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**Before the Copyright Office  
Library of Congress**

In the Matter of )  
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Gap in Termination Provisions ) **FR Doc. 2010-6936**  
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**Comments of  
The Authors Guild and  
The Songwriters Guild of America**

The Songwriters Guild of America (“SGA”) and The Authors Guild (“Authors Guild”) submit these comments in response to the above-captioned Notice of Public Inquiry and Request for Comments regarding the application of Title 17 to the termination of certain grants of transfers or licenses of copyright, specifically those for which execution of the grant occurred prior to January 1, 1978 and creation of the work occurred on or after January 1, 1978. Because the possibility exists that the right to terminate transfers of some works will never become available, and because this result is contrary to the clearly articulated intent of Congress in enacting the statute, we strongly encourage the Copyright Office to advise Congress accordingly and request a prompt legislative correction of this problem.

**Summary of Comments.**

Congress clearly provided -- in two separate sections of the Copyright Act -- for authors and creators of artistic works to be able to recapture their rights in works that were earlier transferred to publishers. Thus, Section 304 covers works where rights were transferred prior to January 1, 1978, and Section 203 covers works where rights were transferred after that date. There is no logical policy reason to exclude from this benefit certain works that were created after this date but rights in which were transferred prior to such date. If the courts were to determine that the statute in fact created such a “gap,” then it is possible that the right to terminate a transfer of rights might be denied to: (1) hundreds, and perhaps thousands, of songwriters, and (2) authors of nearly all books published in 1978, the vast majority of books published in 1979, and a substantial proportion of the books published in 1980. This is an inequitable result that is contrary to the clear intent of the statute, and should not be allowed to occur.

These termination right issues will become increasingly important to songwriters, authors, and other creators as we approach 2013, when authors first become eligible to terminate post-1978 grants of rights (the notices of termination for which may initially be

served in 2011). There is an immediate need to clarify this issue, and we encourage the Copyright Office to assist in that task.

### **Background on Commenting Parties.**

The Songwriters Guild of America is the nation's oldest and largest organization run exclusively by and for songwriters, with more than five thousand members nationwide and over seventy-five years of experience in advocacy for songwriters' rights. It is a voluntary association comprised of songwriters, composers and the estates of deceased members. SGA provides a variety of services to its members, including contract advice, copyright renewal and termination filings, and royalty collection and auditing to ensure that they receive proper compensation for their creative efforts. SGA's efforts on behalf of all U.S. songwriters include advocacy before regulatory agencies and the U.S. Congress, and participating in litigation of significance to the creators of American music.

The Authors Guild is the largest society of published authors in the U.S., representing more than 8,500 book authors and freelance writers, more than 8,250 of whom have published books. Its members represent the broad sweep of American authorship, including literary and genre fiction, nonfiction, trade, academic, and children's book authors, textbook authors, freelance journalists and poets. Guild members have won countless honors and all major literary awards. (Every American winner of the Nobel Prize for Literature was an Authors Guild member.) Its members include published authors living in 38 countries, including Australia, Canada and the United Kingdom. Almost since the day it was founded, the Guild has been the leading advocate for published authors in the United States, pursuing its mission of promoting fair book and freelance journalism contracts, effective copyright protection and freedom of expression.

#### **A. Experience**

The Copyright Act grants to songwriters and literary authors ("authors" or "creators") and their specified family members the right to terminate transfers of copyrights in certain circumstances under sections 203 (post-1978 transfers) and 304(c) and (d) (pre-1978 transfers). Congress enacted the termination right as a matter of fairness to creators and their families, to act as an effective safety net and estate planning mechanism so that creators would have an incentive to pursue such an economically perilous profession.

