

Copyright Termination -- Get Rights Back and Perhaps Get Back to Work!

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Introduction to Termination

What with remakes and sequels constituting so much of what fills the theatres and television programming these days, it is difficult to fathom why literary authors and their representatives are not more aggressively tracking and asserting copyright termination rights. An author of a screenplay purchased by a studio on November 1, 1988 is entitled to send a notice of termination in November of 2013 with an effective termination date of November 1, 2023. Upon termination, the studio would lose the right to produce a remake or sequel from the underlying literary property and the author would regain those rights, but the simple act of giving notice of termination may well immediately benefit the author both economically and professionally. How? For one thing, by issuing a notice of termination, the author is reminding the studio that it has a valuable asset, albeit one with a limited shelf life. Likely the head of production would be notified that rights in the property may be forfeited and if she or her producer friends were at all interested in the property, the studio would likely engage in negotiations to re-acquire the author's rights, resulting in "fresh cash" to the author who might even be able to persuade the studio to involve the author in the creative process of a sequel or remake. In that regard, issuing a notice of termination might well invigorate a writer's career.

"Copyright Termination" is the legal term for the right of an author to terminate any transfer of his or her interest in a copyrighted work. This includes any sale or grant of any rights in a copyright, including licenses, such as a literary purchase or option agreement for a screenplay.

To summarize what this means, at a certain date governed by the Copyright Act, the author (or, in some cases, his or her legal heir as defined by the Act) has the right to take back whatever rights have been transferred in the copyright, provided that the specific requirements laid out in the Copyright Act are met. This right is inalienable, meaning that it exists no matter how much money was paid for the transfer or what the contract being terminated says. In other words, *the right to terminate a copyright transfer cannot be signed away.*

The right to terminate a copyright transfer does not apply to works created by a writer as a "work made for hire", such as when a motion picture studio engages a writer to create or revise a screenplay (in which case the studio is the author of the literary work); however, the right to terminate a copyright transfer would apply to an underlying literary work, such as a treatment or screenplay, which the writer is hired to revise. Sometimes the author and the employer disagree as to whether the author's contribution was a work made for hire and courts engage in an intensive factual analysis to determine the result.

The "Old" vs. "New" Copyright Act

Many of the requirements for termination, including which transfers can be terminated, depend on when the copyright was issued and when the agreement containing the transfer was executed. This is because there are two separate Copyright Acts in the United States. The "old" Copyright Act governs copyrights issued prior to January 1, 1978. The "new" Act governs copyrights issued on or after January 1, 1978.

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Subject to some variations, copyrights governed by the old Act are generally protected for a total of 95 years under current law, assuming they are properly renewed. This includes an initial 28-year copyright term and a 67-year renewal term. On the other hand, copyrights governed by the new Act are protected for the life of the author plus 70 years.

For terminations, the key date is when the agreement you wish to terminate was entered into. If the agreement was executed before January 1, 1978, then the time periods established by the old Act apply. If the agreement was executed on or after January 1, 1978, then the new Act applies.

When and How to Terminate

When to Terminate -- Five-Year Window. Both the old and new Acts provide for a specific five-year window in which a copyright transfer can be terminated.

For copyrights governed by the old Act -- meaning the transfer was executed prior to January 1, 1978 -- termination can be effected at any time during a five-year period which begins at the end of 56 years from the date the copyright was originally issued. For example, if a screenplay was copyrighted on January 1, 1956, then sold at any time prior to January 1, 1978, a termination of that sale agreement can happen at any time during the five-year window from January 1, 2012 through January 1, 2017.

What happens if the 56-year period has already passed? For some copyrights governed by the old Act, there is a second chance at termination after 75 years. To qualify for this second chance, (a) the copyright must have been in its renewal term as of October 27, 1998 (the effective date of the Sonny Bono Copyright Term Extension Act which governs this issue), (b) the initial 56-year period must have already expired prior to October 27, 1998, and (c) the termination right must not have been previously exercised. In such cases the author or owner of the termination right can terminate any transfer executed prior to January 1, 1978 during a period of five years beginning at the end of 75 years from the date the copyright was originally issued (allowing the author to reclaim the final 20 years of copyright protection). This exception potentially applies to any works copyrighted before October 27, 1942, provided all the requirements are met.

Copyright transfers executed on or after January 1, 1978 are all subject to the same rule established by the new Act. For such transfers, a termination can be carried out during a five-year period beginning at the end of 35 years from the date of execution of the transfer. If the transfer covers the right to publish the work, then the period begins at the earlier of either 35 years from the date of publication of the work or 40 years from the date of execution of the transfer.

Who Can Terminate -- Author or Heirs. Under either the old Act or the new Act, termination may be effected by the author if the author signed the agreement transferring rights in the work. If the author is dead, the termination interest is owned and may be exercised by the author's legal heirs as specified in the Copyright Act. In the case of joint works, where the rights were granted by two or more of the authors, a termination may be effected by the majority of the authors who executed it (or by their heirs if they are dead).

Where the old Act and new Act diverge is on transfers by anyone other than the author. A transfer executed by someone other than the author which took place prior to January 1, 1978 (governed by the old Act), can be terminated by a surviving person who executed it. However, transfers which took place on or after January 1, 1978 can only be terminated if they were executed by the author. What this means in practice is that if an author's heirs or anyone else obtained the rights to a copyrighted work and then transferred them *after* January 1, 1978, they *do not* have the right to terminate that transfer 35 years later.

As mentioned at the outset, regardless of when the work was copyrighted or transferred, if it was created as a "work made for hire," it is not subject to the termination right. Also, if the right to a copyright is granted through a will, such a transfer cannot be terminated.

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How to Terminate -- Notice Requirement. To carry out a termination, the author (or other authorized person as explained above), must do two things. First, the author must give advance notice of the termination in writing to the party who currently owns the copyright. The written notice must be signed by the author or anyone else entitled to terminate the transfer. The notice must state the effective date of the termination (which must fall within the appropriate five-year period) and be served on the current owner a minimum of two years -- and no more than ten years -- before the effective date. A copy of the notice must also be recorded in the Copyright Office before the effective date of termination.

By way of example, if a screenplay was sold on August 1, 1979, the first step is calculating when the five-year window for termination begins and ends. In such a case, the window would begin on August 1, 2014 (35 years after the transfer) and end on August 1, 2019. To terminate the transfer, a signed written notice must be given to the appropriate party no earlier than August 1, 2004 (10 years prior to the beginning of the five-year window) and no later than August 1, 2017 (2 years prior to the end of the window).

Conclusion

The discussion above is a general overview of copyright termination and the most widely applicable rules. Specific rules and circumstances may impact whether termination rights exist for a particular transfer, as well as when and how such rights must be exercised to be effective. But asserting rights of termination may bring old works to the attention of a studio, may result in a rights payment and may even lead to creative involvement in a sequel or remake. For questions about specific copyrighted works, how to calculate the critical dates and how to reclaim your rights, please contact David Stern (310-201-3530) or Brian Yates (310-712-6840) at Jeffer Mangels Butler & Mitchell LLP.



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