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Marybeth Peters
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20059-6000

Dear Ms. Peters,

I am writing to provide comments regarding the vexing "gap" that exists between 17 U.S.C. Sections 203 and 304(c) resulting in confusion over which section applies in cases where the parties entered into a grant prior to 1978, but where works authored pursuant to that grant were not created until January 1, 1978 or thereafter.

This issue has enormous commercial significance and, as these provisions are drafted, no thoughtful attorney can truly discern how to comply with the statute in the cases presented in your examples. I first contacted the Copyright Office about this issue in 2007, and later assisted Michael Perlstein in drafting a letter to Maria Pallante addressing this and other ambiguities in the terminations provisions, and am very grateful you are inviting comments on this highly problematic issue at this time.

To my mind, the better argument is that Section 203 should govern.

My initial reason for concluding this is because it is readily apparent from the language of the statute that Section 304(c) does *not* apply. Section 304(c) applies to grants "executed before January 1, 1978, by any persons designated by subsection (a)(1)(C) of this section." The sole persons designated by subsection 304(c)(a)(1)(C) are the author's statutory successors that "shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years." That is, Section 304(c)(a)(1)(C) plainly applies only to 1909 Act works (i.e., works subject to the renewal regime, originally securing copyright prior to January 1, 1978) and *not* at all to 1976 Act works.

Similarly, elsewhere in Section 304(c), subsection (c)(3) instructs that termination of a pre-1978 grant "may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later." In light of Section 304(c) generally, this section appears also to refer only the termination of 1909 Act works under Section 304(c), and not works created on or after January 1, 1978. Thus, the intent of Section 304(c) seems pretty clear. If a work is a 1976 Act work, it is outside the scope of Section 304(c).

On the other hand, Section 203 applies to grants "executed by the author on or after January 1, 1978." Section 203 applies not only to grants covering pre-existing 1909 Act works, but – unlike Section 304(c) – to grants covering 1976 Act works. Can and/or should Section 203 be applied to grants executed prior to 1978 covering works not authored until 1978 or later? Because Section 304(c) so plainly *cannot* be applied in such cases, either Section 203 *must* apply to such grants/works, or else no section can apply, and one must conclude that Congress intended to exclude grants covering 1976 Act works such as those in your example from termination altogether.

The latter conclusion is unthinkable and unsupportable, given the legislative history and statutory intent of Congress in enacting the termination provisions (which have been amply addressed in the case law). And Congress clearly knew how to exclude grants from termination when it intended to do so (e.g., grants covering works made for hire and grants by will). There is no doubt in my mind that this "gap" is due to a drafting oversight, and is not any evidence of Congressional intent.

Is there any way of interpreting Section 203 so that it could apply in these instances? What constitutes a "grant" for copyright would normally be a matter of state contract law. I imagine credible arguments may be made that no "grant" exists under state contract law until rights in the work actually vest in the grantor.

This same conclusion, I think, would find considerable support under federal law, which might well be preemptive. The U.S. Copyright Act solely concerns "original works of authorship fixed in any tangible medium of expression." Until a work is authored and fixed, no copyrightable subject matter yet exists, and U.S. copyright law does not apply. The pre-1978 "grant" in your example was executed by the songwriter, to be sure, but that person was not yet an "author" under

copyright law, so what federal copyright interest could he or she have "granted?" It is nonsensical to speak of a terminable copyright interest (i.e., a terminable "grant") existing prior to the creation and fixation of a work. Only "authors" and their heirs have termination rights. At least for purposes of the termination provisions, it would seem that a "grant" cannot be deemed "executed" with respect to any particular, future copyrightable work until an author springs into being upon its moment of fixation.

Leaving the matter to state law could very well lead to different results under various states' laws, to litigation, and to further confusion. One way or another, this problem appears to cry out for a federal solution, through preemption or otherwise. Although it is admittedly a strained reading of the statute, it seems to me that Section 203 should be read as applying to all 1976 Act works, regardless of when the underlying written agreement may have been executed. If this conclusion cannot be fairly reached by the text itself, Section 203 should be amended, because there is certainly no basis for concluding Congress intended that these works be excluded.

Thank you in advance for considering these comments. Please do not hesitate to request further comments from me if you believe they would be of any assistance.

Kindest regards,

Bill Gable