Congress was clear in articulating its motivation in adopting the termination right, stressing the fact that creators have historically been forced to enter into license and transfer agreements early in a work's copyright term, prior to the establishment of the work's true market value and at a time when authors have little or no economic leverage. According to both the House and Senate reports accompanying the Copyright Act of 1976:

The provisions of section 203 are based upon the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. § 24) [applicable to ALL pre-1978 copyrights] should

be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 124-28 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

The Copyright Act sets forth a complex series of notice and termination provisions that permit the recapture by authors and their heirs, under certain circumstances, of rights granted in copyrighted works to third parties. These provisions, which are steeped in complicated formalities and which have been subject to numerous interpretations by courts throughout the nation (including the United States Supreme Court), present authors and their heirs with a narrow window of opportunity to place licensees on notice of termination. Reversions of rights under such circumstances are often subject to the continuing rights of licensees in derivative works prepared during the term of the license under a complex system of rules governing those works. SGA in particular has had experience with assisting songwriters (and their estates and heirs) in terminating transfers of copyright in musical works that still have significant value. The parties on whom notice of termination is served often fully avail themselves of all defenses to the proposed action, and are well-versed in the wide range of statutory formalities that must be satisfied before termination can be effected. If there is an opportunity for a current copyright owner to object to the legal basis for terminating an earlier transfer of copyright, then such opportunities are often taken. It is therefore important that the potential "termination gap" problem be clarified before the large number of post-1978 works become available for notice of termination in 2011.

For book authors, the statutory termination right can help clarify ambiguous rights ownership matters. Most book contracts with trade publishers provide that the author may request a termination of the contract, with all rights in the book reverting to the author, once a work goes out of print. Generally, however, the contract provides that termination formally occurs when the publisher sends a letter to the author reverting rights. Many publishers, in fact, will not re-publish a work without proof that the prior publisher has issued a reversion letter. In the Authors Guild's experience, obtaining a reversion letter can be a time-consuming matter of low priority to the publisher. Obtaining reversion letters can be particularly difficult if the book contract has been acquired by another publisher through a merger or through the purchase of assets under bankruptcy procedures. In such cases, which would certainly include tens of thousands of contracts affected by the "gap," contractual records may be difficult for the new publisher to locate, further impeding formal termination of the contract. The statutory termination right thus promotes the public's compelling interest in allowing book authors – without assistance from their publisher or the successor in interest to their publisher – to gain clear title to their rights so that they can make their works available again to readers.

While it is impossible at this point to determine precisely how many songwriters—and their heirs—might be affected by the "gap," SGA believes that the number would be

significant. Hundreds and perhaps thousands of independent and staff songwriters were working under exclusive songwriter agreements in the mid to late 1970s that generally carried three-to seven year terms. Given that, writers who signed agreements as early as 1972, who created songs under those agreements after January 1, 1978 could be left with no termination rights as to those songs. And those many writers who assigned songs to publishers prior to 1978 that were never published might likewise have no termination rights. Such a situation would be manifestly unfair and in direct contravention of Congress's stated intent. For example, Charlie Daniels's 1979 signature song, "The Devil Went Down to Georgia" could be subject to agreements signed before 1978 – making it unclear when or if Daniels is legally entitled to take back ownership.<sup>1</sup>

The Authors Guild believes that nearly all books published in 1978, the vast majority of books published in 1979, and a substantial proportion of the books published in 1980 are affected by the "gap," since most book contracts are signed more than a year before book publication. According to industry statistics reported in *The Bowker Annual of Library & Book Trade Information, 26<sup>th</sup> Edition* (R.R. Bowker 1981), and *The Bowker Annual of Library & Book Trade Information, 27<sup>th</sup> Edition* (R.R. Bowker 1982), the U.S. book industry produced approximately 42,000 new titles in 1978, 46,000 new titles in 1979, and 46,000 new titles in 1980. The proportion of affected titles, the Authors Guild believes, would decline precipitously after 1980. The Authors Guild estimates that as many as 100,000 authors could have works subject to the gap.

## **B. Interpretation**

The "gap" issue raises the question of whether an unintended gap exists in the termination right provided to authors by Congress for works created or first registered or published *after* January 1, 1978 that are purportedly the subject of transfers or grants of rights made pursuant to agreements executed by the authors *prior* to 1978. One example of a work that might fall into this allegedly gray area of termination rights would be a song written *after* January 1, 1978, the publishing rights to which work were subject upon its creation to transfer to a music publisher pursuant to an exclusive songwriter agreement signed between the author and the publisher *prior* to 1978. Another such example would be a work that was created and assigned to a publisher *prior* to 1978, but neither published nor registered until *after* January 1, 1978.

