CAN'T BUY ME LOVE, BUT YOU CAN BUY MY COPYRIGHTS (AS LONG AS YOU GIVE THEM BACK): FINDING BALANCE IN THE ERA OF TERMINATING TRANSFERS

MEGAN KEELAN†

I. INTRODUCTION

Every musician has to start somewhere, and usually that starting point is accompanied by a bad deal, even if you're The Beatles. The first music publishing agreement that the band executed in 1963 has been regarded by the members themselves as a "slave contract."[1] The effects of that deal with Northern Songs were felt by all four members of the band, not just John Lennon and Paul McCartney who together wrote the majority of The Beatles' works.[2] Ringo Starr and George Harrison were given such a small piece of the publishing income and copyrights that Harrison famously wrote the song "Only Northern Songs," which includes the line "it doesn't really matter what chords I play. . . as it's only a Northern Song," referring to that infamous publishing deal.[3]

The Beatles' deal with Northern Songs gave both Lennon and McCartney a "15 percent stake" in the company, however, that share was sold four years later to ATV, which would eventually merge with Sony to become Sony/ATV.[4] By the time The Beatles parted ways as a band, John Lennon and Paul McCartney had sold all of the copyrights

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1. Eli Attie, *Did The Beatles Get Screwed?*, SLATE (Mar. 4, 2013, 2:25 PM), https://slate.com/culture/2013/03/the-beatles-start-northern-songs-was-it-really-a-slave-contract.html.

2. *Id.*; Greg Kot, *The Beatles Box Score: John Outhits Paul*, CHI. TRIBUNE (May 15, 1990), https://www.chicagotribune.com/news/ct-xpm-1990-05-15-9002090515-story.html.

3. Attie, *supra* note 1; THE BEATLES, *Only Northern Songs*, *on* YELLOW SUBMARINE (Apple 1969).

4. Dan Rys, *A Brief History of the Ownership of the Beatles Catalog*, BILLBOARD (Jan. 20, 2017), https://www.billboard.com/articles/columns/rock/7662519/beatles-catalog-paul-mccartney-brief-history-ownership.

in their works, while only retaining their respective songwriter's share—a passive income stream without control in the actual copyrights.[5] Today, writers of Lennon and McCartney's stature, along with those who have had a miniscule amount of success in comparison, will own both the songwriter's share and retain an ownership share in the copyrights.[6]

While The Beatles may be an extreme example considering their success, the effects of long-lasting bad deals can be felt by artists and songwriters of all levels.[7] The problem with new artists is that there is no good way to predict what might sell in the future, which means artists who do end up with successful careers are stuck with the remnants of the first deals that they made, no matter how unfavorable the terms.[8] This is why the Copyright Act of 1976[9] created a termination right that allows authors to recapture the rights they had previously granted to others and allow them an opportunity to control the copyright again or renegotiate in order to secure a more favorable deal.[10] One of the purposes of the Copyright Act of 1976 was to create an easy path for authors to recapture those rights; however, because of the technical nature of the termination formalities, companies that have purchased or been granted the rights have the ability to essentially hold the rights hostage and not transfer them if there are errors, other than harmless ones, in the termination notice.[11]

While these statutory provisions were written with good intentions, the execution, creates a situation where "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 property comply with some aspect of the termination formalities."[12] Furthermore, there is nothing in the provisions or promulgated rules that requires a party receiving notice to indicate

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5. *Id.*

6. JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS 59-60 (7th ed. 2011).

7. *See* Nick Messite, *Five Truly Terrible Record Deals Compiled for Your Convenience*, FORBES (Apr. 30, 2015, 12:20 PM), https://www.forbes.com/sites/nickmessitte/2015/04/30/five-truly-terrible-record-deals-compiled-for-your-convenience/#13a02b335a35; Ashley Cullins, *Wiz Khalifa Sues to End Contract with Manager*, HOLLYWOOD REP. (Jun. 1, 2016, 3:21 PM), https://www.hollywoodreporter.com/thr-esq/wiz-khalifa-sues-end-contract-898680.

8. Attie, *supra* note 1.

9. P.L. 94-553, tit. 1, § 101, Oct. 19, 1976, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

10. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 330 (8th ed. 2012).

11. *See generally* R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895, 896-97 (2016) (explaining some of the complex issues that have arisen because of the technical requirements of termination notices).

12. *Id.* at 903-04.

whether the termination notices were received or met the requirements, leaving creators in a state of limbo wondering if the notice was effective.[13]

This problem was what led Paul McCartney to sue Sony seeking a declaratory judgement to state that the notice sent was effective and that works included in the termination notices he sent will actually revert back to him.[14] In the end, the result is that "[t]hose 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."[15]

This Note details how the balanced copyright system that Congress intended to exist after enacting the Copyright Act of 1976 can be achieved through: a clarification of the harmless error rule, a system of accountability that requires a party receiving notice to acknowledge the receipt of such and to acknowledge any errors so that the terminating party may fix the errors, as well as instituting liability when an artist detrimentally relies on a term of an agreement which transfers the rights in the copyright irrevocably or in perpetuity and the author misses the termination window.

In Part A, I will first explore the background of the music industry and the necessary role of transferring copyrights within the music industry as well as the various parties involved with a copyright transfer.[16] Furthermore, Part A will explore the statutory background of the termination provisions in the Copyright Act of 1976 (the "Copyright Act") as well as the promulgated rules which put those provisions into effect.[17]

Part B takes a look that the harmless error rule created by the promulgated regulations regarding termination notices and how the rule has been interpreted by the courts as well as the Copyright Office.[18] Part C discusses the hurdles that an author must confront that stem from the power imbalance tipped in the favor of grantees.[19] That power imbalance is highlighted by the archaic language of standard grant-of-right clauses in music publishing agreements, the historical imbalance of power between the parties, and the lack of obligation on

13. Eriq Gardner, *Paul McCartney Sues Sony to Regain Rights to Beatles Songs*, BILLBOARD (Jan. 18, 2017), https://www.billboard.com/articles/business/7661702/paul-mccartney-sues-sony-to-regain-rights-to-beatles-songs.

14. *Id.*

15. Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1117 (C.D. Cal. 2008).

16. *See infra* notes 23-37 and accompanying text.

17. *See infra* notes 38-122 and accompanying text.

18. *See infra* notes 123-39 and accompanying text.

19. *See infra* notes 140-57 and accompanying text.

behalf of grantees to acknowledge that the notice of termination is effective.

Part D proposes amendments or additions to the regulations accompanying the Copyright Act that are designed to effectuate the termination of transfer provisions.[20] These additions to the current regulations include: (1) an addition to the harmless error rule that would clarify an additional exemplar of what a harmless error may be—any information placed into a notice due to a good faith reliance on prior registration at the copyright office that turns out to be incorrect shall be considered a harmless error, (2) an addition to the Copyright Act that would require parties receiving notice to acknowledge receipt of the termination notice as well as any inaccuracies in the notice in order to allow a grace period for the terminating party to correct such errors, and (3) an addition to the regulations that creates a mandatory disclosure to be included in all agreements that include a transfer that may be terminated under the Copyright Act alerting the author of his ability to terminate the transfer in accordance with the statute.

