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The Copyright Office
Library of Congress
Washington, DC

April 25, 2010

Re: **Gap in Termination Provisions**

Gentlemen:

I respond to your request for comments on the gap in termination provisions published March 29, 2010 in the Federal Register/Vol.75, No. 59. I previously commented on this problem in my October 30, 2007 letter to Maria Pallante, Esq. (copy attached.) I supplement the comments in my October 30, 2007 letter.

A. Experience.

My law practice has a strong focus on music publishing. In my over forty years of practice, I have deep experience representing termination class members and buyers and sellers of individual musical compositions and catalogs where I have conducted extensive due diligence. I have prepared, served and filed numerous termination notices under section 304(c). To date, I have prepared, served and filed one termination notice under section 203 and one under section 304(d). I have lectured on the subject of termination rights including at the California Copyright Conference in Los Angeles, California, the Association of Independent Music Publishers in Los Angeles, California, the 2008 and 2009 symposia of the Entertainment and Sports Section of the Texas Bar Association in Austin, Texas and in my class on the law and business of the music publishing industry at Southwestern Law School in Los Angeles. The question about the gap in termination rights is asked at virtually every lecture.

The situation that occasioned my October 30, 2007 letter was this. I represented a music publisher seeking to buy from another publisher a hit composition with a sale price of nearly Two Million Dollars. I was faced with the very problem of the termination gap. The composition was written pursuant to a pre '78 exclusive term songwriter agreement but created and delivered post 1/1/78. No document covered the grant of transfer of the new composition from the author to the seller publisher. The only agreement or instrument of transfer covering the new composition was the pre '78 agreement. I had to advise my client whether if, after the purchase, the termination class could terminate and recapture the copyright under section 304(c) or section 203. The seller's attorney and I struggled with the question but had no answer. Eventually I

called Maria Pallante for guidance. Ms. Pallante was well aware of the problem. We discussed the possibilities for resolution generally and in theory: (1) the date of publication of the new composition as shown on the copyright registration certificate could be the date of a grant by the author after 1/1/78 and therefore section 203 applied; (2) if the author executes a new grant covering the new composition, the grant would be terminable under section 203; (3) there was no answer if a work was an unpublished registered work and no post '78 executed grant exists; (4) in the absence of a post '78 executed grant, the grant under the original pre'78 agreement was not terminable because there is no renewal term for post '78 works. I reviewed these scenarios with my client but could not provide definitive advice. The client was faced with a business decision whether to risk the purchase and possibly lose USA rights to the composition if a termination somehow became valid, taking into account retention of foreign rights and derivative works. In the end, the transaction failed for other reasons. I have since faced the same dilemma representing purchasers in two more transactions. My advice now is that under the current provisions of sections 304(c), 304(d) and 203, the grant under a pre '78 agreement cannot be terminated unless a subsequent post '78 grant signed by the author exists.

Based on my discussions with executives of various multinational music publishing companies, I know they take the position that their rights to a composition created post '78 that is subject only to the grant under a pre '78 agreement cannot be terminated.

B. Interpretation.

1. A grantee's rights to a work created and delivered post '78 subject only to the grant in a pre '78 agreement (e.g. examples 1 and 2 in the Copyright Office Notice of Public Inquiry; request for comments) cannot be terminated under current sections 304(c), 304(d) and 203 and CFR 201.10. Even though in the examples the post '78 works were published by the original grantee publisher, a date of publication does not constitute a grant that could be terminated because the current statutes provide only for *executed* grants. Sections 304(c) and 304(d) and CFR 201.10 (b)(1) apply specifically to termination of transfers and licenses covering the extended renewal term. Since a work created post '78 has no renewal term, sections 304(c) and 304(d) and CFR 201.10(b)(1) cannot apply. Since in the examples the date of the grant of a post '78 work is a pre '78 agreement, section 203 cannot apply because it applies specifically to post '78 grants executed by the author.

2. Delivery of a post '78 work without the author's executing a new grant would not constitute an executed grant that could be terminated under section 203. I suppose a letter written and signed by the author accompanying delivery of a new work might constitute a post '78 grant but that would depend on the language in the letter. For example, would a letter "Dear Music Publisher. Here's my new song. I know it's a hit." constitute a post '78 grant to the publisher executed by the author, which then becomes a terminable grant? The act of delivery by itself under the current statutes and

regulations simply does not constitute a grant.

3. Publication of a post '78 work likewise does not constitute a grant that could be terminated under section 203 because the section simply does not so provide. While publication, particularly if memorialized on a certificate of copyright registration, would at least lock down a date on which the grantee would have owned the work, the date of the grant would still be the pre '78 agreement. CFR 201.10(b)(2)((iii) and CFR 201.10(b)(2)((v) expressly require the termination notice to state the date of the grant being terminated. Without the date of a post '78 grant, a termination notice under section 203, CFR 201.10(b)(2)(iii) and CFR 201.10(b)(2)(v) simply cannot be made because no post '78 grant executed by the author exists and therefore cannot be identified in a termination notice.

C. Recommendations.

The Copyright Office should promote legislation or promulgate a regulation to close the gap for at least two reasons: (1) insure the rights of members of the termination class to the classic second bite of the apple and (2) insure certainty in commercial transactions. The legislation or regulation should establish a new termination category under section 203 for works created after 1/1/78 subject to the gap; a category for which termination does not require a written grant executed by the author after 1/1/78. The category should apply to works created during the period 1/1/78 – 12/31/98 ("Gap Works") because at some point works originally subject to a pre '78 agreement are unlikely to be created. A work created after 12/31/98 would not qualify as a Gap Work and therefore not be terminable.

(1) Published Gap Works

(a) If a Gap Work is published during the life time of all authors, and registered for copyright as a published work either before or after the death of any author, the date of publication in the certificate of registration should be the date from which the termination date is determined. The termination date should be thirty-five years from the date of publication. The current provisions of sections 203(a)(3) and (4) would apply to the timing and mechanics of termination. All other terms of current section 203 would remain intact.

(b) If the original grantee failed to register the Gap Work during the lifetime of all authors, a majority of members of the termination class of all authors have the right to register the Gap Work in order to secure the certificate. For example, in 2010 the termination class could register a work published on June 1, 1978. The termination window would be a period a five years commencing forty-five years from date of publication in order not to prejudice the termination class for the original grantee's failure to register. The current provisions of sections 203(a)(3) and (4) would apply to the timing and mechanics of termination. All other terms of current section 203 would remain intact.

(2) Unpublished Gap Works

(a) If a Gap Work is not published during the lifetime of all authors, the date of death of the last to die of all authors should be the date from which the termination date is determined, regardless of whether the Gap Work is or is not registered.

(b) the termination date would be the date of death of the last to die of all authors. The termination class would have a period of five years after the date of death of the last to die of all authors to effect termination. The current provisions of section 203(a)(3) and (4) would apply to the timing and mechanics of termination. All other terms of current section 203 would remain intact.

D. Other Issues. I have no other issues to bring to your attention at this time.

Thank you for the opportunity to comment on this problem in urgent need of repair.

Respectfully submitted,

Michael Perlstein