The Little Law that Could (and Probably Will):
Section 203 Copyright Recapture Terminations in America

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Abstract

A little known provision in U.S. law may soon be causing considerable disruption for industries that rely on copyright-protected works of authorship for revenue generation, including the arts and entertainment industries. That provision, a part of the U.S. Copyright Act of 1976 (more specifically, 17 U.S.C. § 203), provides that authors have the right to terminate transfers and reclaim ownership of their works of authorship during a five-year window of time starting on the 35th anniversary of the execution of any license or conveyance. As such, it is a right that could potentially leave record labels, book publishers and movie studios with a steadily eroding ownership interest in their most valuable moneymaking assets. Some journalists and researchers have said that the number of authors who have recorded recapture termination notices to date is more than 10,000. However, recent research indicates that the number is in the low hundreds rather than the thousands. This article focuses on: (1) a premise that the number of Section 203 recapture termination notices recorded with the U.S. Copyright Office to date is quantitatively small, as compared to the potential number that ***could*** have been recorded by now; (2) the proposition that, since it has been over 12 years since the first opportunity anyone had to record such a notice, there should have been more activity in this area by now; (3) a discussion of several possible reasons why we have not seen more termination recapture activity; and (4) a view of the future, and an analysis as to whether recapture termination activity will increase and why. Authors of all types, the business people who represent them and the educators who are teaching the next generation of both groups should all take notice of the law and the potential benefit it provides to authors. The recapture termination right lasts only for a limited time – a window of five years on any given work of authorship. This means that each day starting with January 1, 2018 (the 40 year anniversary of the effective date of the Copyright Act of 1976), the window will shut on another group of works for the authors thereof, whose inalienable right to recapture termination will be lost forever.

Introduction

A little known provision in U.S. law may soon be causing considerable disruption for industries that rely on copyright-protected works of authorship for revenue generation, including the arts and entertainment industries. That provision, a part of the U.S. Copyright Act of 1976 (more specifically, 17 U.S.C. § 203), provides that authors have the right to terminate transfers and reclaim ownership of their works of authorship during a five-year window of time starting on the 35th anniversary of the execution of any license or conveyance.

Historically, some categories of authors in the arts have typically never transferred their rights permanently or for long terms. For example, playwrights would typically own their intellectual property rights for their entire duration, and only license them on a user-by-user basis. For many other categories of arts authors, though, it has historically been customary to execute either long-term license or outright transfers of ownership. For example, songwriters would historically have transferred all or part ownership of their songs to a music publisher; musicians would typically have transferred all ownership of their sound recordings to a record label; book authors would typically have transferred all ownership of their manuscripts to a book publisher; all authors involved in the creation of a motion picture or television production would typically have transferred all ownership of their audiovisual works to a studio or producer; etc. Because of this

phenomenon – entire categories of arts authors who typically would have signed documents purporting to transfer intellectual property rights, either permanently or for very long terms – Section 203 presents a right that could potentially leave music publishers, record labels, book publishers, movie and television studios, and the like with a steadily eroding ownership interest in their most valuable moneymaking assets.

When the Copyright Act of 1976 was enacted, Section 203 granted the recapture termination right to all authors. As stated in the preceding paragraph, for many authors, it has real relevance, because permanent or long-term transfers can be terminated, and the rights recaptured. It has now been more than 35 years since the law was enacted (more than 40 years, in fact), and Section 203 is now vesting in authors the ability to regain control of their works of authorship on a daily basis. Section 203 applies to "[works of authorship as to which] the…grant of a transfer or license of copyright…[was] executed by the author on or after January 1, 1978..." (Copyright Act of 1976). In relevant essence, it provides that: (1) authors have an ***inalienable*** right to terminate transfers of ownership, effective as of a date they specify, within a five-year window from the 35-year anniversary to the 40-year anniversary of the date upon which license or conveyance was signed; and (2) an author seeking to exercise the right must both serve (on the current holder of the copyright interest at issue) and record (with the U.S. Copyright Office) a notice of recapture termination not less than two (2) nor more than ten (10) years prior to the specified recapture date. (Copyright Act of 1976). When one compares the time periods provided for in the statute with the calendar, one calculates that: (A) the first possible recapture termination date was January 1, 2013; and (B) that the first possible date an author seeking to recapture could have served and recorded a recapture termination notice was January 1, 2003. Thus, we are now more than 12 years into the window in which Section 203 recapture termination notices could have been served/recorded.

While some journalists and researchers have said that the number of authors who have to date recorded recapture termination notices is more than 10,000 (See, e.g., Patrick Soon and Rebecca Bellow, *Prince and the Copyright Revolution (Part Two)*), independent research conducted by the author indicates that the number is instead in the low hundreds (i.e., an average less than two authors per month). That much lower figure is consistent with other relevant research as well. (Johnson, 2013).

In addition to the relative dearth of recapture termination notice activity, there is also scant scholarly and journalistic discussion of it. While there is much scholarly research and publication regarding the fact that the Section 203 recapture termination right exists, the ambiguities and glitches that Congress' drafting left in the law and the many potential pitfalls that exist for authors seeking to exercise their recapture termination right, there is no apparent scholarly research discussing the volume of activity and the potential reasons why there has been so relatively little. The amount of journalistic coverage discussing the recapture termination right is also small, and is limited to a handful of periodical articles and blog sites that occasionally post regarding the topic.

This article does not again address the issues of the existence of the right, the glitches or the potential pitfalls. Rather, this article focuses on: (1) a premise that the number of Section 203 recapture termination notices recorded with the U.S. Copyright Office to date is quantitatively

small, as compared to the potential number that ***could*** have been recorded by now; (2) the proposition that, since it has been over 12 years since the first opportunity anyone had to record such a notice, there should have been more activity in this area by now; (3) a discussion of several possible reasons why we have not seen more termination recapture activity; and (4) a view of the future, and an analysis as to whether recapture termination activity will increase and why.