Finally, Part E first explores how the additional provision to the harmless error rule proposed in Part D will add a layer of protection for authors who are seeking to terminate their previous transfers so that they may feel assured that information they have relied on from a credible source, even if it turns out to be factually inaccurate, will not thwart their ability to terminate and recapture their rights.[21] Furthermore, Part E will delve into how the interplay between acknowledgement by a party receiving a termination notice that it has received the notice and whether or not there are fatal errors in the notice, a grace period to fix said fatal flaws, and recognition of a mandatory disclosure that alerts the author of the right to terminate will create a more balanced system of copyright transfers that was sought by Congress in creating the termination provisions.[22]

II. BACKGROUND

A. Statutory and Regulatory Background and Purposes

1. Brief Overview of the Music Industry

The music industry is centered on relationships that are created by different variations of copyright transfers—whether that is a full grant of exclusive rights or a non-exclusive license to use a work for

20. *See infra* notes 158-59 and accompanying text.
21. *See infra* notes 160-63 and accompanying text.
22. *See infra* notes 164-68 and accompanying text.

various uses.[23] A full grant of exclusive rights, as set forth in section 106 of the Copyright Act of 1976, is a transfer where the author gives the grantee the ability to exclusively exercise the "bundle of rights."[24] The "bundle of rights" included in a copyright are delineated in section 106 of the Copyright Act: the reproduction right, the right to create derivative works, the distribution right, the public performance right, the display right, and the right of public performance by means of digital audio transmission.[25] On the other hand, a non-exclusive license allows a grantee to exercise a specific right or rights under section 106 without limiting the grantor's ability to allow other grantees the same right.[26] .

When considering a song that has just played on terrestrial radio (as opposed to satellite radio which has additional rights), there are typically two exclusive transfers of the full bundle of rights and approximately three non-exclusive licenses for individual rights involved in the broadcast of that song.[27]

First, the songwriter who has written the song, and is considered the author for copyright purposes, has likely transferred the full bundle of rights to a music publisher.[28] A music publisher finds artists to record the songs written by the songwriter and other users of the composition, issues licenses to users of the song, collects the royalty payments for the songwriter, disperses the royalties back to the writer, and handles all the registrations of copyright for the writer.[29] While established acts may be able to hold on to some of their copyrights when signing with a music publisher, most new acts will have to sign over all of their rights in the copyrights in order to receive a deal.[30]

Once the music publisher has found an artist that wants to record the song, the music publisher will reach out to the artist's record label to obtain a mechanical license that is a non-exclusive grant of the right of reproduction and distribution for a statutory rate.[31] Currently, that statutory rate requires the record label to pay $0.0910, with fifty percent going to the publisher and fifty percent going to the

23. DAVID J. MOSER & CHERYL L. SLAY, MUSIC COPYRIGHT LAW 59-60 (2011).

24. The Copyright Act of 1976 §106, 17 U.S.C. §106 (2018).

25. 17 U.S.C. § 106; *see generally* PASSMAN, *supra* note 10, at 210-11; MOSER & SLAY, *supra* note 23, at 75.

26. *Id*.

27. *See* PASSMAN, *supra* note 10, at 210-11 (discussing the bundle of rights including with a copyright).

28. *Id. at* 219-20, 300 (discussing the role of a publisher as well as a typical publishing deal).

29. *Id*. at 219; JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS 1 (7th ed. 2011).

30. PASSMAN, *supra* note 10, at 300.

31. *Id*. at 210-11, 224-25.

songwriter, for every copy of the song that is sold.[32] This rate remains the same whether the song is purchased digitally, physically, by itself, or as part of a larger album.[33]

If the artist who records the song written by the songwriter is signed to a record label, the copyrights in the sound recording, rather than the composition itself which is owned by the music publisher, will be owned by the record company.[34] The transfer may be made as an assignment from the artist as the author to the record label or it may qualify as a work made for hire.[35]

Music publishers also affiliate with performing rights societies, primarily to allow the performing rights society to license to radio stations the right to publicly perform the composition by playing it on the radio.[36]

All of these grants are subject to the termination of transfer provisions found in the Copyright Act of 1976.[37]

2. Termination Provisions of the Copyright Act of 1976

The Copyright Act of 1976 (the "Copyright Act") created for authors an inalienable right to terminate previous assignments and transfers of copyright (other than those transfers initiated through a will or created as a work made for hire).[38] There is one exception to the inalienability rule: once notice is sent to the transferee but before the transferor gets the rights back, the two parties can negotiate a new agreement regarding the rights that will be enforceable.[39]

The year of transfer (or of creation if the work was created after the transfer was made) determines what provision of the Copyright Act will govern the termination process.[40] Transfers prior to 1978 are governed by Section 304, while Section 203 governs those works transferred after January 1, 1978.[41]

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32. PASSMAN, *supra* note 10, at 220.

33. HARRY FOX, *Rate Charts*, https://www.harryfox.com/#/rate-charts (last visited Mar. 5, 2020).

34. MOSER & SLAY, *supra* note 23, at 70.

35. *See id*. The scope of the work made for hire doctrine and its role in terminations of transfer is outside the scope of this Note, instead, this note will focus on pure assignments of copyright.

36. PASSMAN, *supra* note 10, at 238-39. In the United States, the prominent performing rights societies include American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc., ("BMI"), and Society of European Stage Authors and Composers ("SESAC").

37. The Copyright Act of 1976 § 203, 17 U.S.C. § 203(a) (2018).

38. *Id.* §§ 203, 304; PASSMAN, *supra* note 10, at 330.

39. PASSMAN, *supra* note 10, at 330.

40. 17 U.S.C. §§ 203, 304.

41. *Id.*

The types of transfers that are subject to the termination provisions are the same under both Section 304 and Section 203.[42] These provisions cover transfer of copyright through either "the exclusive or nonexclusive grant of a transfer or license" of any of a copyright or any right that is included in a copyright's bundle of rights.[43]

Under Section 203, if the transfer was "executed by one author," then only that author is able to terminate the transfer if the author is still alive.[44] However, if the grant was transferred by more than one author, such as a band jointly signing a group recording contract, then only a majority interest may terminate the transfer.[45] Alternatively, even if there is more than one author, if that author had transferred his interest separately than his joint authors, then he may terminate the grant on his own.[46] Transfers under Section 304, on the other hand, may not have been made by the author because the renewal rights in the pre-1978 works could be contracted away and Section 304 addresses that nuance.[47]

While those sections are similar but not exact, the provisions governing which persons may effectuate and send a termination notice if the author is dead are the same whether the transfer was made under Section 304 or 203.[48] If the author is survived by a spouse but no children or grandchildren, then the right to terminate is vested entirely in the spouse.[49] If the author is survived by a spouse and children, then a fifty percent interest vests in the spouse while the other fifty percent vests equally between the children.[50]

In any situation, the children and grandchildren's share are "divided among them and exercised on a per stirpes basis according to the number of such author's children represented."[51] Where there are grandchildren who have a vested interest because of the death of the author's child, only a majority of those grandchildren may exercise the deceased child's share.[52] If the author has died without a surviving spouse, child, or grandchild, the author's estate will control "the author's entire termination interest."[53] No matter which situa-

