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Copyright's Termination of Transfers Provisions*

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BEYOND THE GAP: A PRACTICAL UNDERSTANDING OF COPYRIGHT'S TERMINATION OF TRANSFERS PROVISIONS

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Charlie Daniels, American country music legend, has been an active singer, songwriter, and multi-talented musician since the 1950s, but it wasn't until the 1970s that his career really started to take off. In 1974 his first hit single reached number nine on the Billboard Hot 100, the following year he had a Top 30 hit as a member of the Charlie Daniels Band, and in 1979 he won a Grammy for his number one hit "The Devil Went Down to Georgia."¹ The song was even featured in the popular 1980 film, "Urban Cowboy." Daniels released a total of nine studio albums between 1971 and 1977—his popularity was the kind most music publishers only dream of.² In recent years, Daniels, now seventy-three years old, has made it into the headlines again, though he is attracting a somewhat different crowd.³ Hoping to share in the commercial success "The Devil Went Down to Georgia" brought to Universal Music Publishing Group over the past three decades, Daniels attempted to exercise his right under the Copyright Act of 1976 to reclaim copyright ownership in his Grammy-winning song.⁴ Unfortunately for Daniels, he learned that his right to terminate his transfer to Universal might have slipped through the cracks because of a statutory gap, or more precisely, a gaping statutory ambiguity.⁵

One of the most acute examples of the competing interests of creators, distributors, and consumers of creative content in the copyright laws of the United States is the termination of transfers provisions.⁶ A complex statutory

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1. *Charlie Daniels*, CHARLIE DANIELS BAND, <http://www.charliedaniels.com/the-band/bio-charlie.htm> (last visited Feb. 24, 2012).

2. *Id.*

3. Brian Reisinger, *Charlie Daniels' Signature Song at the Heart of Copyright Dispute*, NASHVILLE BUS. J. (Mar. 28, 2010, 11:00 PM), <http://www.bizjournals.com/nashville/stories/2010/03/29/story2.html>.

4. *Id.*

5. *Id.*

6. During the general revision process, the decades leading up to the enactment of the Copyright Act of 1976, interested parties weighed in on the debates over the revision of

scheme allows authors to set aside contractual obligations and reclaim rights in their works decades after assigning them away. In the decades leading up to the 1976 overhaul of the U.S. copyright laws, Congress saw heated arguments on both sides of the debate over the novel right these provisions ultimately created. Now—just under thirty-five years since the 1976 Act’s effective date—the first transfers executed under the Act will soon be ripe for termination. As this happens, interpretive debates over how these provisions should operate have begun to echo the explosive debates out of which termination of transfer rights were born.

One prominent area of uncertainty surrounding the termination of transfer provisions concerns works, like “The Devil Went Down to Georgia,” where creators assigned the copyright to the publisher prior to the January 1, 1978 effective date of the Act but did not actually create the work until after this date. Though this may seem like an odd situation, it is a common industry practice.⁷ For example, Universal Music Publishing Group’s predecessor signed Daniels to an exclusive term deal in 1975; he then wrote and recorded this particular song in 1979.⁸ Works, like this one, that were assigned prior to but created after January 1, 1978 earned the name “Gap Works” because they are not explicitly referenced anywhere in the termination of transfers provisions. As a result, Gap Works have raised many questions about how the inalienable termination of transfers provisions will operate as the crucial date swiftly approaches for the first such transfers to be ripe for termination. Moreover, the language of the statute is facially confusing and allows for multiple and equally plausible interpretations.

various provisions, including the termination of transfers provisions. See, e.g., *Comment Received from American Book Publishers Council, Inc.* (Nov. 1963) [hereinafter *Book Publishers’ Comment*], in STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 247–51 (Comm. Print 1964) [hereinafter *COPYRIGHT LAW REVISION PT. 4*], reprinted in 3 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY* (George S. Grossman ed., 2001); *Comment Received from American Book Publishers Council, Inc. and American Textbook Publishers Institute, Inc.* (June 12, 1964) [hereinafter *Joint Publishers’ Comment*], in *COPYRIGHT LAW REVISION PT. 4, supra*, at 267–71, reprinted in 3 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, supra*; *Comment Received from Authors League of America, Inc.*, (June 19, 1964) [hereinafter *Authors League Comment*], in *COPYRIGHT LAW REVISION PT. 4, supra*, at 313–14, reprinted in 3 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, supra*.

7. See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 136–42 (7th ed. 2009); Letter from Michael Perlstein to Maria Pallante, Deputy Gen. Counsel, U.S. Copyright Office (Oct. 30, 2007), available at <http://www.copyright.gov/docs/termination/comments/2010/perlstein-et-al.pdf>.

8. Reisinger, *supra* note 3.

The Songwriters Guild of America predicts that the Gap Works issue will affect hundreds if not thousands of songwriters,⁹ and the Author's Guild estimates as many as 100,000 works—the majority of books published in 1978, 1979, and 1980—fall into this “gap”.¹⁰ However, the final interpretation of the statute in resolution of the Gap Works problem will incidentally affect a much larger number of authors moving forward. Thus both authors and producers in all relevant industries seek clarity on this issue in the hopes of avoiding costly delays and litigation or “a state of play where termination rights are left unexercised.”¹¹

This Note cautions that there is danger in hasty resolution of the Gap Works problem and argues that more time and thought must be given to the problem given the broad impact such resolution will have on the operation of the statute moving forward. Given the explosive debates that have surrounded the termination of transfers provisions from their inception, courts must be careful to engage in practical statutory interpretation, both heeding the conventions of textual and historical analysis and also considering the practical effects of their interpretation. As the date approaches when the first § 203 transfers will be ripe for termination, scholars and various interested parties have posited two convincing readings of the statute: one uses the date of creation of the copyrighted work as the date from which the termination window is calculated, while the other uses the date of the assignment contract that transferred the copyright. The implications of the interpretation stretch far beyond the classification of Gap Works—i.e., those works that straddle the effective date of the Act—since early decisions will set an interpretive precedent for the operation of the statute with respect to all subsequent creative works. This Note asserts that while a textual analysis of § 203 and a historical analysis of the Congressional intent behind the provision may support both opposing interpretations, practical reasoning exposes the superiority of the date-of-the-agreement interpretation.¹² Though the repercussions of this interpretation for authors of non-Gap-Works seem less severe since such authors will still have a termination interest regardless, determining the superior basis for calculating

9. U.S. COPYRIGHT OFFICE, ANALYSIS OF GAP GRANTS UNDER THE TERMINATION PROVISIONS OF TITLE 17, at 7 (2010), available at <http://www.copyright.gov/reports/gap-grant%20analysis.pdf> [hereinafter COPYRIGHT OFFICE, GAP GRANTS].

10. *Id.*

11. *Id.*

12. This term refers to the statutory interpretation model espoused in William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

the termination window is fundamental to ensuring successful operation of the statute in the industries in which it will have the greatest impact.

Part I of this Note provides background and context on the termination of transfers provisions of the Copyright Act of 1976. Part II exposes ambiguity in the statute, including one particular fact pattern that the statute does not explicitly reference, discusses the nature of contracting for creative works, and explains why certain entertainment industry practices make this statutory ambiguity significantly broader than the gap works problem. Part III then engages in careful statutory interpretation, examines two convincing but divergent interpretations, and shows how practical reasoning exposes one as superior to the other. The final Sections of Part III demonstrate the specific practical superiority of one interpretation in several of the industries that will feel the greatest impact of the termination of transfers provisions.

I. BACKGROUND

The very existence of a gap in the termination of transfers scheme of the Copyright Act of 1976 arises out of ambiguity in certain statutory provisions. This Part contextualizes this ambiguity by outlining the statutory definitions of copyright authorship, ownership, transfer of ownership, and termination of transfers.

A. AUTHORSHIP AND OWNERSHIP

U.S. copyright law, in fulfillment of Congress's authority to "promote the Progress of Science and the useful Arts,"¹³ provides protection to "original works of authorship."¹⁴ Copyright "vests initially in the author or authors of a work."¹⁵ The exception to this is where the work is created as a work for hire. In these cases, the employer will be deemed the statutory author of a work and own "all of the rights comprised in copyright."¹⁶

Section 106 of the Act sets forth the exclusive rights of a copyright owner: (1) reproduction, (2) preparation of derivative works, (3) distribution, (4) public performance, (5) public display, and (6) public performance by means of a digital audio transmission.¹⁷ Not all § 106 rights may be applicable

13. U.S. CONST. art. I, § 8, cl. 8.

14. 17 U.S.C. § 102 (2010); *see* U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

15. 17 U.S.C. § 201(a).

16. *Id.* § 201(b).

