

IT'S ONLY A DAY AWAY: RETHINKING COPYRIGHT TERMINATION IN A NEW ERA

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ABSTRACT

January 1, 2013 marks the beginning of an important shift in U.S. Copyright Law. On that day, for the first time, authors who signed over their creative rights to a producer, publisher, or other “litigation-savvy” grantee under the current Copyright Act will begin to enter a window of time within which they may terminate those prior grants of rights and reclaim their original copyrights. Of course, such actions are unlikely to go unchallenged, as many of these works generate billions of dollars of revenue for their current owners. This Article will examine the “new-works termination” provision of the Copyright Act, which has been a part of the Act since its inception in 1976 but will only now begin to have any practical effect, by examining likely legal challenges to the statute and possible strategies for avoiding the effects of the law. Ultimately, by examining analogous case law and the language of the statute itself, this Article will conclude that, by conceptualizing termination as a contingent right, judges, scholars, and litigators will be better able to understand and interpret the contours of this little-understood provision.

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A work is worth only what someone is willing to pay for it. But what happens when an author sells a creative work to a distributor for one price, but the work later turns out to be worth much more? This scenario is not common, but when it does occur, it usually involves an instantly recognizable creation: *Captain America*, *Lassie*, “When Irish Eyes Are Smiling,” and the works of John Steinbeck are just a few of the works whose profitability quickly outgrew the price their authors earned when granting away their rights. Another familiar character, Winnie the Pooh, was sold in 1930 for a thousand dollars.¹ Today, Disney makes as much as six billion dollars per year on the Winnie the Pooh franchise alone.²

¹ *About Stephen Slesinger, Inc.*, STEPHEN SLESINGER, <http://www.stephenslesinger.com/index.php?id=33> (last visited Nov. 10, 2012).

² See Dominic von Riedemann, *Winnie the Pooh and Cheetah Girls*, SUITE 101 (June 10, 2008), <http://suite101.com/article/winnie-the-pooh-and-cheetah-girls-a55429>.

One point of view (the “authors’ rights” view) is that emerging creative authors are in such a poor bargaining position with respect to companies who buy and license their creative works that copyright law must protect authors in some way against “unremunerative transfers.”³ Opposing this viewpoint (the “right to contract” view) is the reality that producers and publishers take as many risks as creative authors; copyright law has no business stepping on the toes of simple contract law, and the grantees of creative work should be permitted to derive the full economic benefit for which they bargained.⁴

Copyright law is structured to strike a balance between these competing interests. Two provisions in the Copyright Act give authors the power to regain copyrights they previously contracted away through a rarely utilized process known as “copyright termination.”⁵ The first provision, which this Article will refer to as the “old-works termination” statute, has been litigated frequently and governs grants of rights issued before 1978 (when the current Copyright Act went into effect).⁶ The second provision, which this Article will refer to as the “new-works termination” statute, is effective as of January 1, 2013⁷ and has yet to be litigated.⁸

This Article anticipates potential legal challenges to new-works termination, modeled after the litigation surrounding old-works termination. Unfortunately, the holdings of the old-works termination cases are wildly inconsistent,

³ H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740.

⁴ Adam R. Blankenheimer, *Of Rights and Men: The Re-alienability of Termination of Transfer Rights in Penguin Group v. Steinbeck*, 24 BERKELEY TECH. L.J. 321, 322 (2009) (“The Steinbeck decision . . . illustrates the tension between Congress’s intent to prevent authors and their heirs from selling future copyright interests and courts’ unwillingness to curtail freedom of contract.”).

⁵ *Cf.* H.R. REP. NO. 60-2222, at 14 (1909) (describing the legal predecessor to termination, copyright renewal, as occurring in “comparatively few cases” and limited to “the exceptional case of a brilliant work of literature, art, or musical composition.”).

⁶ 17 U.S.C. § 304(c) (2006); *see, e.g.*, *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

⁷ 17 U.S.C. § 203.

⁸ *But see* *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 585–86 (9th Cir. 1993) (holding that section 203 preempts California state law allowing termination of any contract at will by either party). It is, perhaps, more accurate to clarify that the practical effects of the specific provisions of the new-works termination provision have never been litigated. At the time this Article was going to print (January of 2013), the first individual battles over the meaning of section 203 were just beginning. *See, e.g.*, *One, LLP, Famed YMCA Song Center Stage in Copyright Termination Battle*, INFRINGEMENT NATION, <http://onellp.com/blog/famed-ymca-song-center-stage-in-copyright-termination-battle/> (last visited Jan. 14, 2013).

even within the same circuit.⁹ Without a clear model of analysis, courts will be ill-prepared to face the bevy of unprecedented litigation concerning termination rights that will become exercisable for the first time in 2013 and beyond. This Article proposes a new method of analysis: conceptualizing copyright termination as a conditional, exclusive right. Courts and litigants may understand both old- and new-works termination as a right that authors may sell (or waive) once it fully vests and that it fully vests only when authors can properly invoke it. In other words, if an author cannot terminate in that moment, then that author, similarly, cannot sell (or waive) his termination right for the future. To aid in this analysis, consider this real-life scenario:

The authors of *Annie*, the stage musical based on the *Little Orphan Annie* comic strip, sold the film rights to the play in 1978, making it one of the first transactions to fall under the purview of the current Copyright Act.¹⁰ Columbia Pictures currently owns the exclusive right to any film adaptations of *Annie*.¹¹ In 2009, however, the original authors filed a notice of termination, which, in effect, would revert the film rights back to the authors on December 30, 2013.¹² The authors likely terminated their grant so that they could re-grant the rights to Will Smith, who plans to remake the classic film starring his daughter, Willow.¹³ Using Columbia Pictures and the film rights to *Annie* as an example, this Article will explore the uncharted territory that is new-works termination.

Part I will consider contractual strategies a grantee could use in an effort to prevent an author from exercising their new-works termination rights. Part II will examine possible legal challenges to new-works termination by examining the holdings of the old-works termination cases of *Captain America*, *Winnie the Pooh*, *Lassie*, and the works of John Steinbeck, concluding that the law is inconsistently applied in both the Second and Ninth Circuits and is not a sufficient

⁹ See Allison M. Scott, *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split Over the Alienability of Copyright Termination Rights*, 14 J. INTEL. PROP. L. 357, 360 (2007) (“[T]he purpose of this Note is to show the true tension between decisions within the Second and Ninth Circuits and to address those circuits’ divergent approaches towards the interpretation of termination rights.”).

¹⁰ LITTLE ORPHAN ANNIE, Registration No. R 250-793, Doc. No. V1715P224 (filed Mar. 26, 1979), available at <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi> (input “V1715P224” into search box, search by document number).

¹¹ *Id.*

¹² ANNIE, Registration No. RE 918-254, Doc. No. V3564D197 (filed Oct. 27, 2009) (termination effective Dec. 30, 2013), available at <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi> (input “V3564D197” into search box, search by document number).

¹³ Nardine Saad, *Willow Smith as ‘Annie’? Will Smith, Jay-Z Could Bring It*, L.A. TIMES, Jan. 20, 2011, 7:31 PM, <http://latimesblogs.latimes.com/gossip/2011/01/willow-smith-annie-remake-jay-z-will-smith.html>.

proxy for new-works termination. Finally, Part III will provide a framework for resolving new-works termination issues by arguing that termination should be treated as a conditional right, and Part IV will apply that framework to the upcoming termination of the *Annie* film rights.

I. “EASY STREET”¹⁴: INTRODUCTION TO STATUTORY COPYRIGHT TERMINATION

Imagine you are the lead negotiator for Columbia Pictures in 1978. Your assignment: to secure the film rights to *Annie* from the authors. Film rights, like most creative rights, are protected and governed by the Copyright Act of 1976.¹⁵ Embodied in various sections of Title 17 of the U.S. Code, copyright law protects original works of authorship fixed in a tangible medium of expression¹⁶ and is designed to encourage further creation and public dissemination of creative work by allowing authors to derive economic value from their creative output.¹⁷ The Act accomplishes this goal by granting authors various exclusive rights to their works,¹⁸ including the right to prepare derivative works,

¹⁴ MARTIN CHARNIN & CHARLES STROUSE, *Easy Street, in ANNIE* (1977).

¹⁵ 17 U.S.C. § 102(a)(6) (2006).

¹⁶ *Id.* § 102(a).