Authors of all types, the business people who represent them and the educators who are teaching the next generation of both groups should all take notice of the law and the potential benefit it provides to authors. The recapture termination right lasts only for a limited time – a window of five years on any given work of authorship. This means that, each day beginning on January 1, 2018 (the 40 year anniversary of the effective date of the Copyright Act of 1976), another group of authors will forever lose their inalienable right to recapture termination.

Research Methodology

- **Methodology: The Number of Termination Notices Recorded**

The research methodology used to ascertain that only a few hundred individual artists have to date recorded notices of recapture termination was simple. A search was conducted of the U.S. Copyright Office database for all records that contain the words: (1) "203" and "termination"; (2) "203" and "terminate"; or (3) "203" and "terminat".[1] Those results were then configured into spreadsheet format, and then manipulated to show multiple requests filed by individual authors, revealing the number of ***authors*** who have recorded notices (as differentiated from the number of ***notices*** recorded).

One potential challenge to the research methodology might be that the U.S. Copyright Office probably has a backlog of recapture termination notices submitted but not yet formally recorded and, therefore, not appearing in the publicly available database. Surely, there is some truth to the "backlog" contention, as the U.S. Copyright Office itself has indicated that its manual processing system has resulted in a database that is not fully complete. (Rohter, 2011). On the positive side, some insiders indicate that more staff has recently been hired, and that that staff will be dedicated solely to processing the backlog. (L. Rosario, personal communication, May 7, 2015).

Another potential challenge to the research might be that there exists a body of notices that have been served but not yet submitted to the U.S. Copyright Office for recordation, since recordation isn't required until the effective date of the recapture termination notice. This makes some logical sense, and it is apparent that some authors are currently in a process of serving iterative

[1] Note that neither Congress nor the U.S. Copyright Office has promulgated a fill-in-the-blank form document for effectuating a recapture termination notice. Rather, each author is left to his/her own devices, which suggests that all or nearly all notices recorded would have been drafted in narrative form in Microsoft Word and contained a reference to the operative statute (17 U.S.C. § 203) and some form of the verb "terminate."

notices due to objections raised by the holders, and that those authors are waiting to record until they are sure they are recording the final or "right" one. (B. McBride, personal communication, April 24, 2015; Davis, 2012).

Finally, another potential challenge to the research might be that the methodology outlined above was faulty in the search terms used. That contention does not logically hold, since one must reasonably conclude that virtually all notices recorded would contain a reference to both the operative statute (17 U.S.C. § ***203***) and some form of the verb "terminate."

Thus, even if one adds a liberal 100% increase factor to account for a U.S. Copyright Office backlog ***and*** another liberal 100% increase for recapture termination notices served but not yet submitted for recordation, the total number of authors having recorded recapture termination notices is still far below 1,000 (indeed, it's below 900). This author contends that fewer than 900 notices for 12 years' worth of works of authorship is ***still*** so low as to be accurately labeled "anemic."

- **Methodology: The Amount of Scholarly Research and Press Coverage**

The methodology used in ascertaining the amount of scholarly research and press coverage was generic online research (e.g., Google®, Westlaw®, etc.).

- **Methodology: The Potential Reasons for a Relative Dearth of Termination Recapture Activity to Date, and Whether There will be an Increase**

In 2015, the author conducted telephone and in-person interviews with (in alphabetical order) activists, authors, lawyers, musicologists, scholars and termination consultants. Each interview subject was provided with a draft of the Introduction to this article, and then interviewed with the questions listed in Appendix A as a starting point. Each author interviewed is currently in a position to exercise termination recapture as to some of their most valuable works of authorship.

The Current State of Affairs

As mentioned above, more than 12 years have elapsed since the first Section 203 recapture termination notices could have been served and recorded. This is ample time for a significant number of authors to have taken action to terminate and recapture their rights. Since Section 203 provides that any recapture termination notice must be recorded with the U.S. Copyright Office as a condition to its taking effect (Copyright Act of 1976), and since the U.S. Copyright Office provides a database, equipped with search functionality, of all of its records (http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First), any recapture termination that has been recorded is publicly visible. Yet, as of mid-2015, fewer than 300 authors (of all disciplines, be they songwriters, book authors, recording artists, etc.) have recorded recapture termination notices. It is worth noting, however, that many of those authors

have recorded multiple notices, for multiple works, so that the number of ***notices*** is several times higher than the number of ***authors***. Further, most press coverage to date has been limited to recapture termination notices recorded by or relating to the works of a handful of high-profile music industry authors such as Tom Petty, Charlie Daniels and The Village People.

Potential Reasons for Anemic Activity to Date

Given that there has been a rather small number of Section 203 recapture termination notices recorded with the U.S. Copyright Office relative to the number of works of authorship that have become eligible for the recapture termination right to date, and that it has been over 12 years since the first opportunity anyone had to record such a notice, the question arises: Why has the recapture termination activity to date been so anemic? Several possible answers to that question exist.

- **Reason One: Authors Lack Knowledge and Understanding of the Available Right**

One valid and impactful reason for the low volume of copyright termination recapture notices is that authors don't know that the recapture termination right even exists, let alone understand what those rights could mean for them and/or how to exercise the right. This is in keeping with a widely accepted economic explanation described by Bebchuk (1984), that whether a party will enforce their legal rights is influenced by the fact that parties may have different information about the likely outcome of a looming dispute, and that a party who is not savvy or knowledgeable (such as an artist, here) may inaccurately assess their rights. (Bebchuk, 1984). Hylton (1993) tested this idea of information imbalance and said that that plaintiffs in litigation are at an inherent information disadvantage as to their rights. (Hylton, 1993). It would then follow that an artist would arguably be at a disadvantage where intellectual property rights are concerned.

