

**STATUTORY HEIRS APPARENT?:  
RECLAIMING COPYRIGHT IN THE AGE OF  
AUTHOR-CONTROLLED, AUTHOR-BENEFITING TRANSFERS**

*Tonya M. Evans*<sup>1</sup>

I.	THE HISTORY AND ROLE OF COPYRIGHT TRANSFER TERMINATION .....	106
	<i>A. Transfer Termination, Generally</i> .....	107
	<i>B. The Mechanics of Termination</i> .....	108
	<i>C. The Termination Right’s Predecessor: The Renewal Term</i> .....	110
	<i>D. Congress’s Intent in Creating the Transfer Termination Right</i> .....	111
II.	THE ROLE AND IMPORTANCE OF TESTAMENTARY FREEDOM IN PROBATE LAW AND LIMITATIONS .....	113
	<i>A. Testamentary Freedom: An Historical Look</i> .....	113
	<i>B. Various Justifications for Testamentary Freedom</i> .....	116
	1. Jurisprudential Justifications .....	116
	<i>i. The “Natural Right” Justification</i> .....	116
	<i>ii. Utilitarian Justification</i> .....	117
	<i>iii. Orthodox Economics Justification</i> .....	117
	<i>iv. Libertarian Justification</i> .....	118
	2. Pragmatic Justifications.....	118
	<i>i. Market for Social Services</i> .....	118
	<i>ii. Intellectual Estate Planning Justification</i> .....	119
	<i>iii. Non-Traditional Family Structures</i> .....	119
	<i>iv. Administrative Efficiency</i> .....	120
	<i>C. Limitations on Testamentary Freedom</i> .....	120
III.	THE EMERGENCE AND DOMINANT ROLE OF WILL SUBSTITUTES	121
	<i>A. Will Substitutes, Generally</i> .....	122
	<i>B. Common ACAB Entities</i> .....	123
	1. Grantor Trusts .....	123

---

<sup>1</sup> Associate Professor, Widener University Commonwealth School of Law. B.S., Northwestern University; J.D. (Dean’s List), Howard University School of Law (*Cum Laude*). Many thanks to my research assistants Mark Kovalcin, Ryan Logan, Erica Townes, and Paolo Shipman for their considerable efforts in the preparation of this Article. Additionally, thank you to the numerous scholars who commented on this work or otherwise provided critical food for thought, including the attendees of the Intellectual Property Law Roundtable hosted by Texas A&M School of Law in fall 2015 and Works in Progress Intellectual Property Colloquium hosted by the University of Washington School of Law in spring 2016.

2016]	<i>STATUTORY HEIRS APPARENT?</i>	101
	2. Asset Protection Trusts.....	124
	3. Closely-Held Business Entities.....	125
	4. Charitable Entities.....	125
IV.	COMMON ACAB ENTITIES IN THE ENTERTAINMENT INDUSTRY .	125
	<i>A. Loan-Out Company Formation</i> .....	126
	1. Common Contracts Utilized to Create a Loan-Out Arrangement.....	127
	2. The Benefits of the Corporate Form.....	128
	3. Tax Advantages of Using a Loan-Out Company.....	128
	<i>B. Music Publishing Companies</i> .....	130
	<i>C. Celebrity Family Office</i> .....	131
V.	TRANSFER TERMINATION CASES INVOLVING STATUTORY HEIRS.....	131
	<i>A. Ray Charles Foundation v. Robinson</i> .....	132
	<i>B. Section 304 "Guidepost" Cases</i> .....	133
	1. <i>Baldwin v. EMI Feist Catalog, Inc.</i> .....	133
	2. <i>Milne ex rel. Coyne v. Stephen Slesinger, Inc.</i> .....	136
	3. <i>DC Comics v. Pacific Pictures Corp.</i> .....	138
	4. <i>Brumley v. Albert E. Brumley &amp; Sons, Inc.</i> .....	139
	5. <i>Classic Media, Inc. v. Mewborn</i> .....	141
VI.	RECLAIMING TESTAMENTARY CONTROL OF COPYRIGHT.....	145

What do musical artists Bob Dylan,<sup>2</sup> Loretta Lynn,<sup>3</sup> Bruce Springsteen,<sup>4</sup> Kool and the Gang,<sup>5</sup> and original “Village People” member Victor Willis<sup>6</sup> all have in common? During their lifetimes, these songwriters all successfully served notice of termination to transferees of their copyright interests in their musical compositions and reclaimed ownership of their copyrights.<sup>7</sup> In fact, Willis, author<sup>8</sup> of the perennial karaoke hit *Y.M.C.A.*, is the first living artist to successfully terminate the transfer of a post-1977 copyrighted musical composition under § 203 of the 1976 Copyright Act.<sup>9</sup>

Willis may have been the first, but since 2013 an increasing number of artists from all entertainment industry sectors have and will successfully serve notices and terminate transfers and licenses that were thought at the time of contract to be irrevocable and perpetual.<sup>10</sup> The list of successful artists includes

---

<sup>2</sup> Bob Dylan is an iconic folk rock singer-songwriter whose career emerged in the 1960s and whose songs often commented on and critiqued various social issues and ills of the day. *See Bob Dylan Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/bob-dylan/biography> (last visited Oct. 6, 2016).

<sup>3</sup> Loretta Lynn is a renowned and beloved country singer and songwriter. She was inducted into the Country Music Hall of Fame in 1988 and awarded the Pioneer Award at the 1995 Academy of Country Music Awards. *See Loretta Lynn Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/loretta-lynn/biography> (last visited Oct. 6, 2016).

<sup>4</sup> Bruce Springsteen is one of America’s most treasured singer-songwriters, visionaries, and political activists of modern times. His exceptional talent has spanned over four decades and he continues to this day to use his passion and dedication to his craft to transform hearts and minds, especially those in America’s ‘heartland’. *See Bruce Springsteen Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/bruce-springsteen/biography> (last visited Oct. 6 2016).

<sup>5</sup> The group Kool & the Gang has created hit after melodic hit for over four decades and they show no signs of slowing down any time soon. Their songs always seemed more like timeless anthems for life. Their catalogue is extensive and their hit songs include Celebration, Cherish, Jungle Boogie, and Summer Madness. *See Jason Newman, Kool & the Gang: Our Life in 15 Songs*, ROLLING STONE (June 29, 2015), <http://www.rollingstone.com/music/lists/kool-the-gang-my-life-in-16-songs-20150629>.

<sup>6</sup> Self-proclaimed ‘Kings of Disco’, The Village People emerged to the height of success in the late 1970s. Their hits include Macho Man, YMCA, In the Navy, and Go West. *See Village People Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/village-people/biography> (last visited Oct. 6, 2016).

<sup>7</sup> *See Larry Rohter, Record Industry Braces for Artists’ Battles Over Song Rights*, N.Y. TIMES (Aug. 15, 2011), [http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html?\\_r=0](http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html?_r=0).

<sup>8</sup> Although § 101 of the Copyright Act does not define “author,” the term is understood broadly to include any creator of a copyright. A creator is one who creates a literary or artistic work “fixed in any tangible medium of expression.” 17 U.S.C. § 102(a) (2012).

<sup>9</sup> *See Eriq Gardner, Village People Songwriter Victor Willis Wins Case Over Termination of ‘Y.M.C.A.’ Rights*, HOLLYWOOD REP. (May 8, 2012, 10:32 AM), <http://www.hollywoodreporter.com/thr-esq/village-people-ymca-lawsuit-victor-willis-321576>.

<sup>10</sup> *See Q&A with Copyright Grant Termination Expert Lisa A. Alter, Esq.*, AUDITRIX, INC. (Mar. 30, 2014), <http://blog.auditrix.net/2014/03/q-with-copyright-grant-termination.html> (“An

the late Prince Rogers Nelson (aka Prince),<sup>11</sup> who, after an infamous and legendary 18-year rights battle, reclaimed his music catalog from Warner Brothers beginning with his debut album released in 1978.<sup>12</sup> This Article focuses on what has transpired since the 2013 termination window opened as termination controversies move from the boardroom to the courtroom.

Owners of copyrighted works created on or after January 1, 1978, were first empowered to begin terminating any transfers of those works on January 1, 2013. Because Willis (and the others) reclaimed control of their respective copyright interests during their lifetimes, they are free to dispose of their copyrights, as intangible personal property, during their lifetime in any way they choose or they can exercise their testamentary freedom to transfer property at death.<sup>13</sup>

The testamentary freedom of creators of post-1977 copyrighted works who die *before* the termination window becomes available, however, are not nearly as free. The reason is that when a termination notice window opens, certain statutorily prescribed heirs (herein called “Statutory Heirs” or “Heirs”) are empowered to close forever the testamentary intent door on the decedent author’s estate plans. The 1976 Copyright Act limits a creator’s testamentary freedom by expressly empowering Statutory Heirs to terminate decedent’s lifetime copyright transfers and to assume ownership of those assets or to undo a testamentary plan created to benefit an author-controlled, author-benefiting

---

increasing number of authors are exercising their termination rights. Those who do not may simply be unaware of the opportunity.”); Eriq Gardner, *Rock Band Boston Involved in Copyright Termination Fight*, HOLLYWOOD REP. (Mar. 21, 2013, 9:06 AM), <http://www.hollywoodreporter.com/thr-esq/rock-band-boston-involved-copyright-430177> (noting that “[m]any song artists have done the math and filed termination notices to reclaim their works. Now comes the lawsuits.”).

<sup>11</sup> Musical icon, producer, singer/songwriter, and performer, Prince Rogers Nelson, was born in Minneapolis, Minnesota on June 7, 1958. *Prince Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/prince-9447278> (last visited Oct. 6, 2016). He died in his home, known as Paisley Park, of an apparent drug overdose on April 21, 2016. *Id.* His parents, who predeceased him, were both musicians. *Id.* He had no spouse or descendants. *Id.* He also died intestate, joining Amy Winehouse, Sonny Bono, and Steve McNair as mega stars with considerable fortunes who died without a will. See Judy Martel, *If Prince Really Left No Will, He Joins These 4 Other Celebrities Who Died Intestate*, BANKRATE.COM, <http://www.bankrate.com/finance/estate-planning/prince-other-celebrities-who-died-intestate-1.aspx#ixzz4HAy7nfCo> (last visited Oct. 6, 2016). For an in-depth critical study of Prince’s life and artistry, see generally TOURÉ, *I WOULD DIE 4 U: WHY PRINCE BECAME AN ICON* (2013).

<sup>12</sup> See Lisa Kay Davis, *Prince Fought Big Labels for Ownership, Artistic Control*, NBCNEWS.COM (Apr. 21, 2016, 9:04 PM), <http://www.nbcnews.com/news/nbcblk/prince-fought-big-labels-ownership-artistic-control-n560161>; Shontavia Johnson, *Why It’s Tough to Find Prince’s Songs Online—and Other Musicians Are Thankful*, THE CONVERSATION (Apr. 22, 2016, 5:56 PM), <http://theconversation.com/why-its-tough-to-find-princes-songs-online-and-other-musicians-are-thankful-58321>.

<sup>13</sup> Other successful “terminators” include the Doobie Brothers, Tom Petty, Bryan Adams, and Kris Kristofferson. See Rohter, *supra* note 7.

entity (“ACAB”).<sup>14</sup> This holds true even if the decedent gratuitously transfers a copyright interest to, for example, an ACAB entity like a charitable organization, into her own grantor or asset protection trust, or to someone who does not qualify as a Statutory Heir.

This limitation on an author’s testamentary freedom also extends any lifetime transfers the author makes to his or her loan-out company or music publishing company.<sup>15</sup> In addition to terminating an author’s lifetime gratuitous transfers, a disgruntled heir can also thwart a decedent’s will provisions involving or relating to copyright (e.g., copyright royalties) to the extent they benefit someone or some entity other than a Statutory Heir.

Case in point is *Ray Charles Foundation v. Robinson*<sup>16</sup> in which the Ninth Circuit considered whether the Foundation, which relied upon royalties generated by copyrights held by assignee music publisher Warner/Chappell, could sue Charles’s heirs for their attempt to terminate copyright transfers that Charles made to the music publisher.<sup>17</sup> This incongruous treatment of probate and nonprobate transfers leaves authors at risk of diminished testamentary freedom to select the most advantageous means of exploiting and protecting their intellectual property assets because of the ever present risk that Statutory Heirs can later exercise their termination right and undo all of the author’s beneficial financial, tax, and estate planning. In fact, concerns about the incongruous results between probate and nonprobate dispositions under succession laws led the Uniform Law Commission to create rules that would render results that are more consistent. Consistent results, therefore, seem the optimal result.

Many scholars, practitioners, and copyright transferees in the entertainment business surmised the likely impact of the first reclamation trigger date of January 1, 2013, under § 203 of the 1976 Copyright Act on post-1977 transfer terminations.<sup>18</sup> Some also expressed concern with the apparent distinction between, and treatment of, transfers by will and nonprobate transfers.<sup>19</sup> In this Article, I focus on what has actually transpired since that trigger date. Specifically, I argue that Congress should treat certain lifetime gratuitous author transfers to ACAB business and nonprobate entities in the same way that transfers by will are treated. I assert that parity in the treatment of wills and will substitutes is necessary given the rise in importance and frequency of use by celebrities of those ACAB vehicles. I propose a statutory amendment to prevent Statutory Heirs from terminating the decedent author’s lifetime

---

<sup>14</sup> I refer to these transfers collectively as author-controlled, author-benefiting (“ACAB”) transfers.

<sup>15</sup> See *infra* Part IV.

