US copyright termination: re-monetization's final frontier

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I. Introduction

During its most recent overhaul of copyright law over 40 years ago, US Congress identified the need to protect authors and their heirs from 'the unequal bargaining position of authors' in dealing in their insipient (read: unpublished) works.[1] This need arose primarily from 'the impossibility of [an author] determining [his] work's prior value until it has been exploited', a proposition appearing on its face to be unassailable.[2] Until an author 'monetizes' his or her creative work via publication, usually via a third party in the business of exploiting creative works, s/he has no way to gauge that work's critical importance or commercial value.

The above results in what economists call an imperfect market, exhibiting anomalies like a lack of ready buyers or patently unfair transactions (or both). Such anomalies are particularly evident when it comes to an unknown author granting all or substantially all rights in an unpublished work or works to a third party.[3] These authors are especially vulnerable in such circumstances: many struggle to make ends meet and almost none have any meaningful experience in the business of exploiting their own works.

Thus, as it developed, what eventually became the 1976 Copyright Act gave authors and their heirs certain statutory rights to terminate grants of their copyright interests either 35 years from the initial grant if the grant post-dated the Copyright Act, or 56 years from the copyright registration if the grant predated the Copyright Act.[4] For recording artists, songwriters and their heirs, the mechanism by which the Copyright Act allows them to terminate grants has now emerged as a critical and increasingly deployed device for 're-monetizing' their sound recordings and musical compositions. Recapturing ownership of these copyrighted

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This article

- During its most recent overhaul of copyright law over 40 years ago, the US Congress identified the need to protect authors and their heirs from 'the unequal bargaining position of authors' in dealing in their insipient works. Until an author 'monetizes' his or her creative work via publication, usually via a third party in the business of exploiting creative works, s/he has no way to gauge that work's critical importance or commercial value.

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* Email: dmg@phillaw.com. A version of this article first appeared as 'U.S. Copyright Termination: Remonetization's Final Frontier', in The Monetization of the Global Music Business, ed. Marcelo Goyanes and William Lewis (London: IAEL, 2016), ch. 3.5 at 292.

1 H.R. Rep. No. 94-176, at 124 (1976).

2 Ibid.

3 Dick James was often called the 'luckiest man in the history of the industry' because in early 1963, manager Brian Epstein handed him worldwide ownership and control of the entire song repertoire of The Beatles, an arrangement that 'in nearly every reminiscence' Paul McCartney called 'a slave deal – and worse'. Reportedly, neither McCartney nor John Lennon even read the agreement put in front of them before signing it (Bob Spitz, *The Beatles: The Biography*, Boston, MA: Little, Brown & Co., 2005, pp. 363–5). The result for the band and its two principal songwriters was described earlier in one of the most trenchant (and tragic) chapters ever written on the economics of the music business, ironically entitled 'The Beatles Go Broke', in Albert Goldman, *The Lives of John Lennon* (New York: Morrow & Co, 1988), pp. 332–4.

4 17 USC. §§ 203, 304(c)-(d).

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doi:10.1093/jiplp/jpw124

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works by their authors or heirs has tremendous consequences. What follows summarizes the statutory and judge-made limitations on those termination mechanisms, how authors and their heirs use those mechanisms and how the system, if utilized correctly, can create substantial benefit to recording artists, songwriters and their families.

II. History, context and scope of the US termination right

A. History of recapture rights in the US

The introduction of copyright termination rights can be traced to the renewal structure codified in the 1909 Copyright Act which can, in turn, be traced to the 1710 Statute of Anne.[5] That structure, which in 1909 included an original 28 years of copyright protection, followed by a separate renewal term of 28 years if the author survived the first term, was codified to give authors the same type of protection the current termination provisions are designed to today.[6] 'It not infrequently happens,' Congress explained in 1909, 'that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of 28 years [. . .] it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.'[7]

Unfortunately for authors, the US Supreme Court stripped much of the intended benefits of the renewal system in its 1943 *Fred Fisher* decision. There it held that authors could freely assign their renewal right prior to its exercise.[8] Predictably, newly minted agreements appeared including a grant of both the original and renewal copyright and, whether they knew it, authors began giving up their renewal right in the first grant of rights in their insipient works. The current termination provisions of the Copyright Act sought in part to fulfil the intention of the 1909 renewal term concept.

