



## Transferring Literary Rights to the Next Generation: Draft Carefully

By: Doug Welty, J.D.



### Funding an inter vivos trust with copyright interests could lead to unexpected problems generations later.

Copyright interests are different from other categories of intangible personal property (such as contract rights) because they are governed by a unique federal statutory system that allows an author's heirs to "terminate" a copyright's transfer under certain circumstances. ("Termination" being a term of art meaning, in the copyright context, rescission of the transfer by an heir of the transferor.)

Whoa, you say! How can this be? Isn't an author free to sell or give the rights to his works to a third party (such as a Trustee), for consideration or for no consideration? And isn't a deal a deal, once you shake on it, sign the documents, and pay the money (if any)?

Well, no. Congress, in its seemingly infinite wisdom, has for more than a century enacted various schemes to protect authors from themselves - or, to be fair, to protect them from being taken advantage of early in their careers by predators who would pay them a pittance for their work. The 1909 Copyright Act provided an initial 28-year term of copyright protection, followed by a second 28-year "renewal" term whose rights vested either in the author, if still living, or if deceased, in statutorily-designated successors who recaptured any U.S. rights from any prior grantee of the author.

But this right was eroded over the years by various court decisions and industry practices. So, when enacting the 1976 Copyright Act, Congress created a new termination right that, unlike the 1909 renewal-term right, was inalienable by the author during his lifetime. (The 1976 Act termination right also applies to works that pre-existed its effective date.)

Under the 1976 Copyright Act, the following statutory successors, if they jump through the right deadline and filing hoops properly, and in the proper order, may be able to *terminate and reclaim* an author's lifetime grant of literary rights, *including an inter vivos grant to a Trustee*:

- The widow (or widower), who takes the entire termination interest unless there are children or grandchildren, in which case she takes half.
- The author's children and grandchildren, *per stirpes*, subject to the widow's share just mentioned. The children of a dead child must act by majority decision.
- If there is no living widow, child, or grandchild, then the author's executor, administrator, or trustee will own the entire termination interest.

See 17 U.S.C. secs. 203(a)(2) and 304(c)(1). (There are other rules, such as the condition that a group of successors may exercise termination rights only if the group represents collectively more than half the rights that exist.)

To both complicate and simplify matters, though, some categories of copyright grants are immune from termination. Grants of copyrights in works made for hire are not terminable. Grants of non-U.S. copyright interests are not terminable under the Copyright Act (although they might be under applicable foreign statutes). And, most significantly for estate planners, *a copyright grant made in a Will is not terminable*, unlike an inter vivos grant to the Trustee of a revocable living trust. 17 U.S.C. secs. 203(a)(2), 304(c). *See, e.g., Larry Spier Inc. v. Bourne Co.*, 750 F. Supp. 648, 650, (S.D.N.Y. 1990), <http://is.gd/j60912>, *rev'd on other grounds* 953 F.2d 774 (2d Cir 1992).

As a practical matter, then, estate planners should keep this unique provision of law in mind when designing and funding living trusts for authors and artists. Funding a living

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trust with literary rights via inter vivos transfer can open up a door for termination litigation instituted after the author's death by unruly widows, or heirs who are omitted as beneficiaries or given only limited interests in trust assets, or groups of heirs who band together to defeat spendthrift limitations. Or, in a worst-case scenario, creditors or divorcing spouses of heirs might discover termination rights of which the heirs themselves were not aware.

Attorneys who advise executors, trustees, and heirs (whether the heirs are disgruntled or happy), or act as executors or administrators themselves, also need to be aware of how termination rights work. They should be prepared to assert them, or defend against their unwarranted assertion, as may be appropriate.

The safest course of action for trust-based estate planners will usually be (i) to specifically exclude literary rights from general inter vivos assignments of personal property to Trustees, and (ii) to specifically include them in either a stand-alone or residuary clause of a pour-over Will. This will assure that they are transferred to the Trust under the provision of the Copyright Act referred to above that makes transfers by Will non-terminable.

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For a more detailed discussion of the theory and practice of terminations of copyright transfers, with many useful citations, see Bill Gable, *Taking It Back*, LOS ANGELES LAWYER, June 2008 at 34, <http://is.gd/7uroMg>.

### About the Author:

*Doug Welty is the owner of C. Douglas Welty P.C. in Arlington, Virginia. He focuses his practice on estate and trust planning and wealth preservation. Doug received his J.D. from the University of Virginia in 1982, and is a member of the Virginia State Bar and the District of Columbia Bar. His website is at [weltyblair.com](http://weltyblair.com).*