<sup>16</sup> 795 F.3d 1109 (9th Cir. 2015).

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See *infra* text accompanying notes 26–49.

<sup>19</sup> See *infra* text accompanying notes 46–54.

gratuitous transfers to best protect the author's testamentary intent and valuable copyright ACAB transfers in the same way testamentary transfers are protected. Finally, I discuss post-1977 termination cases, which are just starting to make their way through the court system, to highlight the unintended consequences of Statutory Heir termination.

In Part I, I explore the legislative history and purpose of the transfer termination right to highlight why Congress added it in 1976 and why transfers made by will are not subject to termination. Further, I compare and contrast briefly pre-1978 (§ 304) and post-1977 (§ 203) termination rights.

In Part II, I explore the history and importance of testamentary freedom as an organizing principle of succession law.<sup>20</sup> Additionally, I highlight the trend led by the drafters of the Uniform Probate Code to interpret succession laws expansively in order to glean and to honor testamentary intent. In this Part, I also discuss the traditional limitations on testamentary freedom in favor of certain favored familial relationships like that of spouse and child, namely the elective share in common law states and pretermitted heir statutes.

In Part III, I examine the historical development and emergence of will substitutes in succession law.<sup>21</sup> First, I identify and discuss the common types of will substitutes. Next, I focus more specifically on the types of nonprobate transfer vehicles typically involved in the entertainment industry that an artist might use to hold copyright interests and other intellectual property during their lifetimes and to transfer those same assets at the artist's death. These types include self-settled trusts, private foundations, and asset protection trusts.

In Part IV, I examine the role and prevalence of celebrity loan-out companies and music publishing companies in the entertainment industry. Entertainers across entertainment sectors often set up loan out corporations as a way to protect their assets and secure certain tax benefits.<sup>22</sup> Usually the entertainer acts as an employee of the corporate entity and the entity enters into contracts with other businesses such as a production company. The company "loans out" the services of the actor to the production company and may also receive transfers of copyright interests and, after the entity is formed, acquire control of copyrights on a work-for-hire basis to insulate them from the termination right altogether. Music publishing companies are used to control and

---

<sup>20</sup> See Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1133–34 (2013).

<sup>21</sup> See Dennis M. Horn & Susan N. Gary, *Death Without Probate TOD Deeds—the Latest Tool in the Toolbox*, 24 PROB. & PROP. 13, 13 (2010). See generally John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 AM. C. TR. & EST. COUNS. L.J. 1 (2012); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) [hereinafter *The Nonprobate Revolution*].

<sup>22</sup> See Russ Alan Prince, *What Is a Celebrity Loan Out Corporation?*, FORBES (Oct. 27, 2014, 6:26 AM), <http://www.forbes.com/sites/russalanprince/2014/10/27/what-is-a-celebrity-loan-out-corporation>.

exploit songwriting copyrights. A songwriter's music publishing company may also receive transfers initially and then own future copyrights created by the songwriter on a work-for-hire basis. ACAB transfers to these business entities are vulnerable to Statutory Heir termination.

In Part V, I analyze several ACAB transfer termination cases where heirs, who inherited the unexercised termination right, challenged a decedent's copyright transfer into an author-created vehicle designed to pass copyright ownership (or the benefits that flow therefrom) to someone or some entity other than those heirs. To that end, I examine the facts and outcome of *Ray Charles Foundation v. Robinson*, the most prominent and recent case involving an analogous fact pattern.<sup>23</sup> Thereafter, I highlight several pre-1978 cases that interpret § 304. I use those cases to serve as a guidepost for how statutory heirs can effect termination in a way that is contrary to an author's testamentary intent and to highlight how common it was under § 304 for an heir to challenge an author's lifetime disposition of copyright assets and create an end-run around the author's estate plans.

Finally, in Part VI, I offer ways to effectively reconcile the copyright succession rules to best balance an author's lifetime and testamentary wishes with the policies underlying the government's interest in protecting the welfare of author's closest heirs if the author dies before having the opportunity to exercise his or her termination right.

For example, Congress could amend the Act to except from "any transfer" those that would qualify as author-benefiting transfers to author-controlled vehicles or closely held corporate entities. This exception could be unlimited or limited to a certain time period from the date the author created an author-controlled, author-benefiting entity.

#### I. THE HISTORY AND ROLE OF COPYRIGHT TRANSFER TERMINATION

The Copyright Act provides that an author may transfer ownership of a copyright in whole or in part "by any means of conveyance" during life and at death by will or intestate succession.<sup>24</sup> The Act also gives authors the right to terminate any *inter vivos* transfer and to reclaim ownership of the transferred copyright interest 35 years after the date of transfer.<sup>25</sup> The termination right exists regardless of any agreement that purports to irrevocably grant copyright to the transferee. This right, therefore, is nonwivable and inalienable. However, an unexercised right is inheritable.

If the author dies before exercising her termination right, her Statutory Heirs (spouse, child or grandchild) inherit the termination right and can terminate

---

<sup>23</sup> *Ray Charles Found. v. Robinson*, 795 F.3d 1109 (9th Cir. 2015).

<sup>24</sup> 17 U.S.C. § 201(d)(1) (2012).

<sup>25</sup> *See infra* Part I.B.

any lifetime transfer made by the decedent author. Although any *inter vivos* transfer that an author makes can be terminated by her Statutory Heirs, ownership interests transferred at death via will or intestate succession cannot be terminated.<sup>26</sup> Therefore, a decedent author's testamentary freedom is preserved in the case of probate transfers, but the author is not similarly protected when his or her testamentary scheme includes an ACAB transfer.

This result is problematic given the prevalence of author transfers to ACAB entities for business, tax, and other reasons beneficial to the author, particularly in the entertainment industry. Examples of such transfers include those made into a performing artist's loan-out company or a songwriter's lifetime transfer of musical composition and sound recording copyrights into a music publishing company. Other examples include transfers to a grantor trust, charitable foundation, or an author's closely held business entity.

The practical effect is that a Statutory Heir who inherits the right to terminate may exercise that right and successfully reclaim copyright ownership against the decedent's intent to transfer copyright ownership at death to a person (or entity) other than that statutorily prescribed heir. Congress enacted the termination provisions to protect authors from being saddled for the full copyright term with bad deals made early in their careers when they had little, if any, bargaining power.<sup>27</sup>

However, Congress did not intend for the right to prevent authors from making advantageous lifetime transfers into vehicles controlled by the author for prudent business, tax, and estate planning reasons. To the contrary, Congress sought to empower authors to reap the financial benefits the copyright exclusivity monopoly was intended to protect. Given that intelligent estate planning is a key pragmatic justification for testamentary freedom, copyright law must be reconciled and made consistent with the general goal of probate law to encourage individuals to thoughtfully capture their wishes in a writing and to honor their actual or probable intentions.<sup>28</sup>

#### *A. Transfer Termination, Generally*

The Copyright Act states that copyright ownership "may be transferred in whole or in part by any means of conveyance," by will or intestate succession.<sup>29</sup> As noted above, any *inter vivos* assignment that an author makes can be terminated by Statutory Heirs, but interests transferred at death via will or intestate succession cannot be so terminated.<sup>30</sup>

---

<sup>26</sup> Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 166 (2006).

<sup>27</sup> H.R. REP. NO. 94-1476, at 124 (1976).

<sup>28</sup> See generally *infra* Part II.

<sup>29</sup> 17 U.S.C. § 201(d)(1) (2012).

<sup>30</sup> Tritt, *supra* note 26, at 166.

If an author does not want his or her plans upset by a Statutory Heir's exercise of the termination rights, the author might, theoretically, decide to transfer the rights only by will.<sup>31</sup> However, that approach is impractical at best. Most copyrighted works in the entertainment industry would remain either unexploited or underexploited (and therefore of minimal value) unless transferred to a recording company, publisher, studio, or other similarly situated entity in a far better position to distribute, monetize, and otherwise exploit the work. This remains true despite the impact the Internet and digital technology have had in substantially leveling the playing field between artists and entertainment industry middlemen. The entertainment industry middlemen were historically positioned as the gatekeepers to distribute content and to provide access to consumers.<sup>32</sup>

### *B. The Mechanics of Termination*

An author who transfers or licenses a copyrighted work created on or after January 1, 1978, (aka a post-1977 or § 203 transfer), other than works-made-for-hire,<sup>33</sup> in whole or in part, may terminate those transfers 35 years after transfer (or publication) and effectively reclaim copyright ownership.<sup>34</sup> A

---

<sup>31</sup> HOWARD B. ABRAMS, 2 THE LAW OF COPYRIGHT § 12.29 (2014).

<sup>32</sup> See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.U. L. REV. 63, 118–27 (2002).

<sup>33</sup> Congress defined a “work-made-for-hire” as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101 (2012).

<sup>34</sup> Specifically,

[T]ermination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

*Id.* § 203(a)(3).

transfer includes any “conveyance” or “alienation.”<sup>35</sup> Upon termination, all § 106 rights<sup>36</sup> of the Copyright Act revert to the original author or interest holder.<sup>37</sup> Finally, § 203 termination is determined from the date at which the grant was made.<sup>38</sup> This means that even for copyrighted works created before 1978, § 203 may apply so long as the transfer was made after January 1, 1978.<sup>39</sup>

The termination right is inalienable and unwaivable.<sup>40</sup> Therefore, it cannot be contracted away. However, it can be lost if the transferor does not precisely follow the highly technical and complex termination rules.<sup>41</sup> If the creator dies before the termination window, the right is inherited and exercisable by the creator’s surviving Statutory Heirs. If there are none, “the author’s executor, administrator, personal representative, or trustee” will control the reversionary interest and right to terminate.<sup>42</sup> A majority of the interest holders must agree in order to exercise termination right if the author’s interest is divided between multiple Heirs.<sup>43</sup>

<sup>35</sup> *Id.* § 101.

<sup>36</sup> This includes the rights to reproduce, distribute, adapt, publicly display, or publicly perform. *Id.* § 106(1)–(5).

<sup>37</sup> *Id.* § 203(b).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 203(a).

<sup>40</sup> *See e.g.*, *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“The 1976 Copyright Act . . . provides an inalienable termination right.”); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 282 (2d Cir. 2002) (“Section 304(c) grants . . . an inalienable right to terminate . . . .”); *Music Sales Corp. v. Morris*, 73 F. Supp. 2d 364, 372 (S.D.N.Y. 1999) (“[U]nlike the renewal right[], the termination right is inalienable. Neither the author nor the statutory heirs may contract away their termination right . . . .”).

<sup>41</sup> William Patry explained that the author’s affirmative duty to follow precisely the complex and confounding termination rules reflects a “weakening” agreed to by “authors, distributors, the Copyright Office, and Congress.” William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 921 (1997). The compromise required copyright owners to serve notice of termination rather than allowing termination to occur automatically. *Id.* (explaining that “[t]he weakening occurred not by forcing authors to wait thirty-five years to terminate instead of twenty-five years (although this was a weakening), but by deleting their automatic nature.”). As further evidence of the notice requirement’s deleterious impact on an author’s rights, “the hoops erected for filing the termination notice are even more complicated than those for filing a renewal application.” *Id.*

<sup>42</sup> 17 U.S.C. § 203(a)(2)(D) (2012); *see also* Melville Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 967 (1977) (stating, “If an author dies before the rights subject to termination have been vested in him or her by such termination, the author’s termination interest passes to the author’s surviving spouse and children (and in some cases, grandchildren) in the proportions described [in § 203(a)(2)(A); § 203(a)(4); 304(c)(2)(A); and § 304(c)(4)].”).

<sup>43</sup> *See* 17 U.S.C. §§ 203(a)(2)(C), 304(c)(2)(C) (2012); *see also* 3 NIMMER & NIMMER, NIMMER ON COPYRIGHT § 11.03[A][2][b] (2006) (“If a grant is executed by an author who does not survive until the vesting of the termination interest, a statutorily defined ‘per stirpes majority’ of those who succeed to the deceased author’s termination interest is entitled to terminate the grant.”).

For renewal rights transferred before 1978 (pre-1978 or § 304 transfers), authors and their statutory successors have the right to terminate the transfer at any time during a five-year period that begins January 1, 1978, or fifty-six years after the date the statutory copyright was secured, whichever is later.<sup>44</sup> When Congress adopted the Sonny Bono Copyright Term Extension Act of 1998,<sup>45</sup> it added § 304(d), which applies to transfers made before January 1, 1978. Section 304(d) provides for the extended 20 year period a termination right to authors and successors whose original termination rights had, as of October 26, 1998, expired without being exercised.<sup>46</sup>

Overall, the key difference between § 203 and § 304 is how the time-frame is determined. Section 203 is based on the “date of the execution of the grant.”<sup>47</sup> Section 304 is based on the date the copyright was originally secured.<sup>48</sup> In either case, the author can terminate a grant at any time during a period of five years beginning at the end of 30 years from the date the copyright was originally secured.<sup>49</sup>

### *C. The Termination Right's Predecessor: The Renewal Term*

Under the 1909 version of the Copyright Act,<sup>50</sup> the Copyright regime consisted of two terms. Copyright protection lasted for 28 years for the first term and, if timely and properly renewed, a second 28-year period. This resulted in a maximum duration of 56 years.<sup>51</sup> However, if the copyright owner did not renew, the work fell into the public domain after the first term.<sup>52</sup> Authors at that time were generally required to assign both the initial and renewal copyright terms to

---

<sup>44</sup> 17 U.S.C. § 304(c)(3) (2012).

<sup>45</sup> Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) [hereinafter CTEA] (codified as amended in scattered sections of 17 U.S.C.). This Act increased the term of all subsisting copyrights by 20 years.