B. Qualifying grants

The applicability and timing of the termination provisions to a given work are dependent on (1) the type of grant, (2) when the work was created, (3) when the grant was made and (4) who made the grant.

The types of grants subject to the termination provisions are broad; they include non-exclusive licenses of copyright or any right comprised in a copyright.[9] Excluded are grants made by will, grants of works made for hire (a particularly fertile area for dispute over sound recording terminations; record labels often claim that these are works for hire under their agreements with recording artists and music producers) and grants made by those other than the author or his statutory heirs.[10]

A grant made by an author or his statutory heirs prior to 1 January 1978 may be terminated under 17 USC § 304(c) during the five-year period beginning 56 years from the date the copyright was originally secured.[11] § 304(d) provides authors and their heirs, whose termination term expired prior to 1998 and who had not previously exercised their termination right, a second chance to terminate starting 75 years from the date of original registration, also running for five years.

The termination of grants made on or after 1978 is governed by 17 USC § 203. A grant may be terminated under § 203 only if it was 'executed by the author'.[12] § 203 termination may be effected by the author, or, if the author is dead, by those who are entitled to exercise a total of more than one-half of that author's termination interest.[13]

§ 203 terminations are a relatively new phenomenon because they may be effected during a five-year period beginning at the end of 35 years from the date of execution of the grant, or, if the grant covers the right of publication, during a five-year term beginning at the end of 35 years from the date of publication of the work under the grant or 40 years from the date of execution of the grant, whichever is earlier.[14] Thus, as terminations under § 203 only became effective in 2013 (35 years after 1978), this statutory scheme is *in practice* a relatively new phenomenon.

5 8 Ann c 19; *Fred Fisher Music v M Witmark & Sons*, 318 US 643, 647 (1943).

6 The current scheme generally provides copyright protection for works created on or after 1 January 1978 for the author's life plus 70 years, while works created prior to 1978 are entitled to a 28-year original term, plus a 67-year automatic renewal term (17 USC §§ 302, 304).

7 HR Rep No 2222, at 14 (1909).

8 *Fred Fisher Music*, cit, 318 US at 657–9.

9 Nimmer on Copyright, § 11.02 [A] at 11–12 (2015).

10 17 USC. §§ 203, 304(c) & (d). §§ 203(a)(2) & 304(c)(2) set out how the ownership of the termination interest is divided if the author is dead: if a widow survives and there are no surviving grandchildren, he/she owns the entire interest. If a widow and surviving children/grandchildren survive, the widow gets 50% and the children/grandchildren get 50%, divided per stirpes. If there is no widow, the children/grandchildren own the entire interest. If there is no widow or children/grandchildren, the author's executor owns the entire interest.

11 17 USC § 304(c)(3).

12 17 USC § 203(a).

13 Ibid.

14 17 USC § 203(a)(3).

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C. Foreign reversionary rights

Termination or reversionary rights are not limited to the USA. A number of European countries have some sort of reversionary right, with many depending upon the use of the work made by the grantee.[15]

Under the EU Term Directive (Article 3(2)(a)), recording artists have a non-waivable right to terminate a grant if, 50 years after the publication of their record, their record producer does not effectively exploit their sound recording. In Germany and Poland, an author may terminate a contract if his work no longer reflects his beliefs, or if exploitation is made contrary to their fundamental interest. In Spain, a publishing contract is automatically extinguished 10 years after its execution if payment is fixed as a flat fee.[16] In the UK, transfers made between July 1912 and June 1957 automatically revert to the author's estate 25 years after the author's death.[17] Australia, New Zealand and South Africa have similar time-limited reversion laws, while Canada retains the UK's 1912 to 1957 structure for all transfers—even current ones.[18]

III. Mechanics of exercising US termination rights

A. § 304 terminations

To effectuate a termination in the USA, a grantor must serve notice upon a grantee or the grantee's successor no fewer than two years and no more than 10 years before the termination date.[19] Under federal regulations promulgated in 2003, the notice must contain:

- The termination provision;
- The name of each grantee;
- The title and name of at least one author and the date the original copyright was secured, and original registration number (if possible);
- A brief statement reasonably identifying the grant;
- The effective date of the termination (within the five-year periods identified above);
- If termination is under § 304(d), a statement that termination under § 304(c) has not been previously exercised;
- If the grant was made by persons other than the author, a listing of the surviving person or persons who executed the grant; and
- If (1) the grant was made by author(s) and (2) the termination is exercised by successors, a listing of names and relationships to that deceased author of all of the following, together with specific indication of the person or persons executing the notice who constitute more than one-half of that author's termination interest: surviving widow or widower, surviving children, or grandchildren of deceased children.[20] If such information is not available to the persons signing the notice, they may provide an explanation and a statement that to the best of their knowledge, the notice is signed by all persons whose signature is necessary to terminate the grant under § 304.[21] The information must be contained in the notice itself and may not be incorporated by reference to other documents.[22]