The "gap" issue arises due to the fact that section 304(c) of the Act is applicable only to those works subsisting in either their "first or renewal term[s] on January 1, 1978," and section 203(a) permits only the termination of rights and transfers "executed by the author on or after January 1, 1978." Thus, under a narrow reading of sections 203 and 304, a court might not be willing to recognize termination rights in either of the above instances. We believe that Congress' intent is clear that both pre-1978 and post-1978 works should be subject to termination, and we note that there is no legislative history or statutory policy that would support denying termination rights to the writers and authors

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<sup>1</sup> Brian Reisinger, *Charlie Daniels' signature song at heart of copyright dispute*, Nashville Business Journal, March 26, 2010 at <http://nashville.bizjournals.com/nashville/stories/2010/03/29/story2.html> (accessed April 30, 2010).

whose works fall within the class described in this proceeding. Nonetheless, the two sections of the Copyright Act can certainly be read narrowly to deprive such works of coverage under either termination provision, and it is almost a certainty that some copyright owners will use this ambiguity to oppose an otherwise valid termination notice. As such, statutory clarification is necessary and urgently needed.

### **C. Recommendation**

The “gap” issue is straightforward and, while it has a substantive effect on creators’ rights, it is technical in nature. We would recommend that, at a minimum, Congress move forward to correct this problem promptly, since a “gap” that would prevent some creators from exercising termination rights in 2011 so clearly runs counter to Congressional intent.<sup>2</sup> As noted above, we see no statutory policy that would favor excluding the works covered within the “gap” period, nor is there legislative history to support such as result.

One possible approach to revising the law is to clarify through inclusion of a “catch-all” sentence that any work that is not explicitly described in either section 203(a) or section 304(c) be available for termination under section 203(a) on the date that is 35 years from the date of its first publication as to works created and transferred prior to January 1, 1978, or the date that is 35 years from the date of its creation as to works created on or after January 1, 1978 but subject to transfer instruments executed prior to January 1, 1978. As to this latter category of works, it should be noted that the law should be read in its current form to constructively bring such works under the terms of section 203, by the fact that logically a work cannot have been transferred prior to the moment of its creation.

Again, we believe remedial action is particularly important now, because the initial period to file notices of termination for post-1978 works begins next year. In addition, if Congress cannot act promptly prior to January 1, 2011, we recommend that it extend the time during which notice can be filed for any such work falling into the “gap” -- so that authors’ and creators’ rights are not reduced while Congress considers and resolves this problem.

### **D. Subject of Inquiry**

With respect to the examples raised in this section:

Example 1: SGA agrees that the contractual situation with respect to composers described in this example is the relevant example for purposes of this notice of inquiry.

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<sup>2</sup> We have considered whether a persuasive legal argument could be made that a “gap” does not exist because a pre-1978 agreement transferring the rights to a song written post-1978 should be interpreted to be “constructively executed” after January 1, 1978 and so come within section 203. While we believe such an argument is reasonable, the question would surely be litigated and the outcome uncertain. More to the point, that would put songwriters, who would have to litigate individually, at a severe economic disadvantage against large publishing companies. Therefore, we believe a legislative fix is the far better option for creators.

Example 2: The Authors Guild believes this describes a work that a court could rule to fall within the statutory “gap.”

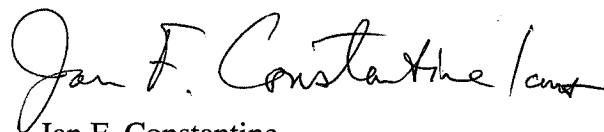
**E. Other Issues**

We also urge the Copyright Office to review recent litigation with respect to the termination right, particularly where the Federal Courts have ruled to narrow or limit the termination rights of authors and creators. One such example is the case of *Penguin Group (USA) Inc. v Steinbeck*, 537 F.3d 193 (2d Cir. 2008) where the Second Circuit allowed a publisher to frustrate the termination rights of the heirs of the famous writer John Steinbeck. We believe it important for the Copyright Office to keep Congress informed of the results of such litigation, as improper judicial narrowing of the rights intended by Congress should be remedied by our lawmakers.

Respectfully submitted,



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