<sup>46</sup> See 17 U.S.C. § 304(d)(1)–(2) (2012); see also *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 163 (1985) (labeling the post-termination interest a “reversion”); *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 26 (2d Cir. 2015) (The court in that case explains: “When an author or his statutory heirs serves a termination notice, the grantee’s previously undivided copyright interest is effectively split into three pieces, one owned by the author or his statutory heirs and two owned by the grantee. The author (or his statutory heirs) holds a future interest in the copyright.”); Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS & ENT. L. 55, 61 (2012).

<sup>47</sup> 17 U.S.C. § 203(a)(3)(2012).

<sup>48</sup> Pierre B. Pine, *You’re Terminated! Termination and Reversion of Copyright Grants and the Termination Gap Dilemma*, 31 ENT. & SPORTS L., May 2014, at 1, 27.

<sup>49</sup> 17 U.S.C. § 304(d)(2) (2012).

<sup>50</sup> Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (repealed 1976).

<sup>51</sup> Moss & Basin, *supra* note 45, at 58 (citing Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976)).

<sup>52</sup> *Id.*

publishers.<sup>53</sup> The practice of forcing authors to part with both present and future interests in their copyrights was upheld by the Supreme Court in *Fred Fisher Music Co. v. M. Witmark & Sons*.<sup>54</sup> However, the result in that case was contrary to congressional intent.<sup>55</sup>

In response, Congress made explicitly clear in the 1976 Act and again in the 1998 amendment<sup>56</sup> that termination rights are inalienable and unwaivable.<sup>57</sup> Congress intended to provide authors a second chance to benefit financially if the work proved valuable over time. This rather paternalistic approach reflected the reality that copyright creators often have little bargaining power in comparison to corporate assignees. Accordingly, Congress created inalienable termination rights to avoid the *Fred Fisher* result.<sup>58</sup>

#### D. Congress's Intent in Creating the Transfer Termination Right

The 1976 Copyright Act, which took effect on January 1, 1978, replaced the two-term system of the 1909 Act with a single term that endured for the life of the author, plus fifty years after the author's death.<sup>59</sup> Congress extended the term an additional 20 years in 1998.<sup>60</sup> For pre-1978 copyrights, the 1976 Act extended the renewal term by 19 years, thereby increasing the total protection of those works to 75 years.<sup>61</sup>

<sup>53</sup> *Id.*

<sup>54</sup> 318 U.S. 643 (1943); see also Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 804 (2010).

<sup>55</sup> The House Committee wrote:

If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is existing law, so that he could not be deprived of that right.

H.R. REP. NO. 60-2222, at 14–15 (1909).

<sup>56</sup> See CTEA, *supra* note 45.

<sup>57</sup> Congress made explicit its intent to ensure that authors could not be forced to contract away or around the termination right: "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." 17 U.S.C. §§ 203(a)(5), 304(c)(5), 304(d)(1) (2015).

<sup>58</sup> See H.R. REP. NO. 60-2222, at 14 ("It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum."); see also *Stewart v. Abend*, 495 U.S. 207, 218–19 (1990) ("In this way, Congress attempted to give the author a second chance to control and benefit from his work. . . . The renewal term permits the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested.").

<sup>59</sup> See 17 U.S.C. § 302(a) (1976) (current version at 17 U.S.C. § 302(a) (2015)).

<sup>60</sup> CTEA, *supra* note 45.

<sup>61</sup> 17 U.S.C. § 304(a) (1976) (current version at 17 U.S.C. § 304(a) (2015)). This term is known as the "extended renewal term."

When Congress deliberated about how to amend the renewal provisions of the 1909 Act, the main concern was that many authors or heirs of predeceased authors might not be able to exploit an extended renewal term because of prior assignment of a copyrighted work's first and renewal terms.<sup>62</sup> To combat this, Congress created a new right of termination which enabled authors, and certain heirs, to recapture rights that had been previously granted.<sup>63</sup> Congress's intent was to ensure that authors would not be unfairly exploited due to the unequal bargaining position of the author without any further recourse or opportunity to renegotiate if and when the work's value is realized and proves lucrative.<sup>64</sup> The Supreme Court expressly affirmed this congressional intent to create a new inalienable "estate" in *Stewart v. Abend*.<sup>65</sup>

In early drafts to amend the two-term system, the Copyright Office recommended a unified term with an automatic termination right.<sup>66</sup> Publishers and distributors, of course, vehemently opposed the automatic feature and the industry reached a compromise. Congress adopted the compromise and created a unified term of life of the author plus 50 years after the author's death and a termination right that required the author (or author's Statutory Heirs or representative) to take specific affirmative action.<sup>67</sup> The transfer termination notice provisions, however, did not negate Congress's clear intent for the termination right to be inalienable and nonwaivable.<sup>68</sup> Congress confined the termination right to lifetime transfers executed by the author and did not extend it to transfers by the author's successors in interest or to the author's own testamentary bequests.<sup>69</sup>

At the time Congress debated the merits and details of the termination, the Uniform Probate Code ("UPC"), which sought primarily to simplify, clarify, and reconcile state testacy and intestacy succession laws to best glean and honor a decedent's intent, had only been in existence for a few years.<sup>70</sup> Additionally,

---

<sup>62</sup> H.R. REP. NO. 94-1476, at 124 (1976).

<sup>63</sup> *Id.* at 125–26.

<sup>64</sup> *Id.* at 124.

<sup>65</sup> 495 U.S. 207, 208 (1990) ("The renewal provisions . . . eg, their legislative history, and the case law interpreting them establish that they were intended both to give the author a second chance to obtain fair remuneration for his creative efforts and to provide his family, or his executors absent surviving family, with a 'new estate' if he died before the renewal period arrived.").

<sup>66</sup> See Patry, *supra* note 40, at 921 ("These termination proposals were strongly objected to by distributors and strongly defended by authors, and became, in the words of the Copyright Office, 'the most explosive and difficult issue in the revision process.'").

<sup>67</sup> H.R. REP. NO. 94-1476, at 124. The types of affirmative action discussed included serving advance notice within specified time limits and under specified conditions. See also Patry, *supra* note 41.

<sup>68</sup> H.R. REP. NO. 94-1476, at 124–25.

<sup>69</sup> *Id.* at 125.

<sup>70</sup> UNIF. PROBATE CODE § 1-102 (amended 2010).

nonprobate vehicles like trusts, joint tenancies, contracts of deposit, payable-on-death accounts and so forth were just emerging as viable alternatives to transfer property at death instead of or in conjunction with a will.<sup>71</sup>

The congressional record does not show any debate about whether to also except author transfers by will substitute. Rather than including emerging means to distribute property, Congress seemed to focus instead on the traditional method of transferring property at death: the will. Congress chose to expressly except this most essential author-controlled testamentary disposition of copyright. Because will substitutes serve an analogous goal by different but equally effective means, Congress should similarly except will substitutes that meet the ACAB scheme definition defined in section III. B.

## II. THE ROLE AND IMPORTANCE OF TESTAMENTARY FREEDOM IN PROBATE LAW AND LIMITATIONS

In this Part, I explore the import of testamentary freedom historically and the trend led by the drafters of the UPC to interpret succession laws expansively to glean and to honor testamentary intent. I also discuss the various justifications for testamentary freedom and limits on this freedom in favor of certain favored familial relationships like that of spouse and child; most notably spousal elective share and pretermitted heir statutes.

### *A. Testamentary Freedom: An Historical Look*

Testamentary freedom, the governing principle of American succession law, is the belief that individuals have the right to dispose of their property as they please at death.<sup>72</sup> Over time, testamentary freedom has been identified as an important stick in the proverbial bundle of property rights.<sup>73</sup> The basic premise on which testamentary freedom rests is that individuals should control the disposition of their property at death, much like they control its usage and disposition during life.<sup>74</sup> Testamentary freedom encompasses a variety of property rights, including:

- 1) The right to gift or devise during life or death;
- 2) The right to choose to whom to devise the property;
- 3) The ability to place conditions on the transfers;

---

<sup>71</sup> See SUSAN N. GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 8, 153–59 (Vicki Been et al. eds., 2d ed. 2011).

<sup>72</sup> Tritt, *supra* note 26, at 109, 115–16.

<sup>73</sup> *Id.* at 116.

<sup>74</sup> *Id.*; see also Kelly, *supra* note 20, at 1127 (“One justification for privileging donative intent, like the justification for deferring to owners in how they use their property, is that doing so will promote social welfare.”).

4) The right to choose the character and timing of receiving the property,  
and

5) The ability to appoint others to make the decisions instead.<sup>75</sup>

In sum, testamentary freedom is integral to one's property rights.

Because the organizing principle in American property jurisprudence is freedom of disposition, the purpose of American law should be to facilitate instead of unduly regulate that principle.<sup>76</sup> This public policy is codified in the UPC.<sup>77</sup> One of the UPC's express purposes is to "discover and make effective the intent of a decedent in distribution of his property."<sup>78</sup>

The law of wills dates as far back as 449 A.D.<sup>79</sup> Early on, like most societies of the time, donative transfers followed a scheme of intestacy and did not recognize wills.<sup>80</sup> Gradually, however, succession law moved in the direction of permitting the decedent's power to dispose of property at death.<sup>81</sup> Testamentary freedom appears to have been less important during this period of time because the family's claim took precedence over the individual's post-death wishes.<sup>82</sup>

A major advance in the evolution of testamentary freedom came in 1066 with King William I's conquest of England. That invasion introduced feudalism to the English property system, which served as the foundation for American property law.<sup>83</sup> Promotion of the feudal system led to the common law courts exercising jurisdiction over real property instead of the church.<sup>84</sup> This shift moved away from devises of land and to a system where the eldest son always succeeded to real property.<sup>85</sup> The only way that the eldest son could be prevented from inheriting the land was for the father to convey it to a third party before death.<sup>86</sup>

---

<sup>75</sup> Tritt, *supra* note 26, at 116.

<sup>76</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>77</sup> UNIF. PROBATE CODE § 1-102(b)(2) (amended 2010).

<sup>78</sup> *Id.* The UPC has been adopted, at least in part, by 18 states. *Uniform Probate Code*, LEGAL INFO. INST., <http://www.law.cornell.edu/uniform/probate> (last visited Oct. 6, 2016).

<sup>79</sup> Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 62 (2006).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 63.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 64.

<sup>86</sup> Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 150 (2008).

The disposition of personal property was entirely different at that time.<sup>87</sup> Personal property still fell within the jurisdiction of the ecclesiastical courts, which recognized wills as a method of disposition.<sup>88</sup> Nonetheless, there was still a limitation on a decedent's testamentary freedom, in the form of the legitim<sup>89</sup> that granted forced shares to the testator's surviving spouse and descendants.<sup>90</sup> Generally speaking, this left only a portion of a testator's personal property to be devised as he saw fit.<sup>91</sup>

Property owners, of course, did not approve of *any* limitations on their testamentary freedom since their desires were being circumvented by the primogeniture system, which forced a particular result and disposition.<sup>92</sup> However, it was not until 1540 when the Statute of Wills was enacted that the right to devise property by will became widely accepted.<sup>93</sup> A fundamental purpose of the Statute of Wills was to enable decedents to dispose of their property and to support their families in the ways they see fit.<sup>94</sup>

Early American property law rested on the English approach and adopted the idea of property disposition by will.<sup>95</sup> By 1800, almost all American states had abolished any rule of primogeniture because it was determined to be incompatible with a "republican form of government."<sup>96</sup> The importance of testamentary freedom in American succession law in the past cannot be underestimated.<sup>97</sup> Society continues to recognize the inherent value in protecting an individual's ability to acquire and transfer private property during life and at death.<sup>98</sup> The concept of "testamentary freedom can be viewed as one stick [indeed an important one] in the bundle of rights referred to as property rights."<sup>99</sup> The influence and import of testamentary freedom has persisted. Therefore, I argue that copyright law should reflect this enduring, fundamental purpose in the

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Legitim is defined as: "the portion of an estate usually including both real and personal property reserved to the children and sometimes other heirs upon the death of the father under Roman, civil, and Scots law." *Legitim*, MERRIAM-WEBSTER UNABRIDGED, <http://unabridged.merriamwebster.com/unabridged/legitim> (last visited Aug. 18, 2016).

<sup>90</sup> Tate, *supra* note 86, at 150–51.

<sup>91</sup> *Id.* at 151.

<sup>92</sup> *See id.*

<sup>93</sup> Champine, *supra* note 79, at 64.

<sup>94</sup> *Id.* at 64–65.

<sup>95</sup> Tate, *supra* note 86, at 154.

<sup>96</sup> *Id.* at 155.

<sup>97</sup> Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 375 (2009).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

disposition of copyright, categorized as intangible personal property, and treat nonprobate ACAB transfers the same as testamentary transfers.

*B. Various Justifications for Testamentary Freedom*

The reasons for America's steadfast recognition of testamentary freedom, and its importance generally rests on basic human pleasures and desires.<sup>100</sup> However, these desires are supported by a variety of economic, philosophical, and societal values.<sup>101</sup> Professor Lee-ford Tritt explains that the development of testamentary freedom can be traced to, and aligned with, various jurisprudential and pragmatic justifications.<sup>102</sup> I will discuss each in turn.

1. Jurisprudential Justifications

Jurisprudence is best and widely understood to mean legal philosophy.<sup>103</sup> The etymology of the word jurisprudence (and jurisprudential) finds its origins in the Latin term "*juris prudentia*, which means 'the study, knowledge, or science of law.'"<sup>104</sup> In the estates law context, Professor Lee-ford Tritt curates a set of jurisprudential justifications that apply more specifically to testamentary freedom. Each of the approaches he describes offers its own rationale for why testamentary freedom has endured and remains essential as a foundational principle of succession law.