If the grant was made by a non-author, all surviving persons who executed the grant must sign the notice. If the grant was made by an author, the notice must be signed by the author, or if the author is deceased, by the number and proportion of owners necessary to terminate the grant.[23]

The notice must be served personally or via first-class mail to the last known address of the grantee.[24] The service requirement includes a reasonable investigation by the person executing the notice of the current ownership of the rights being terminated and the last known address of the owner(s).[25] A reasonable investigation includes a search of the records of the Copyright Office, the records of a performing rights society (if the work is a musical composition—in the US, the three principal societies are ASCAP, BMI and SESAC, all of which maintain publicly available databases of their song catalogues) and a report from that performing rights society identifying current claimants.[26]

15 European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States: Study*, § 3.2 at 77–8 (2014), available at <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarrangements_/contractualarrangements_en.pdf> (accessed 22 February 2016).

16 Rule of expiration, LPI art. 69.

17 UK Copyright Act of 1911, section 5(2); Nimmer, *supra*, at § 17.12[A][2][a].

18 Canada Copyright Act, section 14; Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Cheltenham: Edward Elgar, 2010), p. 117.

19 17 USC § 304(c)(4).

20 37 CFR § 201.10(b)(1)(i)–(vii).

21 Ibid.

22 Ibid, at § 201.10(b)(3).

23 Ibid.

24 Ibid at § 201.10(d)(1).

25 Ibid at § 201.10(d)(1)–(2).

26 Ibid at § 201.10(d)(3).

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A copy of the notice must be recorded in the US Copyright Office, together with a recordation fee and a statement setting forth the date and manner of service of the notice before the effective date of termination.[27] Importantly, the regulation provides that 'harmless errors' in the notice 'shall not render the notice invalid'.[28]

B. § 203 terminations

The mechanics of a § 203 termination are identical to those under § 304, except that the notice does not need to contain the date of the original copyright registration but rather the date of execution of the grant being terminated and, if the grant covered the right of publication, the date of publication of the work under the grant.[29]

Examples of both a § 304 termination (for musical compositions) and a § 203 termination (for sound recordings) are appended to this article.

IV. Limitations on US termination rights

A. Statutory limitations: territoriality and derivative works

Only rights conveyed by the grant and within the ambit of the Copyright Act are terminable. A mixed grant of rights under the Copyright Act and other rights, when terminated pursuant to the Copyright Act, only terminates the copyright portion of the conveyance.[30]

Of particular note are extraterritorial grants. Recording artists and songwriters commonly grant worldwide rights. The generally accepted view is that the language of both §§ 203 and 304 (which is identical) indicate that such extraterritorial rights, to the extent they are grants of rights under foreign laws, are not reachable via the termination mechanisms of the USA.[31]

Another important limitation on the termination right is that 'a derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant'.[32] Thus, a sound recording of a musical composition made before the termination of a grant of the right to the musical composition may continue to be exploited pursuant to the terms of the grant, even though the grant has been terminated. However, after termination, no further derivative works may be created pursuant to the terminated grant.

The statutory exclusion of foreign and derivative work rights create important limitations and complications for authors whose work creates income abroad or whose income stems from derivative works created during the term of the terminated grant. Even if the termination provisions are successfully employed, authors and their heirs may still be stuck with a vast majority of the grant they bargained for before they knew the value of their works.

