

**Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

In the Matter of:

Gap in Termination Provisions; Inquiry

**REPLY COMMENTS OF THE  
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.**

The Recording Industry Association of America, Inc. (“RIAA”) submits these Reply Comments in response to the Copyright Office’s Request for Comment (“RFC”) regarding the application of the Copyright Act’s termination provisions to certain grants of transfers or licenses entered into prior to January 1, 1978 covering works created on or after January 1, 1978 (sometimes referred to herein as “Specified Grants”). *See* 75 Fed. Reg. 15,390-91 (Mar. 29, 2010). RIAA is still evaluating the issues raised by the RFC and the initial comments, but because some of the initial comments suggest adoption of regulations or legislation addressing the issues raised by the RFC, we thought it important to file these Reply Comments to be clear that the RFC and initial comments do not raise a mere “technical” issue as some commenters suggest. They raise complicated issues of law and policy that have significant economic consequences for different groups of authors and for the recipients of grants made by authors. Moreover, attempts to address these issues by changing current law retroactively may be subject to constitutional limitations. We therefore believe caution is essential and would be pleased to participate in future discussions.

## I. Background

As the Office knows well, the Copyright Act provides separate termination regimes for certain transfers and licenses executed by the author on or after January 1, 1978 (Section 203) and certain transfers and licenses executed before January 1, 1978 covering the renewal term of works in which copyright subsisted on January 1, 1978 (Section 304). The initial round of comments in response to the RFC illustrates a disagreement concerning application and operation of those provisions, and particularly concerning what Congress intended when it used the term “executed” in these provisions. Most of the initial comments argue that the term executed must mean something like carried into full effect or completed, and that a grant should not be considered executed until creation of the relevant work. However, other comments argue or assume that in the case of a written grant, the term executed means made or signed. The choice of definition matters, because interpretation of the word executed in Section 203 affects both the universe of grants to which that provision applies and the timing of when Section 203 termination rights may be exercised when available.

These issues have a long history. Sections 203 and 304 codify compromises that resolved what had been “the most explosive and difficult issue” during the early stages of the general revision process that ultimately led to enactment of the Copyright Act of 1976. H. Comm. on the Judiciary, 89th Cong., Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 71 (Comm. Print 1965). The Register’s report initially describing those compromises indicates that to avoid upsetting settled expectations, “[t]he right of termination would not be retroactive.” *Id.* at 73. It also provides an example of a book publishing contract for a work that was not completed when the contract was signed, and seems to indicate that the termination period would be measured from the date of signing. *Id.* at

74-75. As some of the initial comments pointed out, the Office’s internal guidance from 1977 provided an example of a Specified Grant and indicated that it “would not be subject to termination.” See U.S. Copyright Office, *General Guide to the Copyright Act of 1976* § 6.6 (1977). We have also heard that the scope and operation of the termination provisions were widely discussed at the time the 1976 Act was enacted, and that the issues raised by the RFC were recognized at that time.

## II. Discussion

The RFC and initial comments raise questions concerning interpretation of existing law, as well as issues of policy and constitutional considerations that may be relevant to any proposed change in law. None of these is simple.

As to current law, the view that a grant should not be considered executed until the work is created warrants further consideration as a matter of statutory interpretation to evaluate evidence that, at least in the case of a written grant, Congress may have intended the term executed to mean signed. For example, the Appendix to Professor Ginsburg’s comment indicates that in a number of places in which the Copyright Act uses the word executed to apply to transfers, that use is most consistent with that term referring to signing or entering into an agreement (e.g., Sections 204(b)(1), (2); 205(a), (d)). To reach an informed conclusion concerning the view that a grant should not be considered executed until creation of the relevant work, one would need to explore further whether it is possible to interpret the statute in ways that do not require assigning different meanings to the same word in related contexts. See, e.g., *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164-65 & n.33 (1985); *Badaracco v. Comm’r*, 464 U.S. 386,

397 (1984).<sup>1</sup> Accordingly, it would be premature to reach a conclusion concerning current law without more consideration than is practicable in the time provided for filing reply comments in response to the RFC.<sup>2</sup>

