Progress of . . . the useful Arts by securing for limited Times to Authors . . . the exclusive Rights to their . . . Writings . . . ."). The theme of securing "to Authors [and not publishers]" runs throughout the statements of authors' representatives in the 1976 and 1909 conferences.
91. 1961 RENEWAL STUDY, *supra* note 78, at 125*; see also* Pierre N. Leval & Lewis Liman, *Are Copyrights for Authors or Their Children?*, 39 J. COPYRIGHT SOC'Y U.S.A. 1 (1991-1992) (examining whether a benefit to the author's family is consistent with the Copyright Clause).
92. The study cites a 1907 Senate Report in support of the proposition that Congress wanted to benefit the author's "dependent relatives." 1961 RENEWAL STUDY, *supra* note 78, at 125 (citing S. REP. NO. 59-6187, pt. 1, at 8 (1907)). When the quoted phrase is read in full context, however, the intent is limited to extensions:

    > The bill follows the act of 1831 in permitting *to existing copyrights* the benefit of the possible extension; as introduced, however, it limited the privilege to cases where the author or his widow or children are still living, whereas the act of 1831 extended it also to his heirs, executors, or administrators (not, it will be observed, to his assigns). The committee believe [sic] that the limitation would discriminate unfairly against dependent relatives of the author and recommend [sic] an amendment which will include them *to the same extent as by the act of 1831*.

    S. REP. NO. 59-6187, pt. 1, at 8 (emphasis added).

and an asset that is difficult to value.[93] Up until the hurried revisions of late 1908 and early 1909, "renewal" was an issue only for existing copyrights, and operated to extend them for the duration of the author's life plus a term of years.[94] Since authors may have planned around the 1831 Act, and since the earlier bills contemplated a much longer term probably not planned for by authors, a statutory class of successors made sense.

When the life-plus term was abandoned, the class of individuals entitled to exercise and benefit from the renewal right was, at best, an assumption that authors would want their widows and children to benefit. Alternatively, it may reflect an unspoken congressional wish that authors' mistresses not benefit at the expense of wives. Given the extent of author involvement in the debate, it seems odd that nobody ever sought more precision in the class of successors. One possible reason for this inattention is that until 1916, there was no permanent estate tax,[95] and thus no need to structure asset transfers around it.

In a 1961 Report with recommendations, the Register of Copyrights identified the difficulty the renewal scheme posed for estate planners, noting that it "operate[d] to change the usual rules, under State laws, of succession to a deceased person's property."[96] Among the arguments against the renewal-and-reversion system was the proposition that, "An author's copyrights, like his other personal property, should be subject to his bequest by will or, if he leaves no will, should go to his heirs under the general law of intestate succession."[97] The Register's recommendation was to abolish reversion, permit any person claiming an interest in the copyright (author, executor, heir, employer, assignee, etc.) to file for registration, and for the renewal to extend all rights to the full term, for the benefit of anyone with an interest in the copyright.[98]

To replace renewal and reversion and ameliorate the author's inferior bargaining position, the Register recommended placing a time limit on transfers:

> The statute should provide that any assignment by an author or his representative or heirs shall not be effective for more than 20 years from the date of its

93. *See* 1961 Renewal Study, *supra* note 78, at 125 ("It has often been said that the renewal provision was based on the 'familiar imprudence of authors in commercial matters.' While superficially logical, there is nothing in the legislative history that supports this supposition. There is more evidence of a Congressional recognition that author-publisher contracts must frequently be made when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position.").

94. *See supra* section III.A.

95. *See* Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 Fla. Tax. Rev. 875, 881–82 (2010).

96. Register of Copyrights Report, *supra* note 82, at 53.

97. *Id.* at 54.

98. *Id.* at 54, 92.

> execution, unless it provides for the continuing payment of royalties based on the uses made of the work or the revenue derived from it.[99]

This recommendation proved to be "one of the two or three most controversial recommendations in the entire Report."[100] Publishers disputed the notion that authors were in a poor bargaining position and argued for freedom of contract.[101] Authors sought the best of both worlds—having copyright treated like any other property, but still subject to termination.[102] Perhaps because of their experience with the renewal reversion, authors recognized that if Congress used the same statutory class of heirs for a termination interest, their ability to plan property transfers would be limited.[103] Authors' representatives argued that a particular author may have good reason to transfer copyrights to those outside the statutory class of heirs—for example, where the individual in the class is wealthy, but where other dependents outside the class are in need.[104]

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99. *Id.* at 94.

100. Staff of the H. Comm. on the Judiciary, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 277 (Comm. Print 1964) (statement of Barbara Ringer, Assistant Register of Copyrights for Examining), *in* 3 1976 Omnibus, pt. 3, at 277.

101. Staff of the H. Comm. on the Judiciary, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 104 (Comm. Print 1963), *in* 3 1976 Omnibus, pt. 2, at 104 (statement of Joseph Dubin of Universal Pictures Co., Inc.) ("[T]his report states that the poor author is in a bad bargaining position and everybody takes advantage of him. Whoever wrote that report never sat in on a negotiation to acquire rights form an author because, first of all, he doesn't deign to be present. He's too important. But he comes represented by his agent, his agent's attorney, his own attorney, his business manager, and his tax adviser. And on top of that, he is a member of a collective bargaining unit who has protected him by a contract."); *id.* at 357 (letter from Edward Sarogy, counsel for the Copyright Committee of the Motion Picture Association of America) (characterizing the proposed termination provision as "[p]erhaps the most disturbing portions" of the Register's proposal).

102. *See id.* at 104 (statement of Joseph Dubin) (responding to statements by Irwin Karp of the Authors League of America and John Schulman of the American Patent Law Association Committee on Copyright).

103. *See id.* at 239 (letter from the American Guild of Authors and Composers) ("[I]t is our recommendation that the author have full right to dispose of the renewal interest or any reverted interest (as the case may be) and that such interest should become part of his estate . . . . Statutory rigidity in this matter can thwart the worthy desires of an author and the genuine needs of his dependents. . . . Such statutory operation can also thwart an author in making the presently prevalent arrangements to protect and enhance his estate, known as estate planning."). Publishers also recognized the potential issues. *See id.* at 279 (letter from Joseph Dubin) ("The recommendations [regarding disposition of a reversionary interest], rather than assisting the author and his heirs, would seem to militate against the possibility of any satisfactory arrangement being entered into for the exploitation of the author's work.").

104. *Id.; see also id.* at 360 (statement from the Motion Picture Association of America) (arguing for free transferability by inheritance or during life).