B. Judicial limitations: joint author and multiple work complications and the agreements to the contrary problem

1. Victor Willis's Extended Stay in San Diego. While published decisions on the exercise of § 203 termination rights are scant, Victor Willis's § 203 termination, litigated extensively in the Southern District of California (San Diego), provides a glimpse into complications arising when multiple authors and multiple works are involved.[33]

Willis, a songwriter and original member of The Village People, served a § 203 copyright termination notice on his music publisher in 2011, attempting to terminate his grant of certain music compositions (including 'YMCA', 'In the Navy' and 'Macho Man').[34] Later that year the publisher filed a lawsuit seeking a declaratory judgment that Willis had no interest in the compositions.[35] In 2012 the court granted Willis's

27 Ibid at § 201.10(f).

28 Ibid at § 201.10(e); cf *Burroughs v Metro-Goldwyn-Mayer*, 683 F2d 610 (2d Cir 1982) (failure to list five of 35 books in copyright termination notice means termination was ineffective as to those five books) with *Siegel v Warner Bros Entertainment*, 658 F Supp.2d 1036, 1091–5 (CD Cal 2009) (discussing harmless error provision and finding two weeks' worth of comic strips excluded from notice containing thousands of works were effectively terminated by otherwise sufficient notice).

29 37 CFR § 201.10(b)(2)(iii).

30 Nimmer, *cit*, § 11.02[B][1] at 11–21.

31 17 USC §§ 203(b)(5) & 304(c)(6)(E) ('Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.'). The 'generally accepted view' is reflected in one court decision, *Fred Ahlert Music v Warner/Chappell Music*, 155 F.3d 17, 20 (2d Cir 1998), and supported by one of the leading authorities on copyright law, see Nimmer, *cit*, §11.02[B] at 11–21. The author takes a slightly different position, namely that this question may also be answered with reference to the actual grant of rights including, crucially, the language of the parties' written agreement. (The Copyright Act requires a writing assigning a copyright ownership interest from the author to a third party: 17 USC § 204.) In the right circumstance, a court could find under general contract principles that the parties contemplated *by agreement* the right of termination over the entire worldwide grant.

32 17 USC §§ 203(b)(1), 304(c)(6)(A).

33 *Scorpio Music v Willis*, No 11-cv-1557BTM (RBB), 2015 WL 5476116 (SD Cal Sept 15, 2015).

34 Ibid at *1.

35 Ibid.

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motion to dismiss, holding that Willis could unilaterally terminate his grants under § 203 because his grant was separate from that of his co-authors.[36]

The music publisher amended its complaint and sought a declaratory judgment that Willis was entitled to, at most, 33.3% of the copyright interest because there were two other songwriters. Willis counterclaimed that he was entitled to 50% authorship of the 24 works because there was only one other songwriter.

After the court denied a motion to dismiss and three different motions for partial summary judgment made by the music publisher, the case went to a jury trial in 2015. The jury ruled that Willis was entitled to a 50% interest in 13 of the songs and a 33.3% interest in the remaining 11 songs.[37] Thus, after four years of federal court litigation, Willis's termination rights were vindicated in substantial part, and he recovered over half a million dollars in costs and attorney's fees for his trouble.[38]

2. To the Contrary of Plain Language. § 304 terminations have developed a more robust case law. One particularly litigious issue concerns what happens to the termination right when heirs renegotiate a pre-1978 grant post-1977. § 304(c)(5) states: 'Termination of the grant may be effected notwithstanding any agreements to the contrary.' Commentators have argued that this plain language indicates that a post-1977 renegotiation of a pre-1978 grant should not extinguish termination rights.[39] Courts, however, have generally held that if the new agreement effectively revokes the old agreement under state contract law principles, the party has extinguished their § 304 termination right as to the old agreement.[40]

A case at the intersection of the § 304 'agreements to the contrary' issues and § 203 is *Baldwin v EMI Feist Catalog, Inc* 805 F.3d 18 (2d Cir 2015). A songwriter of the perennial holiday favourite 'Santa Claus is Coming to Town' renegotiated his 1951 assignment to music publisher EMI in 1981. The Second Circuit held that because the 1981 agreement effectively revoked the 1951 agreement, the § 304(d) termination notice, served in 2004 by his heirs, was ineffective, but the § 203 notice, served in 2007, was effective and terminated EMI's rights to the song in 2016.

More recently, the Sixth Circuit decided that under Missouri contract law, a post-1978 assignment from a widow to two sons did not revoke and supersede a 1975 assignment from the songwriter and the widow to those same sons, thus allowing the four other siblings to terminate the 1975 assignment under § 304 and revive their interests in the copyright.[41] Importantly, the court noted that § 304(c)(5)'s 'agreement to the contrary' language might be 'another ground' to uphold the termination if appellees had raised the argument.[42]

Thus, a living author's subsequent renegotiation is saved by § 203, but heirs who renegotiate may forfeit their termination right depending on the terms of the assignments and the applicable state contract law because § 203 is inapplicable to their grant.[43]

V. How US termination rights are being exercised[44]

According to US Copyright Office records from 1977 to 2009, that Office received 8,429 § 304 notices and 105 § 203 notices. Since 2009, the Office has experienced a dramatic (and expected) increase in § 203 filings with over 1,000 notices received.

