

Dear Register of Copyrights:

These comments are being submitted by the National Songwriters Association (NSA). The NSA is comprised of the Nashville Songwriters Association International, the California Songwriters Association and the Texas Songwriters Association. NSA has around 6,000 active members and features chapters in 150 plus cities.

Our mission statement reads:

*NSA consists of a body of creative minds, including songwriters from all genres of music, professional and amateur, who are committed to protecting the rights and future of the profession of songwriting. NSA also exists to educate, elevate, and celebrate the songwriter and to act as a unifying force within the music community and the community at large.*

NSA has been very active over the past decade in informing songwriters about “recapture” rights. We have staged educational seminars, disseminated information and had personal sessions with individual songwriters on a regular basis to make them aware of the “recapture” framework and timelines.

As 2013 approaches, the first date that songs which fall under Section 203 can be “recaptured,” NSA focuses its comments to the Copyright Office more on the intent of Congress in creating Section 203 rather than interpreting the specific language that has resulted in what may be a flaw in the “recapture” process. In other words, if there is a problem with the language, it should be changed to reflect Congress’ original intent.

**QUESTION: DOES THE COPYRIGHT ACT PROVIDE A RIGHT OF TERMINATION FOR AUTHORS (and other persons specified by statute) for particular works (other than works-made-for-hire) created on or after January 1, 1978 but for which a grant was made prior to 1978 (other than by will)?**

Yes. At least that was the intent of Congress.

The clear purpose of updating termination structure in the Copyright law was illustrated by hundreds of pages of testimony, comments and a consistent message from then-Register of Copyrights Barbara Ringer and others. In fact the entire update process that resulted in adoption in 1976 of a new “Copyright Act” began more than a decade earlier. From the mid-1960’s to the mid-1970’s the record of studies, testimony and hearings indicate the importance of “constructing a framework that would provide benefit to authors”.

While Ringer was credited with taking both music publisher and songwriter interests into account, as she similarly balanced music industry and the public’s interests during the massive 1970’s copyright rewrite process, nonetheless the intent of the amendments, according to her, was “an equitable framework for the songwriter”.

“There are reforms that are of benefit to authors and artists with respect to ownership, in addition to the longer term, and one of these is in Section 203 of the bill,” Ringer said in testimony delivered in hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Ninety-Fourth Congress, First Session on HR 2223.

“Instead of the present complex and rather arbitrary and capricious renewal provisions, it allows an author of his beneficiaries to re-do a bad deal. In effect present law was intended to accomplish that result but has been most imperfect in doing this.

Section 203 is the reversion provision which basically allows an author, if he is still living or his widow and children and grandchildren to terminate a transfer after 35 years under certain circumstances.

If they don't do that, then the contract continues. If they do do it, then they have an absolute right to call the deal to a halt. In my opinion, despite the complexities of these provisions, it is a real plus for authors,” Ringer testified.

## QUESTION

### WHICH STATUTORY PROVISION APPLIES TO SUCH TERMINATION?

As we believe that the Copyright Act provides for a right of termination for such authors, the problem lies in identifying the appropriate provision to effectuate such a right. NSA acts only as an information resource to let our members know they have “recapture” rights, accordingly, we are not directly involved in the “recapture” process. However, our members often share their experiences on this matter. Songwriters-composers, or their representatives, have received a variety of answers to the above question as they have begun to implement the “recapture” procedures--indicating that there is not a consistent answer or business approach to this topic even within the music publishing industry. The approach taken by many is to file notices based upon every conceivable interpretation, which results in excess administrative burden and expense not only for authors, but also for the Copyright Office who must process the duplicative efforts to effectuate the recapture. It further serves to postpone the inevitable—the need to determine the eventual effective date of such termination.

The basis for Congress' creation of two distinct sets of rules, and the corresponding categorization of eligible works for recapture under the applicable rule, was intended to coincide with the version of the Copyright Act that existed at the time a musical work was actually “created” ( i.e., based upon the relevant term of copyright for the work in question).

It is also worthy of noting that Congress enacted the termination provisions in the 1976 Act in almost the same form as they appeared more than a decade earlier in the 1965 draft revision bill. This is because by 1976 there was essentially industry-wide acceptance for the compromise provisions. Neither Congress nor the music industry were focusing on how nuances in the old and new Copyright Acts might allow certain songs to fall into the jurisdiction of a particular

version of the Copyright Act that did NOT coincide with the song's creation. "The legislation is the culmination of 15 years of painstaking negotiation and compromise," said John Lorenz, Acting Librarian of Congress testified during the 94<sup>th</sup> Congress.

While logic dictates that no grant of a song (or more specifically, grant of a copyright) can exist BEFORE the song is actually written, as the NSA Board of Directors and various committees through the years have reviewed the topic, the dialogue always turns to fairness and practicality under the unique circumstances of the business practices in the music publishing industry. When possible solutions to the question of which statutory provision applies, conclusions of the NSA Board and pertinent committees, in different incarnations through the years, consistently falls to the actual date-of-creation of the song. "When was the song actually written," is the common-sense question a songwriter-member always asks.