Congress recognized the information disadvantage problem when it created the termination recapture right of Section 203. Referring to Congress' intent, Loren (2010) states: "Thus, it was [an] information-deficit-driven valuation problem…that led Congress to create [the termination recapture right]." (Loren, 2010).

In contradiction to the "lack of knowledge/understanding" notion is the fact that, by some accounts, both authors and the current holders of the copyrights in and to those authors' works (the latter, collectively, the "Establishment") began seeking advice on the Section 203 recapture termination issue as early as the 1990s. (E. J. Schwartz, personal communication, April 23, 2015). Indeed, Rick Carnes of the Songwriters Guild of America has said he "…had the date circled in red [on his calendar] for 35 years…." (Rohter, 2011).

However, such prescience is the exception rather than the rule. Artists of all types, and those who regularly work with them, typically will attest to a lack of business sophistication in the "artist" demographic, particularly among artists who, creatively brilliant as they may be, have had little commercial experience and/or success. Phil Soussan, who has written and recorded with several high profile artists, including Ozzy Osbourne, Billy Idol, Vince Neil, Johnny Hallyday and John Waite for more than 30 years says "[i]ntellectual property rights is one of the least informed areas in the music business." (P. Soussan, personal communication, January 11, 2016). Joe Lynn Turner, a songwriter and vocalist whose most well-known period was with the bands Rainbow, Yngwie Malmsteen and Deep Purple between 1981 and 1990, echoes this sentiment, opining that "[n]ot all artists are as astute with the business end as perhaps they should be, and many have neither heard about nor investigated this right." (J. L. Turner, personal communication, January 4, 2016). Bob Donnelly, a prominent New York business lawyer with the firm Lommen Abdo, which has sent numerous notices of recapture termination for compositions and sound recordings in the music industry, adds "[d]on't forget that the right to recapture is today often in the hands of the elderly artists or the heirs of deceased artists. If you assume that in 1976 a typical artist was 30 years old this means that artist would now be 70. I think it's reasonable to assume that many artists in this age category are no longer paying close attention…and that heirs of deceased artists are unaware of the possibility of recapture since they had little knowledge or interest in this subject to begin with." (B. Donnelly, personal communication, January 5, 2016).

Many authors are simply more interested in creating art than they are in understanding basic intellectual property law, let alone a little known provision that even many lawyers, managers, business managers, academics and journalists ***all*** seem to be largely overlooking.

Thus, it seems as though one valid and impactful possible reason for the current state of affairs is that authors lack enough knowledge that the recapture termination right even exists, let alone an understanding of what it could mean for them and/or how to avail themselves of it.

- **Reason Two: Even Authors Who Have Knowledge and Understanding of the Available Right have Procrastinated**

Another possible reason for a lack of meaningful recapture termination activity is that authors – even those who have knowledge that the recapture termination right exists ***and*** an understanding of what it could mean for them and how they can avail themselves of it – have procrastinated. (B. McBride, personal communication, April 24, 2015).

Studies have found that procrastination is a common behavior trait among creative types (a negative relationship between creative behavior and conscientiousness). (King, McKee Walker, & Broyles, 1996). One study found this relationship among persons with high creative ability.

(Wegner, 1994). Another study found that procrastination is even a functional aspect to creativity because it may serve to incubate ideas. (Wolfradt & Pretz, 2001). While in some professions procrastination may have serious negative consequences (e.g., an accountant who fails to file tax returns by the deadline), in creative professions it may be a part of the very essence of that creativity.

Studies aside, those who work regularly with authors and artists of all types typically will attest to a certain proclivity to procrastination in that group, and that the oft-true stereotype can apply even to members of the demographic who ***have*** had commercial experience and success. Indeed, all one needs to do is enter the phrase "do artists procrastinate?" into a search engine to receive results that show (regardless of whether the stereotype is true) there is much discussion of this topic, as well as much "self-help" advice for artists who suffer from the affliction!

Artists themselves recognize that procrastination is a common artist personality trait. Greg D'Angelo was a founding member of Anthrax and White Lion (both bands that achieved notable success during the 1980s) and has also written and recorded with numerous other name-brand acts whose termination recapture rights are now coming ripe, including Zakk Wylde and Stephen Pearcy. His own observation is that "while I know a lot of authors who are completely 'on the ball,' I also know a number who are in a constant state of distraction and procrastination – who act like they could be diagnosed with ADD." (G. D'Angelo, personal communication, January 8, 2016).

Thus, it seems as though another valid potential reason for the current state of affairs is that even authors who have knowledge that the recapture termination right exists and an understanding of what it could mean for them and how to avail themselves of it, have procrastinated.

- **Reason Three: Authors are Afraid and/or Intimidated**

One more possible reason why authors have seemingly not been active and diligent in recapturing – even authors who have knowledge and understanding of the right and are not prone to procrastination – is that they fear exercising their rights will have a "blackball" effect or are otherwise intimidated by the sheer largesse of the industries that collectively represent the Establishment.

In a study involving litigation imbalance between parties, Bender (1989) notes that corporate defendants in litigation are usually highly organized and wealthy, as opposed to individual plaintiffs, who have fewer resources at their disposal. The reason for this is that corporations often have in house counsel and other experts that can share information within their corporate network. (Bender, 1989). Further, Reich (2010) notes that large corporate defendants (such as a record label) are able to "pay once and then reuse much of the same research, memoranda, and

experts when there are common questions between claims. This allows the defendant to spread its litigation costs across multiple lawsuits." (Reich, 2010). As such, an individual author will likely be intimidated by an Establishment defendant.