Data from the year 2000 provides a snapshot of the nature and scope of § 304 terminations. That year, 219 notices were recorded by 61 unique authors (or groups of authors), terminating the rights to 1,045 works. Of the 219 notices filed, only 19 were filed by the authors themselves, 43 were filed by an executor and 157 were

36 *Scorpio Music v Willis*, No 11-cv-1557BTM (RBB), 2012 WL 1598043 (SD Cal May 7, 2012).

37 *Scorpio Music, supra*, 2015 WL 5476116, at *1–2. Among the big three musical compositions, Willis ended up with 50% of 'YMCA', and a third of both 'In the Navy' and 'Macho Man'.

38 Ibid at *5. Mr Willis's legal adventures are not over quite yet; the music publisher has appealed the attorney's fee order to the Ninth Circuit: *Scorpio Music v Willis*, No 15-56462 (9th Cir) (appeal filed 23 September 2015).

39 Nimmer, *cit*, § 11.07, at 11-73-11-127; Menell & Nimmer, *Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers*, (2009) 33 Colum JL & Arts 227; Bates, *The Grapes of Wrathful Heirs: Termination of Transfers of Copyright and 'Agreements to the Contrary'* (2010) 27 Cardozo Arts & Ent LJ 663.

40 *DC Comics v Pacific Pictures*, 545 Fed. Appx. 678 (9th Cir. 2013); *Penguin Group v Steinbeck*, 537 F.3d 193 (2d. Cir. 2008); *Milne v Slesinger*, 430 F.3d 1036 (9th Cir. 2005). But see *Classic Media v Mewborn*, 532 F.3d 978 (9th Cir. 2008).

41 *Brumley v Albert E. Brumley & Sons, Inc*, 822 F.3d 926 (6th Cir 2016).

42 Ibid at *7 ('The alert reader may wonder why we decline to reject Robert's defence on another ground – that the 1979 agreement, if construed to assign or extinguish Goldie's termination rights, would amount to an impermissible "agreement to the contrary".').

43 Space does not permit a thorough-going analysis of other, perhaps more complex and potentially intractable technicalities of termination; for that, see generally Donnelly, 'Everything You Need to Know About Copyright Reversions' (2012) 1(1) *St John's Entertainment, Arts & Sports Law J.* http://www.lommen.com/wp-content/uploads/2016/03/Everything-You-Need-to-Know-About-Copyright-Reversions-5-12-version.pdf

44 What follows here comes courtesy of (and with the author's gratitude to) R. Anthony Reese, Chancellor's Professor of Law at the University of California, Irvine School of Law. Professor Reese is engaged in extensive research into the use of the US termination mechanisms by authors and their heirs. This research includes his team's coding all termination notices received by and recorded in the US Copyright Office for analysis. While his research is ongoing, Professor Reese was generous enough to share some preliminary data with the author for purposes of this article.

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filed by some combination of surviving spouses and children. Of the non-author terminations, 107 of 200 were made by single parties holding 100% of the termination interest, and 79 of the 93 remaining multiparty terminators wielded 100% of the termination interest.

The majority of terminations were targeted to only one work and 47 of the 61 authors/author groups consisted of solo authors. As to the type of works, the overwhelming majority were musical compositions. In 2000, 879 of the 1,045 works terminated were musical compositions (84.11%); contributions to periodicals (eg, a short story published in a magazine) were the next most popular with 40 terminations (3.83%). Overall, the numbers were skewed even further with 88.85% of all terminations noticed from 1978–2010 being for musical compositions. In addition, terminated grantees have been overwhelmingly music publishers, receiving 77.17% of notices in 2000.

Parties are exercising their termination rights as soon as possible. Over 75% of terminations come in the first year of the termination window and under 3% come in the last year. Notices, on the other hand, are given close to the deadline, with almost 37% of notices given just 2–3 years in advance and under 14% given in the 9–10 year range.

Thus, as a general proposition, terminations are being exercised by heirs of single author songwriters yielding 100% of the copyright interest, terminating grants made to music publishers as soon as they possibly can.