¹⁷ *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[Copyright law] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

¹⁸ 17 U.S.C. § 106. The pertinent text of the section reads:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

such as developing a film from a stage play.¹⁹ Further, authors are specifically guaranteed the right to sell or lease any portion of these rights to whomever they wish, in what this Article, for ease, will deem the “transfer provision.”²⁰

Authors own the exclusive rights to make a film from their work, and they may transfer that right via contract. Therefore, it would seem that Columbia Pictures merely needs to negotiate the terms of the contract, and they will own the film rights until the work gets so old that it falls out of copyright protection and into the public domain. Such a transaction is not that simple, however. Deeper within the Copyright Act is a provision entitled “Termination of Transfers”; this new-works-termination statute allows authors to terminate a prior grant of an exclusive right beginning thirty-five years from the date of the execution of the grant.²¹ Therefore, if a grant is made on December 30, 1978, the authors will be able to terminate the contract and regain the film rights to their work beginning on December 30, 2013.²² Although the authors must provide between two and ten years notice before termination—thereby providing the original grantee an opportunity to renegotiate the deal—Columbia Pictures (like most large production companies) would prefer to address this potential hurdle in the initial agreement to avoid future ownership issues.²³

Id.

¹⁹ *Id.* §§ 101, 106(2) (defining “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”).

²⁰ *Id.* § 201(d)(2) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”).

²¹ *Id.* § 203. The ability to terminate only lasts five years, however; if termination does not occur between thirty-five and forty years after the grant, the termination window closes forever. *Id.* § 203(a)(3). Slightly different date ranges cover grants of the right of publication. *Id.*

²² *ANNIE*, *supra* note 12.

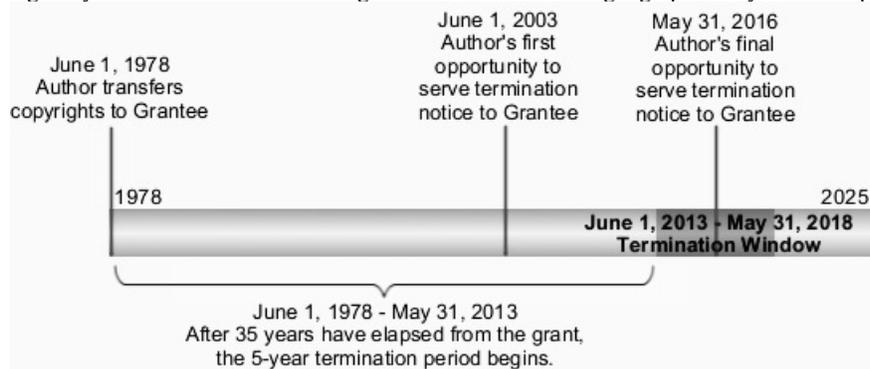
²³ *Id.* § 203(a)(4)(A). The notice requirement means that, in effect, authors have a thirteen-year window in which they can serve notice of termination that runs from twenty-five to thirty-

Three options present themselves: (1) simply accept that statutory termination is a possibility and discount the price of the license accordingly; (2) sign the initial contract, then at some point in the future renegotiate the grant, providing the authors with more money in exchange for a new thirty-five year extension of the right; or (3) convince the authors to agree to never exercise the termination provision and insert language into the contract to that effect. The third option provides the best combination of security and cost effectiveness, but will such a strategy work? Unfortunately, like seemingly all issues involving statutory termination, the answer is complicated.

A. “There’s a Tear in Your Eye, and I’m Wondering Why”²⁴: Fred Fisher Music Co. and the Destruction of Authors’ Rights

The strategy embodied in Option 3—a preemptive agreement not to terminate—was implicitly permitted by the Supreme Court in 1943 in *Fred Fisher Music Co. v. M. Witmark & Sons*.²⁵ There, the Court was asked to rule on the copyright ownership of “When Irish Eyes Are Smiling,” whose original authors had sold the song title and all rights to the music publishing firm M. Witmark & Sons during the initial copyright term.²⁶ This case dealt not with statutory termination, which did not exist prior to 1978, but rather with the pre-

eight years after the initial grant. The following graph may be helpful:



How Do I Terminate?, KEEP YOUR COPYRIGHTS, <http://www.keepyourcopyrights.org/copyright/reversion/termination/how-do-I> (last visited Jan. 3, 2012).

²⁴ CHAUNCEY OLCOTT & GEORGE GRAFF, JR., *When Irish Eyes Are Smiling* (1912).

²⁵ 318 U.S. 643, 657 (1943).

²⁶ See *id.* at 645.

decessor to termination: the right of renewal.²⁷ Though the structure of copyright law has changed, the rationale behind *Fred Fisher Music Co.* provided the impetus for that change, and so a full examination of the case is essential for a complete understanding of the philosophical underpinnings of the termination right.

Prior to 1978, an author could receive copyright protection for one “term” of years.²⁸ At the conclusion of that term, the author and only the author (or the author’s heirs, if the author had died) could renew the copyright for an additional term.²⁹ This system was designed to protect the authors (the same “authors’ rights view” that is still relevant today). As the House Committee noted at the time they passed the renewal system:

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success . . . your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that he could not be deprived of that right.³⁰

The Court, however, disagreed with such an explicit purpose and instead held that authors could assign their renewal rights away (presumably to a publisher) during the initial term of copyright.³¹ Favoring the right-to-contract approach, the Court suggested that it was protecting authors’ freedom of contract, for authors who had “devised means of safeguarding their interests.”³² Further, the Court cautioned against taking sides in the policy debate, noting that “[i]t is not for courts to judge whether the interests of authors clearly lie upon one side of this question rather than the other.”³³

The strategy for securing the film rights to *Annie* in perpetuity—by paying additional consideration so the authors agree never to exercise statutory termination—would appear sound based on this Supreme Court precedent. But this precedent did not survive to the present day. The *Fred Fisher Music Co.* decision had a disastrous effect on artists’ rights in the United States in the subsequent three decades.³⁴ An industry practice developed quickly in the publish-

²⁷ See *id.* at 657.

²⁸ Act of March 4, 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075.

²⁹ *Id.* § 24.

³⁰ H.R. REP. NO. 60-2222, at 14 (1909).

³¹ See *Fred Fisher Music Co.*, 318 U.S. at 657.

³² *Id.*

³³ *Id.*

³⁴ See, e.g., Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1344 (2010) (“The Supreme Court signif-

ing industry (as well as analogous industries like film and music) to force artists to contract away their rights in both the initial and the renewal terms in the first production contract they signed, which effectively destroyed any purpose the two-term structure once had.³⁵ Ultimately, the *Fred Fisher Music Co.* effect was recognized and reversed when Congress switched to a single-term structure with provisions for old- and new-works termination in 1978, when the current Act went into effect.³⁶

B. “Yesterday Was Plain Awful”³⁷: Statutory Termination Under the Current Copyright Law

Under the current law, an author may terminate a prior grant “notwithstanding any agreement to the contrary.”³⁸ That sounds ominous and potentially far-reaching. But what does it mean? The statute itself provides some clues; namely, it modifies the phrase “any agreement to the contrary” with the clause “including an agreement to make a will or to make any future grant.”³⁹ This language refers to agreements to agree, and not agreements NOT to terminate, so they do not seem to apply here. The legislative history of the Act, however, sweeps more broadly: “[A]lthough affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away.”⁴⁰ Congress wanted to prevent the exact sort of advance waiver permitted in *Fred Fisher Music Co.*,⁴¹ so the options to prevent termination appear limited. The House Report referenced above, however, refers to an author’s act of termination as a “right”—should not an author therefore be able to sell the right to

icantly undermined the benefit to authors and their families of the reversionary aspect of the renewal term by holding that agreements assigning the renewal term were valid, even if executed before the renewal term had vested. . . . If the renewal term was meant to give authors the opportunity to renegotiate their compensation, permitting assignments of contingent interests made that benefit largely illusory.”)

³⁵ See *id.* (“[I]t became standard practice in the [publishing] industry not only to have the author assign his or her interest in the ‘initial and all renewal terms’ but also to require the author’s spouse and even children to assign their contingent interest in the renewal term as well.”).

³⁶ See H.R. REP. NO. 94-1476, at 127 (1976).

³⁷ MARTIN CHARNIN & CHARLES STROUSE, *I Don’t Need Anything but You*, in ANNIE (1977).

³⁸ 17 U.S.C. § 203(a)(5) (2006) (emphasis added).

³⁹ *Id.* (emphasis added).

⁴⁰ H.R. REP. NO. 94-1476, at 127.

