

Terminating Exclusive Licenses

Terminating exclusive licenses after the passage of time is a statutory right. The Copyright Act of 1976 decrees that the author shall have a right exercisable only once for each separate literary work under exclusive license and for a brief window of time after 35 years from the date of a work's publication to terminate a license. (There are some qualifications to this, but not necessary to explain the concept). There are two provisions concerning statutory termination, one [Section 304(c)] relates to literary works published prior to January 1, 1978; the other [Section 203] relates to literary works published after January 1, 1978. Both sections can be thought of as gifts from Congress to authors, or their estates, or spouses and children to renegotiate with the licensee of an economically valuable work or terminate licenses entered into at the beginning of an author's career when he or she was in an unequal bargaining position with the licensee. We are going to confine our comments to Section 203, for post-1978 publications. The procedures for exercising the right are complicated.

If your literary work was published in 1978, 2013 is an important (in fact, the opening) year for terminating exclusive licenses because if you acted properly in accordance with the time requirements for notice you are either in the process of renegotiating the license or taking steps to terminate an exclusive license for further exploitation with another licensee. If you started publishing in 1988, to take a random subsequent year, your important year is 2023, which means that this year, 2013 is the opening year for giving notice. Notice can be served at anytime between 2013 and 2021.

What was the purpose of the Act and how does it work? In its Report on the passage of the Copyright Act of 1976 the House of Representatives stated that "The purpose of the Act was to "safeguard[] authors against unremunerative transfers" [that is, transfers at the beginning of their careers] and address "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." H.R. Rep. No. 94-1476, at 124 (1976). Section 203 reads in pertinent part:

In the case of any work other than a work made for hire, the exclusive or nonexclusive grant
of a transfer or license of copyright or of any right under a copyright, executed by the
author
on or after January 1, 1978 ... is subject to termination.

In other words, you have to own the copyright to be eligible to terminate the license. This issue has come up in some cases involving the superman character. There are no termination rights because the cartoonists created the superman stories and character as works made for hire.

You are familiar I know with the standard grant of rights provision in a publishing contract. It states that the grant is exclusive to the Publisher for "the term of copyright and all renewals thereof." Well, this is not exactly accurate because 35 years from publication of a literary work is likely to be less than halfway through the current term of copyright which is life of the author plus 70 years. Nothing in the grant of rights language takes away the author's statutory termination right which is non-waivable. In order to receive the benefit of the Act the author has to give notice to the licensee at least 2 years before the date of termination. The notice can be served anytime within a 10 year window preceding the anniversary date of the publication year. In other words, for a termination to be effective in 2013, notice had to have been given between 2003 and 2011. If notice was given in 2012, the earliest date for termination would be 2014.

The problem is that there is another window, a 5 year window. In other words, if the critical year is 2013 the window closes in 2018 so that if the notice is not served between 2008 and 2016 the right is irretrievably lost. Who benefits? The author if he or she is still living, the author's estate if there is no living spouse and children, or living spouse and children if there are any. If there are only children and grandchildren, the termination interest can only be exercised by the action of a majority of them. Very, very complicated particularly if the family is at odds with each other.