2. *Congressional Proceedings*

The preliminary draft of the revision bill proposed two alternatives for limitations on transfer of copyright ownership.[105] Alternative A limited transfers of exclusive rights to twenty-five years, with rights reverting to the author or his legal representatives, legatees, or heirs at law, notwithstanding any agreement to the contrary.[106] Alternative B permitted an author to bring an action to reform or terminate a transfer if, after twenty years, the compensation received by the author was "strikingly disproportionate" to the profits of the transferee.[107] Where an author was deceased, her legal representatives, legatees, or heirs at law could exercise the right.[108] The right came with a limitations period of sorts, with filing required within three years after the twenty-year period elapsed.[109]

Predictably, publishers opposed the notion of termination[110] and thus particularly disliked Alternative B.[111] The termination right itself was so controversial that there was very little discussion of the

105. STAFF OF THE H. COMM. ON THE JUDICIARY, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 15–16 (Comm. Print 1964), *in* 3 1976 OMNIBUS, pt. 3, at 15–16.

106. *Id.* at 15–16. This version of the termination right did not apply to works for hire or transfers by will, and permitted the original transferee to continue to exploit derivative works. *Id.*

107. *Id.* at 16. Alternative B was patterned on a draft copyright law under consideration in Germany. *Id.* at 278 (statement of Barbara Ringer).

108. *Id.* at 16.

109. *Id.*

110. *See id.* at 281 (statement of Richard Colby of the MPAA Copyright Committee) ("We will oppose this provision and if it is to be included in the draft submitted to the Congress, we must take the position that a bill should not pass with either of these alternatives."); *id.* at 281 (statement of Horace Manges of the American Book Publishers Council) ("[E]ither one of these alternatives would be devastating insofar as they apply to book publishers."); *id.* at 284 (statement of Philip Wattenberg) ("[I]f [the termination section], in either of its present alternative forms or substantially in any form, remains in the final draft, music publishers will strongly oppose the entire revision draft."); *id.* at pt. 3, 341 (comments of Julian Abeles, American Textbook Publishers Institute) ("Publishers submit that this provision is highly impractical and against public interest, as well as detrimental to the functions of the publishers and their incentive to publish needed costly works.").

111. *Id.* at 279 (statement of Richard Colby of the MPAA Copyright Committee) ("[A]lternative B is so burdensome and mechanically complicated, that it should not receive favorable consideration. Indeed, I am a little surprised that it is put forward even as an alternative provision since it can so upset business practice."); *id.* at 282 (statement of Horace Manges) ("[Alternative B] is a system for encouraging multitudinous litigation . . . ."); *id.* at 283 (statement of Julian Abeles) ("[Alternative B] is contrary to every contractual and legal principle. How can such a provision be justified?"); *id.* at 292 (statement of A.H. Wasserstrom of the Magazine Publishers Association Copyright Committee) ("[A]lternative B is an inexcusable litigation-breeder.").

manner in which the beneficiary clause was drafted.[112] The subsequent revision bill did away with automatic termination and instead required notice by "the author who executed [the transfer] or, if he is dead, by his legal representatives, legatees, or heirs . . . notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer."[113] No termination right was available for works made for hire, or with respect to transfers by will.[114] While opposition to termination as a whole remained,[115] authors viewed the provision as "a compromise of a very difficult and bitter problem."[116]

Bella Linden, commenting on behalf of the American Textbook Publishers Institute and as a lawyer for authors, remarked that the revised version created "a system under which we would have the complicated problem of who owns what at the end of 35 years."[117] Because the draft class was not limited to the widow, widower, or children, it introduced the complication of next of kin, administrators, and other collateral relatives.[118] Others speaking for publishers begged the drafters to "preserve the reversion concept" (presumably the statutory class of successors) as it existed in the law in force.[119] Perhaps seeking certainty, publishers argued that if the purpose of termination was to protect an author's widow and children against the improvidence of the author, allowing termination by "legal representatives, legatees, or heirs" defeated that purpose.[120] Publishers favored "the widow, widower, and children of the author, provided

112. A single commenter (and lawyer), A.H. Wasserstrom of the Magazine Publishers Association, suggested that as a matter of draftsmanship, "distributees" would be a better term than "legatees" or "heirs at law." *Id.* at 293.

113. STAFF OF THE H. COMM. ON THE JUDICIARY, 89TH CONG., 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 10 (Comm. Print 1965) (§ 17 of draft bill), *in* 4 1976 OMNIBUS, pt. 5, at 10.

114. *Id.*

115. *Id.* at 154 (statement of Philip Wattenberg on behalf of the Music Publishers Association) ("I am fully in accord with the many previous arguments in favor of deleting the reversion provision."); *id.* at 156 (statement of Horace Manges on behalf of the American Book Publishers Council) ("[W]hile section 16 as now written is a decided improvement over what it was in the draft, it is still intolerable."); *id.* at 160 (statement of Robert Evans, on behalf of Columbia Broadcasting System) ("[I]t's very difficult to say anything good about section 16. I think at best it's an extreme case of misguided paternalism; at worst, it's a reflection of the philosophy which someone in public life has, in another context, called 'no win.'").

116. *Id.* at 156 (statement of Irwin Karp on behalf of the Authors League of America). E. Gabriel Perle, representing Time, Inc., characterized the revision as "a compromise that is going to make nobody happy." *Id.* at 165.

117. *Id.* at 165.

118. *Id.*

119. *Id.*

120. *Id.* at 225–26 (letter from the American Book Publishers Council, Inc. and American Book Publishers Institute) (requesting changes in the draft revision bill). As

they or any of them are the copyright owners."[121] Having framed their appeal for a termination right as motivated by a desire to benefit their families, authors were hardly in a position to argue that they should be also able to use termination to benefit paramours[122] and private foundations.[123]

The Register's 1965 Supplementary Report acknowledged that the termination provision was "the most explosive and difficult issue" in the drafting phase.[124] Notwithstanding the opposition, the Copyright Office "remained firmly committed to the general principle of reversion," but sought to structure the provision "to be of practical benefit to authors and their families without being unfair to publishers, film producers, and other users."[125] The Register explained that the drafters used a class of statutory successors to provide "a clearer, more determinate class of beneficiaries consisting of the author's immediate family."[126] Though there is scant support for such a congressional purpose in the legislative history, the Register also justified statutory successors as a mechanism "to keep the right of reversion out of the author's estate so that it would not be subject to the claims of creditors."[127]

By 1965, the termination provision had assumed the basic form it would eventually take under the 1976 Act. Grants were terminable for a five-year window, beginning thirty-five years from the date of the grant.[128] Termination would not be automatic, but instead required the author or her statutory successors to file notice.[129] Grants were terminable by the author, the surviving widow (or widower) and children, or the children of any dead child.[130] Generally, authors ap-

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discussed in subsection III.C.1, *supra*, this is a questionable proposition, at least in the Register's view. *See supra* notes 91–93 and accompanying text.

121. *Id.*

122. Larry Spier, Inc. v. Bourne Co., 953 F.2d 774, 776 (2d Cir. 1992) (involving a case where composer Dave Dreyer created a testamentary trust, under which income was to be paid to "Anna (Dreyer's wife), Lewis (Dreyer's son), Marie (Dreyer's daughter) and Mynna Granat (Dreyer's mistress)").

123. Saroyan v. William Saroyan Found., 675 F. Supp. 843 (S.D.N.Y. 1987) ('Saroyan willed certain real property and $150,000 to his children and sister. The rest of his estate, including 'all copyrights, rights to copyright and literary property in published or unpublished work,' was left to defendant William Saroyan Foundation . . . .").

