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Termination Formalities and Notice

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TERMINATION FORMALITIES AND NOTICE

R. ANTHONY REESE*

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INTRODUCTION

The 1976 Copyright Act's provisions on termination of transfers give authors or their statutory successors a mechanism to recapture copyright rights that the author previously transferred to a third party.¹ The statute and its implementing regulations outline a relatively complex set of formalities that must be complied with in order to effect a termination. In this article, I examine two different kinds of notice issues related to these formalities.

The first issue concerns whether the statute and regulations give adequate notice to a potential terminating party regarding termination formalities. That is, how well do the statute and the regulations tell someone who might wish to terminate a grant precisely how to go about doing so? This is primarily an issue of statutory and regulatory clarity and workability. The current statutory termination provisions in some respects fail to provide clear and understandable notice to authors (and their statutory successors) of how to fulfill the formalities necessary to effect a termination. Some of this notice failure is due to poor statutory drafting that leaves those trying to use the provision uncertain of how it operates. Some of the failure arises because such a long time passes between the events that trigger termination's availability and the start of the actual termination process. But the end result is that the statute's complex formalities impose hurdles that can potentially stymie attempts to exercise the statute's termination right.

The second issue concerns how well the statutory scheme gives notice of a termination (and the consequent change of copyright ownership) both to those whose ownership of copyright rights is being terminated and to strangers to the terminated transaction who may wish to use the work involved. When a termination occurs and previously granted rights revert to the terminating party, how clearly does the termination system inform interested parties of the change of ownership? This issue primarily concerns whether the copyright system does a good job of putting grantees and their successors in title on notice of the termination of their ownership, and putting potential users of copyrighted works on notice of whom they should contact to get permission for their desired use.

Part I briefly introduces the formalities that the statute requires an author or her statutory successor to follow in order to effect a termination. Parts II and III then consider ways in which the statute is unclear and therefore does not

¹ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (2012)). The statute actually contains two termination provisions. One covers grants made by authors on or after January 1, 1978—this provision is my focus in this Article. *Id.* § 203. Another provision covers grants of rights in the extended renewal term for copyrights secured before January 1, 1978, and I will largely not discuss that provision here. *Id.* § 304(c).

give terminating parties good notice of how to effect termination. More specifically, Part II examines the statutory provisions about *when* termination can take place, argues that the system created by the statute often makes it very difficult to determine the precise period during which a termination can be made to take effect, and suggests reforms that could reduce these timing difficulties. Part III looks at the provisions requiring advance service of notice in order to effect termination, considers difficulties in identifying and locating the party or parties who must be served, and argues that many of the difficulties created by the statutory scheme are ameliorated by the implementing regulations.

Part IV examines notice from another angle and looks at how the termination system provides notice of a termination and the resulting change in copyright ownership. This Part first considers the notice provided to the grantee (or her successor in title) who, once the termination takes effect, will no longer own some or all of the rights conveyed by the original transfer. Next, it considers how well the system provides notice to the public of the change in ownership. Again, potential reforms are suggested to make the termination formalities better serve this notice function.

I. TERMINATION FORMALITIES

A party who wishes to exercise the termination right must comply with a number of formalities in order to do so. Copyright formalities are often thought of as formal requirements that the law requires an author to complete to obtain or maintain copyright protection—such as the requirements in U.S. law until 1989 to place a proper copyright notice on every published copy of a copyrighted work.² These familiar formalities might be thought of as copyright-constitutive formalities—when and where they are in place, they are obligations that must be met in order for a copyright to exist at all. The statutory termination provisions in place today are not copyright-constitutive formalities, but the provisions nonetheless do impose formalities.³ These formalities relate not to a copyright's *existence*, but to who *owns* that copyright. The statute imposes detailed formal requirements that must be met

² See, e.g., Act of Mar. 4, 1909, Pub. L. No. 60-349, § 9, 35 Stat. 1075, 1077 (repealed 1978). From 1909 to 1978, failure to place a proper notice on every published copy of a work generally resulted in the work losing copyright protection and entering the public domain. See, e.g., PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 3.4 (3d ed. Supp. 2016). Starting in 1978, notice was not necessary to obtain copyright, as the 1976 Copyright Act vested copyright in every original work of authorship immediately upon its fixation, but when a work was published, proper notice generally still had to be placed on every published copy in order to maintain the copyright, or else the act of publication would thrust the work into the public domain. *Id.* § 3.5.2. Effective in 1989, as a consequence of U.S. adherence to the Berne Convention, Congress eliminated all formalities as conditions to obtaining or maintaining copyright protection. 17 U.S.C. §§ 401-402 (providing only that notice “may” be used); see also GOLDSTEIN, *supra*, § 3.4.

³ See 17 U.S.C. § 203(a).

by a terminating party in order to terminate a transfer or license and reclaim the transferred rights. In particular, the statute specifies what formal action is necessary to effectuate termination, who must take that action, when the action must be taken, and how the action must be accomplished.⁴

The statutorily prescribed formalities that an author or her successor must comply with in order to effect termination can be quite complicated. The law requires, at minimum, that the terminating party:

- identify who holds the right to terminate, and, if the right is held by multiple parties, identify and correctly compute their proportionate shares, and get the holders of more than one-half of the shares to agree to terminate;⁵
- calculate the time period during which termination can occur and choose an effective termination date in that period;⁶
- calculate the time period during which advance notice must be served on the party whose rights are being terminated;⁷
- identify and locate the party on whom the advance notice must be served;⁸ and
- draft a proper termination notice, serve it properly, and record a copy of it in the U.S. Copyright Office before the effective date.⁹

These requirements can present a daunting challenge to an author or successor looking to terminate. Courts and commentators have recognized the complexity of the termination formalities. One court noted that the statute's "intricate provisions oftentimes create unexpected pitfalls that thwart or blunt the effort of the terminating party to reclaim the full measure of the copyright in a work of authorship."¹⁰ Another court described the termination provisions as a "legal thicket."¹¹ In Jane Ginsburg's understated phrasing, "[t]he notice provisions [for statutory termination] are not author-friendly."¹² As Register of Copyrights Maria Pallante has said, "the provisions as enacted are almost incomprehensible on their face, particularly for the authors, widows, widowers, children and other heirs who need to navigate them."¹³

⁴ *Id.*

⁵ *Id.* § 203(a)(1)-(2).

⁶ *Id.* § 203(a)(3).

⁷ *Id.* § 203(a)(4)(A).

⁸ *Id.* § 203(a)(4).

⁹ *Id.*

¹⁰ *Siegel v. Warner Bros. Entm't Inc.*, 542 F. Supp. 2d 1098, 1117 (C.D. Cal. 2008) (discussing counterpart provisions of § 304(c)).

¹¹ *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 19 (2d Cir. 2015).

¹² Jane C. Ginsburg, *Authors' Transfer and License Contracts Under U.S. Copyright Law*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING 3, 13 (Jacques de Werra ed., 2013).

¹³ Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 316 (2013).

The hurdles imposed by the statute's complex formalities can potentially stymie attempts to exercise the termination right.¹⁴ In some instances, people may be deterred from attempting to terminate a transfer because the procedure seems too complicated.¹⁵ In other instances, those who actually work through the complicated procedures and attempt to exercise their termination right may find their attempt invalidated because they have failed to properly comply with some aspect of the termination formalities.¹⁶

In many ways, the question of termination formalities is a mirror image of the current discussions about copyright-constitutive formalities. Some scholars have questioned whether U.S. law has overly simplified the acquisition and/or maintenance of copyright protection by eliminating formalities such as notice and renewal.¹⁷ But as Parts II and III explain, the termination provisions offer an example of formal requirements remaining in U.S. law that seem so complicated as to unduly hinder exercise of the rights that they govern. The statutory provisions do not provide potential terminating parties with clear notice of how to exercise their termination rights.

II. TERMINATION TIMING

A. Complexities of the Current Provisions

One aspect of the termination system that can present particular difficulties to someone wishing to exercise her termination right is the timing requirement. Section 203 allows termination “at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.”¹⁸ To effect a termination, the terminating party must choose an effective date within the five-year termination window, state that date in a termination notice, and serve that notice on the grantee or

¹⁴ See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1241 (2010) (observing that the current termination mechanism “is so cumbersome and complicated that most authors will not realistically have a meaningful opportunity to terminate these transfers”).

¹⁵ See, e.g., *Siegel*, 542 F. Supp. 2d at 1101-02.

¹⁶ See, e.g., *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 628 (2d Cir. 1982) (discussing termination under § 304(c)).

¹⁷ For a helpful survey of much recent scholarship on formalities, including scholarship critiquing the elimination of mandatory formalities in U.S. law, see Michael W. Carroll, *A Realist Approach to Copyright Law's Formalities*, 28 BERKELEY TECH. L.J. 1511, 1512-25 (2013).

