Comments on
Termination of Certain Grants; Gap in Termination Provisions; Inquiry

submitted by: Lewis Anderson

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Background: In 2004 I founded Legacyworks LLC, a Nashville company specializing in songwriters' copyright interests and termination. Legacyworks LLC represents a prominent list of songwriters – pop, rock, folk, and country - who have composed some of the great songs of the past sixty years. We have filed terminations for scores of songs, and prepared the data for filing for hundreds more. The company developed software specific to Sections 2 and 3 of US Copyright Law for the purposes of preparing and filing terminations, which is to my knowledge the only commercially available software of its kind. Prior to Legacyworks LLC, I was for thirty years a successful songwriter myself, with songs released on many major artists, included on many gold and platinum records, a great number of chart records including four # 1 songs on the country charts, and winner of BMI's Country Songwriter of the Year of 1984.

Comments: This is one of a number of issues that, when current law was written, were not foreseen. In this case the statute lacks a definition as to how a song might be terminated if the grant precedes 1-1-1978, but the song was created on or after that date under terms of the grant. I have encountered this situation more than once.

We must first accept that an exclusive term agreement between a writer and a publisher, one that binds all works created within a certain period, sufficiently qualifies as the grant for all works created during that term. Some publishers have questioned this even though they have writers bound by them; others have not. Those publishers who raise this question see a benefit in working from the date of each single song agreement subject to the term agreement, as this potentially prolongs the period prior to each work qualifying for termination. They believe that working from the original execution date of a long-standing agreement could severely reduce the time the publisher has to actually publish a song created very late in the term. (Example: Songs created twelve years from the start date of a term agreement might therefore be terminated forty years from the grant, which might actually be only twenty-eight years after they were created.) But for purposes of this discussion, we must accept the term agreement as a binding transfer of grant for multiple works. Until some form of litigated judgment decides otherwise, I believe it is. And because it is, there are many cases where a term agreement has been signed prior to 1978, but works under the agreement have been created long after 1977.

Section 304 is based around the older method of a 28 year initial term followed by a 28 year renewal term – therefore, the earliest termination date was conceived as starting and extending beyond an original 56 years of copyright protection. The section defines termination for works transferred by an agreement signed prior to 1978 and created prior to 1978. Since songs copyrighted on or after 1-1-1978 enjoy "life plus 70" years of copyright, the 56 year period was not carried forward in the law, and under Section 203 the earliest termination date is the earlier of 40 years from the grant or 35 years from publication.

What to do with a grant dated 1973 and a hit song created in 1981 under such grant? I have used these dates because these are the very specifics for one of my clients. In this case the publisher took the position that the song was granted under the 1973 agreement and termination rights were undefined – a "black hole" for exercising termination rights. Faced with this, my client decided that, rather than try to set precedent by filing a lawsuit against the deep pockets of the corporate publisher, he would wait and see if time would bring about some resolution to this dilemma, either by litigation or legislation. I am hoping this inquiry will do just that.

Recommendations: It seems clear that to try to put a 56 year termination requirement, such as applies to older works, on songs created on or after 1-1-1978 would be a step backward. The termination right itself is an attempt to rectify a structure in the old law that had been compromised - the original intent of a second term, a 28 year renewal term, being to allow an author to enjoy the renewal term without the commitment of the initial term. Unfortunately, this structure was circumvented contractually, and publishers essentially enjoyed all 56 years.

Since works created on or after 1-1-1978 come into existence under the revised law, and have a potentially much greater copyright life, I believe they reasonably should enjoy the terms of Section 203, as well. The grant prior to 1978 would be honored, but the rules for terminating works created on or after 1-1-1978 would be exercised under the rules of Section 203. However, without a grant date on or after 1-1-1978 from which to establish the termination date, what date should be used?

The choices for such a date could come from the following list:
(1) a single song agreement, if available; one which is subject to the earlier term agreement but executed at the time the song was submitted to the publisher; or
(2) the date of creation; or
(3) the date of evidence of the existence of the work in a tangible form.

Regarding (1): Were a single song agreement to be used for this purpose, we must view the single song agreement as a reaffirmation of the original term agreement. (Were it not, then it would stand-alone and no dilemma would exist.)

Many publishers continue to have songwriters sign a single song agreement specific to each work, even though the work is subject to an existing term agreement. The date of such single song agreement could satisfy the needs of combining the rules under Sections 203 and 304 for works affected by this issue. But I wish to offer a caution: Relying on the date of a single song agreement should only be used to satisfy the specifics of this issue. For works that clearly already qualify under Section 203, no rules should be changed.

In the event no single song agreement was created for a song covered under a pre-1978 term agreement, then suggestions (2) or (3) might be used.

Other Issue: A related dilemma also exists without definition and it may require a fourth solution. This dilemma is the song created and transferred prior to 1978, but for which no copyright registration was filed. According to Nimmer, such a work would have common law copyright prior to 1978; then recognized to have been automatically copyrighted under the new law beginning 1-1-1978. So, how to terminate such a song?

There could be many possibilities for arriving at how to calculate termination. Were date of creation used, Section 304 might be amended to apply. But it would likely prove difficult to establish factual dates of creation for works now over thirty-two years old at a minimum. I believe the simplest method for deciding termination for such works would be to apply the rules of Section 203, using 1-1-1978 as the hard, fast transfer date, and the rules of Section 203 beyond this. This would be a compromise, no doubt, but well within the progressive nature of the change in law in 1976.

Respectfully submitted,

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