

The Sooner the Better? How to Optimize Bargaining Power When Serving Notice of Copyright Termination

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INTRODUCTION

If artists like Billy Joel cannot successfully reap the benefits of copyright termination, then who can, and *how*?¹ Congress primarily enacted the termination right to give authors a “second bite at the apple”: the ability to terminate their disadvantageous deals after a specified number of years and re-exploit the value of their copyright when that value is better known.² Despite this noble goal, statutory termination is highly complex, and few artists—even icons like Billy Joel—succeed in availing themselves of its purported rewards.³ Case law discussing the termination right is sparse, yet scholarship and critical commentary on termination is extensive, further indicating that sections

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1. See DYLAN GILBERT ET AL., MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS ARTISTS AND HOW TO FIX IT 23 (Pub. Knowledge 2019), <https://publicknowledge.org/wp-content/uploads/2021/11/Making-Sense-of-the-Termination-Right-1.pdf> [<https://web.archive.org/web/20260129210002/https://publicknowledge.org/wp-content/uploads/2021/11/Making-Sense-of-the-Termination-Right-1.pdf>] (discussing Billy Joel’s struggle and ultimate failure in 2013 to terminate his 1978 grant of copyright); David Marchese, *In Conversation: Billy Joel*, VULTURE (July 2018), <http://www.vulture.com/2018/07/billy-joel-in-conversation.html> [<https://web.archive.org/web/20260125195855/https://www.vulture.com/2018/07/billy-joel-in-conversation.html>] (“[I]t’s one thing if you own your recordings. I don’t. There was a supposed to be a reversal of copyright back to me in 2013. Well, the record company dug in and got their battery of lawyers and we never got the stuff back. So I still don’t own my recordings. People wonder why there’ve been so many Billy Joel live albums and compilations. They’re not my idea. The record company owns all these recordings and can package them any way they want.”); 17 U.S.C. §§ 203, 304.

2. H.R. REP. NO. 94-1476 (1976); see David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y U.S.A. 387, 405 (2001).

3. See R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895, 899–900 (2016) (discussing the difficulty of comprehending various complex termination requirements); see *infra* Part I.

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203 and 304 of the 1976 Copyright Act are ripe for reform.⁴ However, given the underuse of the termination right, change has been relatively slow, and authors possess little guidance from Congress, the courts, or the Copyright Office on how to use the current system to their advantage.⁵

The termination process, as codified in sections 203 and 304, is replete with requirements and formalities, and while termination itself is a powerful tool, authors have little choice in how they wield it.⁶ Serving notice of termination, which is required “not less than two or more than ten years” before the effective date of termination, and choosing an effective termination date are two of the limited termination decisions left to the discretion of the author.⁷ In this Note, I will weigh the potential benefits and detriments of sending early notice of termination versus later notice of termination. Specifically, I will examine two statutory “exceptions” to termination—the “Right of First Refusal” Exception and the Derivative Works Exception—not only to determine how each exception influences when an author should send notice, but also to help authors navigate the practical consequences of each exception in the music, book, and film industries.

This Note begins, in Part I, with a brief overview of the termination right and the process of sending notice of termination. Part II will delve into the potential pros and cons of sending the notice of termination as early as possible, and which authors will benefit most from early notice. I will focus on the practical implications of the “Right of First Refusal” Exception, which allows authors to renegotiate a new grant of copyright with their original grantee (usually an author’s original publisher) immediately after serving notice of termination.⁸ Part III, on the other hand, will enumerate the benefits of sending notice of termination as close to the effective termination date as possible. Specifically, this section will explore the Derivative Works Exception, which allows owners of a derivative work (again, usually an author’s publisher) to exploit and distribute their derivative works even after the copyright owner of the underlying work terminates the original grant.⁹ I will discuss the real-world consequences of the many possible interpretations of this Exception, particularly for the music industry, and how these interpretations might influence certain authors or artists to serve later notice of termination. Finally, Part IV will examine how authors may balance the various considerations that arise under these exceptions to determine

4. See GILBERT ET AL., *supra* note 1; Lionel Bently & Jane C. Ginsburg, “The Sole Right . . . Shall Return to the Authors”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1579 (2010).

5. Joshua Yuvaraj et al., *U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets*, 19 J. EMPIRICAL LEGAL STUD. 250, 280 (2022) (“[Termination] laws have been subject to remarkably little use.”); see also Chase A. Brennick, Note, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, 93 N.Y.U. L. REV. 786 (2018).

6. See Reese, *supra* note 3; 17 U.S.C. §§ 203, 304.

7. 17 U.S.C. §§ 304(c)(4)(A), 203(a)(4)(A).

8. The “Right of First Refusal Exception” is codified in 17 U.S.C. §§ 203(b)(4), 304(c)(6)(D). If authors are interested in negotiating a new grant with a different publisher (i.e., not their original publisher), they must wait until *after* the effective date of termination (explained further in Part II).

9. The “Derivative Works Exception” is codified in 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

the optimal moment to terminate their grants of copyright. While I ultimately argue that earlier termination confers the most benefits on the greatest number of authors, I will note the rare exceptions to this rule and propose some best practices for these authors going forward.

I. BACKGROUND: TERMINATION AND THE NOTICE REQUIREMENT

Copyright termination, as codified in sections 203 and 304 of the 1976 Copyright Act, is an inalienable right enacted to “safeguard[] authors against unremunerative transfers” of their copyrights “notwithstanding any agreement to the contrary.”¹⁰ Despite Congress’s good intentions, the termination process is notoriously complicated, containing multiple formal requirements authors must satisfy in order to successfully terminate their grants.¹¹ This Part will provide a brief overview of these various requirements and their accompanying legislative history, with a specific focus on the requirement to send notice “not less than two or more than ten years” before the effective date of termination.¹² This Part will also discuss how serving notice at a particular time affects authors’ abilities to negotiate or regain their transferred rights.

A. THE TERMINATION RIGHT

The 1909 Copyright Act allowed authors to regain and re-grant their copyright after twenty-eight years (the “renewal term”) when the value of the work was much clearer than at the time the author assigned the copyright to a grantee.¹³ While the renewal provision technically gave authors a “second chance” to benefit from their work, authors were often forced to assign their renewal rights to their powerful publishers before the rights vested—eviscerating authors’ abilities to take advantage of their reverted rights once the twenty-eight-year term ended.¹⁴ When crafting the 1976

10. H.R. REP. NO. 94-1476, at 124 (1976); 17 U.S.C. §§ 203(a)(5), 304(c)(5).

11. See Reese, *supra* note 3, at 899 (“[T]he termination provisions offer an example of formal requirements remaining in U.S. law that seem so complicated as to unduly hinder exercise of the rights that they govern. The statutory provisions do not provide potential terminating parties with clear notice of how to exercise their termination rights.”); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKLEY TECH. L.J. 1175, 1241 (2010) (arguing that the termination provision “is so cumbersome and complicated that most authors will not realistically have a meaningful opportunity to terminate these transfers”); Jane C. Ginsburg, *Authors’ Transfer and License Contracts Under U.S. Copyright Law*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING 132, 142 (Jacques de Werra ed., 2013) (discussing how “[t]he notice provisions of § 304(c) are not author-friendly”).

12. 17 U.S.C. §§ 304(c)(4)(A), 203(a)(4)(A).

13. H.R. REP. NO. 94-1476, at 133–34 (1976).

14. MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 chs. 6:1, 6:4 (1977) (discussing H.R. REP. NO. 94-1476 (1976)); see GILBERT ET AL., *supra* note 1, at 4 (“[I]t became common practice for publishers to require that authors sign away their renewal rights as part of their initial license contract . . . This frustrated the ultimate policy goal of automatic rights reversion because, as a matter of practice, to get their works commercially published, authors generally had no option but to assign their rights to both terms of protection.” (citing Kate Darling, *Occupy Copyright: A Law & Economics Analysis of U.S. Author Termination Rights*, 63 BUFFALO L. REV. 147, 152 (2015))). The Supreme Court validated this practice in *Fred Fisher Music Co. v. M. Witmark & Sons*, where “Justice Frankfurter contended that authors need not be protected

Copyright Act, Congress discarded the twenty-eight-year renewal term and created an *inalienable* termination right with sections 203 and 304, which allow authors to terminate any “transfer of copyright ownership” or non-exclusive license after a certain period of time, as explained in greater detail below.¹⁵ Section 203 applies to “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978,” while section 304—a “close but not exact counterpart” of section 203—generally applies to “any copyright subsisting in either its first or renewal term on January 1, 1978.”¹⁶ To simplify, section 203 covers post-1978 grants, and section 304 covers pre-1978 grants.

While section 304 is far more robust and includes many additional components compared to section 203, both contain essentially identical provisions when it comes to serving notice, though with one notable difference: the opening of the notice window.¹⁷ Both sections allow authors to effect termination within a five-year window.¹⁸ However, under section 203, the window opens thirty-five years from the date of execution of the grant or, if the grant covers the right of publication, either “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” (the “Zone of Termination”).¹⁹ Under section 304, on the other hand, the window generally

against themselves, and that they could rationally choose to assign the renewal term for a small consideration before its vesting, rather than gamble on a greater return at the end of twenty-eight years.” Bently & Ginsburg, *supra* note 4, at 1586 (summarizing *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943)).

15. H.R. REP. NO. 94-1476, at 125 (1976); Dori Ann Hanswrith, *I’ll Be Back: Termination Rights Under Section 203 of the Copyright Act*, 2012 INTELL. PROP. MAG. 59. This Note mainly focuses on scholarship and case law surrounding section 203 terminations since they only began in 2013 and are rapidly increasing (while section 304 terminations are decreasing). However, I will still reference section 304 case law given the similarity of the section 304 and section 203 termination provisions.

16. 17 U.S.C. §§ 203(a), 304(c); H.R. REP. NO. 94-1476, at 140 (1976).

17. See H.R. REP. NO. 94-1476, at 124, 139 (1976). Section 304 generally covers the “Duration of Subsisting Copyrights,” while section 203 singularly covers “Termination of Transfers and Licenses.” In addition to termination provisions, section 304 discusses the future of copyrights that, at the time of the 1976 Act, are in their renewal term as prescribed under the 1909 Act. Therefore, there are some key differences between sections 203 and 304, but none beyond the notice window are relevant for the sake of this Note.

18. 17 U.S.C. §§ 203(a)(3), 304(c)(3). In other words, the statute provides authors with a five-year termination interval, and they can choose an effective termination date at any time within that interval.

19. 17 U.S.C. § 203(a)(3). The House Report provides two examples illustrating the notice period in practice:

Case 1: Contract for theatrical production signed on September 2, 1987. Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year [sic] termination period). Assuming that the author decides to terminate on September 1, 2022 (the earliest possible date) the advance notice must be filed between September 1, 2012 and September 1, 2020.

