Liberating Estates Law from the Constraints of Copyright

Lee-ford Tritt
University of Florida College of Law, tritt@law.ufl.edu

Follow this and additional works at: http://scholarship.law.ufl.edu/facultypub

Part of the Estates and Trusts Commons, and the Intellectual Property Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outlier@law.ufl.edu.
LIBERATING ESTATES LAW FROM THE CONSTRAINTS OF COPYRIGHT

Lee-ford Tritt

TABLE OF CONTENTS

I. INTRODUCTION ..................................................................................................... 111

II. ESTATES LAW ...................................................................................................... 115
   A. Testamentary Freedom ................................................................................... 115
   B. Justifications for Testamentary Freedom ....................................................... 117
      1. Jurisprudential Justifications ................................................................. 118
         a. Natural Rights ...................................................................................... 118
         b. Utilitarianism and the Advent of Wealth Maximization .......... 121
         c. Orthodox Economics ................................................................. 123
         d. Libertarianism .................................................................................. 124
      2. Pragmatic Justifications .............................................................................. 125
         a. Market for Social Services ............................................................. 125
         b. Promotion of Intelligent Estate Planning ........................................ 126
         c. Amenable to Modern Family Dynamics ....................................... 128
         d. Administrative Ease ................................................................. 129
   C. Testamentary Freedom as a Constitutional Right ............................................ 130
   D. Exceptions to Testamentary Freedom ............................................................ 132
      1. Elective Share ............................................................................................ 134
      2. Family Allowances ..................................................................................... 136
      3. Homestead Allowance ................................................................................. 137
      4. Personal Property Allowances ................................................................. 138

* Assistant Professor of Law, University of Florida Fredric G. Levin College of Law; Director, The Center for Estate & Elder Law Planning; and Associate Director, The Center on Children and Families. With sincere thanks and appreciation to Michael R. Siebecker, Bridget J. Crawford, Renata J. Ferrari, Thomas P. Gallanis, Jeffrey L. Harrison, Francis M. Nevins, John Peschel, Robert H. Sitkoff, Jeffrey N. Schwartz, Christopher Slobogin, and E. Gary Spitko. Thanks also to Nathaniel T. Quirk for his superb research assistance and much-appreciated support.
III. COPYRIGHT LAW ................................................................. 140
   A. Foundations and Doctrine of Copyright Law ........................... 140
      1. Intellectual Property in General .......................................... 140
      2. Copyright in General .......................................................... 141
   B. History of Will-Bumping and Birth of Estate-Bumping ............. 144
      1. Statute of Anne (1709) ......................................................... 144
      2. The Copyright Act of 1790 .................................................. 147
      3. The Copyright Act of 1831 ................................................... 148
         a. The Basic Problem of Will-Bumping ................................. 150
         b. Will-Bumping Scenarios ............................................... 152
      4. The Copyright Act of 1909 .................................................. 154
      5. The Copyright Act of 1976 ................................................... 157
         a. The Death of Will-Bumping ............................................. 157
         b. The Birth of Estate-Bumping .......................................... 160

IV. THE BASIC PROBLEMS WITH ESTATE-BUMPING ...................... 167
   A. Conflicts with Testamentary Freedom ..................................... 167
      1. Revocable Trusts .............................................................. 170
      2. Lifetime Transfers ............................................................ 173
         a. Annual Exclusion .......................................................... 173
         b. Applicable Credit ......................................................... 175
         c. Payment of Gift Tax ..................................................... 176
      3. Family Holding Entities ................................................... 177
      4. Charities ........................................................................ 179
      5. Modern Family Concerns .................................................... 180
         a. Prenuptial Agreements .................................................... 180
         b. Blended and Nontraditional Families ............................... 181
   B. Ineffectiveness of Copyright Law .......................................... 182
      1. Original Intent Undermined ................................................ 182
      2. Circumventing Copyright Law with Will Contracts .................. 183
   C. Inefficiency of Copyright Law .............................................. 184
      1. Duplicative ....................................................................... 184
      2. Arbitrary Nature of Timing ............................................... 184
      3. Inconsistent Restraints on Authors ..................................... 185
      4. Devaluation of Copyright Interests ..................................... 186
   D. Unconstitutionality of Copyright Law ..................................... 187
      1. Outside Scope of Copyright Power ..................................... 187
      2. A Potential Taking ........................................................... 189