17. *Id.* § 106.

to every type of copyrighted work.¹⁸ Additionally, certain statutory exceptions authorize an act that would otherwise infringe one of these exclusive rights.¹⁹

Subsequent to initial vesting of a copyright in the “author” of a work, an author may transfer some or all of her rights.²⁰ Section 101 defines a “transfer of ownership” as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”²¹ However, such a transfer of ownership in the copyright, either by assignment or license, does not affect the creator’s status as the author of her work.

B. TERMINATION OF TRANSFERS

The difference between owning rights as an author and owning rights as an assignee is crucial in U.S. copyright law because of the novel statutory right of authors to terminate assignments or licenses of their copyrights decades after signing them away, irrespective of their contractual obligations.²² These termination rights are found in two separate provisions: § 203 applies to transfers executed on or after January 1, 1978 and § 304(c) to transfers made prior to 1978. Perhaps the most important and novel aspect of these rights is that they are inalienable: an author can invoke them “notwithstanding any agreement to the contrary.”²³

18. *Id.*

19. *E.g., id.* § 107 (excepting fair use); *id.* § 108 (excepting reproduction by libraries and archives); *id.* § 109 (excepting effect of transfer of a particular copy or phonorecord); *id.* § 110 (excepting exemption of certain performances and displays); *id.* § 111 (excepting secondary transmissions of broadcast programming by cable); *id.* § 112 (Limitations excepting ephemeral recordings).

20. *Id.* § 201(d).

21. *Id.* § 101. Section 204 articulates a statute of frauds requirement, that has been interpreted as requiring not just complete assignments, but also exclusive licenses of some or all of the § 106 rights to be stated in some form of a writing signed by the owner. *Id.* § 204; *see Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) (“Section 204’s writing requirement is not unduly burdensome; it necessitates neither protracted negotiations nor substantial expense. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It does not have to be the Magna Charta; a one-line pro forma statement will do.”). This requirement does not apply to non-exclusive licenses, though there are benefits to the written memorialization of any contract, like clarity and evidentiary concerns. Section 205 provides procedures for recording transfers with the Copyright Office, though such recordation is not required for any type of copyright transfer. 17 U.S.C. § 205.

22. *See* 17 U.S.C. §§ 203, 304(c).

23. *Id.* §§ 203(a)(5), 304(c)(5).

Section 203 permits an author to terminate any transfers of rights he had made in a copyrighted work.²⁴ Neither transfers made by subsequent owners, like transferees or the author's heirs, nor transfers by will are subject to termination under § 203.²⁵ On the other hand, works made for hire are not considered transfers because original authorship vests in the employer; thus, they are not terminable by the creator.²⁶ Such terminations may be made by the author or, if she is dead, those who own at least fifty-one percent of the termination interest.²⁷

Section 203 terminations may be made during a five-year period starting at the end of thirty-five years from the execution of the grant.²⁸ There is an exception to this timeline for grants that include the right of publication, in which case the five-year window begins at the earlier of thirty-five years after publication or forty years after the grant.²⁹ Terminations can be made by serving written notice to the transferee no fewer than two and no more than ten years before the termination is to occur.³⁰ Such notice must comply with formalities set forth in the Copyright Office regulations. In addition, a copy of such notice must be recorded in the Copyright Office before the effective date of termination.³¹ A § 203 termination reverts all rights to the terminating party.³² The important exception to this is that a transferee may continue to exploit *existing* derivative works after termination if they were prepared under the authority of the grant.³³

Section 304(c) applies to transfers made before January 1, 1978. Since such transfers involve works where duration is governed by the 1909 Act, there is an added layer of complexity. The prior regime granted authors a dual term in which rights-holders had to affirmatively seek renewal in order to receive protection for the second term.³⁴ Section 304(c) allows authors or their heirs to terminate transfers that conveyed interest in the renewal term, because they, and not the transferee, were the statutorily designed beneficiaries of the extended renewal term and thus get the first opportunity

24. *Id.* § 203(a).

25. *Id.*

26. *Id.*

27. *Id.* § 203(a)(2) (detailing the transfer of an author's termination interest at death).

28. *Id.* § 203(a)(3).

29. *Id.*

30. *Id.* § 203(a)(4).

31. *Id.*

32. *Id.* § 203(b).

33. *Id.* § 203(b)(1).

34. *Id.* § 304(a)–(b). The 1976 Act, incorporating language of 17 U.S.C. § 24 (1976 ed.), retains the dual-term system with respect to works in their original or renewal term as of January 1, 1978.

to benefit from the term extension.³⁵ So, terminations under § 304(c) can only apply to grants of the renewal term, not the initial term.³⁶ Furthermore, works made for hire and transfers made by will are not terminable under § 304(c).³⁷ Though § 304(c) allows for both authors and their successors in interest to terminate transfers, when someone other than the author seeks to terminate a grant of rights, only the surviving person or persons who actually executed the grant can terminate it.³⁸

Termination under § 304(c) can be effected during a five-year window that begins fifty-six years from the date statutory copyright protection was initially secured.³⁹ The person seeking to terminate must serve advance notice of termination on the transferee or his successor in title not less than two and no more than ten years before the desired effective date of termination, and she must record the termination with the Copyright Office before the effective date arrives. The effect of termination is the reversion of all rights under copyright to the person or persons who exercised § 304(c) rights. However, the transferee may continue to exploit existing derivative works prepared under the authority of the grant.⁴⁰

Sections 203 and 304(c) provide substantively similar rights for grants executed before and after the effective date of the 1976 Act. They are identical in their procedures for serving notice, the effect of termination, and their applicability to exclusive and nonexclusive licenses, as well as outright transfers of ownership. Both provisions also clarify their inapplicability to works for hire and the exception for the continued exploitation of derivative works. Moreover, both § 203 and § 304(c) contain the unique feature that terminations may be effected “notwithstanding any agreement to the contrary.”

In spite of these similarities, the two provisions differ in (1) the party who may effect the termination; (2) the scope of grants covered; and (3) the timeline for effecting termination. While § 304(c) allows both an author and

35. *Id.* § 304(c).

36. *Id.* Subsequent to the enactment of this dual-term regime, Congress further extended copyright duration. Section 304(d) concerns the additional twenty years provided by the 1998 Copyright Term Extension Act (“CTEA”). It states that the termination rights provided in subsection (c) which have expired on or before the effective date of the CTEA may be exercised under the same conditions as subsection (c) and that such terminations may be effected during a period of five years from the date the copyright was originally secured. *Id.* § 304(d).

37. *Id.*

38. *Id.*

39. *Id.* § 304(c)(3).

40. *Id.* § 304(c).

her successors in interest to terminate grants, § 203 allows only the author herself to terminate. Additionally, § 203 applies to grants of any or all interest in copyright, where § 304(c) only applies to grants of the renewal interest. Moreover, § 304(c) calculates the five-year window in which termination can be effected from the date the copyright was originally secured, but § 203 calculates it from the date of execution of the grant. These differences, however, are mostly rooted in practical considerations, as both termination of transfers provisions promote the same public policy goals. The Appendix illustrates the principal differences between the two sections.

C. HISTORY, POLICY, AND PURPOSE

The policy goals that underlie the inalienable right to terminate transfers derive from the practical situations in which copyright transfers arise. A common justification of the termination provisions looks to basic fairness concerns. The provisions allow the author to recapture rights from a transferee because between the two parties, society finds it “more fair” for *the author* to reap the benefits of the lasting commercial success of her work than for a producer or distributor to do so. Moreover, “the constitutional prescription is to accord copyright to authors and their beneficiaries,” and is not meant to privilege the rights of subsequent transferees.⁴¹ Many, however, find this policy goal to be paternalistic and controversial. The more accepted articulation of the policy goal roots these fairness concerns in the utilitarian notion of distributive justice.⁴² The House and Senate Reports state plainly: “A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”⁴³ Such an articulation both accounts for the precarious position of authors who are often at the mercy of producers and distributors in negotiating initial transfers since they have no way of predicting the work’s commercial viability, but also acknowledges the valuable role of producers and distributors in taking on this economic risk and thus fostering the commercial success of a work.

Professor Loren articulates the prevailing concern: “Why does federal copyright policy dictate that freedom and sanctity of contract must give way

41. *Transcript of Meeting* (Sept. 14, 1961), in STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2, DISCUSSIONS AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 38–39 (Comm. Print 1963), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, *supra* note 6.

42. Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the ‘Inalienable’ Right To Terminate*, 62 FLA. L. REV. 1329, 1330 (2010).