According to Darling (2012, p. 5120), "[i]n many markets, the seller often has better information about the true worth of the good than the buyer. In the case of exclusive rights, it is likely to be the other way around. Publishing firms that employ teams of experts and have years of experience and know-how in distributing and marketing artistic works will generally have far better knowledge of the probabilities that a certain work will be successful enough to achieve distribution over future media, and of the expected revenues. Indeed, it has been argued that one of the reasons that publishing firms exist is that they offer the asset of superior knowledge of the industry and thus can function as gatekeepers."

At the risk of relying too much in this article on the stereotype of the "artist," here too one might credibly make the point that the typical individual author is likely to have at least some fear of the likes of, for example, Universal Music, Random House or Paramount Studios. In other words, the typical individual author is likely to have at least some fear of the Establishment. This fear can be greater in some genres of authorship and/or geographic areas. For example, in country music in general and Nashville in particular, many authors who have or will have the recapture termination right are or will be reluctant to exercise it due to the "good old boy" network that operates in Nashville or because of a sentiment along the lines of "[t]hey were so nice to me…." (B. McBride, personal communication, April 24, 2015). In other words, many authors simply may be hesitant to rock the proverbial boat.

Musicians don't necessarily agree. According to Greg D'Angelo, "I think on this point, I would hope the artist would skew towards being more daring as they get older, and, since artists who have this right are in fact older they probably wouldn't be so intimidated." (G. D'Angelo, personal communication, January 8, 2016). Joe Lynn Turner, himself 53 years of age, holds a somewhat different view: "I ***do*** try to avoid bad blood, and I certainly don't want to bite off my nose to spite my face. You never know whether you're ever going to have to go back across that bridge." (J. L. Turner, personal communication, January 4, 2016).

Potentially adding to the fear and/or intimidation factor is the fact that, under Section 203, once the author serves his/her notice of recapture termination, the current holder of the rights (as against whom the recapture termination would have effect) has an exclusive negotiation right for the copyright at issue, that lasts until the recapture takes effect. (Copyright Act of 1976). While that exclusive right (which results in figuratively tied author hands, at least to ***some*** extent and for ***some*** period of time) might be intimidating enough on its own, some authors may additionally be misinterpreting it as giving the current copyright holder a greater entitlement than actually exists. Again, a lack of understanding that contributes to a failure to recapture.

It seems, then, that another valid reason for the lack of a meaningful volume of recapture terminations could be that many authors are fearful and/or intimidated.

- **Reason Four: Some Establishment Members have Proactively Reached out to Renegotiate, Preempting Notice of Recapture Termination**

Hand in hand with the psychological underpinnings associated with feelings of fear or intimidation is a somewhat opposite mentality that some speculate is at play within the Establishment, namely that the Establishment is reaching out proactively to authors, *before receiving a notice of recapture termination*, to offer a renegotiated deal. (D. Fagundes, personal communication, June 25, 2015). The theoretical purpose of such behavior is to garner the psychological advantage of having reached out with a friendly olive branch in the form of proposed better terms.

According to Huang and Wu (1992), although financial considerations are important in determining whether a potential dispute is resolved amicably or through litigation, nonfinancial, emotional reasons may be just as important. Huang and Wu state that emotions may skew a party's preference for suing or settling, stating that "[e]motions, more often than not, arise in reaction to the beliefs over behavior by another party." Those emotions can arise from a perception of whether the other party is friendly (or not), each of which has the potential to trigger an emotional response to match. (Huang & Wu, 1992).

David Fagundes, Professor of Law at Southwestern Law School, speculates that some authors may have been enticed into friendly renegotiation by a new and more favorable offer from their Establishment operator (with which the author may already have been in business for some 35 years). (D. Fagundes, personal communication, June 25, 2015). Says Fagundes, "[t]he number of recapture termination notices filed with the U.S. Copyright Office significantly understates the ***impact*** of the law on authors and grantees. This is true in part because grantees may approach authors whose opportunity to terminate is approaching and negotiate a rescission and re-grant of their original agreement on more favorable terms, thereby eliminating or at least delaying the author's termination rights." (D. Fagundes, personal communication, June 25, 2015).

It is apparent, then, that this potential reason makes sense as well - the Establishment is in some cases reaching out proactively to authors, before receiving a notice of recapture termination, to offer a renegotiated deal. It could be yet another explanation for the fact that some authors whom one might reasonably expect to have recorded recapture termination notices appear to have not yet exercised their rights.

- **Reason Five: Even for Authors who Understand the *Concept* of the Recapture Termination Right, There is a Great Deal of Complexity in the Actual Process of *Exercising* it.**

Again, the focus of this article is neither the ambiguities and glitches in the law nor that there exist many potential pitfalls for authors seeking to exercise their recapture termination right. Much has already been written by others on those topics. Suffice it to say that there are, indeed, numerous ambiguities, glitches and pitfalls. Indeed, the spirit and effect of Section 203 might be another example of the phenomenon described by Benghozi and Paris (1999), who pointed out that the spirit of a law and the complexity of exercising rights under it, as well as changing events after the law has been enacted, are often at odds with one another. (Benghozi and Paris, 1999). In any event, to give the reader some idea of just a few of the glitches, ambiguities and pitfalls, consider the following:

  - An author seeking to exercise recapture termination must include in the notice of recapture termination both the date of license or conveyance and the identity and contact information of the current holder of the rights. (Copyright Act of 1976). Practically, the first of these requirements means that the author must have a copy of the original paperwork, which would be decades old. Further, the second of these requirements means that the author must have access to facts and documents that reveal a decades-long chain of title, through assignments, mergers, acquisitions and similar "change of holder" events as to which the author may have never been apprised. According to Casey Rae, Chief Executive Officer of the Future of Music Coalition, "who owns these rights now?" may be the biggest question, and one to which even the Establishment in many cases does not know the answer. (C. Rae, personal communication, May 13, 2015). Authors, as well as lawyers working in this area, tend to agree that the daunting task of finding paperwork looms large for many authors. For example, Bobby Kimball, original vocalist and co-author of many of the songs on the first four releases from the rock band Toto (released 1978 – 1982) says: "We had a manager. The manager was handling everything. I have no idea whether we ever even ***had*** a publishing deal, let alone with whom or where that paperwork might be." (B. Kimball, personal communication, December 29, 2015). Lawyer Bob Donnelly points out: "I think many authors are discouraged from pursuing these rights because they either never possessed or no longer possess copies of the underlying agreements that they signed many decades ago. In fact, in my experience I would say that it is rare for an author – a music industry author, anyway – to possess all of the seminal documents that need to be examined in order to make a full and proper assertion of these rights." (B. Donnelly, personal communication, January 5, 2016).

- The recapture termination right, by its terms, does not apply to works for hire. (Copyright Act of 1976). Where sound recordings in particular are concerned, this gives rise to ambiguity, since an analysis of how record company/recording artist relationships have historically worked probably leads to a conclusion that those sound recordings were ***not*** work for hire. However, most major label recording contracts have for decades included an acknowledgement that the sound recordings ***were*** work for hire. Tim Matson, another music lawyer from Lommen Abdo, says "[r]ecord labels…have uniformly opposed a recording artist's right to terminate, claiming sound recording copyrights are excluded from termination because they were created as 'works made for hire.'" (T. Matson, personal communication, January 6, 2016).

- Effectuation of the recapture termination right for a work authored by multiple authors requires that a majority of the joint authors join in the recapture termination (regardless of their individual contributions to the work in relation to its whole). (Copyright Act of 1976). Again where sound recordings in particular are concerned, there is ambiguity on this issue, since it can be argued that authorship of a sound recording extends beyond band members to, for example, the producer, sound engineer, studio musicians used, etc. Keep in mind as well the fact that each of those persons probably signed an assignment of rights is irrelevant, because it is that very assignment that would be subject to recapture termination!

- The fact that the majority of joint authors must agree is further complicated because there is disagreement over whether the majority required by the statute is the majority of all authors of the work at issue or the majority of the authors who signed the license or conveyance (i.e., the piece of paper) that is the subject of the copyright recapture termination notice at issue. In other words, and for example, if three authors each signed individual conveyance documents (as opposed to all three authors signing one conveyance document), can each author, as "one of one" on ***that*** conveyance document (i.e., not only a majority, but unanimous) terminate his/her individual grant, leaving the other grants in place; or, alternatively, is a "yes" vote required by two of the three authors to terminate all three separate transfers as to the work as a whole, regardless of how many pieces of paper were signed? (Davis, 2012; Parks, 2013).

- The recapture termination right, by its terms, does not apply to works for which the license or conveyance was prior to January 1, 1978. For a conveyance document signed prior to January 1, 1978 referencing a work authored subsequent

to January 1, 1978, what is the effective date of the license or conveyance (i.e., is it possible to convey a work prior to its existence)?

The foregoing considerations are just a few of the many pitfalls, glitches and ambiguities at issue. Given this complexity, it is probably safe to say that many authors would need a lawyer, or at least a knowledgeable advisor, to successfully accomplish recapture termination. Eric Schwartz, a partner specializing in intellectual property with Mitchell, Silberberg & Knupp in New York was one of the earliest lawyers working in this area, and he agrees. According to Schwartz, "…even if termination is understood [by the author or his or her heirs], it likely requires hiring a lawyer which, in some cases, may be more expensive than any monies that would result from re-capture." (E. J. Schwartz, personal communication, December 29, 2015).

Thus, the glitches and ambiguities, which result in considerable logistical complexity, are likely another reason why many authors have not exercised their rights.

- **Reason Six: Some Authors Have Intentionally Delayed, Hoping for Greater Legal Clarity**

Another potential reason for a mere trickle of recapture termination activity to date: authors have strategically delayed service and/or recordation of their recapture termination notice(s) in the hope that some of the ambiguity surrounding the right and its manner of exercise, as discussed, above, will be clarified by further legislation from Congress, rulemaking by the U.S. Copyright Office and/or third party litigation with favorable precedential value. (Beldner, 2012).

It has been opined that a potential rights claimant may strategically delay pursuit of rights enforcement in order to allow other plaintiffs to "test the waters." The motivation behind this type of strategy will be to defer the risk of testing novel legal theories. Further, it may make good strategic sense to adopt a strategy with the benefit of knowing how a court deals with a particular type of claim. This type of behavior has been noted among patent claimants who use continuations to "game the system." Those owners often wait and see what standards get adopted and then redraft their patent claims around those standards." (Lemley, 2007). This wait-and-see approach is referred to as "real option theory," and it is commonly applied to provide an economic analysis of litigation (and particularly intellectual property litigation) whereby it may be better to wait to litigate if possible until some uncertainty is resolved and cost reduction can be achieved. (Sidak, 2008).

It makes sense for artists contemplating recapture to remain mum on this topic. Nonetheless, musician Greg D'Angelo points out that a sensible conclusion is that "a lot of artists below the top, top tier might be saying to themselves 'why spend the money to establish law for what might be a pennies on the dollar recovery for ***me***? Maybe I should just wait for the Billy Joels of the

world to establish the precedent I'll need." (G. D'Angelo, personal communication, January 8, 2016).

Thus, intentional delay pending action by others might make sense for a number of authors who are reluctant to spend the money that would be required to press the issue, reluctant to be "the one" who pressed it, etc.