*i. The "Natural Right" Justification*

The natural right justification suggests that it is an individual's innate privilege to control the consumption and disposition of her property during life.<sup>105</sup> Since, this natural right predates civil law, it is beyond the government's power.<sup>106</sup> Various philosophers, including Hugh Grotius, John Locke, and Jean-

---

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See generally Tritt, *supra* note 26, at 118–30; Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 751–61 (2006).

<sup>103</sup> See *Jurisprudence*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/jurisprudence> (last visited Sept. 5, 2016). The site explains further that the terms are more broadly understood in the United States as the science or philosophy of law. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Tritt, *supra* note 26, at 118.

<sup>106</sup> Tritt, *supra* note 26, at 118.

Jacques Burlamaqui, have all been linked to the natural rights approach to testamentary freedom.<sup>107</sup>

However, there were various critics as well, including philosopher William Blackstone.<sup>108</sup> Blackstone argued that although we have a natural right to property during life, that natural right ends at death.<sup>109</sup> Regardless of its initial proponents and critics, the idea that testamentary freedom is a natural right persists even today.<sup>110</sup> Various state courts<sup>111</sup> have held that the right to transfer property by will is a natural property right recognized by law.<sup>112</sup>

### *ii. Utilitarian Justification*

A second jurisprudential justification for testamentary freedom is based on utilitarian principles.<sup>113</sup> These principles are premised on the rationale that “individuals derive personal pleasure [from] bequeathing property to others.”<sup>114</sup> Proponents of this utilitarian justification can be traced back to the thirteenth century, when it was argued that testamentary freedom “encourages individual initiative, investments, and savings.”<sup>115</sup> Modern social scientists have supported a similar theory known as wealth maximization.<sup>116</sup> Their argument is that if testamentary freedom is limited, the limitation would decrease the value of property, but if promoted, it would motivate individuals to save and invest.<sup>117</sup> Overall, both utilitarian and wealth maximization based rationales also remain prevalent today.

### *iii. Orthodox Economics Justification*

A third jurisprudential justification is known as orthodox economics,<sup>118</sup> which combines the natural right and utilitarian rationales. Orthodox economists

---

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 119.

<sup>109</sup> *Id.* If this justification applies then, presumably, Statutory Heirs inherit a new right.

<sup>110</sup> Tritt, *supra* note 26, at 119.

<sup>111</sup> *See id.* at 119–20 (citing *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990); *In re Estate of Beale*, 113 N.W.2d 380 (Wis. 1962); *In re Will of Hopkins*, 79 N.W. 2d 131 (Wis. 1956); *Nunnemacher v. State*, 108 N.W. 627 (Wis. 1906)).

<sup>112</sup> *Id.* at 119–20.

<sup>113</sup> *Id.* at 121.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 122.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 123.

believe testamentary freedom is a state-sanctioned natural right.”<sup>119</sup> In furtherance of this view is a “slippery-slope” concern that if the state is empowered to forbid property succession, then it could also forbid lifetime gifts (an undesirable result).<sup>120</sup> While not as prevalent or strongly supported, orthodox economics is still an accepted premise for supporting testamentary freedom.<sup>121</sup>

#### *iv. Libertarian Justification*

A final jurisprudential justification is libertarianism.<sup>122</sup> This rationale is based on the belief in complete freedom of the individual.<sup>123</sup> As a result of this dogged individualism, any right to manage, consume and dispose of property during one’s life necessarily carries with it the absolute right to control the distribution of property at death.<sup>124</sup> This justification supports and promotes testamentary freedom as an essential individual right.

In sum, these jurisprudential justifications all promote an inherent right of the individual testator to dispose of property at death either by will, intestate succession or by way of a nonprobate vehicle. Regardless of the justifications adopted and applied, testamentary freedom has and continues to hold very important jurisprudential rationales for its existence.

## 2. Pragmatic Justifications

Legal pragmatists take an opposite view of the jurisprudential underpinnings of law, generally, and judicial decision-making, specifically.<sup>125</sup> Legal pragmatists challenge the traditional notions of legal theory by emphasizing its practical application “. . . best thought of as a practice that is rooted in the specific context at hand, without secure foundations, instrumental, and always attached to a perspective.”<sup>126</sup> Professor Tritt offers four practical justifications for testamentary freedom, explained below.

---

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting RONALD CHESTER, *INHERITANCE, WEALTH, AND SOCIETY* 26 (1982)).

<sup>121</sup> *Id.* at 124.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Tritt, *supra* note 26, at 124.

<sup>125</sup> See Brian Edgar Butler, *Legal Pragmatism*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/leglprag/> (last visited Sept. 9, 2016).

<sup>126</sup> *Id.*

*i. Market for Social Services*

One pragmatic justification for testamentary freedom can be classified as the market for social services.<sup>127</sup> This approach is premised on the belief that testamentary freedom incentivizes potential beneficiaries to take responsibility for their family because of the potential testamentary gift that may await them.<sup>128</sup> One can trace this approach back to the thirteenth century, where philosopher Henry de Bracton believed that spouses and children were incentivized to treat the testator well.<sup>129</sup>

Furthermore, with the incentive of potentially receiving a bequest, theoretically testamentary freedom could promote family harmony because, presumably, no one wants to be left out of the will.<sup>130</sup> Arguments against this approach are premised on the idea that care should be, and is given, to those who need care, and thus the care is not based on some incentive.<sup>131</sup>

*ii. Intellectual Estate Planning Justification*

A second pragmatic justification is the promotion of intelligent estate planning.<sup>132</sup> This rationale applies well in the case of copyright creators in the entertainment industry. This justification is based on the fact that someone who takes the time to create an estate plan, probably has specific gifts and bequests in mind.<sup>133</sup> If the decedent were to die intestate, the “statutory will” distributions under intestacy statutes may be nothing like what the decedent intended.<sup>134</sup> Allowing the freedom to distribute one’s property as she sees fit encourages an individual to take the time to write a will or will substitute to capture her intentions.<sup>135</sup>

*iii. Non-Traditional Family Structures*

A third pragmatic justification in support of robust testamentary freedom is that it allows individuals to effectuate their intentions based on their particular family structure and situation.<sup>136</sup> From the effects of divorce and remarriage, to

---

<sup>127</sup> Tritt, *supra* note 26, at 125.

<sup>128</sup> *Id.*

<sup>129</sup> Tritt, *supra* note 26, at 125.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 126.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Id.* at 128.

children born out of wedlock, to unmarried couples living together, and same-sex adoption and the legality of same-sex marriages,<sup>137</sup> testamentary freedom provides an avenue to meet the needs that individuals in those situations may be facing.<sup>138</sup> Having the flexibility to custom-fit one's property distributions is key to promoting testamentary freedom.<sup>139</sup>

*iv. Administrative Efficiency*

Finally, administrative efficiency (also known as ease) is the fourth pragmatic justification. It would be impossible for the state to police property transfers at death by prohibiting them completely.<sup>140</sup> Such a ban would also be ineffective and, therefore, inefficient.<sup>141</sup> Absent testamentary freedom, people would still find some way to transfer their property.<sup>142</sup> Thus, support of testamentary freedom is important in ensuring people have sufficient resources to live, and also sufficient legal leeway to provide for those they wish to after their death.<sup>143</sup>

In sum, these four considerations highlight the more practical—rather than theoretical—reasons that testamentary freedom has persisted as the bedrock of American succession laws. Promotion of testamentary freedom is integral to the structure of property succession.<sup>144</sup>

*C. Limitations on Testamentary Freedom*

Despite a well-established history in succession law of protecting a testator's freedom, limits on this freedom are not unusual. For example, states have historically protected spouses and children—even contrary to a decedent's

---

<sup>137</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>138</sup> Tritt, *supra* note 26, at 128–29.

<sup>139</sup> *Id.* at 129.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 129 (“If the state were to prohibit succession of property at death, individuals simply would find other means to circumvent the ban and to distribute their property to intended beneficiaries (such as through various forms of lifetime gifts, creation of corporations to pay ‘salaries’ to the intended beneficiaries or low interest loans to the intended beneficiaries).”).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

wishes—with community property regimes,<sup>145</sup> spousal elections, pretermitted heir statutes, antilapse statutes, as well as a host of allowances and exemptions.<sup>146</sup>

There are numerous public policy reasons to protect certain family members despite a testator's wishes.<sup>147</sup> Weighing the benefits and drawbacks of allowing the law to intervene and alter testamentary dispositions despite a testator's wishes is a perennial debate.<sup>148</sup> However, maximizing an heir's inheritance alone, especially if such a goal is contrary to the testator's intentions and overall testamentary scheme, should not be included among those justifications.

### III. THE EMERGENCE AND DOMINANT ROLE OF WILL SUBSTITUTES

Since the mid-1960s, when Norman Dacey's *How to Avoid Probate* became popular, the use of will substitutes, particularly to avoid probate, has continued to increase.<sup>149</sup> Now, this mainstream demand for probate avoidance "has coincided with a fundamental change in the nature of wealth."<sup>150</sup> The confluence of these primary influences has been an integral part in the rise and utilization of will substitutes.<sup>151</sup>

---

<sup>145</sup> Although beyond the scope of this article, for an informative and thought-provoking analysis of whether an author-spouse may terminate the transfer of copyright in the context of a domestic relationship, see Llewellyn Joseph Gibbons, *Then, You Had It, Now, It's Gone: Interspousal or Community Property Transfer and Termination of an Illusory Ephemeral State Law Right or Interest in a Copyright*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 97 (2013). In that article, the author concludes, "in the context of copyright termination, the domestic relationship, and state law, the author-spouse will always be able to nullify the carefully ordered state law presumptions for domestic relations and the possible ensuing dissolution of the marital union." *Id.* at 98.

<sup>146</sup> These laws include dispositions related to: spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categorical restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 10.1 cmt. c (AM. LAW INST. 2003); SUSAN N. GARY ET AL., *CONTEMPORARY TRUSTS AND ESTATES* 605–07 (2d ed. 2014) (discussing state override of testator wishes to protect "the natural objects of one's bounty" against disinheritance.). Professor Gary also questions whether the law should continue to protect spouses against disinheritance now that the social and marital landscape has changed. Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, 44 *WILLAMETTE L. REV.* 337, 338–40 (2007).

<sup>147</sup> See Kelly, *supra* note 20, at 1128 (asserting that reasonable justifications for limits on testamentary freedom include "imperfect information, negative externalities, and intergenerational equity").

<sup>148</sup> See *id.* at 1131.

<sup>149</sup> *The Nonprobate Revolution*, *supra* note 20, at 1116.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1108.

The average individual typically utilizes both a will (to the extent one is used at all) and a variety of will substitutes.<sup>152</sup> And for high net worth individuals like successful artists and entertainers, who require sophisticated wealth transfer and asset protection planning strategies, regularly incorporate a wide range of complex, nuanced techniques to achieve their testamentary scheme.<sup>153</sup>

A. *Will Substitutes, Generally*

At least three significant differences exist between wills and will substitutes: will substitutes are primarily asset specific, property covered by a will substitute avoids probate, and the formal requirements for wills do not apply to will substitutes.<sup>154</sup> Overall, while wills still accomplish necessary functions, the use of will substitutes has increased greatly by the average person and, even more so, in the entertainment industry. Not only are will substitutes more convenient, they are easier to create and afford far more privacy and, in some cases, greater tax benefits. As a result, will substitutes have become the predominate contemporary estate planning tool.<sup>155</sup>

A will substitute is defined as:

[A]n arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.<sup>156</sup>

---

<sup>152</sup> *Id.* at 1115; *see also* GARY ET AL., *supra* note 71, at 8, 171 (stating that the utilization of methods incorporating both probate and nonprobate dispositions can be characterized as a "comprehensive estate plan").

<sup>153</sup> Robert G. Alexander & Dallas E. Klemmer, *Creative Wealth Planning with Grantor Trusts, Family Limited Partnerships, and Family Limited Liability Companies*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 307, 310 (2010). The authors explain that, "[t]he best planning occurs when several components are blended together to create an efficient, comprehensive plan to accomplish wealth shifting and asset protection in perpetuity." *Id.* Further, the authors explain that, "[t]ypically, the components of this planning include trusts, leveraged wealth shifting strategies, and the use of entities to obtain valuation discounts." *Id.*

<sup>154</sup> *The Nonprobate Revolution*, *supra* note 20, at 1117. Although probate is looked at with disdain, Langbein argues that probate does solve three problems: (1) "title-clearing" of property so that it becomes marketable again, (2) creditor protections, and (3) distribution as per the testator's donative intentions. *Id.* Thus, while will substitutes have gained increasing favor, the "necessity" of the standard will, and thereby the probate process, is still prevalent. *Id.*

<sup>155</sup> Tritt, *supra* note 26, at 116.

<sup>156</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1(a) (AM. LAW INST. 2003).