Case 2: Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, [2022] (35 years from publication). Assuming that the author decides to make the termination effective on January 1, [2024], the advance notice would have to be served between January 1, [2014], and January 1, [2022]. H.R. REP. NO. 94-1476, at 126 (1976).

opens fifty-six years from the date copyright was originally secured, or on January 1, 1978—whichever is later.²⁰

Even when the window opens, termination is not automatic. The statute requires advanced notice in the form of a letter from the author, served no less than two and no more than ten years before the effective date of termination.²¹ Accordingly, if dealing with a grant executed after January 1, 1978 (subject to section 203) that does not cover the right of publication, the earliest date an author can serve notice of termination is twenty-five years after execution of the grant, and the latest date an author can serve notice is thirty-eight years after execution of the grant.²² The author must not only calculate an effective date of termination that falls within the termination window—a process that is easier said than done—but the author’s notice must also comply with a number of formalities, including service of notice on the grantee or the grantee’s successor-in-interest and recordation of the notice with the Copyright Office.²³ Failure to observe the requisite formalities may ultimately render the notice invalid or result in extensive litigation to determine whether the author still possesses a right to terminate her copyright.²⁴

B. NOTICE: “NOT LESS THAN TWO OR MORE THAN TEN YEARS”

The two-to-ten-year stretch before the Zone of Termination is thus a critical period for authors interested in terminating their works. If the author does not send notice of termination within this timeframe, the author automatically loses the right to terminate (though the author may still terminate the agreement with the consent of the

Note that the original House Report incorrectly used the years 2222, 2224, and 2214 in its example (e.g., thirty-five years after 1987 is 2022, not 2222). Congress corrected these errors via the Congressional Record in the section entitled, *Correction of Errors in Printed House Report on S.22*. 122 CONG. REC. 31,676–77 (1976) (amending the aforementioned years to 2022, 2024, and 2014, respectively).

20. 17 U.S.C. § 304(c)(3); *but see* 17 U.S.C. § 304(d)(2) (providing that where an author’s termination right expired before the effective date of the 1976 Act, and the author did not previously exercise a termination right under the 1909 Act, termination may be effected “at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured”); *see also* MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 11.06 (2025) (discussing exceptions to standard termination periods and “gap grants,” i.e., transfers made before January 1, 1978, for works created *after* that date).

21. 17 U.S.C. §§ 304(c)(4)(A), 203 (a)(4)(A).

22. NIMMER ON COPYRIGHT, *supra* note 20, at § 11.06 (also discussing the earliest and latest dates to send notice of termination for pre-1978 grants and post-1978 grants covering the right of publication); *see supra* note 19 for other examples.

23. *See* Reese, *supra* note 3, at 901–02 (discussing the ambiguities in calculating the effective date of termination).

24. *See* Nance v. Equinox Music, No. 09-cv-7808, 2010 U.S. Dist. LEXIS 113146 (N.D. Ill. Oct. 22, 2010) (emphasizing the importance of serving notice to the correct grantee); Mtume v. Sony Music Ent., 408 F. Supp. 3d 471, 474 (S.D.N.Y. 2019) (where musician Jason Mtume’s termination notices were challenged because he “failed to list the correct date of execution for the works as required by statute”); *see also* Joshua Yuvaraj, *An Empirical Study of Case Law Relating to 17 U.S.C. § 203*, 64 IDEA 678, 716–19 (2024) (further discussion of case law emphasizing statutory termination requirements).

original grantee).²⁵ Interestingly, the legislative history barely discusses this seemingly arbitrary selection of two-to-ten years for the notice period.²⁶ The Supplementary Report of the Register of Copyrights from 1965 does mention that the two-to-ten year period was meant to “establish a definite period for filing the notice toward the end of the 35- or 40-year term, thus avoiding earlier, indiscriminate terminations, and to provide a fair period of advance notice to the grantee that his rights are to be terminated.”²⁷ Therefore, it seems Congress calculated the notice period with the grantee rather than the author in mind. Additionally, while authors and grantees have litigated termination notices that fell outside of the two-to-ten-year period, the courts and Copyright Office have yet to debate how the timing of a termination *within* the notice period influences an author’s termination right.²⁸ As a result, authors possess limited instruction when deciding to send notice of termination.

Nimmer offers some guidance, emphasizing the importance of choosing an effective termination date within the five-year period that “permit[s] compliance” with the “ten-year maximum and two-year minimum” notice requirements.²⁹ He provides the following example:

Suppose . . . that termination may occur during the period of January 1, 2022, through January 1, 2027. If the actual date for termination as specified in the notice is January 1, 2026, then its notice must be served not later than January 1, 2024, two years before the specified termination date. A termination notice served thereafter, but prior to January 1, 2025, would be ineffective, even though it is served more than two years before the expiration of the five-year period.³⁰

Beyond this general acknowledgement that an author’s choice of effective termination date ultimately dictates the notice window, it is still unclear whether providing notice ten years before effective termination will benefit the author in any way, or if waiting until the two-year mark is preferable.³¹

25. See *Archie Comic Publ’ns, Inc. v. DeCarlo*, No. 00 Civ. 5686 (LAK), 2001 U.S. Dist. LEXIS 19692 (S.D.N.Y. Dec. 3, 2001) (holding that premature service of notice outside of the notice period is not permitted); see also Yuvaraj, *supra* note 24, at 716–18 (discussing the importance of complying with notice requirements). For an extended discussion of voluntary termination—where the author and grantee mutually decide to terminate an agreement—see *infra* Part II(A)(1).

26. See H.R. REP. NO. 94-1476 (1976).

27. SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 75 (H. Comm. Print 1965) [hereinafter “SUPPLEMENTARY REPORT”]. Note that the Report is specifically referring to section 203 given its reference to the “35- or 40-year term.”

28. See *Archie Comic Publ’ns*, 2001 U.S. Dist. LEXIS 19692, at *11.

29. NIMMER ON COPYRIGHT, *supra* note 20, at § 11.06.

30. *Id.*

31. *Id.*; see Reese, *supra* note 3, at 902 (discussing the limited guidance offered to authors when terminating their copyright).

C. HISTORY OF TERMINATION NOTICES AND THE IMPORTANCE OF TIMING

In a 2016 study of section 304 termination notices filed in the year 2000, scholars found that most terminations were filed by “heirs of single author songwriters . . . terminating grants made to music publishers as soon as they possibly can.”³² In a recent 2022 study analyzing all termination notices served under section 203 or 304 from 1977–2020, the data showed how sound recordings made up less than 5 percent of copyright registrations, but more than 31 percent of total works subject to termination notices.³³ This statistic not only further indicates musicians’ (and their heirs’) recognition of the potential value of terminating sound recording rights, but also demonstrates why heirs of songwriters might have served notice as soon as possible—to promptly benefit from the potential profit of the termination.³⁴ The same 2022 study also notes that the American Guild of Authors and Composers (“AGAC”, now the Songwriters Guild of America) was largely responsible for the initial spike of termination notices immediately after section 304 came into effect.³⁵ AGAC filed 86 percent of termination notices within the “performing arts” category in 1978, suggesting that AGAC filed for termination on behalf of its various claimants the moment it became possible to do so.³⁶ However, the study also proposes that AGAC’s rationale had less to do with a specific strategy for the authors, and more to do with AGAC’s excitement to use section 304—especially since AGAC was a huge advocate for the creation of a termination right.³⁷

While the 2022 study provides some rationale behind an author’s decision to serve notice at a certain time (usually as early as possible, at least within the music industry, to benefit as quickly as possible), the study does not address whether this strategy ultimately helped or hindered the authors’ ability to terminate or renegotiate their rights.³⁸ Although Congress created the notice period for the benefit of the grantee, providing more or less notice can significantly influence an author’s negotiating power depending on the author’s circumstances—e.g., what rights did the author reserve in the original grant?³⁹ Does the author want to remain with the original grantee? Does the author have concerns about her estate or the heirs to her copyright interests?

This Note argues that sending notice as soon as possible, and choosing the earliest effective termination date, is generally the best strategy, regardless of an author’s

32. Yuvaraj et al., *supra* note 5, at 255 (citing David M. Given, *U.S. Copyright Termination: Re-monetization’s Final Frontier*, 11 J. INTELL. PROP. L. & PRAC. 826 (2016)).

33. *Id.* at 270–71, 275 (finding that there was “little correlation between the proportion of registrations and termination notices”). This statistic indicates the relative longevity of the commercial value of musical compositions compared to other copyrighted works, as discussed in greater detail *infra* Part III(B)(ii).

34. *Id.* According to the study, musical compositions are the most popular type of work subject to termination under sections 203 or 304.

35. *Id.* at 274–75.

36. *Id.*

37. *Id.*

38. *Id.*

39. SUPPLEMENTARY REPORT, *supra* note 27, at 75 (discussing how the notice period was created with the grantee in mind).

current situation. However, this Note will also highlight the various detriments of early notice, as well as the specific instances where sending later notice of termination, thus providing the grantee with as little notice as possible, is beneficial. Specifically, I will address how two statutory exceptions present countervailing interests for authors: the Right of First Refusal, which encourages early notice of termination, and the Derivative Works Exception, which, as currently interpreted by the courts, encourages late notice of termination.

II. THE RIGHT OF FIRST REFUSAL EXCEPTION AND BENEFITS OF EARLY NOTICE OF TERMINATION

A. THE “RIGHT OF FIRST REFUSAL” EXCEPTION

In the House Report, Congress described section 203(b)(4) as “a right of ‘first refusal,’” as it gives the original grantee the chance to negotiate a new deal with the author or author’s heirs before any other third party.⁴⁰ While authors are prohibited from granting rights in their work to a new grantee until after the effective date of termination, sections 203(b)(4) and 304(c)(6)(d) of the Copyright Act allow authors or their heirs (under specific circumstances) to negotiate with the original grantee immediately after serving notice of termination.⁴¹ Therefore, if an author is only interested in renegotiating with the original publisher or grantee, as opposed to reclaiming their rights, then an author can send notice to terminate and regrant their rights up to ten years before the effective date of termination.⁴²

This is a very common practice in both the book and music publishing industries, as many authors are not looking to shop around their works to other publishers or receive substantially more money in the long run. Authors are usually more interested in an immediate lump-sum advance, or “refresher” advance, and a slight increase in

40. 17 U.S.C. § 203(b)(4); H.R. REP. NO. 94-1476, at 127 (1976). While termed “a right of first refusal,” it is not technically a right of first refusal as the author is under no obligation to negotiate with the original grantee. See Brennick, *supra* note 5, at 819 (discussing the “Right of First Refusal” Exception).

41. 17 U.S.C. § 304(c)(6)(D) (“A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee’s successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.”); 17 U.S.C. § 203(b)(4) (“... as an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee’s successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a)”); H.R. REP. NO. 94-1476, at 127, 140 (1976).

42. See H.R. REP. NO. 94-1476, at 127 (1976). For example, if an author is terminating a grant subject to section 203 that does not cover the right of publication, and that author chooses an effective termination date exactly thirty-five years after the date of execution of the original grant, the author may begin negotiations with the original grantee just twenty-five years after the date of execution.

royalties.⁴³ Additionally, many authors recognize that they are inextricably bound to the original grantee post-termination, either through the grantee's continued exploitation of international rights (which, at least until recently, were not considered terminable under sections 203 or 304), contractual provisions outside of the terminated grant of copyright, or joint authorship with the original grantee.⁴⁴ Instead of bifurcating their U.S. and international rights by granting U.S. rights to a third party while international rights remain with the original grantee, authors are further incentivized to exploit the Right of First Refusal and remain with the original grantee.⁴⁵

While the Right of First Refusal Exception eliminates authors' ability to exploit their rights themselves or grant rights to a new entity until the next termination period accrues, the Exception is often mutually beneficial for author and grantee. Grantees "lock in the [author's] property" without competition from third parties, and authors not only renegotiate rights and receive better terms up to ten years before the termination period begins, but also avoid angering the original grantee with termination, which could result in retaliatory behavior.⁴⁶ For example, if the original grantee retains international rights post-termination, "there is the risk that, if the author invokes section 203 without the intent to retransfer, the transferee could express its discontent by underexploiting the international rights, sabotaging the author in the marketplace."⁴⁷ All things considered, particularly when it comes to general convenience, it is not surprising that most authors remain with their original grantees and utilize the Exception.