42. *Id.* §§ 203(a), 304(c).
43. *Id.*
44. *Id.* § 203(a)(1).
45. *Id.*
46. Scorpio Music S.A. v. Willis, No. 11cv1557 BTM(RBB), 2012 WL 1598043, *2 (S.D. Cal. May 7, 2012).
47. 17 U.S.C. § 304(c)(1).
48. *Id.* §§ 203(a)(2), 304(c)(2).
49. *Id.*
50. *Id.* §§ 203(a)(2)(B), 304(c)(2)(B).
51. *Id.* §§ 203(a)(2)(C), 304(c)(2)(C).
52. *Id.*
53. *Id.* §§ 203(a)(2)(D), 304(c)(2)(D).

tion applies, only a majority interest may decide to terminate the transfer.[54]

The life of a copyright for works created prior to 1978 is an original term of twenty-eight years with an option to renew the copyright for an additional twenty-eight years for a total of fifty-six years.[55] However, the Copyright Act automatically extended the renewal term for all works by nineteen years, and the Sonny Bono Act of 1998[56] further extended that term by twenty years.[57] The provisions under Section 304 allow authors whose works were in the first term or renewal term to recapture his rights after the expiration of what was originally the renewal term before the extensions were made to exploit for the final thirty-nine years of the life of the copyright.[58]

Under Section 304, a termination "may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later."[59] However, if the termination right had "expired on or before the Sonny Bono Copyright Term Extension Act" then the "[t]ermination of the grant may be effected at any time during a period of five years beginning at the end of 75 years from the date copyright was originally secured."[60] This window allows for the author to take advantage of the final twenty years of the life of the copyright.

On the other hand, authors whose transfers are subject to Section 203 are able to recapture their rights for a longer period because of the longer life of copyright offered to post-1978 works.[61] For works that are subject to Section 203, the life of the copyright is extended for the life of the author plus seventy years with no renewal terms.[62] The window for termination under Section 203 is determined by whether or not the grant included the right of publication of the work.[63]

The right to publication allows the copyright holder the right of "distribution of copies or phonorecords of a work to the public by sale

54. *Id.* §§ 203(a)(1), 304(c)(1).
55. MOSER & SLAY, *supra* note 23, at 140 tbl. 8.1.
56. 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2).
57. PASSMAN, *supra* note 10, at 318-19.
58. Robert C. Lind, *Copyright Law: Statutory Termination*, Am. Bar Ass'n 6 (2012), https://www.americanbar.org/content/dam/aba/events/entertainment_sports/2012/10/forum_on_the_entertainmentsportsindustries2012annualmeeting/tv_cable_radiomusic_publishing/copyright_law_statutory_termination.pdf. Works must have also been "affirmatively renewed between 1978 and 1991, or were automatically renewed after 1991." *Id.*
59. 17 U.S.C. § 304(c)(3).
60. 17 U.S.C. § 304(d).
61. MOSER & SLAY, *supra* note 23, at 140 tbl. 8.1.
62. *Id.*
63. 17 U.S.C. § 203(a)(3).

or other transfer of ownership or by rental, lease, or lending" or "[o]ffering to distribute copies or phonorecords to a group of people for purposes of further distribution, public performance, or public display. . . ."[64] Nearly all grants of copyright include the right to publication.[65] Termination under this section "may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of the execution of the grant. . . ."[66] However, if the right of publication is included in the grant, then the window "begins at the end of thirty-five years from the date of publication of the work" or "at the end of forty years from the date of execution of the grant, whichever term ends earlier."[67]

Under both Section 304 and 203, termination is only effective upon the author giving advance notice to the grantee that states the effective date of the termination.[68] Furthermore, a copy of the notice must be "recorded in the Copyright Office before the effective date of termination. . . ."[69]

For all works, the notice must be sent no earlier than ten years and no later than two years before the effective date.[70] That means that for works subject to Section 304, the earliest that notice may be sent is forty-six years from the date the original copyright was secured or January 1, 1978 depending on which is later and the latest notice may be sent is fifty-nine years from that same date.[71] For those Section 304(d) works where the termination may be effected at the "end of seventy-five years from the date copyright was originally secured," notice may be sent, at the earliest, sixty-five years after the copyright was originally secured or, at the latest, seventy-eight years after such date.[72]

For those works subject to Section 203 that did not include a right of publication, notice may be sent, at the earliest, twenty-five years after the date of the grant or, at the latest, thirty-eight years after the grant.[73] Finally, for those works subject to Section 203 that included a grant of publication, the following time window applies: if the earlier date is thirty-five years from the date of publication, notice may be sent, at the earliest, twenty-five years after the date of the publication

64. *Circular 1: Copyright Basics*, U.S. COPYRIGHT OFFICE 7 (Sept. 2017), https://www.copyright.gov/circs/circ01.pdf.
65. PASSMAN, *supra* note 10, at 329.
66. 17 U.S.C. § 203(a)(3).
67. *Id.*
68. *Id.* §§ 203(a)(4), 304(c)(4).
69. *Id.* §§ 203(a)(4)(A), 304(c)(4)(A).
70. *Id.*
71. *Id.* § 304.
72. *Id.* § 304(d).
73. *Id.* § 203.

or, at the latest, thirty-eight years after the date of the publication.[74] However, if forty years from the date of the grant comes earlier than thirty-five years from the date of publication, notice may be sent, at the earliest, thirty years from the date of the grant or, at the latest, forty-three years from the date of the grant.[75]

Once notice has been served as well as recorded in the Copyright Office, "[u]pon the effective date of termination, all rights under the Copyright Act that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests."[76] This is an automatic reversion, and there are no further steps that the author or those owning a termination right need to take once the notice has been served and recorded in the Copyright Office.[77] In addition, once notice has been served in compliance with the Copyright Act and the accompanying promulgated regulations by the Copyright Office, those who have the power to terminate shall have a vested future interest in those copyrights, in proportion to the shares set forth by the Copyright Act.[78]

What Section?	What Works Are Covered?	When Can You Terminate?	When Can Notice Be Sent?
§ 203	Works created after January 1, 1978	With right of publication: Within five years following the earlier of 35 years from the date of publication or 40 years from the date of the grant Without the right of publication: Within five years following 35 years from the date of the grant	As early as 10 years prior, but no later than two years prior to the effective date of the notice
§ 304	Works created prior to 1978	Within five years of the later of 56 years from the date that the original copyright was secured or 56 years from January 1, 1978 If termination right expired on or before October 27, 1998: Within five years of 75 years after the original copyright was secured	As early as 10 years prior, but no later than two years prior to the effective date of the notice

74. *Id.*
75. *Id.*
76. *Id.* § 203(b). While that language is derived from Section 203, Section 304 contains language to the same effect. *Id.* § 304(c)(6).
77. *See id.* §§ 203, 304.
78. *Id.*

3. Technical Formalities of Termination Notices

Pursuant to the Copyright Act of 1976 Section 203, the Library of Congress promulgated rules regarding the formal requirements for filing a termination notice.[79] The regulation includes content, service, and recordation requirements as well as the effect of harmless errors on the effective nature of the termination notice.[80]

In order for a termination notice to be effective, the notice must contain certain complete pieces of information "without incorporation by reference of information in other documents or records."[81] For all works that have an applicable termination right, an effective notice must state which section of the Act that the termination is being made under, as well as "a brief statement reasonably identifying the grant to which the notice of termination applies. . . ."[82] The notice must also include the name of the person or entity whose rights are being terminated and the address where the notice will be served, including any successors of interest of the original grantee.[83] Furthermore, all notices must include the title of the work, the effective date of termination, and if possible, the original copyright registration number.[84]