- **Reason Seven: Given the Many Other Factors, Often There is Inadequate Economic Benefit**

Still another potential reason why there has not been more recapture termination activity to date is that the vast majority of works for which the termination recapture right is available lack the current and future economic value to justify the time, effort and/or expense of pursuing recapture termination.

Sheer common sense strongly suggests that most works of authorship have limited if any commercial value to begin with, let alone 35 years after having been licensed or otherwise conveyed. Artists agree. According to "The Fretless Monster" Tony Franklin, who has written and recorded since the early 1980s with some of music's most well-known names (e.g., Jimmy Page, Paul Rodgers, David Gilmour, Whitesnake, Kenny Wayne Shepherd, etc.), opines that "[recapture termination is] a lot of work and a copyright is only so valuable in today's music industry. I think that most copyrights of that age (35 years) have almost reached their useful life." T. Franklin, personal communication, January 8, 2016). Professor Fagundes adds, "[r]ecapture termination is worthwhile to authors only to the extent that there remains commercial value in their works. A very small percentage of works retain enough value thirty-five years after their publication to warrant termination, especially given that navigating the termination process itself can be quite costly." (D. Fagundes, personal communication, December 22, 2015). Attorney Donnelly drives home the point even more emphatically: "The other big, no ***huge***, point is the authors' inability to pay for the legal and other costs associated with the prosecution of their claims in this category. That reason is (as we old-timers used to say) 'Number One With A Bullet.' This is to say that all of the other reasons are a distant second place." (B. Donnelly, personal communication, January 5, 2016).

True, for ***some*** works now in or around the 35-year recapture termination window, the remaining commercial value is substantial. Nonetheless, as notable as some superstar authors and their works are, it is safe to say that most authors' works have far less commercial value. Lawyers working in this area indicate that many cannot afford (or will not pay) even a reasonable flat fee. (L. Rosario, personal communication, May 7, 2015).

Thus, another potential reason for a lack of activity in the recapture termination area is that the cost/benefit analysis just doesn't make sense for a very large group of authors. This could be the case even where the out-of-pocket cost of pursuing recapture termination would be small.

- **Reason Eight: The Logistics of Either Self-Exploitation or Finding a New Establishment Home, after Recapture Termination is Effected, can be Cumbersome and Even Counterproductive**

In today's digital world, many authors have had success self-exploiting their works of authorship. Others continue to choose Establishment output sources. Indeed, pundits opine that having the Establishment in an author's corner is economically advantageous, and no doubt it can make life a lot easier for an author, leaving the author more time for authoring. In addition, consider the following arguments that may weigh against exercising the recapture termination right, simply to keep life "easy."

First, some would say that, for a prolific author, splitting one's body of work between multiple Establishment output sources and/or a self-exploitation outlet is economically and logistically disadvantageous. For example, does a book author want to have some of his/her books published by Penguin Random House and some by Simon & Schuster? Or does a band want to have some of its albums distributed through Warner Bros., some through Universal and some by itself? (E. J. Schwartz, personal communication, April 23, 2015). Perhaps the distinction would be lost on consumers, but for the author, going merely from one outlet to two increases by 100% the number of contracts to deal with, royalty statements to review, audits to conduct, etc.

In addition, consider the fact that the existing Establishment holder of an author's works – some of which are currently subject to recapture termination and some of which are not – may have the ability to offer a renegotiated deal regarding the author's ***entire*** body of work (i.e., those works subject to recapture termination ***and those not subject***), and perhaps also exploitation of ***all*** works outside of the United States (remember, the recapture right applies only domestically). (Christman, 2012). According to musician Greg D'Angelo, that existing Establishment holder of rights also has an advantage due to its experience with the work(s) at issue: "If an author recaptures, then during the down time [between the old rights holder and the new] he'll lose money because everything stops and there is potential for a smoothing out period where income goes unaccounted. The person who has 35 years of experience [in exploiting the work(s) at issue] probably knows the game." He quickly adds, though, "[t]here's a lot less for the label to do now, a lot less investment, so its cut should be a lot less than the old deal." (G. D'Angelo, personal communication, January 8, 2016). Author and singer Bobby Kimball adds, "[i]t would be great to get my publishing back, but I'd need help with shopping the rights to find a new deal." (B. Kimball, personal communication, December 29, 2015).

These sentiments seem to indicate that the existing holder has a strategic advantage over either a new, potential "split body" Establishment recipient or a self-exploitation output of a mere portion of the author's copyrights.

Further still, for certain types of works, such as sound recordings, the self-exploitation path can be difficult and expensive. Take, for example, a late-1970s work such as the sound recordings now subject to recapture termination in the music industry. For this type of work, many recording artists have neither the facilities nor the expertise to store and extract current-technology copies from the original master tapes. (Christman, 2012). Where 35-year-old sound recordings are concerned, D'Angelo's fellow musician Tony Franklin says: "[t]aking a 35 year old master into a recording studio with multi-track capability and undertaking properly the work required to release that music anew can be expensive. Do we want to open that can of worms?" (T. Franklin, personal communication, January 8, 2016). Also where sound recordings are concerned, an Establishment label determined to make a recapturing author's life difficult might raise an issue that ownership of the sound recording embodied on a master tape (i.e., the intellectual property) is different from ownership of the master tape itself (i.e., the storage media on which the intellectual property resides). Some authors – particularly recording artists – may be recognizing that there would be a potentially significant capital investment cost associated with termination recapture.

