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OVERVIEW OF COPYRIGHT LAW

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COPYRIGHT LAW 101: The Basics

1. The Acts:

Copyright arises automatically when an original work is created. Created means when the work is fixed in a tangible copy or a phonorecord for the first time.

The United States has two different bodies of copyright law that cover how long a work is protected by copyright law before the work falls into the public domain. Works created and published prior to January 1, 1978 or created and registered prior to January 1, 1978, are subject to the 1909 Copyright Act and revisions. Works created after January 1, 1978 or created prior to January 1, 1978, and neither published nor registered prior to January 1, 1978, are subject to the 1976 Copyright and revisions. (17 U.S.C. §§ 302-305)

Under the 1909 Act there is a two-term system of protection. The original term was 28 years from registration or publication and the renewal term was 28 years. If there had not been revisions to the 1909 Act, all works would have become public domain 56 years after registration or publication. Works created prior to 1923 are in the public domain. Works existing in their first term of copyright under the 1909 Act on January 1, 1978 shall last for the initial 28 years and then shall be renewed for 67 years. Works in their renewal term on January 1, 1978 shall be protected by copyright for 95 years from publication.

Under current revisions to the 1976 Act, works created on or after January 1, 1978 are protected for the life of the author plus 70 years. Works created, but not published or registered prior to January 1, 1978, are protected for life of the author plus 70 years, but shall not expire before December 31, 2001. The duration of copyright for "works made for hire" is 95 years from publication or 120 years from creation, whichever is shorter.

We often discuss the copyright laws in a vacuum without grasping just how many works are controlled by these laws. Based upon the 2003 Report of the Register of Copyrights, total copyright registrations issued from 1790 through 2003 are 30,787,934. The number of registrations issued from 1978 through 2003 is 14,116,890. The total number of registrations issued from 1923 through 1977 is 12,788,248. Based on these numbers, the importance of understanding the intricacies of both the 1909 Act and 1976 Act becomes evident.

2. Benefits of registration:

Registration of your copyright in the copyright office is not a condition of securing a copyright. There are three situations where registration is required to receive the maximum protection of the copyright laws:

Registration is necessary prior to the filing of an infringement law suit;
If registration is made prior to infringement of the work, attorney's fees are available in addition to selecting between pursuing statutory or actual damages in an action for infringement; and
If registration is made within 5 years of publication; the information provided on the registration is accepted by the court as true.

3. Notice of copyright:

Under the 1909 Act it was detrimental to your copyright if the work was published without proper notice. The requirement of publication with proper notice carried into the 1976 Act until March 1, 1989 when the U.S. joined the Berne Convention. The law no longer requires use of a copyright notice. IT IS HIGHLY RECOMMENDED THAT YOU CONTINUE TO USE A PROPER COPYRIGHT NOTICE to receive the

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maximum recovery allowed under the law in the event of litigation.

4. Proper notice:
Proper notice consists of three elements. Visually perceptible copies of the work should contain all three of the following elements.

The **symbol** "©" or the word "Copyright" or the abbreviation "Copr.";
The **year** of first publication of the work; and
The **name** of the owner of the copyright.

As an example: © 2001 Bennett Law Office

If the copyrighted work is a sound recording, the proper symbol is the letter P in a circle.

5. Exclusive rights of copyright owner:
As the holder of exclusive rights, the copyright owner may grant permission to some and prevent others from doing the following five items:

To **reproduce** the copyrighted work in copies or phonorecords;
To prepare **derivative works** based upon the copyrighted work;
To **distribute copies** or phonorecords of the copyright work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
To **perform** the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works; and
To **display** the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphical, or sculptural works, including the individual images of a motion picture or other audiovisual work.

COPYRIGHT LAW 201: Renewals

1. How Long?:
As stated above, under the 1909 Act there were two terms of copyright. The original term of 28 years and a renewal term of 28 years. In order to secure copyright protection for the renewal term, a renewal copyright application must have been filed during the twenty-eighth year (the final year of the first term.) Timing was critical. If the renewal was filed untimely or not at all, the work was thrust into the public domain.

In a study prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, it was found that less than ten percent (10%) of all copyrights were renewed and fewer than five percent (5%) of copyrighted books and pamphlets were renewed prior to the completion of this 1961 Copyright Office study.