¹⁸ 17 U.S.C. § 203(a)(3) (2012).

the grantee's successor "not less than two or more than ten years before" the chosen effective date.¹⁹

The following sections explain how the statute's termination provisions may make it quite difficult for a terminating party to choose a valid termination date. The statute does not provide clear notice to terminators as to (1) how to calculate the dates of the relevant statutory periods, or (2) how to determine the date of the events that trigger the running of those statutory periods.

1. When Do the Thirty-Five Years End?

To understand the difficulties the required timing can present, consider first a relatively straightforward example—perhaps the easiest possible scenario. In this scenario, the author of a play that has already been completed signs a written agreement granting to the transferee with immediate effect the exclusive right to publicly perform the play on stage, and the agreement is dated on its face on the date it is signed, September 2, 1987.

Because the author's grant does not cover the right of publication,²⁰ the alternative calculation method provided by the statute does not apply, and termination can be made during the five-year window that begins "at the end of thirty-five years from the date of execution of the grant."²¹ The signing of the agreement on September 2, 1987 clearly seems to be the date of the execution of the grant in this scenario, and thirty-five years after 1987 is 2022. But does the termination window open on September 2, 2022, or on September 3, 2022?²² That is, for a grant executed on September 2, 1987, does the thirty-five year period conclude at the end of the day on September 1, 2022, so that termination can be effected starting on September 2, 2022? Or does the thirty-five year period run to the end of the day on September 2, 2022, so that the termination can be effected starting on September 3, 2022?²³ If so, then a notice choosing September 2, 2022 as the effective date of termination would likely be invalid. This question essentially turns on whether the anniversary date of the grant's execution is or is not counted as part of the thirty-five year period.

And, of course, the question of how to count the anniversary date will affect the calculation of when the termination window closes, since that window runs for "a period of five years."²⁴ If the anniversary date doesn't count, then the thirty-five year period ends on September 1, 2022, and the five-year

¹⁹ *Id.* § 203(a)(4).

²⁰ On the issue of publication, see *infra* text accompanying note 64.

²¹ 17 U.S.C. § 203(a)(3).

²² Or perhaps, as discussed below, on September 1, 2022.

²³ The statute gives no indication that the *time* of day the grant was executed is relevant, so it does not appear that the thirty-five year period in this instance would run until the same time on September 2, 2022 that the grant was executed on September 2, 1987. See 17 U.S.C. § 203(a)(3).

²⁴ *Id.*

termination window would open on September 2, 2022 and close on September 1, 2027. As a result, a termination notice stating an effective date of September 2, 2027 would likely be invalid for choosing too late an effective date. But if the anniversary date counts in calculating the termination window, then the thirty-five-year period ends on September 2, 2022, and the five-year termination window would open on September 3, 2022 and close on September 3, 2027. In this case, a termination notice with an effective date of September 2, 2027 would be valid.

Section 203's legislative history offers little help in resolving this question. Indeed, it actually confuses the issue. The House Report on the bill that became the 1976 Act offers this precise example—a contract for public performance, signed on September 2, 1987.²⁵ But it then offers, in the same paragraph, two different answers to the question of when the termination window opens. First, the report declares, “[t]ermination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year termination period).”²⁶ This would appear to offer a clear answer to the question—the anniversary date is not counted as part of a year, so one year from September 2 runs to the following September 1. And yet, the very next sentence states, “[a]ssuming that the author decides to terminate on September 1, 2022 (the earliest possible date) the advance notice must be filed between September 1, 2012 and September 1, 2020.”²⁷ Thus, within the same paragraph, the House Report offers two different dates—September 1, 2022 and September 2, 2022—as the dates on which the termination window opens.²⁸

²⁵ H.R. REP. NO. 94-1476, at 126 (1976).

²⁶ *Id.*

²⁷ *Id.* Oddly, while the first statement, about the termination window running from September 2, 2022 to September 1, 2027, does *not* include the final anniversary date (September 2, 2027) in the five-year termination period, the second statement, about the notice period running from September 1, 2012 to September 1, 2020 *does* include the final anniversary date in the two-year notice period, rather than requiring the notice to be served no later than August 31, 2020.

²⁸ *Id.* The *Correction of Errors in Printed House Report on S. 22*, which appeared in the Congressional Record, does not include any corrections to this paragraph, although it contains corrections to the following paragraph, which in the printed House Report contained references to years 2214, 2222, and 2224 instead of 2014, 2022, and 2024. 122 CONG. REC. 31,676 (1976).

Earlier legislative history of the provision did not include this confusing language. The 1966 and 1967 House Reports on copyright revision legislation gave the example of a contract signed on September 1, 1975 and uniformly gave the opening and closing dates of the termination window and the notice period as September 1. H.R. REP. NO. 90-83, at 93 (1967); H.R. REP. NO. 89-2237, at 122 (1966). In addition, a subsequent example in the 1976 Act's legislative history does not evince similar confusion. That example states the possible dates when the termination window might open as the anniversary date of the triggering event, though the example does not state any of the possible dates on which the

Given the statutory silence on the question, and the confusing legislative history, one might look to Copyright Office practice for guidance.²⁹ The Copyright Office practice of calculating renewal dates under the 1909 Copyright Act offers an example of how an analogous question was treated in the past. The 1909 Act required an application for renewal to be made “within one year prior to the expiration of the original term of copyright,” and the original term of copyright endured for “twenty-eight years from the date of first publication.”³⁰ If a work was first published on, for example, September 2, 1947, when could a renewal application be properly made? The Copyright Office view was that the “renewal year” “includes both the twenty-seventh and twenty-eighth anniversaries of the date on which the copyright began.”³¹ So a work first published on September 2, 1947, could apparently have been properly renewed by an application filed anytime between September 2, 1974 and September 2, 1975, inclusive.

This approach, of course, offers no direct guidance on the proper calculation of the termination window under § 203, because it represents only the Copyright Office’s practice regarding a timing requirement for a different formality, under a statute superseded by the 1976 Act. The Copyright Office, however, appears to take the same approach of including both anniversary dates in its guidance on calculating termination and notice windows. Indeed, the current *Compendium of U.S. Copyright Office Practices* uses the same example as the legislative history: an author’s grant, executed on September 2, 1987, of the right to publicly perform a dramatic work on stage.³² But the Copyright Office provides different dates for the termination window than

termination window would close. With respect to notice, the example states that notice could be served at the earliest on the anniversary date ten years prior to the effective termination date, and at the latest on the anniversary date two years prior—i.e., for an effective termination date of January 1, 2024, notice could be served between January 1, 2014 and January 1, 2022. H.R. REP. NO. 94-1476, at 126, *as corrected by* 122 CONG. REC. 31,676.

²⁹ One might also look for guidance to other legal practices as well. For example, the Federal Rules of Civil Procedure prescribe as a general practice for computing time periods that the date of the triggering event does not count in calculating the period, and that the anniversary date of the triggering event is within the period. FED. R. CIV. P. 6(a)(1). The rule adopts this approach for “computing any time period specified . . . in any statute that does not specify a method of computing time.” *Id.* Although that language could perhaps be read broadly enough that Rule 6’s command would apply to § 203, the rule does not generally appear to have been applied directly to the computation of statutory time periods other than those involved in district court actions. *See, e.g., Miller v. Daybrook-Ottawa Corp.*, 291 F. Supp. 896, 905 n.17 (N.D. Ohio 1968) (finding Rule 6 method inapplicable to service of notice of patent infringement under 35 U.S.C. § 287 (1964)).

³⁰ Act of Mar. 4, 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075, 1077 (repealed 1978).

³¹ U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES: 1973 REVISIONS § 11.2.2 (1973).

³² U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 2310.3(C)(1) (3d ed. 2014).

those given in the House Report. According to the Copyright Office, the grant “may be terminated between September 2, 2022 (thirty-five years from the date of execution) and September 2, 2027 (forty years from the date of execution),” while, as noted above, the House Report indicates (in one alternative) that the termination window runs from September 2, 2022 to September 1, 2027.³³ Given the Copyright Office’s limited statutory authority to implement § 203, however, the interpretation in the *Compendium* is likely not binding but only persuasive authority.³⁴

As for service of notice, the Copyright Office, like one of the House Report alternatives, includes both anniversary dates within the notice period. The *Compendium* states that if the effective date of termination is September 2, 2022, then “the notice may be served as early as September 2, 2012, and must be served no later than September 2, 2020.”³⁵ However, the Copyright Office has also prepared tables to accompany this section of the *Compendium* which, contrary to the dates given in the text of the example, indicate that for a termination effective in 2022 notice must be served “on or after” that date in 2012 and “before” that date in 2020.³⁶ According to that table, then, for a termination effective September 2, 2022, the last day to serve notice of termination would be September 1, 2020, not September 2, 2020 as stated in the text of the *Compendium*’s example.

On the method for calculating when the termination window opens and closes, then, the statute, the legislative history, and administrative practice do not give a potential terminating party clear notice of how to determine the precise period during which termination can occur. And this lack of clarity appears to have significant consequences. A terminating party who calculates the termination window using a method that turns out not to be the one required by statute would determine the dates on which the window opens and closes in error. If, as a result, the terminating party chooses an effective date of termination that falls outside the actual termination window as accurately determined according to the statute, then the purported termination would appear to be invalid because it falls outside the time period in which the statute allows a termination to occur.³⁷

³³ *Id.*

³⁴ The Copyright Office itself notes that “[t]he policies and practices set forth in the *Compendium* do not in themselves have the force and effect of law.” *Id.* at Introduction: 2.