V. CONCLUSION AND RECOMMENDATIONS .................................. 190
I. INTRODUCTION

A disturbing phenomenon has driven an unintended wedge between copyright law and estates law. Currently, copyright law effectively prevents copyright authors from disposing of their copyright interests through common estate planning mechanisms resulting in an effect I have termed "estate-bumping." This restraint on an author's freedom to dispose of his or her copyright interest at death is not imposed on any other type of property interest. With the explosive growth of the monetary value of copyright interests in the United States economy, this unique restraint on the disposition of copyrights will severely hamper important economic and liberty interests of an ever increasing number of authors. Considering this restraint is entirely accidental, Congress should reform the copyright code to preserve testamentary freedom and prevent unintended estate bumping.

Testamentary freedom—the basic principle at stake in this conflict—is the hallmark principle of estates law. Basically, testamentary freedom is the notion that individuals have the right to control the disposition of their

1. In the context of copyright law, the creator of a copyrightable work is referred to as the “author” regardless of the nature of the work. See, e.g., 17 U.S.C. § 106A (2000). Although the term “author” may seem appropriate when the copyrightable work is a novel, but inappropriate when the copyrightable work is a painting, film or computer technology, all copyright creators are nevertheless referred to as authors.

2. I have coined the phrase “estate-bumping” to describe this phenomenon because copyright law has the disturbing potential of thwarting, or "bumping," an author’s dispositive estate plan.

3. A 2005 report indicated that copyright industries accounted for at least six percent of the annual gross domestic product of the United States, or more than $600 billion, see ROBERT J. SHAPIRO & KEVIN A. HASSETT, THE ECONOMIC VALUE OF INTELLECTUAL PROPERTY 16 (2005), available at http://www.usaforinnovation.org/news/ip_master.pdf, and they are one of the fastest growing sectors of the U.S. economy, see id. at 7.

property during their lifetime and upon death. American society has long recognized the value inherent in protecting each individual's ability to acquire and transfer ownership of private property. Just as individuals are generally free to consume and transfer property during their lifetimes, individuals generally are, and should be, free to dispose of their property however they please at death.

Current copyright law, however, imposes a unique restraint on the testamentary freedom of authors. The Copyright Act of 1976 (the "1976 Act") permits a statutorily designated group of heirs—ones not necessarily selected by the author—to control the disposition of the author's copyright interests after death. In effect, this enables unintended beneficiaries to rewrite, or "bump," an author's estate plan. Thus, it is copyright law—rather than an author's utilization of testamentary freedom—that determines who ultimately has the right to profit from the author's works at death.

Given the firm entrenchment of testamentary freedom, why does copyright law contravene such a basic principle of American estates law? Quite frankly, the contravention is accidental. Historically, American copyright law has provided authors with a unique "reversionary right" in their copyrightable work. In effect, American copyright law has allowed authors the ability to "take back" previously assigned copyright interests in order to reassign them for a second chance to profit from their copyright interest. In an attempt to alleviate some unintended ill-effects of previously enacted reversionary systems, the 1976 Act revised the reversionary system by creating a new copyright property interest—"termination rights." Termination rights accomplish copyright law's reversionary goal by providing authors the ability to retake previously assigned copyright interests by exercising a non-waivable right to terminate previously assigned copyrights in order to reassign (by transfer or sale) the copyrights.

