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January 24, 2011

Ms. Maria Pallente  
Acting Register of Copyrights  
U.S. Copyright Office  
101 Independence Avenue SE  
Washington, DC 20059-6000

**Re: Notice of Public Inquiry; Request for Comments**

Dear Acting Register Pallente:

We respond to the Copyright Office request for comments on its proposal to amend its regulations governing notices of termination of certain grants of transfers and licenses of copyright under section 203 of the Copyright Act of 1976.

In its Analysis of Gap Grants under the Termination Provisions of Title 17 of December 7, 2010, the Copyright Office concludes that the meaning of "execution of the grant" in section 203 means the date post-1977 when a work is created, i.e. when a work is fixed in a tangible medium of expression. Thus, as a matter of proof, to determine date of "execution" will require a factual determination of the date of "creation," which the Copyright Office itself has acknowledged will "present challenges".

As veteran practitioners, (and in the case of Bill Gable also a professional recording artist and songwriter), we respectfully submit that the Copyright Office's requirement of identifying a date of creation 35-40 years after the fact is unrealistic and likely to generate litigation. And the avoidance of such litigation is something these regulations should strive for.

Based upon our collective experience, we believe that neither authors nor their grantees (e.g. publishing companies) were ever on notice that they needed to retain documents evidencing date of creation (as distinguished from date of delivery, for example), and that even if such documents may once have existed neither party often will have preserved them. As a result, we are concerned that practitioners will face serious difficulties in drafting termination notices.

Accordingly, in this comment we propose guidelines for future legislation and/or best practices to determine the date of execution of a grant under section 203 on other bases. These guidelines are author-friendly, consistent with legislative and judicial intent that authors and their heirs benefit from the termination statutes. (See *Korman v. HBC Florida*, 182 F.3d 1291 (11<sup>th</sup> Cir.1999), *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985)).

We propose the following order of priority to determine date of execution of the grant:

1. First, written documentation signed by the author, e.g. a short form instrument of transfer or single song agreement (in the case of an exclusive term songwriting agreement) or note or memorandum of some sort, with a date post-1977;

2. Second, the date of publication as set forth on the Certification of Registration or if no registration of the published work, other proof of a publication date (e.g. release date or publication date shown by external evidence);

3. Third, for unpublished works with a registered copyright, December 31 of the year of creation as set forth on the Certificate of Registration (which has the effect of giving the author the benefit of the doubt that a work with a year of creation of 1978 would have been created at the earliest some time during 1978);

4. Fourth, for unpublished works with no registered copyright, a rebuttable presumption that author-provided proof of creation (e.g. dated manuscripts or letters to the licensee or date stamped taped or demos or other dated materials) is the date of creation; or

5. Fifth, for unpublished works with no registered copyright and no author-provided proof of creation, a rebuttable presumption the work was created (which thereby executed the grant) on the statutorily fixed date of January 1, 1978. The grantee can rebut the presumption by presenting documentary proof (e.g. manuscripts or date stamped tapes or demos) that the work was created pre-1978.

Grantees must submit written objection (supported by documentary evidence) to a termination notice that does not identify a written grant signed by the grantor on or after January 1, 1978 within ninety (90) days after receipt or else be barred from claiming the notice is defective or incorrect (otherwise a grantee may be able to thwart a legitimate termination notice by simply asserting, without any supporting evidence, that the work in question was created prior to 1978 and thus the notice is defective.).

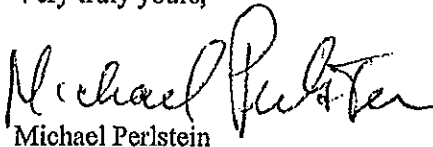
### Conclusion

We applaud the Copyright Office's recognition of the problem inherent in interpreting the current statute for works falling within the identified termination gap. The proposed regulation goes a long way toward clarity. However, we are concerned that in the absence of a practical framework, the proposed fix will create more problems than it was intended to fix.

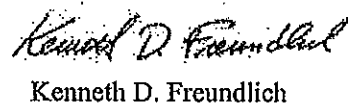
We believe our suggested guidelines will help resolve most legal and marketplace issues.

Please feel free to contact us with respect to this letter.

Very truly yours,

  
Michael Perlstein

  
Bill Gable

  
Kenneth D. Freundlich