³⁵ *Id.* § 2310.3(C)(1).

³⁶ *Section 203: Grants Executed by the Author on or after January 1, 1978, That Did Not Convey the Right of Publication*, U.S. COPYRIGHT OFFICE (Jan. 2016), <http://copyright.gov/comp3/docs/termination-table-section203rp.pdf> [https://perma.cc/8K9S-PFGP].

³⁷ The Copyright Office has authority to prescribe by regulation requirements for the form, content, and manner of service of termination notices. 17 U.S.C. § 203(a)(4)(B) (2012). The regulations promulgated pursuant to that authority provide that “[h]armless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of section 203 . . . shall not render the notice invalid.” 37 C.F.R.

Fortunately, because the ambiguities in calculation involve a five-year termination window, a well-advised terminating party can fairly easily avoid choosing the wrong date and thereby failing to effect a termination. Whatever method the statute actually calls for in calculating precisely which date is “the end of thirty-five years from the date of execution of the grant,”³⁸ and precisely which date concludes “a period of five years beginning” on that date,³⁹ there will be hundreds of dates that fall unambiguously within the five-year termination window under either approach. In our straightforward example, if the terminating party chooses an effective date of September 4, 2022, that date will be within the statutory period under any plausible method of calculation that the statute is eventually interpreted to require. Similarly, if the party chooses an effective date of August 30, 2027, that date will be within the five-year termination window under any of the plausible calculation methods. Thus, with a little caution, and the sacrifice of a few days of ownership of recaptured rights, those who wish to terminate should be able to do so despite the statutory ambiguity.

Nevertheless, the statute should provide clearer notice. In some instances, a terminating party may not see the ambiguity. That party therefore might not take the cautious approach of choosing an effective date a couple days later than the latest possible date on which the termination window might open, or a couple days earlier than the earliest possible date on which the termination window might close. In other cases, circumstances may delay termination, such that the terminating party will need to know exactly when the termination window closes in order to choose a valid effective date and make the required service of advance notice. Given the complexities imposed on those who wish to terminate, it does not seem too much to ask that the statute provide the clearest guidance possible on how to comply with a formality as fundamental as identifying the period of time during which termination can take place.

§ 201.10(e)(1) (2014). Given that the statute dictates the period during which termination may be effected, an incorrect date would not seem to be a harmless error under this standard. Notably, errors concerning the effective date of termination are not among the errors that the regulation specifically calls out as harmless when made “in good faith and without any intention to deceive, mislead, or conceal relevant information.” *Id.* § 201.10(e)(2). The Copyright Office has noted that while misstating the date of a grant’s execution in a notice might be a harmless error, “if the wrong date is recited in the notice and a court subsequently determines that the actual date of execution was at a time that places the effective date of termination or the date of service of the notice of termination outside the statutory windows, the harmless error doctrine will be of no assistance.” Gap in Termination Provisions, 76 Fed. Reg. 32,316, 32,319 (June 6, 2011) (codified at 37 C.F.R. § 201.10 (2015)).

³⁸ 17 U.S.C. § 203(a)(3).

³⁹ *Id.*

2. When Was the Grant Executed?

The example discussed in the previous section involves the straightforward case where it is fairly clear when a grant was “executed” so that the starting point for measuring when the five-year window begins and ends is fairly clear. But in many instances, figuring out when the grant was “executed” in order to calculate the timing of the termination and notice windows will not be easy.

a. *Unwritten Grants*

As an initial matter, while it may be relatively easy to determine the date on which a transfer was executed if there is a written, dated agreement, it may be much more difficult to determine the date of execution of an oral nonexclusive license, or of a nonexclusive license implied from the grantor’s conduct. The statute does not require nonexclusive licenses to be in writing.⁴⁰ Both types of licenses are subject to termination, as § 203 expressly applies to “the exclusive or *nonexclusive* grant of a transfer or *license* of copyright.”⁴¹ The Eleventh Circuit has expressly held that § 203 applies even to implied licenses, which are neither written nor spoken, let alone signed, but instead are implied from the conduct of the parties to the license.⁴² The court in that case rejected the author’s argument that an “executed” license under § 203 must be in writing, holding instead that “executed” means “carried into full effect,” and that an unwritten, implied nonexclusive license was executed when it went into effect based on the parties’ conduct.⁴³ The court therefore concluded that the implied nonexclusive license was within the scope of § 203, despite the lack of any signed writing.⁴⁴

So an oral or implied license will be “executed” as the statute requires without, by definition, any signed writing coming into existence. Determining the “date of execution of the grant” thus becomes more complicated. When was the oral license granted? When did the conduct occur that gave rise to the implied license? A terminating party will likely find answering such questions particularly difficult because between twenty-five and thirty-eight years may have passed since the events giving rise to the license occurred.

⁴⁰ Section 204(a) provides that a “transfer of copyright ownership” is only valid if an instrument of conveyance or memorandum of the transfer is in writing, but § 101’s definition of “transfer of copyright ownership” expressly excludes “a nonexclusive license.” *Id.* § 204(a); *cf. id.* § 205(e) (providing priority rules for nonexclusive licenses but only if “evidenced by a written instrument,” implying that not all nonexclusive licenses will be in writing). Courts have held that because nonexclusive licenses need not be in writing, they can be implied from the conduct of the copyright owner. *See, e.g.,* *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990).

⁴¹ 17 U.S.C. § 203(a) (emphasis added).

⁴² *Korman v. HBC Fla., Inc.*, 182 F.3d 1291, 1293-94 (11th Cir. 1999).

⁴³ *Id.* at 1294.

⁴⁴ *Id.* at 1293.

b. *Undated Written Grants*

Even with signed, written agreements, determining the date of execution may not be simple. For example, the written agreement may not be dated on its face, requiring additional information in order to determine when it was signed. The Copyright Act's provision that validates transfers only if a signed writing exists does not prescribe any particular form of writing and so does not require that the writing be dated.⁴⁵ And the statute's writing requirement can be satisfied not only by "an instrument of conveyance," but also by "a note or memorandum of the transfer."⁴⁶ Many courts have been fairly liberal in interpreting the "note or memorandum" provision. As one court noted, "[i]t doesn't have to be the Magna Charta; a one-line pro forma statement will do."⁴⁷ For example, courts have found that the author's endorsement on a deposited check from the grantee could fulfill the writing requirement.⁴⁸ If that endorsement constitutes the execution of the transfer, how easy will it be for the author or her successor to determine the date on which the author endorsed the check, after the passage of twenty or thirty years, and when the signed check has presumably been returned by the banks involved to the author's grantee who drew the check? Even if it is possible to determine the date the author signed the endorsement (or other writing memorializing the grant), that will not necessarily be the date on which the transfer was executed. At least some courts have accepted the principle that a later writing can validate a prior unwritten transfer, and that the transfer will be effective on the date it was made, not on the date the later writing was signed.⁴⁹ In those circumstances, the terminating party will need to determine when the oral transfer took place, prior to the signing of the later note or memorandum, raising all of the problems discussed in the previous subsection in dating oral agreements.

c. *Grants Made in Yet-to-Be-Created Works*

Other situations can present even more complications. Even if a written agreement granting copyright reveals on its face the date it was signed, that may not be the date on which the transfer was "executed"—which the statute makes the relevant date for determining when a grant can be terminated.

⁴⁵ 17 U.S.C. § 204(a).

⁴⁶ *Id.*

⁴⁷ *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990).

⁴⁸ *See, e.g., Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 564 (2d Cir. 1995); *Gary Friedrich Enters., Inc. v. Marvel Enters., Inc.*, 837 F. Supp. 2d 337, 341-42 (S.D.N.Y. 2011), *aff'd in part, vacated in part*, 716 F.3d 302 (2d Cir. 2013); *Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc.*, 195 U.S.P.Q. (BNA) 31, 35-36 (E.D. Pa. 1977), *aff'd*, 575 F.2d 62 (3d Cir. 1978).

⁴⁹ *See, e.g., Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 827, 830 (3d Cir. 2011); *Imperial Residential Design, Inc. v. Palms Dev. Grp., Inc.*, 70 F.3d 96, 99 (11th Cir. 1995); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1533 (11th Cir. 1994); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 36 (2d Cir. 1982).