43. S. REP. NO. 94-473, at 65 (1975).

to the rights of authors and their families to negate otherwise valid assignments and licenses?”⁴⁴ The fundamental conflict between freedom of contract and constitutional protection for authorial works led to an uneasy compromise when Congress enacted the termination of transfers provisions of the 1976 Act.⁴⁵ Sections 203 and 304 codify compromises on what had been “the most explosive and difficult issue” throughout much of the mid-twentieth century revision of U.S. Copyright law.⁴⁶

During the omnibus revision of the U.S. copyright laws that culminated in the Copyright Act of 1976, the competing interests of authors and publishers came to a head when it came time to design a statutory scheme to succeed the “reversion rights” of the 1909 Act.⁴⁷ The publishers (and other

44. Loren, *supra* note 42, at 1329.

45. See STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 1965 REVISION BILL 71 (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT], reprinted in 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9-15 (Matthew Bender Rev. ed. 2010) (“Throughout the drafting phase of the revision program the most explosive and difficult issue has been the problem that the *Report* in 1961 called ‘protection of authors against unremunerative transfers,’ and that section 203 of the 1965 bill calls ‘termination of transfers and license by the author,’ but that has come to be known generally as the ‘reversion problem.’”).

46. The strength of competing interests surrounding the “reversion right” was evident early on as illustrated by a comment in a 1960 study about Copyright “Renewal as a reversion or reservation of author’s rights,” commissioned by Congress and conducted by Barbara Ringer, who would subsequently become the Register of Copyrights and hold the position a decade and a half later when the revision was finally passed into law. In the 1960 Study, Ringer commented that the problems surrounding the reversion right “promise to be among the most troublesome the legislative drafters will have to face.” Barbara Ringer & Julius A Culp, *Renewal of Copyright, Study No. 31*, June 1960, reprinted in 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, *supra* note 6, at 190; see also SUPPLEMENTARY REPORT, *supra* note 45, at 1. Discussions that gave rise to the novel termination of transfers provisions may have taken place as early as the decades preceding World War II, but appear concretely in the legislative history as early as 1960, in Ringer’s study. See Ringer & Culp, *supra*, at 188, 201; see also H.R. REP. NO. 94-1476, at 124 (1976) (“The final ‘Shotwell Committee’ bill was introduced by Senator Thomas on January 1, 1940” and contained a reversion term that read “no grant by an author who was a natural person would be valid for more than 25 years.”); SUPPLEMENTARY REPORT, *supra* note 45, at 72 (“[The Copyright Office sought] actively and persistently to find a basis for agreement that would be a practical benefit to authors and their families without being unfair to publishers, film producers, and other users.”).

47. See *Transcript of Meeting*, *supra* note 41. In 1955 Congress provided funds for “a comprehensive program of research and studies by the Copyright Office as the groundwork for such a revision.” Accordingly, the Copyright Office commissioned thirty-five studies focusing on the major substantive issues that were the subject of revision, the results of which were ultimately published in 1961 in the “Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law.” See JOSEPH C. O’MAHONEY, 86TH CONG., COPYRIGHT REVISION STUDIES 29–30 iii (Comm. Print 1961) (“This committee print is the

transferees) voiced concerns that the reversion right would place an undue burden on them and hinder their successful performance of a necessary intermediary function between creators and consumers.⁴⁸ But authors championed the importance of keeping a reversion right, to ensure the protection of authors in their dealings with transferees, who were often more sophisticated.⁴⁹

A complicated back-and-forth during the revision process in the 1970s reflects the fundamental divide between the rights of authors and the rights of publishers. The Authors League argued that authors are in an inferior bargaining position when negotiating with publishers and that therefore some version of a reversion clause was needed to equalize the playing field over time and protect authors from unknowingly acting contrary to their best interests.⁵⁰ The publishers retorted that despite the existence of the reversion right in the 1909 Act renewal scheme, which aimed to address this concern but did not strictly limit transfer or waiver, “[t]he author can, and usually does, contract with his publisher to assign to him his rights in the renewal term.”⁵¹ The authors, in turn, insisted that “[t]hey do not have the economic bargaining power to resist the inclusion of [unfavorable clauses] in publishing contracts . . .” just as they struggle under the current regime to “resist the demand . . . that they tie-in an assignment of their renewal rights, when they grant publishing rights under the original copyright.”⁵² But the publishers filed multiple comments explicitly rejecting all of the early proposals that revised the reversion scheme, grounding their resistance in the changed commercial landscape:

The whole idea of reversion rests on a theory that authors as a class are improvident or are not in a position to bargain equally with copyright users and hence should not be allowed to contract freely for their works as may appear to them to be in their best interest. It would appear that at best this is a highly questionable theory, and that authors and publishers would both benefit from a freedom to make such contracts as seem to them naturally advantageous . . .

tenth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, U.S. Code).”).

48. *Book Publishers' Comment*, *supra* note 6, at 248–51; *Joint Publishers' Comment*, *supra* note 6, at 274.

49. *Authors League Comment*, *supra* note 6, at 313–14.

50. *Id.* at 313–14 (internal quotations omitted).

51. *Book Publishers' Comment*, *supra* note 6, at 248.

52. *Authors League Comment*, *supra* note 6, at 313–14.

the antiquated concept that an author requires protection against his own improvidence in bargaining with a publisher is not true today if it ever was. Today an author is generally represented by a literary agent, by an attorney trained in the field of literary property and by tax counsel.⁵³

This argument, which may hold even more truth today than it did during the revision process, suggests that the “unequal bargaining power” justification appears unnecessarily paternalistic at best under current conditions of creation.

However, Congress took a different tack in justifying the provisions, noting that, contrary to what the authors’ and publishers’ exchanges suggest, the disadvantaged bargaining position arises out of the inherent difficulty of determining a work’s value before its commercial exploitation, and not out of the difference in the parties’ sophistication.⁵⁴ Furthermore, the provisions that ultimately made it into the 1976 Act arguably achieve a delicate balance in the following way.⁵⁵ While the termination of transfer provisions generally favor the authors’ interests, the Act mitigates the harsh effect on publishers and distributors in two important ways: (1) the reversion is not automatic but instead places the burden on authors to actively seek termination, and (2) termination has no effect on an assignee’s ability to exploit derivative works prepared under the grant.⁵⁶ In spite of these compromises, the unusual nature

53. *Joint Publishers’ Comment, supra* note 6, at 274–75 (“It is the position of the Council and the Institute that, as under the British Copyright Law, there should be no reversion; that the author is competent to bargain freely in transferring his copyrighted work, just as if he were selling his house. He should not be a ward of society and should not be entitled to any greater protection than is afforded inventors who are free to deal with their patent rights as they see fit.”); *Book Publishers’ Comment, supra* note 6, at 250 (“The net effect of the proposed provisions with respect to reversion, collective works, and works for hire would seriously curtail publishers’ rights and it is probably that book publishers would be better off under the present law than under a new statute with those provisions. However, other interests, notably motion pictures, are even more seriously affected and have joined in protesting these proposals.”). The 1961 Report had recommended two alternatives to the existing reversion right: either (1) an unwaivable twenty-five year limit on transfers effective automatically upon expiration of the term, thus placing burden on transferee, but with a specific exception for continued rights in derivative works like motion pictures; or (2) a three-year window beginning twenty years after grant where an author or her representatives can terminate or reform the contract if “the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the author or his successors.” *Book Publishers’ Comment, supra* note 6 at 250.

54. H.R. REP. NO. 94-1476, at 124 (1976); S. REP. NO. 94-473, at 65 (1975).

55. *See* S. REP. NO. 94-473, at 65 (“Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.”).

56. *See supra* Part I.B.

of the provisions made their existence controversial even as Congress passed the final Act. The House and Senate reports on the final bill echo many of the concerns that plagued the revision process and the historical context of the conception and evolution of the termination of transfers provisions.⁵⁷

II. DEFINING THE GAP

The policies underlying the termination provisions are far less controversial than the 1976 Act's novel method of executing the policies through an inalienable, unwaivable right. Moreover, before creators can make reliable use of the provisions, the law must resolve substantial ambiguities in the statutory provisions that compound the difficulties with the novel right.⁵⁸ Discussion in recent years about how the statute will treat Gap Works, like "The Devil Went Down to Georgia," has illuminated the fundamental necessity of addressing this uncertainty in advance of the first wave of § 203 terminations.

A. THE "GAP WORKS" PROBLEM

The undefined word "executed" in the statute almost singlehandedly creates the Gap Works problem. Section 203 clearly provides for termination of grants "executed . . . on or after January 1, 1978" for works created on or after January 1, 1978.⁵⁹ There are two perhaps equally plausible interpretations of what Congress meant by requiring execution of a grant on or after this date. The Copyright Office has promulgated the first interpretation: in order for the actual assignment of a copyright in a work to be "executed," the copyright, and thus the work, must actually exist.⁶⁰ Under this interpretation, the date of grant execution can be no earlier than the date of creation of the work. The second interpretation uses the plain-language meaning to find that execution means the actual signing of the assignment contract, which includes contracts for works that do not yet exist. Since the first transfers "executed" under the 1976 Act will be ripe for termination on January 1, 2013, courts will soon have to address this ambiguity, and they cannot do so earlier. Given the novel character of the termination of transfers provisions and their highly disputed conception, courts must proceed in this task with a heightened sensitivity and caution.