124. STAFF OF THE H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 71 (Comm. Print 1965) (§ 14 of draft bill), *in* 4 1976 OMNIBUS, pt. 6, at 71.

125. *Id.* at 72.

126. *Id.* at 73.

127. *Id.*

128. H.R. 4347, 89th Cong. § 203(a) (1965).

129. *Id.*

130. *Id.*

proved of the provision, and publishers at least accepted it as a reasonable[131] and preferable alternative to the renewal system.[132] Authors and publishers jointly requested that successor rights to terminate and negotiate new grants be exercisable by a majority, rather than unanimously.[133] Having arrived at a perhaps delicate compromise, commenters urged the Committee to leave the termination provision alone.[134] The subsequent Senate bill clarified the rights held by a surviving spouse and children, and adopted the recommendation that termination be exercised by a majority vote.[135] The House Committee, after spending "a good deal of time" on the question of unanimity, adopted a provision similar to the Senate's.[136] This provision was retained in the final 1976 Act, and the record reflects no further discussion of statutory successors.[137]

131. *See Copyright Law Revision: Hearing on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. of the H. Comm. on the Judiciary*, 89th Cong. 107 (1965) (statement of Irwin Karp, Authors League of America) ("We are happy to report that the Authors League has reached an accord [on termination] with various users' organizations, with the American Textbook Publishers Institute, [and] with the American Book Publishers Council. I understand that certain organizations of music publishers find also find acceptable the proposals in the bill . . . . There are one or two industry groups that are still opposed to the clause . . . . We hope that they will see the light of reason . . . ."), *in* 5 1976 OMNIBUS, Pt. 1, at 108; *id.* at 129 (statement of Horace S. Manges, American Book Publishers Council) ("Although still [opposing termination], we, nevertheless, compromised with authors in the spirit of harmony. Thus, based on the agreement of the Authors League to certain recommended changes, we are not opposing the reversion provision."). *But see id.* at 159 (statement of the Magazine Publishers Association, Inc.) (arguing the termination provision is "wrong in principle" and that "[t]here appears no sufficient reason for treating an author as the feckless 'darling' of the law, one who must be saved from the consequences of his own jural acts"). The Composers and Lyricists Guild of America's opposition to the termination provision stemmed from its exclusion of works for hire. *Id.* at 264 (statement of Leonard Zissu on behalf of the Guild).

132. *Id.* at 149 (supplemental statement of American Book Publishers Council) ("We are vigorously opposed to any renewal system. Our acceptance of a proposed term of life plus 50 years was predicated on the very fact that it is a single continuous term, not requiring any renewal . . . .").

133. *See id.* at 129–30 (recommendation of the American Publishers council). Professor Nimmer shared their concerns. *Id.* at 1816 (statement of Melville B. Nimmer) ("I can envisage—and I am sure I am not alone in that—problems there, where one out of several claimants, for reasons good or otherwise, refrains from joining in the request for reversion."), *in* 7 1976 OMNIBUS 1816.

134. *See id.* (statement of Joseph Dubin, American Patent Law Association) ("In the interest of obtaining a workable copyright revision law, I urge that the provisions covering 'recapture' should be left untouched."), *in* 7 1976 OMNIBUS 1537–38.

135. S. 597, 90th Cong. § 203 (1967), *in* 9 1976 OMNIBUS 15–16.

136. H.R. REP. NO. 89–2237, 119–224 (1966).

137. *See Copyright Law Revision, Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 74 (1967) (statement of Horace Manges, American Book Publishers Council, Inc.) (explain-

Sections 203(a)(2)(D) and 304 (c)(2)(D), which provide that in the absence of a surviving spouse or children, an "author's executor, administrator, personal representative, or trustee" own the entire termination interest, were added by the 1998 Copyright Term Extension Act.[138] The legislative history sheds no light on what prompted the addition.[139]

IV. A MORE SENSIBLE SUCCESSION

Given the explosive nature of the debate over the termination right, Congress, authors, and publishers may shy away from *any* future revision rather than risk upsetting the compromise. However, if the termination provision proves as frustrating to authors and publishers as the renewal provision, Congress could, by making modest changes, make the termination right less of a trap for the unwary planner. This Part examines the problems planners face because of termination, reasons for favoring an author's chosen beneficiaries over a statutory class of successors, and then suggests changes to the statute to bring about that result.

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ing that termination receded as an issue because of the compromise between authors and publishers), *in* 9 1976 OMNIBUS 74.

138. Copyright Term Extension Act, Pub. L. No. 105-298 § 2, 112 Stat. 2827 (1998).

139. H.R. REP. NO. 105-452, 8 (1998) (explaining, simply, "This section amends Sections 203(a)(2) and 304(c)(2) by allowing an author's executor to receive his entire termination interest in the event that the author's widow, widower, children, or grandchildren are not living, or in the absence of a will, the author's next of kin shall own the author's entire termination interest."). References to termination in committee hearings expressed termination as a preferable alternative to vesting an extended term in heirs automatically. *See, e.g., The Copyright Term Extension Act of 1995: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. (1995), *archived at* http://perma.unl.edu/2DST-4RZQ (statement of Pat Alger, Nashville Songwriters Association International) ("It has been suggested that the bill be further amended to vest the proposed extra 20 years of copyright protection automatically in authors or their heirs. Instead, NSAI would rather rely on the termination of transfer provisions as currently guaranteed in Sections 203 and 304 of the Copyright Act to protect its members, ability to recapture their copyrighted works. To this end, NSAI continues to actively educate its membership concerning those rights."); *id.*, *archived at* http://perma.unl.edu/4W28-RBQ5 (statement of Marybeth Peters, Register of Copyrights) (noting the consensus that the term extension should benefit "authors and their heirs" and favoring termination as the mechanism). *But see id.*, *archived at* http://perma.unl.edu/9B94-8TPZ (statement of Professor Peter Jaszi, Washington College of Law, American University) (arguing against term extension, generally, but suggesting that an extended term should vest automatically in authors and their heirs); *id.*, *archived at* http://perma.unl.edu/JQ2B-UFQ7 (statement of Dennis Karjala, Professor of Law, Arizona State University) ("If sustenance, to two generations of authorial descendants is really the goal, we should be considering prohibitions on transfers and/or stronger termination rights rather than a longer term of protection.").

A. Termination as a Planning Challenge

Estate planning addresses two intertwined concerns: achieving the client's wishes with regard to property distribution, and doing so in a tax-efficient manner. For most people, property distribution is the main concern; fewer than one percent of adult deaths result in payment of estate taxes.[140] So, though the termination interest poses some interesting tax questions,[141] its more troubling effect is the uncertainty it introduces into property transfers.