There are additional requirements if the termination of a grant is being exercised by parties that are not the author.[85] When the successors-at-law of a deceased author exercise their rights under this act, they must list in the notice all "the names and relationships to that deceased author" as well as "specific indication of the person or persons executing the notice who constitute more than one-half of that author's termination interest. . . ."[86] However, if this information is unavailable, the notice may include as much of the information as possible and available as well as a "brief explanation of the reasons why full information is or may be lacking. . . ."[87] If the information is unavailable, then the notice must also include a "statement that, to the best knowledge and belief of the person or persons signing the notice, the notice has been signed by all persons whose signature is necessary to terminate the grant. . . ."[88]

In addition to the requirements above, termination notices being made under Sections 304(c) and 304(d) of the Copyright Act must in-

79. *Id.*§ 203(a)(4)(B); 37 C.F.R. § 201.10 (2019).
80. 37 C.F.R. § 201.10.
81. *Id.* §§ 201.10(b), 201.10(b)(3).
82. *Id.* §§ 201.10(b)(1)(i), 201.10(b)(1)(iv), 201.10(b)(2)(i), 201.10(b)(2)(v).
83. *Id.* §§ 201.10 (b)(1)(ii), 201.10(b)(2)(ii).
84. *Id.* § 201.10.
85. *Id.* § 201.10 (b)(1)(vii).
86. *Id.*
87. *Id.* § 201.10 (b)(1)(vii)(A).
88. *Id.* § 201.10 (b)(1)(vii)(B).

clude a "statement that termination of renewal term rights . . . has not been previously exercised."[89]

Solely for those works that were transferred on or after January 1, 1978 and subject to Section 203, a notice must also include the "date of execution of the grant being terminated and, if the grant covered the right of publication of a work, the date of publication of the work under the grant."[90]

When drafting the promulgated regulations, the Copyright Office included a safeguard in the form of the harmless error rule, which allows errors to be considered harmless if they do not affect a receiving party's ability to identify the work or "do not materially affect the adequacy of the information required to serve the purposes" of the termination provisions.[91] These types of errors are not considered to be fatal in determining whether or not a notice is effective.[92]

While the rule is a general one, the promulgated regulation also lists specifically enumerated examples of harmless errors, including errors in the date of copyright registration, date of publication, date of the grant being terminated, or the original copyright registration number.[93] Harmless errors also include those errors made while attempting to comply with the provisions governing notices sent by parties that are not the author and in "describing the precise relationship[ ]" between the signatory of the notice and the author.[94] However, if the error is made in bad faith with the "intention to deceive, mislead, or conceal relevant information," then even the errors specifically enumerated will be considered fatal.[95]

Service of the notice must be made to "each grantee whose rights are being terminated, or the grantee's successor in title."[96] All notices must be served either by "personal service, or by first class mail" to the "last known address of the grantee or successor in title."[97] Even if the grantee has assigned the rights to a successor in title, if after a "reasonable investigation is made by the person or persons executing the notice," there is no indication that the rights have been transferred, the notice may be effective by serving it on the grantee.[98]

However, "if there is reason to believe that such rights have been transferred by the grantee to a particular successor in title," then the

89. *Id.* § 201.10 (b)(1)(vi).
90. *Id.* § 201.10 (b)(2)(iii).
91. *Id.* § 201.10 (e)(i).
92. *Id.* § 201.10 (e).
93. *Id.* § 201.10 (e)(ii).
94. *Id.*
95. *Id.*
96. *Id.* § 201.10 (d)(1).
97. *Id*.
98. *Id.* § 201.10 (d)(2).

notice is only effective once it is served on the successor in title.[99] Under these regulations, a reasonable investigation may include "a search of the records in the Copyright Office" or, if the work is a musical composition that has been "licensed by a performing rights society, a reasonable investigation also includes a report from that performing rights society identifying the person or persons claiming current ownership of the rights being terminated."[100]

Finally, before the termination may be effective, the notice of termination must be submitted and recorded in the Copyright Office.[101] In order for the notice to be recorded, the party sending notice must submit to the Copyright Office a copy of the notice that is "certified to be, a true, correct, complete, and legible copy of the signed notice of termination as served" along with a "statement setting forth the date on which the notice was served and the manner of service. . . ."[102]

The Copyright Office will not record a notice of termination if, "in the judgment of the Copyright Office, such notice of termination is untimely."[103] A notice is untimely according to the Copyright Office if "the effective date of termination does not fall within the five-year period described in [the Copyright Act];" the submitted copy of the notice "indicate that the notice of termination was served less than two or more than ten years before the effective date of termination;" or the notice is not recorded before the effective date of termination.[104]

When submitting the copy of the notice for recordation, it must be mailed to the Copyright Office with the proper fee and a Recordation Notice of Termination Cover Sheet.[105] Once the copy of the notice, the statement of service, and the proper fee have been received by the Copyright Office, the notice will be "returned to the sender with a certificate of recordation" that acknowledges the date of recordation.[106]

While recordation is required to put a termination of a grant into effect, a recordation notice "is not a determination by the Office of the notice's validity or legal effect" and the Copyright Office will rely on the information provided by the sender in the Recordation Notice of Termination Cover Sheet without "confirm[ing] the accuracy of such certifications or information against the submitted notice."[107] This means that even though it is recorded with the Copyright Office, the

99. *Id.* § 201.10 (d)(2)(ii).
100. *Id.* § 201.10 (d)(3).
101. *Id.* § 201.10 (f).
102. *Id.* § 201.10 (f)(1)(i).
103. *Id.* § 201.10 (f)(1)(ii)(A).
104. *Id.*
105. *Id.* § 201.10 (f)(2)(i)-(ii).
106. *Id.* § 201.10 (f)(3).
107. *Id.* § 201.10 (f)(4)-(5).

information in the notice may not be accurate and may still include fatal errors in the notice.

4. Purpose of the Termination Provision of the Copyright Act of 1976

The Copyright Act of 1976 was much more than a revision of the Copyright Act of 1909. Instead, it is viewed as a "completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act."[108] The 1976 Act has deeply changed the way copyrights are treated, particularly in how authors are able to recapture their rights in and to the copyrights that they have created. This was not a process that occurred over night—the legislative history of the Copyright Act of 1976 includes "more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years."[109] The result was a copyright act that was largely comprised of provisions that were heavily negotiated by parties that control the rights of copyrights, and not Congress itself.[110]

One of the most profound changes contained within the Copyright Act of 1976 was the creation of the inalienable right of termination.[111] The termination provisions were added to the Copyright Act of 1976 in order to give creators the ability to realize the full value of their works in a way that renewal periods had failed to do. Originally, renewal periods were created as "a legal trigger to renegotiate problematic licensing terms with their publishers and producers."[112] However, the right to renewal became futile in achieving its purpose because of the Supreme Court's decision in *Fred Fisher Music Co. v. M. Witmark & Sons*[113], which allowed authors to "transfer their rights to the renewal term during the initial term."[114] After that decision, it became standard for companies to require the assignment of the renewal right

108. Barbra Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y. L. SCH. L. REV. 477, 479 (1977).

109. Jessica D. Litman, *Copyright Compromise and Legislative History,* 72 CORNELL L. REV. 857, 865 (1987).

110. *See id.* at 868-69.

111. *See* Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 316-17 (2013).