5. See Hodel v. Irving, 481 U.S. 704, 716 (1987) ("In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.").
7. Id. § 203, 90 Stat. at 2569-70.
8. The legislative history and accidental nature of this contravention is explained in Part III.B of this Article.
9. 17 U.S.C. §§ 203, 304(c) (2000 & Supp. 2002). No other type of property owner or property interest is afforded these rights. Similar restraints never developed in other property rights, including other intellectual property rights such as trademarks and patents. The law of patents never followed copyrights into a reversionary system. Likewise, neither did trademark law, where rights are contingent on use of the mark in commerce and rights continue in perpetuity until the mark is no longer used. See generally Johanna F. Sistek, Goodwill
On their face, the 1976 Act’s termination rights provisions were drafted wholly to benefit authors. Unfortunately, though, the 1976 Act does more than grant termination rights to authors. In order to protect the interests of an author’s family members, the 1976 Act also grants termination rights to a statutorily defined class of heirs upon the author’s death. Most notably, authors cannot effectively divest these statutory heirs of termination rights nor alter these statutory heirs’ respective interests in termination. It is this inability to divest the statutory heirs of their termination rights that has the accidental effect of enabling these individuals to bump an author’s estate plan and take the copyright interests in their own right regardless of the author’s dispositive intention.

This conflict between estates law and copyright law is not only accidental, the conflict is also unnecessary. A policy rationale supporting termination rights is that by allowing individuals a second chance to profit from a copyrightable work, individuals will be financially motivated to undertake creative works, which in turn will benefit public knowledge. This policy is not naturally at odds with the jurisprudential underpinnings of testamentary freedom because a fundamental justification for testamentary freedom is a wealth enhancement rationale. This rationale is based on the idea that the ability to control the succession of one’s personal property adds value to the property, which in turn motivates wealth accumulation and strengthens the economy’s capital base. Hence, this rationale for testamentary freedom seems entirely compatible with the policy of granting authors termination rights in their works. Yet, termination rights were created (and have been maintained) in a way that not only conflicts with testamentary freedom, but also undermines the very rationale underlying

---

10. See 17 U.S.C. §§ 203, 304(c). In essence, the copyright code creates a class of forced heirs. Basically, the term “forced heirship” means that a testator is forced to leave a certain percentage of the testator’s property to certain individuals. In other words, the testator cannot deprive these heirs from inheriting a portion of the testator’s estate—the individuals are “forced” to be heirs.


termination rights in the first place because they give no regard to common estate planning mechanisms.\textsuperscript{13}

The inability to divest the statutory heirs of termination rights creates several practical problems. Specifically, termination rights create a variety of estate planning, economic, social, and constitutional problems. Allowing the statutory heirs to retake copyrights after an author’s death drastically curtails an author’s testamentary freedom and undermines well-crafted estate plans. In addition, termination rights are ineffective because they no longer fulfill the original statutory purpose of protecting family members of deceased authors. Also, termination rights are inefficient because they are duplicative of family protections provided under states’ estates law and are therefore wholly unnecessary. Finally, termination rights may be unconstitutional.

Unfortunately, the estate-bumping problem has been almost completely ignored by scholars and practitioners. Moreover, those scholars who have opined about the topic argue that any conflict between estates law and copyright law was resolved by the adoption of the Copyright Act of 1976,\textsuperscript{14} which eliminated the previous reversionary system and replaced it with termination rights. The false assertion that the conflict between the two legal disciplines has been reconciled creates a false sense of security among practitioners, which perhaps exacerbates the significance of the true conflict that remains.

Fortunately, there is time to amend the 1976 Act in order to avert any estate-bumping problems because the estate-bumping effects will not be felt until 2013—the earliest statutory date that termination rights may be effectuated. If left uncorrected, however, copyright law will “bump” the estate plans of copyright authors and transfer the author’s valuable copyrights to individuals other than those whom the author specifically intended to receive that property. Absent legislative action, be forewarned: the era of “estate-bumping” will soon be upon us.

In order to describe fully the phenomenon of “estate-bumping” and its import, and to understand how to balance estates law and copyright law, this

\textsuperscript{13}. For example, one could argue that by diminishing an author’s control over the ultimate disposition of copyright interests, which is available to all other property owners, the copyright code unnecessarily devalues copyrights as a property interest.