To illustrate the uncertainty suppose that, like Albert Brumley, an author makes a lifetime transfer of copyright. This is a common estate planning technique because even where taxation is not a concern, a donor may want to transfer control over an asset before death.[142] Because it is a grant by the author other than by will, the grant will be subject to termination thirty-five years after it is made.[143] If the author dies before the termination window closes, the statutory successors will have the ability to terminate the grant.[144] The terminated rights go to those in the statutory class,[145] rather than the author's intended recipient (who may or may not be a member of the class). Because nobody knows who will survive until the termination window opens or closes, ownership of the rights under the grant is inherently uncertain. Even if the author wanted to obtain an agreement from all potential statutory successors, the statute prevents her from doing so. The termination interest passes to the statutory class, "notwithstanding any agreement to the contrary."[146]

Not only is this uncertainty troublesome for planners, it is at odds with the general preference in American property law for the ability to freely dispose of transfers with certainty, as discussed below.

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140. *See* Brian Raub & Joseph Newcomb, Internal Revenue Serv., *Federal Estate Tax Returns Filed for 2007 Decedents*, STATS. OF INCOME BULL., Summer 2011, at 182 (noting that in 2007, estate tax returns were filed only or 1.5% of all adult deaths, and that of those returns, slightly less than half resulted in payment of estate tax), *archived at* http://perma.unl.edu/RK2E-LDWZ. In 2015, the unified credit against estate tax exempted from taxation the first $5.43 million of an individual's estate; a married couple can shelter twice that amount. Rev. Proc. 2014–61, 2014–47 I.R.B. 19.

141. *See infra* note 170. One possible reason is that if copyrights are inherently difficult to value, contingent ownership of a right to terminate a grant of copyright—which may or may not be exercisable depending on who survives for how long—is more difficult still.

142. *See* Alexander & Klemmer, *supra* note 2.

143. 17 U.S.C. § 203(a)(3) (2012).

144. *Id.* § 203(a)(2).

145. *Id.* § 203(b).

146. *Id.* § 203(a)(5).

B. The Preference for Testamentary Freedom

The law of property succession in America is organized around the principle that a person may dispose of her property as she chooses.[147] State succession laws generally "facilitate rather than regulate" property transfers.[148] For example, when interpreting donative instruments, a court's first consideration is the intention of the donor.[149] The justifications for freedom of testation go beyond donor satisfaction, however. It is thought to serve a number of social goals, including achieving a socially optimal distribution of property,[150] because donors have better information about the needs of their families and other donees than courts or legislatures. As a result, they are in the best position to allocate the donated resources.[151]

When a legislature or a court restricts testamentary freedom, it generally does so because in certain circumstances, complete freedom produces a socially undesirable result.[152] For example, in most states, a testator may not completely disinherit her surviving spouse because in some cases, this would result in the surviving spouse becoming dependent on the state for support. In economic terms, a disinherited spouse is a potential negative externality resulting from unfettered testamentary freedom.[153] Most state legislatures have responded by giving the surviving spouse election to take under the terms of a will or take a fixed fraction of the estate.[154]

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147. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

148. *Id.*, cmt. c.

149. *See*, *e.g.*, Thorson v. Neb. Dep't of Health & Human Servs., 274 Neb. 329, 332, 740 N.W.2d 27, 33 (2007).

150. Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1136 (2013).

151. *Id.*

152. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c ("Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations.").

153. *See* Kelly, *supra* note 150, at 1161 (discussing disinheritance of minor children as a negative externality).

154. *See, e.g.*, NEB. REV. STAT. § 30-2313 (Reissue 2012). Nebraska is one of more than a dozen states that have adopted a version of the Uniform Probate Code (UPC). *See* Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 896–901 (1992) (discussing the development and adoption of the UPC). Even where it has not been adopted in its entirety, many states have adopted at least part of it, and it reflects the modern rules governing estates. *Id.* at 900–01. Because of the influence and acceptance of the UPC, this analysis uses Nebraska's version as a stand-in for basic principles governing the distribution of a decedent's property.

Is there a defensible justification for Congress's interference with testamentary freedom through forced succession to the termination interest? At best, the negative externality justification provides weak support for the use of statutory successors to termination. State elective share laws apply to the decedent's entire estate.[155] An elective share provision is an efficient solution to the negative externality in that context because an omitted spouse has been deprived of *any* benefit from the estate. The termination succession provision, however, applies only to copyright assets and only to those subject to a grant by the author. Moreover, the state's interest in creating forced shares is preventing a state-dependent spouse. The federal interest is—at least in theory—providing an incentive to the author. Restricting the author's ability to transfer the property she creates can hardly be said to be an incentive. Any negative created by an author who disinherits her surviving spouse of the termination interest is not really a matter of federal concern, and to the extent it is, state law has already developed a solution.

Another argument marshaled for restrictions on testamentary freedom is that in making a will, the testator is necessarily operating with imperfect information.[156] In the case of the termination right, the most obvious missing information is the value of the copyright interest covered by a grant. As the legislative history makes clear, the difficulty of valuing copyright assets is one of the justifications for the termination interest.[157] While better information about the value of a copyright could conceivably change an author's choices about who has the ability to terminate a grant, it does not follow that a class of successors is a solution to the problem. The imperfect information problem is usually addressed through judicial intervention by modifying or interpreting the terms of an individual will or trust to give effect to a donor's intent in the event of unforeseen circumstances.[158] By applying the same inflexible succession scheme to all grants and frustrating most transfers, Congress has arguably frustrated the state law solution to the imperfect information problem.

The final justification for restraints on testamentary freedom is that the living—not the dead—have the greatest incentive to efficiently manage property.[159] Here, too, the congressional choice falls short of a solution. Even where it is economically efficient to terminate an existing grant, the interest may be split between a surviving

155. *See, e.g.*, NEB. REV. STAT. § 30-2314 (Reissue 2012) (including in the augmented estate the testamentary estate plus nontestamentary transfers).

156. Kelly, *supra* note 150, at 1158.

157. *See supra* Part III.

158. Kelly, *supra* note 150, at 1158–60.

159. *Id.* at 1164.

spouse, children, and grandchildren.[160] The *Brumley* litigation is illustrative: the dispute involved two of the author's surviving children, the surviving spouses of two of his children, and the four of the author's grandchildren.[161] As the protracted proceeding in *Brumley* illustrated, fractionalizing the termination right makes it more difficult to manage it efficiently. To the extent Congress may have sought to use statutory successors to promote efficient management by the living, its chosen mechanism is demonstrably ineffective.

C. Two Statutory Solutions

The 94th Congress no doubt had the best of intentions when it passed the termination provisions of the 1976 Act, dividing the termination right of a deceased author. For the reasons discussed in the previous section, however, the author is in the best position to understand her survivors' needs and provide for them accordingly. An author may have two spendthrift children and one prudent one, or one wealthy child and one of more limited financial success. More plausibly, an author may want to pass along her estate in a way that preserves family harmony and limits squabbling among survivors.[162] If anything, forced succession invites more squabbling—the *Brumley* litigation spanned nearly eight years[163] and no doubt resulted in the kind of family discord that Albert Brumley hoped to avoid.

