

Getting Back Your Copyrighted Songs

Imagine you sold some songs back in the 1980s, maybe the 60s or 70s. Your assignment to the publisher said, as per the usual boilerplate, that you were assigning the songs "for the full term of copyright in the work, including all renewals and extensions thereof." The copyright in the songs may not expire for a very long time – 70 years after you're dead. Does this mean your rights are locked up until that date? No. Under the Copyright Act, there are two different statutory termination provisions, set forth in sections 203 and 304 of the 1976 Copyright Act, under which you or your family could get back your rights in the songs prior to the end of the copyright term.

Section 203 – Recapture 35 years after the contract date

Under § 203, any grant of rights in a copyrighted work "executed by the author on or after January 1, 1978" may be terminated at any time during a five-year window beginning 35 years after the date of execution of the grant. Before termination, you have to serve a written notice on the party who's being terminated, and that notice has to be served not less than two years, and not more than ten years, before the effective date of the termination. Accordingly, if your old deal was signed on January 1, 1978, your termination window would run from Jan. 1, 2013 to Jan. 1, 2018 and the period for serving the notice would run from 2003 (2013 – 10 = 2003) to 2016 (2018 - 2 = 2016). Notices have already been sent to terminate a number of high-profile contracts from the late 1970s, and no doubt more writers will begin sending notices as the word gets around. So dust off those old contracts you thought you were stuck with, and send out the notices during the proper time period; if they're early or late they won't count.

Who can do it: Only the songwriter can terminate, if he or she is alive. If the songwriter is deceased, the right may be exercised by the widow or widower, if living, and any children or grandchildren. If more than one of these relatives is living, the rights are divided half to the widow/widower, half to the children and surviving grandchildren, divided among them proportionally. A vote of the majority of the termination interest is required to make an effective termination – if there is a stand-off between the widow/widower (who owns half) and everybody else who owns the remaining half, the termination is not effective. If there are none of the above relatives still living, the right can be exercised by "the author's executor, administrator, personal representative, or trustee."

The written notice has to specify what work is being terminated, the particular agreement being terminated, the effective date of termination, and the authority of the person exercising the termination (as author, widow, trustee, etc.)

Significantly, the termination right under § 203 may not be waived by prior agreement, as the statute provides that termination may be effected "notwithstanding any agreement to the contrary, including an agreement to make a will or a future grant." So the writer or heirs cannot actually sell or waive their termination right to anybody. Like life, liberty and the pursuit of happiness these termination rights are literally "inalienable." The law does specifically allow authors to negotiate new deals with their original publishers after the termination notice has been served, however. Many publishers try to acquire such rights whenever possible, to avoid losing valuable older titles.

Even before the termination notice is served, recent cases in the courts have also allowed authors to make new contracts with the original grantee to supersede the older, termination-prone ones, but courts scrutinize such agreements very carefully to make sure that the original buyer is not taking unfair advantage and undercutting the basic purpose of termination, which is to give the writer a second bite at the apple and realize the true long-term value of a song that may have been sold too cheaply back in the day.

Section 203 does have its limits, however. It does not apply to works made for hire, since those works are deemed owned by the employer ab initio rather than by means of a grant from the individual creator. Also, it does not divest the publisher of foreign rights in the work, but only pertains to rights under the US Copyright Act. Moreover, only grants executed by the author may be terminated under the section. Further, § 203 does not prohibit the continued exploitation of derivative works prepared by the publisher "under authority of the grant before its termination." Accordingly, a publisher would not be able to continue issuing licenses for new uses after termination, but older recordings or videos could continue to be sold.

Section 304 –Recapture 56 (or 75) years after publication

Section 304 provides for another form of termination, which takes effect at the end of the 56th year of the copyright term. Under § 304, any grant executed before 1978, by the writer or any of his/her statutorily designated heirs, may be terminated in a five-year window between the 56th and 61st year, allowing the author or heirs to recapture the copyright in the work for the remainder of the term. For works still under copyright but beyond their 61st year as of 1998, the § 304 right is available in the five-year period between the 75th and 81st years of the copyright term.

Like § 203, § 304 does not apply to works made for hire and does not allow for the termination of foreign rights. Like § 203, Section 304 also permits the continued exploitation of derivative works made prior to termination, but only when the terminated grant was made by a party other than the author (§ 304(c)(6)(A)). As noted above, under § 203, grants made by persons other than the author are not terminable at all, but all pre-termination derivative works may continue to be exploited.

As with § 203, only widows, children and executors can exercise the termination rights, and they must follow similar procedures as to the timing and content of the notice of termination. These formalities are easily complied with by motivated authors and their estates, however, provided that they are made aware of their termination rights.

In sum, if you sold your rights under a grant that was (a) made prior to 1978, (b) by the author or a widow/child/executor, § 304 makes those rights subject to termination, in the US, as of the 56th year of the copyright term in the work, or beginning in the 75th year, if the work was already past its 61st year in 1998. If you sold your rights under a contract (a) made in 1978 or later, (b) by the author, those rights are vulnerable to termination under § 203 starting in the 35th year after the execution of the grant.