Adhering strictly to a literal reading of the statute would result in anomalously placing certain works outside the scope of both termination of

57. See H.R. REP. NO. 94-1476, at 124–28; S. REP. NO. 94-473, at 65.

58. See *supra* Section I.C.

59. 17 U.S.C. § 203(a) (2010).

60. See COPYRIGHT OFFICE, GAP GRANTS, *supra* note 9, at iii.

transfer provisions. Consider a work for which an assignment was made prior to January 1, 1978, but the work itself was not created until after January 1, 1978. On its face, section 304(c) is inapplicable to this work because, although it applies to grants made prior to January 1, 1978, it requires a subsisting copyright as of that date.⁶¹ Section 203 similarly might not apply to this fact pattern because it requires the grant to have been “executed . . . on or after January 1, 1978.”⁶² This is the essence of the Gap Works problem.

This “gap” has attracted attention in recent years because it raises threshold questions about the intersection of copyright and contract law in the operation of these novel provisions. As the first § 203 terminations approach in 2013, the copyright community is left wondering: Did Congress inexplicably exclude this class of works entirely from the termination of transfers provisions? What is actually required to “execute” an assignment grant? Is it possible to “execute” a grant of a transfer of rights in a work that has not yet been created, or is the “execution” date implicitly conditioned on the work’s creation date?

Because the statute requires that authors record notice of expected terminations between ten and two years prior to the date they wish to terminate, the 2003–2011 window for termination notice has already passed for the first § 203 terminations and the Copyright Office has already had to confront Gap Works complications. Beginning in March 2010 the Copyright Office conducted a Notice and Comment period to determine whether it should accept and record notice of Gap Works transfer terminations.⁶³ This effort produced two conclusions, one binding and one not binding. In its final rule governing its administrative functions, the Copyright Office stipulated it will accept and record such notice.⁶⁴ However, in December 2010 the Office pushed further in recommending that Gap Works be considered fully terminable under § 203.⁶⁵ But this last recommendation has

61. 17 U.S.C. § 304(c).

62. *Id.* § 203(a).

63. *See* Gap in Termination Provisions; Inquiry, 75 Fed. Reg. 15,390 (Copyright Office Mar. 29, 2010) (to be codified at 37 C.F.R. § 201); Gap in Termination Provisions; Inquiry (Supplemental Notice: extension of comment period), 75 Fed. Reg. 27,248 (Copyright Office May 14, 2010) (to be codified at 37 C.F.R. § 201); Gap in Termination Provisions (Notice of Proposed Rulemaking), 75 Fed. Reg. 72,771 (Copyright Office Nov. 26, 2010) (to be codified at 37 C.F.R. § 201).

64. 37 C.F.R. § 201.10(f)(5) (2011).

65. COPYRIGHT OFFICE, GAP GRANTS, *supra* note 9. The Copyright Office has recommended clarifying the statutory language consistent with this stance, suggesting that § 203(a)(3) be amended by adding a new sentence at the end as follows:

minimal legal impact because the Office conducted its study only in discharging its ministerial duties rather than on a special mandate from Congress, which would have carried more legal authority.⁶⁶ The December 2010 Report explicitly clarifies this point: “[T]he rulemaking is not a substitute for statutory clarification. Although authors must record the notice they serve on grantees as a condition of termination taking effect, . . . [r]ecordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal and formal requirements for issuing a valid notice have not been met.”⁶⁷ But even if this recommendation carries little legal weight, the Notice and Comment period and the Copyright Office’s analysis of the Gap Works problem has importantly illuminated the greater interpretive challenges that § 203 presents.

B. THE PRACTICAL SCOPE OF THE PROBLEM: BEYOND “GAP WORKS”
AND THE NATURE OF CONTRACTING FOR CREATIVE WORKS

The questions underlying the Gap Works problem, however, resonate far beyond the class of works that straddles the Act’s effective date. Practical concerns within creative industries make assignments of rights in subsequently created works (here called “prospective assignments”) a common practice. Such prospective grants characterize book publishing deals, record label contracts, and screenplay acquisition deals.⁶⁸ Because § 203 measures the start of the five-year termination window from the date on which the assignment grant was executed, even when contract signing and work creation do not straddle the January 1, 1978 effective date, grantors and

Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier. *For purposes of this section, and without prejudice to the operation of any other provision in Title 17, the date of execution of the grant is no earlier than the date on which the work is created.*

COPYRIGHT OFFICE, GAP GRANTS, *supra* note 9, at iii (emphasis in the original).

66. Compare this function of the Copyright Office with the 1955 commissioning of the studies and the 1961 report. See Andy Gass, *Considering Copyright Rulemaking: The Constitutional Question*, 27 BERKELEY TECH. L.J. (forthcoming 2012).

67. COPYRIGHT OFFICE, GAP GRANTS, *supra* note 9, at iii.

68. See *infra* Sections III.C.2.b)i)–iii); DINA APPLETON & DANIEL YANKELEVITS, HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV, AND NEW MEDIA 247 (2010); PASSMAN, *supra* note 7, at 136–42; Letter from Perlstein to Pallante, *supra* note 7.

grantees are left to wonder whether a copyright assignment grant can ever be “executed” before the copyright (and thus the actual work) actually exists. Although this inquiry is more acute in the Gap Works context because a negative answer would imply that this group of creators have no right whatsoever to terminate their transfers, it is equally crucial for works fully covered by § 203 because it dictates the point at which the clock starts for the notice and termination windows for all prospective assignments.

III. ANALYSIS: PRACTICAL REASONING AS STATUTORY INTERPRETATION

Regardless of why the Gap exists or the practical scope of the problem the Gap illuminates, its resolution depends on determining what meaning should be given to the statutory text. Over the last three decades, scholars and courts have begun to embrace a philosophy of statutory interpretation based less on any singular historical canon of interpretation and more on “practical reasoning.”⁶⁹ William V. Eskridge, Jr. and Philip P. Frickey defend this approach as “both more natural and more useful,” lauding the coherent analysis that results when courts follow a “practical reasoning model” and schematizing the structure of such interpretation as a “funnel of abstraction” that considers, in turn, textual, historical, and practical evolutive considerations.⁷⁰ This Part engages with the statute in each of these three capacities, acknowledging the strength of multiple interpretations but ultimately determining that the practical superiority of the date-of-agreement interpretation makes for the best construction of the statute.

69. Eskridge, Jr. & Frickey, *supra* note 12.

70. *Id.* at 322, 353 (explaining how this “funnel” model represents both the hierarchy of sources and the degree of abstraction of each, and that inquiries from different sources may be less concrete than inquiries from other sources). The Supreme Court applied a version of this “practical reasoning model” to its interpretation of the Copyright Act of 1976 in *Community for Creative Non-Violence v. Reid* (*CCNV v. Reid*), 490 U.S. 730 (1989). In determining the scope of the “work for hire” provisions of the 1976 Act, the Court considered textual, historical, and evolutive inquiries, ultimately determining that the best interpretation of the statutorily undefined term “employee” was the common-law agency definition. The Court’s analysis in *CCNV v. Reid* is instructive for two reasons. First, it provides an example of thorough, reasoned statutory interpretation in the context of the copyright statute. Second, it shows how common law and practical norms often lead to the most natural and useful interpretation of an ambiguous statutory provision. See Peter S. Menell, *The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyam Balganeshe ed., forthcoming 2012), available at <http://ssrn.com/abstract=1895784>.

A. TEXTUAL INTERPRETATION

The Practical Reasoning model first looks at the statutory text, starting with the specific words of the provision and then looking to how the provision fits with related provisions and the general structure of the statute.⁷¹ In looking at the specific words of the statute, case law suggests that adopting the common law meaning of a term often results in the proper construction of a statutory provision.⁷²

As discussed in Part II, *supra*, the interpretation of § 203 hinges on what the statute requires by the word “executed”.⁷³ Both interpretations of this word within the context of § 203—date-of-creation and date-of-agreement—find support in a textualist analysis of this provision. The legal meaning of the term “executed” technically refers to a contract in which nothing remains to be done by either party—an interpretation that supports the date-of-creation interpretation.⁷⁴ However, Congress commonly used the term “executed” interchangeably with the term “signed”, suggesting that the term’s conventional meaning supports the date-of-agreement interpretation.⁷⁵ This Section shows how a textualist interpretation of § 203, in the first phase of Eskridge and Frickey’s model, equally supports both interpretations.⁷⁶

1. *Textual Support for Date-of-Creation*

The basis of the date-of-creation interpretation is that the statute is, in fact, not ambiguous once one assumes that the execution cannot be completed until the copyrighted work actually exists. This interpretation follows the reasoning that an assignment of a copyright is not fully executed

71. Eskridge, Jr. & Frickey, *supra* note 12, at 354.

72. See discussion *supra* note 70; see also Menell, *supra* note 70, manuscript at 30 (“When we examine the substance of modern federal intellectual property law, the judiciary’s imprint and evolving role are unmistakable and profound.”).