Two modest changes to the termination statutes could give authors greater freedom in planning the disposition of property and make transfers more certain.

1. Reorder Statutory Successors

A modest revision to § 203(a)(2) and § 304(c)(2) could benefit authors by allowing them to more effectively plan the disposition of their estates, and publishers by eliminating the need to locate and negotiate with surviving children and grandchildren.[164] If the executor is first

160. 17 U.S.C. § 203(a)(2) (2012).

161. Brumley v. Alfred E. Brumley & Sons, Inc. 727 F.3d 574 (6th Cir. 2013).

162. For a discussion of how thoughtful estate planning can nip potential conflicts in the bud, see Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQ. ELDER ADVISOR 255 (2007).

163. Docket Report, Brumley v. Albert E. Brumley & Sons, No. 3:08-CV-01193 (M.D. Tenn. July 9, 2010).

164. Though this reform would have the effect of depriving statutory successors of a termination interest and thus raise a possible Fifth Amendment Takings Clause issue, claims on that basis are unlikely to succeed. Termination interests are personal, not assignable, contingent, and the subject of investment-backed expectations. Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 992–93 (2015).

in the class of statutory successors, publishers need only locate one individual.[165] The provision below is offered as a starting point:

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) If the author has left a will, the executor[166] holds the entire termination interest and may exercise the interest if it is consistent with the terms of the author's will and in the best interest of the beneficiaries of the author's will. If an author's will appoints an executor or executors for the express purpose of managing the author's copyrights, such executor or executors shall hold the entire termination interest.

(B) If the author has not left a will, the author's personal representative[167] shall hold the entire termination interest for the benefit of the author's heirs, as determined pursuant to the intestacy laws of the author's domicile on the date of the author's death.

(C) If an executor or personal administrator has been appointed but discharged, a successor appointed under state law shall hold the entire interest. If state law does not allow for appointment of a successor, the holder of the termination interest shall be determined according to (D), below.

(D) If an author has left no will, and if no person is authorized or appointed to distribute the author's estate, the termination interest shall be divided among the author's intestate heirs pursuant to the intestacy laws of the State of the author's domicile on the date of the author's death.[168]

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165. *See* Tim Matson & Scott Nelson, *Estate Planning for the Entertainer or Athlete*, ENT. & SPORTS LAW., Summer 2011, at 24, 25 (suggesting that planners and their clients develop instructions for beneficiaries on whether and how to dispose of intellectual property).

166. To ensure consistency, it is advisable to define "executor" in § 101 as "any person appointed by a testator to carry out the terms of a will." This is because not all states use the term "executor" to refer to the person appointed by the testator to distribute the estate according to the terms of the will. *See, e.g.*, NEB. REV. STAT. § 30–2209(33) (Reissue 2012) (denominating such persons as "personal representative"). In most states, applications for formal or informal probate are matters of public record and must identify an executor or personal representative. *See, e.g.*, NEB. REV. STAT. §§ 30–2414, 30–2426 (Reissue 2012).

167. For reasons similar to those identified in the preceding note, it is advisable to define "personal representative" in § 101 as "a person authorized pursuant to the law of the State of the author's domicile at the author's death to distribute the author's intestate estate."

168. This provision is included as a fail-safe to provide some guidance in the event the author's survivors elect not to pursue formal or informal probate proceedings.

To the extent Congress might intend to put the termination interest beyond the reach of claimants against the estate,[169] the proposed revision retains the structure of the prior provision and passes the termination interest outside of the author's estate.[170] In addition to identifying for publishers one holder whose identity is a matter of public record,[171] giving the author's executor priority among statutory successors gives the author a measure of dead-hand control. Because the executor is bound by fiduciary obligation to act according to the terms of the decedent's will and in the best interests of successors to the estate,[172] the author has some assurance that her wishes regarding intellectual property, as expressed in her will, will be respected.

Because termination notices cannot be served until twenty-five years following a grant at the earliest, vesting the renewal interest in the executor may mean that by the time the termination window has

169. Though this is recited as one of Congress's goals in passing the termination interest to statutory successors, there is no convincing support for it in the legislative history. If the rationale is really about giving authors the opportunity to renegotiate (rather than creating a paternalistic protection), why protect them from creditors?

170. Whether or not termination is in the estate, the termination interest may (at least, conceptually) result in transfer tax liability. *See* Crawford & Gans, *supra* note 8 (exploring potential arguments for taxation of termination interests). However, the I.R.S. has not acknowledged the existence of the termination right in any published guidance. *Id.* at 74. This is perhaps because the Service views copyrights and patents as "similar in substance," notwithstanding the absence of a termination right in patents. *See, e.g.*, Rev. Rul. 60-226, 1960-1 C.B. 26 ("Since the property rights of patents and copyrights are similar in substance, it is concluded that the Service should adopt, in the case of copyrights, the position that is being taken in the case of patents."). For purposes of categorizing income, a "sale" of copyright occurs upon the grant of exclusive right to exploit the work in a medium of publication throughout the life of the copyright. I.R.S. Gen. Couns. Mem. 39,252 (July 3, 1984) (citing Rev. Rul. 54-409, 1954-2 C.B. 174). A pre-1978 Revenue Ruling found a sale notwithstanding a contractual termination provision because the availability was conditioned upon "a future event not under the control of the transferor." Rev. Rul. 75-202, 1975-1 C.B. 170. How this ruling would interact with a termination interest is unclear. The facts of the ruling recite that the transferor could terminate the agreement if the publisher failed to keep the work in print for more than a year, or failed to publish the work in three years. *Id.* Presumably, if the transferor died six months after making the transfer, her rights under the contract would be exercisable by her estate. In contrast, unless a transferor of copyright leaves no surviving spouse or children, her executor (but note, not her estate) has no ability to exercise the termination right.

171. *See supra* note 166.

172. NEB. REV. STAT. § 30–2464(a) (Reissue 2012) ("A personal representative is a fiduciary who shall [prudently manage the assets of the estate]. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He or she shall use the authority conferred upon him or her by this code, the terms of the will, if any, and any order in proceedings to which he or she is party for the best interests of successors to the estate.").

opened, the executor has been discharged. One possible conclusion is that in such situations, nobody holds a termination interest.[173] Provision (C) is intended to address this situation, and reflects the fact that many states have come up with a similar solution, and allow estates to be re-opened and a new personal representative appointed when new property is discovered.[174] Congress could handle this by allowing for appointment of an administrator to stand in the executor's place.[175] As a best practice, authors' plans should include appointment of a literary executor to handle long-term management of intellectual property.[176]

This proposal leaves open the possibility that a profligate author will not name her surviving spouse or children (or either) as beneficiaries of the will, depriving them of a termination interest. If Congress wants to avoid that result,[177] the cleanest way to achieve it is to

173. *See* 3-9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.04[B] (2015) (discussing the problem in the context of renewal).

174. *See, e.g.*, NEB. REV. STAT. § 30-24,122 (Reissue 2012) ("If other property of the estate is discovered after an estate has been settled and the personal representative discharged or his appointment terminated, the court upon petition of any interested person and upon notice may appoint the same or a successor personal representative to administer the subsequently discovered estate.").