Will substitutes can “take a variety of forms, including gifts, . . . living trusts, certain bank and securities accounts and life insurance policies.”<sup>157</sup> One of the key differences between wills and will substitutes is that will substitutes are generally not subject to the same formalities as wills.<sup>158</sup> Another key difference is that while a will transfers ownership of probate property at death, property subject to a will substitute is not probate property because, by utilizing a will substitute, the owner no longer owns the property at death.<sup>159</sup> Essentially, a will substitute effects a present transfer of a nonpossessory future interest, and thus the enjoyment of that possession, for the transferee, is deferred until the transferor’s death.<sup>160</sup>

Most will substitutes developed because of one of three reasons: the customary commitment to one’s spouse and other family members, due to contractual obligation between companies and their customers, or based on some business formality and company-customer interactions.<sup>161</sup> In the case of business formalities, for example, individuals are required to complete a beneficiary designation form to inform an insurance company of whom to pay the proceeds.<sup>162</sup> Finally, many individuals use will substitutes because of their convenience, ease, and less arduous formalities.<sup>163</sup>

#### B. Common ACAB Entities

Use of certain corporate entities in estate planning like trusts, closely held family businesses, and charitable entities has long been an important tool in the toolbox of any planner, particularly those representing high net worth individuals.<sup>164</sup> I summarize below some of the commonly used vehicles used by those individuals generally, and artists and entertainers specifically. I discuss industry-specific ACAB entities in subsection C below.

##### 1. Grantor Trusts

A grantor trust is one in which the creator of the trust, or the settlor or grantor, transfers property to herself as trustee and retains full control over the

---

<sup>157</sup> GARY ET AL., *supra* note 71, at 8.

<sup>158</sup> *Id.*; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 cmt. a (AM. LAW INST. 2003) (“To be valid, a will substitute need not be executed in compliance with the statutory formalities for a will because a will substitute is not a will.”).

<sup>159</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 cmt. a (AM. LAW INST. 2003).

<sup>160</sup> *Id.*

<sup>161</sup> GARY ET AL., *supra* note 71, at 172.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See Alexander & Klemmer, *supra* note 153; see also Tritt, *supra* note 25, at 179–80.

property in the trust.<sup>165</sup> A grantor trust can be revocable or, if the grantor retains certain incidents of ownership, irrevocable. The Internal Revenue Code taxes grantors on the trust income of these trusts because the grantor is deemed to exert sufficient incidents of control over the assets to, in effect, still be the legal and beneficial owner of the assets despite retitling in the name of the trustee.<sup>166</sup>

## 2. Asset Protection Trusts<sup>167</sup>

An asset protection trust (“APT”) is a spendthrift trust created and maintained either in a foreign jurisdiction (“offshore APT”) or under state law (“DAPT”).<sup>168</sup> A spendthrift trust prevents a beneficiary’s creditors from reaching assets held in trust for the beneficiary’s benefit unless and until trust income or principal is distributed to the beneficiary.<sup>169</sup>

Wealthy individuals who utilize APTs generally prefer to set up offshore accounts because domestic spendthrift trusts, especially self-settled ones, do not provide sufficient protection against the claims of creditors.<sup>170</sup> Favorite locales include: Anguilla, the Bahamas, Barbados, Belize, Bermuda, the British Virgin Islands, and the Cayman Islands.<sup>171</sup>

Generally, the settlor of an offshore APT will not retain any control over the trust, the trust terminates on a future date-certain, and a foreign trust company or financial institution serves as the trustee (not the settlor).<sup>172</sup> Assets so held are generally beyond the jurisdiction of American courts and foreign jurisdictions do not enforce American judgments in their countries.<sup>173</sup> As of September 2015, 15 states recognize DAPTs in some form.<sup>174</sup>

---

<sup>165</sup> GARY ET AL., *supra* note 71, at 727–28.

<sup>166</sup> 26 U.S.C. §§ 671–677 (2015).

<sup>167</sup> See generally Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147 (2007) (describing the benefits and drawbacks of offshore trusts and various attempts through judicial scrutiny to limit offshore asset protection).

<sup>168</sup> *Id.* at 150–52.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 152.

<sup>171</sup> *Id.* Others include the Cook Islands, Cyprus, Gibraltar, the Isle of Man, Jersey, Mauritius, Niue, Saint Kitts and Nevis, and the Turks and Caicos Islands.

<sup>172</sup> *Id.* at 153–54.

<sup>173</sup> *Id.* at 154.

<sup>174</sup> The following states enacted DAPT provisions: Nevada, South Dakota, Tennessee, Ohio, Delaware, Missouri, Alaska (the first state to enact DAPT legislation), Wyoming, Rhode Island, New Hampshire, Hawaii, Utah, Virginia, Oklahoma, and Mississippi. See generally ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES (David G. Shaftel et al. eds., 2016), <http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf>.

### 3. Closely-Held Business Entities

Family limited partnerships (“FLPs”),<sup>175</sup> family limited liability companies (“FLLCs”), and S-corporations are commonly used to achieve optimum asset protection and wealth maximization strategies.<sup>176</sup> FLPs and FLLCs in particular are two of the most popular estate planning and wealth maximization tools among practitioners.<sup>177</sup> These closely-held businesses are often used in addition to—rather than instead of—trusts.<sup>178</sup> When successfully created, funded, and managed these corporate structures are extremely successful asset protection and wealth management tools for wealthy individuals, generally, and financially successful artists and entertainers in particular.<sup>179</sup>

### 4. Charitable Entities

Section 501(c)(3) of the Internal Revenue Code exempts from federal income taxation certain entities organized and operated exclusively for religious, charitable, educational, or certain other purposes and that satisfy various additional requirements.<sup>180</sup> Common charitable vehicles include charitable foundations, charitable trusts, and transfers to third-party charitable beneficiaries.

High net-worth individuals often include in a comprehensive estate plan charitable donations of money and property, including intellectual property, for a host of beneficial philanthropic, tax, and financial reasons. In many instances, these transfers could be categorized as an ACAB transfer that is subject to a Statutory Heir’s termination rights.

## IV. COMMON ACAB ENTITIES IN THE ENTERTAINMENT INDUSTRY

Entertainers across all entertainment sectors often set up loan out corporations to protect their assets and to secure certain tax benefits and music publishing companies to own and administer their musical composition (“MC”) copyrights. Entertainers often transfer existing copyrights to these industry-specific ACAB entities. They may also create future works as an employee of

---

<sup>175</sup> FLPs are businesses formed and funded by family members. See Eric Atstupenas, *Using Family Limited Partnerships in Estate Tax Planning*, R.I. B.J., May-June 2012, at 21, 21.

<sup>176</sup> See Alexander & Klemmer, *supra* note 153, at 311 (explaining that closely-held entities are helpful and desirable to leverage what the authors call “wealth shifting”); Atstupenas, *supra* note 167, at 21.

<sup>177</sup> See Alexander & Klemmer, *supra* note 145, at 316.

<sup>178</sup> See *id.* at 311.

<sup>179</sup> See *id.* at 316–17 (“Despite vigorous, increased IRS attacks on FLPs and FLLCs, they remain an important component of advanced wealth transfer and asset protection planning.”).

<sup>180</sup> U.S.C. § 501(c)(3) (2015).

the company on a work-for-hire basis.<sup>181</sup> However, these transfers, like any transfer except for those made by will, are subject to Statutory Heir termination.

#### *A. Loan-Out Company Formation*

A loan-out company (usually formed as a corporation or limited liability company) is set up as a separate and legal entity usually for an actor, recording artist, or other individual for the purposes of using the loan-out company's corporate legal protection.<sup>182</sup>

Entertainers set up loan-out corporations as a way to protect their assets and obtain certain tax benefits.<sup>183</sup> The entertainer—an actor, for instance—is an “employee” of the loan out corporation.<sup>184</sup> The corporation enters into contracts with third-party employers like a production company and then “loans out” the services of the actor to the production company.<sup>185</sup>

While there are few differences between studio employers employing an artist through a loan-out company and employing the artist outright, artists may have more of his or her intellectual property and financial interests protected by utilizing a loan-out company.<sup>186</sup> Accordingly, due to its prevalence in the entertainment industry, this part will focus on the three common contracts

---

<sup>181</sup> Section 101 of the Copyright Act (title 17 of the U.S. Code) defines a “work made for hire” as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

<sup>182</sup> See Prince, *supra* note 22.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Robert C. Lind & Zeina Hamzeh, *Use of Loan-Out Corporations in the Entertainment Industry*, 17 ANDREWS ENT. INDUS. LITIG. REP. 1 (2006).

utilized to create a loan-out arrangement, the general benefits of the corporate form, and the considerable tax advantages of using a loan-out company.<sup>187</sup>

### 1. Common Contracts Utilized to Create a Loan-Out Arrangement

Generally, a loan-out arrangement requires that three contracts be executed.<sup>188</sup> These contracts include an employment agreement, a lending agreement, and an inducement agreement.<sup>189</sup> The corporation and artist enter into the employment agreement.<sup>190</sup> In most cases, the corporation is wholly owned by an artist and the entity's sole function is to "loan-out" the artist's services to other entertainment industry employers.<sup>191</sup> The loan-out company designates the artist as its employee, and in some instances, the artist may even transfer intellectual property rights to the corporation.<sup>192</sup> This agreement allows the corporation to lend the artist's services or license the artist's work and to receive compensation paid for the artist's services.<sup>193</sup> In turn, the corporation—not the employer—pays the artist's salary, expenses and provides a range of employment benefits.<sup>194</sup>

Third-party employers and the loan-out company enter into the lending agreement to enable the loan-out company to "lend" the services of the artist to the employer.<sup>195</sup> This contract exists independently from the employment agreement and contains its own contractual obligations and rights. The terms generally provide that the third party receive the services and intellectual property as if it had entered into a direct, contractual relationship with the artist.<sup>196</sup> By contracting with the loan-out company instead of the artist directly,

---

<sup>187</sup> Entertainment figures are not the only ones to use such corporate forms to protect their intellectual property and financial interests. For example, Tiger Woods transferred his trademark and other interests into his privately-held corporation, ETW Corp. (which carries his initials). See generally *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (discussing Tiger Woods's transfer of trademark and other rights to his privately-held corporation for marketing paraphernalia).

<sup>188</sup> THOMAS D. SELZ ET AL., 1 ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 8.31 (3d ed. 2014).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See Moss & Basin, *supra* note 46, at 72.

<sup>192</sup> SELZ ET AL., *supra* note 188.

<sup>193</sup> SELZ ET AL., *supra* note 188, § 8.31.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

the employer avoids having to pay FICA,<sup>197</sup> state payroll taxes, and liability insurance.<sup>198</sup>

Finally, the third-party employer and the artist enter into an inducement agreement.<sup>199</sup> This agreement binds the artist to personally guarantee she will be bound to the terms of the lending agreement, even if the loan-out company breaches the lending agreement.<sup>200</sup>

## 2. The Benefits of the Corporate Form

Utilizing the corporate form, allows an artist to take advantage of limited personal liability and beneficial tax treatment.<sup>201</sup> Limiting personal liability prevents a third party from reaching an artist's personal assets to satisfy the loan-out company's obligations.<sup>202</sup> Thus, artists can successfully distinguish themselves from the corporation.<sup>203</sup>

Like other areas of corporate law, the court will sometimes "pierce the corporate veil" to hold the artist personally liable to prevent fraud, protect third persons, prevent injustice, or other equitable considerations.<sup>204</sup> However, as mentioned above, any issue that may arise is generally offset by having the artist's personal guarantee of the loan-out company's obligations via an inducement agreement.<sup>205</sup>

---

<sup>197</sup> Federal Insurance Contributions Act, or FICA, is a United States federal payroll (or employment) tax imposed on both employees and employers to fund Social Security and Medicare—federal programs that provide benefits for retirees, the disabled, and children of deceased workers. *Policy Basics: Federal Payroll Taxes*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 23, 2016), <http://www.cbpp.org/research/federal-tax/policy-basics-federal-payroll-taxes>.

<sup>198</sup> SELZET AL., *supra* note 188.

<sup>199</sup> *Id.*

<sup>200</sup> Caution is recommended when drafting and signing the inducement agreement, so as to only guarantee the artist's personal obligations, not the entire duties and obligations of the loan-out company. *See id.*

<sup>201</sup> *See Moss & Basin, supra* note 46, at 72.

<sup>202</sup> *See id.*

<sup>203</sup> The most well-known example involves Kim Basinger (an "A" List movie star at that time), Main Line Pictures, and the movie *Boxing Helena*. *See e.g., Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244, at \*1 (Cal. Ct. App. Sept. 22, 1994) (holding that Basinger was a separate legal entity than her "loan-out company" and thus not liable to Main Line, even though she was the single shareholder of the corporation).

<sup>204</sup> *See Lind & Hamzeh, supra* note 186, at \*2.

<sup>205</sup> Jeffrey K. Eisen & Allan E. Biblin, *Estate Planning for Clients in the Entertainment Business*, 33 EST. PLAN. 26, 27 (2006). Although there are a variety of corporate forms, the most commonly utilized form for a loan-out entity is an S corporation. S corporations are used over C corporations for four primary reasons: (1) To avoid the problems associated with "zeroing out" a C corporation at year-end; (2) To prevent double taxation; (3) To avoid personal holding company tax; and (4) To allow the pass-through of foreign tax credit to the artist. *Id.*

### 3. Tax Advantages of using a Loan-Out Company<sup>206</sup>

An artist enjoys numerous tax advantages by utilizing a loan-out company. For example, an artist can defer income, set up her own pension plan, and maximize the deductibility of expenses.<sup>207</sup> By utilizing the loan-out company, the artist also avoids an employer/employee relationship with the production or record label.<sup>208</sup> The loan-out company is paid the gross contract amount without wage withholdings, which would otherwise be withheld if the artist was an employee.<sup>209</sup> Before loan-out companies became a viable and preferred alternative, artists tried to distinguish themselves from the corporate interest-holders as independent contractors, and the IRS pushed back forcefully against such arguments.<sup>210</sup> However, by using the loan-out company the artist avoids this issue almost entirely.<sup>211</sup>

Additionally, loan-out companies provide for greater flexibility in pension plans. The loan-out company can itself create a pension plan, sheltering some of the artist's income.<sup>212</sup> Conversely, if the artist was an employee of the studio, she would be subject to the studio's pension plan (generally limited to an individual retirement account).<sup>213</sup> Setting up the pension plan through the loan-out company also allows the artist to borrow up to \$50,000, which is different than self-employed individual's pension plans.<sup>214</sup>

Furthermore, loan-out companies can deduct medical and insurance costs, as well as the costs of life insurance and disability insurance.<sup>215</sup> Neither an employee nor self-employed artist could do so.<sup>216</sup> In addition, the corporation can deduct itemized miscellaneous expenses under the Internal Revenue Code

---

<sup>206</sup> As with most corporations, there are certain drawbacks that an artist must be careful to either avoid, or address appropriately; namely (1) falling within Internal Revenue Code Section 269A; (2) personal holding company tax penalties; and (3) income-withholding taxes in foreign countries. See Lind & Hamzeh, *supra* note 186, at 5.