Article will address the philosophical foundations of estates law and copyright law as well as the important doctrinal developments in each that have given rise to the current conflict. Part II ("Estates Law") introduces the doctrine of testamentary freedom; addresses at length the panoply of common philosophical and pragmatic rationales for a robust right of testamentary freedom; briefly describes a constitutional platform that might exist for the right of free testation; and discusses the limited exceptions to the principle that exist under state law. Turning to the other side of the conflict, Part III ("Copyright Law") reviews the concepts of intellectual property and copyright in general and provides an analysis of the development of the current copyright law framework, focusing with particularity on the history, development, and pitfalls of the renewal system and termination rights. Based on the preceding philosophical and doctrinal investigation, Part IV ("The Basic Problems with Estate-Bumping") describes the on-going problem of estate-bumping, which assaults the testamentary freedom of a copyright author and renders impotent sound estate planning. Finally, Part V ("Conclusion and Recommendations") concludes that copyright laws must be amended to eliminate the problem of estate-bumping and proposes two relatively simple, yet significant, changes to reconcile the presently disconnected regimes of estates and copyright law.

II. ESTATES LAW

A substantive analysis of how termination rights under the 1976 Act infringes upon testamentary freedom must begin with an elementary overview of the traditional philosophical justifications for, and limitations upon, testamentary freedom. An appreciation of the jurisprudential underpinnings of testamentary freedom is necessary because the present copyright code can potentially thwart an author’s desire concerning his or her estate plan and in turn impact how the author treats copyright interests during his or her lifetime.

A. Testamentary Freedom

The principle of testamentary freedom, which is the governing principle underlying American estates law, is simply the notion that individuals have

15. See sources cited supra note 4. However, some scholars are skeptical concerning the importance of testamentary freedom in American estates law. See generally, e.g., Melanie B. Leslie, The Myth of Testamentary Freedom, 38 ARIZ. L. REV. 235 (1996).
the freedom (or right) to dispose of their property according to their pleasure at death. Testamentary freedom can be viewed as one stick in the bundle of rights referred to as property rights. The notion that individuals have testamentary freedom in determining the ultimate recipient of their property interests and choosing the character of the transfer derives from a general and well-established property right—the right to control the consumption and disposition of one's personal property. Thus, just as individuals have the right to control the lifetime consumption and disposition of property, testamentary freedom posits that individuals should be able to control the disposition of property at death.

Yet, the principle of testamentary freedom is broader than a simple freedom to bequest one's property. In fact, testamentary freedom encompasses several distinct but interconnected property rights: the right to gift or devise property during life or at death; the right to choose who receives such property; the right to place conditions on the donative transfer; the right to choose the character and timing in and at which the beneficiary receives the property; and the right to appoint another person to make these choices.

Generally, there are three ways to manifest a testator's freedom or intent in the disposition of property at death: Wills, Will-substitutes (e.g., revocable inter vivos trusts, contracts, life insurance, pension plans, and joint accounts), and intestacy statutes. In the United States, will-substitutes are becoming the predominate estate planning tool. In fact, far more property passes by Will-substitutes than by Will in the United States. While Wills, Will-substitutes, and intestacy statutes differ in a variety of ways, they are similar in that they each provide a means of effectuating testators' intent.

Even though testamentary freedom is the underlying leading principle of Anglo-American estates law, complete testamentary freedom is not a universally accepted principle. Freedom over the character of the disposition of private property at death is congruent with ideas concerning the nature of

---

17. WAGGONER ET AL., supra note 4, at 7.
18. Basically, a Will-substitute is the functional equivalent of a Will executed during life. Will-substitutes recognize a testator's intent by including provisions that dispose of a decedent's property at death according to his or her wishes.
19. When the wishes of a decedent are not known due to a lack of express intent, intestacy statutes attempt to recognize an individual's testamentary intent by disposing of property in accordance with "the probable intent of the average intestate decedent." JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 62 (7th ed. 2005).
20. Id. at 9.
property ownership itself. Even though all societies respect and permit some form of private ownership of property, there is no society that recognizes complete and unfettered private ownership of property. As the mere existence of private property does not necessarily lead to the recognition of an individual’s right to control all aspects of that property during one’s life, it also does not lead to the recognition of full control over the disposition of property at death. Thus, questions arise as to proper justifications for the policy of testamentary freedom and what, if any, are proper limitations on testamentary freedom.