⁴¹ See 318 U.S. 643, 657 (1943).

terminate just as he may sell any other exclusive right?⁴² This argument may become important in combating a future challenge to an attempted termination of rights. In the meantime, Columbia Pictures will likely insert the waiver provision into the agreement anyway; legislative history is not binding, and the Supreme Court already overrode Congressional intent once in *Fred Fisher Music Co.*⁴³ At worst, some future court may hold the provision unenforceable, but at best, Columbia Pictures has protected its investment for the duration the work will be protected under copyright law.⁴⁴

At this point in the hypothetical, it would be beneficial to fast forward to 2012. In fact, the *Annie* authors filed a notice of termination in 2011, and the film rights will revert back to them on December 30, 2013.⁴⁵ Imagine, for the sake of argument, that Columbia Pictures still considers *Annie* to be a precious commodity, has considered making a new, updated *Annie* film, and, therefore, still has a financial interest in retaining the film rights to *Annie*. Is there any way to prevent this termination from occurring?

There are two methods by which a production company might challenge an attempted termination of rights: (1) by arguing that the waiver of termination rights is not an “agreement to the contrary” under analogous case law and is therefore permissible, or (2) by advancing a novel reading of the law that a waiver of termination rights must be permitted under the transfer provision because of its status as a “right.”⁴⁶ This Article will examine the case law argument first. Unsurprisingly, no case law explicitly dealing with the new-works termination provision exists, as the provision will not have any practical effect until 2013.⁴⁷ But the old-works termination provision has been litigated recently, and because the “notwithstanding any agreement to the contrary” language appears in identical form in both the old- and new-works provisions, an examination of those prior holdings could prove determinative. The next section will examine those prior holdings, their workability in establishing a coherent body of law, and their applicability to new-works termination.

⁴² H.R. REP. No. 94-1476, at 125 (“[T]he *right* to [effect a termination] . . . cannot be waived in advance or contracted away.”) (emphasis added); see 17 U.S.C. § 201(d)(2) (“Any of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately.”).

⁴³ See *Fred Fisher Music Co.*, 318 U.S. at 657.

⁴⁴ A producer or publisher may also attempt to disincentivize termination by adding a contractual advance of funds in exchange for an agreement not to terminate. Such a scheme would likely prove ineffective, however, as the only authors who would be interested in terminating in the first place would be those who created commercially successful works.

⁴⁵ ANNIE, *supra* note 12.

⁴⁶ See H.R. REP. No. 94-1476, at 125.

⁴⁷ *But see* *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 585–86 (9th Cir. 1993).

II. “IT’S A HARD-KNOCK LIFE”⁴⁸: THE SPLIT OVER TERMINATION IN THE SECOND AND NINTH CIRCUITS

How do courts treat a contractual agreement not to terminate a grant of copyright? The Supreme Court has never spoken definitively on the issue, although they have mentioned it in dicta.⁴⁹ Because most publishers and producers are located in either New York City or Los Angeles, the Second and Ninth Circuits have long held a position of prominence and expertise in handling copyright issues.⁵⁰ The inconsistency that has developed between and within both circuits concerning the viability of agreements not to terminate, therefore, is as concerning as it is bewildering.⁵¹

A. “Amen for NYC”⁵²: *The Second Circuit View of Old-Works Termination*

In 2002, the Second Circuit effectively threw down the gauntlet against contractual waiver of statutory termination. In *Marvel Characters, Inc. v. Simon*,⁵³ the court held that a settlement agreement between Marvel and the author of *Captain America*, designating the superhero story as a work made for hire, was an impermissible agreement to the contrary.⁵⁴ Because a work made for hire (in which an author creates a work within the scope of his employment for an employer) is “authored” by whatever company commissioned the work, and not the creator, such creators of works made for hire have no termination rights.⁵⁵ Such an after-the-fact designation functioned as a novel way for the original author of *Captain America* to waive his termination rights by contract.⁵⁶

⁴⁸ MARTIN CHARNIN & CHARLES STROUSE, *It's a Hard-Knock Life*, in ANNIE (1977).

⁴⁹ See *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“The 1976 Copyright Act provides a single, fixed term, but provides an inalienable termination right.”).

⁵⁰ See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 336 (2d ed. 2006) (“[The Second and Ninth] [C]ircuits and their lower courts tend to be leaders in the copyright field given the presence of substantial publishing, entertainment, and software companies in their jurisdictions.”).

⁵¹ See generally Scott, *supra* note 9.

⁵² MARTIN CHARNIN & CHARLES STROUSE, *NYC*, in ANNIE (1977).

⁵³ 310 F.3d 280 (2d Cir. 2002).

⁵⁴ See *id.* at 290.

⁵⁵ See 17 U.S.C. § 304(c) (2006) (“In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978 . . . is subject to termination”) (emphasis added); see also *id.* § 101 (“A ‘work made for hire’ is—(1) a work prepared by an employee within the

The Second Circuit was both deferential to Congressional intent and concerned about a possible repeat of the *Fred Fisher Music Co.* result.⁵⁷ Noting the dangers of “litigation-savvy publishers,” who could compel authors to forfeit their termination rights due to the unequal bargaining positions of the parties, the court hypothesized that such a result would effectively revive *Fred Fisher Music Co.* for the 1976 Act and that the “agreement to the contrary” language in the statute was included specifically to avoid such a result.⁵⁸

Marvel is a distinctly creator-friendly decision. By removing an author’s option to forfeit his termination rights, the court severely limited the ability of a grantee to secure rights to a work in perpetuity. Columbia Pictures’ options are similarly limited under this line of reasoning. If an agreement that has the effect of a waiver (like an agreement to reclassify a work as a work made for hire) is impermissible, a direct waiver of termination rights has little hope of survival. Furthermore, large film production companies are akin to the “litigation-savvy publishers” contemplated by the Second Circuit, so a lower court in that Circuit would be unlikely to favor any attempts to pre-emptively avoid statutory termination in the first grant of rights. Fortunately, Columbia Pictures is not in the Second Circuit, so what does the Ninth Circuit have to say on the matter?

B. Oh, Bother!: The Ninth Circuit View of Old-Works Termination

At first blush, the Ninth Circuit appears to view termination waivers with more solicitude towards “litigation-savvy publishers.” The Circuit’s 2005 holding in *Milne v. Stephen Slesinger, Inc.*⁵⁹ affirmed the enforceability of a grant of the *Winnie-the-Pooh* rights from Christopher Robin Milne (A.A. Milne’s son) to a publisher (who licensed the rights to Disney) that included an agreement not to terminate in the future.⁶⁰ Distinguishing *Marvel* as applying only to retroactive attempts to re-characterize the nature of an author/publisher relationship, the court reasoned that, because Milne’s contract was a re-negotiation of his father’s original 1930 grant, he was fulfilling the very pur-

scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”).

⁵⁶ See *Marvel Characters, Inc.*, 310 F.3d at 282.

⁵⁷ See *id.* at 290–91.

⁵⁸ *Id.*

⁵⁹ 430 F.3d 1036 (9th Cir. 2005).

⁶⁰ See *id.* at 1040.

pose—to allow authors to receive additional compensation for their works by re-licensing them at a more competitive market rate—for which the old-works termination provision was enacted.⁶¹ Of course, the fact that the contract at issue was a re-granting of rights, and not an initial grant, is significant; the court accorded great weight to the fact that Christopher Robin could have served a notice of termination when he instead opted to renegotiate his father's grant, suggesting that the threat of termination had served its exact purpose.⁶² Now that the *Annie* authors have served a termination notice, a new, re-negotiated grant of rights that includes a termination waiver may well be enforceable under *Milne*. Extending *Milne* to protect a waiver contained in the initial grant of rights, however, is dubious, as such a holding would be akin to enforcing a *Fred Fisher Music Co.*-esque strategy of eliminating the opportunity for termination while an author's bargaining power is at its lowest. Such a holding would likely conflict with Congressional intent: by changing the U.S. copyright structure from a dual-term, renewal-right regime to a single-term regime with a termination right, Congress explicitly attempted to weaken the bargaining advantage enjoyed by large, professional grantees (such as publishing and production houses) that developed in the post-*Fred Fisher Music Co.* era.⁶³

The Ninth Circuit dealt the viability of such a waiver another blow in 2008 in *Classic Media v. Mewborn*,⁶⁴ which limited the holding in *Milne* even further by invalidating waiver of termination rights that accompanied a re-granting of the rights to *Lassie* a mere two years after the initial grant.⁶⁵ The termination right in *Milne* was valid, according to the *Classic Media* court, not merely because it involved a re-granting of rights (as opposed to an initial grant), but rather because the renegotiation occurred during a time period in which the author (or his heirs) could have otherwise successfully terminated the grant (that is, between two and ten years before the termination period that exists from years thirty-five to forty of a grant of rights).⁶⁶ Because only two years had passed since the initial grant was made in *Classic Media*, the author could not *actually* terminate the grant for another thirty-three years, and could not serve notice for another twenty-three. Therefore, any new granting of rights before that time could not include a limitation on the author's future ability to

⁶¹ See *id.* at 1044, 46.