112. *Id.* at 317.

113. 318 U.S. 643 (1943).

114. MOSER & SLAY, *supra* note 23, at 138 (citing Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943)).

from the start of the agreement.[115] Thus, artists lost all ability to get that second bite at the apple.[116]

Because of the ineffectiveness of the renewal provisions, Congress determined that there was a "need for a new legal framework," while still "carrying over and reinventing a compelling policy objective."[117] Thus, when it came time to reformulate the Copyright Act, the drafters did away with the renewal system and created the termination provisions to address the ability to recapture rights.[118] More specifically, the drafters made an inalienable ability to terminate so that a creator may not unknowingly (or even knowingly) contract away his or her right to recapture and renegotiate the rights.[119] By doing so, Congress "recognized the importance of a reversion of rights and found justification in the need to 'safeguard authors against unremunerative transfers . . . because of the [. . .] impossibility of determining a work's prior value until it has been exploited.'"[120]

Most importantly, the termination provisions allow songwriters and other authors of copyrights to renegotiate the deals that became more lucrative over time than originally believed by allowing "authors or their heirs a second opportunity to share in the economic success of their works."[121] Much like The Beatles were unsure of what level of success they would garner before signing away their rights, most new authors are unlikely to get favorable deals that reflect what may or may not come to fruition during their careers.

It is also difficult to value works before they are created; therefore, the reversion interest created by the termination provisions allow creators to see a rightful return that may have been bargained away prior to the creation of the work.[122] Therefore, in most situations, the only way that an artist is able to share monetarily in a more equalized manner is through the termination provisions and through the concept of the inalienability of these rights.

B. What Constitutes a Harmless Error?

One safeguard that was put in place to help assist those authors or successors who are attempting to terminate the transfer of copy-

115. *Id.*
116. *See id.*; Pallante, *supra* note 111, at 317.
117. Pallante, *supra* note 111, at 317.
118. *Id.*
119. 17 U.S.C. §§ 203, 304.
120. Marc S. Brown, *Copyright Law – Termination of Transfers; Trump Card or Joker*, 1 Det. C.L. Ent. & Sports L.F. 41, 44 (1994) (quoting Harry Fox Agency, Inc. v. Mills Music, Inc., 543 F. Supp. 844, 859 (S.D.N.Y. 1982)).
121. Gap in Termination Provisions, 76 Fed. Reg. 32,316, 32,316 (June 6, 2011) (codified at 37 C.F.R. pt. 201).
122. Pallante, *supra* note 111, at 317.

rights was the harmless error.[123] Specifically, it allows for "harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of [the termination provisions] whichever applies. . . ."[124] This "safety valve" was created in *Siegel v. Warner Bros. Entertainment Inc.*[125] in recognition of the "intricacies of the formalities being established and the potential for gaps in the terminating parties' (especially in the case of an author's heirs) knowledge of the information sought by those formalities due to the long passage of time that may have occurred since the grant and works in question were executed and published . . . ."[126]

The standard set forth in the harmless error rule is "expressly tie[d]" to the information that is necessary to "adequately fulfill" the purpose of providing terminating parties a "meaningful opportunity to recapture the right to the extension in the copyright term afforded to such earlier works by the 1976 Act, while at the same time ensuring that reasonable notice is given to grantees (or their successors) and to the public so as to identify what work(s) are affected."[127]

The specifically enumerated harmless errors in the regulations include: listing the incorrect date of the grant, the incorrect date of publication, the incorrect date of copyright registration, or the incorrect copyright registration number; not listing all of the authors involved in the creation of the work; or not specifying the relationship between the author and the signatory as long as the error was made "in good faith and without any intention to deceive, mislead, or conceal relevant information."[128] The purpose of this list was not to limit the harmless error rule, but rather to avoid disputes "that those particular errors could ever be considered harmful" and "foreclose disputes as to a certain narrow class of errors."[129]

When deciding whether an error is harmless, a "careful consideration of the nature of the property at issue is necessary to assess th[e] balance between providing unreasonable notice to the grantee (or its successors) and the public and avoiding undue burdens on authors or their heirs."[130] The key is the adequacy of the information, a showing of due diligence on the part of the persons sending notice, and the abil-

123. 37 C.F.R. § 201.10(e) (2019).
124. *Id.* § 201.10(e)(1).
125. 690 F. Supp. 2d 1048 (C.D. Cal. 2009) (remanded on other grounds).
126. Siegel v. Warner Bros. Entm't Inc., 690 F.Supp.2d 1048, 1052 (C.D. Cal. 2009) (remanded on other grounds).
127. *Siegel*, 690 F. Supp. 2d at 1061 (remanded on other grounds).
128. 37 C.F.R. § 201.10(e)(2).
129. *Siegel*, 690 F. Supp. 2d, at 1053-54 (remanded on other grounds). *See* Termination of Transfers and Licenses Covering Extended Renewal Term, 42 Fed. Reg. 45,916, 45,919 (Sept. 13, 1977) (codified at 37 C.F.R. pt. 201).
130. *Siegel*, 690 F. Supp. 2d, at 1056 (remanded on other grounds).

ity of the information to put the grantee on notice of what rights will be reverting back to the author.[131]

For example, a "boilerplate designation of the grant to be terminated" instead of a specified designation that is included with "a complete listing of the [c]ompositions, their author, date of copyright, and effective date of termination" is sufficient to satisfy the requirements of the promulgated rule.[132] Furthermore, where the "information in [a] catch-all provision is adequate to give the public a 'reasonable opportunity' to identify the affected works" and the body of work is so prolific, such as the full body of work containing the character Superman that spanned a notice that was 546 pages long, that omitting just a few works from a proper termination notice was not a fatal error.[133] The catch-all provision in *Siegel v. Warner Brothers* stated that "the intent was for the termination notice to apply 'to each and every work . . . that includes or embodies" Superman, and the failure to list any such work in the notice was 'unintentional and involuntary.'"[134]

The courts seem to apply more flexibility with errors in notices for prolific catalogs of works rather than smaller transactions.[135] While the catch-all provision was enough for a notice for tens of thousands of works, the omission of five titles from a notice for a catalog of forty works made the termination ineffective for the five omitted titles.[136]

The one area that seems to be a clear area of fatal error is missing the five-year termination window or serving notice during the incorrect time frame.[137] A district court in California even went so far as to call the five-year window an "unbendable rule," even when missed by only a few days.[138] Furthermore, even though an error in a date of grant or publication is considered a harmless error under the promulgated regulations, if the error causes the notice to be sent after the end of the five-year window has passed, based on the accurate date,

131. *See id.* at 1072-73 (holding that a catch all provision is adequate to cover omitted works where a relatively few works are not included in a listing of a prolific catalog of work) (remanded on other grounds).

132. Music Sales Corp. v. Morris, 73 F. Supp. 2d 364, 380 (S.D.N.Y. 1999) (deciding that a boilerplate designation of the grant was adequate to identify the grant that was being terminated).

133. *Siegel*, 690 F.Supp.2d, at 1070 n. 13 (remanded on other grounds).

134. *Id.* at 1051 n. 6 (remanded on other grounds).

135. Carrie Casselman, *Counseling Statutory Successors Regarding Copyright Termination*, 23 N.Y. STATE BAR ASS'N ENT., ARTS, & SPORTS L.J. 26, 28 (2012).

136. Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 622 (2d. Cir. 1982).

137. Casselman, *supra* note 135, at 28.

138. *Id*. (citing Siegel v. Warner Bros. Entm't Inc., 542 F.Supp.2d 1098,1121-22 (C.D. Cal. 2008) ("Once a termination effective date is chosen and listed in the notice, the five-year time window is an unbendable rule with an inescapable effect, not subject to harmless error analysis.")).

even if the error is made in good faith, the termination notice will not be effective.[139]

Beyond those errors specifically enumerated in the promulgated regulation and the few examples of harmless errors and fatal errors as recognized by the courts and the Copyright Office, it is unclear what all can be considered as a harmless error.

C. The Current Imbalance of Power Between Authors or an Author's Statutory Successors and Grantees and Why It Needs to Be Calibrated

In nearly every industry relationship that revolves around a transfer of copyright, there is a significant power imbalance, particularly in the bargaining powers between an author and a company who is purchasing that author's rights. That power imbalance is usually present from the moment the author signs over his rights to the other party and continues to affect the relationship even through the process of terminating the grant.

Congress intended to help neutralize the imbalance through the termination provisions because Congress realized that "[s]ince authors are often in a relatively poor bargaining position . . . provisions should be made to permit them to renegotiate their transfers that do not give them a reasonable share of the economic returns from their works."[140] In addition, a comment by the Register of Copyrights on an early draft of the Copyright Act of 1976[141] stated that "[t]he reason you need a reversion is because the imbalance in bargaining positions makes it impossible for the author to obtain the sort of bargain that he would like to obtain."[142]

With that intent, Congress made sure that the termination provisions created by the Copyright Act would give authors an inalienable right to recapture their copyrights in order to reap more fully in the benefits of their exploited works.[143] The fact that the termination right may not be contracted away addresses the biggest loophole of the renewal provisions while "protect[ing] the careless or thoughtless author, who, under pressure, may be coerced into agreeing subsequent to

139. Reese, *supra* note 11, at 903-04 (citing Gap in Termination Provisions, 76 Fed. Reg. 32,316, 32,319 (June 6, 2011) (codified at 37 C.F.R. pt. 201).

140. Reg. of Copyrights, 87th Cong., Copyright Law Revision Pt. 1, Report on the General Revision of the U.S. Copyright Law 90, 92 (Comm. Print 1961).

141. P.L. 94-553, tit. 1, § 101, Oct. 19, 1976, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

142. Register of Copyrights, 88th Cong., Copyright Law Revision Pt. 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 286 (Comm. Print 1964).

143. The Copyright Act of 1976 § 203, 17 U.S.C. § 203(a)(5) (2018); *see* Passman, *supra* note 10, at 318-19.

the grant, or in the grant itself, to waive or otherwise contract away his right of termination."[144] However, the statute protects more than just the "careless or thoughtless author" from explicitly signing away his right to termination, the statute also protects any author who signs an agreement that looks innocuous and has no mention of waiving the termination right on the face of the agreement.[145]

Despite "[a]ny prudent, provident author . . . want[ing] to give a limited grant, because he knows that the value of his rights can't be adequately determined at the time the bargain is made," because of the lack of bargaining power of authors until they have already established a certain level of success, a limited grant is unlikely to be given in lieu of a full grant.[146] The lower bargaining position of authors entering into agreements to transfer their rights in their various copyrights has also allowed grantees to place misleading and outmoded language in agreements that can in effect deter authors from exercising their termination rights. Nearly all exclusive songwriter agreements provide for a grant of rights that is irrevocable for the life of the copyright.[147]

An author such as a songwriter who is not legally trained, may take the "irrevocable grant" language at face value without realizing that he or she has an inalienable right to terminate the grant.[148] A standard grant of rights clause in a music publishing agreement will read as such:

> Writer hereby irrevocably assigns and grants to Publisher and its successors, all rights and interests of every kind and nature in and to the results of Writer's songwriting and composing services, including, the Compositions, the copyrights therein and any and all renewals and/or extensions thereof throughout the Territory, all for the full term of copyright protection and all extensions and renewals thereof throughout the Territory.[149]

The language in this standard clause is merely a remnant of the days of renewal periods when authors had the ability to contract away their rights in and to their copyrights. Because that is no longer applicable under the current copyright laws in the United States, this language serves no purpose other than to mislead or confuse authors into believ-

144. Benjamin Melniker & Harvey D. Melniker, *Termination of Transfers and Licenses Under the New Copyright Law*, 22 N.Y. L. Sch. L. Rev. 589, 602 (1977).

145. *Id.*

146. 88TH CONG., *supra* note 142, at 286 .

147. Justin M. Jacobson, *An Examination of the Songwriter & Music Publisher Relationship [Part 1],* TUNECORE (Oct. 16, 2017), https://www.tunecore.com/blog/2017/10/examination-songwriter-music-publisher-relationship-part-1.html.

148. PASSMAN, *supra* note 10, at 318-19.

149. Jacobson, *supra* note 147.

ing that they do not have the ability to terminate the transfer.[150] In effect, this clause does not have the full legal effect that it purports to have because the right to recapture or terminate the transfer is inalienable.[151] Furthermore, this clause does nothing to put the author on notice that he has the right to recapture those rights which he has assigned the grantee.[152] Unless the author has been made aware of his right to terminate, if the author takes that clause at face value, he will never exercise his legal right to terminate the grant.

The imbalance in bargaining power is apparent long after the author originally enters into the agreement. The same imbalance appears again when the author or his statutory successors begins to attempt to put a termination notice into effect. While the termination provisions of the Copyright Act are written in a manner as to be put into effect by an author or the author's heirs/statutory successors, in the words of former Register of Copyrights Maria Pallante, "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."[153]

There is nothing in the statute that requires the author or the statutory successors to hire an attorney to serve a notice of termination, however, the complexity of the formalities that accompany the termination provisions make it difficult for those who are not legally trained to navigate and decipher all of the requirements, let alone comply with said provisions.[154] The formalities have "aptly been characterized as formalistic and complex, such that authors, or their heirs, successfully terminating the grant to the copyright in their original work of authorship is a feat accomplished 'against all odds.'"[155] Between the rigid nature of the formal requirements and the complexities involved with calculating the termination and notice windows, there are many reasons for authors to simply decide not to even try to recapture their rights.[156]

In addition to the difficult-to-navigate formalities of the termination provisions, there is no obligation for the grantee who is sent a notice to acknowledge receipt of the notice let alone acknowledge the

150. *See generally* PASSMAN, *supra* note 10, at 318-19 (discussing the inalienable right to terminate).

151. 37 C.F.R. § 210.10 (2019); Jacobson*, supra* note 147.

152. Jacobson, *supra* note 147.

153. Pallante, supra note 111, at 315, 316 .

154. *See generally* Reese, *supra* note 11, at 903-04.

155. Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1101-02 (C.D. Cal. 2008) (quoting 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 7:52 (2007)).

156. Reese, *supra* note 11, at 903-04.

effectiveness of such notice.[157] This leaves authors in a state of limbo for two to ten years to wait and see whether they will actually receive their rights back, unless they decided to seek a declaratory judgment in court. Without a reason to acknowledge errors, the grantees, who already have substantially more power than the author, essentially control the ability to hold the author's rights hostage until the termination window closes and the author can no longer recapture his rights. This only serves to give more power to the already powerful parties that have the upper hand.