1. Voluntary Termination and Superseding Agreements

While the "Right of First Refusal" provides a specific time period—from service of notice to the effective termination date—for authors and grantees to terminate and renegotiate their original agreement, it is important to note that the Exception does not limit the author's ability to terminate and renegotiate contracts at any time with the *consent* of the original grantee.⁴⁸ When describing section 203, Congress included certain language that it did not include when describing section 304: "Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any

43. See Brennick, *supra* note 5; Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1352 (2010); Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists and Labels Over Album Copyrights*, BILLBOARD (Sep. 28, 2017), <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law> [<https://web.archive.org/web/20251017135730/https://www.billboard.com/pro/album-copyrights-master-recordings-1976-law/>] ("[L]abels much prefer to offer these acts higher royalty rates or rich advances in order to hold onto the rights.").

44. See Brennick, *supra* note 5, at 789, 804–15; see discussion *infra* Part II(B)(1).

45. See Brennick, *supra* note 5, at 808–14; see discussion *infra* Part II(B)(1).

46. Eynne Grover, *Copyright Act § 203 Termination of Transfers and Licenses: Could More Blockbusters Get Busted?*, 35 COMM'NS LAWYER 23, 28 (2020); see Brennick, *supra* note 5, at 819–20.

47. Brennick, *supra* note 5, at 819 (Additionally, the original grantee could "engag[e] in questionable accounting practices that diminish the amount of income that the author would receive from exploitations of the works.").

48. H.R. REP. NO. 94-1476, at 127 (1976).

time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running.”⁴⁹ While the legislature explained that section 304 is a “close counterpart” of section 203, Congress never clarified 1) whether section 304 prevents parties from terminating agreements at any time, or 2) if new agreements effectively restart the termination clock as explicitly stated in section 203.⁵⁰ However, *Penguin Grp., Inc. v. Steinbeck* resolved this question.⁵¹

Penguin centered around two agreements with Viking/Penguin Press for some of John Steinbeck’s most famous works.⁵² Steinbeck and Viking executed the original agreement in 1938, and Steinbeck’s widow, Elaine, executed a subsequent agreement for continued publication in 1994.⁵³ The 1994 agreement explicitly superseded the previous agreement, as it addressed the publication of all works covered by the 1938 agreement and altered the economic terms of the 1938 agreement to Elaine’s benefit.⁵⁴ Elaine passed away in 2003, bequeathing her copyright interests to her children and grandchildren from a previous marriage—a move that intentionally excluded Thomas and John Steinbeck IV (Steinbeck’s sons from a previous marriage) from the proceeds of the 1994 agreement.⁵⁵ When Steinbeck’s sons attempted to file notice of termination for the original 1938 agreement, the court held that their termination notice was invalid since the 1994 agreement terminated and superseded the 1938 agreement, leaving in effect no pre-1978 grants subject to section 304(d) termination.⁵⁶ The *Penguin* court thus acknowledged the validity of the 1994 agreement and, accordingly, the ability to terminate original agreements with the parties’ mutual consent before the start of the termination period under section 304.⁵⁷

B. AUTHORS WHO BENEFIT FROM EARLY EXPLOITATION OF THE EXCEPTION

1. Authors Intending to Remain with the Original Grantee

If an author intends to remain with the original grantee, there are not only benefits to exploiting the Right of First Refusal but also exploiting it as early as possible. As previously mentioned, it has become standard practice for authors to regrant their

49. *Id.*

50. *Id.* at 140. Given the lack of explicit language, there was uncertainty whether parties could still terminate agreements at any time prior to termination, and if new agreements (for the same work) executed prior to termination restarted the thirty-five-year termination period.

51. *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

52. *Id.* at 196.

53. *Id.*

54. *Id.* The 1994 agreement explicitly stated, “when signed by Author and Publisher, [it] will cancel and supersede the previous agreements, as amended, for the [works] covered hereunder.” *Id.* at 196. The agreement also increased royalties to 10-to-15 percent of retail sales (rather than wholesale sales) and provided a larger annual guaranteed advance. *Id.*

55. *Id.* at 197.

56. *Id.* Note that the 1994 agreement was not terminable since it was not made by an author, as required under section 203. Elaine thus succeeded in completely cutting out the other heirs. Discussed further *infra*, Part II(B)(2)–(C)(1).

57. *Id.*

rights to the original grantee for a myriad of reasons.⁵⁸ While authors can terminate the underlying grant of copyright, Chase Brennick's note, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, illustrates how difficult it is for an author to fully extricate herself from the original grantee.⁵⁹ Sections 203 and 304 seemingly only allow for termination of U.S. rights, so if an author's original grant permitted international distribution, the original grantee will still retain the foreign rights to the author's work after termination.⁶⁰ Additionally, authors usually grant promotional rights and rights of publicity (such as name, image, and likeness) to the original grantee.⁶¹ Again, while the original grantee may no longer have the right to exploit an author's underlying work, it will still possess these other rights post-termination for the duration of the contract. This situation is exacerbated when a prolific author—one with multiple books or songs with the same publisher—terminates only a single book or song, while the original grantee still has the right to publish and distribute the author's other works.⁶²

Therefore, there are clear advantages to regranting rights to the original grantee. Many logistical issues are solved, particularly since the author does not have to worry

58. See Brennick, *supra* note 5; Yuvaraj et al., *supra* note 5, at 280 (discussing how Stephen King filed termination notices for grants with Knopf and CBS Films, but Knopf then released a new paperback edition of his book, and CBS films released a new series adaptation post-the effective date of termination. This suggested that the termination notices “encouraged the publishers and film production company to negotiate new distribution agreements . . . enabling King to share more fully in the proceeds of *The Stand*.”).

59. Brennick, *supra* note 5, at 804, 819.

60. However, the Fifth Circuit recently affirmed the District Court for the Middle District of Louisiana's holding in *Vetter v. Resnik*: that statutory terminations of copyright grants, as well as terminations of contingent copyright renewal rights, apply worldwide and are not limited to domestic U.S. rights. No. 23-1369-SDD-EWD, 2024 U.S. Dist. LEXIS 122767 (M.D. La. July 12, 2024), *aff'd*, 163 F.4th 951 (5th Cir. 2026). While this affirmation suggests that authors may not need to worry about bifurcation of U.S. and foreign rights going forward, many legal scholars have already voiced their concern regarding the implications and significant consequences of the decision. See, e.g., Aaron Moss, *Fifth Circuit Expands Copyright Termination Beyond U.S. Borders*, COPYRIGHT LATELY (Jan. 12, 2026), <https://copyrightlately.com/vetter-resnik-fifth-circuit-ruling/> [<https://web.archive.org/web/20260223212333/https://copyrightlately.com/vetter-resnik-fifth-circuit-ruling/>] (explaining how the Fifth Circuit “leav[es] intact a holding” that 1) “threatens to destabilize international expectations for authors, rightsholders, and anyone dealing in cross-border copyright exploitation,” and 2) is “built on a misreading of statutory text, a misapplication of the Supreme Court's opinion in *Kirtsaeng v. John Wiley & Sons*, and a fundamental disregard for how international copyright actually works”); see, e.g., Joshua Love et al., *Termination Beyond U.S. Borders? What Vetter v. Resnik Means for Authors and Rightsholders*, REED SMITH (Jan. 26, 2026), <https://www.reedsmith.com/articles/termination-beyond-us-borders-what-vetter-v-resnik-means-for-authors-and-rightsholders/> [<https://web.archive.org/web/20260223195021/https://www.reedsmith.com/articles/termination-beyond-us-borders-what-vetter-v-resnik-means-for-authors-and-rightsholders/>] (“The decision is likely to prompt a wave of U.S. litigation testing (i) whether *Vetter* was correctly decided, and (ii) if so, how far its reasoning extends beyond the Fifth Circuit.”). Therefore, it is questionable what *Vetter's* relevance and influence will look like, and whether other U.S. courts will adopt the Fifth Circuit's rationale in future termination decisions.

61. Brennick, *see supra* note 5, at 813–14 (“In the early- to mid-2000s, record labels began making ‘360-degree deals,’ which entitle record labels to a percentage of the author's income from all entertainment activities, including touring, merchandise, fan clubs, acting, and promotional activities.”).

62. *Id.* at 820.

about bifurcating the U.S. and international rights to their work or dealing with potential competition between multiple grantees.⁶³ Additionally, the Right of First Refusal effectively increases the amount of time an author can push for a new advance or better marketing from the original grantee. For example, if the work in question is a major bestseller for a book publisher, the publisher likely wants to retain rights to the work. Therefore, an author can request that, during the period between notice and effective termination, the publisher implement or propose new marketing strategies to demonstrate its commitment to the author and the title.⁶⁴ The author is unable to grant rights to a new party or exploit the rights herself during this exclusive period anyway, so to best exploit the benefits of the Right of First Refusal, the author might as well serve notice as early as possible to extend the period of renegotiation.⁶⁵

Authors must realize, though, that the Right of First Refusal Exception ultimately prohibits the author from exploiting rights on her own or transferring rights to another publisher or third party.⁶⁶ While authors may receive increases in royalty percentages and a refresher advance, particularly if the work is valuable, the Exception essentially preserves the status quo.⁶⁷ However, as previously discussed, the practice of re-granting rights to the original grantee is relatively ubiquitous, and the pros of keeping all rights for a work in one place likely outweigh the cons (namely, losing the potential for complete creative control of your work post-termination).⁶⁸

2. Authors of Multiple Works

If an author has written or created only one work, the incentive to terminate will differ from an author with an extensive catalogue of works. When an author publishes a series of books or many works with a single publisher, the value of each individual work becomes tied to the value of the catalogue as a whole—especially if all of the works center around a particular character, and there is a film series surrounding that character (such as Harry Potter).⁶⁹ Consequently, grantees prefer to retain the rights to

63. *Id.* at 819.

64. I observed this successful strategy on numerous occasions working as an agent at a boutique literary agency—particularly with author estates. *See also* Ed Christman, *Reversion Rights: Will 2013 Be a Game-Changer?*, BILLBOARD (Dec. 27, 2012), <https://perma.cc/DN9E-9JF5> (discussing various ways publishers “sweeten the pot” to retain authors whose works are up for termination).

65. 17 U.S.C. §§ 304(c)(6)(D), 203(b)(4). Once an author receives an offer from the original grantee during the exclusivity period, the author also receives vital valuation information she can use if she ultimately decides to effect termination with the original grantee/shop the work around to other entities.

66. 17 U.S.C. §§ 304(c)(6)(D), 203(b)(4); *see* Brennick, *supra* note 5.

67. *See* Brennick, *supra* note 5, at 789.

68. *Id.* at 819–21.