⁶² See *id.* at 1048.

⁶³ H.R. REP No. 94-1476, at 125 (1976); see *Milne*, 430 F.3d at 1045–46.

⁶⁴ 532 F.3d 978 (9th Cir. 2008).

⁶⁵ *Id.* at 979–80.

⁶⁶ See *id.*

terminate.⁶⁷ Further, the court reaffirmed the broader holding of *Marvel* that the purpose behind old-works termination was to prevent authors from contractually waiving their ability to terminate.⁶⁸

The matter is not quite so cut-and-dried, however. First, the original agreement in *Classic Media* was never expressly revoked, and any rights associated with termination were never expressly transferred, which the court found at least as equally dispositive as factors such as Congressional intent and timing.⁶⁹ Second, the court explicitly relied on a favorable district court holding from the Second Circuit involving a dispute over a renegotiated grant of rights between John Steinbeck's widow and his publisher, Penguin Books.⁷⁰ That decision, which held that the new agreement was an impermissible "agreement to the contrary" because Penguin did not lose or gain any new rights it had not previously acquired,⁷¹ was reversed by the Second Circuit in *Penguin Group v. Steinbeck*⁷² shortly after the Ninth Circuit rendered the *Classic Media* decision.⁷³ *Penguin Group* clarified that the new-works termination provision governed a

⁶⁷ See *id.* at 987.

⁶⁸ See *id.* at 986 n.5. The court notes:

The district court misapprehended the nature of the termination right when it characterized it as an additional motion picture, television and ration right newly acquired by Mewborn. These rights are distinct. . . . These agreements—whether they are called grants, assignments, or licenses—are subject to the right of authors, widows, and heirs to terminate under the 1976 Act.

Id.

⁶⁹ See *Classic Media*, 532 F.3d at 982. The court writes:

Despite (1) the express statutory language that termination of a pre-1978 transfer "may be effected notwithstanding any agreement to the contrary," (2) Congress's clear intent to benefit authors and their heirs with additional years of copyright protection in the 1976 Act, as recognized by the Supreme Court; and (3) *the omission of any language transferring termination rights in the 1978 Assignment or even a mention of the right of termination*, the district court concluded that Mewborn intended to relinquish and impliedly waived her "newly acquired right of termination" when she executed the 1978 Assignment. . . . We disagree.

Id. (emphasis added) (citations omitted).

⁷⁰ See *id.* at 986 (citing *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395 (S.D.N.Y. 2006), *rev'd on other grounds* *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008)).

⁷¹ *Steinbeck*, 433 F. Supp. 2d at 401–02.

⁷² *Penguin Grp.*, 537 F.3d at 204.

⁷³ *Id.*

post-1978 grant; even if the provision replaced a pre-1978 grant of rights, an author is still only entitled to one opportunity to terminate a grant of his rights.⁷⁴

C. *Think, Think, Think: Resolving the Circuit Split*

Unfortunately, the existing old-works-termination case law provides limited clarity on the issue of new-works termination. *Classic Media* is the latest word from the Ninth Circuit, but it is unclear whether protecting Congress's intent to prevent termination waivers was even determinative in that case, and the most recent decision the court relied on as persuasive authority was reversed shortly thereafter. The case that most strongly cuts against a valid waiver of termination rights ideologically is *Marvel Characters, Inc. v. Simon*,⁷⁵ but that decision itself has been limited in its own circuit to attempts to reclassify a prior agreement between an author and a grantee.⁷⁶ How to derive a coherent set of rules from this body of law at all, much less a set of rules to apply to new-works termination, is not immediately clear.

Without a consistent collection of case law, the best available course of action is to look closely at the statute itself. The determinative question in this context is short, but significant: is termination a right? Every case this author could find addressing the matter refers to both old- and new-works termination as a right.⁷⁷ The *Classic Media* court, in fact, goes out of its way to note that the termination right is analogous to, but distinct from, the other exclusive rights of an author under current copyright law.⁷⁸ It may be useful, then, to view the facts and holdings of the old-works termination cases through the lens of termination

⁷⁴ See *id.* (citing 17 U.S.C. § 304(d) (2006)). The court's reliance on section 304(d), which extends the period of time that old-works termination may be effected in connection with the extension of the copyright term generally, may have been misplaced. See 17 U.S.C. § 304(d). The court read the requirement in section 304(d) that termination rights cannot have been exercised previously to permit only one use of all termination rights, when in fact the provision is likely only limited to section 304(d), and not to old- or new-works termination generally. *Penguin Grp.*, 537 F.3d at 200–01. Section 304(d) resurrected old-works termination rights that had already been waived by the passage of time, hence the requirement that they could not have been exercised in the past; which distinguishes it from the old- and new-works termination provisions, which provide for rights that could still be exercised in the future. 17 U.S.C. § 304(d); see *infra* Part IV.

⁷⁵ 310 F.3d 280 (2d Cir. 2002).

⁷⁶ See *Penguin Grp.*, 537 F.3d at 203 (“*Marvel* concludes only that backward-looking attempts to recharacterize existing grants of copyright so as to eliminate the right to terminate under section 304(c) are forbidden by section 304(c)(5).”).

⁷⁷ See, e.g., *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 986 n.5 (9th Cir. 2008).

⁷⁸ *Id.*

as an exclusive right of an author, keeping in mind that all exclusive rights can be sold or leased at will by an author under the transferability provision.⁷⁹ In this light, the debate between the authors' rights view and the right to contract view seems much less important.

The key issue becomes whether or not the author's termination right is vested (the author can terminate at that moment), or remains conditional (the termination right will vest in the future, but the author cannot terminate at the present time). According to the case law, the former situation will allow authors to sell or waive their termination rights in accordance with the transferability provision, while the later scenario would give meaning to the "notwithstanding any agreement to the contrary" language by forbidding the sort of "agreements to agree" that would constitute selling or waiving a right that has not yet vested. How would such an argument progress? What would the implications be for the *Annie* hypothetical, or for future cases? The next section will explore the justifications as to why termination should be considered a conditional right, how such a construction conforms with the language of the Copyright Act as currently structured, and how conceptualizing termination as an exclusive right can help create a coherent body of law surrounding new-works termination in the future.

III. "MAYBE NOW IT'S TIME"⁸⁰: STATUTORY TERMINATION AS A RIGHT

Interpreting the Copyright Act is no different than interpreting any other statute: the language of the statute controls.⁸¹ Analyzing whether or not termination is a right protected under the transfer provision of the Act, then, requires a close look at the plain language of the copyright provisions that grant and govern rights, as well as the termination provisions. The language of the Act, however, must be interpreted to be consistent with the legislative purpose of the Act.⁸² If, and only if, the statutory language is unclear, other sources (including

⁷⁹ See 17 U.S.C. § 201(d)(2).

⁸⁰ MARTIN CHARNIN & CHARLES STROUSE, *Maybe, in ANNIE* (1977).

⁸¹ E.g., 3A NORMAN J. SPRINGER & J.D. SHAMBIE SPRINGER, SUTHERLAND STATUTORY CONSTRUCTION § 71:9 (7th ed. 2011) ("The [Copyright Act's] language is the best and most reliable index of the statute's meaning and must be consulted first."); accord *Broad. Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769 (6th Cir. 2005) ("To determine legislative intent, a court must first look to the language of the statute itself. If the language of the statute is clear, a court must give effect to this plain meaning.") (citations omitted).

⁸² E.g., SPRINGER & SPRINGER, *supra* note 81, § 71:9; accord *Broad. Music, Inc.*, 396 F.3d at 769.

legislative history) can be used.⁸³ This section will use statutory language and legislative history (in that order) to tackle this two-step analysis of “termination as a right”: (1) whether the transferability provision of the Act applies to all exclusive rights within the Copyright Act, and (2) whether termination is one of those exclusive rights.

A. “*I Think I’m Gonna Like It Here*”⁸⁴: Textual Analysis of the Transferability Provision

One section of the Copyright Act (section 106) contains what are typically thought of as the exclusive “bundle of rights” owned and controlled by the author of a copyrighted work.⁸⁵ The specific number of the section is important, because it appears again in the text of the transfer provision, which reads: “Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.”⁸⁶ The first consideration in the termination-as-a-right analysis, then, is whether the transferability provision even applies to rights outside of the traditional “bundle of rights.”