<sup>207</sup> See *id.* at 3.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* at 4.

<sup>211</sup> See *id.* I say "almost" entirely because occasionally the IRS has invalidated loan-out companies and determined the artist to be an employee.

<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See *id.*

without limit.<sup>217</sup> While employees can deduct only expenses that exceed 2% of the employee's adjusted gross income, a corporation can deduct 100%.<sup>218</sup>

Finally, a loan-out company can defer income to the next fiscal year like other personal service corporations.<sup>219</sup> The corporation's income is paid out as a bonus to the shareholder (i.e. artist).<sup>220</sup> While there are certain restrictions,<sup>221</sup> the benefit still is evident. A loan-out company provides many tax advantages. From the classification of employee status, to pension plans, deductions, and deferral of income, utilizing a loan-out company can readily benefit an artist from the constraints of a typical employee relationship.

Overall, loan-out companies have both identifiable benefits and drawbacks. While there may not be a realistic difference from the hiring party's point of view between employing an artist directly or through her loan-out company, this "middle man" can be useful in maximizing the benefits the artist receives. Creating a loan-out company may add another "layer" to an already complex estate plan, but if effectively created during the artist's life, it can adequately accomplish the artist's wishes after death, generally. However, when the loan-out company holds copyrights transferred to it by the artist (instead of copyrights created on a work-for-hire basis in the context of employment), the artist's transfers are susceptible to Statutory Heir terminations.

### *B. Music Publishing Companies*

A music publishing company owns MC copyrights or administers the MC copyrights owned by an individual or independent music publisher.<sup>222</sup> Music publishing companies serve a critical function in the recording industry, and only a few major music publishing companies exist. However, hundreds of independent publishing companies, and individual songwriters who administer their own MCs, also exist.<sup>223</sup>

As singer-songwriters and other composers learned that revenues generated by exploiting MC copyrights can be considerable (far more than album sales or performance fees), recording artists are far more likely now to create their own publishing companies, maintain control over their publishing, and either administer their catalogs themselves, enter into administration deals with

---

<sup>217</sup> *See id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

<sup>221</sup> The fiscal year must end in either September, October, or November, and the corporation must pay the shareholder (artist) compensation by December 31 each year.

<sup>222</sup> SELZ ET AL., *supra* note 188, § 1:49.

<sup>223</sup> *Id.*

a larger music publisher, or enter into a co-publishing deal with a major music publisher.<sup>224</sup>

### C. Celebrity Family Office

The Celebrity Family Office is another business vehicle high net-worth entertainers and athletes are using to protect and maximize wealth.<sup>225</sup> The celebrity family office is based on the more general multi-family office.<sup>226</sup> The structure allows a celebrity to combine into one entity the core activities of a business manager's job with a wide range of financial and legal planning and expertise.<sup>227</sup>

There are two types of family offices: single family and multi-family.<sup>228</sup> A single-family office manages the financial and business affairs of just one family.<sup>229</sup> In contrast, a multi-family office manages the financial and business affairs of several different families. Both offer a range of services that can be grouped into two basic categories: wealth management (e.g., investment management, advanced planning and private investment banking) and family support (e.g., administrative and lifestyle services).<sup>230</sup> Each category is further divided into a range of specific products and services. Each is separately available in the marketplace. But celebrities can leverage the Celebrity Family Office and maximize financial and tax benefits by housing all of the varied products and services under one proverbial roof.<sup>231</sup>

In conclusion, given the prevalence and importance of these corporate forms in the entertainment industry—an industry that generates a substantial amount of copyrighted material—Congress must address and reconcile the unintended incongruent treatment of nonprobate ACAB transfers and pure testamentary transfers.

---

<sup>224</sup> *Id.*; see also TONYA EVANS-WALLS, *CONTRACTS COMPANION FOR WRITERS* 63–65 (2007).

<sup>225</sup> See Russ Alan Prince, *The Growing Appeal of the Celebrity Family Office*, *FORBES* (May 26, 2016, 6:14 AM), <http://www.forbes.com/sites/russalanprince/2016/05/26/the-growing-appeal-of-the-celebrity-family-office/#4b27cdffa965>.

<sup>226</sup> Russ Alan Prince, *What Is a Celebrity Multi-Family Office?*, *FORBES* (Oct. 15, 2013, 6:14 AM), <http://www.forbes.com/sites/russalanprince/2013/10/15/the-celebrity-multi-family-office/#5f7986844104>.

<sup>227</sup> *Id.*

<sup>228</sup> Russ Alan Prince, *What is a Family Office?*, *FORBES* (May 22, 2013, 6:39 AM), <http://www.forbes.com/sites/russalanprince/2013/05/22/what-is-a-family-office/#2563cae91038>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

## V. TRANSFER TERMINATION CASES INVOLVING STATUTORY HEIRS

The initial § 203 termination right trigger date occurred on January 1, 2013. Therefore, cases litigating the various issues related to § 203 termination are just starting to make their way onto lawyers' desks, and they will eventually make their way through the legal system. *Ray Charles Foundation v. Robinson*<sup>232</sup> is the first case to highlight the reality of a 203 Statutory Heir's right to effect a testamentary-scheme defeating termination.<sup>233</sup> Therefore, that case provides important insight into the concerns I raise in this article about, and need for, protection of ACAB transfers.

## A. Ray Charles Foundation v. Robinson

The Ninth Circuit recently heard *Ray Charles Foundation v. Robinson*.<sup>234</sup> That case presents facts analogous to the problem my proposed amendment seeks to resolve; that is, when a statutory heir asserts a termination interest clearly contrary to the decedent author's testamentary wishes. In that case, Ray Charles named his private charitable foundation as sole heir of his rights and recipient of his royalties during his life and thereafter.<sup>235</sup> The Foundation is totally funded by the royalties and is prohibited from receiving any other means of support.<sup>236</sup> Charles negotiated with his twelve children to waive any right to his estate in exchange for half a million dollars into an irrevocable trust for each.<sup>237</sup> He died before the transfer termination window opened.<sup>238</sup> The perfect storm.

After his death, seven children served dozens of termination notices on various transferees and the Foundation sued challenging the termination notices.<sup>239</sup> The issue was whether the Foundation had standing to sue.<sup>240</sup> The

---

<sup>232</sup> 795 F.3d 1109 (9th Cir. 2015).

<sup>233</sup> Another recent case examines a pre-1978 transfer that involved a revised contract, which triggered applicability of 203. *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18 (2d Cir. 2015). In that case, the Statutory Heirs sought a declaratory judgment from the court to affirm that their copyright termination notice was valid and enforceable. If valid and enforceable, the notice would effectively terminate the grantee's copyright in the song. *Id.*

<sup>234</sup> See *Ray Charles Found.*, 795 F.3d at 1109.

<sup>235</sup> *Id.* at 1112.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1112–13.

<sup>239</sup> *Id.* at 1113 (noting that the Terminating Heirs filed 39 termination “notices under § 203 and § 304(c) to terminate pre- and post-1978 grants authorized by Charles” to various transferees, including Warner/Chappell).

<sup>240</sup> *Id.* at 1114–15.

Ninth Circuit held that it did.<sup>241</sup> If the Foundation is successful ultimately on the merits, the transferee, Warner Chappell, will remain in control of the copyrights and the Foundation will continue to be funded. Ray Charles's wishes and intent will survive. If, however, the terminating Statutory Heirs are successful, Charles' testamentary scheme will be decimated.

This case serves as a stark example of how Statutory Heirs may receive an unintended and undue benefit when they inherit an author's termination right when the artist dies before the termination window opens. Therefore, all author copyright transfers to ACAB vehicles and entities that serve the artist's overall estate plan and testamentary scheme should be excepted in the same way that testamentary transfers by will are protected.

*B. Section 304 "Guidepost" Cases*

Although copyright transfers made on or after January 1, 1978, entered into the transfer termination window as of January 1, 2013, and are governed by the 1976 version of the Act, the 1909 version of the Act is still relevant for renewal right transfers made before 1978 as they are still subject to § 304(d).<sup>242</sup> Therefore, cases involving 304(d) terminations are illustrative.

The following cases are prominent Statutory Heir transfer termination cases decided in the last ten years. This curated list of cases from various sectors of the entertainment industry show the prevalence of such terminations regardless of the type of creative work. Some cases do not directly involve terminations of ACAB transfers. However, all of these cases highlight Congress's likely intent in permitting Statutory Heirs to exercise a deceased author's termination right.

1. *Baldwin v. EMI Feist Catalog, Inc.*<sup>243</sup>

In the 1930s, J. Fred Coots and Haven Gillespie jointly composed the Christmas classic *Santa Claus is Comin' to Town*.<sup>244</sup> Coots and Gillespie sold the song's copyright to EMI's predecessor, Leo Feist, Inc., by agreement in 1934 ("1934 Agreement").<sup>245</sup> Although most authors during that time "sold their rights in the initial term and renewal term simultaneously, Coots granted his renewal

---

<sup>241</sup> *Id.* at 1119–22.

<sup>242</sup> See 17 U.S.C. § 304(c), (d) (2015); see also Allison M. Scott, *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split over the Alienability of Copyright Termination Rights*, 14 J. INTELL. PROP. L. 357, 358 (2007) ("Of the three termination provisions of the 1976 Act, § 304(c) and § 304(d) will continue to be employed for the next few decades to terminate [renewal] transfers made before 1978." (citations omitted)).

<sup>243</sup> 805 F.3d 18 (2d Cir. 2015).

<sup>244</sup> *Id.* at 19.

<sup>245</sup> *Id.* at 19–20.

rights” by separate agreement in 1951 (“1951 Agreement”).<sup>246</sup> Feist renewed its copyright in 1961 and the rights were set to expire in 1990.<sup>247</sup>

In 1981, Coots sent a termination notice (“1981 Termination Notice”) for the 1951 Agreement to Feist’s successor, Robbins Music Corporation (“Robbins”).<sup>248</sup> Coots filed a copy of the 1981 Termination Notice with the Copyright Office and entered into an agreement with Robbins (“1981 Agreement”).<sup>249</sup> That agreement both conveyed the rights and represented and warranted that Coots served Robbins with a termination notice to Robbins and recorded the same in the Copyright Office.<sup>250</sup>

After Congress enacted the 1998 Sonny Bono Copyright Term Extension Act, Coots’ Statutory Heirs sought to take advantage of the 304(d) termination right granted to them.<sup>251</sup> In 2004, they served EMI (Robbin’s successor-in-interest) with notice of termination (“2004 Termination Notice”) and recorded the same with the Copyright Office.<sup>252</sup> The heirs sent notice believing EMI still owned the rights under the 1951 Agreement and that Coots had never exercised his termination rights under § 304(c).<sup>253</sup> Assuming that the 1981 Agreement was operative, EMI searched the copyright records for a copy termination notice, but after finding nothing, entered into negotiations with Coots’s heirs.<sup>254</sup>

EMI and the Statutory Heirs agreed that “in light of the 1981 Agreement, EMI’s rights in the [songs] were more appropriately terminated under Section 203.”<sup>255</sup> Accordingly, in 2007, the Statutory Heirs served and recorded a second termination notice (“2007 Termination Notice”), which indicated that the 1981 Agreement would terminate pursuant to § 203.<sup>256</sup> Mr. Coots’ attorney then attempted to negotiate the sale of the “to-be-terminated” rights back to EMI, but those negotiations fell through.<sup>257</sup>

---

<sup>246</sup> *Id.* at 20.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 22.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* Oddly and without explanation, on May 26, 1982, Coots’ attorney received a letter from the Copyright Office stating that “[p]ursuant to our telephone conversation on March 1, 1982, we are returning [the 1981 Agreement] to you unrecorded.” *Id.* at 23. Coots’ attorney stated he could not recall what had transpired in the telephone conversation referenced in the letter. *Id.* Ultimately, the court held that the notice was never recorded. *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 24.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

Two years later, in 2009, Warner-Chappell Music, copyright administrator for a Coots family venture, wrote to EMI claiming control of the copyright in the song under the 2004 Termination Notice.<sup>258</sup> EMI asserted that its copyright “ha[d] not been and could not be terminated” because Coots had already exercised his § 304(c) termination via the 1981 Agreement.<sup>259</sup>

In 2012, the Statutory Heirs served and recorded a third termination notice (“2012 Termination Notice”), which cited § 203, not § 304(d), as the source of the heirs’ right to terminate.<sup>260</sup> Further, the 2012 Termination Notice assumed that the 2007 Termination Notice was premature, on the theory that the 1981 Agreement was a grant only of the right to publish the work and nothing else.<sup>261</sup> Under that theory, the 1981 Agreement could not be terminated until 2021 (40 years after transfer).<sup>262</sup>