From the moment the author signs an agreement transferring his rights to another party until the time that the author is able to effectively recapture his rights through a termination of transfer, the balance of power is tipped heavily in favor of the grantee rather than the author. This is so despite the attempt by Congress to create a more balanced system by enacting the termination provisions and making them inalienable.

D. Proposed Solutions

In order to effectuate a more balanced termination process, three changes should be implemented: These changes include redefining the harmless error rule, creating a system of acknowledgment for parties who receive a termination notice, and mandatory disclosures in all written agreements that include a terminable grant that puts the author on notice of his right to terminate.

1. Redefining the Harmless Error Rule

In order for authors and their statutory successors to be able to rely in good faith on information that is contained in previous copyright registrations and recordations without the fear that the termination notice will be ineffective, the current language of 37 CFR 201(e)(2) should be amended to read as follows:

> Without prejudice to the general rule provided by paragraph (e)(1) of this section, errors made in giving the date or registration number referred to in paragraph (b)(1)(iii), (b)(2)(iii), or (b)(2)(iv) of this section, or in complying with the provisions of paragraph (b)(1)(vii) or (b)(2)(vii) of this section, or in describing the precise relationships under paragraph (c)(2) or (c)(3) of this section, shall not affect the validity of the notice if the errors were made in good faith and without any intention to deceive, mislead, or conceal relevant information. *For the avoidance of doubt, errors made from reliance on user-re-*

157. *See generally* 37 C.F.R. § 201.10 (no obligations imposed on parties receiving notice within the regulations governing termination notices).

> *mitted errors contained within a previous registration or recordation at the Copyright Office shall be considered an error made in good faith for purposes of this section. Furthermore, in the event that the error made in giving the date referred to in paragraph (b)(1)(iii), (b)(2)(iii), or (b)(2)(iv) of this section was made in a good faith reliance on information contained in a previous registration or recordation at the Copyright Office and takes the notice out of the termination window, the error shall be considered harmless under this section.*[158]

This revision would allow authors or their statutory successors to be more secure in the process of terminating transfers and filing notice of such terminations because even if the information they have relied on is incorrect in the timing of filing the notice, it will not automatically take away the ability for the author or his statutory successors to recapture those rights.

2. Creating a System of Acknowledgement for Parties Receiving Termination Notices

Because of the lack of accountability on behalf of the parties receiving termination notices to make the terminating party aware of any errors that would make the notice ineffective, the receiving party has the power to essentially hold the songwriter's rights hostage until the termination window has elapsed. A new system of accountability for all parties should be put in place in order to serve the purposes of Congress in creating the termination right in the Copyright Act of 1976.[159]

The regulations which put into effect the termination provisions of the Act should be amended to include the following:

> A party receiving a termination notice shall acknowledge the receipt of such notice as well as any errors found in the notice, whether or not that error would be fatal to the effectuation of the notice. The notice of receipt and errors shall be sent to the terminating party after a reasonable time to allow for the receiving party to complete due diligence of the accuracy of the notice, however, this period is not to exceed ninety days. Furthermore, if the terminating party has over a year left in the termination notice window, then the receiving party shall give the terminating party a six-month grace period to correct such errors. This grace period shall begin upon the terminating party's receipt of notice of such errors.

This would introduce an obligation of acknowledgment on behalf of the party receiving notice while giving a grace period to the author

158. *See* 37 C.F.R. § 201.10(e)(2) (2019) (revision in italics).
159. *See generally* 88TH CONG., *supra* note 142, at 286.

and his heirs to correct any errors. However, the grace period will only be available if the notice is served in a timely manner to prevent unfair gaming of the system.

3. Requiring Mandatory Disclosures in Agreements That Put the Author on Notice of His Right to Terminate

The regulations created to put into effect the termination provisions should be amended further to include the following:

> All agreements that purport to transfer a grant of rights that is considered terminable under Section 203 of the Copyright Act must include an explicit disclosure that alerts the transferor that he, along with his statutory heirs, has an inalienable right to terminate the grant according to the statute.

This mandatory disclosure would ensure that not only the author signing the agreement has a statutory right to terminate the transfer, but it would also ensure that the author's heirs who may not be familiar with the inner workings of the music industry could look at the plain language of the agreement and see that there is a right to terminate the transfer and recapture the rights.

E. Arguments for the Proposed Solutions

All three proposed solutions work together to allow authors to have a greater chance to exercise their termination rights effectively and hold both parties to a certain level of accountability. The addition to the harmless error rule allows authors and their statutory successors to rely on information provided to the public through the Copyright Office without worrying that the information will cause them to err and not be able to recapture their rights. This is particularly valuable when they may not be able to obtain the information from other sources.

At the same time, an acknowledgement requirement allows for a fairer process of effectuating terminations of transfer. Further, limiting it to a certain period of time that is not the entire termination window puts accountability on both the author (or his statutory successors) and the grantee. Finally, the mandatory disclosure that creates an obligation for the grantee to put the author on notice that he has the ability to terminate holds the grantee accountable in case the grantee has included holdover language from before the termination era that does not have the legal effect that it purports to have.

1. Recognizing Errors Made in Reliance on Information from Previous Copyright Registrations and Recordations as a Harmless Error

As the termination window for more works opens every day, more opportunities for disputes become available. One less category of dispute could arise, if the harmless error rule were to be clarified to specifically include inaccurate information that was ascertained from prior copyright registrations and recordations that had contained user-remitted errors.

Neither the statute, the promulgated regulations, nor precedent address the issues that have arisen due to reliance on inconsistent copyright registrations. With musical compositions that are written by multiple parties whose music publishers register their own copyrights separately, the likelihood of having inconsistent copyright registrations is high.[160] However, sometimes the information obtained from the Copyright Office may be the only information that an author or his statutory successors can obtain.

In particular, the songwriters in the 1970s and 1980s, whose rights are currently available for recapture did not have today's luxuries of voice memos, iPhone notes, electronic calendars, and e-mail to keep track of a song's date of creation. Rather, those songwriters were left to handwrite the lyrics, and hopefully put a date on the lyric sheet.[161] Looking for handwritten lyric sheets (which may ultimately prove to be a fruitless endeavor if there are not dates of creation on them) becomes significantly more complex and time consuming when it is the songwriter's heirs who are sending the termination notices because they may not know where to find such notes or information. Even the author may be unable to locate the original documents. Unless the grant was made after the song was written, if the author is unable to find a date of creation or publication, the notice may not be sent within the timeframe provided in the statute. In fact, it may never be sent at all.

That information, however, is likely to be found at the Copyright Office on the prior registrations for the work. The online database for the Copyright Office is searchable by the public and may be the best

160. *Compare* Sun Daze, Copyright Reg. No. PA0001967589 (2014), *with* Sun Daze, Copyright Reg. No. PA0001997579 (2015). Both copyright registrations are for the same song, however, there are different claimants, dates of creation, and dates of publication listed on the registration.

161. Jack Tempchin, *Jack Tempchin, Eagles Songwriter*, SONGWRITERS ON PROCESS (Jul. 29, 2010), http://www.songwritersonprocess.com/blog/2010/07/29/tempchin (looking at the writing process of Jack Tempchin and how it has evolved since he wrote "Peaceful Easy Feeling" for The Eagles on a random piece of paper that had other various pieces of information on it).

place for those sending a notice of termination to get the information required by the statute and promulgated regulations.[162]

The law should reflect such by allowing for errors that arose from a reliance on information that had been previously recorded or registered incorrectly with the Copyright Office, because the termination of transfer provisions were written with the intent that the songwriter or his heirs would be able to effectuate such notice without necessarily obtaining legal advice or help.