Consider an author who signed a contract with a book publisher on April 10, 1980 to publish a book the author has yet to write. The author eventually writes the manuscript and delivers it to the publisher; the publisher edits the book and eventually publishes it on August 23, 1987.⁵⁰ The question of when the grant of rights in the work was “executed” in this instance is complicated.

i. The Copyright Office View

While the date of the grant’s execution might appear to be April 10, 1980, when the publishing agreement was signed, a recent Copyright Office rulemaking calls that conclusion into question.⁵¹ That rulemaking involved the interaction of § 203 and its counterpart, § 304(c). Section 304(c) applies to copyright grants “executed” before January 1, 1978 for any work whose copyright was “subsisting in either its first or renewal term on January 1, 1978,”⁵² while § 203 only applies to grants “executed by the author on or after January 1, 1978.”⁵³ But what if an author *signed* an agreement in 1977 granting a publisher rights in a work the author was to create in the future, and the author did not create that work until 1978? Section 304(c) would not appear to allow termination of that grant because the rights granted were not rights in a work whose copyright subsisted on January 1, 1978. But § 203 also would not allow termination of the grant if the date the author signed the agreement in 1977 constituted the transfer’s date of execution, because § 203 only applies to transfers executed on or after January 1, 1978. The Copyright Office conducted a rulemaking proceeding to address how its regulations should cover such instances of what it called “Gap Grant” works.⁵⁴

The Copyright Office concluded that in the situation described, “the better interpretation of the law is that Gap Grants *are* terminable under section 203, as currently codified, because as a matter of copyright law, a transfer that predates the existence of the copyrighted work cannot be effective (and therefore cannot be ‘executed’) until the work of authorship (and the copyright) come into existence.”⁵⁵

If the Copyright Office’s view is correct, it complicates the calculation of the termination window under § 203 even for non-“Gap Grant” works. Many terminations will likely involve contracts for works that have not yet been created (or completed) at the time the contract is signed. Authors often sign contracts with publishers in which they agree to create a particular work after

⁵⁰ This example comes from the 1976 Act legislative history. H.R. REP. NO. 94-1476, at 126 (1976).

⁵¹ Gap in Termination Provisions, 76 Fed. Reg. 32,316 (June 6, 2011) (codified at 37 C.F.R. § 201.10 (2015)).

⁵² 17 U.S.C. § 304(c) (2012).

⁵³ *Id.* § 203. Section 203 thus covers authors’ grants made after 1977, regardless of whether the work involved was created or copyrighted before, on, or after January 1, 1978.

⁵⁴ Gap in Termination Provisions, 76 Fed. Reg. at 32,316.

⁵⁵ *Id.*

the contract is signed, and those contracts generally provide that the author transfers to the publisher the right to publish the author's work once it is created. A novelist, for example, might sign a publishing contract on the basis of nothing more than a book proposal, and write the book only after (sometimes long after) the contract is signed.⁵⁶ Or a songwriter might sign an agreement with a music publishing company in which the songwriter agrees to transfer to the publisher the copyright in every musical work she writes in the course of the following five years.⁵⁷ Under the view adopted in the Copyright Office's rulemaking, the date of the grant's "execution" appears to be not the date the contract is *signed*, but rather appears to be the date the copyrighted work came into existence.

As a result, calculating when the termination window opens for such a transfer requires a terminating party to determine not when the written agreement between the author and the transferee was signed, but rather when the work at issue was created. Determining the date on which a work was created twenty or thirty years earlier may not be easy, even for the author or her successors. Will authors create careful records about the creation dates of their works and retain them in accessible form and location for two or three decades?⁵⁸

And will there even be a single date on which the work, and its copyright, came into existence? After all, the Copyright Act provides that copyright in a work "subsists from its creation,"⁵⁹ that "[a] work is 'created' when it is fixed . . . for the first time," and that "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time."⁶⁰ If an author who has contracted to write a novel for a publisher writes the novel over the course of a year before delivering the manuscript to the publisher, and the early chapters are in final form by June 1, while the later chapters are not in final form until December 1, when did the work and its copyright come into existence for purpose of "executing" the author's grant of rights in the novel to the publisher?

ii. The Statute's Alternative Calculation Method for Grants of Publication Right

To make matters worse, in many instances where authors agree by contract to transfer rights in yet-to-be-created works, calculating the termination window will be more complicated still. Recall that the thirty-five-years-from-

⁵⁶ Gap in Termination Provisions; Inquiry, 75 Fed. Reg. 15,390, 15,391 (Mar. 29, 2010).

⁵⁷ *Id.*

⁵⁸ For a discussion of the difficulties an author might face in accessing information on a work's creation if it is kept in digital format, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 637-42 (2003); R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUS. L. REV. 287, 307-10 (2012).

⁵⁹ 17 U.S.C. § 302(a) (2012).

⁶⁰ *Id.* § 101 (defining "created").

execution date is only the default rule for when the termination window opens. If the author's grant covered the right of publication, then determining when the termination window opens requires an alternative calculation: the earlier of thirty-five years from the date of publication under the grant or forty years from the date of the grant's execution.⁶¹ As the legislative history explains, this "alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work."⁶²

This alternative calculation method requires measuring thirty-five years from the date of the work's publication and forty years from the date of the transfer's execution to determine which comes first. As an initial matter, a party who wants to terminate a grant will have to determine whether the alternative calculation method even applies to the grant at issue. The method applies only where the grant "covers the right of publication of the work."⁶³ "Publication" is defined by the statute primarily as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."⁶⁴ As the legislative history suggests, the alternative seems designed to address situations where the author signs a grant conveying to a publisher the right to publish the author's work, but where the writing, editing, revising, and other efforts needed to ready the work for publication take a substantial amount of time, so that several years might pass before the publisher is able to begin exploiting the transferred rights in the author's work. But what of the situation where the author grants the publisher the right to publish her work, and that work is ready for immediate publication?⁶⁵ Does the alternative method apply? The grant "covers the right of publication," and the statutory language does not contain any limitations.⁶⁶ The Second Circuit, however, recently held that the alternative method essentially applies only to grants of the right of *first* publication.⁶⁷ As a result,

⁶¹ *Id.* § 203(a)(3).

⁶² H.R. REP. NO. 94-1476, at 126 (1976).

⁶³ 17 U.S.C. § 203(a)(3).

⁶⁴ *Id.* § 101. The statute also defines the term to include "offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display," though it makes clear that a "public performance or display of a work does not of itself constitute publication." *Id.*

⁶⁵ This might happen where, for example, the work had previously been published by another publisher, but the author's grant of rights to that publisher ended, and the author re-granted the publication right to a new grantee.

⁶⁶ 17 U.S.C. § 203(a)(3).

⁶⁷ *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 33 (2d Cir. 2015). The Second Circuit's interpretation seems sensible, given the reasons Congress stated for adopting the alternative calculation. If the author's work is already in existence and ready for publication when the author grants the right to publish the work to a transferee, the transferee will not usually face any delay in exploiting the rights granted to her. In those cases, of course, the alternative calculation method may only make a minor difference in the timing of the

in the situation just described, the alternative method would not apply. Until the Second Circuit's interpretation becomes uniform (or uniformly rejected), parties who want to terminate will have to determine whether the grant in question covers the right of first publication or subsequent publication and then evaluate how a court reviewing the attempted termination will decide whether the alternative method applies.

In addition, it seems likely that many situations that require the alternative calculation method will involve contracts for works not yet created when the contract is signed. Under the view adopted in the Copyright Office "Gap Grant" rulemaking, then, the date of the grant's "execution" will not be the date the contract is signed, but rather the date on which the copyrighted work came into existence.

As a result, using the alternative calculation method will require a terminating party to determine both the precise date on which the work was created and the precise date on which the work was first published under the grant. For the former date, as discussed above, authors or their successors may well have difficulties determining the "date of creation" for a work created twenty or thirty years earlier.⁶⁸ And determining the publication date will not necessarily be easy either. If copyright in the work has been registered, the registration record should indicate the date of the work's first publication.⁶⁹ But if the work was not registered, the author (or the author's statutory successors) may not be in a good position to determine the precise date on which publication originally occurred two or three decades earlier, since the facts concerning publication are more likely in the publisher's control.

B. *Potential Reforms to Give Terminating Parties Clearer Notice of When Termination Can Occur*

As Section II.A shows, figuring out when termination can occur can be quite complicated. And if the author or other terminating party makes a mistake in

termination window, because in those circumstances the transferee will likely publish the work soon after it acquires the rights. As a result, thirty-five years from the date of publication will likely be relatively close to thirty-five years from the date of the grant's execution (and much earlier than forty years from the date of the grant's execution). But the alternative calculation method would mean that the terminating party must determine the publication date, rather than the grant's execution date, in order to properly calculate when the termination window opens.

⁶⁸ See *supra* Section II.A.2.c.