The Statutory Heirs then filed a declaratory action, seeking a judgment that the 2007 Termination Notice would terminate EMI’s rights in 2016, or, alternatively, that the 2012 Termination Notice would terminate EMI’s rights in 2021.<sup>263</sup> “Following discovery, the parties cross-moved for summary judgment,” and the district court granted EMI’s motion and denied that of Coots’s heirs.<sup>264</sup> The court held that since the 1981 Termination Notice was never recorded, EMI controlled the rights in the song under the 1951 Agreement, which is not terminable under § 203.<sup>265</sup>

Further, the court concluded that § 304(d) was unavailable to the Statutory Heirs because “[p]laintiffs exercised their § 304(c) termination rights when they served the 1981 Notice on EMI and secured a substantial \$100,000 bonus payment.”<sup>266</sup> As such, the district court concluded that EMI’s rights would actually survive until 2029.<sup>267</sup>

In 2015 the Second Circuit Court of Appeals was essentially tasked with determining what agreement, if any, was the controlling document, and what legal effect that determination had on prior agreements.<sup>268</sup> On appeal, the first question the Court considered was whether EMI owns its rights in the song under the 1951 Agreement or the 1981 Agreement.<sup>269</sup> The Statutory Heirs argued that

---

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 25.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

the 1981 Agreement superseded the 1951 Agreement and, upon doing so, became the operative source of EMI's rights.<sup>270</sup> In rebuttal, EMI argued that the 1981 Agreement did not supersede the 1951 Agreement, and that the failure of Coots to record the 1981 Termination Notice rendered the 1951 Agreement the operative agreement.<sup>271</sup>

The court found EMI's argument unpersuasive, finding that the 1981 Agreement not only granted EMI the future interest scheduled to revert to Coots, it also replaced the 1951 Agreement as the source of EMI's rights.<sup>272</sup> The court concluded that the parties to the 1981 Agreement clearly manifested an intention to replace the former 1951 Agreement, as opposed to merely granting Coots's future interest.<sup>273</sup> The court was persuaded by the plain language of the 1981 Agreement, which stated that Coots was also granting "all rights and interests . . . heretofore . . . acquired or possess[ed] by [him] . . . under any and all renewals and extensions."<sup>274</sup> As such, the court found that the 1981 Agreement effectively replaced the 1951 Agreement.<sup>275</sup> The court found it would defy logic to have two grants of the same exact rights be operative at the same time.<sup>276</sup> Lastly, Coots's failure to record the 1981 Termination Notice was irrelevant to the question of whether EMI presently owns the copyright under the 1951 or 1981 Agreement.<sup>277</sup>

The court concluded that the 1981 Agreement was the source of EMI's rights in the song and could be terminated under § 203 in 2016.<sup>278</sup> Accordingly, the 2007 Termination Notice terminated the 1981 Agreement at that time.<sup>279</sup>

## 2. *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*<sup>280</sup>

In 1930, Alan Alexander Milne ("author"), author of the *Winnie the Pooh* children's books, granted various rights to Stephen Slesinger, who subsequently transferred those rights to a corporation he controlled, Stephen Slesinger, Inc. ("SSI").<sup>281</sup> The author died testate in 1956, survived by his widow

---

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 25–26.

<sup>272</sup> *Id.* at 28.

<sup>273</sup> *Id.* at 29.

<sup>274</sup> *Id.* at 28.

<sup>275</sup> *Id.* at 29.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 31.

<sup>278</sup> *Id.* at 31–32.

<sup>279</sup> *Id.* at 32.

<sup>280</sup> 430 F.3d 1036 (9th Cir. 2005).

<sup>281</sup> *Id.* at 1039.

and son, Christopher Milne.<sup>282</sup> Author's will bequeathed all beneficial interests in the Pooh works to a trust for the benefit of his widow during her lifetime ("Milne Trust"), and, after her death, in further trust for other beneficiaries ("Pooh Properties Trust").<sup>283</sup> Christopher and Christopher's daughter, Clare, were among the named beneficiaries of the Pooh Properties Trust.<sup>284</sup>

In 1961, SSI granted to Walt Disney Productions ("Disney") the exclusive rights it acquired pursuant to the 1930 Agreement.<sup>285</sup> Simultaneously, Disney entered into a similar agreement with author's widow and the Milne Trust in order to acquire other exclusive rights.<sup>286</sup> The author's widow died in 1971, and the remaining Milne Trust corpus was added to the Pooh Properties Trust.<sup>287</sup> Five years later, the 1976 Act added an author's termination rights to the Act.<sup>288</sup>

In 1983, faced with the threat that Christopher may exercise his right to terminate, Disney renegotiated a new and more lucrative deal with him.<sup>289</sup> This new agreement specifically referenced and acknowledged the 1930 and 1961 Agreements and provided that the new agreement would effectively revoke the prior agreements from 1930 and 1961 and re-grant the rights in the Pooh works to SSI (who, in turn, granted various rights to Disney).<sup>290</sup>

In 2002, Christopher's daughter Clare sought to recapture rights to the Pooh works.<sup>291</sup> She served SSI with her notice of termination and entered into an agreement with Disney to assign the rights she expected to reclaim.<sup>292</sup> She also commenced a declaratory action in district court asking the court to recognize her termination notice as valid.<sup>293</sup> Clare argued that the 1983 Agreement was merely an extension of the 1930 Agreement.<sup>294</sup> Additionally, she argued that a grantee could not simply contract around "the statutory rule against obtaining a new grant prior to termination of the original grant" unless and until there was at

---

<sup>282</sup> *Id.* Milne granted Slesinger "exclusive merchandising and other rights based on the Pooh works in the United States and Canada 'for and during the respective periods of copyright and of any renewal thereof to be had under the Copyright Act[.]'" *Id.* (citation omitted in original).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1040.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* The Pooh Properties Trust "received double SSI's share of the royalties, compared to about half of SSI's share before the 1983 agreement. Thus, the renegotiations between the parties resulted . . . in a net gain of hundreds of millions of dollars . . ." *Id.* at 1040–41.

<sup>290</sup> *Id.* at 1040.

<sup>291</sup> *Id.* at 1041.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

least a “‘moment [of freedom]’ when the grantor is bound under neither the prior nor the new grant.”<sup>295</sup> However, the court quickly dismissed this argument, finding instead that a plain reading of § 304(c)(6)(d) sets clear guidelines on the proper timing mechanism for grants and agreements.<sup>296</sup>

SSI argued that Clare’s termination notice was invalid because the 1930 grant of rights at the heart of the termination notice had already been revoked by the 1983 agreement, and as such, could not be the subject of termination.<sup>297</sup> Both the district court and, ultimately, the Ninth Circuit agreed.<sup>298</sup>

The district court held that the 1983 Agreement revoked the grants under the 1930 Agreement and the grant made to SSI via the 1983 Agreement was, therefore, not subject to termination.<sup>299</sup> That court reasoned further that the termination provisions apply only to grants made prior to 1978, and that the Copyright Act did not alter the power of private parties to contract.<sup>300</sup> Clare’s argument that the 1983 Agreement was an extension of the 1930 Agreement was also unpersuasive.<sup>301</sup>

The Ninth Circuit addressed whether the 1983 Agreement was an “agreement to the contrary” pursuant to § 304(c)(5). The Act does not define the term.<sup>302</sup> The court held the 1983 Agreement to be easily distinguishable and not contemplated by the legislative history.<sup>303</sup> Accordingly, the Ninth Circuit held that the 1983 Agreement revoked and replaced the 1930 Agreement, and as such, the 1983 Agreement was controlling and non-terminable.<sup>304</sup>

### 3. *DC Comics v. Pacific Pictures Corp.*<sup>305</sup>

This 2013 case, also from the Ninth Circuit Court of Appeals, addresses the effect a post-1978 agreement (“1992 Agreement”) has on termination rights pursuant to an author’s prior agreement from 1938 (“1938 Agreement”).<sup>306</sup>

In 2003, Mark Peary, the executor of the estate of Joseph Shuster (one of the two co-creators of Superman), filed a copyright termination notice

---

<sup>295</sup> *Id.* at 1042.

<sup>296</sup> *Id.* at 1047–48.

<sup>297</sup> *Id.* at 1047.

<sup>298</sup> *Id.* at 1048.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1042–43. The court further stated that the 1983 Agreement “was created in order to protect SSI and Disney from a termination of the rights granted to them.” *Id.* at 1042.

<sup>301</sup> *Id.* at 1041–42.

<sup>302</sup> *Id.* at 1043.

<sup>303</sup> *Id.* at 1044.

<sup>304</sup> *Id.*

<sup>305</sup> 545 F. App’x 678 (9th Cir. 2013).

<sup>306</sup> *Id.* at 680.

(“Termination Notice”) pursuant to § 304(d), seeking to reclaim the copyrights to Superman that Shuster had assigned to DC Comics (“DC”) in 1938.<sup>307</sup> In response, DC sought a declaratory judgment that the estate’s Termination Notice was ineffective.<sup>308</sup> DC argued that the 1992 agreement, signed with Joseph Shuster’s siblings (including his sister and sole heir, Jean Peavy) granted the siblings pensions for life in exchange for a revocation of the 1938 Agreement of copyrights to DC and a re-grant of all of Shuster’s copyrights in Superman, effectively revoking and replacing the 1938 Agreement.<sup>309</sup> The court agreed with this assertion, as the plain text of the 1992 Agreement, which states that it “‘fully settles all claims’ regarding ‘any copyrights, trademarks, or other property right in any and all work created in whole or in part by . . . Joseph Sinister,’ and further ‘now grant[s] to [DC] any such rights,’” superseded the 1938 Agreement as a matter of law.<sup>310</sup>

The executor argued that the 1992 agreement did not expressly cancel the 1938 Agreement.<sup>311</sup> The court dismissed this argument based on New York precedent stating that in deciding whether one agreement supersedes another the focus is on the intent of the parties to supplement or to supplant the prior agreement.<sup>312</sup> The executor also argued that the 1992 Agreement could not foreclose the Termination Notice because it is an “agreement to the contrary” within the meaning of § 304(d).<sup>313</sup> The court found this contention to be in direct conflict with the plain text of the copyright termination statute, in that it would permit the copyright termination provision to nullify a post-1977 assignment, “despite the statute’s express limitation to assignments ‘executed before January 1, 1978.’<sup>314</sup> “The Court cited its decision in *Milne* to show that the estate’s contention would conflict with the legislative history and congressional intent underlying these provisions parties to have the free right to contract.<sup>315</sup>

---

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* These facts are more analogous to *Ray Charles Foundation* because heirs in that case also contractually agreed to certain benefits in exchange for releasing any rights to exploit the copyright.

<sup>310</sup> *Id.* at 680–81.

<sup>311</sup> *Id.* at 680.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 681.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 681–82. Judge Thomas filed a lone dissenting opinion in this case. *Id.* at 682 (Thomas, J., dissenting). He opined that the real question before the Court was “whether the 1992 Agreement was a novation that validly revoked and re-granted” Joseph Shuster’s 1938 Agreement, which he found to not be the case. *Id.* at 683.

4. *Brumley v. Albert E. Brumley & Sons, Inc.*<sup>316</sup>

Albert Brumley, Sr. (“Brumley, Sr.”) was the composer of a popular gospel song, *I’ll Fly Away*.<sup>317</sup> On September 15, 1932, the Hartford Music Company (“Hartford”) secured the initial copyright in the song by publishing it in a songbook.<sup>318</sup> In the 1940s, Brumley, Sr. formed a music-publishing company, Albert E. Brumley & Sons (“Brumley & Sons”), to own Brumley’s copyrights.<sup>319</sup> Eventually, he purchased all of Hartford’s assets, including the song.<sup>320</sup> Brumley, Sr. renewed the copyright registration in 1960 and he continued to control all rights to the song through the Brumley & Sons music publishing company.<sup>321</sup>

In December of 1975, Brumley, Sr. sold his interest in Brumley & Sons to two of his children, William and Robert.<sup>322</sup> Shortly thereafter, Brumley, Sr. and his wife, Goldie, “executed a Bill of Sale that purported to transfer, among other personal property, copyrights listed in an attachment, to William and Robert.”<sup>323</sup> It was undisputed that the list included the song at the heart of this litigation.<sup>324</sup>

Brumley, Sr. died testate in 1977, survived by his wife, Goldie, and their six children.<sup>325</sup> Brumley, Sr. bequeathed all of his property, including his interests in any copyrights, to Goldie.<sup>326</sup> In May of 1979, Goldie executed another Bill of Sale, wherein she maintained that she was the “sole and rightful owner” of all of her late husband’s songs and then purported to assign those rights to Brumley & Sons.<sup>327</sup> The agreement also conveyed to Brumley & Sons the rights to renew copyrights for all rights therein.<sup>328</sup> In 1986, Robert bought out William’s share of Brumley & Sons, leaving Robert as the sole owner when Goldie died in 1988.<sup>329</sup>

In 2006, the other four Brumley children (Jackson, Albert, Betty, and Thomas) delivered a notice of termination to Brumley & Sons purportedly to

---

<sup>316</sup> 727 F.3d 574 (6th Cir. 2013).

<sup>317</sup> *Id.* at 575.

<sup>318</sup> *Id.* at 575–76.

