April 30, 2010

Office of the General Counsel
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Washington D.C. 20024

RE: Possible Gap in Termination Provisions

Pursuant to the Notice of Public Inquiry published in the Federal Register of March 29, 2010 (p. 15390-91), the Picture Archive Council of America ("PACA") submits these comments on behalf of its members in response to the Copyright Office's request for comments regarding the application of Title 17's termination provisions to grants of copyright transfers in works that were created on or after January 1, 1978 but the execution of the grant occurred prior to January 1, 1978.

As the principal trade organization of stock photo archives that license images for commercial reproduction, PACA represents over 100 member organizations in North America. PACA commends the Copyright Office in seeking comments regarding the possible gap in the termination provisions of sections 203 and 304 of the Copyright Act. The confusion over whether or how the termination provisions apply to circumstances where a grant was executed prior to January 1, 1978 but the work was created on or after January 1, 1978 has significant real world consequences for both authors and publishers, who would appreciate more certainty as to whether these grants may be terminated and, if so, under what provision.

From the perspective of PACA members, this particular lacuna in the termination provisions is a drafting error that should be resolved by the application of section 203 to the following circumstances: 1) where the grant was executed prior to January 1, 1978 but the work was created on or after January 1, 1978, and 2) where the grant was executed prior to January 1, 1978, the work was delivered by the author to the publisher before January 1, 1978 but the work was not published until after January 1, 1978, providing, of course, that the grant was made by the author and not the author's estate.

Many commentators, including Nimmer[1] and the Copyright Office itself, suggest that copyrights transferred in these circumstances are not subject to termination, without any

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[1] "[A] grant of common law copyright (by hypothesis made before January 1, 1978) that purports to include a grant of renewal rights when and if such rights vest will not be subject to termination if the work in which the interest is granted remained in common law copyright until January 1, 1978 [i.e., a work delivered to a publisher but not yet published, which could be protected by state copyright law under the 1909 Act], when it became subject to statutory copyright by reason of federal pre-emption. Such a grant will not be subject to termination under Section 203(a), because it was not executed 'on or after January 1, 1978.' It will not be subject to termination under Section 304(c) because… such terminations pertain only to grants 'of the renewal copyright or of any right under it.'" Melville B. Nimmer, *Nimmer on Copyright* § 11.02[A][1] (1976).

supporting policy rational for such literal interpretation of the code. The Copyright Office General Guide to the Copyright Act of 1976 notes that some works will not be subject to termination rights under either section 203 or 304.[2]

However, this result was clearly not the intent of Congress. In enacting section 203, Congress was "safeguarding authors against unremunerative transfers" caused by 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. No. 94-1476 (1976). Congress further noted that "[t]he arguments for granting rights of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it." H.R. No. 94-1476 (1976).

Congress' clear intention in enacting the termination provisions, then, was to protect creators with little or no leverage or negotiation skills from living with the consequences of bad deals into which they unsuspectingly entered. In light of these aims, Congress surely could not have intended that this very particular group of authors, whose only distinctive feature is bad timing, should be singled out as not having termination rights. Indeed, the "unequal bargaining position of authors" is highlighted by the predicament of a legally unsophisticated author who, unaware of the impending changes to copyright law and the new termination provisions, entered into an agreement with a publisher in 1977 to transfer the copyrights to future works pursuant to a negotiated fee schedule and whose works created between 1978 and 1983 became economically viable. There is simply no reason to suspect that Congress intended that this author's works, which were created after the effective date of the new Copyright Act, would not be subject to termination by virtue of the fact that she could not wait until January 1, 1978 to sign a contract pertaining to works created after that date.

Furthermore, in the interest of clarity, it is PACA's position that section 203 should apply in these circumstances and not section 304. The application of section 304's termination provisions would be impractical as it would effectively add a two-term copyright for works in which copyright did not subsist prior to January 1, 1978 and that would otherwise be measured under the single term provided for by the 1976 Copyright Act. Since section 203 applies only to author-made grants, the application of its termination provisions could further ensure that rightsholders have certainty as to the duration of the rights they have acquired. Moreover, restricting the works in this "gap category" subject to termination to those covered by author-made grants under section 203 would strike a sensible balance between the competing interests of authors and rightsholders. The application of section 203 would protect authors from long-term damage resulting from

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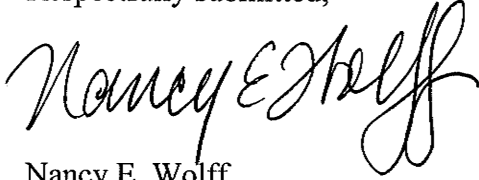
[2] The Guide gives the following example of one such work:
"A publishing company, on July 1, 1977, makes a contract with Norbert Novelist for a new book. The book is not written until July 20, 1979. The rights transferred in the July 1, 1977 contract would not be subject to termination. The grant was made before January 1, 1977 [sic, should read 1978] but not for a work in which copyright was subsisting on the effective date of the new law." Copyright Office, Library of Congress, General Guide to the Copyright Act of 1976, at 6:6 (1977).

bad deals into which they may have entered as Congress clearly intended, and it would guarantee certainty for rightsholders by limiting the number of works subject to termination and establishing predictable time periods in which termination could occur.

Respectfully submitted,



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