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MEMORANDUM

TO: The Copyright Office

FROM: Casey Del Casino

DATE: May 20, 2010

RE: Reply to Responses to Notice of Inquiry With Respect to Gap In Termination Provision

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I write in reply to the many scholarly and informative responses posted in response to the Copyright Office's Notice of Inquiry, regarding the Gap in Termination Provisions/ *Federal Register* Vol. 75, No. 93. Clearly the majority, if not all, of the sixteen responses posted either has been directly confronted with a situation, involving a pre-January 1, 1978, purported grant of an alleged copyright interest in a post-January 1, 1978, created work, or is acutely aware of the problem. Moreover, all of the sixteen responses recognize that something needs to be done, either in terms of new regulations from the Copyright Office or a legislative cure to close the gap.

Although I have at least two (2) clients, who created post-January 1, 1978, songs, whose copyrights were purportedly conveyed to the publisher pursuant to a pre-January 1, 1978, agreement, which are directly on point with Example 1 in the Notice of Inquiry, I do not have anything new to add to the exhaustive and thorough positions set forth in the sixteen responses posted in response to the Notice of Inquiry.

There is clearly a "gap" in the termination provisions that possibly could render the prior transfer of certain works as outlined in Example 1 of the Notice of Inquiry as non-terminable. Given the legislative history of the termination right provisions, where Congress expressed its belief of the need for a "safeguard to protect authors against unremunerative transfers," due to both "the unequal bargaining power of authors" and "the impossibility of determining a work's value until it had been exploited," the gap in the termination provisions has to have been an oversight by Congress when it included the termination rights provisions in the Copyright Act. It is impossible to fathom that Congress would go to such great lengths to include the termination right provision for post-1978 transfers of copyright, as well as pre-1978 works, and then inexplicably exclude a whole class of works, which do not necessarily seem to fit neatly into

either Section 203 or Section 304. There is no explanation or indication in the legislative history of the Copyright Act that would lead one to believe that this was done by design. Thus, it had to be an oversight.

Notwithstanding the preceding, my purpose in writing is not to rehash the many fine arguments set forth in the sixteen responses to the Notice of Inquiry. Rather, I write to encourage the Copyright Office to either issue new regulations to close the gap, or implore Congress to pass new legislation that will address this apparent oversight. The real concern here is that the failure to correct this "gap" either through regulation or new legislation could result in protracted, costly and unnecessary litigation. This in turn could result in inconsistent legal opinions between jurisdictions that could take years, if ever, to reconcile. Moreover, should the U. S. Supreme Court decline to hear any of these possible "gap" in the termination provisions cases, which the Court has done in the past few years with respect to another termination of copyright case, such inconsistency between jurisdictions may never be reconciled.

Further, in the event that Congress fails to correct this gap in the termination provisions of the Copyright Act, such that someone ultimately litigates this issue, resulting in a court rendering an erroneous decision, Congress may thereafter be unwilling to correct this gap in the termination provisions, out of deference to the judiciary and the separation of powers, notwithstanding the incorrect decision. Frankly, it would seem to be in the interest of any party that is served with a termination notice letter for a work that falls in the "gap" of the termination provisions to litigate the issue. The worst case scenario for that party is that the party loses the copyright, which was going to happen anyway, if the true legislative intent behind the termination provisions is followed. The best case scenario for that party is that the transfer of the copyright in the work is determined to be not terminable. This would be antithetical to the original legislative intent behind the termination right provisions. Thus, just when an author or the author's statutorily designated heirs would otherwise get a "second bite of the apple" and enjoy the true value of the author's creativity, they could become embroiled in litigation, against parties with the money, the wherewithal and the unequal ability to impose their agenda, contrary to the legislative intent behind the termination provisions of the Copyright Act.

The effect of all of this and Congress' failure to remedy the "gap" in the termination provisions is that it is likely to create uncertainty in the marketplace for copyrights, resulting in depressed prices for valuable copyrights. Similarly, it creates uncertainty for authors and their families with respect to their own financial planning. Moreover an author or an author's family that serves a termination notice upon an original grantee for a work that possibly falls in this "gap" may, at the first sign of opposition from the original grantee, be unwilling or unable to oppose the original grantee on this issue. Thereafter, during the two year window that the original grantee has the exclusive right to negotiate for the termination right, the author or the statutory heirs may hastily enter into an improvident agreement for the termination right with the original grantee, out of fear of losing the termination right, thereby eschewing the free, and open marketplace, which is really the only place that the true value of the work can be properly ascertained. Such an outcome is contrary to the legislative intent behind the termination right provisions of the Copyright Act.

As we are presently in the window with respect to the termination of post-'78 works, as the first effective date of termination for works created as of January 1, 1978, pursuant to Section 203 of the Copyright Act, will be as of January 2013, an intervention to remedy this gap by the Copyright Office and Congress is more than timely. For all of the foregoing reasons, it is imperative that some action be taken.