If the original authors of the 1976 revisions did not precisely accomplish that purpose (i.e., in aligning function of the recapture rules with the version of the Copyright Act under which a copyright is governed) then perhaps the Copyright Office should recommend a solution based on the original intent...to get as close to the date of creation as possible and allow the song to fall under either the Section 203 or Section 304 rules on that basis. Legislative language in Section 203 referring to the issuance of grants on a song creates confusion over this issue. As exemplified by the specific scenarios set forth in the Subject of Inquiry, the documentation of a grant, transfer or assignment does not always coincide with an actual date-of-creation of the subject matter of such grant. To more closely align Congressional intent with the actual language, it would appear necessary in the instance where a "grant" predates the creation of a work, to interpret the date of such "grant" not as the date of the documentation evidencing the intent to make a future grant, but rather, when such grant achieves legal operation, namely, upon creation of the subject matter of the grant, which is the date of creation (or, more specifically, "fixation") of the song.

In the absence of clear evidence of the actual date-of-creation, such determinations could be based on one or more of the following evidentiary bases, as available on a case-by-case basis:

- (1) Evidence of the recording of work tapes, song demos or master recordings (e.g., recording sessions, session reports, expenditures...etc.;
- (2) Contemporaneously-prepared works notes or journals of the songwriter;
- (3) Documentation of delivery of the song to the songwriters' publisher;
- (4) Execution date of short-form assignments of copyright (i.e., as customarily required pursuant to a songwriter's exclusive songwriter agreement concurrently with the delivery of the song, which, notably, would typically have a then-current effective date);
- (5) Confirmation of a songwriter's fulfillment of delivery of applicable periodic song quota pursuant to the applicable exclusive songwriter agreement;
- (6) The date the song was added to the repertoire of a songwriter though their performing rights society; and
- (7) The date the song was registered with the U.S. Copyright Office.

It is important to note that it is often the custom and practice (based in part on economic and administrative reasons) that a song is not added to a songwriter's repertoire of a performing

rights society or registered with the U.S. Copyright Office until the song has been recorded by a recording artist for commercial release. Accordingly, it may well be the case the song was created long before registration or commercial release. Absent other proof, however, the date of a song's release as a commercial recording might be used as the latest possible date-of-creation. (Accounting for some time between creation and a record's release, when resorting to this method for determination of a creation date for a work, the Copyright Office might consider designating the "date-of-creation" as occurring a few months prior to release, as a form of compromise.)

Returning to the expressed intent of those involved in adoption of these rules in 1975, the solution to the current interpretive dilemma is guided by such original intent. In summary of the proper perspective in guiding a resolution of the issue at hand, we look to the comment of then-Register of Copyrights Barbara Ringer in her 1975 Statement to Congress:

"My feeling as the head of the Copyright Office is that my responsibility is to one group and one group only, and that is the group that is identified as the sole beneficiary of the copyright law of the United States under the Constitution, the authors of the so-called writings. In other words, the creators of copyrighted works as we now know them.

I am profoundly of the belief that authors in this country have been treated shabbily and stingily from the very beginning of our copyright system. And whatever I say will be with the thought that the situation of authors, not only as creators of works of economic value, but as something that is infinitely precious to our country, needs to be promoted.

I don't think this has been done effectively under previous legislation. I am also conscious that everyone else besides the author is a user of the author's work, and as between users there may be arguments that are extremely persuasive for reasons unrelated to protection of the author but in some respects are irrelevant to the essential purpose of copyright law.

In these areas I think compromises have been reached. I think compromises have been necessary and I think further compromises will be made. But it is vitally important that you consider the effect of a particular provision on the individual author and not primarily of its effect on an economic group using the author's work for good or ill."

## ADDITIONAL ISSUE

### ARE SONGS CREATED BETWEEN 1976 AND 1977 SIMPLY INELIGIBLE FOR RECAPTURE?

Another issue often raised by NSA members concerns whether songs from the years 1976 and 1977 are eligible for recapture. NSA members have indicated that some music publishers have taken the position that a strict reading of both Sections 203 and 304 mean songs from certain years, simply "fall through the cracks." This position, again, defies the intent of the U.S. Copyright Office and Congress outlined above. It is hard to believe that Congress worked on this complicated issue for over a decade and intentionally allowed songs from certain years to be

exempt from the “recapture” process. Had they intended to exclude such compositions under the new framework, they could have easily expressly done so, just as they clearly excluded works-made-for-hire and grants by will.

Thank you for allowing the NSA to submit these comments on behalf of our songwriter-members. We look forward to working with the U.S. Copyright Office to resolve these issues in a fair and timely way. We hope this input is valuable and indicates, based on the original intent of Congress, any ambiguities addressed by the U.S. Copyright office should be determined in favor of the American songwriter.

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