69. Additionally, characters themselves can be copyrightable depending on certain criteria, and grantees will likely want to hold on to an initial book or film that develops critical character traits for a main character who appears in other books/films in a series. *See* *Klinger v. Conan Doyle Est.*, 755 F.3d 496 (7th Cir. 2014); *see* *Anderson v. Stallone*, 11 U.S.P.Q. 2d 1161 (C.D. Cal. 1989); *see infra* Part III(B)(3) (discussing how termination of an initial work impacts sequels and series in the film industry).

all the works rather than one-off books within the series or catalogue, since they would rather deal with the author's works holistically.⁷⁰

As a result, when an author with many works—published over many years—decides to terminate the first of those works to reach the Zone of Termination, publishers are not only concerned about the work that is up for termination, but the other works that will reach their respective termination periods over the next few years.⁷¹ Losing one work could significantly influence the value of the remaining works, which often incentivizes publishers to not only exploit the Right of First Refusal for the work that is up for termination, but to also use it as an opportunity to terminate the remaining agreements for the author's subsequent works—including those that will not reach their termination periods for several years.⁷² Therefore, a publisher will not just renegotiate a new deal for the book up for termination but offer a much larger deal encompassing, and reflecting the joint value of, the entirety of the author's catalogue. Unlike initial contracts, publishers are also more willing to limit the duration of these new contracts (i.e., no longer the full term of copyright), so authors can renegotiate a new advance and royalties much sooner than termination would typically allow.⁷³

Authors with several books must keep this practice in mind when they decide to terminate their works, especially if they do not intend to take their books elsewhere and prefer to remain at their original publisher. The Right of First Refusal Exception permits authors to renegotiate a new deal for one title up to ten years before the effective date of termination, and it also allows authors to renegotiate deals for all their titles decades before they reach their respective Zones of Termination.⁷⁴ Authors can thus receive a much larger advance and royalties, as they are negotiating many valuable titles at once. Additionally, if an author has written ten books and the original grantee possesses rights to only six of those books post-termination, the publisher's willingness to invest in those six books may decrease, as their marketing efforts for the author could, in effect, benefit the other publishing house that receives rights to the remaining

70. In-house counsel at a leading book publisher confirmed that it is "common for imprints [i.e., the small subsidiaries that make up a larger publishing house] to negotiate a new backlist deal holistically rather than process terminations piecemeal." In my own experience as a literary agent, I saw this type of negotiation often—particularly when some of our author's books with the original grantee would not reach their termination window for five-to-ten more years.

71. While this Note mainly discusses this situation in the context of the book industry, it is as—if not more—relevant to the music industry where "industry contracts are relatively long-term (often covering five to six albums)," and "the first album may be eligible for termination," but "the subsequent four remain under the original transferee's control." Brennick, *supra* note 5, at 820 (citing DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 68, 104–05 (8th ed. 2013)).

72. *Id.*

73. See also Christman, *supra* note 64 (quoting a record label executive, who describes how the label can offer attractive benefits to musicians who are willing to renegotiate: "We can offer a higher royalty rate for the expiring copyright, and we can sweeten the pot by offering to pay a higher royalty rate for albums that have not yet hit the 35-year point, and we can offer a higher royalty rate on records outside the U.S.>").

74. Again, authors and publishers may terminate and renegotiate agreements at any time before the termination window opens. However, it is unlikely publishers will be willing to do so unless there are extenuating circumstances, or the first of the author's books is in the termination window.

four titles—especially if those four titles are the most valuable.⁷⁵ Again, authors would thus benefit from keeping all of their work in one place and using the Right of First Refusal to reap those benefits as soon as possible.

However, authors must keep in mind that entering into new agreements for works that have yet to reach the Zone of Termination could either restart the termination period or, if the new grant is made by the author's heir, eliminate the termination right entirely.⁷⁶ *Steinbeck* and similar cases, including *Baldwin v. EMI Feist Catalog, Inc.*, *Milne v. Stephen Slesinger, Inc.*, *Classic Media, Inc. v. Mewborn*, and *Brumley v. Albert E. Brumley & Sons, Inc.*, address the implications of superseding agreements—one being that, if the author signs a new agreement that 1) contains express language specifying its superiority over a prior agreement or 2) grants the same rights as a prior contract with new financial benefits to the author or heirs, the termination period restarts from the date of the new agreement.⁷⁷ Therefore, if only one work is up for termination but the publisher's offer under the Right of First Refusal Exception covers the remaining books in an author's catalogue, the author will ultimately extend the termination deadline for all titles in the deal. If the author intends to stay with the publisher indefinitely and receive a large payment upfront, this is less of a concern. However, if the author is interested in eventually terminating her relationship with the original grantee, she may inadvertently extend it.

Additionally, section 203 specifies that “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, *executed by the author* on or after January 1, 1978, otherwise than by will, is subject to termination.”⁷⁸ Therefore, only section 203 grants *made by the author* are terminable, so heirs who “regrant rights in lieu of termination thereby lose their statutory termination rights.”⁷⁹ In order to avoid situations like *Steinbeck* where Elaine's superseding agreement essentially divested Steinbeck's sons of their termination rights (though not for reasons related to section 203), heirs who terminate and renegotiate agreements must do so carefully.⁸⁰

3. Authors of Works That Decrease in Value Over Time

Scholars have suggested that the time between initial transfer of rights and termination is too long, and research on the frequency and type of typically filed terminations indicates that few text-based works have enough enduring value for

75. See Brennick, *supra* note 5 (discussing the same practice within the music industry).

76. See *infra* notes 78–80 and accompanying discussion.

77. Bently & Ginsburg, *supra* note 4, at 1585–86 (describing this practice as the “recission-and-rollover technique”); *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18 (2d Cir. 2015); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008); *Brumley v. Albert E. Brumley & Sons, Inc.*, 822 F.3d 926 (6th Cir. 2016). The cases discuss the various instances where an agreement will “supersede” a prior agreement versus when an agreement is “an agreement to the contrary” that does not supersede the original/restart the termination clock.

78. 17 U.S.C. § 203(a) (emphasis added).

79. Bently & Ginsburg, *supra* note 4, at 1585.

80. *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

authors and heirs to even pursue recovering their rights in the first place.⁸¹ In Yuvaraj's 2022 study assessing termination notices from 1977–2020, data suggested that books subject to termination notices accounted for only 0.03% of corresponding copyright registrations.⁸² In other words, despite the millions of books registered in that time period, only 0.03% (about 750 books) were subject to section 203 termination notices.⁸³ While the study partially attributed this low figure to informal or contractual reversion of rights outside of the official copyright termination process, the study's authors also inferred that "most books have little value to authors and estates 35 years after the rights are granted," and that termination laws, as they currently exist, disproportionately benefit a "handful of the most commercially successful writers."⁸⁴ New books are typically most profitable in the first year of sale, and, given the benefits conferred upon authors of multiple works, it is somewhat predictable that termination provisions are far more useful for authors of bestselling series.⁸⁵

Unless Congress or the courts reform the current statute, authors—particularly authors of works that decrease in value over time (like books)—should send notice as soon as possible to best capitalize on the value of their work, which may be higher twenty-five years after execution of the original grant than thirty-five years after execution.⁸⁶ If an author selects an effective termination date as soon as the termination period opens, the author can either begin renegotiations with the original grantee or, in some circumstances where the grantee is no longer interested in exploiting rights to the author's work, regain their rights up to ten years before the effective termination date.⁸⁷ While an author of a single, modest title is unlikely to see the significant returns

81. See Yuvaraj et al., *supra* note 5, at 252, 273 ("... rightsholders (such as book and music publishers and record labels) typically lose interest in works at the end of their commercial life which can be many decades before the copyright expires"); see Reese, *supra* note 3, at 896.

82. Yuvaraj et al., *supra* note 5, at 278–79.

83. *Id.*

84. *Id.* at 279–80; see GILBERT ET AL., *supra* note 1, at ii–iii ("[W]hile the music industry has placed a growing emphasis on making its back catalog available to consumers, this is an outlier among creative industries; it is exceptionally rare for books, for example, to remain widely distributed and promoted for decades after their initial publication."). While book publishing relies on "backlist" titles—i.e., titles that are no longer in their first year of publication—to "pay the bills," books must demonstrate continuous sales to become a particularly valuable part of the backlist.

85. *Id.*; see *infra* Part IV(B) for further discussion.

86. Yuvaraj et al., *supra* note 5, at 279.

87. This process is the functional equivalent of a "reversion" or "out-of-print" clause, which "allow[s] an author to regain copyrights in works that the publisher is no longer exploiting. In most publishing contracts, the rights do not automatically revert; it is up to the author to demand that the publisher put the book back on sale, and if the publisher declines to do so within a specified period, the author gets the rights back." *Out of Print Clauses*, KERNOCHAN CTR. FOR LAW, MEDIA & ARTS, <https://kernochan.law.columbia.edu/content/out-print-clauses> [https://web.archive.org/web/20260127005424/https://kernochan.law.columbia.edu/content/out-print-clauses] (last visited Jan. 26, 2026). In the termination scenario, though, an author does not need to rely on nonexistent sales as a prerequisite for renegotiation. "Recently, at least one publisher has taken the position that a book never goes 'out of print,' because digital media make it possible for publishers to make the book available on demand. So even if the publisher sells only one copy a year (or for that matter, no copies), the book would not be 'out of print' because the publisher stands ready to make and send a copy to anyone who requests it." *Id.* Even if the book is selling well, a negative relationship, or a grantee's lack of willingness to

of someone like Stephen King or Debbie Macomber, the less time between publication and invocation of the Right of First Refusal, the better.⁸⁸

C. ADDITIONAL BENEFITS OF EARLY NOTICE OF TERMINATION

1. Facilitate Estate Planning

Under sections 203(b)(2) and 304(c)(6)(B), future rights that revert upon termination of the grant “become vested on the date the notice of termination has been served.”⁸⁹ In other words, when notice is served, “ownership of the rights covered by the terminated grant reverts to everyone who owns termination interests.”⁹⁰ Depending on the age of the author or heir within whom the rights will vest, it might be preferable to send notice of termination as early as possible. For example, if the terminating party is worried about estate planning and wants to ensure that the rights vest in their name or their designated heirs, serving notice at the ten-year mark is prudent. Literary executors are still a rarity and, given the extensive litigation and controversies between family members that arise surrounding rights to literary estates, serving notice ensures that the ownership and legacy of an author’s work is not left to chance.⁹¹

2. Limit Potential Litigation on the Validity of Notice

Statutory formalities are critical for statutory termination, and there is substantial case law highlighting the importance of filing notices on time, to the right grantee, and with the correct dates of execution and effective termination.⁹² If the work subject to termination is particularly valuable, the grantee may file a counternotice or challenge the validity of the notice of termination.⁹³ While the Copyright Office and some courts have held that “harmless” errors will not affect the adequacy of notice, the litigation process is time-intensive, and the longer an author waits to serve notice, the more likely litigation will extend past, and hold up, the effective date of termination.⁹⁴ If an author

market a book that will reach termination in the next decade, might motivate grantees to relinquish the rights upon service of notice.

88. Yuvaraj et al., *supra* note 5, at 279.

89. 17 U.S.C. §§ 203(b)(2), 304(c)(6)(B).