73. 17 U.S.C. § 203 (2010).

74. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.1 (3rd ed. 2004); WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 22 (5th ed. 1874).

75. See Comment from Jane C. Ginsburg, Professor, Columbia Univ., to Maria Pallante, Associate Register, U.S. Copyright Office, re: Notice of Inquiry 5–7 (Apr. 27, 2010), available at <http://www.copyright.gov/docs/termination/comments/2010/ginsburg-jane.pdf> [hereinafter Ginsburg Comment].

76. In her comment to the Copyright Office, Jane Ginsburg includes a textualist analysis of the provisions surrounding § 203. The analysis consists of identifying each occurrence of a form of the word “execute” in these provisions and a classification of each use as meaning: (1) signing, (2) something other than signing, or (3) either. However, perhaps unsurprisingly, this endeavor fails to illuminate one clear meaning but instead shows the range of potential meanings Congress apparently assigned to this single word even within this particular portion of the Copyright Act. See Ginsburg Comment *supra* note 75.

until the future interest it purports to grant actually vests in the grantee.⁷⁷ Such vesting cannot occur until the copyright subsists, which under § 201(a) of the 1976 Act occurs upon creation and fixation of the work.⁷⁸ The convincing logic behind this reasoning comes from the support it finds in common law conceptions of contract and property law.⁷⁹ U.S. contract law defines an “executed agreement” as “one in which nothing remains to be done by either party, and where the transaction is completed at the moment that the agreement is made.”⁸⁰ Under this definition, prospective copyright assignments, where the work and thus the copyright in the work do not yet exist, are not “executed agreements.” Instead, such assignments are more akin to “executory agreements,” which transfer a future interest that does not take full effect until a later time.⁸¹

The notion that § 203 requires something other than the signing of the assignment contract also finds support in the context provided by the rest of the Section as well as its surrounding provisions within Title 17. To explain, § 203 permits the termination of non-exclusive licenses which, unlike exclusive licenses, are not subject to the statutory writing requirement and may instead be granted orally or inferred from conduct. Since they are not subject to a writing requirement, non-exclusive licenses need never be signed,

77. See, e.g., Letter from Kenneth D. Freundlich & Neil W. Netanel to Marybeth Peters, Register of Copyrights, U.S. Copyright Office 1–2 (Apr. 30, 2010), available at <http://www.copyright.gov/docs/termination/comments/2010/freundlich-kenneth-neil-netanel.pdf> [hereinafter Freundlich & Netanel Letter] (concluding that full execution of the grant does not occur until the day copyright title vests).

78. See 17 U.S.C. § 201(a).

79. FARNSWORTH, *supra* note 74, § 1.1; see Jake Shafer, *The Gap Years*, L.A. LAW. 2 (Nov. 11, 2011), <http://www.lacba.org/Files/LAL/Vol34No8/2866.pdf>; cf. CCNV v. Reid, 490 U.S. 730 (1989) (construing the Copyright Act using a definition of “agency” consistent with the common law definition of the word).

80. FARNSWORTH, *supra* note 74, § 1.1; STORY, *supra* note 74, § 22.

81. BLACK’S LAW DICTIONARY 369 (9th ed. 2009) (defining an “executed contract” as “a contract that has been fully performed by both parties” and an “executory contract” as “a contract that remains wholly unperformed or for which there remains something still to be done on both sides.”); FARNSWORTH, *supra* note 74, § 1.1; see Shafer, *supra* note 79, at 2 (“If property must exist before legal title can pass, and any contract attempting to transfer such nonexisting property is merely executory, then the execution of any transfer agreement of a gap work should by definition date subsequent to the effective date of the 1976 Act (when legal title would vest) and would thus be terminable under section 203.”); see also Freundlich & Netanel L, *supra* note 77, at 6 (citing *T.B. Harms & Francis, Day & Hunter v. Stern*, a Second Circuit case addressing a contract purporting to transfer rights to all musical compositions the author composed during a five-year period where the court held that “[a]t law one cannot transfer by a present sale what he does not then own, although he expects to acquire it; b]ut, while [such a] contract [is] without effect at law as a contract for sale, it operate[s] as an executory agreement to sell”).

or “executed” in the “signed” sense of the word. Therefore, “a permissible inference may be drawn that within the context of § 203 the term ‘executed’ refers to the date of the completed transaction and not to the date of a signed agreement, because there may be no signed agreement.”⁸² To illustrate this, Professor Ginsburg pointed to an Eleventh Circuit case where the court held an oral copyright license that was never reduced to a signed agreement was still “fully executed” for the purposes of copyright.⁸³

Professor Ginsburg offers a textual analysis of §§ 203, 204, and 205 in which she examines the different possible meanings of the term “executed” in these provisions of the Copyright Act.⁸⁴ She highlights usage that indicates “the perfection of the transaction,” usage consistent with signing or entering into an agreement, and usage that could be consistent with either meaning.⁸⁵ However, the result of this meticulous textual analysis is the simple observation that “[i]n most cases, the signature is all that is needed to effect the transaction, so it’s not surprising that most of the usage of the terms ‘executed’ or ‘execution’ could be interpreted to mean both entering into the agreement, and concluding the transaction.”⁸⁶

2. *Textual Support for Date-of-Agreement*

But date-of-creation is not the only possible interpretation. Textual analysis can also support the date-of-agreement interpretation. First, the term “executed” appears many times in the Act to refer solely to signing or otherwise entering into a contract.⁸⁷ Second, § 203(a)(3) provides an alternative method in some cases for calculating the termination window that clearly contrasts the use of the word “execution” with the word “publication”:

if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of

82. Shafer, *supra* note 79, at 40. Section 203 allows for termination of non-exclusive licenses but the writing requirement of section 204 applies to “transfers of copyright.” 17 U.S.C. §§ 203, 304; *see id.* § 101 (defining the transfer of copyright ownership as “not including a nonexclusive license”); *supra* note 21; Shafer, *supra* note 79, at 36, 39–40; *see also* Ginsburg Comment, *supra* note 76, at 2.

83. Ginsburg Comment, *supra* note 76, at 2 (citing *Korman v. HBC Fla.*, 182 F.3d 1291 (11th Cir. 1999)).

84. *Id.* at 5–7.

85. *See id.*

86. *Id.* at 5.

87. *See, e.g., id.*, at 5–7 (demonstrating the range of uses of the word “execute” in the provisions of the Copyright Act of 1976 surrounding section 203.)

the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.⁸⁸

Thus the text of § 203 shows that Congress considered a model where exploitation of the rights under a grant could not begin immediately upon the date of the agreement, explicitly calculating the termination window in such cases from the date of publication, as required by fairness concerns, to allow the publisher to enjoy a transfer term closer to the thirty-five years envisioned by the statute. This alternative method sits in opposition to the method that starts the termination clock running upon “execution” of the grant.

B. HISTORICAL INTERPRETATION

The next phase of the Practical Reasoning model looks to historical considerations, like evidence of the statute’s background, including policy considerations, to recover its original meaning. Using the legislative history to understand contemporaneous congressional expectations, historical interpretation seeks to approximate congressional intent to resolve ambiguity in the statutory text.⁸⁹ However, interpreting a particular statutory provision in terms of the general purposes of the statute can prove quite difficult.⁹⁰ Even after focusing the inquiry on the original problems Congress was trying to solve by enacting the statute, the interpreter may find several different purposes that pull her towards divergent interpretations of the provision.

Study reveals precisely this kind of bifurcated intent behind § 203, which explains the inconclusive result of the historical inquiry: while the legislative history of the termination of transfer provisions supports reading the statute as referencing a bright-line rule, it simultaneously indicates that Congress had no intention of creating a Gap.⁹¹ Thus, like the textual interpretation, the historical interpretation of § 203 can plausibly support both the date-of-creation and the date-of-agreement interpretations.

1. *Historical Support for Date-of-Creation*

The historical analysis in support of the date-of-creation interpretation is simple: the articulated public policies and delicate balance between authors’ and publishers’ interests that underwrite the termination provisions, discussed in Section I.C, *supra*, provide no logical explanation for excluding

88. 17 U.S.C. § 203(a)(3) (2010).

