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Via Facsimile (202) 707-8366

Maria Pallante, Esq.  
Deputy General Counsel  
United States Copyright Office

**Re: Termination Rights**

Dear Ms. Pallante:

I refer to our August 3, 2007 telephone conversation regarding a gap in coverage in the termination provisions of Copyright Act Sections 203 and 304(c).

For over forty years, my practice has had a strong emphasis on the music publishing industry. Music publishers customarily sign songwriters to exclusive term contracts pursuant to which the writer is obligated to deliver to the publisher all compositions the writer creates during the term of the contract. The term of an exclusive term contract entered into during the 60s, 70s and early 80s was typically measured by yearly periods, with an initial period of one year plus up to four one year option periods exercisable by the publisher.

The issue of the gap in coverage between Section 203 and 304(c) arises when an exclusive term contract was entered into prior to January 1, 1978. Termination of a contract covering any composition created under such a contract for which the copyright was secured prior to 1/1/78 would be covered by Section 304(c). However, it is easily the case that the term of a pre 1/1/78 contract could extend beyond 1977 by the publisher's exercise of options. When a composition subject to a pre 1/1/78 term contract is created during a post 1977 option period, the termination provisions of Sections 203 and 302(c) do not cover. A post 1977 composition has no renewal term and therefore even though the contract covering the composition was signed before 1/1/78, it makes sense that Section 304(c) cannot apply. Moreover, the copyright in a post 1977 composition could not be secured pre 1/1/78. Therefore, Section 203 should apply. However, since the date of the grant which should be terminated under Section 203 is the date of the pre 1/1/78 contract, Section 203 cannot apply. Therefore, a composition created post 1977 under a pre 1/1/78 exclusive term contract is in termination limbo.

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Some publishers required writers sign a new "single song" songwriter contract for each composition delivered under an exclusive term contract. In this case there would be a precise date of grant of the new composition under a superseding contract (superseding a pre 1/1/78 exclusive term contract) where Section 203 would apply. Occasionally, rather than a full single song contract, the writer would sign a simple form identifying the title of the new work, co-writers and date of delivery to the publisher. In this case, this written acknowledgement might suffice as the date of the grant made by the author under Section 203. However it was more the case for the writer simply to deliver a composition to the publisher without any written acknowledgement or new single song contract.

CFR Section 201.10(b)(2)(iii) requires the termination notice under Section 203 to include a clear identification of the date of execution of the grant being terminated and if the grant covers the right of publication, the date of publication of the work under the grant. There is no comparable requirement in the regulation for the termination notice under 304(c).

For a published composition, the date of the grant of a post 1977 composition written under a pre 1/1/78 contract could be the date of publication as stated on the face of the copyright registration. In that case, Section 203 and CFR Section 201.10(b) (2) (iii) could apply although it is clear the regulation distinguishes between date of grant and date of publication. More problematic is the date of the grant of an unpublished post 1977 composition written under a pre 1/1/78 contract, registered for copyright post 1977. What is the date of the grant in the absence of a written contract, other than the pre 1/1/78 exclusive term songwriter contract? One can believe the composition would have been created after 1977 and therefore one could simply pick a reasonable date prior to the registration date of the Pau as the date of the grant to be terminated under Section 203. But nothing in the Copyright Act or regulations permits this arrangement. Simply "picking" a date places the practitioner in jeopardy of potential Copyright Office rejection of a Section 203 termination notice.

While different from the gap problem, a related question arises where two or more authors each with separate pre 1/1/78 exclusive term songwriter contracts create a post 1977 joint work. Can each author or his or her successor class take the position that the author's interest in the joint work can be terminated as to that author's interest only by claiming termination of the original pre 1/1/78 grant (because there are separate exclusive term contracts) or does the creation of a post 1977 joint work require termination by a majority of the authors because the grant of the post 1977 joint work is by the three authors collectively and therefore requires termination by a majority of the authors or their successors under Section 203?

This question pertains to any type of pre 1/1/78 contract with option periods that extend the term beyond 1977. The problem is particularly critical in connection with the purchase and sale of copyrights where certainty of the rights bought and sold is a necessity.

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I hope this information helps effect a solution to the problem, preferably through regulation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Perlstein". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Michael Perlstein

MP/mk

P.S. I had a serendipitous conversation with Marybeth Peters about the gap problem at the Entertainment Institute of the Texas State Bar a couple of weeks ago. It was interesting to learn she was well aware of the problem at the time the Copyright Act was enacted. I told her you and I had already been in touch on the subject and that this letter was forthcoming.

cc: Jeffrey Sacharow, Esq.

Bill Gable, Esq.

Edwin Komen, Esq.