90. H.R. REP. NO. 94-1476, at 127 (1976).

91. See Lloyd J. Jassin & Ronald M. Finkelstein, *Literary Executors: A Primer for Authors, Executors, Trustees & Heirs*, COPYLAW (Nov. 29, 2021), <https://www.copylaw.org/2018/05/estate-planning-and-copyrights.html> [<https://perma.cc/8NM6-E3QP>]; see also *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

92. See *supra* notes 24–25 and accompanying discussion.

93. See Yuvaraj et al., *supra* note 5, at 281–82.

94. 37 C.F.R. § 201.10(e)(1) (2025) (“Harmless errors in a notice. . . shall not render the notice invalid” if they do not “materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 203”); see Reese, *supra* note 3, at 903–04 n.37 (“Given that the statute dictates the period during which termination may be effected, an incorrect date would not seem to be a harmless error under [the Copyright Office’s] standard.”); see *Mtume v. Sony Music Ent.*, 408 F. Supp. 3d 471, 476–78 (S.D.N.Y. 2019) (ordering

is proactive and serves notice well before the two-year deadline, she will not only limit the possibility that litigation will cut into her ability to terminate and exploit her rights, but she will also increase the likelihood of conciliatory behavior from the original grantee—potentially limiting litigation in the first place.⁹⁵

III. THE DERIVATIVE WORKS EXCEPTION & BENEFITS OF LATE NOTICE OF TERMINATION

A. THE DERIVATIVE WORKS EXCEPTION

The Derivative Works Exception is an explicit “carve-out” to the termination right and is codified in sections 203(b)(1) and 304(c)(6)(A).⁹⁶ Both sections contain identical language:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.⁹⁷

A derivative work is a “work based upon one or more preexisting works,” and works consisting of “editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship” can be classified as “derivative”—i.e., films, sound recordings, audiobooks, etc.⁹⁸ For the purposes of this Note, it is also important to highlight that the copyright in a derivative work “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work.”⁹⁹

The Derivative Works Exception arose as a “limitation” on the copyright owner’s termination rights to “protect owners of derivative works like film producers who own derivative copyrights in books or plays.”¹⁰⁰ It balances the termination right, allowing owners of derivative works—if “prepared” pre-termination—to continue exploiting those works “under the terms” of the terminated grant without having to renegotiate with the author of the underlying work.¹⁰¹ However, grantees are not permitted to create new derivative works post-termination, and the grantee’s use of previously prepared derivatives post-termination is limited to the “terms” of the original grant.¹⁰² Therefore, if the grantee was required to pay royalties on the derivative to the author

additional discovery to determine if the assignee received adequate notice and the error was made in good faith).

95. See Brennick, *supra* note 5, at 819.

96. 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

97. *Id.*

98. 17 U.S.C. § 101.

99. 17 U.S.C. § 103(b).

100. H.R. REP. NO. 94-1476, at 127 (1976); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 170 (1985).

101. *Id.*

102. See *Mills*, 469 U.S. at 155–56, 165–67 (clarifying “under the terms of the grant” in the context of royalty distributions post-termination); Loren, *supra* note 43, at 1341.

pre-termination, the same obligation remains post-termination.¹⁰³ Additionally, if the grantee's use of the derivative exceeds the scope of the original grant, all revenue generated by such a use belongs solely to the author.¹⁰⁴

1. The Problem with "Prepared" and the Impact on Notice

While the Derivative Works Exception seems relatively reasonable and straightforward on its face, Lionel Bently and Jane C. Ginsburg acknowledge an ambiguity in the statutory language of the Exception—specifically, the word “prepared” in the phrase “*prepared* under the authority of the grant before its termination.”¹⁰⁵ In order to continue utilizing a derivative work post-termination, it must have been *prepared* pre-termination. The question thus arises: “[M]ust the derivative work have been fully created before termination, or will the derivative work escape termination so long as its creation has been undertaken before the effective date of termination?”¹⁰⁶ Additionally, how should this influence an author's timing when he or she serves notice of termination? If an author decides to serve notice ten years before the effective date of termination, does this ultimately give the creator(s) of the derivative work a heads-up, incentivizing them to develop as many derivatives as possible within those ten years?¹⁰⁷

Derivative works are very common, particularly within the music industry where authors typically grant copyright in their musical compositions to their publishers and their right to exploit sound recordings to their record labels.¹⁰⁸ When grantees are given wide breadth to exploit the Derivative Works Exception, the author of the underlying work increasingly loses the ability to exploit his or her rights post-termination, as the market is already “flooded” with certain derivative uses of the work by the time the author regains her rights.¹⁰⁹ Therefore, broad interpretation of the word “prepared” could severely limit the author's rights and expand the grantee's right to

103. Loren, *supra* note 43, at 1341; *see also* Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc., 155 F.3d 17, 23, 24–25 (2d Cir. 1998) (holding that the revenue generated by the post-termination use of a sound recording belonged to the author, not the music publisher, because it went beyond the scope of the pre-termination license).

104. Ahlert, 155 F.3d at 23–25.

105. *See* Bently & Ginsburg, *supra* note 4, at 1579–80 (citing 17 U.S.C. § 304(c)(6)(A)).

106. *Id.* at 1579.

107. In conversations with copyright termination litigators, they explained how they do not believe that notice terminates publishers' or grantees' ability to continue developing derivative works, as there are no such limitations in the statutory language.

108. *See* Brennick, *supra* note 5, at 794–95 (“There are two separate copyrights in music: the musical work (the composition, the music and lyrics) and the sound recording. Two types of transferees have emerged around these two copyrights: music publishers for musical works and record labels for sound recordings. While the content handled is distinct, music publishers and record labels have remarkably similar business models. Both contract with authors for a transfer of the ownership of the copyrighted work and distribute these works to the public.” (citing PASSMAN, *supra* note 71, 17 U.S.C. § 102(a)(2))); *see also* James J. Schneider, Note, *Defeating the Terminator: How Remastered Albums May Help Record Companies Avoid Copyright Termination*, 53 B.C. L. REV. 1889, 1899–1903 (2012).

109. Brennick, *supra* note 5, at 802.

exploit derivative works. If “prepared” is merely interpreted as “developed” or “started,” the publisher could technically begin “preparing” the derivative work the day before effective termination and still preserve the ability to exploit the derivative post-termination. Notice of termination thus becomes a significant consideration, as the author must serve notice a minimum of two years before termination. Once the grantee is aware that termination is coming, it could rush to “prepare” derivatives before termination, as two years is sufficient time to not only start but also complete a sound recording or audiobook.¹¹⁰

2. Prevailing Interpretations of “Prepared”

As Bently and Ginsburg point out, neither the Copyright Office nor the courts have directly confronted or ruled on the proper understanding of “prepared,” and Congress never defined “prepared” despite its prevalence throughout the 1976 Copyright Act.¹¹¹ Only Nimmer provides a reading of “prepared” in relation to the Exception, suggesting that, “because a work that is ‘fixed’ in the copyright sense is also ‘prepared’ within the meaning of the . . . Derivative Works Exception, it would seem that the part . . . that has been fixed as of the termination date may be utilized thereafter.”¹¹² In other words, even if the work is not “complete,” whatever portion of it is “fixed” can be utilized after termination. If more material is added to the derivative work after the termination date, though, “the later added material may be used if, and to the extent that, such additional material is not in itself based on the underlying work the rights in which have been terminated.”¹¹³ Nimmer then provides the example of a film based on a novel, where the story elements were filmed pre-termination, but a musical score was added post-termination.¹¹⁴

If Nimmer’s interpretation is correct, then publishers or third parties who create a derivative work do not have to “complete” the derivative work before the effective termination date. While Nimmer’s reading does limit the publisher’s or third party’s

110. See *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at *14–15 (S.D.N.Y. Aug. 10, 2021). Upon receiving notice of termination for the “Phillie Phanatic” mascot costume, The Phillies immediately began preparation of a derivative version of the costume. *Id.*

111. See Bently & Ginsburg, *supra* note 4, at 1579–80. The word “prepared” appears over thirty times throughout the 1976 Copyright Act, but at no point is it explicitly defined. In the Derivative Works Exception alone, “prepared” appears twice in two different forms: first, “prepared under authority of the grant” and second, “this privilege does not extend to the preparation after the termination of other derivative works.” 17 U.S.C. § 203(b)(1); 17 U.S.C. § 304(c)(6)(A). While “prepared” is past tense, as if referring to something that has been completed or already exists, and “preparation” connotes the beginning or process of developing something, the division in meaning between the two uses is not that simple. Throughout the Copyright Act, “prepared” is also notoriously used to categorize works made for hire, governmental works, and joint works. See 17 U.S.C. § 101. Neither the Act nor the legislative history clarify whether “prepared” means “complete” versus “created/started,” or if “prepared” merely refers to the compilation or creation of a work under certain circumstances (e.g., as something developed within the author’s scope of employment). See Bently & Ginsburg, *supra* note 4.

112. NIMMER ON COPYRIGHT, *supra* note 20, at § 11.02[C].

113. *Id.*

114. *Id.*

ability to utilize source material after termination, grantees could still prioritize “fixing” all elements relying on source material in the window between notice of termination and effective termination. One might question whether, if an author serves notice just two years before the effective termination date, someone creating a derivative could “fix” all necessary aspects in such a short time. While one could read Nimmer’s example of a film and assume that, given the difficulty of coordinating shooting schedules, little could be done in a two-year period, this is not the case for other industries where creation-to-completion has a much quicker turnaround.¹¹⁵ Therefore, the type of work—both the underlying work and the derivative work—becomes an important consideration that may influence when an author decides to send notice of termination.¹¹⁶

So far, Nimmer’s reading is referenced only in *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, a district court case interpreting section 203 in the context of architectural plans.¹¹⁷ While the plaintiff (an architect) devised the initial drawings for an apartment complex, his relationship with the contracting entity dissolved, so a different architectural firm created a derivative site plan (using the plaintiff’s drawings) and continued to alter the plan after the plaintiff terminated his license to use the drawings.¹¹⁸ Although the plaintiff claimed that the defendants wrongfully “prepared” their derivative after he revoked his license to the underlying work, the court held that the defendants could add material to a derivative post-termination as long as all post-termination “changes . . . ha[ve] nothing to do with the [underlying] work.”¹¹⁹ Since the defendants allegedly did not reference the plaintiff’s work for any post-termination alterations to the site plan, the court found that the Derivative Works Exception applied.¹²⁰

The *Architettura* court did not rest its ultimate holding on an interpretation of “prepared,” but the court’s rationale— i.e., that the “changes . . . ha[ve] nothing to do with the [underlying] work”—indicates an acceptance of Nimmer’s reading. The court utilized Nimmer’s hypothetical about adding a musical score to a film post-termination and repeatedly emphasized how, if the plaintiff prevailed, the defendants would have to destroy any work completed pre-termination if they could not finish the work post-

115. See *Phillies*, 2021 U.S. Dist. LEXIS 243554, at *13–15 (where the creator of the derivative Phillie Phanatic costume delivered sketches 19 months after the owners of the original costume served notice of termination).

116. See *supra* Part IV(A) for additional discussion of the types of work.

117. *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, 652 F. Supp. 2d 775, 782, 784–85 (N.D. Tex. 2009).

118. *Id.* at 776–77.