Utilizing merely the plain language of the statute,⁸⁷ it is ambiguous whether the “including any subdivision” clause is meant to emphasize: (1) In the universe of rights conveyed by the Copyright Act that can be bought and sold, those rights contained in the bundle of rights provision may be divided and transferred independently of one another;⁸⁸ or (2) only those rights contained in the bundle of rights provision may be bought or sold, but they need not all be sold together.⁸⁹ A successful argument advocating termination as a right depends on the former interpretation; if the latter interpretation controls, whether or not termination is a right is irrelevant, because the transferability provision only applies to the bundle of rights provision.

The best case for the former interpretation, that the bundle of rights provision is not the only place exclusive rights can be found in the Copyright Act, is in the language itself: The termination provision refers to “[a]ny of the exclu-

⁸³ *E.g.*, SPRINGER & SPRINGER, *supra* note 81, § 71:9; *accord* CBS Broad., Inc. v. EchoStar Commc’ns Corp., 265 F.3d 1193, 1212 (11th Cir. 2001).

⁸⁴ MARTIN CHARNIN & CHARLES STROUSE, *I Think I’m Gonna Like It Here*, in ANNIE (1977).

⁸⁵ 17 U.S.C. § 106 (2006).

⁸⁶ *Id.* § 201(d)(2).

⁸⁷ *See* SPRINGER & SPRINGER, *supra* note 81, § 71:9.

⁸⁸ 17 U.S.C. § 201(d)(2).

⁸⁹ *Id.*

sive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106.”⁹⁰ The word “including” in reference to the bundle of rights provision indicates that section 106 is not the only place exclusive rights can be found.⁹¹ A quick glance at the Act itself confirms this interpretation, as, for example, the section immediately following the bundle of rights provision contains additional exclusive rights owned by visual artists.⁹² Following the canon of statutory construction that a reader is to assume every word and phrase is intentional,⁹³ the broad language beginning the termination provision should likewise be construed broadly.

The “including any subdivision” clause, in this context, may be understood as a clarification that the 1976 Copyright Act was making a substantive change to the law when it was drafted. Under the Copyright Act of 1909 (which was the controlling law until Congress implemented the 1976 Act), the same “bundle of rights” could only be sold or leased together as a cohesive whole; the “including any subdivision” clause was designed to explicitly change that provision of the old law to allow authors more freedom to buy and sell their rights.⁹⁴

The principal counterargument to this reading of the statute, and the best argument in favor of the alternate, more limited view, is that Congress understood all of “the exclusive rights comprising a copyright” to be contained within the bundle of rights provision alone, and that one must interpret the plain language of the statute with congressional intent in mind.⁹⁵ Indeed, to the extent that enough ambiguity in the language of the statute exists such that examining legislative history would be appropriate, the House Report accompanying the Act supports such a reading:

⁹⁰ *Id.*

⁹¹ *Id.*; see also SPRINGER & SPRINGER, *supra* note 81, § 71:9 (“Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted . . .”).

⁹² 17 U.S.C. § 106A (granting the exclusive rights of attribution and integrity to visual artists).

⁹³ *E.g.*, SPRINGER & SPRINGER, *supra* note 81, § 71:9.

⁹⁴ Compare SAMUEL SPRING, RISKS & RIGHTS 167 (1st ed. 1952) (“Any assignment of the copyright [under the Copyright Act of 1909] is invalid unless all of the bundle of rights is transferred at one time But an assignment of some of the rights included in the bundle . . . is invalid and unenforcible [sic], except as a license.”), with 17 U.S.C. § 201(d)(2) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.”).

⁹⁵ SPRINGER & SPRINGER, *supra* note 81, § 71:9 (“Above all else, statutory interpretation must give a fair and reasonable meaning to legislation so that the intent of the legislature is honored.”); see H.R. REP. NO. 94-1476, at 61 (1976).

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The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.⁹⁶

In addition, that Congress said what it meant by purposely leaving the “any of the exclusive rights” language broad and inclusive may be read as a tactical move by Congress to leave open the possibility of creating and adding more exclusive rights in the future. Such a reading would not be an invitation to construe other then-existing sections of the Copyright Act as exclusive rights protected under the transferability provision. The additional exclusive rights for visual artists created two decades after the Copyright Act was revised would be one example of such an extension,⁹⁷ but the termination provisions, which were enacted in 1976 at the same time as the transfer provision at issue, would not.

This final point is key to resolving the issue for both points of view. Congress used the all-encompassing language “any of the exclusive rights,” in the actual text of the statute, when it could have instead specifically limited transferability to the bundle of rights provision by using similar language to that used in the legislative history. As statutory interpretation presumes Congress chose every word and phrase intentionally, the most likely conclusion is that Congress intended to leave open the possibility that the bundle of rights comprising a copyright would expand in the future.⁹⁸ As identical words in separate parts of the same act are construed to have identical meanings,⁹⁹ a search of the language of the Act reveals that statutory termination was affirmed as an exclusive right in 1998 as part of the Copyright Term Extension Act (CTEA),¹⁰⁰ and is therefore protected by the transferability provision.¹⁰¹

⁹⁶ H.R. REP. NO. 94-1476, at 61.

⁹⁷ See 17 U.S.C. § 106A.

⁹⁸ See, e.g., SPRINGER & SPRINGER, *supra* note 81, § 71:9 (“Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.”).

⁹⁹ E.g., *id.*

¹⁰⁰ Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 278 (1998) (codified in scattered sections of 17 U.S.C.).

¹⁰¹ See 17 U.S.C. § 304(d); *infra* Part IV.

B. “Together At Last!”¹⁰²: Judicial Interpretation of Termination as an Exclusive Right

The text of both the old- and new-works termination provisions as constructed in 1976 do not contain any reference to termination as a right, instead referring to it as an “interest.”¹⁰³ But when the length of the term of copyright protection was extended in 1998, an additional subsection was inserted into the Act following the old-works termination provision.¹⁰⁴ The old-works termination provision can be found in subsection (c) of section 304 of the Copyright Act; subsection (d) of the same section, passed in 1998, refers multiple times to the “termination rights provided in subsection (c).”¹⁰⁵ This new reference to the old-works termination provision as containing “termination rights” may be understood as a *change in Congressional understanding* of what exclusive rights comprise a copyright to include termination rights, as amendments are presumed to have changed the law as it previously existed.¹⁰⁶

There is no such addendum added to the new-works termination provision, as the change in the length of copyright did not have the same (or any) effect on new-works termination as it did on old-works termination.¹⁰⁷ Nevertheless, the substantial similarity between the two provisions makes it incongruous to understand old-works termination as a right, while new-works termina-

¹⁰² MARTIN CHARNIN & CHARLES STROUSE, *I Don't Need Anything but You*, in ANNIE (1977).

¹⁰³ *E.g.*, 17 U.S.C. § 203(a)(1) (“[T]ermination of the grant may be effected by that author or . . . by the person or persons who . . . own and are entitled to . . . that author’s termination interest.”).

¹⁰⁴ *See id.* § 304(d).

¹⁰⁵ *Id.* Section 304(d) was enacted as part of the Sonny Bono Copyright Term Extension Act (CTEA) in 1998, which extended the length of copyright protection by 20 years. *See* H.R. REP. NO. 105-452, at 7–8 (1998).

¹⁰⁶ *E.g.*, SPRINGER & SPRINGER, *supra* note 81, § 71:9. *But see* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (“To propose a change in a law’s text is not necessarily to propose a change in the law’s effect. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty.”).

¹⁰⁷ Because the CTEA created an additional property interest, Congress elected to allocate the potential benefits to authors in the form of old-works termination rights in section 304(d). *See* H.R. REP. NO. 105-452, at 8 (“This bill also subjects to termination any exclusive or non-exclusive transfers or licenses of works in their renewal term in certain circumstances. This is to allow the original authors of works and their beneficiaries to benefit from the extended copyright protection.”). Because the extension did not create any new termination rights in new-works termination (which would not take effect for another 15 years), no analogous provision was necessary. *Cf. id.*

tion remains a more amorphous “interest.”¹⁰⁸ The reference to “termination rights” in one provision but not in the other, however, may be construed as ambiguous,¹⁰⁹ so a look at the judicial treatment of the acts is instructive.