⁶⁹ The Copyright Act allows, but does not require, registration in the Copyright Office of claims of copyright. 17 U.S.C. § 408(a). If registration is made within five years of a work's first publication, then the registration certificate provides prima facie evidence of the facts stated in the certificate, which would include the publication date. *Id.* § 410(c). Because even prompt registration only provides prima facie evidentiary value, a terminating party who relies on a first publication date stated in registration records might still eventually find that using that stated publication date to calculate when the termination window opens might result in choosing an invalid termination date.

her calculation, she may end up not being able to effect termination. The statute requires termination to take place in the five-year window set out in § 203, and courts applying the parallel termination provision under § 304(c) have not been forgiving of terminating parties who have chosen an effective termination date outside of that window.⁷⁰ The challenges posed by the complexity of the current termination formalities raise a question. If we want to make it less daunting for authors or their successors to exercise their termination right, how could we reduce the obstacles that § 203's current timing provisions place in the way of a party who wants to effect a termination? This section suggests three possible statutory reforms.⁷¹

1. Measure by Year, Not by Date

One reform would decouple the timing of termination and notice from the precise date of events that occurred long ago. This would be a relatively simple improvement, at least if we think an author or her successor will find it easier to determine the *year* in which a triggering event happened, even if it is difficult or impossible to determine the precise *date* on which the event occurred. We could have the termination window open on January 1 of the thirty-fifth-anniversary year of the triggering event, and close on December 31 in the fortieth-anniversary year of the triggering event.⁷²

Revising the termination formalities in this way would put much less pressure on determinations of precise dates. If an author can determine that a transfer was executed at some point during 1990, then termination could occur any time between January 1, 2025 (because the thirty-fifth anniversary of the date of execution will occur on some date in 2025) and December 31, 2030 (because the fortieth anniversary of the date of execution will occur on some date in 2030).⁷³

⁷⁰ See, e.g., *Siegel v. Warner Bros. Entm't Inc.*, 542 F. Supp. 2d 1098, 1117-18 (C.D. Cal. 2008).

⁷¹ A fourth possibility is a more substantial reform that would allow termination at any time after the termination window opens, rather than allowing termination only during a five-year period. See Samuelson et al., *supra* note 14, at 1242. Under this approach, a terminating party that erred in choosing an effective date of termination could, once the error was discovered, simply serve a new termination notice with a new effective date.

⁷² This approach could perhaps be complemented with a grace period. For example, any notice served in good faith on or before January 31 could be deemed effective if it would have been timely if served on December 31 of the previous year, and any notice served in good faith on or after December 1 could be deemed effective if it would have been effective if served on January 1 of the following year.

⁷³ Depending on whether the anniversary date is included in calculating the notice window, notice could then be given any time between January 1, 2015 and either December 31, 2022 or January 1, 2023 if the author chooses the earliest possible termination date of January 1, 2025, and any time between December 31, 2020 and December 30 or December 31, 2028 if the author chooses the latest possible termination date of December 31, 2030.

This approach is consistent with the general approach to copyright terms taken by the 1976 Act, which provides that all terms of copyright run to the end of the calendar year in which they would otherwise expire.⁷⁴ Indeed, the adoption of this rule in the 1976 Act meant that, for copyright renewals between 1978 and 2005, the renewal period was no longer measured from the precise date on which copyright was originally secured, but from January 1 to December 31 of the final year of the copyright term.

This approach would, of course create a somewhat longer termination window for authors and their successors. By advancing the opening of the termination window to January 1 of the year in which it would now occur, and by delaying the closing of the window to December 31 of the year in which it would now occur, the author will have a total of six years, rather than five, in which to exercise the termination right. The history of the termination provisions, however, offers no reason to think that any particular significance attaches to a five-year termination window as opposed to a six-year window.⁷⁵

2. Allow Judicial Reformation

Another possible reform would allow for judicial reformation of termination notices that would otherwise be invalid. This approach would play out where a terminating party fulfills the statutory requirements to effect a termination, but the terminated grantee challenges the termination in court. The terminating party may have made a reasonable, good faith determination of when the termination window opens and closes, and thus have chosen an effective date within that window. But a court may nevertheless eventually rule that the terminating party erred in properly identifying, for example, the date of the execution of the grant, or the date of publication of the work. And by the time this judicial determination occurs, it may be too late for the terminating party to effectuate a termination within the proper window.⁷⁶

In such cases, given the statutory complexity and the terminating party's reasonable, good-faith efforts, the statute might provide that the court need not hold that the terminating party's notice is invalid and ineffective. Instead, the Copyright Act could give the court the power to reform the termination notice by correcting the effective date. To ensure that the terminated grantee has adequate notice of when the termination will be effective, the statute could require the court to make the termination effective two years after the date of

⁷⁴ 17 U.S.C. § 305.

⁷⁵ *Cf.* H.R. REP. NO. 94-1476, at 126 (1976). Of course, if this were a serious objection, the termination window could close on December 31 of the year in which the thirty-ninth anniversary of the triggering event occurs, maintaining the total length of the termination window at five years, rather than six.

⁷⁶ Even if a terminating party chooses a date early in the window she calculates, if she gives only two years advance notice, final judicial resolution of a challenge to the termination might easily happen at a time when the correct five-year termination window has already closed, or when it is already too late to give the required two-year advance notice before that window closes.

the final judgment reforming the termination notice. This would give the grantee as much notice as she is otherwise entitled to under the statute. Of course, given how long litigation over termination might drag on, it is possible that the reformed effective date in a judicially reformed notice might be after the closing of the statutory five-year termination window. The statute might nonetheless allow such reformation. The terminated grantee would still get to enjoy the granted rights for longer than the forty-year maximum period that the statute contemplates. And given the original notice with the incorrect effective date and the ensuing litigation, the grantee would already be well aware of the terminating party's intention to terminate the grant. There seems no good reason under those circumstances to bar the termination just because the terminating party, acting reasonably and in good faith, has incorrectly applied complicated statutory provisions to difficult-to-ascertain facts about events from two or three decades earlier.

3. Eliminate the Alternative Calculation Method for Grants of the Right of Publication

Another reform would simplify the statute by eliminating the provision that delays the opening of the termination window when the grant covers the right of publication. As noted above, the legislative history explains that “[t]his alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.”⁷⁷ This makes some sense where the author and the grantee sign a publishing agreement, and years pass before the author actually completes and delivers the manuscript to the publisher. While the author is creating the work, the publisher, through no fault of its own, obviously cannot exploit the rights it has contracted for. If the statute's goal is to give grantees a minimum of thirty-five years in which to exploit a licensed work, then the publisher in this case needs a longer pre-termination period than thirty-five years from the time the publishing agreement was signed.

Achieving this congressional objective, however, may not require the alternative calculation method, given the Copyright Office's interpretation, in the Gap Grant rulemaking, that a grant of rights in a work is not “executed” until the work comes into existence.⁷⁸ Under this view, if an author signed a publishing agreement for a yet-to-be-written book in 2010, and finished and delivered the manuscript to the publisher in 2015, the date on which the grant was executed will not be the 2010 signing of the contract, but the 2015 delivery of the manuscript. Under this interpretation of the basic termination provisions, the thirty-five year period will begin to run not in 2010, but in 2015. At that point, though, the publisher will have the manuscript in hand and can move forward with the publication process. There is no apparent need to start the termination window forty years after the grant is “executed” by

⁷⁷ H.R. REP. NO. 94-1476, at 126.

⁷⁸ Gap in Termination Provisions, 76 Fed. Reg. 32,316 (June 6, 2011).

delivery of the manuscript in order to assure the publisher of thirty-five years of enjoyment of the granted rights.⁷⁹

The statute should protect grantees against long delays between the signing of a grant of rights in a copyrighted work and the delivery of a copy of that work to the grantee. The Copyright Office's interpretation of when a grant is "executed" offers that protection. So does the alternative calculation method. But grantees do not need *both* of those protections, and having both makes the statute more complicated for parties who want to exercise termination. If the Office's interpretation is correct, then the alternative calculation method should be eliminated.

III. SERVICE OF NOTICE

A. *Complexities of the Current Provision*

Another aspect of the termination formalities that can present problems is the requirement that the terminating party serve a written advance notice of termination "upon the grantee or the grantee's successor in title."⁸⁰ As the following sections explain, a terminating party may find it difficult to satisfy this requirement. First, the statute is unclear as to whether service must be made on the original grantee, or on that grantee's successor in title, or both. Second, even if the terminating party identifies who must be served, she may have difficulty locating the grantee or successor in order to serve the termination notice.

1. Who Must Be Served: Grantee or Successor?

As an initial matter, the statute creates ambiguity by describing the parties to be served in the alternative.⁸¹ If the grantee has transferred to a successor the rights that the grantee received from the author in the original transfer, may the terminating party choose to serve either the grantee "or" the successor in title? Or in using the word "or" was Congress simply enumerating the possibilities, but intending that service should be made on the original grantee if no further transfer has occurred but on the successor in title if the grantee has made such a transfer?

At least one district court has interpreted the parallel notice provision in § 304(c) to require service on the successor in title, rather than the original grantee, if the rights at issue have passed from the grantee to a successor.⁸²

⁷⁹ Of course, the work might not be published immediately upon delivery by the author, but once the author has delivered the work to the publisher, it seems more fair to hold the publisher responsible for shortening the effective length of time that it can exploit the work before termination due to publishing delays.

⁸⁰ 17 U.S.C. § 203(a)(4) (2012).

⁸¹ *Id.*

⁸² *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 392 (S.D.N.Y. 1981); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 491 F. Supp. 1320, 1325 (S.D.N.Y. 1980).