119. *Id.* at 785. The plaintiff also argued that “the Derivative Works Exception does not apply to situations where, as here, a revocable license of indefinite duration has been terminated by the grantee,” and “applies only to statutory terminations of licenses, a situation governed by 17 U.S.C. § 304(c)(6)(A).” *Id.* at 782. The court rejected this argument, citing *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999) and NIMMER ON COPYRIGHT, *supra* note 20, at § 11.02 n.2, determining that the Exception applies to “all nonexclusive grants of a license executed after January 1, 1978, including implied, oral licenses that are revocable at will.” *Architettura*, 652 F. Supp. 2d at 782.

120. *Id.* at 785.

termination.¹²¹ Therefore, the court endorsed the albeit limited ability to continue “preparing” derivative works post-termination of the underlying grant, particularly in situations where further changes post-termination are necessary to make a valuable derivative useful or functional.

In a more recent case, *Phillies v. Harrison*, the S.D.N.Y. court used a similar rationale when evaluating whether a new version of the “Phillie Phanatic” mascot costume, designed during the two years post-termination notice and pre-effective termination, was a derivative work subject to the Exception.¹²² The court held that, given the Second Circuit’s relatively low standard for originality in derivative works, the new costume was a derivative work despite the very minor changes between the original and derivative costumes.¹²³ The court also said it was “undisputed” that the Phillies “developed” the new costume before the date of termination since the drawings of the costume were complete pre-termination, though the costume itself was not fully constructed.¹²⁴ Therefore, the costume qualified as a derivative work because, as stated in the “plain language” of the statute, it was “prepared under the authority of the grant before its termination.”¹²⁵

This case demonstrates one of the main concerns regarding the Exception: when notice incentivizes a grantee to prepare a new design “with the express intent of creating a derivative work” in the interim between notice and termination.¹²⁶ The *Phillies* court seemed to acknowledge the challenges grantee-generated derivatives present to authors, even referencing how “the rights that would revert [to the author] are highly limited” given the quantity of other derivative works—merchandise, etc.—The Phillies created before termination.¹²⁷ However, this recognition did not inspire the court to narrow its interpretation of acceptable derivatives. The court still sided with The Phillies, seemingly unconcerned about the fact that permitting such unlimited creation of derivatives could eviscerate the termination right.¹²⁸

121. *Id.* at 784–85. The court explained that finding in the plaintiff’s favor would create an “absurd result . . . contrary to the purpose of the Derivative Works Exception,” as it would render the defendants’ pre-termination efforts futile. *Id.*

122. *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at *14–16, *121–22 (S.D.N.Y. Aug. 10, 2021).

123. *Id.* at *15–16, *79–80, *84–85. According to the Second Circuit, the derivative work must be “independently copyrightable,” and while the alterations to the original work must be “more than trivial,” the court has recognized the originality test as a “modest” one, with a low threshold.” *Id.* at *80 (citing *TCA Television Corp. v. McCollum*, 151 F. Supp. 3d 419, 430–31 (S.D.N.Y. 2015) and *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980)). In *Phillies*, the court found that minimal edits (“no great strokes of brilliance”) to the Phillie Phanatic mascot costume—a wider head, larger hat, etc.—were sufficient to constitute a derivative work that could be utilized post-copyright termination. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at *85. The court also discussed how derivatives are supposed to have the “same aesthetic appeal” as the original, as they would otherwise not be derivatives, but “entirely new creation[s].” *Id.* at *84.

124. *Id.* at *91–92.

125. *Id.* at *92 (emphasis added).

126. *Id.* at *14.

127. *Id.* at *17.

128. *Id.* at *17, *121–22.

While informative, the staying power of both cases is questionable, particularly since the holdings significantly contravene the termination right through the courts' generous interpretation of the Derivative Works Exception.¹²⁹ These cases avoid any significant discussion of legislative intent—which dominated the section 304 case law interpreting the Derivative Works Exception—and reframe the Exception as balancing original and derivative authors' interests rather than, as indicated in the legislative history, balancing original authors' and publishers'/producers' interests.¹³⁰ However, the issue underlying *Phillies* is not an isolated incident, and many practitioners seem to endorse Nimmer's reading of "prepared."¹³¹ Until there is additional case law, grantees can rely on these cases as precedent, and they are thus relevant for authors planning on termination.¹³²

B. AUTHORS WHO MAY BENEFIT FROM LATER NOTICE

1. Authors Who Do Not Intend to Remain with the Original Grantee

As previously discussed in Part II, there are many advantages to remaining with the original grantee, and if an author does decide to remain with the original grantee, sending notice as early as possible allows the author to reap the most benefits from the

129. See *supra* note 123 and accompanying text.

130. In the process of concluding that the Derivative Works Exception must prevail, the courts in *Phillies* and *Architettura* emphasized how ruling in favor of the original author would significantly contravene the derivative author's ability to create their work. The courts found that such a holding would be "contrary to the purposes of the Derivative Works Exception." *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, 652 F. Supp. 2d 775, 784 (N.D. Tex. 2009); see also *Phillies*, 2021 U.S. Dist. LEXIS 243554 at *82–90. However, neither court cited the legislative history of the Exception in the opinion, even though previous case law dealing with the Exception discussed legislative intent extensively. *Mills Music, Inc. v. Snyder*—the most notable case dealing with the Exception—and the line of cases that followed made it clear that the Exception was enacted to balance the interests of the original author with the "motion picture producer" or her equivalent. 469 U.S. 153, 174–76 (1985); see *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998) ("[A] ruling for [the original author] is 'more consistent with the general thrust of § 304, which is designed to protect the interests of authors and their heirs and to maximize their ability to exploit the value of their Songs during the extended renewal term.'"); see also *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995). In reframing the Exception as a battle between authors of seemingly equal status, the recent case law ignores the "principal purpose" of copyright termination: "to provide added benefits to authors," and to "make the rewards for the creativity of authors more substantial" when they were forced to deal with powerful, exploitative entities in their original grant of copyright. *Mills Music*, 155 F.3d at 172–73.

131. In discussions with practitioners, including in-house counsel at publishers, they mentioned the innumerable times they saw publishers intentionally exploit derivative works rights after receiving notice.

132. See Aaron Moss, *Judge Recommends Approving New Phanatic Mascot Despite Termination*, COPYRIGHT LATELY (Aug. 10, 2021), <https://copyrightlately.com/judge-recommends-approving-new-phanatic-mascot-despite-copyright-termination/> [<https://web.archive.org/web/20260130205257/https://copyrightlately.com/judge-recommends-approving-new-phanatic-mascot-despite-copyright-termination/>] ("[T]he *Phillies* case could have an impact far beyond the world of sports mascots, potentially serving as a blueprint for motion picture studios looking to ways to retain rights in fictional characters. So long as relatively modest changes are made to a character before copyright termination is effected, that derivative version could be used even after termination. And if the modified version has become the definitive representation of the character in the eyes of the public, this could significantly devalue the original grantor's termination rights.")

Right of First Refusal Exception. However, if authors have a negative experience with a grantee and are certain, even at the time of notice, that they want to transfer rights to someone else or exploit rights themselves, the incentive to send notice as early as possible decreases—especially if 1) the grantee is not aware that termination is approaching, and 2) the author granted many subsidiary/derivative rights in their contract that the grantee could exploit (without author approval) in the period between notice and termination.¹³³ Additionally, practitioners tend to advise publishers or grantees to increase their exploitation of rights (i.e., increase preparation of derivatives) as the termination date approaches, especially after service of notice.¹³⁴ Even if the grantee exploited its derivative rights before the notice period began, notice provides an official end date, prompting grantees like The Phillies to act.¹³⁵

It is also important to note that, while it is still standard for authors to re-grant their rights to the original grantee in the book and music publishing industries, authors like Debbie Macomber and Nora Roberts and musicians like Prince have successfully transferred their terminated rights to new publishers.¹³⁶ Additionally, in this digital age, the ability for an author to exploit her own rights through various online platforms (Spotify, Open Road, etc.) has significantly increased.¹³⁷ Most authors also have only one work, so there is less of a need to remain with the original grantee for the benefit of the author's series or multiple works, as discussed in Part II(B)(2). Therefore, it is questionable whether regrating rights to the original grantee will remain the default, and if not, serving late notice of termination could benefit those artists hoping to retain as many potential exploitations as possible.

133. See GILBERT ET AL., *supra* note 1, at 15 (“Because the language of the initial contract governs the scope of the later termination, grantees may take advantage of *Mills* and avoid *Ahlert* by requiring expansive terms for grants—such as, for example, authorizing the grantee to exercise unilateral control over all exploitations of derivative works.” (citing Bently & Ginsburg, *supra* note 4, at 1579)); see also Christman, *supra* note 43 (discussing singer-songwriter Louise Goffin, who wanted to leave the original grantee because, in her words, “[t]here is always the point where the label moves on when the second single doesn’t sell; or the label has a changing of the guard. Soon, you find yourself stuck with people who don’t know who you are and you have no sovereignty over your work, and it just sits in the vaults. That is where the artists have their souls destroyed.”).

134. Publishing attorneys explained, and the *Phillies* case demonstrates, how creation of last-minute derivatives can effectively empower grantees—even if the derivatives are subpar. See generally David Gurnick & Tal Grinblat, *Nine Ways to Avoid Copyright Termination: Part Two*, 37 NEW MATTER 5, 5–7 (2012) (enumerating the various ways grantees can avoid copyright termination, including by creating derivative works during the term of a copyright grant); see generally Schneider, *supra* note 108 (discussing how record companies should develop remastered sound recordings to preserve rights to exploit music post-termination, even though it is questionable whether sound recordings qualify as derivative works under the Copyright Act).

135. See *supra* Part III(A)(2).

136. Christman, *supra* note 43; Yuvaraj et al., *supra* note 5, at 279, 281.

137. See Brennick, *supra* note 5, at 815 (“Although most authors contract with transferees to distribute their works, authors have successfully distributed their works independently, especially now that most distribution occurs through online streaming services.”).

2. Authors Whose Works Increase in Value Over Time

While the possible increase of value over time is not a standalone basis to justify delaying service of termination, it is still worthwhile to acknowledge the types of works that benefit from longevity and, therefore, might benefit from later notice of termination. Unlike books, music often increases in value the longer it is available.¹³⁸ Therefore, if an author, unlike those mentioned above, is interested in renegotiating with the original grantee or taking their rights elsewhere, it might be more advantageous to choose an effective termination date on the latter end of the termination period and serve notice closer to the two-year mark. Just as the author of a work that *decreases* in value over time will heighten their bargaining position at an earlier date, an author whose work *increases* in value over time might have more negotiating power at the latest possible date. Although there is no guarantee that a work will be more valuable at the thirty-eight-year mark than at the twenty-five-year mark (respectively, the latest and earliest times an author can serve notice under section 203), the estimated future value of an author's work remains a relevant consideration.¹³⁹

3. Authors Whose Works Are Ripe for Quickly Developed or Highly Valuable Derivatives

As previously mentioned, the music industry is known as a hive for derivative works, not only because music publishers can license musical works to create sound recordings (and remastered sound recordings may qualify as derivative works), but also because the creation of sound recordings is a relatively quick process.¹⁴⁰ Even two years of notice can prompt extensive development of many derivative works, each of which limit authors' ability to exploit their own work in a similar manner post-termination—that is, if the author does not decide to re-grant rights to the original grantee.¹⁴¹ While this may seem like less of a concern in the book publishing industry, since authors (at least those represented by an agent or attorney) today typically transfer few derivative rights in the initial grant, audiobook rights have become increasingly valuable and, like

138. GILBERT ET AL., *supra* note 1, at ii–iii (“[T]he music industry has placed a growing emphasis on making its back catalog available to consumers.”).