<sup>319</sup> *Id.* at 576.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

terminate the 1975 transfer of rights from Brumley, Sr. to William and Robert.<sup>330</sup> When Robert refused to recognize the validity of the termination notice, the Brumley heirs filed suit.<sup>331</sup>

At trial, Robert argued that the termination notice was invalid for two reasons. First, he contended that Goldie exercised her termination rights by assigning her rights in the 1979 Bill of Sale, which would serve to prevent the Brumley heirs from later attempting to exercise those same rights.<sup>332</sup> Second, Robert argued that Brumley, Sr. was an employee of the Hartford Music company at the time that he created the song, and as such, that song should be declared a “work made for hire,” thus placing it outside the purview of the termination provisions of the Copyright Act.<sup>333</sup>

The district court held that Goldie’s 1979 Bill of Sale did not constitute an exercise of termination rights and recognized the validity of the Brumley heirs’ termination notice.<sup>334</sup> Robert then filed an interlocutory appeal, seeking appellate review of the district court’s determination.<sup>335</sup> On appeal the appeals court found that the district court erred in excluding items from evidence, and, therefore, never addressed the termination issue raised by Robert.<sup>336</sup>

##### 5. *Classic Media, Inc. v. Mewborn*<sup>337</sup>

In 2008, the Ninth Circuit heard *Classic Media, Inc. v. Mewborn* and analyzed whether a transfer termination right can be extinguished by a post-1978 re-grant of the same rights previously assigned *before* 1978.<sup>338</sup> The Ninth Circuit held it did not and viewed a contrary result as inconsistent with the congressional intent underlying the Copyright Act.<sup>339</sup>

---

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* The district court made some pre-trial evidentiary rulings that, although peripheral to the focus of this memorandum, effectively served to stifle the court’s ability to answer the relevant question concerning the Termination Notice. *Id.* at 577. The district court bifurcated the trial based upon the evidentiary issues raised, and held a jury trial for the purpose of determining whether Brumley, Sr.’s song was a “work made for hire” in pursuance of the statute. The jury concluded that Brumley, Sr. was the statutory author of the song, meaning that it was not made for hire and that Brumley, Sr.’s heirs would have termination rights under § 304(d). *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 580.

<sup>337</sup> 532 F.3d 978 (9th Cir. 2008).

<sup>338</sup> *Id.* at 979 (emphasis added).

<sup>339</sup> *Id.* at 979–80.

Eric Knight, author of *Lassie Come Home* (the “Lassie Works”), published and registered the Lassie Works in the Copyright Office in 1940.<sup>340</sup> Knight granted television rights to Classic Media, Inc.’s (“Classic”) predecessor-in-interest, but Knight died in 1943 before the renewal rights had vested.<sup>341</sup> After Knight’s passing, the interest in the renewal term of the copyrights passed to Knight’s wife, Ruth, and their three daughters: Jennie Moore, Betty Myers, and Winifred Mewborn (“Mewborn”).<sup>342</sup> Classic’s predecessor-in-interest only had an agreement in place with Knight’s widow, so it had to secure agreements with Knight’s daughters to secure the renewal term of motion picture, television, and radio rights.<sup>343</sup>

In 1976, Mewborn assigned her 25% share in the Lassie Works to Lassie Television, Inc. (“LTI”) via written agreement (“1976 Agreement”).<sup>344</sup> Mewborn, however, was the only one to assign her interest at that time.<sup>345</sup> LTI was not able to obtain similar assignments from the other sisters until 1978.<sup>346</sup> To make the individual grant of rights among the sisters equally, Mewborn signed a second agreement (“1978 Agreement”) which contained the identical transfer of rights as the 1976 Assignment.<sup>347</sup> This agreement, albeit identical to those signed by her sisters in every other way, also granted some ancillary rights to LTI and contained the following language:

[a]ll of the foregoing rights are granted to [LTI] throughout the world in perpetuity, *to the extent such rights are owned by me*, as hereinafter provided . . . The rights granted herein to [LTI]

---

<sup>340</sup> *Id.* at 980.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* The agreement stated, in pertinent part:

I, Winifred Knight Mewborn, . . . hereby sell, grant, and assign to [LTI] all of the following rights in and to the story entitled LASSIE COME-HOME written by Eric Knight and published in the Saturday Evening Post on December 17, 1938 and the novel or book based thereon also written by Eric Knight and published by John C. Winston Co. in 1940 . . . :

All motion picture (including musical motion picture), television and radio rights in and to the said literary work[s] . . . throughout the world for the full period of the renewal copyrights in the work[s] and any further renewals or extensions thereof.

*Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 980–81.

are *in addition to* the rights granted by me to [LTI] under and pursuant to an assignment dated July 14, 1976 . . . .<sup>348</sup>

In 1996, Mewborn served a notice of termination on Palladium Limited Partnership (“Palladium”), LTI’s then successor-in-interest in the Lassie Works, in an attempt to recapture her rights by terminating the 1976 Agreement.<sup>349</sup> This notice purported to terminate the 1976 Agreement effective May 1, 1998.<sup>350</sup>

On April 1, 1998, counsel for LTI’s then successor-in-interest, Golden Books Family Entertainment, by letter, rejected and repudiated Mewborn’s termination notice.<sup>351</sup> Later, in 2004, Mewborn discovered that Classic was preparing to produce a motion picture based upon her father’s Lassie Works, and Mewborn’s counsel subsequently wrote to Classic demanding payment for Classic’s exploitation of the Lassie motion picture.<sup>352</sup> That letter served as the impetus for this case.<sup>353</sup> Classic filed a declaratory action requesting a judgment that Mewborn had no interest in the Lassie film or any of the rights she previously assigned from the 1978 Agreement and that her termination notice was ineffective.<sup>354</sup> Mewborn then counterclaimed, arguing that Mewborn had, in fact, recaptured some of her previously assigned rights.<sup>355</sup> Both parties filed cross-motions for summary judgment.<sup>356</sup>

On February 9, 2006, the district court granted Classic’s motion for summary judgment and denied Mewborn’s motion as moot.<sup>357</sup> The district court interpreted the termination right under § 304(c) to be inalienable but subject to waiver or relinquishment, and found that the parties intended the 1978 Agreement to “give away” all of Mewborn’s additional rights that were not assigned via the 1976 Agreement, including her newly acquired right to terminate under § 304.<sup>358</sup> Therefore, the court concluded that Mewborn had relinquished her termination right, and deemed the Notice of Termination ineffective.<sup>359</sup> Further, the district court found that the 1978 Agreement did not

---

<sup>348</sup> *Id.* (emphasis in original).

<sup>349</sup> *Id.* at 981.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 982.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

substitute or revoke the 1976 Agreement, and that the 1976 Agreement was still intact.<sup>360</sup> Mewborn appealed.<sup>361</sup>

The Ninth Circuit was quick to disagree with the district court's assertion that "the only reasonable interpretation of the 1978 contract language is that [Mewborn] intended to give away any additional . . . rights not given away in 1976, thus relinquishing her newly acquired right of termination."<sup>362</sup> The court referenced the congressional intent leading to § 304(c) and noted that the new renewal process was intended to give an author and his heirs a second chance to benefit from the fruits of his labors.<sup>363</sup> The court explained further that copyrights, unlike other property rights, are incapable of being accurately valued prior to the time they become exploited.<sup>364</sup>

The court of appeals opined that the district court misrelied upon *Milne v. Stephen Slesinger, Inc.*, finding it to be factually dissimilar.<sup>365</sup> In discussing *Milne*, the Court noted that the author's heirs obtained considerably more money through a renegotiated deal made with the impending possibility of one of the heirs would exercise their right of termination.<sup>366</sup> This renegotiated deal, therefore, served the intended congressional purpose underlying the provisions, allowing the heirs to benefit from the fruits of the author's labor, not a grantee.<sup>367</sup>

In differentiating the instant case from *Milne*, the Court noted two major factual discrepancies that played a role in its analysis. First, *Milne* had, and *knew* that he had, the right to exercise his termination right as a means to leverage his position for a better deal.<sup>368</sup> Mewborn did not even have the option to serve notice of her termination right for another six years, leaving Mewborn in no better position to bargain.<sup>369</sup> Secondly, the intended nature of the agreements in the instant case compared to *Milne* were not the same.<sup>370</sup> In *Milne*, the post-1978

---

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 982–83.

<sup>364</sup> *Id.* at 983. The Court noted that:

Congress enacted the inalienability of termination rights provision in [Section] 304(c) [as a means] to resurrect the fundamental purpose underlying the two-tiered structure of the duration of copyrights it originally adopted: to award to the author, and not to the assignee of the right to exploit the copyright during its initial term, the monetary rewards of a work that may have been initially undervalued . . . .

*Id.*

<sup>365</sup> *Id.* at 987.

<sup>366</sup> *Id.* at 987–88.

<sup>367</sup> *Id.* at 988.

<sup>368</sup> *Id.* at 989.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

agreement expressly revoked the pre-1978 agreements and simultaneously re-granted the same rights.<sup>371</sup> Mewborn's 1978 Agreement granted rights "in addition to" the ones granted in the 1976 Agreement.<sup>372</sup> Further, the agreement in *Milne* also stated expressly that it was made in exchange for the non-exercise of the termination right.<sup>373</sup> The 1978 Agreement in the instant case was silent on the issue.<sup>374</sup> Finally, the Court found no evidence that the termination right was considered by either party in making the 1978 Agreement or that Mewborn was even aware of her termination right.<sup>375</sup> Accordingly, the Court held that the 1978 Agreement merely served to explicitly affirm the 1976 Agreement and did not modify, revoke, or replace it.<sup>376</sup>

The Court found that Mewborn did not intend to relinquish a known termination right, and the 1978 Agreement did not expressly or impliedly transfer that right as to the 1976 Agreement.<sup>377</sup> As such, the Court reversed the district court decision and held the termination notice was valid and effective.<sup>378</sup>

#### VI. RECLAIMING TESTAMENTARY CONTROL OF COPYRIGHT

Congress created transfer termination rights to fully empower authors to renegotiate from a position of strength. When authors do not live long enough to reclaim their rights, Congress empowers Statutory Heirs to, in effect, step into the shoes of the author and reclaim, renegotiate, or otherwise exploit the rights instead. However, Congress was careful not to include testamentary transfers by will so as not to disturb the author's testamentary freedom when the author made some express disposition of copyright interests. Now that more and more authors are using nonprobate vehicles in addition to wills (or instead of them) to accomplish a comprehensive estate plan for business, financial, philanthropic and other reasons, Congress must recognize the unintended consequence of leaving such ACAB transfers at risk of termination by Statutory Heirs contrary to an author's testamentary intent. Further, Congress must reconcile this disparate treatment of wills and will substitutes and amend the Copyright Act to balance an author's inter vivos and testamentary wishes with the policies underlying the government's interest in protecting the welfare of author's closest

---

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* The Court further found that "if LTI had entered into the 1978 Assignment intending that the termination right was on the bargaining table, the contract language fails to reflect this intention or provide any consideration for that right." *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 990.

heirs if the author dies before having the opportunity to exercise her termination right.

Congress could empower authors to reclaim testamentary control of ACAB transfers by, for example, excepting such transfers altogether from termination by a Statutory Heir. Doing so would place ACAB transfers wholly and rightfully on par with wills. Whether grounded in jurisprudential or pragmatic justifications,<sup>379</sup> succession laws have and continue to be liberally applied and construed to honor a testator's intent. Copyright holders should be afforded the same opportunity at death as non-holders to determine the disposition of copyright transfers; at least to the extent those transfers remain under the control of the author and benefit the author as opposed to an arms-length, third party transferee like a publishing company or distributor.

Alternatively, Congress could create a time-limited exception for all lifetime ACAB transfers made within three years of entity formation. A three-year time period is reasonable because: 1) such a time limit would cover most transfers made by an artist to a loan-out company, publishing company, or Celebrity Family Office, recognizing that all other copyrighted works would be works-made-for-hire as long as the artist is an employee of the entity; and 2) it is consistent with other "look back" rules in succession and tax law and the three-year statute of limitations set forth in UPC section 3-108.

Absent a legislative fix, estate planning practitioners are severely limited in their ability to protect a client's testamentary wishes to exploit rights during the client's lifetime and to further estate planning goals for copyright interests, which survive an author's death for seventy years,<sup>380</sup> to the extent the client's wishes differ from the limited class of Statutory Heirs created by the Copyright Act. Federal judges are also hamstrung as they are charged only with the task of applying existing law as enacted by Congress.

In conclusion, Congress should treat certain lifetime gratuitous author transfers to author-controlled, author-benefiting business and nonprobate entities in the same way that wills are treated. Presumably, wills are excepted from the termination provisions to, among other things, honor the testator's intent and testamentary freedom. Both corporate structures that shield personal liability and will substitutes that avoid probate and offer administrative, business, and tax benefits, have and will continue to increase in popularity. Therefore, parity in the treatment of wills and will substitutes is necessary given the rise in importance and frequency of use of those ACAB vehicles. My suggested amendment will prevent Statutory Heirs, sometimes disgruntled or greedy (or both), from terminating the decedent author's lifetime gratuitous transfers and best protect

---

<sup>379</sup> See *supra* Part II.B.

<sup>380</sup> 17 U.S.C. § 102 (2015). The duration of copyright for a single creator is life of the author plus 70 years after the author's death. For this reason, it is especially important that authors be empowered to make author-controlled, author-benefiting transfers that cannot be undone by the limited class of Statutory Heirs.

2016]

*STATUTORY HEIRS APPARENT?*

147

the author's testamentary intent and valuable copyright. Only then will authors truly be empowered to reclaim testamentary control of copyright.