175. *Id.*

176. *See* Cheryl E. Hader, *Making the Intangible Tangible: Planning for Intellectual Property*, 29 ESTATE PLANNING 574, 575–76 (2002) (suggesting that authors or artists designate literary executors to manage copyrights, and that literary executors should be named and qualify as court-appointed executors in order to have legal authority to engage in transactions regarding copyrights). Hader also notes that uniting management and control of creative assets is "essential" to maximizing their value. *Id.* Where an author wants copyrights to benefit multiple distributees, transfer to a trust, corporation, or other entity prevents fragmentation of control. *See* Richard E. Halperin, *Vehicles for Artists' Holding and Transferring of Copyrights*, 22 COLUM.-VLA J.L. & ARTS 435, 440–41 (1998) (discussing the risks of fragmentation of copyright).

177. *See* Peter S. Menell & David Nimmer, *Judicial Resistance to Copyright Law's Inalienable Right to Terminate*, 33 COLUM. J.L. ARTS. 227 (2010) (criticizing *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193, 200–04 (2d Cir. 2008) and *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1043–47 (9th Cir. 2005), in which the courts' interpretation of the law had the result of consistency with the author's estate plan, as judicial overstep of the inalienable character of the termination interest). Quaere, though, whether forced succession really aligns with the author-incentive theory of copyright. Though some commentators appear to have an inherent suspicion of a second spouse, perhaps benefitting that second spouse, even at the expense of surviving children, is the optimal incentive for an author. *Compare id.* at 237 ("Rather than bequeath their copyright royalties by will to their surviving family members, authors at times designate a favored charity, a mistress, or a testamentary trust to act for the benefit of numerous interests."), *with* Leval & Liman, *supra* note 91, at 9 ("Had the provision for statutory successor [in the 1909 Act] been understood to function only in the absence of . . . devise by the author, it might be defended as an intestacy provision governing property consigned to the power of Congress, functioning where the author had failed to provide for the renewal term. . . . As the section

make the termination right part of the author's estate[178] and subject it to the restraints of state law, which are well-understood by estate planners and courts alike.[179] Though some commenters fear that this would result in assignment of termination rights,[180] that result is not inevitable, particularly if agreements to make a will remain unenforceable as applied to copyrights.[181] Though the law of testate and intestate succession is not uniform from state to state,[182] it is familiar and generally well developed, in contrast to the confusion surrounding the current statutory succession scheme and the taxation of the termination interest.[183] Federal courts faced with a dispute over termination should have no more difficulty applying state succession laws than any other body of state law.

2. *Exempt Certain Lifetime Transfers*

Whether or not Congress chooses to tinker with the order of the class of successors, it could expand authors' planning options by excluding certain lifetime transfers from termination. Presently, only

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was interpreted, however, it cannot benefit from that justification, for the successor's rights will prevail over those arising from the author's . . . will.").

178. To achieve this result, the proposed revision to 17 U.S.C. § 203 (2012) would need to be modified:

> (2) Where an author is dead, his or her termination interest is owned by his or her estate.

The effect is to treat a termination interest like any other property, leaving an author free to plan for its transfer.

179. *See* Francis M. Nevins, Jr., *Copyright Law vs. Testamentary Freedom: The Sound of a Collision Unheard*, 23 REAL PROP. PROB. & TR. J. 47, 47 (1988). Most states allow a surviving spouse omitted from a will to receive a portion of the estate. *See, e.g.,* NEB. REV. STAT. § 30–2320 (("If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will . . . .").

180. Brad A. Greenberg, *DOMA's Ghost and Copyright Reversionary Interests*, 108 NW. U. L. REV. COLLOQUY 102, 107 (2013) (exploring whether a same-sex spouse would be recognized as a statutory survivor in states not recognizing same-sex marriage, and noting that though giving authors testamentary freedom might seem a simple solution, it would make assignment of termination rights "inevitable").

181. 17 U.S.C. §§ 204(a)(5), § 304(c)(5) (2012) ("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." (emphasis added)).

182. *See* Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 895 (1992) (citing the lack of uniformity as a source of frustration).

183. At least conceptually, the termination interest may result in transfer tax liability. *See* Crawford & Gans, *supra* note 8 (exploring potential arguments for taxation of termination interests), *and* discussion *supra* note 170.

transfers by will are excluded from termination.[184] Modern estate and tax planning frequently uses tools that require lifetime (rather than testamentary) transfers.[185] Because these transfers do not involve the same poor bargaining position that drove Congress to create the termination right, they should be exempted from termination. There are at least three categories of lifetime transfers that could be excluded: gifts to individuals, charitable gifts, and transfers to business entities owned by the author. Making annual gifts of property is a commonly used way to reduce the amount of a client's taxable estate without incurring transfer tax.[186] In the absence of fraud, duress, or other over-reaching conduct, there is no reason to believe that Congress intended to protect an author against gratuitous transfers. A gift may turn out to be improvident, but not because an author has a poor bargaining position relative to a publisher. The same rationale supports an exemption for transfers to charitable organizations. Where an author transfers copyright to an entity completely owned by the author, there is likewise no basis to be concerned about the author's poor bargaining position, or about the difficulty of valuing the copyright, since the author ultimately retains control over it.

V. PLANNING & TERMINATION

Unless and until Congress decides to revisit the third rail of copyright, estate planners whose clients' assets include copyright have to advise their clients of the right's existence, and to the extent they can, plan around it. This Part explores options and considerations for planners dealing with copyright, focusing on property transfers using common estate planning techniques.[187]

A. Is Termination a Concern?

Under the terms of the statute, termination provisions do not apply to certain grants or to certain types of works. Under any of the termination provisions, grants made by will are not subject to termination[188] and termination is unavailable if the work is a work made

184. 17 U.S.C. § 203(a) (2012) ("[T]he exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright . . . otherwise than by will, is subject to termination . . . .").

185. *See* Alexander & Klemmer, *supra* note 2.

186. *See infra* note 228.

187. Those interested in the details of how intellectual property transactions are taxed should refer to JEFFREY A. MAINE & XUAN-THAO N. NGUYEN, INTELLECTUAL PROPERTY TAXATION (2015). For questions on taxation of the termination interest itself, see Crawford & Gans, *supra* note 8.

188. 17 U.S.C. §§ 203(a), 304(c), 304(d) (2012).

for hire.[189] Grants that, by their own terms, expire within thirty-five years are also not subject to termination. Grants made after January 1, 1978, are only subject to termination if they are "executed by the author."[190] Grants made before January 1, 1978, are subject to termination by the author or statutory successors if made by the author.[191] Pre-1978 grants made by persons other than the author are subject to termination only by the surviving person or persons who executed the grant.[192]

Even if a work is not a work made for hire, and even if the grant is subject to termination, termination is not a concern if the time to serve notice has elapsed. For post-1978 works generally, termination may take effect at any time during a five-year period, beginning thirty-five years from the date the grant was executed.[193] If the grant covers the right of publication, the five-year period begins at the earlier of thirty-five years after publication of the work under the grant, or forty years after the date of execution of the grant.[194] Notice stating an effective date within the appropriate window must be served at least two but not more than ten years before the effective date.[195] Accordingly, for grants other than the right of publication, notice will be ineffective to terminate the grant if it is served more than thirty-eight years after the date the grant was executed. For a grant involving the right to publication, notice must be served by the earlier of thirty-eight years from the date of publication or forty-three years from the date the grant was executed.