The policy choices are also not as clear-cut as some of the commenters suggest. Any interpretation of the term executed in Section 203 has benefits for some authors and detriments for other authors. For example, interpreting executed to require creation of the relevant work benefits authors who made Specified Grants, because that interpretation would make Specified Grants terminable 35 years after publication of the relevant work (assuming other conditions for termination are satisfied and the work was published within five years after creation of the work). However, that interpretation disadvantages some authors who, after 1977, signed terminable grants covering works not yet created, and which were ultimately not published until more than five years after the grant was signed, because the date for possible termination of such grants would be later than if the termination window was measured from signing. Interpreting

---

<sup>1</sup> Some of the initial comments suggest that interpretation of the term executed may depend upon the legal effect of grants signed before a work is created. It is clear in patent law that when a grant of rights to an invention that has not then been made is stated in present terms, the grant is sufficient to transfer title to the invention when it comes into being, without further action to implement or confirm the grant. *E.g.*, *DDB Technologies, L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1289-90 (Fed. Cir. 2008); *Speedplay, Inc. v. Bebop, Inc.*, 211 F.3d 1245, 1253 (Fed. Cir. 2000). Although it appears that courts have had fewer recent occasions to consider comparable grants of copyrights, it has long been established that a valid grant of copyright rights can be made before those rights vest. *E.g.*, *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (author's assignment of renewal rights made before original copyright expires is valid if the author is alive at the commencement of the renewal period). Grants of rights to works that do not yet exist are common, and important to commerce involving copyrighted works. The Office should do nothing to cast doubt on the validity of such grants.

<sup>2</sup> We understand that the Office may be asked to record documents submitted as notices of termination, the validity of which will ultimately depend upon the meaning of the term executed in Section 203. In the absence of a definitive judicial interpretation of that term, the Office should be cautious in its processing of such documents to avoid appearing to endorse an interpretation of existing law that it does not intend to embrace.

executed to mean signed or entered into has the opposite consequences and so disadvantages authors who made Specified Grants while benefiting some authors who signed later grants.

The economic effects of the competing terminations are difficult to quantify, but significant money is clearly at stake, because many works remain commercially important 35 years after their publication and many works are first published more than five years after the relevant contract is signed. In any individual case in which a grant was otherwise terminable, if the work is commercially important the choice between interpretations could have significant economic effects for the authors and grantees involved. However, assessing the impact on authors and grantees with interests in multiple works from different time periods under different agreements is very complex, and the effects will vary depending on their individual circumstances.<sup>3</sup>

Finally, while a full constitutional analysis of any legislative proposal is beyond the scope of these comments, Congress' power to change the Copyright Act's termination provisions retroactively may be limited.<sup>4</sup>

### **III. Conclusion**

While RIAA is still evaluating the issues raised by the RFC and the initial comments, it is clear that they raise complicated issues that should not be addressed hastily. We believe it would be premature to take any action on these issues at this time. If the Office or Congress is inclined

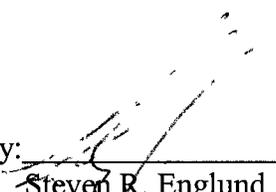
---

<sup>3</sup> Most sound recordings are owned by record companies as works made for hire under applicable contracts.

<sup>4</sup> See *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (“An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1016 (1984) (property interest in trade secrets protected by takings clause of Fifth Amendment; government use and disclosure of certain trade secrets may constitute taking).

to act on the initial comments, they should proceed cautiously. RIAA would be pleased to participate in any further proceedings or discussions concerning any such actions.

Dated: May 21, 2010

By: 

Steven R. Englund  
JENNER & BLOCK LLP  
1099 New York Avenue, N.W.  
Suite 900  
Washington, D.C. 2001  
(202) 639-6000  
*Counsel for the Recording Industry  
Association of America, Inc.*

Of Counsel:

Steven M. Marks  
Victoria Sheckler  
RECORDING INDUSTRY  
ASSOCIATION OF AMERICA, INC.  
1025 F Street, N.W., 10th Floor  
Washington D.C. 20004  
(202) 775-0101