Furthermore, the notice requirements include information that can only be provided in a copyright registration, so terminating parties should not be punished for using the information from the Copyright Office when filing a termination notice.[163] Since the Copyright Office recognized in the promulgated regulation that an error in the date of grant is a harmless error, it should follow that the consequences of the error should also be considered harmless. If the termination window is missed because the author relied to his detriment on the information in the copyright registration without any alternative sources of information available, the author should not have to surrender his ability to recapture his copyright because of previous user error. Instead, the author or his heirs should have the opportunity to recapture the rights based on the date listed on the copyright registration.

However, in no event would this provision apply if the terminating party acted in bad faith in relying on the date obtained from the copyright registration or recordation without any due diligence solely to extend the termination window beyond the five-year window provided by the statute. Bad faith can be proven through a showing that the terminating party had reasonable access to information that stated the date of publication or the date of the grant as a date that if used would have fallen into the correct five-year window. Only where there is no other information available aside from that at the Copyright Office or in the control of the grantee, the termination window should be based on the date remitted to the Copyright Office, whether or not that date is accurate.

Because the formalities of the termination provision require information that can only be found on a previous registration from the Copyright Office and it is an accessible way to pull the information where the original source documents or information may not be available or easily accessible, reliance on the information in those registrations when filling out a notice of termination should be considered a good

162. U.S. COPYRIGHT OFFICE, *Public Catalog*, https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First (last visited Feb. 8, 2020).

163. 37 C.F.R. § 210.10 (2019).

faith effort and not a fatal error. Furthermore, when that information is relied on, it should not cause the author's notice to be ineffective, even if the notice was not filed timely because of the date listed on the registration.

2. Neutralizing the Power Imbalance of Authors and Grantees Through Clearer Contract Terms and Acknowledgment of Receipt and Errors in Termination Notices

Congress, by creating the termination right, was moving toward a more balanced system of copyright ownership particularly after its attempt to do so through the copyright renewal provisions failed to create such a system.[164] However, such a balanced system is idealistic but unworkable in its current state because of an imbalance of power between copyright authors and the parties to whom the author chooses to transfer his rights.

The termination provisions allow an author a second chance to negotiate the favorable terms that he was unable to receive when he first signed the agreement because the value of his uncreated work had not yet been realized. However, there are multiple barriers beginning from the language of the agreement itself and ending with the process by which a termination is effectuated that must be addressed if there is to be a fair opportunity for authors to recapture their rights.

Beginning with the original agreement between the author and the grantee, the language of standard grants of rights clauses needs to be reconsidered.[165] Provisions in agreements that claim a grant of copyright is irrevocable, for perpetuity, or for the full term/life of the copyright are antiquated and no longer in sync with current copyright law.[166] Because the termination provisions created an inalienable right of reversion, these terms do not have the full legal effect that they once did when renewals of copyright could be assigned away.[167]

While an author who has hired an attorney might have been advised of the technicalities of the termination provisions, most unrepresented authors could read that language in their agreements and believe that they do not have the chance to terminate that transfer of copyright. Also, termination of transfers may be put into effect by the heirs of the author who may not have any experience or knowledge of the music industry. Thus, statutory successors find and read the

164. Pallante, *supra* note 111, at 317.

165. *See* Jacobson, *supra* note 147.

166. *See generally id.*

167. *See* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943) (holding that renewal rights under the Copyright Act of 1909 are freely assignable).

agreement, they are unlikely to realize that legally, irrevocability does not mean what it says on its face.

A mandatory disclosure requirement that spells out that the author has a statutory right to recapture his copyrights would effectively put the author on notice. While the disclosure would not require the publisher or other grantee to lay out the exact specificities of the statute, it would at least alert the author that he should be aware of such provisions in the Copyright Act of 1976 (the "Copyright Act") and the corresponding right of termination.

Beyond putting the author on notice of the right to terminate, agreements that contain clear language alerting the reader of the agreement that these rights exist will allow an author's statutory heirs who may come across the agreement years down the road to be on notice of the right to recapture. Requiring such language that specifically addresses the idea of statutory heirs needing to be aware of the provisions will allow more non-legally trained persons, as well as those who are unfamiliar with the music industry, to effectuate terminations of transfer. If the termination provisions are more accessible by both authors and their heirs, Congress's intent when establishing the termination provisions is closer to being fulfilled.

Once clearer contractual language is in place, the next problem area that needs to be addressed is the lack of accountability that currently exists on the behalf of grantees who are receiving a termination notice. Grantees have no obligation to acknowledge that they have received the notice of termination, nor do they have any obligation to acknowledge that there are fatal errors in the notice.

By creating a system of accountability that applies in part to both parties, Congress would be furthering the intentions behind the termination provisions of wanting to give authors a chance to "share in the long-term value of their works."[168] With the acknowledgement of fatal errors, and a grace period if the author or his heirs has served notice in a timely manner, grantees will no longer be able to hold an author's rights hostage while the author is unaware that he has not actually made an effective termination. While the author will still have to comply with the many hurdles created by the complexities of the termination requirements, this would at least offer an opportunity to fully exercise the rights that have been granted to him through the Copyright Act.

The grace period incentivizes the terminating party to file a timely termination notice so that he may ultimately have an opportunity to correct any errors and effectively terminate his rights. This is

168. Pallante, *supra* note 111, at 316.

also valuable for the grantee because the earlier that an author or his statutory successors serves notice of termination, the sooner that the grantee has the opportunity to renegotiate and secure an interest in the copyrights for what will be the rest of the life of the copyright.

No matter what, the parties are contractually obligated to one another whether there is animosity between the two or not. It is in both parties' best interest to have a system in place that fairly balances the interests of both. If grantees have more obligations to make terminating a transfer a fairer process, authors and their heirs are going to be more inclined to look amicably upon the grantee and work toward a renegotiation rather than a full recapture of rights as they are entitled.

Together, clearer contractual terms along with an obligation for grantees to acknowledge receipt of a termination notice or of any harmful errors and a grace period for authors or their heirs to correct the notice will be a way to equalize the power imbalance that tips greatly in the favor of grantees currently.

III. CONCLUSION

When the Copyright Act of 1909 was amended in 1976 to create the termination right[169], Congress intended for it to be a painless way for authors to recapture their rights and get a second chance to negotiate poor deals, however, the reality has not been quite so clear cut.[170] There is still a clear power imbalance between authors and the parties to whom they have transferred the rights in their copyrights. This imbalance can be brought closer to equilibrium through a clarification of the harmless error rule that allows for reliance on information that has been previously remitted in a copyright registration or recordation. The pursuit for equilibrium can be further achieved through the implementation of a system of acknowledgement by the party receiving notice upon receipt of said notice of termination that includes a grace period to correct any such issues, as well as a mandatory disclosure that puts any author signing the transfer of a grant on notice of his right to terminate the transfer.

169. 17 U.S.C. §§ 204, 304 (2018).
170. Pallante, *supra* note 111, at 317; Gardner, *supra* note 13.