B. Justifications for Testamentary Freedom

Various theories have been offered in support for the principle of testamentary freedom—some more widely accepted, others more controversial. In general, testamentary freedom responds to basic human pleasures and desires and is supported by a variety of economic, philosophical, and societal values. The simplest rationale for testamentary freedom is that, in a society based on the theory of private property, the freedom of testation might be the least objectionable arrangement for dealing with property succession at the testator’s death. Other arguments for robust testamentary freedom are that it is natural, creates happiness, promotes wealth accumulation, encourages industry, creativity and productivity, reinforces family ties, promotes responsibility, and allows the testator to adapt to the needs and circumstances of his particular family. Each rationale has its proponents and skeptics, but the very breadth of jurisprudential and pragmatic justifications for testamentary freedom is, in itself, a testament to why this concept is at the core of Anglo-American succession law. A more detailed description of the various jurisprudential and pragmatic justifications of the notion of testamentary freedom follows.

21. In the United States, the institution of property revolves around the concept of ownership—whether an individual can possess particular rights or assets individually and whether the individual is free to dispose of these rights or assets as the individual chooses. Accordingly, estates law is felt to be in harmony with property law. Therefore, estates law overlaps with the domain of private property. Friedman, supra note 4, at 10-11.


23. See id.

1. Jurisprudential Justifications

a. Natural Rights

One of the oldest rationales for testamentary freedom is the belief that individuals have a natural right to control the consumption and disposition of their property during life and at death and that this right predates civil law and therefore remains beyond the government's power. The basic premise, which is commonly know as the natural rights approach to testamentary freedom, advocates that individuals, after working hard to create and retain wealth, are naturally free to do with their wealth as they please during life and at death.

The natural rights approach to testamentary freedom first came to prominence during the Enlightenment Period of the seventeenth century and is mainly linked with the philosophers Hugh Grotius, John Locke, and Jean-Jacques Burlamaqui. In 1625, Hugo Grotius wrote that the freedom to transfer property by Will is integrally related to the concept of property ownership and, therefore, it "belongs to the law of nature." Later, John Locke espoused that individuals have an aboriginal right to oneself and therefore to the product of their labor and that this right is a natural one, ungrounded in civil governments. Locke believed that ownership rights in property are not created by civil laws but are rather God-given rights; in that

26. Note, however, that natural rights philosophers did not and do not necessarily agree as to the foundational root to the right to testamentary freedom (for example, whether the right is an inheritance right or a right to bequeath).
27. See J.J. Burlamaqui, The Principles of Natural and Politic Law (Nugent trans., Cambridge Univ. Press 1807) (1763); 2 Hugo Grotius, De Jure Belli Ac Pacis Libri Tres [On the Law of War and Peace: Three Books] 265 (Francis W. Kelsey trans., 1925); John Locke, Two Treatises of Government 134 (Thomas I. Cook ed., Hafner Publ'g Co. 1966) (1690). Note, however, that these philosophers qualified the natural right of testamentary freedom insofar as it conflicted with the testator's natural obligations to his dependents. Hirsch & Wang, supra note 12, at 6. But, they recognized greater testamentary freedom once the testator's children were properly cared for. "[A] Father may dispose of his own Possessions as he pleases, when his Children are out of danger of perishing from want." Id. at 6 n.18 (citation and internal quotation marks omitted). See generally Orrin K. McMurray, Liberty of Testation and Some Modern Limitations Thereon, 14 U. Ill. L. R. 96 (1919) (providing discussion of various natural law theories of testamentary freedom).
28. 2 Grotius, supra note 27, at 265.
29. Locke, supra note 27, at 134.
he viewed that testamentary rights were as fundamental as other property ownership rights.\textsuperscript{30}

