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To: Maria A. Pallante, Acting Register of Copyrights

From: Karyn Soroka

Date: January 22, 2011

Re: Comments On Proposed Rulemaking Re: Gap in Termination Provisions

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In response to the request for comments on the notice of proposed rulemaking in connection with the gap in termination provisions, I have two areas that I would like to address:

1. I would hope that the revised regulations, or, at least, the documentation supplementing the revised regulations, will contain a statement of the Register's opinion on the gap works, as expressed in her analysis and recommendation on this topic, and that it is because of this opinion that the regulations are being amended. As these regulations may be the only official writing on this matter, either for the short or long term, it can be most effective only if it explicitly states the Register's position "that Gap Grants are terminable under section 203 as currently codified, because as a matter of copyright law a transfer that predates the existence of the copyrighted work cannot be effective until the work of authorship (and the copyright) come into existence."

2. With regard to the specific change in the regulations, there needs to be additional clarity about what is, or how to determine, the date of creation in the absence of supporting documentation, or an acknowledgement that this date may be impossible to definitively state.

The date of creation is an almost impossible thing to document and, more so, to prove thirty-five years later. Most authors do not keep records of when works are completed. They may document when a work was delivered to their publishers, licensees or assignees, but not of the actual completion of creation. This means that, in practice, guesses will have to be made in order to "fill in the blank" on termination notices. These guesses can lead to arguments about the accuracy of the information and whether an incorrect date is a harmless or material error, which, in turn, could possibly lead to litigation, the inability to conduct business due to uncertainty about ownership and, in general, great expenditures of time and money by both sides in order to try to get to the correct outcome.

Perhaps the regulation can read that stating the year of creation will suffice, as that is really the only thing that matters in this specific instance -- whether or not the work was either created before, or created on or after January 1, 1978. The copyright registration application also only requires the year of creation, thus there is precedent for utilizing solely the year.

As to determining the exact termination windows and dates, most will be calculated based on dates of publication or, for non-gap works, on the date of the agreement by which the grant was made and, as a matter of practice, the date of registration will likely be used as the date for the majority of unpublished works. It's only a small percentage of the relevant works (i.e., unpublished and/or unregistered) that will have to rely on the actual date of creation for determining termination dates. Admittedly, this suggestion (of using the year, only) may pose a problem for those works, but it still resolves the problem for the majority of applicable works. Maybe for those works where a more specific date can't be documented, either by proof of creation, delivery, publication or registration, it can be agreed that July 1st of the applicable year can be set as a compromise to be used for calculating the termination dates, thereby creating an absolute standard to be followed.