The Supreme Court and the circuit courts share this view of termination as a right. The Supreme Court recognized old-works termination and new-works termination as exclusive rights in *Mills Music, Inc. v. Snyder*¹¹⁰ and *Stewart v. Abend*,¹¹¹ respectively, even before such language was explicitly inserted into the Copyright Act.¹¹² Similarly, all four of the old-works termination cases refer colloquially to termination as a right; statutory termination is referred to most frequently in these cases using the phrase “termination right.”¹¹³ This phrase is used to describe old-works termination, which was at issue in the cases, as well as new-works termination.¹¹⁴ Judicial and legislative consensus, then, suggests that, regardless of how termination was viewed in 1976, it is now considered to be an exclusive right of the copyright holder, and as such must be freely transferrable under the transferability provision.¹¹⁵

C. “Put Us to the Test”¹¹⁶: Counter-Analysis

Despite the logical appeal of categorizing statutory termination as a right, such a treatment is subject to a variety of challenges, the most glaring being that termination is never once referred to as a “right” in the statute as

¹⁰⁸ E.g., SPRINGER & SPRINGER, *supra* note 81, § 71:9 (“Courts avoid any construction of statutory language that leads to an absurd result.”).

¹⁰⁹ See *id.* (defining a statute as “ambiguous” if it is “susceptible to more than one interpretation”).

¹¹⁰ 469 U.S. 153 (1985).

¹¹¹ 495 U.S. 207 (1990).

¹¹² *Id.* at 230 (“The 1976 Copyright Act provides a single, fixed term, but provides an inalienable termination right.”) (citing 17 U.S.C. §§ 203, 302 (1988)); *Mills Music*, 469 U.S. at 172–73 (“[T]he termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.”) (citing H.R. REP. NO. 94-1476, at 127 (1976)).

¹¹³ See *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 *passim* (2d Cir. 2008); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 *passim* (9th Cir. 2008); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 *passim* (9th Cir. 2005); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 *passim* (2d Cir. 2002).

¹¹⁴ E.g., *Penguin Grp.*, 537 F.3d at 198–99 (referring to 17 U.S.C. § 203 as providing a “slightly different termination right” than 17 U.S.C. § 304).

¹¹⁵ See 17 U.S.C. § 201(d)(2).

¹¹⁶ MARTIN CHARNIN & CHARLES STROUSE, *I Think I’m Gonna Like It Here*, in *ANNIE* (1977).

drafted in 1976. If Congress intended to make termination a statutory right, it was clearly capable of doing so; indeed, the majority of Chapter One of the Copyright Act concerns the exclusive rights and limitations on the rights of copyright owners.¹¹⁷ New-works termination is captured in Chapter Two, entitled “Copyright Ownership and Transfer,”¹¹⁸ while old-works termination appears in the chapter entitled “Duration of Copyright.”¹¹⁹ Indeed, Congress appears to go out of its way to avoid calling termination a “right,” instead stating that a copyright grant “is subject to termination.”¹²⁰

Further, the sweeping reference to “termination rights” by judicial and academic writers can be explained merely as incidents of colloquial ease. It is grammatically difficult to discuss statutory termination without referring to the provisions as “termination rights,” and any legal point regarding the termination actions of an author is more succinctly made using the term “termination rights” rather than “ability to terminate,” “subject to termination,” or other such legally accurate but grammatically obtuse constructions. Courts and legislatures have proven in the past to be susceptible to conflating or misconstruing the precise definitions of particular legal terms of art, creating the potential for judicial inconsistency and confusion.¹²¹ This interpretation is supported by the simple fact that the implications of termination as an actual right, and the potential conflict between termination-as-a-right and the transferability provision are not addressed by either the Second or Ninth Circuit in any of the aforementioned cases.¹²²

¹¹⁷ See 17 U.S.C. § 106 (“Exclusive Rights of Copyright Owners”), §§ 107–12 (beginning each section title with “Limitations on Exclusive Rights”).

¹¹⁸ *Id.* ch. 2.

¹¹⁹ *Id.* ch. 3.

¹²⁰ *Id.* § 304(c).

¹²¹ See generally Joan Steinman, *Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes*, 65 WASH & LEE L. REV. 1593 (2008) (discussing the conflation of the terms “civil action” and “claim” by the Supreme Court in interpreting 28 U.S.C. § 1367, and the subsequent legal confusion and inconsistency that resulted).

¹²² See *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 (2d Cir. 2002). *But see* *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 986 n.5 (9th Cir. 2008). As discussed above, the Ninth Circuit in *Mewborn* assumed that termination is a right; it elaborated a bit more than the other courts, though, in noting that the termination right is separate from motion picture and television rights:

The district court misapprehended the nature of the termination right when it characterized it as an additional motion picture, television and radio right newly acquired by Mewborn. These rights are distinct. Copyright subsists in

This counterargument admittedly has merit. Other evidence in the legislative history of the Act suggests Congress had a less-than-perfect understanding of the precise legal definitions of certain terms. For example, Congress used the terms “fundamental rights” and “exclusive rights” interchangeably in describing the bundle of rights contained in section 106.¹²³ Traditionally, fundamental rights are “inherent rights common to all citizens.”¹²⁴ Jurisprudential debates have raged for over a century over whether certain rights embodied in the Bill of Rights are fundamental, and thereby must be extended to the states.¹²⁵ This sort of language skews to the hyperbolic when considering the various rights afforded by the Copyright Act; after all, copyright is a government-granted right, not a natural one.¹²⁶ Even if these rights were intended to be fundamental, the two terms are not interchangeable—fundamental rights are a logical subset of exclusive rights (i.e., all fundamental rights are exclusive, but not all exclusive rights are fundamental). It is not a stretch, then, to hypothesize that, despite the traditional canons of statutory construction, Congress did not intend every reference to a “right” in the Copyright Act to carry with it the full legal weight of the term.¹²⁷

“original works of authorship,” such as the literary works at issue here. The copyright proprietor may contract with third parties to exploit those rights in various media such as in motion pictures, television series or over radio. These agreements—whether they are called grants, assignments or licenses—are subject to the right of authors, widows and heirs to terminate under the 1976 Act.

Id. (citations omitted).

¹²³ H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 (“The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106.”).

¹²⁴ BALLENTINE’S LAW DICTIONARY 508 (3d ed. 1969).

¹²⁵ *E.g.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3023 (2010) (holding the right to bear arms is a fundamental right, and therefore applies equally to the federal government and the states).

¹²⁶ *See* H.R. REP. NO. 60-2222, at 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights . . .”).

¹²⁷ *See generally* Linda Ross Meyer, *Unruly Rights*, 22 *CARDOZO L. REV.* 1 (2000) (advocating for an interpretation of rights as “practices of respect” rather than absolute rules, as with rights of property and liberty, or a balance of individual and private interests, as with rights of privacy).

Despite arguments to the contrary, however, the text of the statute should control.¹²⁸ There is no explicit evidence in the Copyright Act that a “right” in the transfer provision should be treated any differently than a “right” in the old-works termination provision.¹²⁹ Furthermore, to consider old-works termination to be subject to transferability rules without subjecting new-works termination to the same principles would surely be incongruous with congressional intent; the statutes are designed to function in nearly identical ways, as evidenced by their nearly identical language.¹³⁰ The determinative argument leading to this conclusion that the text of the statute should be taken at face value is this: It works. The next section will examine the effect conceptualizing termination as a right would have on (1) the previously decided old-works termination cases, and (2) future cases dealing with new-works termination. Such a construction clarifies the current law and creates a workable framework for the future while simultaneously resolving any potential conflicts between the transferability provision and the “notwithstanding any agreement to the contrary” clauses of the termination provisions.

IV. “THINKIN’ ABOUT TOMORROW”¹³¹: THE EFFECT OF TERMINATION AS A RIGHT

So far, this article has determined that both old- and new-works termination are exclusive rights owned by copyright authors and, as such, are subject to the transferability provision. What effect, if any, does this determination have on future cases (including the hypothetical *Annie* dispute)? This section will attempt to answer that question, first by addressing the apparent conflict between the transferability provision and the identical “notwithstanding any

¹²⁸ E.g., SPRINGER & SPRINGER, *supra* note 81, § 71:9 (“The statute’s language is the best and most reliable index of the statute’s meaning and must be consulted first.”).

¹²⁹ *See id.* (“The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning.”).

¹³⁰ Compare 17 U.S.C. § 203(a)(5) (2006), with *id.* § 304(c)(5) (stating, in each section, “[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”). Subtle differences do exist between the statutes, mostly dealing with the different circumstances of rights each statute covers, but the only substantive difference between the two is that old-works termination is available for grants of authors or their heirs, while new works termination is only available for grants of authors. Compare *id.* § 203(a)(1), with *id.* § 304(c)(1); see also Penguin Grp. (USA) Inc. v. Steinbeck, 537 F.3d 193, 203 n.6 (2d Cir. 2008); Loren, *supra* note 34, at 1333–34 (2010) (outlining the reasons for differences between the two statutes).