For pre-1978 grants, there are potentially two opportunities to terminate. Under § 304(c), termination may take effect during a period of five years beginning fifty-six years after the date copyright was originally secured.[196] Notice must be served at least two but not more than ten years before the termination takes effect,[197] so this means the latest the notice can be served for a § 304(c) termination is fifty-nine years after the date copyright was secured. If a work was in its renewal term on October 27, 1998[198] (the effective date of the Sonny

189. *See id.* (each addressing "other than a work made for hire"). For an overview of works made for hire in copyright law, see generally 1-5 NIMMER & NIMMER, *supra* note 173, § 5.03.
190. 17 U.S.C. § 203(a).
191. *Id.* § 304(c).
192. *Id.* § 304(c)(1) ("In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it.").
193. *Id.* § 203(a)(3).
194. *Id.*
195. *Id.* § 203(a)(4)(A).
196. *Id.* § 304(c)(3).
197. *Id.* § 304(c)(4)A).
198. The most recent work that could possibly be in its renewal term on October 27, 1998, is one for which copyright was originally secured on December 31, 1969.

Bono Copyright Term Extension Act),[199] and if the § 304(c) termination right has not been exercised, the grantor has a second chance to terminate under § 304(d). Termination may take effect at any point in a five-year window beginning seventy-five years from the date copyright was originally secured[200] and the same notice rules apply. Accordingly, the latest notice can be served is during the seventy-eighth year after the grant.[201]

If a grant is subject to termination, the statute permits authors (or successors) to make a new grant after the effective date of termination.[202] Appellate decisions also suggest that an author can "restart the clock" by contractually terminating and superseding a prior grant while the termination window is open.[203] The courts in each of these cases reasoned that Congress surely anticipated the possibility for renegotiation through contract rather than statutory termination, and that such contractual renegotiations should not be treated as "agreements to the contrary" (and thus ineffective under the Act).[204] If renegotiation (rather than protection from alienation) is the basis for termination, this result makes sense, though it is not without its critics.[205]

B. Transfer by Will

The simplest way for an author to ensure that her copyrights go to particular individual upon her death is to transfer the copyrights by will, because transfers by will are not subject to termination.[206] Of

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Under the 1976 Act, copyright terms run to the end of the calendar year in which they would otherwise expire. *Id.* § 305 (1976). Accordingly, to be covered by § 304(d), the first twenty-eight-year term must end before calendar year 1998. The earliest work that could possibly be in its renewal term on October 27, 1998, is one for which copyright was originally secured on January 1, 1923. There is no calendar-year provision in the 1909 Act, so the first term would run until January 1, 1951. Assuming copyright was renewed, the original forty-seven-year renewal term would have still been in effect on October 27, 1998.

199. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).
200. 17 U.S.C. § 304(d)(2).
201. This means that as of this writing, 1936 and earlier grants are not terminable.
202. 17 U.S.C. §§ 203(b)(3)–(4) (2012), 304(c)(5)(C)–(D).
203. Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193, 200–04 (2d Cir. 2008); Milne *ex rel.* Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036, 1043–47 (9th Cir. 2005).
204. *Penguin Group*, 537 F.3d at 202–04; *Milne*, 430 F.3d at 1045–46.
205. *See, e.g.*, Menell & Nimmer, *supra* note 177.
206. Under the 1909 Act, the renewal-and-reversion scheme had the potential to displace an author's testamentary disposition. *See* 17 U.S.C. § 304(a)(1)(C), § 304(a)(2)(B) (entitling a statutory class of successors to renewal and extension upon application with the copyright office); Francis M. Nevins, *Little Copyright Dispute on the Prairie: Unbumping the Will of Laura Ingalls Wilder*, 44 St. Louis U. L.J. 919, 922–28 (discussing how the renewal reversion provision affected the

course, any such testamentary transfer remains subject to any un-terminated grants the author made during life, and the rights under the terminated grant will revert to statutory successors. As a result, transfer by will is of limited usefulness for the types of works licensed for long terms.

An author can transfer copyrights outright, or to a trust for which one or more individuals are beneficiaries.[207] The same is true of transfers to charities. With respect to transfers to or for the benefit of individuals other than qualified charities[208] or the author's surviving spouse,[209] the certainty may come at the cost of estate tax, if the author's taxable estate exceeds the unified credit (presently $5.34 million for individuals).[210] For those fortunate authors, a plan involving tax-efficient life transfers[211] of non-copyright assets may mitigate some of the effect of the estate tax.

C. Work Made for Hire

For forward-looking authors who value certainty more than the opportunity to renegotiate grants and who need to make lifetime transfers, the exclusion of works made for hire from the termination provisions presents a planning opportunity. A work prepared by an employee within the scope of her employment is a work made for hire,[212] and the employer will be considered the author of the work, and own all rights to it, in the absence of a written agreement to the contrary.[213] This suggests that if an author creates a business entity and is treated as an employee by the entity, works created as an em-

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disposition of Laura Ingalls Wilder's estate in a manner that clearly contravened the provisions of her will). Fortunately for planners, "will-bumping" by renewal reversion is no longer an issue. The last possible year in which a pre-1978 work could have entered its renewal term was 2005, and the time to register a claim has long since passed. *See id.* at 931 (celebrating that fact); 17 U.S.C. § 304.

207. *See* Hader, *supra* note 176, at 575–76 (suggesting that this approach is best if the goal is to maximize value).

208. *See* 26 U.S.C. § 2055(a) (2012) (providing a deduction for bequests to charities).

209. *See id.* § 2056(a) (2012) (providing a marital deduction for any interest in property passing from the decedent to the surviving spouse). Though copyrights are terminable interests, *see* 26 C.F.R. § 20.2056(b)–1(b) (1994), the marital deduction should be available for a transfer by will. *See* 26 C.F.R. § 20.2056(b)–1(c), (g) ex. (6).

210. Rev. Proc. 2014-61, 2014-47 I.R.B. 867. Note that if the author is married, her surviving spouse's unified credit will shelter from estate tax a further $5.43 million.

211. For example, gifts qualifying for the annual exclusion are not subject to gift tax. *See* 26 U.S.C. § 2503(b) (2012) (excluding from gift tax gifts up to an inflation-adjusted amount, per person); Rev. Proc. 2014-61, 2014-47 I.R.B. 868 (placing the inflation-adjusted amount for 2015 at $14,000). As a result, the amount of the gift is removed from the grantor's estate without incurring transfer tax liability.