89. Eskridge, Jr. & Frickey, *supra* note 12, at 356.

90. *Id.* at 358 (“[P]urposivist analysis is inherently ambiguous.”).

91. *See* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001).

Gap Works entirely from termination eligibility. Interpreting § 203 to apply as of the “date-of-agreement” would leave no termination rights at all for the authors of works that happen to fall within the gap. This goes against every stated policy and purpose of these heavily-disputed and finely-tailored termination provisions, which aim to both protect authors and promote distributive justice and fairness.⁹² Undeniably, historical analysis of § 203 shows Congress did not intend to create a gap, and thus supports a date-of-creation interpretation which sweeps the Gap Works within the purview of the provision.

2. *Historical Support for Date-of-Agreement*

However, historical evidence also clearly indicates Congress’ intent to create termination of transfers provisions that function like a bright-line rule.⁹³ At various stages in the general revision process, Congress considered the concern that using the date of a work’s creation as the operative date for determining rights under copyright was impractical.⁹⁴ For example, such concerns provided the impetus to condition the 1976 Act’s copyright duration on the life of the author rather than the date of creation or fixation.⁹⁵ The legislative history further indicates that Congress wanted to avoid drafting the termination of transfers provisions in a way that would present an “open invitation to endless and costly litigation.”⁹⁶ Ambiguity in determining the proper termination window creates problems with exercising termination rights and, due to the commercial value of the underlying works, such disputes will likely result in litigation. Although some disagreement may be unavoidable, Congress expressed a clear preference for designing a regime that avoided difficulties such as routinely having to discern through litigation the elusive date on which a work was completed.⁹⁷

92. Ginsburg Comment, *supra* note 76, at 3.

93. See *Transcript of Meeting*, *supra* note 55, at 38–39; *infra* Section III.C.2.

94. See, e.g., *Joint Publishers’ Comment*, *supra* note 6, at 276 (“[I]t is wholly impracticable to date the commencement of the copyright term from creation of the work. Publishers have no effective way of ascertaining when such creation took place.”).

95. See *Transcript of Meeting*, *supra* note 55, at 38–39.

96. *Book Publishers’ Comment*, *supra* note 6, at 250 (criticizing an early incarnation of the termination of transfers provisions as “extremely impractical in terms of its open invitation to endless and costly litigation in which the publishers might well find themselves at the mercy of the courts, which would have no objective standard to guide them”). Congress ultimately agreed with this assessment, at least to some extent, because it removed the specific provision that was the subject of this gripe.

97. The argument that Congress intended to create a clear, predictable window is further evidenced by the statute’s notice provisions found in 17 U.S.C. § 203(a)(4). See SUPPLEMENTARY REPORT, *supra* note 45, at 4 (“The thought behind the 2- to 10-year limitation on the time for serving notice was to establish a definite period for filing the

The legislative history also strengthens the argument for the date-of-agreement interpretation by contextualizing the alternative method for calculating the termination window when publication rights are included in the grant.⁹⁸ Congress included this alternative method in § 203, which adds up to five years to the operative period in cases where the contract is signed long before publication,⁹⁹ to protect book publishers and other transferee factions who, in their comments to Congress, argued that “in many cases a straight period of 35 years from the execution of the grant would be illusory, since a number of publication contracts are signed before the work is written, and it may be years before it is completed and published.”¹⁰⁰ These concerns show that Congress must have considered the special issues raised by the prospective grant model as it drafted § 203.¹⁰¹ Furthermore, Congress itself illustrated how this alternative method of calculation would operate in practice:

Contract for a book publication executed on April 10, 1980; book finally published on August 23, 1987. Since the 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, 2222 (35 years from publication)¹⁰²

Notably, this illustration clearly assumes that “execution” means the date of the agreement.

Furthermore, several contemporaneous Copyright Office references indicate that date-of-agreement was the accepted meaning of § 203 at the time the statute was enacted. Specifically, the Copyright Office’s *General Guide to the Copyright Act of 1976* not only gives an example of a Gap Work but also

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.”).

98. This is discussed in Section III.A.2, *supra*.

99. See 17 U.S.C. § 203(a)(3) (2010); SUPPLEMENTARY REPORT, *supra* note 45, at 75.

100. SUPPLEMENTARY REPORT, *supra* note 45, at 75; see also S. REP. NO. 94-473, at 65 (1975) (“This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.”).

101. In a recent piece published in a practitioners’ journal, Jake Shafer asserts that “[t]his rationale supports the argument that Congress understood the dilemma facing the publishing industry regarding transfer agreements entered into before the delivery of a work and intended the date of execution to be synonymous with the date of the signed agreement.” Shafer, *supra* note 79, at 39.

102. S. REP. NO. 94-473, at 65.

notes that some grants simply “would not be subject to termination.”¹⁰³ That the Copyright Office was already considering this scenario three decades ago seriously undermines assertions that historical evidence supports interpreting the statute so as to eliminate the Gap Works problem. Rather, Congress may even have been fully aware of this result, which would be consistent with choosing date-of-agreement as the proper context for the word “executed”.

C. PRACTICAL REASONING INTERPRETATION

This final phase of interpretation considers sources that reflect how the statute has evolved over time, taking into account social and legal circumstances not anticipated during the statute’s enactment and importing current values, such as modern ideas of fairness related to statutory policies, into the analysis.¹⁰⁴ Unlike the previous two interpretive inquiries, the practical reasoning analysis of § 203 yields only one superior interpretation: date-of-agreement. Despite the fact that such an interpretation would leave Gap Works creators without a right of termination, the certainty and efficiency of a date-of-agreement scheme far outweigh its costs in lost protection.

1. *Practical Reasoning Provides Limited Support for Date-of-Creation . . .*

Since Gap Works, by definition, were created after January 1, 1978, the date-of-creation interpretation simply deems the grants executed after that date, fitting them squarely within the scope of § 203 and affording the creator with a right of termination of transfer, eliminating the Gap entirely.¹⁰⁵ This practical result accords with the fact that, as discussed in Section III.B.1 *supra*, there is no apparent explanation for why Congress excluded this particular group of works from the termination of transfer regime.¹⁰⁶ Another practical advantage of this interpretation is that every assignee would enjoy an equal, thirty-five-year assignment term before becoming vulnerable to § 203 termination, rather than having the term shortened when creation lags behind the signing of the assignment contract. Since both of these results

103. COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 § 6.6 (1977), available at <http://www.copyright.gov/reports/guide-to-copyright.pdf>; see also SUPPLEMENTARY REPORT, *supra* note 45, at 74–75.

104. Eskridge, Jr. & Frickey, *supra* note 12, at 359.

105. See 17 U.S.C. § 203(a) (2010) (“[T]he 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 . . .”).

106. See Ginsburg Comment, *supra* note 76, at 3 (“The text of the statute and its legislative history amply demonstrate Congress’ intent that authors should enjoy enforceable termination rights. The statute should be interpreted to cover as many works as possible (other than works made for hire).”).

appear consistent with notions of fairness and distributive justice, the date-of-creation interpretation holds substantial practical reasoning appeal.

2. . . . *But It Ultimately Favors Date-of-Agreement*

Nonetheless, practical reasoning dictates the superiority of the date-of-agreement interpretation for two reasons: (1) the date-of-agreement model is an accepted norm in other intellectual property transfer regimes, and (2) the certainty derived from the bright-line rule this interpretation creates promotes efficient business practices in the industries most affected by § 203.

a) Accepted Norm in Other Intellectual Property Transfer Regimes

Practical reasoning favors interpreting the statute to allow execution of prospective assignments to be synonymous with the signing of the assignment contract in part because this is the accepted practice in other areas of intellectual property. For instance, assignment agreements transferring patent ownership frequently cover future inventions—i.e., those inventions for which applications have not yet been issued or filed, or that have not yet been conceived.¹⁰⁷ When a party makes a grant of rights to an invention that has not yet been made, the grant is accepted as sufficient to transfer the title to the invention as soon as it comes into being, requiring no further action to implement or confirm the grant.¹⁰⁸ Although courts have not had the opportunity to directly consider comparable grants of copyrights, it has long been established that a valid transfer of rights under copyright can be made before those rights vest.¹⁰⁹

107. Jake Shafer explains,

Patent assignment agreements are contracts transferring patent ownership in all patents generated in a defined time, often the duration of employment. In a recent decision, the Federal Circuit reaffirmed its position, declaring that if a “contract expressly conveys rights in future inventions, no further act is required once an invention comes into being, and the transfer of title occurs by operation of law.” With patents, as with copyrights, the property must exist before title can vest. However, there is no statutory termination-of-transfer mechanism in patent law, and therefore the determination of the date of execution for such purposes has never been an issue.