In 1992, the 1976 Copyright Act was amended in regards to works registered or published between 1964 and 1977 such that a renewal application was no longer required to be filed to keep the work out of the public domain.

The 1976 Act maintained the two term system for works copyrighted prior to January 1, 1978. Under the 1976 Act, the original 28 year term was maintained and the renewal term was 47 years. The 1998 amendment to the 1976 Act increased the renewal term to 67 years for a total of 95 years of copyright protection.

2. Who Owns/Claims the Renewal?:
The courts have determined the renewal term is an expectancy interest and is not a vested right. Because it is an expectancy, the claimant(s) of the renewal term will vary based on certain factors.

If the work is created as a "work for hire," the author relinquishes any claim to the renewal. The employer or party that commissioned the work will claim the renewal.

If the author assigned the renewal term of the work to a third party and the author survives to the start of the renewal term, the assignee will retain the renewal term.

If the author assigns the renewal term of the work to a third party, the third party will own the renewal IF…. the author does not survive to the beginning of the renewal term.

What happens if the author assigns the renewal term and dies prior to the last year of the first term? The renewal term then vests as specified in the 1976 Copyright Act.

It is important to keep in mind that if the author predeceases the start of the renewal term, the Copyright Act controls the distribution of the renewal interest, not state intestacy laws or the author's will. (17 U.S.C. § 304(c)(2))

3. Why File A Renewal Copyright?:
Even though there is no longer a requirement to file a renewal, it is still important to do so. Filing at any time, even after the 28th year, will garner the claimant many benefits. The renewal certificate serves as prima facie evidence to the validity of the copyright during the

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renewal term and of the facts stated in the renewal. Renewal registration is a prerequisite to statutory damages and attorney's fee in infringement suits and for filing an infringement action.

Filing a renewal is key for controlling the further use of derivative works created during the original term. If the renewal is filed within one year prior of the expiration of the original term, the claimant may terminate any grants for derivative works that were issued during the original term. The U.S. Supreme Court ruled in the "Rear Window" case (*Stewart v. Abend*, 496 U.S. 643 (1990)) that any license granted during the original term would only remain in effect if the author survived to the start of the renewal term and the renewal term vested in the author's assignee. The Rear Window case involved an Alfred Hitchcock film based upon a book. The author did not survive to the start of the renewal term, so the claimant was able to cutoff the derivative rights holder.

The last works to be subject to a renewal term were those works published or registered in 1977. The 28th year for these works was 2005. The final renewal term begin in 2006. Even if your client missed the window to file to cut off the derivative rights holders, it is still important to file the renewal.

It is VERY IMPORTANT to understand that simply filing the renewal application will not serve as notice to the original copyright claimant or any derivative rights holders. How does the claimant of the renewal term go about notifying all the necessary parties that there is new owner for the U.S. rights? An even bigger question may be who are the necessary parties? For a musical composition you have several parties to notify. First, send written notice to the original term claimant(s). You should also request information on all licenses they have issued. This is for purposes of terminating derivative licenses. I have found the publishing company will not be forthcoming with this information unless you are persistent. If your client keeps good records, you may be able to determine derivative rights holders from past royalty statements. Next send written notice to the performance rights organization in which the song is registered with the song title, author and publisher information, copyright information and the new claimant information. The performance rights organization will then confirm the new ownership splits with the publisher for the initial term and revise their records accordingly. The PRO's will typically not back date claims. It is imperative to file the notice immediately so that all royalties for the renewal term are directed to the appropriate accounts. If the Harry Fox Agency is the mechanical licensing agent for the original term copyright holder, send them the notice you sent to the performance rights organization. Again, timely notice is important to secure the monies due. The Harry Fox Agency will adjust their records such that payments for any licenses issued pursuant to the original term ownership will be paid in accordance with the renewal term ownership going forward.

If you do not make these notifications, the original term claimant will continue to collect the funds and you will then have to pursue collections from the original term claimant. Depending on the amount of time that has passed from the start of the renewal period and the original term claimant receiving notification, your client may have issues with statues of limitations and laches in securing those past royalties. (*Stone v. Williams*, 970 F.2d 1043 (2nd Cir. 1992)(*cert denied*)).