This data may speak to one or all of the following: the difficulties arising from more complicated terminations (see Victor Willis's case, above); the potential value in certain musical compositions; and the particular and historic transactional asymmetry between music publishers and songwriters.[45]

VI. The real-world impact of copyright termination

So what does it all mean? If a musical work—be it a post-1972 sound recording (pre-1972 sound recordings are not protected by US copyright law) or musical composition—has a commercial life exceeding 35 or 56 years, then it likely owes that success to the creative genius of the recording artist or songwriter, and not to the capital and labour contributed by the record label or music publisher.[46] It is therefore entirely correct and fair, in this author's view, that the recording artist or songwriter has the right and ability to claim the revenues earned later in a sound recording or musical composition's life from a record label or music publisher, and certainly from one having no direct involvement in the creative process. In such circumstance, where a high-yield legacy recording or song is presumptively in issue, the financial stakes are extraordinary.[47] Copyrights in these works function as annuities—at their age, the works are 'known commodities' (a term used advisedly), with a sound financial track record that one can extrapolate into the future. Their worth, when capitalized using standard accounting and valuation methods, can be tremendous. Even the threat of a recapture of rights in such works creates enormous leverage for an author or his heirs to 're-monetize' their interest in those works by, for example, settling existing audit issues, improving the terms and conditions of the grant or marketing the works to others.

More importantly, perhaps, whether a musical work is a high-yield asset or a vanity project with little financially at stake, retaking ownership and therefore management and control of its use and exploitation from a record label or music publisher can be exceedingly meaningful to an author and his heirs. Control of these works is enshrined in the concept of 'droit moral' (moral rights), the personal and inalienable rights an author has in his work, which protects the artistic integrity of and prevents others from altering a work without the author's permission. While the US Congress extended limited moral rights to works of visual art when it passed the Visual Artists Rights Act of 1990, no such rights attend to musical works in the USA.[48]

Once an author or his heirs re-establish management and control over a musical work, the true business of

45 Conclusions drawn from this data are solely those of the author and do not reflect the views of Professor Reese or the conclusions he or his team may ultimately reach once their work is complete.

46 Goldstein on Copyright, § 5.4 at 5:113 (3d ed. 2016). On the treatment of pre-1972 sound recordings and statutory termination, see US Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights*, at 146–9 (December 2011). Two very recent Court of Appeals decisions have blurred the lines of whether and to what extent the Copyright Act, state law, both or neither provide protection for pre-1972 recordings: *Flo & Eddie, Inc v Sirius XM Radio, Inc*, No. 15-13100, 2016 WL 3546433, Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 827 F.3d 1016, 1019-24 (11th Cir. 2016) (certifying question to Florida Supreme Court whether Florida common law copyright extended to pre-1972 sound recordings); *Capital Records, LLC v Vimeo, LLC*, Nos. 14-1048/1049/1067/1068, 2016 WL 3349368, *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 87-93 (2d Cir. 2016) (disagreeing with the US Copyright Office and holding that the Digital Millennium Copyright Act safe harbor provision applies to pre-1972 sound recordings).

47 Those having filed to recapture their song copyrights reportedly include Bob Dylan, Tom Petty, Bryan Adams, Loretta Lynn, Kris Kristofferson, Tom Waits and Charlie Daniels. See Rohter, 'Record Industry Braces for Artists' Battles Over Song Rights' (*New York Times*, 15 August 2011).

48 See 17 USC § 106(A). A possible exception to the 'no moral rights in music rule' is 17 USC § 115(a)(2), which limits a compulsory license to arrange a musical composition to those whose arrangements 'shall not change the basic melody or fundamental character of the work'.

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're-monetization' can begin. Termination and recapture allows a recording artist or songwriter or their heirs to reset the use and exploitation of the work upon termination and into the future—for the remaining life of the copyright in the work. By definition, this means new uses like cover recordings (in the case of songs), new compilations (in the case of recordings—including remixes) as well as television, film and internet uses.

The latter is especially important as the consumption of music transitions to a subscription-based streaming model. Because that model measures use in real time and compensates the copyright proprietor accordingly, and because like the performing rights societies these grants are almost always short-term and non-exclusive, an author or heir who has recaptured rights in a musical work should have an unobstructed path to determining how and where the work is heard. As new distribution platforms continue to emerge, presenting additional opportunities to re-monetize musical works, the time is now for recording artists and songwriters to take full advantage of the termination and recapture rights of US copyright law.

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