Shafer, *supra* note 79, at 39 (internal citation omitted).

108. *DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1289–90 (Fed. Cir. 2008); *Speedplay, Inc. v. Bebop, Inc.*, 211 F.3d 1245, 1253 (Fed. Cir. 2000).

109. Reply Comments of the Recording Industry Association of America, Inc. at 4 n.1, *In re Gap in Termination Provisions; Inquiry* (U.S. Copyright Office, Library of Congress), May 21, 2010, available at <http://www.copyright.gov/docs/termination/comments/2010/reply/riaa.pdf> [hereinafter RIAA Comment]; see, e.g., *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (finding author’s assignment of renewal rights made

b) Certainty Promotes Efficient Business Practices in the Industries
Most Affected by § 203

Another rationale favoring the date-of-agreement interpretation is that to actually represent a meaningful compromise between the interests of authors and publishers, the termination of transfers provisions must be useful for both parties, and usefulness requires legal predictability. Even proponents of the date-of-creation interpretation acknowledge its inherent practical difficulties, noting that the date of creation of a work may prove indefinable in part because “Authors’ abilities to recall or document the month and day on which they completed creating a work may be more uncertain.”¹¹⁰ Furthermore, the resultant uncertainty could result in costly litigation or discourage parties from exercising their termination rights in the first place.

Accordingly, despite the theoretical and philosophical appeal of the date-of-creation interpretation, both transferors and transferees (e.g., authors and publishers) are, as a practical matter, likely to find the date-of-agreement interpretation more appealing. A transferee that cannot clearly and definitely discern the finite period during which it will be vulnerable to termination of its rights in the work will likely be reluctant to invest in any projects concerning that work. Despite shortening the term of their assignment if a creator exercises the termination right, transferees may still find this clear definition more attractive because it provides a certain date that better allows them to assess their exposure, to plan ahead for potential terminations, and to determine with certainty when the termination window has expired and

before initial term expires is valid if the author is alive at the commencement of the renewal period). The RIAA further argues that “grants of rights to works that do not yet exist are common, and important to commerce involving copyrighted works.” RIAA Comment, *supra*, at 4 n.1.

110. Ginsburg Comment, *supra* note 76, at 3. But Ginsburg notes that “the statute offers evidence of Congress’ expectation that the author should be able to identify the actual date” referencing 17 U.S.C. § 409(7) (application for registration “shall include” “the year in which creation of the work was completed.”). *Id.* Furthermore, even if an author keeps immaculate records of her creative process, which is a highly unlikely proposition, at what stage in this often-fluid process will a work be deemed to have been created? An author often goes through many drafts and revisions before arriving at the work that is eventually published or distributed by the assignee. Yet, the preliminary versions of a work are likely copyrightable themselves and provide the foundation for the later work, not to mention may allow the transferee to begin exploiting the work (think of a motion picture/ TV script acquisition—the script is constantly in flux, but the studio is still able to move forward on development and perhaps production). Thus, under an interpretation of §203 that looks to the date of creation in calculating the termination window for prospective assignments, there would be substantial difficulty in determining any precise dates. As a result, the transactional efficiency that accompanies predictability would vanish and transferees would be unable to know their rights with any certainty.

their rights are no longer vulnerable. Likewise, an author who is uncertain about how to calculate the termination window and confused about how the process works may decide not to exercise her rights at all. Thus, transferors benefit from this interpretation because it allows them to readily comply with § 203's notice requirements and exercise their rights without having to untangle a vague "creation" requirement or respond to objections by the transferee in the likely case that such a date is not clearly defined. Analysis of three major industries where the termination of transfer provisions will have the greatest impact leads to the undeniable conclusion that the date-of-agreement interpretation is the superior one.

i) Film and Television Production and Distribution

Rights acquisition in the film and television industries varies significantly from some other creative industries primarily because screenplays and motion pictures, unlike sound recordings and a number of other creative works, can both be created as works for hire.¹¹¹ As discussed in Section I.B, *supra*, works for hire are not subject to termination.¹¹² This statutory exception arose following strong lobbying by the Motion Picture Association of America ("MPAA") and other interested parties during the general revision process.¹¹³ Still, the impending tidal wave of § 203 will inevitably make a splash in this multi-billion dollar industry.

As a general practice, motion picture and television studios require all contributing talent (e.g., directors, writers, producers) to sign a certificate of authorship before they can receive any compensation.¹¹⁴ This agreement sets forth the parameters of the employment relationship—be it that of employee or independent contractor.¹¹⁵ The agreement usually stipulates that all future contributions will be deemed "for hire," making the studio the sole author and owner of all copyright interests in the work.¹¹⁶ In cases where a studio acquires content that already exists, it will have the author assign all of the rights in such content to the studio in some sort of option or purchase agreement.¹¹⁷ However, the studio can never retroactively become the statutory author of the work simply by contractually defining the previously

111. 17 U.S.C. § 101 (2010) (defining "work made for hire").

112. *Id.* § 203.

113. *Book Publishers' Comment, supra* note 6, at 250.

114. APPLETON & YANKELEVITS, *supra* note 68, at 232.

115. *Id.* at 247.

116. *Id.* at 232.

117. *Id.*

created work as one “made for hire.”¹¹⁸ These cases are where studios are vulnerable to termination of transfers.

In anticipation of the first wave of terminations, motion picture and television studios have undertaken extensive reviews of their libraries.¹¹⁹ Their goal in this process is to determine the periods during which the rights to properties acquired by assignment or license may be vulnerable to termination. By doing this, the studios can prepare for the worst-case scenario and advise the appropriate internal departments on what can and cannot be done with the properties upon such termination. Identifying periods during which properties are vulnerable also allows studios to know if and when such windows have passed.¹²⁰ Underlying this endeavor is the assumption that the studios can easily ascertain such periods. Studios have likely been conducting their reviews and assessing their vulnerability based on the dates of the assignment contracts, under the assumption that such dates represent the dates of “execution” for the purposes of § 203. Adopting the date-of-creation interpretation instead would force the studios to undertake the massive task of retroactively discerning this often elusive date and recalculating their dates of termination vulnerability.

ii) Book Publishing

In the context of book publishing the two interpretations could produce vastly different results. Most book publishing deals are signed in advance of creation and delivery of the final manuscript, meaning the interpretation of “executed” in § 203 is crucial. Publishers attempting to plan ahead for impending terminations by authors of works with particular commercial longevity are also likely basing such calculations on the plain language of the statute, or the date-of-assignment interpretation. Section 203 explicitly allows the five-year termination window to begin at the earlier of thirty-five years after publication or forty years after “execution of the grant” whenever publishing rights are included in the grant. Under a date-of-agreement interpretation, publishers can sign a work up to five years prior to its publication without suffering a shortened assignment period; book publishers probably never considered basing their calculations on the date of creation.¹²¹

118. *See* 17 U.S.C. § 101 (2010).

119. *E.g.*, Keith Blau, General Counsel, Universal Motion Picture Grp., Guest Lecture in LAW 278.75 Entertainment Law: TV and Film, University of California, Berkeley, School of Law (Nov. 14, 2011) (lecture notes on file with author).

120. *Id.*

121. *See* 17 U.S.C. § 203(a)(3).

The situation that Congress expressly anticipated—of publication occurring up to five years after contract signing—may arise because the publisher delayed publication of a ready work for whatever reason, or because an author created or delivered the work more than five years after the signing of the contract, thereby delaying the publication.¹²² Thus, as discussed in Section III.A.2, *supra*, Congress designed the statute to account for complications caused by prospective grants in the book publishing context, basing the two alternatives on two easily-discernible dates: the date of publication and the date of the agreement.¹²³

iii) Music Publishing

The termination of transfers provisions, in general, present significant issues for parties involved in music publishing.¹²⁴ The issues surrounding what is required for a grant to be “executed” within the meaning of § 203 are especially acute in this arena, not just because neither the work-for-hire exception nor the alternative method for calculating based on date of publication apply, but also because of certain well-established industry practices.

Music industry custom, both today and over at least the last four decades, involves exclusive term contracts between music publishers and songwriters.¹²⁵ Pursuant to such contracts, a writer must deliver to the publisher all compositions she creates during the term of the contract.¹²⁶ During the 1960s, 1970s, and 1980s the term of an exclusive term contract was “typically measured by yearly periods, with an initial period of one year plus up to four one year option periods exercisable by the publisher.”¹²⁷ Thus, not only is the Gap Works issue invoked in cases where the term of a pre-January 1, 1978 contract extends beyond 1977, either because the term straddles this date or by the publisher’s exercise of options, but moreover, nearly every work in this context that becomes ripe for termination involves a prospective assignment and thus implicates the statutory interpretation at issue in this Note.