And at least one circuit judge has expressed the view (in a concurring opinion) that “[t]he statute is sensibly read to mean that notice is to be served (a) on the grantee, if the grantee has retained all rights originally conveyed, (b) on the transferee, if the grantee has conveyed all rights to the transferee, or (c) if only some rights have been conveyed, on the grantee or the transferee (or both) depending upon which rights are sought to be terminated.”⁸³ But the question has yet to receive a definitive judicial answer, so the statute as currently written and interpreted does not give a terminating party clear notice as to the proper party on whom notice must be served to effectuate termination.

2. “Orphan” Grantees and Successors: Identifying and Locating the Proper Party to Serve

The difficulty determining if the statute allows a terminating party to choose whether to serve notice on either the grantee or a successor in title, or requires that service be made on one or the other (or both) without expressly stating which one, is largely a problem of unclear statutory drafting. But the service provision poses other problems for terminating parties who try to comply with it, and those problems arise not because of ambiguous statutory language, but because of the potential practical difficulties of complying with the statute’s substantive service requirement, even when that requirement is clearly understood or definitively interpreted. These potential difficulties will be obvious to anyone familiar with “orphan works” problems in copyright law generally.⁸⁴

If the grantee and the author (or the author’s statutory successors) have remained in contact, the service requirement may pose few obstacles. For example, authors (or surviving family members) who receive regular royalty checks from grantees will likely have little trouble locating the grantee in order to serve a copy of the termination notice. But in many instances, the requirement poses difficulties when the terminating party determines that she must serve the original grantee but cannot locate that grantee. This may not be uncommon in the termination context: when the time comes to serve a termination notice twenty-five or more years will have passed since the grant was made. Even when the terminating party is the author who made the

⁸³ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 634 n.8 (2d Cir. 1982) (Newman, J., concurring). Judge Newman’s implicit suggestion that a party could terminate only some of the rights covered in the original grant finds no support in the statute’s express language, which allows only termination of a “grant” and not termination of some subpart of a larger grant. 17 U.S.C. § 203(a). If the statute does not allow such “partial” termination, then whenever the original grantee has retained some of the rights she acquired from the author and conveyed some of those rights to a successor, the terminating party would seem to have to serve the termination notice on both the original grantee and her successor, not just on one or the other as Judge Newman suggests.

⁸⁴ For general background on the orphan works problem, see generally U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), <http://copyright.gov/orphan/orphan-report-full.pdf> [<https://perma.cc/W3UA-C64N>].

original grant, that author may well have lost contact with the grantee decades earlier (particularly if the grant does not require the grantee to make continuing payments to the author). Tracking down the grantee to effectuate service between twenty-five and thirty-eight years after the execution of the original grant may not be easy.

The potential difficulties are compounded when successors in title enter the picture. The statute appears to require the terminating party to identify—again, often more than two decades after the original grant—whether the rights originally granted have remained with the original grantee or have been passed to a successor in title.⁸⁵ In some instances, the original grantee may have notified the author of the grantee’s transfer of the granted rights to a successor; indeed, the contract between the author and the original grantee may require such notice. In other instances, though, the terminating party may have no information about subsequent transfers by the grantee. Identifying whether there is a “successor in title” to the rights originally granted, identifying who that successor is, and locating that successor in order to serve notice may often be difficult.

Consider the following example. In 1990, a freelance journalist assigns the copyright in an article to a corporation that publishes a small, local, independent, weekly newspaper. In 2000, after years of financial struggle, the newspaper goes out of business. Lacking any real assets, the newspaper simply shuts its doors, with no formal bankruptcy proceeding or other winding up of its affairs, and the corporation ceases to exist. Eventually, the journalist wants to terminate the 1990 grant to the newspaper in order to reclaim rights in the article and make it available again. The journalist can effect termination starting in 2025, and can serve notice as early as 2015.

But on whom should she serve the notice? The grantee, the publishing company, no longer exists. Has the journalist’s transfer to the publisher passed to a successor in title? No formal transfer was ever executed by the publisher, and no transfer occurred in bankruptcy. The corporate statutes of the publisher’s state of incorporation may make provision for the transfer by operation of law of the corporation’s assets upon its dissolution, and those provisions would likely cover assets such as the copyright in the journalist’s article.⁸⁶ But how easy will it be for the journalist to identify the relevant legal provisions and use them to identify the legal successor who now (perhaps unknowingly) holds the copyright in her article?

B. *Regulatory Implementation*

The problems identified here with the statute’s requirement to serve advance notice of termination may pose less of a burden on terminating parties than the timing problems identified in Part II because regulatory guidance is available.

⁸⁵ See 17 U.S.C. § 203(a)(4).

⁸⁶ See, e.g., *Gomba Music, Inc., v. Avant*, 62 F. Supp. 3d 632, 640 (E.D. Mich. 2014).

The Copyright Office has promulgated regulations that may assist terminating parties in complying with the statutory requirement to serve advance notice.⁸⁷

The regulations provide that if the terminating party makes “a reasonable investigation . . . as to the current ownership of the rights being terminated,”⁸⁸ then she can satisfy the statute’s service requirement in one of two ways. If the investigation gives her “no reason to believe that such rights have been transferred by the grantee to a successor in title,” then she should serve the grantee.⁸⁹ If, on the other hand, the investigation turns up “reason to believe that such rights have been transferred by the grantee to a particular successor in title,” then the terminating party should serve the successor.⁹⁰ In both cases, the regulations then allow the terminating party to satisfy the statutory service requirement by sending the notice by first-class mail to the last known address of the grantee or the particular successor in title, as revealed by a “reasonable investigation.”⁹¹

Assuming that these regulations are a valid exercise of the statutory power granted to the Copyright Office to “prescribe by regulation” requirements as to the “manner of service” with which a terminating party must comply,⁹² they appear to clarify the ambiguity discussed in Section III.A.1 of the statute’s requirement to serve notice upon “the grantee or the grantee’s successor in title.”⁹³ The terminating party can conduct a reasonable investigation, and the results of that reasonable investigation should determine whether service must be made on the grantee or on a successor in title.

The regulations also help solve the practical difficulties in locating grantees and successors in title many years after a grant is made. As long as the terminating party conducts a “reasonable investigation,” then the terminating party can serve the notice on the grantee or successor by first-class mail to the address that “is found to be the last known address” of that person.⁹⁴ The address may be quite old, and the grantee or successor may have long ago relocated so that they will never receive the termination notice at the last known address, but the terminating party, by complying with the regulation, will have satisfied the statutory service requirement.

The regulations also seem to solve complicated “orphan” situations such as those faced by the journalist in our example above, where the terminating party may find it hard not only to locate the proper party for service, but also to identify that party in the first place. In that example, there may well be reason to believe that the rights at issue have been transferred. As indicated above,

⁸⁷ 37 C.F.R. § 201.10(d)(2) (2015).

⁸⁸ *Id.*

⁸⁹ *Id.* § 201.10(d)(2)(i).

⁹⁰ *Id.* § 201.10(d)(2)(ii).

⁹¹ *Id.* § 201.10(d)(1).

⁹² 17 U.S.C. § 203(a)(4)(B) (2012).

⁹³ *Id.* § 203(a)(4).

⁹⁴ 37 C.F.R. § 201.10(d)(1).

state law may make some provision for the disposition of a corporation's assets when it ceases to exist.⁹⁵ So the rights the journalist originally granted to the publishing company may have been transferred, but that transfer seems to have occurred by operation of law, when the corporate grantee ceased to exist.⁹⁶ As a result, there may well be no reason to believe, as the regulation requires, that the rights "have been transferred *by the grantee*."⁹⁷ If that reading is correct, then service on the grantee would satisfy the statute's requirement.⁹⁸

Of course, service by first-class mail to the publishing company's last known address will be futile as a method of actually notifying the grantee or her successor of the upcoming termination. Since the company went out of business and ceased to exist at least fifteen years earlier, the mailed notice will not reach the grantee (and will most likely be returned to sender rather than reaching anyone who might be the grantee's successor). But this futile attempt at service will not cost the journalist much beyond the price of a first-class stamp, and will, under the Copyright Office's regulations, apparently satisfy the terminating party's statutory duty to serve advance notice of the termination. And given the potential difficulty of locating grantees, or identifying successors, many years after the original grant of rights took place, some mechanism seems necessary to enable the author or her successor to effectuate termination in the face of an otherwise cost-prohibitive (and potentially futile) search for the grantee or her successor.

IV. GIVING OTHERS NOTICE OF TERMINATIONS

Parts II and III have critiqued aspects of the statutory termination formalities that affect a party seeking to follow the statute's rules and effect a termination. But the formalities required to terminate a copyright grant implicate another

⁹⁵ See *supra* note 86 and accompanying text.

⁹⁶ This same gap in coverage might arise in the case of an individual, rather than corporate, grantee, in the case of a transfer by operation of intestacy law upon the grantee's death. While a transfer directed by a grantee's will might well qualify as a transfer "by the grantee," a transfer of a copyright by intestacy as part of the grantee's estate seems hard to describe as a transfer "by the grantee."

