

Termination of “grants” executed before January 1, 1978 when the work is not created until after January 1, 1978.

There is no real gap in the statutory provisions. The only problem is that grantees who executed agreements prior to January 1, 1978 for the creation of works in the future want to be able to hold the copyrights until the end of 56 years from the “grant” instead of 35 years from the grant, which is the earliest termination of grants that occurred January 1, 1978 and later.

In order for the longer period of grant to be applicable, §304(c) is the applicable portion of the statute. That provision says, “In case of any copyright subsisting in either its first or renewal term on January 1, 1978” The operative word is *subsisting*. The copyright cannot subsist in a work that has not been created. That is clear from Section 102 which states, “Copyright protections subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression” If the work is not fixed, the copyright does not subsist. If it is fixed on or after January 1, 1978, then the 35 – 40 year termination window is applicable.

Furthermore, under the 1909 Act, copyright did not subsist until the work was either published with notice, or (in some cases) registered with the copyright office. Neither publication nor registration could happen under that law until the work was fixed (although “fixed” was not a term used in the 1909 law).

In addition, this interpretation comports with the interpretation of the 1909 law relative to the purported transfer of rights in the renewal term, prior to the 28 year. Because the author had no renewal rights to transfer until then, the most the publisher had was an expectation of getting the rights in the renewal term. Similarly, a promise to create a work is only that. The most the publisher has is an expectation that the work will be created and copyright therefore transferred.

Note that this same question will arise for grants executed January 1, 1978 and after. Unfortunately in those cases we do not have the additional language about copyrights “subsisting.” Section 203 speaks only of the date of the grant. So, can the author grant copyrights in works that do not yet exist? A consistent result would be reached by using the date of creation of the work or execution of the grant, whichever is later, as the starting point for the 35 year period. The difficulty with that is determining the date of creation of the work which will be much more imprecise than the date of a formally executed grant.

Geoffrey Hull
Professor Emeritus
Middle Tennessee State University

Recording Industry Department
Attorney licensed to practice in Tennessee.