Accompanying all the potential trouble that an author might experience in taking product to market after a successful termination recapture is the potentially mitigating circumstance that an author might be genuinely happy with his or her current Establishment partner. Tracy Reilly, NCR Professor of Law and Technology and Director of the Program in Law and Technology at University of Dayton School of Law writes, in a soon-to-be published article, "…many labels pair…artists with experienced professionals who help them find audiences, reinvent themselves, and otherwise serve as 'creative partners' throughout a lucrative career." (T. Reilly, personal communication, January 4, 2016). She adds, informally, "[p]erhaps the decision not to terminate the prior contract and recapture per Section 203 is intentional by some artists, in order to maintain this partnership, which has creative advantages that go beyond the obvious economic perks." (T. Reilly, personal communication, January 4, 2016). Music lawyer Bob Donnelly cautions to not overlook "…the importance and likelihood of the strong relationships that have developed over many years of fair and honest dealing, especially, in the music industry, between songwriters and music publishers. Our firm has renegotiated the contract terms of several such deals without the need or expense of filing a notice of recapture termination." (B. Donnelly, personal communication, January 5, 2016).

So then, it can be concluded that some authors might choose to simply leave things where and as they are, rather than exercising the recapture termination right, in order to make life "easier."

- **Reason Nine: Some Authors have Reversion as a Part of Their Original Contracts**

For a lucky few authors, the reasoning behind a decision to not terminate may be a simple one – they have a contractual reversion right anyway, and the formal process of recapture termination as specified by the U.S. Copyright Act is simply unnecessary. This is another potential reason for some "missing" recapture termination activity, though it applies primarily to book authors, whose contracts sometimes include a reversion of the copyright once the book is out of print for a certain amount of time, the number of copies sold falls below a certain threshold, or revenue generated falls below a certain floor. (Cabrera, 2015).

One open question – as well as another potential reason for a relative lack of recapture termination activity – is whether there are significant numbers of artists in ***other*** disciplines who also may be enjoying contractual recapture, and, thus, without need for statutory recapture termination.

- **Reason Ten: Some Deals May be Happening Out of the Public Eye, Due to Mere *Threat* of Termination**

Given a lot of the potential reasons specified above as to why more authors are not visibly exercising their recapture termination rights (i.e., not recording notices of recapture termination), it is likely the case that some renegotiations are happening for which there has not been, and will not be, any filing or recordation of a notice of recapture termination. This makes logical sense, as authors who have good (or at least cordial) relationships with their Establishment rights holders may be skipping the hassle of the recapture termination notice and, rather, proceeding right to the "look, I have these rights and I'm going to exercise them, so let's just renegotiate without the whole world knowing" phase. Robert Meitus, an entertainment lawyer with Meitus Gelbert Rose, LLP in Indianapolis, which has filed termination notices for nearly 200 works of authorship to date, supports the theory that the advantages of renegotiation, for both author and grantee, may be happening out of the public eye. Says Meitus, "…most rights holders benefit more [than they would from formal recapture termination] from the renegotiation with a label or publisher, tied to an advance, or, better yet, a non-recoupable bonus payment, along with increased royalties." (R. Meitus, personal communication, January 11, 2016). Meitus' fellow lawyer, Eric Schwartz, also points out that "[r]enegotiation, ultimately, serves the same congressional purpose as formal recapture termination: the authors or heirs get more money, and the grantee…can continue to exploit the work." (E. J. Schwartz, personal communication, December 29, 2015).

Clandestine renegotiation, then, is also likely the cause of ***some*** of the "missing" recapture termination notice activity (perhaps even some of the most noticeably absent, i.e., from the highest profile authors).

- **Reason Eleven: Nobody Wants to be the (Expensive and High Risk) Test Case…on Either Side**

In the analysis above we see that there are at least ten, separate potential reasons as to why we have not seen more recapture termination activity to date. Given all those factors, and the ambiguity and complexity of the provisions of Section 203, it is commonly believed that one of the biggest reasons for the slow trickle of activity to date is that nobody – neither any author nor any member of the Establishment – wants to be the first to litigate in earnest the ambiguities, glitches and pitfalls. This is because the litigation, when it ***does*** happen, is likely to be expensive, high profile, high risk and tumultuous. (Rohter, 2011.)

According to Huang and Wu (1992), in deciding whether to litigate, a potential litigant typically considers monetary incentives such as the ability to pay fees and costs – both one's own and those of the other party if unsuccessful. (Huang & Wu, 1992). In the context of recapture termination, one fee a litigant may incur involves the attorneys' fee provisions under the Copyright Act, which provides: "[i]n any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." (17 U.S.C. § 505).

Indeed, experts are of the mind that both authors and Establishment may fear not only the economic risks, but also a potential backlash for having been "the one" to have taken the hard line. Attorney Tim Matson says that such a dispute will have "…the high cost of litigation and the risk of an adverse ruling" that are deterring both authors and the Establishment alike. (T. Matson, personal communication, January 6, 2016). Similarly, Eric Schwartz points out that "[t]here is probably little litigation in this area because of the huge risks and costs – the risks of being the bad precedent-setting "test" case (the stakes are so high), and the more obvious high financial costs of litigation (also because the stakes are so high)." (E. J. Schwartz, personal communication, December 29, 2015).

Thus, a very likely reason for an apparent state of relative inactivity to date is that nobody – neither any author nor any member of the Establishment – wants to be the first to litigate the issue. Note that this is ***not*** to say that the issue will ***never*** be litigated. It probably will. It's just that it hasn't been litigated (or at least not significantly so) ***yet***.

A View of the Future – The Volume and Pace of Recapture Termination Notices is Likely to Increase

The first part of this article concludes that there has been a rather small number of Section 203 recapture termination notices recorded with the U.S. Copyright Office to date and that, since it has been over 12 years since the first opportunity anyone had to record such a notice, we should have seen more activity in this area by now. It then goes on to provide and discuss several possible reasons why we have not seen more termination recapture activity. It is appropriate now, then, to move on to a discussion of what we may see in the future in this area.

In short, it is likely that we will see an increased number of Section 203 recapture termination notices recorded with the U.S. Copyright Office. In other words, it is likely that there will be more activity in this area in the future.