122. *See id.*

123. *See supra* Section III.B.2 (showing the only logical meaning of “executed” in § 203(a)(3) is the date of the agreement).

124. *See* Adam Halston Dunst, *It’s Mine! No, It’s Mine! No, It’s Mine!*, 7 VAND. J. ENT. L. & PRAC. 382 (2005); David Nimmer & Peter S. Menell, *Poob-Poobing Copyright Law’s ‘Inalienable’ Termination Rights*, 57 J. COPYRIGHT SOC’Y U.S.A. 799 (2010); 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 (2001).

125. PASSMAN, *supra* note 7, at 136–42; Letter from Perlstein to Pallante, *supra* note 7.

126. PASSMAN, *supra* note 7, at 136–42; Letter from Perlstein to Pallante, *supra* note 7.

127. Letter from Perlstein to Pallante, *supra* note 7.

Leaving aside any consideration of the Gap Works debate, music publishers should generally favor the date-of-creation interpretation because it would allow them to enjoy a full thirty-five year term on each work regardless of when during the exclusive term a songwriter delivers it. By parallel logic, a songwriter should favor the date-of-agreement interpretation as it cuts short the term of the assignments, allowing him to quickly regain rights in works delivered late in the exclusive term. Interestingly, however, the Gap Works debate reverses these positions because the date-of-creation interpretation allows songwriter-transferors to terminate their Gap Works transfers under § 203, while the date-of-assignment interpretation bars them from doing so.¹²⁸

Another industry practice that could potentially complicate matters even more for the music industry than for other creative industries is the “single song” songwriter contract. Under some circumstances, the songwriter will either write a long-form contract or sign a short form memo identifying the title of the new work, co-writers, and date of delivery to the publisher for each composition delivered under an exclusive term contract.¹²⁹ If such a document exists, it may supersede the exclusive term contract and provide a new, later execution date under the date-of-agreement interpretation for the purposes of § 203. However, veteran music attorney Michael Perlstein writes that under industry practices in the 1960s, 1970s, and 1980s, “it was more the case for the writer simply to deliver a composition to the publisher without any written acknowledgement or new single song contract.”¹³⁰ Thus, most transfers of copyrights are made pursuant to the original term deals.

As a result of the disparate outcomes that each interpretation may produce in this context, music publishers and songwriters alike will look to § 203 for guidance, not only to resolve the Gap Works issue, but also to understand if and when prospective assignments of copyrighted works are subject to termination. Since the date of the original agreement, in most scenarios, represents the only bright-line date from which to calculate the termination window, interpreting the statute to reference the agreement date will produce a more efficient, useful rule.

128. Since only a select few works have continuing commercial value three decades after their initial creation, publication, or exploitation, the gap works issue may be significant enough in the minds of interested parties to cause them to support an interpretation of § 203 today that, nevertheless, might not serve their interests in the long run.

129. Letter from Perlstein to Pallante, *supra* note 7.

130. *Id.*

D. A PRACTICAL BUT IMPERFECT SOLUTION

Despite convincing counterarguments, interpreting “executed” within the context of § 203 to refer to the date of the assignment contract produces a sound result: given equally convincing textual and historical justifications for both the date-of-creation and date-of-agreement interpretations, practical concerns justify favoring the latter interpretation. Nonetheless, this interpretation yields the highly undesirable outcome of allowing Gap Works to slip through the cracks of Title 17’s termination of transfers provisions, against congressional intentions. But, since the interpretation of this provision will dictate how the termination of transfers scheme will operate moving forward for the life of the statute, it is crucial to think beyond the Gap.

The apparent congressional oversight that created the Gap Works problem in the first place does not justify creative judicial re-construction of the statute in order to fix poor drafting. In fact, it is often the case with bright-line rules that some cases fall just outside the line and are denied protection, sometimes flagrantly affronting fairness concerns.¹³¹ Moreover, once it has been established that the statute in fact refers to the date of the assignment contract, Congress may be tempted to retroactively revise the termination of transfer provisions specifically to address the Gap Works problem. Despite the apparent attractiveness of this solution, Congress’ power to do this may be limited.¹³² Congress has often created exceptions or transitions to allow for the efficient operation of new laws, allowing transitional periods to ensure that parties had proper notice and that rules were in compliance with due process.¹³³ But in this case, the due process and just compensation clauses of the Fifth Amendment indicate that a retroactive “band-aid” applied to the statute for the purpose of providing authors of Gap Works a right to terminate would simultaneously deny transferees a vested and relied-upon property interest, thus constituting a taking.¹³⁴ Once courts recognize that, properly construed, § 203 refers to the date of the

131. Consider, for example, the notion of a Statute of Limitations.

132. *See* *Roth v. Pritikin*, 710 F.3d 934, 939 (2d Cir. 1983) (“An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”); *see also* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000–16 (1984) (finding a property interest in trade secrets protected by the takings clause of Fifth Amendment; government use and disclosure of trade secrets may constitute a taking).

133. For example, although the Copyright Act of 1976 was signed into law on October 10, 1976, it did not become effective until January 1, 1978.

134. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

agreement, not the date of creation, they will likely have little power to correct the Congressional oversight that created the Gap Works problem.

IV. CONCLUSION

From their conception during the mid-twentieth-century, termination of transfers provisions have been a contentious issue for interested parties.¹³⁵ Though the final statutory provisions present a carefully crafted scheme and a public policy compromise, their successful operation and practical utility will ultimately rest on careful statutory interpretation. The Gap Works issue has illuminated the threshold necessity of interpreting one specific ambiguity in § 203. Whether courts faced with the task of determining what Congress meant by “executed” within the context of § 203 decide to follow the date-of-creation or the date-of-agreement interpretation will determine whether authors of Gap Works have the right to terminate transfers of their copyrights at all. More importantly, however, the final interpretation will define the contours of the § 203 termination of transfers scheme and provide a guide for its operation for the life of the statute. Therefore, given that both interpretations enjoy even textual and historical support, the concerns of certainty, efficiency, and practicality strongly favor the date-of-agreement interpretation as the superior one.

135. *See supra* Section I.C.

APPENDIX: SECTIONS 203 AND 304(C) COMPARED

	§ 304(c)	§ 203
Type of Grants Covered	Applies to grants made by the author or a renewal beneficiary specified under § 304(a). ¹³⁶	Only applies to grants made by the author. ¹³⁷
Who Can Terminate When Author is Living	The author or, for joint works, a majority of authors of a joint work. ¹³⁸	The author or, for joint works, the majority of authors who executed the grant. ¹³⁹
Who Can Terminate When Author is Dead	The surviving widow(er) and/or children own the termination interest. ¹⁴⁰	A majority of owners of author's termination interest (widow(er) and/or children, or if none are living, the author's executor, administrator, personal representative, or trustee). ¹⁴¹
Timing of Termination	May be effected during a five-year window beginning at the end of fifty-six (56) years from the date copyright was originally secured. ¹⁴²	May be effected during a five-year window beginning at the end of thirty-five (35) years from the date of execution of the grant. ¹⁴³ If the grant covers the right of publication, the window begins at the earlier of thirty-five (35) years from the date of publication or forty (40) years from the date of execution of the grant. ¹⁴⁴
How To Terminate	Termination may be effected by serving advanced written notice no less than two (2) or more than ten (10) years before the desired effective date. ¹⁴⁵ Notice must be recorded in the Copyright Office before the effective date of termination and such notice must comply with Copyright Office regulations. ¹⁴⁶	

136. 17 U.S.C. § 304(c)(1).

137. *Id.* § 203(a).138. *Id.* § 304(c)(1)–(2).139. *Id.* § 203(a)(1)–(2).140. *Id.* § 304(c)(1)–(2); *see* H.R. REP. NO. 94-1476, at 125 (1976).

141. 17 U.S.C. § 203(a)(2).

142. *Id.* § 304(c)(3).143. *Id.* § 203(a)(3).144. *Id.*145. *Id.* §§ 304(c)(4), 203(a)(4).

146. 37 C.F.R. § 201.10 (2011).

	§ 304(c)	§ 203
Effect of Termination	All rights revert to those having the right to terminate. ¹⁴⁷ Continued exploitation of derivative works prepared under the authority of the grant allowed, but no new derivative works after the termination date. ¹⁴⁸	
Entitlement to Make Further Grants	Owners of a reverted right are tenants-in-common who can independently authorize further grants if signed by the same number and proportion as are required to terminate. ¹⁴⁹	There is no tenancy-in-common, but rather the same number and proportion as required for termination is required for further grants. ¹⁵⁰

147. 17 U.S.C. §§ 304(c)(6), 203(b)(3).

148. *Id.* §§ 304(c)(6)(a), 203(b)(1).

149. *Id.* § 304(c)(6)(D).

150. *Id.* § 203(b).