

EDWIN KOMEN  
Writer's Direct Line: 202-772-5328  
ekomen@sheppardmullin.com

April 19, 2010

Our File Number: 12NY-125108

The Honorable Marybeth Peters  
Register of Copyrights  
Copyright Office  
Library of Congress  
101 Independence Avenue, SE  
Washington, DC

Re: Gap in Termination Provisions – Inquiry  
Federal Register / Vol. 75, No. 59, March 29, 2010, pages 15390-91

Dear Ms. Peters:

I am writing in response to the above-described inquiry, relating to the Copyright Act's termination provisions, published by the Copyright Office in the Federal Register on March 29, 2010.

It has been brought to the Copyright Office's attention that many transfers may have been made by authors shortly before January 1, 1978 for works that were not created until after that date. On its face, Section 203 only applies to grants made by authors after January 1, 1978. Also, Sections 304(c) and 304(d) only apply to pre-1978 grants of renewal rights. However, if a work was "transferred" before 1978 but not created until after January 1, 1978, it never had a "renewal" so that the pre-1978 grant, even if it transferred many or all rights, could not have been a transfer of renewal term rights.

Significantly, the same would be true for a "created" work protected at common law prior to 1978. These would be works that were created before 1978, but never published or registered for copyright until on or after January 1, 1978. Copyright terms for these works would be governed under Section 303 which likewise provides for a single term of protection without provision for any renewal. In short, pre-1978 grants for works whose copyright terms are governed under either Section 302 (created on or after January 1, 1978) or Section 303 (created but not published or copyrighted before January 1, 1978) may not be terminated under Sections 304(c) or 304(d) which only apply to grants of renewal rights and, even then, only to such grants made before 1978.

The only remaining provision providing for a termination right is Section 203. However, Section 203 only applies to transfers made on or after January 1, 1978. By definition, a transfer made before 1978 would not be eligible for termination under Section 203. It would, thus, seem

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as though neither Section 203 nor Sections 304(c) or 304(d) may be utilized to terminate a pre-1978 transfer of a work created after January 1, 1978.

The dilemma raised by the Copyright Office is one created by the statutory language of the termination provisions themselves which apply to transfers not to works. Each of the three sections applies to a different kind of transfer. Section 203 applies to transfers made by authors after January 1, 1978. Section 304(c) applies to transfers of renewal rights made by authors or certain statutory heirs before 1978. Section 304(d) applies to the same transfers specified in Section 304(c) but where the 304(c) termination right expired before the effective date of the Sonny Bono Copyright Term Extension Act, namely, before October 27, 1998. If the transfer itself is not qualified, the particular section or sections of the Copyright Act do not apply. The transfer posed by the Copyright Office would not qualify under Sections 203, 304(c) or 304(d) and, accordingly, may not be terminated.

Since the issue or "problem" is in the statutory language enacted by Congress and signed into law by the President, it would seem as though it may only be "corrected" through a further legislative "cure".

Sincerely yours,

A handwritten signature in black ink, appearing to read "Edwin Komen". The signature is fluid and cursive, with the first name "Edwin" and the last name "Komen" clearly distinguishable.

Edwin Komen

EK:jbj