⁹⁷ 37 C.F.R. § 201.10(d)(2)(i) (emphasis added).

⁹⁸ If that reading is not correct, and the transfer of the rights that occurred when the corporate grantee ceased to exist does count as a transfer "by the grantee" under the regulations, then the journalist would need to identify the "particular successor in title" to whom the rights were transferred and serve that successor. *Id.* § 201.10(d)(2)(ii). Identifying that successor could well be quite burdensome. The regulations might be interpreted to open a gap into which terminating parties may fall. A reasonable investigation may give reason to believe that rights "have been transferred by the grantee to a successor in title," making 37 C.F.R. § 201.10(d)(2)(i) inapplicable, but not giving any reason to believe that rights "have been transferred by the grantee to a particular successor in title," making 37 C.F.R. § 201.10(d)(2)(ii) inapplicable as well. Under that interpretation, the regulations would offer no guidance on whether to serve the original grantee or the successor in title, and would not offer any direct assistance on how to locate and serve either party.

notice issue. If the terminating party correctly complies with these formalities, will her compliance give other parties adequate notice of the change in ownership of the rights covered by the terminated grant? The termination formalities include two mechanisms that provide such notice. First, as discussed in Part III, the statute requires that a termination notice be served on the grantee or her successor in title, which should ensure that the person who will shortly cease to own the rights that the author transferred to her will have notice that those rights will revert to the terminating party.⁹⁹ Second, the statute requires that the terminating party record a copy of the termination notice in the Copyright Office, which should provide notice of the change in ownership to the broader public.¹⁰⁰ This Part considers how well these aspects of the termination system achieve their notice goals.

A. *Notice to Grantees and Successors*

The termination formalities appear to do a relatively good job of providing notice to those parties most directly affected by a termination—the grantee whose rights are being terminated, or her successors in title. Requiring the terminating party to serve a termination notice on the party whose ownership is being terminated, and to do so well in advance of when the termination occurs, seems reasonably well designed to ensure that terminated grantees are aware that the rights they currently enjoy will soon revert.

The principal concerns here involve the practical implementation of the statutory requirement and echo the issues discussed in Part III. What if the terminating party cannot locate the grantee in order to serve the notice? As discussed above, the Copyright Office regulations allow service by first-class mail to the grantee's last known address discovered through reasonable investigation.¹⁰¹ If a reasonable investigation turns up only a very outdated address, then while mailing a notice to that address will satisfy the terminating party's statutory service requirement, it likely will not actually provide the grantee notice of the impending termination.

Similarly, what if the rights covered by the grant at issue have been transferred by the original grantee to a successor in title? Unless a reasonable investigation provides the terminating party with reason to believe that the grantee has transferred the rights, the terminating party will be able, under the Copyright Office regulations, to satisfy her service obligation by mailing the termination notice to the grantee, rather than to the successor who currently holds the rights and who will lose them when the termination becomes effective.¹⁰² And even if the terminating party has good contact information for the grantee so that the mailed notice actually reaches the grantee, the grantee may have no incentive to transmit the notice on to the successor in title. Once

⁹⁹ See 17 U.S.C. § 203(a)(4) (2012); see also *supra* Section III.A.

¹⁰⁰ 17 U.S.C. § 203(a)(4)(A).

¹⁰¹ See 37 C.F.R. § 201.10(d)(1).

¹⁰² See *id.*

again, while the terminating party will have satisfied the statutory requirement, the party who holds the rights that will soon revert will not get any actual notice of the coming termination.

The failure of the grantee or the successor in these instances to receive actual notice of the termination is less problematic than it might at first appear. The investigation and service obligations placed on the terminating party mean that a grantee or successor who wants to make sure that she receives actual notice of any possible termination has the means to do so. A successor in title can record the transfer or license she received from the original grantee in the Copyright Office pursuant to § 205.¹⁰³ Doing so will mean that, in conducting the reasonable investigation required by the regulations, the terminating party should uncover reason to believe that the original grantee has transferred rights to a particular successor in title. The regulations will then require the terminating party to serve notice on that successor rather than on the original grantee. Similarly, a grantee or successor in title who has relocated but who wants to make sure that a termination notice is served at her current address can record a change of address with the Copyright Office.¹⁰⁴ If she does so, then the last known address to which the terminating party will have to send the termination notice to satisfy the service obligation will be the grantee's current address, rather than an obsolete address at which she may no longer be receiving any mail.

Given the difficulties, discussed in Part III, that would otherwise face terminating parties in identifying and locating grantees and successors in title in order to comply with the statute's service requirement, it seems reasonable to expect grantees or successors who want to make sure they receive actual notice of upcoming terminations to place on the record the facts that the terminating party would need in order to serve a termination notice on them.¹⁰⁵ Their failure to do so should not prevent the author or her statutory successors from exercising the termination right.

¹⁰³ 17 U.S.C. § 205. Alternatively (or additionally), the successor in title could, in the agreement in which the original grantee conveys the rights at issue to the successor, require that the grantee notify the successor if the grantee receives any termination notice regarding the rights conveyed. This approach, though, would presumably only give the successor a contract claim against the grantee if the grantee fails to live up to the obligation to notify the successor. And this approach would be less useful where the rights at issue change hands multiple times.

¹⁰⁴ A statement regarding a change of address is a document pertaining to a copyright that can be recorded in the Copyright Office. 37 C.F.R. § 201.4; U.S. COPYRIGHT OFFICE, *supra* note 32, § 2309.2.

¹⁰⁵ Even if the grantee or successor fails to do so and actual notice of the termination never reaches her, the grantee or successor can still, like any other member of the public, consult the records of the Copyright Office in order to determine whether a termination has been made, since the statute requires both service on the grantee or successor *and* recordation of the notice in the Copyright Office. 17 U.S.C. § 203(a)(4)(A).

B. *Notice to the Public: Recordation*

1. Benefits of Recordation

In many ways, the termination formalities also provide useful notice to the public. In particular, the requirement that the terminating party record a copy of the termination notice with the Copyright Office will help those who are trying to identify the owner of copyright rights in the work.¹⁰⁶ When the Copyright Office properly indexes the termination notice in its database, a search of the Office's records for the title of the work or the name of the author will turn up the existence of the termination notice, and the recorded notice will identify the terminating party or parties and the effective date on which they recapture ownership of the terminated rights.

This addition to the information in the Copyright Office's records obviously improves the accuracy of ownership information and helps avoid misleading those who consult those records. If an author has registered her work soon after creating it, and if a party to whom the author transfers her work records the transfer, then someone who searches in the Copyright Office for information about the owner of the work will discover the recorded transfer, which will indicate that the transferee is the current owner. If a termination has occurred, that indication will be wrong. Requiring recordation of the termination notice ensures that the change of ownership will be reflected in the public record.

The recording requirement also contributes to the completeness of the public record because in many instances, a termination notice under § 203 may be the first and only item in the Copyright Office's records for a particular work. Registration of a claim of copyright under the 1976 Act is entirely optional, as is the recordation of any transfer of ownership (or nonexclusive license).¹⁰⁷ If the copyright owner never registers the work, and if no transfers of the work are ever recorded, then only the recordation of the termination notice will put basic information about the work (including the title of the work, the name of the author, whether the author is still living, whether the work is a joint work, and the claim that the work was not made for hire¹⁰⁸) on the record.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* §§ 205, 408(a).

¹⁰⁸ The Copyright Office regulations require the notice to contain the work's title, the author's name, and the name of the authors who executed the grant if the work is a joint work. 37 C.F.R. § 201.10(b)(2)(iv). The regulations require that the notice be signed by the terminating author, if the author is alive, or by those statutorily entitled to exercise the author's termination interest if the author is dead. *Id.* § 201.10(c)(3). Thus, the notice will disclose whether the author is alive at the time the notice is signed. And since grants of works made for hire are not terminable under § 203, the very act of serving a termination notice under that section is an assertion that the work involved was not made for hire. *See* 17 U.S.C. § 203(a).