Of course, the natural law theory of testation had its detractors. Eighteenth century philosopher William Blackstone, for instance, held a positivist view of testamentary freedom. Blackstone viewed property itself as a “God given” natural right, but distinguished lifetime transfers of property from testamentary transfers.\textsuperscript{31} Although Blackstone’s concept of testamentary freedom was broader than English precedent, Blackstone nevertheless believed property rights expired upon death because nature protects only the living.\textsuperscript{32} He stated that a continuing right of property beyond life “was no[t] natural, but merely a civil right. . . . Wills . . . and testaments, rights of inheritance and succession, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them.”\textsuperscript{33} Another early critic, William Paley, believed in natural property rights, but thought that natural rights to property attached solely to the fruits of one’s labor and, thus, ownership rights in every other type of property were not natural.\textsuperscript{34}

Despite these criticisms, the natural rights argument that individuals have the inherent right to control the disposition of their property during lifetime and at death remains a fundamental theory for justifying testamentary freedom today. In fact, after centuries of being ignored, the natural rights approach to testamentary freedom has been proffered in various state courts in the United States. For instance, the Supreme Court of Wisconsin, in \textit{In re Estate of Beale},\textsuperscript{35} a case affirming a probate proceeding that admitted a Will to probate over the objection of one of the testator’s minor children, stated that “the right to make a [W]ill is a sacred . . . right, which right includes a right of equal dignity to have the [W]ill carried out.”\textsuperscript{36} In allowing the Will to probate, the court relied on precedent\textsuperscript{37} found in \textit{In re Will of Hopkins},\textsuperscript{38} that “the law gives the testator the right to dispose of his property in any

\begin{itemize}
\item \textsuperscript{30} \textit{Chester, Inheritance, Wealth, and Society}, supra note 24, at 14.
\item \textsuperscript{31} \textit{See Kornstein, supra note 25, at 750-51.}
\item \textsuperscript{32} \textit{William Blackstone}, 2 Commentaries \#10-11.
\item \textsuperscript{33} \textit{Id.} at \#11-12.
\item \textsuperscript{34} \textit{See William Paley, The Principles of Moral and Political Philosophy} 153 (a new ed. 1795) (stating belief that there was no right to bequeath land).
\item \textsuperscript{35} 113 N.W.2d 380 (Wis. 1962).
\item \textsuperscript{36} \textit{Id.} at 383.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} 79 N.W.2d 131 (Wis. 1956).
\end{itemize}
manner he may desire as long as it is his own act and free will.\textsuperscript{39} Thus, the court viewed freedom of testation as a natural right that must be recognized by law.

Later, in \textit{Shriners Hospitals for Crippled Children v. Zrillic},\textsuperscript{40} a Florida case in which one of the testator's descendants sought to set aside a testamentary charitable bequest under a Mortmain Statute,\textsuperscript{41} the Supreme Court of Florida held that the right of testation is not purely a creation of statute but, like property rights, is grounded in natural law.\textsuperscript{42} The Florida Supreme Court acknowledged that some courts may have distinguished property rights from testamentary freedom rights in that property rights are inalienable rights grounded in natural law, whereas the right to testamentary freedom is a creation of statute.\textsuperscript{43} The Florida court, however, thought this distinction was irrelevant.\textsuperscript{44} The court opined that this presumed distinction had its roots in the English feudal notions of property and that the "analysis is inapplicable in our society where feudalism never existed and where property rights rest on an express constitutional foundation that is distinguishable from the common law roots of feudal England."\textsuperscript{45} In holding that testamentary disposition is a protected property right, the court relied on \textit{Nunnemacher v. State}\textsuperscript{46} for the proposition that "the right to pass property by [W]ill or inheritance is a natural right under the state constitution and cannot be wholly taken away or substantially impaired by the legislature."\textsuperscript{47} The court held that the right to transfer property by Will is a natural property right that the state constitution must recognize.