¹³¹ MARTIN CHARNIN & CHARLES STROUSE, *Tomorrow, in ANNIE* (1977).

agreement to the contrary” clauses ostensibly preserving the inalienability of both sets of termination rights.

A. “*Something Was Missing*”¹³²: *Agreements to the Contrary and Termination as a Contingent Right*

The interpretation that termination, as a right, is subject to the guarantee of transferability seems to conflict with the identical provisions in both the old- and new-works termination statutes stating that termination grants may be effected “notwithstanding any agreement to the contrary.”¹³³ An agreement not to terminate and an agreement to sell one’s termination right along with the other exclusive rights contained in the grant at issue are functionally the same. Regardless of the precise language of the contract, the behavior at issue is an author agreeing, by contract, to grant a certain portion (or all) of the bundle of rights constituting his copyright in a work, and including in that contractual agreement (or in a separate contractual agreement) a guarantee not to exercise his termination right in that grant. How, then, can the Copyright Act as a whole guarantee an author the ability to sell or lease any of the rights contained in the Act, including the termination right, while simultaneously forbidding the same author from executing such an effective grant of termination rights? As noted above, different provisions of a statute must be read together, as part of a cohesive whole, and cannot be read to conflict with one another.¹³⁴

Fortunately, a closer look at the phrasing of the subsections of the termination provisions helps resolve the issue. The full text of the subsections reads: “Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”¹³⁵ The text of the subsections prevents “agreements to agree”; that is, an agreement to make a contractual grant sometime in the future has no legal effect in preventing the exercise of future termination rights.¹³⁶ Nowhere in the statute does it state that a will or a grant of current termination rights would be impermissible. Because statutory interpretation requires an assumption that

¹³² MARTIN CHARNIN & CHARLES STROUSE, *Something Was Missing*, in ANNIE (1977).

¹³³ 17 U.S.C. §§ 203(a)(5), 304(c)(5).

¹³⁴ *E.g.*, SPRINGER & SPRINGER, *supra* note 81, § 71:9.

¹³⁵ 17 U.S.C. §§ 203(a)(5), 304(c)(5).

¹³⁶ *See id.*

Congress chose its words purposefully,¹³⁷ such future-looking language must be given its due effect.

The purpose of this language becomes clearer by categorizing the nature of the termination right more specifically. Termination can be conceptualized as a contingent right; that is, a right that does not vest but for the fulfillment of two conditions: (1) the passage of a statutorily specified amount of time and (2) the serving of a notice of termination. The “agreement to the contrary” provisions, therefore, can be understood as simply clarifying that the right of termination cannot be contracted away in advance of the fulfillment of these conditions. These conditions must be fulfilled not because of a value judgment made by Congress, but rather as a practical matter, because without the fulfillment of both conditions the right does not exist. Before the passage of the requisite period of time as imposed by statute, an author does not have the right to terminate a prior grant; he only owns what might be termed an expectancy interest in termination. Agreements to agree are disfavored in contract law generally¹³⁸ and particularly in this case, as one cannot contract away what one does not have. In this way, an agreement not to terminate when included in an initial grant of rights (or any time before notice of termination could be served) would be invalid. To phrase it another way, an author (or his heirs) must be able to serve a notice of termination to be similarly able to contractually waive such a right.

B. “Lassie, Come Home!”: Revisiting the Old-Works Termination Cases

This treatment of termination as a contingent right would not only be consistent with the existing old-works termination cases, it would actually clarify their holdings tremendously. The availability of termination rights in *Milne*, *Mewborn*, and *Penguin Group* becomes determinative to their holdings, not because the existence of the rights leveled the playing field between the “litigation-savvy” licensees and the authors’ heirs, or because the courts were protecting the right to contract, but rather because, until the termination rights became available, there was nothing the authors’ heirs could viably contract away. *Marvel*, because it dealt with reclassifying a prior contractual relationship, can still stand on its own in forbidding that sort of retroactive agreement, as rea-

¹³⁷ E.g., SPINGER & SPINGER, *supra* note 81, § 71:9 (“Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.”).

¹³⁸ See, e.g., *Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 323 (5th Cir. 2006) (“[W]here an agreement leaves essential terms open for future negotiations, it is not a binding contract but, rather, an unenforceable ‘agreement to agree.’”).

soned in *Milne* and *Penguin Group*.¹³⁹ The reasoning in all four cases focusing on fulfilling congressional intent (and adopting various points of view) can be understood not as any single or collective affirmative test, but rather as additional policy arguments used by both circuits to bolster their holdings with persuasive, but not determinative, reasoning.¹⁴⁰ At a minimum, treating termination as a conditional right would considerably clarify the legal landscape of old-works termination moving forward.

Before completing the analysis by applying termination as a right to new-works termination, a tangential clarification as to the nature of the contingent right may be useful (though unnecessary for the ultimate analysis). Though this article suggests the serving of actual notice of termination should be one of the requirements for termination rights to vest, this view is not shared by all courts and commentators, even those whose views align with the general principle that termination is a contingent right. Professor Melville Nimmer (and later, his son David), who authored the preeminent treatise on copyright law, advocates a “moment of freedom” interpretation of termination rights, which would require actual notice of termination to be served before a re-granting of rights could take place.¹⁴¹ *Milne* and *Penguin Group*, in contrast, suggest that the mere

¹³⁹ See *supra* Part II.A.

¹⁴⁰ See, e.g., *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 984 (9th Cir. 2008). First, the court offered a detailed explanation of congressional intent in the termination provisions of the 1976 Act:

The 1976 Act, and in particular its twin termination of transfer provisions, were in large measure designed to assure that its new benefits would be for the authors and their heirs. Thus, with the termination of transfer provisions, authors or their heirs are able to negotiate additional compensation for previously granted rights. Without such a right of termination, the Extended Renewal Term would constitute a windfall to grantees.

Id. Later in the opinion, however, the court admitted that the entire issue could be resolved based on the specific facts in the case, without determining the congressional intent behind the “agreement to the contrary” language:

Because LTI owned the motion picture, television and radio rights to the *Lassie* Works in 1978, Mewborn had nothing to transfer by virtue of the 1978 Assignment other than the additional ancillary rights she transferred for \$3,000 . . . Mewborn in 1978 did not even have the right to serve an advance notice of termination.

Id. at 986–87.

¹⁴¹ 3 DAVID NIMMER & MELVILLE NIMMER, *NIMMER ON COPYRIGHT* § 11.07[D][5][a] (4th ed. 2004) (“By analogy to, rather than by strict application of, the pre-existing-duty rule, a grantee may not subvert the statutory rule against obtaining a new grant prior to termination of the original grant unless there is at least a moment when the grantor is bound under neither the prior nor the new grant.” (footnote omitted)).

passage of time sufficient to serve notice is all that is required for the termination right to vest.¹⁴² Nimmer's argument makes more sense from a legal formalist perspective, as it is more in line with the precise language of the statute, which permits re-negotiation of a grant only after a termination notice has been served, and a re-grant of rights to a different grantee only after both notice has been served and termination has actually occurred.¹⁴³ However, the era of legal formalism has long passed, and particularly as applied to copyright law, as notice is no longer required for a work to be protected by copyright generally.¹⁴⁴ Where, as here, the notice requirement is a mere legal formality (clearly both parties are aware the author would like to terminate and has the ability to do so, otherwise they would not be negotiating a new grant of rights), eliminating the requirement of notice as a condition of the vesting of the termination right makes good sense, and both the Second and Ninth Circuits are likely to support such an interpretation.¹⁴⁵ Regardless, however, the passage of the statutorily

¹⁴² *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 201–02 (2d Cir. 2008); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1047–48 (9th Cir. 2005). This debate is highlighted most clearly in *Milne*. In response to Clare Milne's argument that her 1983 grant did not revoke the original 1930 grant from her grandfather to Slesinger because no "moment of freedom" was created, the court first noted that "Clare's sole support for her position is found in a treatise authored by the late-Professor Melville Nimmer." *Milne*, 430 F.3d at 1047. After explaining Nimmer's position, the court then flippantly dismissed Nimmer's points, noting, "Clare's counsel, however, conceded at oral argument that no source of primary authority has endorsed this assumption. We too decline to do so." *Id.* Aside from ignoring the traditional respect the particular treatise has been generally afforded by the legal academy, the court also declined to mention that Clare's counsel was David Nimmer, Melville's son and the co-author of the treatise. *Id.* at 1037.