212. 17 U.S.C. § 101 (2012)

213. *Id.* § 201(b).

ployee will be owned by the entity as works made for hire, not subject to termination.[214] Works pre-dating the employment relationship, however, will still be subject to termination, so transfer by will may be the best option for these.

In addition to sacrificing the ability to terminate grants, this approach may, in some cases, result in copyright protection expiring earlier than it otherwise would have. Copyright in works made for hire endures for the lesser of ninety-five years from the year of first publication or 120 years from its creation,[215] whereas for other works the term is the life of the author plus seventy years.[216] For a young author who creates a work at age twenty and lives to age eighty, protection would ordinarily last a total of 130 years (the sixty years of the author's life plus seventy years). If the author was employed and the work made for hire, assuming the work remained unpublished, protection would only last a total of 120 years.

Though there is some basis for challenge,[217] at least one reported case suggests that this approach will work even if the author effectively controls the "employer." In *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*,[218] choreographer Martha Graham's legatee, Ronald Protas, asserted ownership of Graham's dances by virtue of a residuary clause

214. *See also* Halperin, *supra* note 176, at 443 ("On the other hand, the work made for hire procedure can be beneficial, for example, in that it enables the artist to transfer her ownership in the entity to a friend without fear that some day her surviving spouse or issue would eviscerate the entity by terminating the assignment of the copyrights to the entity."); Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 33 HARV. J. SPORTS & ENT. L. J. 55 (2012) (discussing use of a single-employee loan-out corporation to manage copyrights as giving rise to works made for hire, not subject to termination). The principal reasons for creating a loan-out corporation are limitation of liability and favorable tax treatment. *Id.* at 72–73. Because loan-out corporations must involve a "facially legitimate exchange of rights and services for appropriate compensation" to avoid challenge by the I.R.S., many loan-out agreements deem materials produced to be works for hire. *Id.* at 77.

215. 17 U.S.C. § 302(c) (2012).

216. *Id.* § 302(a).

217. *See* Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc., 375 F.2d 639 (2d Cir. 1967) (concluding that a songwriter was not an "employee" of a corporation in which he was one of three shareholders because he was not paid like an employee, the corporation reserved no right to direct and control his work, and the parties' conduct was inconsistent with an employment relationship); Michael H. Davis, *The Screenwriter's Indestructible Right to Terminate Her Assignment of Copyright: Once A Story Is "Pitched," a Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L.J. 93, 116–17 (2000) ("[I]t is not clear that such writers [employed by their wholly-owned companies] are truly employees . . . ."). *But see* Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 403–04 (2002) (concluding that works produced in a loan-out corporation context are ineligible for termination).

218. 380 F.3d 624 (2d Cir. 2004).

in Graham's will.[219] The Second Circuit concluded that works prepared by Graham while she was employed as a choreographer by the Martha Graham Center of Contemporary Dance were works for hire.[220] As a result, the Center owned the dances for which copyright had been secured.[221] The works were therefore not in her estate, and had not passed to Protas through the residuary clause.

Protas and amici curiae argued that, given Graham's influence over the Center, the dances should not be treated as works made for hire, notwithstanding the employment agreement.[222] They reasoned that since the purpose of the Center was to foster and support Graham's efforts in creating new works, and that as a matter of policy in such situations, copyright should remain with the author.[223] The court noted that though it might be good creative arts policy, that policy judgment was a matter of legislative choice, not statutory interpretation.[224]

In an unreported case, the District Court of Colorado recently determined that a computer was a work made for hire under the 1976 Act based on the creator's relationship with the employer.[225] This was true even though he held an ownership interest in the company (an LLC formed by the plaintiff-employee and defendant), was paid based on its revenues, and the company did not actually exercise a great degree of control over his activities.[226]

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219. *Id.* at 629.

220. *Id.* at 639–42.

221. *See id.* at 642. For the works created before January 1, 1978, whether copyright had been secured depended on whether they had been published with adequate statutory notice, as required by the 1909 Act. *Id.* at 632–33.

222. *Id.* at 639. This argument is based at least in part on the test of works made for hire under the 1909 Act, under which copyright belongs to the person at whose "instance and expense" the work was created. *Id.* at 634–35. Though Graham created the dances at the expense of the Center, Protas argued unsuccessfully that they were not at the Center's "instance" because Graham would have created them with or without her employment at the Center. For works created from 1978 on, the court applied the RESTATEMENT (SECOND) OF AGENCY factors used by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), to determine whether the works were created in the scope of Graham's employment. *Id.* at 641. After noting that the factors weighed in favor of finding that the dances were within the scope of Graham's employment, the court again rejected the argument that Graham's talent and relationship with the Center exempted her from work-for-hire principles. *Id.* at 642.

223. *Id.* at 640.

224. *Id.*

225. JAH IP Holdings, LLC v. Mascio, No. 13–cv–02195–MSK–KLM, 2014 WL 6477923 (D. Colo. Nov. 19, 2014). Concededly, this outcome is at odds with *Donaldson*. *See supra* note 217. Perhaps the difference is explained to a degree by the passage of time and by the difference in context (songwriters versus tech startups).

226. *Id.* at *6–7.

Because transfers of works for hire are not subject to termination, authors can use a work-for-hire-for-an-owned-entity approach to avail themselves of the tax advantages that flow from making lifetime transfers.[227] The author (and owner of the entity) can make annual gifts of interests in the entity up to the annual gift tax exclusion without incurring any transfer tax consequences.[228] Minority interests may be discounted to reflect the fact that in an arm's-length transaction, a buyer is willing to pay less for a non-controlling stake in an entity, further enhancing a donor's ability transfer property in a tax-efficient manner by either gift or sale.[229] Authors considering this route should carefully weigh the potential income tax consequences against the transfer tax benefits.[230]

VI. CONCLUSION

For better or worse, termination of grants is likely to remain part of United States copyright law. Authors have argued for and publishers have grudgingly accepted the need for an opportunity to renegotiate grants. Along the way, though, neither side has stopped to consider whether termination interest should pass to a successors defined by Congress or to the beneficiaries designated under an author's will. The latter arrangement is more consistent with American attitudes toward testamentary freedom and the argument that termination is grounded on renegotiation and valuation difficulties rather than paternalism. Modest amendments to the termination provision could provide authors with more options. Until Congress turns its attention to the question, however, authors are left with a limited set of planning tools under which stability of a transfer of copyright may come at the cost of either the opportunity to renegotiate or additional estate tax.

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227. *See* Halperin, *supra* note 176, at 444–48.
228. *Id.* at 444; 26 U.S.C. § 2503(b) (2012) (excluding from transfer tax gifts of up to a certain amount per person each year); Rev. Proc. 2014-61, 2014-47 I.R.B. 868 (noting the annual exclusion for the 2015 calendar year is $14,000). In other words, a donor can give property worth up to $14,000 to each of as many individuals she pleases in the course of the calendar year without incurring transfer tax consequences.
229. Halperin, *supra* note 176, at 445.
230. *See id.* at 444, 459–61 (summarizing potential tax consequences).