Please keep in mind the renewal term is only for U.S. rights. U.S. copyright laws have no extraterritorial effect so that outside the U.S. the ownership will remain as under the first term of copyright.

COPYRIGHT LAW 301: 56/75 Year Termination (17 U.S.C. § 304)

In addition to renewal provisions to reclaim copyrights, there are other provisions built into the Copyright Act to reclaim ownership.

If you are the author of works copyrighted or published prior to January 1, 1978, or you are a member of the appropriate class outline by the Copyright Act of said author, a 56-year termination provision applies.

If the author assigned the original and renewal term and survived to the start of the renewal term, the renewal term vested in the assignee. The author, or the appropriate class of heirs if the author is deceased, may still terminate the copyright assignment pursuant to 17 U.S.C. § 304.

To terminate a transfer under the 56 Year Rule, notice of termination must be properly sent within a five-year window of time beginning at the end of 56 years from the date of registration of the copyright in the work. The notice cannot be more than 10 years prior to the window or less than two years prior to the close of the window. The Copyright Office has issued specific guidelines for the contents of the notice of termination which can be found in 37 C.F.R. § 201.10. By terminating under the 56 Year Rule, the author or heirs will reclaim the work for the maximum remaining

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years in the copyright. In most cases, that will be 39 years.

How does the math work? Assume our client's hit song "This Is My Retirement" was copyrighted on November 1, 1947. Add 56 years to 1947. That brings us to 2003. Add 5 years to 2003 which is 2008. The window of time is November 1, 2003 to October 31, 2008.

To keep within the not more than 10 year or less than 2 year window, 1993 is the earliest time notice can be sent and 2006 is the latest notice can be sent. So, the latest date the notice can be sent is October 31, 2006 to terminate on October 31, 2008.

If the copyright was published or registered prior to January 1, 1978 and was in its renewal term on October 27, 1998 and the window of time to terminate under the 56 year provision had lapsed, there is a second bite at the apple to terminate. If there was no notice of termination under the 56 Year provision, there is a new five year window in which to terminate beginning 75 years after the original copyright date.

Just as with the claiming the renewals, filing the notice with the Copyright Office is not sufficient to make the original copyright claimant comply and notify any necessary parties. The burden is on the party terminating the grant to make sure these issues are addressed. The notice must be sent to the assignee of the rights and filed with the U.S. Copyright Office prior to the effective date of termination. If notice is either not sent, or is improperly sent, the grant will not be terminated, and the grant, in most situations, will continue until the expiration of the song's copyright.

It is also important to note that reclamation under the 56 Year, 75 Year or 35 Year (discussed below) provisions, does not grant the new copyright claimant the ability to cut off licenses granted for derivative works. This is different than as applied in the renewal situation.

COPYRIGHT LAW 401: 35 Year Termination (17 U.S.C. § 203)

Under the Copyright Act of 1976, any grant of rights made by the author on or after January 1, 1978 may effectively be terminated by the author (or certain classes of heirs if the author is deceased) during a five year window. The window to terminate transfers begins 35 years from the date of publication or 40 years from the date of transfer, whichever is earlier. This is a distinction from the 56/75 Year Rule. Under 56/75 Year Rule, the time is measured from the date of the copyright registration of the work. Pursuant to the 35 Year Rule, the time is measured from the date of transfer or publication, whichever is earlier. The "35 Year Termination" does not apply to works made for hire. The notice of termination may not be served more than ten years prior to the start of the window, or less than two years prior to the close of the window.

In the simplest terms, imagine you entered into a single song publishing agreement on January 15, 1978 for the song "That Song is Mine." On January 15, 2003 you could send the appropriate notice to the copyright holder terminating the transfer under the single song agreement for "That Song is Mine" effective January 15, 2013.

Here is how the math works:
Transfer occurs January 15, 1978
Add 35 years to 1978 = 2013 plus 5 = 2018 (2013 – 2018 is the five year window)

In the above example, notice to terminate may be sent as early as January 15, 2003, but no later than January 14, 2016 to fall within the five year window and to meet the requirement of not being more than ten years or less than two years.

The notice must be sent to the assignee of the rights and filed with the U.S. Copyright Office prior to the effective date of termination. If notice is either not sent, or is improperly sent, the grant will not be terminated, and the grant, in most situations, will continue until the expiration of the song's copyright.

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