2. Deficiencies of Recordation

a. *Contact Information for Terminating Parties*

There are, however, a number of ways in which the recording requirement does not do a good job of providing notice to the public. Perhaps most notably, the Copyright Office regulations prescribing the contents of the termination notice do not expressly require that the notice include any contact information for the terminating party.¹⁰⁹ While many terminating parties may include this information in their notice, they are not required to do so. As a result, a termination notice may be recorded that allows someone searching the Copyright Office records to *identify* the owner of the rights recaptured by termination, but that offers no help at all in *locating* that owner in order to negotiate permission to use the work.

b. *Identifying the Recaptured Rights*

The recorded termination notice may also fail to provide someone searching the Copyright Office records with much assistance in identifying which rights were included in the terminated grant and have been recaptured by the terminating party. The regulations require only that the notice include a “brief statement reasonably identifying the grant to which the notice of termination applies.”¹¹⁰ A statement identifying the grant, though, may provide little or no information about which rights were conveyed by the grant and have been recaptured through termination. For example, the statement “Agreement between Author and Media Corp., dated September 2, 1987,” would seem to satisfy the regulation’s requirement, and would presumably be sufficient for the terminating party and the grantee to identify the grant to which the notice applies. But for someone who retrieves a recorded termination notice from the Copyright Office, that statement offers absolutely no indication of which rights once again belong to the terminating party after the termination occurs. Even somewhat more descriptive statements, such as “Book Publishing Agreement” will often be of little assistance in identifying the relevant rights. Did the author convey to the book publisher in that agreement translation rights? Audiobook rights? Film rights? The notice may inform the researcher that *some* copyright rights have reverted to the terminating party, but the researcher will probably need to contact the terminating party (perhaps without the

¹⁰⁹ See 37 C.F.R. § 201.10(b)(2)(i)-(vii) (listing the items which must be clearly identified in a termination notice under § 203). The Copyright Office does not provide any form for a terminating party to use to record a termination notice, and expressly instructs against using its Document Cover Sheet, which at least includes space for the contact information for the person to whom the document being recorded should be returned once the Copyright Office has imaged the document. *Form DCS (Document Cover Sheet)*, U.S. COPYRIGHT OFFICE (Nov. 2014), <http://copyright.gov/forms/formdcs.pdf> [<https://perma.cc/ZE5L-QP4S>].

¹¹⁰ 37 C.F.R. § 201.10(b)(2)(v).

assistance of any useful contact information in the notice) in order to determine exactly *which* rights reverted.

3. Potential Reforms

Perhaps the easiest way to reform the recordation requirement to give the public better notice of the change of ownership that occurs through termination would be to require that terminating parties include their current contact information in the termination notice. This would at least offer those who search the Copyright Office records some assistance in locating the current owner of the relevant copyright rights in order to request permission.

However, requiring contact information in the termination notice will not eliminate all the difficulties that a party who wants to use the work will face in contacting the current owner of rights in a work after a termination. After all, the contact information listed in the termination notice will only reflect the information as of the date it is filed. As time passes after the notice is recorded, that information may well become obsolete and therefore unhelpful in contacting the owners of the rights recaptured through termination. The terminating party would be under no obligation to update the information on file when that information changes, so the static snapshot provided at the time of termination may or may not remain accurate. And because a terminating party can serve notice up to ten years before the date on which the termination takes effect, contact information in the notice recorded in the Copyright Office might no longer be accurate even on the date when the termination actually occurs.¹¹¹

This problem, though, is not unique to termination notices, but is endemic to the records available in the Copyright Office. None of the formalities regarding copyright ownership—registration, recordation of transfers, etc.—require authors or copyright owners who change their contact information to notify the Copyright Office and update the records. Requiring terminating parties to include their contact information in the termination notice would at least refresh the public record of ownership for the works involved, even if only at the time that the termination notice is served. In many instances, for varying lengths of time, the recorded contact information will be better than nothing. And without requiring the inclusion of contact information, “nothing” is precisely what might be available in the record.

The lack of good information in a termination notice regarding the particular rights covered by the termination is a more difficult problem to address. The most complete solution would be to require the terminating party to attach to the termination notice a copy of the grant being terminated. That copy could be recorded so that anyone interested in identifying which rights were covered by the terminated grant could review the grant itself. This approach, however, would likely be particularly burdensome for terminating parties, who may not have a copy of an agreement signed two or three decades earlier (and by

¹¹¹ See 17 U.S.C. § 203(a)(4)(A).

someone else when the terminating party is the author's successor). And in some instances, of course, there will be no physical copy of the grant being terminated, because the original grant was made orally, or was implied from the conduct of the parties. Requiring a terminating party to deposit a copy of the grant being terminated therefore seems likely simply to add an additional layer of complexity to the already complex termination provisions and to make termination even more difficult than it already is.

The regulations might provide that the notice, in addition to including the brief statement reasonably identifying the grant being terminated (as currently required), should also include a brief description of the rights covered by the grant, to the extent practicable and to the extent that information about the rights covered is available to the terminating party. While in many instances the terminating party may not be a copyright expert and therefore may not offer a very precise description of the rights involved, in other cases—particularly where the terminating party has a copy of the grant being terminated and can perhaps simply copy the language describing the rights conveyed—including this description could well assist those who consult the Copyright Office's records in identifying which rights have reverted to the terminating party. Whatever information would be included in a termination notice in response to this requirement could potentially improve the public record regarding copyright ownership.

CONCLUSION

The Copyright Act's termination provisions impose relatively complex formalities on those seeking to exercise their termination right. Those formalities raise two different notice issues. First, do the formalities provide adequate notice of a termination to interested parties? Second, do the legal provisions embodying the formalities provide someone who wishes to exercise the termination right clear notice of how to actually do so?

The answer to the first question is that the termination formalities do a relatively good job of providing notice, both to a party being terminated and to the public at large, that a termination is taking place. Requiring the terminating party to serve advance written notice on the grantee whose ownership of copyright rights is being terminated (or her successor) in most instances ensures that the party being terminated will know of the termination. And requiring the terminating party to record a copy of the termination notice in the Copyright Office gives the public notice of the termination and the resulting change in ownership of copyright rights. The public notice function of the recordation formality could be improved. In particular, the recorded termination notice could be required to include contact information for the terminating party, who could also be encouraged to provide more detailed information than is currently required about the particular right or rights covered by the termination. But overall, the termination formalities provide notice of a termination to affected parties relatively well.

However, a number of the statutory provisions imposing termination formalities make it difficult for those who wish to effect a termination to understand how to comply with those required formalities. Some of the difficulties arise from statutory drafting (and accompanying legislative history) that is less precise than one would wish. In particular, the statute makes the date that marks “the end of thirty-five years from the date of execution of the grant” being terminated essential to correctly effecting a termination, but provides poor guidance on how to determine that date.¹¹² Similarly, the statutory language requires that a terminating party serve advance notice of the termination “upon the grantee or the grantee’s successor in title”¹¹³ but does not make clear how to determine whether service must be made upon the grantee or upon the successor.

Other difficulties arise because the statute ties the required formalities to the date of an event that can be difficult to determine—the “date of execution of the grant” being terminated.¹¹⁴ The statute does not define “execution” and the term is somewhat ambiguous. For example, is a grant of copyright rights in a yet-to-be-created work “executed” on the date the writing embodying the grant is signed? Or is that grant “executed” only when the work is created and the copyright rights that are the subject of the grant come into existence?

Still more difficulties stem from the length of time that passes between when the events that trigger the availability of termination occur and when the termination formalities must be completed. The five-year window in which a termination can be effected does not open until thirty-five years after the “date of execution of the grant” being terminated. To properly give the statutorily required advance notice, the terminating party will often need to determine the date when a grant was executed more than two or three decades earlier. If the grant is unwritten, or written but undated, determining the exact date of execution may be difficult. Similarly, while the statute requires the terminating party to serve notice on the original grantee (or her successor), the last-known address for that person may be two or three decades out of date and thus offer little help in finding the person who must be served today.

Some of these statutory difficulties can be eased by regulations promulgated pursuant to the statute. Indeed, the Copyright Office regulations offer some assistance to a terminating party who has difficulty locating the grantee (or successor) on whom notice must be served.¹¹⁵ But the Copyright Office’s current regulatory authority under the termination provisions is limited, and extends only to prescribing requirements for the “form, content, and manner of service” of the advance notice required to effect termination.¹¹⁶ Relying on regulations to address other difficulties, particularly those related to the timing

¹¹² *Id.* § 203(a)(3).

¹¹³ *Id.* § 203(a)(4).

¹¹⁴ *Id.* § 203(a)(3).

¹¹⁵ 37 C.F.R. § 201.10(d).

¹¹⁶ 17 U.S.C. § 203(a)(4)(B).

of termination, would likely require amending the Copyright Act to give the Office more authority—for example, to prescribe the method or methods for calculating the various time periods that the statute makes essential to completing the termination formalities.

Indeed, efficiently ameliorating most of the difficulties presented by the current termination formalities would likely require revising the statute to give terminating parties clearer notice of what is required. Congress could, as just suggested, give the Copyright Office more regulatory authority over implementation of the termination provisions. Or it could rewrite the statute itself to make the required formalities clearer by, for example, defining what constitutes the “execution” of a grant that triggers the timing of termination formalities. It could tie that timing less closely to events that occurred decades earlier, perhaps by tying termination formalities to the year in which a grant was executed (rather than to a particular date in that year), or perhaps by allowing courts the flexibility to give effect to attempted terminations that reasonably but incorrectly identify the date of the triggering event.

Ultimately, if Congress does not clarify the statutory language governing termination formalities, courts will likely do so by adopting definitive interpretations of the existing statutory language. That process, however, could take many years—particularly if different circuit courts interpret the requirements differently—and would impose the cost of obtaining clarity principally on the particular parties who end up litigating any of these issues. In the meantime, the lack of clear notice of how to comply with the statutory formalities needed to effect termination will make termination more difficult, costly, and uncertain for the intended beneficiaries of the statute’s termination regime.