139. Note that the notice timeline might change if the grant covers the right of publication. See 17 U.S.C. § 203(a)(3); see H.R. Rep. No. 94-1476 at 126 (1976); see *supra* note 19 and accompanying text.

140. See Brennick, *supra* note 5, at 802–03 (noting that while “[i]t is not yet clear whether remastered sound recordings constitute derivative works . . . affirmance . . . could have significant effects on the post-termination market for the original work. Record labels must receive at least two years’ advance notice of termination, which would give them time to prepare remastered versions before the effective date of termination. Remastered works could devastate the post-termination market for the original work because they are direct replacements.” (comparing Jon Peritz, Note, *Closing a Loophole in Musicians’ Rights: Why Digital Remasters of Analog Sound Recordings Are Not Derivative Works Protected by the Copyright Act*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 385 (2013), with Schneider, *supra* note 108)).

141. Brennick, *supra* note 5, at 802–03.

sound recordings, are quickly and easily developed.¹⁴² The Derivative Works Exception may also seem like less of a concern in the film industry (Congress's main area of concern when drafting the Exception), since two years' notice for termination does not seem like sufficient time for producers to "get in that one last sequel."¹⁴³ However, recent attempts to terminate source material for large movie franchises like *The Terminator*, *Friday the 13th*, and *Die Hard* left the movie industry scrambling, and legal scholars are already recommending that studios "prepare" as much as possible before the effective termination dates.¹⁴⁴

Until additional guidance from courts or the Copyright Office settles the proper meaning of "prepared," authors worried about derivative works should consider sending later notice of termination, as that is likely the best method to preserve the maximum amount of post-termination rights. If Nimmer's reading is correct, grantees will possess the ability—albeit a limited ability—to work on a derivative post-termination.¹⁴⁵ While grantees are not able to continue using the underlying source material post-termination, if the material in question is part of a franchise or series, writers will likely "become adept at crafting a production that uses elements that were added on by the production in sequels without using any of the copyrighted source material that reverted to the author or heirs."¹⁴⁶ Ultimately, limiting access to underlying source material is critical for authors who want to take their rights elsewhere, and serving notice as late as possible is one of the few strategies authors can deploy to protect their work.

In light of the section 203 case law where the courts broadly interpreted the definition of "derivative works," the threat becomes even more acute, as "grantees could attempt to monetize derivative works post-termination by initiating the large-scale

142. Matt Knight, *Securing Audiobook Rights: The Rights You Need to Bring Your Audiobook to Market*, JANE FRIEDMAN (updated Feb. 18, 2025), <https://janefriedman.com/securing-audiobook-rights-the-rights-you-need-to-bring-your-audiobook-to-market/> [<https://web.archive.org/web/20260118171133/https://janefriedman.com/securing-audiobook-rights-the-rights-you-need-to-bring-your-audiobook-to-market/>].

143. See Grover, *supra* note 46, at 23, 28.

144. While this is general advice for filmmakers, regardless of whether a notice has been served or not, termination of underlying source material for major movie franchises has only just begun, and notice of termination has thrown multiple grantees of film rights for a loop. Therefore, in an age where studios are just starting to look out for termination, serving notice will undoubtedly spur movie studios to complete as much as possible before the rights are revoked. See *id.* at 28 (discussing how filmmakers not only rely on underlying works for original films, but for sequels, and how certain questions arise "for the production company that needs to promote the movie completed just before the termination date is effective. Even if the movie is made before the window closes, what about advertising and promotion? Can you exploit the works without creating additional derivative works? In this multiplatform digital world, movies are often promoted with supplementary materials, games, and behind-the-scenes features. How do you make sure all marketing, promotional videos, and supplementary marketing material using the original source work are 'prepared' before the window closes? What are the parameters of exploiting the original derivative work, and how do you do it without creating more?").

145. See *supra* Part III(A)(2).

146. Grover, *supra* note 46, at 29.

creation of ‘derivative works’ based on mere technical changes to the original work.”¹⁴⁷ Again, it is questionable whether the current case law will endure, but a expansive understanding of “derivative work” has prevailed—at least in the Second Circuit—through years of litigation, though in a different context.¹⁴⁸ If adding a bigger hat and brighter coloring to a mascot costume is all it takes to create a derivative, it is unlikely grantees in other industries will need to make significant alterations to sound recordings or the like to create derivatives and secure post-termination exploitation rights.

IV. SOONER IS (USUALLY) BETTER: OPTIMIZING TERMINATION TIMING

Early termination provides ample benefits—especially with the Right of First Refusal Exception—and unless the author is particularly concerned about the creation of derivative works, early termination is preferable. This Part discusses a few guidelines for authors who are unsure about their termination priorities, some recent legal developments that may cabin the threat of the Derivative Works Exception, and recommendations for authors going forward.

A. ASSESS THE TYPES OF WORK AT ISSUE: THE UNDERLYING WORK AND DERIVATIVE WORK

The Derivative Works Exception, while a valid concern, is not the dominating issue for most authors when sending notice of termination. Going back to Nimmer’s example of a movie score added to a film post-termination, the type of underlying work and derivative work likely influence how quickly a publisher, or third party, can prepare or modify a derivative pre-termination.¹⁴⁹ For example, if the underlying work is a musical composition or novel, and the derivative is a sound remaster or audiobook, the incentive to terminate as close to the two-year mark as possible might increase. Since sound recordings and remasters are easily produced, the amount of lead time provided to the publisher may only increase the creation of additional derivative works.¹⁵⁰ This is especially true in cases where the standard for derivatives is low, i.e., where courts have held that slight modifications to the underlying work are sufficient for a derivative, as seen in the *Phillies* case.¹⁵¹

If it will take years to develop a derivative, like a film or book translation, serving notice at the two-year mark may also limit the grantee’s ability to use the underlying

147. GILBERT ET AL., *supra* note 1, at 15–16; see Moss, *supra* note 132 (discussing the potential for film studios to make minor modifications to characters, which would then qualify as derivatives).

148. See Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1509 (2013).

149. See NIMMER ON COPYRIGHT, *supra* note 20, at § 11.02[C][1]; see *supra* note 114 and accompanying text.

150. See *supra* note 140 and accompanying text.

151. See *supra* Part III(A)(2) for an extended discussion of *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554 (S.D.N.Y. Aug. 10, 2021) and Second Circuit case law.

work in the creation of the derivative. However, the need to serve late notice of termination in an effort to preserve certain rights is likely less pressing.¹⁵² Serving earlier notice might actually prove beneficial to authors who anticipate (and want to personally exploit the rights to) a film derivative from their book, as grantees and third-party licensors may be less eager to pursue development of a film at all if an author serves notice of termination ten years before the effective termination date. If the author can time service of notice with the announcement of a movie option, the author also significantly heightens her bargaining position in negotiations with the original grantee, as the grantee likely needs rights to the underlying work post-termination to prepare and market the film.¹⁵³

B. ASSESS THE VALUE OF THE WORKS AT ISSUE

Additionally, authors should not only consider the value of their underlying work, but the potential value and longevity of the derivative work. While a film could have significant staying power in the market, incentivizing a grantee to establish as much of the derivative as possible before termination, grantees may be in less of a rush to prepare a derivative—a new edition of a textbook, perhaps—that has a relatively short shelf life.¹⁵⁴ While the first of these scenarios might convince an author to send notice as late as possible, authors should also keep in mind how late notice could prompt a grantee to rush out shoddy derivatives in the two years between notice and termination. What could have been a highly valuable film or recording thus turns into something with relatively little market power or returns for the author.¹⁵⁵ Therefore, if an author knows a grantee will prepare the derivative in question no matter what, early notice likely triumphs again. The earlier the notice, the more time for a grantee to prepare a quality derivative work using the author's material—something that will benefit the author in the long run.

152. Note that the effort to create translations may decrease significantly going forward, as automated translation services are already putting many translators out of work. See, e.g., Ella Creamer, *Survey Finds Generative AI Proving Major Threat to the Work of Translators*, *GUARDIAN* (Apr. 16, 2024), <https://www.theguardian.com/books/2024/apr/16/survey-finds-generative-ai-proving-major-threat-to-the-work-of-translators> [<https://web.archive.org/web/20260130213906/https://www.theguardian.com/books/2024/apr/16/survey-finds-generative-ai-proving-major-threat-to-the-work-of-translators>] (“More than a third of translators have lost work due to generative AI.”).

153. See Grover, *supra* note 46, at 29 (discussing whether studios will be able to successfully market films without rights to the underlying work post-termination). An important note: Unless the book or underlying work is commercially successful, valuable derivatives like movie options are also rarely a concern for most authors when deciding to send notice of termination.

154. See *How to Save on College Textbooks*, *TENN. TECH COLL. GRADUATE STUD.: BLOG* (Aug. 18, 2021), <https://blogs.tntech.edu/graduate/2021/08/18/how-to-save-on-college-textbooks/> [<https://web.archive.org/web/20260126173040/https://blogs.tntech.edu/graduate/2021/08/18/how-to-save-on-college-textbooks/>] (“In STEM fields, new discoveries are made almost daily, which means textbooks must be updated constantly. This shortens the cycle of production for new editions from roughly every five years to every two or three years. Consequently, expensive books become obsolete very quickly.”).

155. See *infra* Part IV(C) for a discussion of the poor reception of the revised Phillie Phanatic costume.

Authors should also recognize that grantees or publishers will often implement plans for termination as soon as the original agreement is signed, and that they maintain extensive lists of termination dates—especially for their most valuable works.¹⁵⁶ In other words, grantees may increase creation of derivative works as the termination date approaches, regardless of whether notice is served or not. In these situations, the need to optimize or delay notice decreases, since it will have little influence on the grantee's incentive to create derivatives. However, while publishers or grantees will keep track of termination for their most valuable works and utilize their derivative rights long before notice prompts them to do so, it is unlikely they will pay significant attention to a majority of the songs or books in their catalogue.¹⁵⁷ Most authors' works fall into this bucket, so, when serving notice, these authors should still evaluate 1) which derivative rights have not yet been exploited, and 2) whether serving notice might influence the grantee to take advantage of these forgotten, unexploited rights. Given the complexity of termination, publishers also rely on the fact that most authors do not know how to use their termination rights in the first place.¹⁵⁸ Yuvaraj's 2022 study revealed the significant underutilization of copyright termination, so termination is likely not on the forefront of a grantee's mind when it comes to all but the most commercially successful works.¹⁵⁹ Therefore, authors should still expect their notice to contain an element of surprise, which could prompt a sudden reevaluation, and exploitation, of the grantee's derivative rights.

C. THE DERIVATIVE WORKS EXCEPTION: EVALUATING THE THREAT

While the section 203 case law on the Exception does present cause for concern, recent trends in the Copyright Office, plus the increasing use of section 203 terminations, indicate that the Exception's seemingly potent threat may subside. For example, in 2024, the Copyright Office released a final ruling on the applicability of the Derivative Works Exception to the section 115 compulsory license.¹⁶⁰ Prior to this

156. In addition to observing this practice firsthand, I confirmed that this is an industry standard with most large publishers in the book and music space through conversations with in-house counsel, litigators, and agents.