First, it is likely that some of the reasons for the anemic pace of recapture terminations to date will become weaker, and perhaps even disappear, over time. Even a continued slow pace of recapture termination activity and press coverage is ***something***, and should lead to greater awareness and understanding, very possibly with a snowballing and/or tipping point effect. In addition, the complexity of actually exercising the right is likely to lessen as well, as more people have more experience with the law, as banks of form documents grow and disseminate, and there is litigation that establishes a precedent. Sooner or later, it is likely that Congress will pass clarifying law, that the U.S. Copyright Office will promulgate clarifying rules or (most likely, in the author's opinion) that there will be clarifying case law because ***someone*** finds litigation to be the most sensible option. "It's a ticking time bomb," says Rae. (C. Rae, personal communication, May 13, 2015). As one or more of these things happen, and assuming they don't result in an evisceration of the recapture termination right altogether, then even authors who are intentionally delaying for strategic reasons, too, should become a smaller group. Ultimately, a number of the potential reasons for the anemic pace of recapture terminations to date will become weaker, and perhaps even disappear, over time.

That said, and with an immense amount of respect for authors of all types, it is also just as likely that artists will continue to be artists and intellectual property will continue to be intellectual property. This is to say that, to the extent to which it is true that artists stereotypically procrastinate, there do not seem to be indications of imminent categorical change. In addition, it simply makes sense that a fair number of works of authorship will in the future, as they do now, lack sufficient economic value to justify the time, effort and/or expense of pursuing recapture termination (even if the amount of time, effort and/or expense is lessened as ambiguity and complexity are reduced). Thus, it appears also true that a number of the potential reasons for the anemic pace of recapture terminations to date will remain the same.

Finally, while some factors seem likely to change (e.g., awareness and understanding) and some factors seem likely to remain the same (e.g., procrastination and lacking economic value), the future of some factors is harder to predict and/or could simultaneously move in both directions.

One factor in this category is fear and intimidation. "Artist versus the Establishment" is likely for the foreseeable future to be a one-sided affair in favor of the Establishment; yet, some might say that generational shifts and continuing advances in technology will, in the long term, turn the Establishment into something less than the 800-pound gorilla that historically it has been. Additionally, since contractual rights of reversion are already found only infrequently, that factor is seemingly unlikely to change as well. However, and while prolific artists may continue to see the value in not "splitting" a portfolio of works (and continue to opt for the "easy" option of leaving all of their works in one place – i.e., with a single Establishment holder of their rights), over time (and possibly in the foreseeable future) the logistics of either self-exploitation and/or finding and migrating to a new Establishment partner could become significantly easier, cutting the other way on this factor. For these several factors it is difficult to predict the future.

Despite the fact that a logical analysis leads to the conclusion that the pace of recapture terminations will increase, it seems that, in any event, the Establishment is not in a panic. In the music industry, for example, major labels handling recapture termination notices on a case-by-case basis are relying on all of the explanations of author behavior listed above, and it's bearing true so far. In addition, some feel as though, for them, it will all be a "wash" in any event, because they will pick up as many new artists and new works as they lose. (Christman, 2012).

Conclusion

Section 203 of the U.S. Copyright Act of 1976 is a little known law, but one that may soon be causing considerable disruption for industries that rely on copyright-protected works of authorship for revenue generation. The law could potentially leave record labels, book publishers, movie studios and even software publishers with a steadily eroding ownership interest in their most valuable moneymaking assets. Yet, to date, only a few hundred authors have exercised the potentially valuable recapture termination right. This means that it has gone unexercised by a large number of authors to whom it has become available, some of whom have had over 12 years within which to exercise it.

Perhaps the relative paucity of recapture termination activity is not surprising given there appear to be nearly a dozen potential reasons for not doing it. Those reasons include a lack of knowledge and sophistication about the law on the part of the authors whom it was designed to benefit, fear of and intimidation of those authors by the Establishment, and both unwitting procrastination and intentional delay for strategic advantage by the authors.

While, as always, it is difficult to predict the future, many signs indicate that we will see an increased number of Section 203 recapture termination notices recorded with the U.S. Copyright Office (i.e., that there will be more activity in this area in the future). One such sign is that many of the reasons that a relatively small number of recapture terminations has been effected to date (e.g., lack of knowledge of the law) are likely to minimize, or disappear completely, as time

passes. While other of the reasons (e.g., artist procrastination) will likely remain, those reasons do not appear to currently be the major impediment to robust recapture termination activity.

Authors of all types, the business people who represent them and the educators who are teaching the next generation of both groups should all take notice of the law, and the potential benefit it provides to authors. The recapture termination right lasts only for a limited time – a window of five years on any given work of authorship. This means that each day starting with January 1, 2018 (the 40 year anniversary of the effective date of the Copyright Act of 1976), the window will shut on another group of works for the authors thereof, whose inalienable right to recapture termination will be lost forever.

Keywords: Law, copyright, intellectual property, recapture, music, performing arts, entertainment

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APPENDIX A
Interview Questions

Interview Questions for

- What is your involvement and experience in copyright recapture terminations?
- What is your response to the basic premise of the article, that there has been relatively little termination recapture activity to date?
- Assuming that you accept the basic premise:
    - Why do you think we haven't seen more termination recapture activity to date?
    - Do you think the pace of recapture termination activity will increase?
- If you don't accept the premise, why not?
- Would you prefer that this conversation be considered on the record or off?

Interview Questions for Artists

- Are you aware of your copyright recapture termination rights?
- Have you served and/or recorded a notice of recapture termination for any of your works?
- If not:
    - Why not?
    - Did this interview cause you to rethink whether to serve and record?
- Would you prefer that this conversation be considered on the record or off?