¹⁴³ See 17 U.S.C. §§ 203(a)(4) ("The termination shall be effected by serving an advance notice in writing."), (b)(4) ("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] and the original grantee or such grantee's successor in title, after the notice of termination has been served.") (2006); see also Loren, *supra* note 34, at 1356 ("In order for those copyright rights to vest, a notice of termination must be served on the transferee. If no notice is ever served, no terminated rights ever vest.").

¹⁴⁴ See, e.g., H.R. REP. NO. 94-1476, at 143 (1976) ("The fundamental principle underlying the notice provisions of the bill is that the copyright notice has real values which should be preserved, and that this should be done by inducing use of notice without causing outright forfeiture for errors or omissions."). But see 17 U.S.C. § 115(b) (requiring anyone wishing to make use of the compulsory licensing provisions to serve notice of intention to obtain a compulsory license).

¹⁴⁵ Cf. *Penguin Grp.*, 537 F.3d at 204 ("[A]uthors . . . holding termination rights are still left with an opportunity to threaten (or to make good on a threat) to exercise termination rights and extract more favorable terms from early grants of an author's copyright."); *Classic Media*, 532 F.3d at 987 ("[W]hen the Milne heir chose to use the leverage of imminent vesting

required period of time is still necessary, so the conceptualization of termination as a contingent right remains unchanged.

It is also worthwhile to note that the classification of termination as a “right” does not make it impermeable to other instances of positive law or to congressional revision. It would be a gross misunderstanding to liken termination (or any aspect of U.S. copyright law) as akin to a fundamental right like freedom of speech. Rather, the termination right was created by legislation and could just as easily be removed by subsequent legislation. Further, even fundamental rights like freedom of speech extend only so far as exercising those rights do not interfere with the rights of another—freedom of speech does not give one the right to shout “fire” in a crowded theater, to use a well-worn example. Exercising a right of termination, however, carries with it no risk of interfering with the rights of another; only the freedom to contract may be impinged, and the publicly available nature of the law makes it difficult to put forth a strong legal argument that a deep-pocketed grantee was ignorant of all applicable laws when entering into a contract.

C. “*Tomorrow’s at Hand!*”¹⁴⁶: Termination in the New Era

As judges are forced to reckon with new-works termination for the first time, their decision should turn on whether or not they classify termination as a contingent right. If they do, it will be a victory of sorts for authors’ rights (and a blow to the legal strategies of large grantees such as Columbia Pictures). Returning to the *Annie* hypothetical, the authors can terminate the grant thirty-five years after the initial 1978 grant, beginning in 2013. Because the authors can serve notice up to ten years before termination takes effect, their conditional termination right will have vested in 2003. After 2003, the authors could potentially waive their termination rights by contract (depending, of course, on the terms of the agreement), but any waiver of termination rights before then cannot possibly be valid. Columbia Pictures’ best option is to attempt to renegotiate

to revoke the pre-1978 grant and enter into a highly remunerative new grant of the same rights, it was tantamount to following the statutory formalities, and achieved the exact policy objectives for which § 304(c) was enacted.”) (internal citations omitted) (citing *Milne*, 430 F.3d at 1045); *Milne*, 430 F. 3d at 1045 (“Although Christopher presumably could have served a termination notice, he elected instead to use his leverage to obtain a better deal for the Pooh Properties Trust. His daughter, Clare, was a beneficiary of this new arrangement, and her current dissatisfaction provides no reason to discredit the validity of the 1983 agreement and the rights conferred thereby.”).

¹⁴⁶ MARTIN CHARNIN & CHARLES STROUSE, *New Deal for Christmas*, in *ANNIE* (1977).

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with the authors and better whatever deal Will Smith is offering.¹⁴⁷ Of course, they may not value the work as highly as Will Smith does. In that case they will allow the grant to terminate, the authors will maximize their revenue, and the buyer who values the commodity the most will receive it—exactly the way an economically efficient system is supposed to work.

Classifying new-works termination as a conditional right and finding it to be alienable once vested under the termination provision should make the lives and jobs of judges and lawyers facing new-works termination challenges much easier. The only determinative question for new-works termination should be: Did the agreement preventing termination occur during a time when the author could have served a termination notice? If so, the agreement should be allowed. If not, the grantees are out of luck; the agreement not to terminate is probably unenforceable, and the grantees must hope they can put the best offer on the table before termination occurs. Though termination cases have and will continue to increase in both number and complexity as we pass into a new era of copyright termination, the basic economic principle underlying the creation of termination rights in the first place remains the same: a work is worth only what someone is willing to pay for it.

¹⁴⁷ In the real world, it is unclear whether Columbia Pictures achieved such a renegotiation. While the initial press release announcing the movie indicated a partnership between Will Smith's production company and Columbia pictures, later updates have failed to mention the production company at all. Compare Russ Fischer, *Will Smith's 'Annie' Remake Development Officially Announced; Jay-Z Definitely on Board*, SLASHFILM (Jan. 26, 2011), <http://www.slashfilm.com/smiths-annie-remake-official-jayz-board> (including quotes from a Columbia Pictures press release), with Michael Gioia, "Annie" Remake, Starring Willow Smith, Will Begin Production in 2013; Rapper Jay-Z Is Writing New Music, PLAYBILL (Aug. 21, 2012), <http://www.playbill.com/news/article/169278-Annie-Remake-Starring-Willow-Smith-Will-Begin-Production-in-2013-Rapper-Jay-Z-Is-Writing-New-Music>. Interestingly, Strouse and Charnin filed another termination notice under section 203 in February 2012 to remove *Annie* (and 35 other unnamed titles) from Columbia Pictures in 2017. ANNIE & 35 OTHER TITLES, Doc. No. V3606D303 (filed Feb. 15, 2012) (termination effective May 22, 2017), available at <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi> (input "V3606D303" into search box, search by document number; on results page, select "Annie & 35 other titles."). Because of the record-keeping limitations of the Copyright Office, this author was unable to discern whether the 2012 termination notice covered different rights from the 2008 termination notice, or whether Columbia Pictures was successfully able to renegotiate a term of rights with the *Annie* authors for enough time to move forward with the movie remake. Under the latter scenario, this article would argue that the 2012 termination notice would be ineffective. See *supra* Part IV.A.

V. POSTSCRIPT

What could Columbia Pictures have done, if anything, to prevent this termination from occurring prior to a notice of termination being served? Though many of the avenues concocted by “litigation-savvy publishers” in the past have been struck down, the best way to avoid termination is for the grantee to suggest a voluntary re-negotiation of the grant on terms more advantageous to the author long before the work would be eligible for termination. So, in the *Annie* case, if Columbia Pictures had come to the authors, say, twenty years after the initial grant (in 1998) and offered to rip up the existing grant and pay some new amount more advantageous to the author, they may have done so, and the thirty-five year clock ticking down to the availability of termination rights would have rewound and begun anew. In fact, courts have used some language in the past suggesting that authors are permitted only “one shot” at renegotiating a grant, and if they renegotiate their grant without exercising their termination rights, and that grant includes a waiver of future termination rights, a grantee would have a colorable argument based on court precedent that the author used their “one shot” and no further termination is available.¹⁴⁸ Such legal reasoning is tenuous, however, and would fail the slippery slope argument, as theoretically a publisher could pay for a grant of an author’s copyright, then immediately tear up the contract and renegotiate at the time the author’s bargaining position is at its weakest, providing a nominal increase in consideration in exchange for an enforceable agreement not to terminate.¹⁴⁹ Such a construction, if upheld by a court, would create another *Fred Fisher Music Co.* effect, thereby contravening one of the express purposes of the 1976 Act. But until Nimmer’s “moment of freedom” rationale is adopted in a major court, it remains a feasible scenario.

¹⁴⁸ See *Penguin Grp.*, 537 F.3d at 204 (“[N]othing in the [old-works termination] statute suggests that an author or an author’s statutory heirs are entitled to more than one opportunity, between them, to use termination rights to enhance their bargaining power or to exercise them.”); *Milne*, 430 F. 3d at 1048 (“During the two-year period between service of the notice and the termination’s effective date, the original grant remains in effect so that the holder of the termination right is no freer to walk away from the to-be-terminated grant than he was before he served the notice.”).

¹⁴⁹ This practice would still be void under Nimmer’s “moment of freedom” interpretation of statutory termination. See NIMMER & NIMMER, *supra* note 141, § 11.07[D][5][a]; see also Kathleen M. Bragg, *The Termination of Transfers Provision of the 1976 Copyright Act: Is It Time to Alienate It or Amend It?*, 27 PEPP. L. REV. 769, 795–96 (2000).