157. See Brennick, *supra* note 5, at 820 (discussing how “the author’s work is only one of thousands that a large transferee controls,” so underexploiting one author’s work “would not be as devastating to the transferee as it could be for the author”); see also Yuvaraj et al., *supra* note 5, at 280 (“[T]he termination laws, in their current form, disproportionately benefit only a small handful of the most commercially successful writers.”).

158. See generally Yuvaraj et al., *supra* note 5, at 251, 255, 269 (discussing the disproportionately low number of termination notices in comparison to the millions of works registered for copyright); see also Reese, *supra* note 3, at 896.

159. See Yuvaraj et al., *supra* note 5, at 251, 255, 269.

160. Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act, 89 Fed. Reg. 56586 (July 9, 2024) (to be codified at 37 C.F.R. pt. 210); see also Murray Stassen, *Songwriter Groups Hail “Landmark Victory” as U.S. Copyright Office Issues Rule Confirming How Termination Rights Apply to Streaming Royalties*, MUSIC BUS. WORLDWIDE (July 9, 2024), <https://www.musicbusinessworldwide.com/songwriter-groups-hail-landmark-victory-as-us-copyright-office-issues-rule-confirming-how-termination-rights-apply-to-streaming-royalties/>

ruling, many authors worried that, after terminating a grant transferring copyright in a musical composition to their music publisher, they would still have to share any proceeds from a compulsory license with the publisher.¹⁶¹ The publishers argued that, under the analysis of the Exception in *Mills Music*, receiving proceeds or royalties on derivatives (including compulsory licenses) post-termination is the “status quo.”¹⁶²

The Copyright Office rejected this argument, reaffirming the authors’ termination rights under the Music Modernization Act and clarifying that songwriters are entitled to collect all mechanical royalties generated from streaming platforms—even after termination of their underlying grant to their music publishers.¹⁶³ This pronouncement demonstrates the Copyright Office’s awareness of the threat the Derivative Works Exception poses to the purpose of termination rights: to allow authors to “receive fair compensation when reclaiming their copyrights.”¹⁶⁴ While the ruling does not answer the various outstanding questions about derivatives subject to the Exception—especially those outside the category of statutory licenses—it establishes a “precedent that strengthens the very foundation of copyright law in the digital age” and eliminates one of the most significant concerns for composers when terminating their rights.¹⁶⁵

If this trend continues, it is also questionable whether the recent section 203 case law will survive, particularly given the backlash the *Phillies* case engendered.¹⁶⁶ Fans were outraged at the replacement of the original costume with the lackluster, slightly altered derivative—a fact many have speculated led to settlement between the parties

[<https://web.archive.org/web/20260126173845/https://www.musicbusinessworldwide.com/songwriter-groups-hail-landmark-victory-as-us-copyright-office-issues-rule-confirming-how-termination-rights-apply-to-streaming-royalties1/>]. For the sake of clarity, a compulsory license, as codified in 17 U.S.C. § 115, allows artists to create and distribute their own recording of any composition by paying an amount determined by a royalty tribunal.

161. See Matthew Hersh, *Copyright News: Derivative Works Exception Will Not Apply to Statutory Licenses of Musical Works*, VITALLAW: IP LAW DAILY (Jul. 10, 2024), <https://www.vitallaw.com/news/copyright-news-derivative-works-exception-will-not-apply-to-statutory-licenses-of-musical-works/ipm01ab2c75fa5dd04cedada70ec43138e246>

[<https://web.archive.org/web/20260131142211/https://www.vitallaw.com/news/copyright-news-derivative-works-exception-will-not-apply-to-statutory-licenses-of-musical-works/ipm01ab2c75fa5dd04cedada70ec43138e246#>].

162. *Id.*

163. Stassen, *supra* note 160.

164. *Id.*; Termination Rights, *supra* note 160, 89 Fed. Reg. at 56590 (“[T]he Office concluded that ‘[t]o be subject to termination, a grant must be executed by the author or the author’s heirs,’ and that ‘[a]s a type of statutory license, the blanket license is “self-executing,” such that it cannot be terminated’ under section 203 or 304. The Office also explained that ‘[i]f a blanket license cannot be terminated, then it cannot be subject to an exception to termination; the license simply continues in effect according to its terms.’”).

165. Stassen, *supra* note 160 (quoting Jordan Bromley, a board member of the Music Artists Coalition). A 2023 section 304 case, *Atticus Ltd. Liab. Co. v. Dramatic Publ’g Co.*, also circumscribed the Derivative Works Exception somewhat. The court found that, while the Exception allows the grantee to utilize a derivative work post-termination, a license that was exclusive pre-termination is no longer exclusive post-termination. No. 22cv10147 (DLC), 2023 U.S. Dist. LEXIS 73732, at *16–17 (S.D.N.Y. Apr. 27, 2023), *aff’d in part, vacated in part*, 145 F.4th 257 (2d Cir. 2025) (affirming the aforementioned holding).

166. Moss, *supra* note 132 (“[A] large segment of the Phillies’ fan base doesn’t particularly like the ‘new and improved’ version of the Phillie Phanatic.”).

and reinstatement of the original costume.¹⁶⁷ Additionally, as section 203 terminations become more prevalent now that we are a more than a decade out from their 2013 origins, authors and publishers will (hopefully) become more adept at navigating termination.¹⁶⁸ Moreover, increased interest in termination will inevitably lead to increased clarity regarding the scope of the Exception—a situation we have already seen in the realm of section 115 compulsory licenses, where widespread fear of a diminished termination right inspired the Copyright Office to delimit the Exception's reach.¹⁶⁹ For now, as we await additional case law, limiting the preparation of derivative works via late notice remains a relevant strategy, but given the many benefits of early notice of termination, there are better, more proactive methods to preserve termination rights.

D. THE IDEAL SCENARIO: EARLY NOTICE OF TERMINATION FOR A NARROW GRANT

Sections 203 and 304 specify that, after termination, grantees can utilize derivatives only “under the terms” of the original grant.¹⁷⁰ There has been much litigation surrounding this phrase, and while grantees have used this language to their advantage by requiring expansive terms for grants—i.e., grants “authorizing the grantee to exercise unilateral control over *all* exploitations of derivative works”—authors should also take advantage of this language when possible.¹⁷¹ Prince is perhaps the most successful musician to exercise termination rights, largely due to the fact that he demanded an “unusual degree of control over his copyrights and was unafraid to place those demands on his labels and representation.”¹⁷² Few authors possess such bargaining power upfront when negotiating an initial grant, but the lesson is still relevant.

For example, in *Architettura*, the court harped on the fact that, “in order to determine which party is entitled to post-termination distributive rights, the court must examine what rights each party was entitled to before termination.”¹⁷³ In that case, “there were no restrictions on Defendants’ use of [architectural] drawings” pre-termination, allowing Defendants “to show the Work to anyone they wished, until the license was terminated.”¹⁷⁴ Unlike the court in *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.* that concluded the original grantee’s uses of a derivative post-termination were

167. *Id.*

168. See Yuvaraj et al., *supra* note 5, at 267 fig. 4 (a line chart demonstrating a steady increase of section 203 terminations since 2013, though with a slight drop-off after 2019).

169. See *supra* note 164 and accompanying discussion.

170. 17 U.S.C. § 203(b)(1); 17 U.S.C. § 304(c)(6)(A).

171. GILBERT ET AL., *supra* note 1, at 15; see also *supra* note 133 and accompanying text.

172. GILBERT ET AL., *supra* note 1, at 23; see Ryan Faughnder, *Prince Took a Protective Stance on Music Copyrights*, L.A. TIMES (Apr. 21, 2016), <https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-prince-copyrights-20160421-story.html>

[<https://web.archive.org/web/20260126175512/https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-prince-copyrights-20160421-story.html>].

173. *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, 652 F. Supp. 2d 775, 783 (N.D. Tex. 2009).

174. *Id.* at 783–84.

restricted based on the limitations imposed pre-termination, the *Architettura* court found such *lack of restriction* translated to the grantee's unfettered ability to use the derivative post-termination.¹⁷⁵ If authors are particularly concerned about certain post-termination exploitations of derivative rights, they should thus attempt to limit the exercise of such rights through contractual approval or reserved rights in the initial grant.

Again, it can be difficult for most authors, especially debut authors, to exercise significant bargaining power when negotiating an initial grant, but even minimal limitations (e.g., on who the publisher can show the derivative to during the license period) may preserve significant rights when it comes time for termination. Even new authors can successfully negotiate some kind of approval rights, which not only limit possible uses of the derivative later, but also allow authors to send early notice without fear.¹⁷⁶ If the author retains approvals over derivative uses, it stands to reason that the original grantee cannot surreptitiously develop unsatisfactory derivative works between service of notice and effective termination. While a more drastic tactic, authors and their attorneys might also consider negotiating the type and amount of derivative works that a grantee may create after notice is served upfront, i.e., in the initial grant. This could preserve the grantee's ability to prepare derivative works until termination, place the author back in a better bargaining position, and potentially limit litigation on the subject going forward. Ultimately, if the initial grant is relatively narrow, consternation surrounding derivative exploitations post-notice of termination diminishes, and authors can more confidently reap the benefits of early notice of termination.

CONCLUSION

The termination right is far from perfect, and if authors are going to fully benefit from termination as Congress initially intended, reform is necessary. However, until change arrives—if it ever does—authors should keep in mind the various strategies that will best equip them to exploit the termination right in its current form. Service of notice is one of the few ways authors can assert some element of decision-making in the termination process, and rather than arbitrarily choose an effective date of termination or date of service within the specified windows, authors should evaluate whether late or early service is most beneficial to their personal circumstances.

Authors should consider the practical implications of statutory exceptions like the Right of First Refusal—one of the greatest assets for authors of multiple works, if deployed tactically—and the Derivative Works Exception. While these exceptions raise conflicting incentives, authors will generally maximize their bargaining power and receive the greatest remittance of their rights if they serve notice of termination as

175. *Id.*; see *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17 (2d Cir. 1998).

176. See BRIANNA L. SCHOFIELD ET AL., UNDERSTANDING AND NEGOTIATING BOOK PUBLICATION CONTRACTS 91–94 (Brianna L. Schofield & Robert Kirk Walker, eds., 2018) (discussing approvals and consultation requests in a book contract).

early as possible. Not only does early notice allow authors to derive the greatest possible benefits from the Right of First Refusal Exception, but it also provides the authors with the small luxury of time—i.e., additional time to mull over the original grantee's offer, exploit their own works if they so desire, and, most importantly, consider their various options. The Derivative Works Exception is not a negligible threat, but for most authors, its cons do not outweigh the many pros that accrue from early service of notice. Only time—and rulings from the Copyright Office or courts—will tell how “[ph]anatical” authors should feel about its ominous presence, and until that day comes, authors should scrutinize the terms of their initial agreement to determine their vulnerability.

Termination is severely underutilized, and while this is hardly a surprise considering its complexity, lack of clarity on the law should not eviscerate authors' attempts to exploit termination in the first place. Armed with a greater understanding of the notice requirements and the way termination operates within respective arts industries, authors may finally reclaim what is rightfully theirs.