\textsuperscript{39} \textit{Beale}, 113 N.W.2d at 383 (internal quotation marks omitted) (quoting \textit{Hopkins}, 79 N.W.2d at 134-35).

\textsuperscript{40} 563 So. 2d 64 (Fla. 1990).

\textsuperscript{41} See \textit{id.} at 65 n.1. A Mortmain Statute allows lineal descendants to avoid testamentary transfers to charitable, religious or governmental bodies if the decision to make the bequest was reached during the last six months of the testator's life. See \textit{id.} at 65 n.3. The ostensible modern justification for these statutes is to avoid undue influence. \textit{id.} at 69. At the time this case was decided, only Florida, Georgia, Idaho, and Mississippi had these statutes in effect. \textit{id.} at 69 n.5. Today, all American Mortmain Statutes have been repealed or declared unconstitutional. \textit{Restatement (Third) of Prop.} \textit{Wills & Other Donative Transfers} § 9.7 (2003).

\textsuperscript{42} \textit{id.} at 67.

\textsuperscript{43} \textit{id.}

\textsuperscript{44} \textit{id.} at 68-69.

\textsuperscript{45} \textit{id.} at 68.

\textsuperscript{46} 108 N.W. 627 (Wis. 1906).

\textsuperscript{47} \textit{Shriners}, 563 So. 2d at 68.
b. Utilitarianism and the Advent of Wealth Maximization

Equally as old as the natural rights justification for testamentary freedom is a rationale premised on utilitarian principles.\(^{48}\) Simply, the utilitarian rationale for testamentary freedom is premised on the belief that individuals derive personal pleasure out of bequeathing property to others. For utilitarians, the notion that an individual, while living or dead, held natural rights of any kind was nonsense; only the greatest happiness principle—the promotion of happiness (or utility)—could justify the existence of rights.\(^{49}\) One prominent utilitarian philosopher, Jeremy Bentham, professed that the right to bequeath was a civil right, not a natural right, and that the regulation of this right should be to achieve maximal happiness.\(^{50}\) Thus, securing the greatest overall happiness for society provided the utilitarian the basis for advocating testamentary freedom.

As early as the thirteenth century, utilitarian philosophers argued that testamentary freedom encourages individual initiative, investments, and savings. For instance, thirteenth century jurist Henry de Bracton argued that forced heirship (forcing an individual at death to give property to prescribed individuals) would diminish the individual's incentive to work and save.\(^{51}\) Bracton opined “a citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives.”\(^{52}\) In other words, these utilitarians believed that curtailing testamentary freedom subjectively devalues property because one of the potential uses of such property has been denied to the property owner. Once

\(^{48}\) Hirsch & Wang, supra note 12, at 7.

\(^{49}\) Utilitarians “ridiculed reliance on the ‘law of nature’ as a way of avoiding explaining why a proposition is true.” Kornstein, supra note 25, at 750. Embracing policies that promoted the greatest happiness principle for the greater community, utilitarians attempted to drive a wedge between natural law and normative principles. Chester, Inheritance, Wealth, and Society, supra note 24, at 25-26.

\(^{50}\) Chester, Inheritance and Wealth Taxation, supra note 24, at 83.


\(^{52}\) Bracton, supra note 51, at 181. The normative virtues of this principle were followed by later utilitarian philosophers such as Jeremy Bentham and John Stuart Mill. See, e.g., JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE, in 1 THE WORKS OF JEREMY BENTHAM 338 (John Bowring ed., 1962) (questioning whether individuals would frivolously spend their money during their lives if they could not bequeath their property at death); 1 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 221-22 (rev. ed. 1899).
the property has been devalued, individuals may be discouraged from accumulating property, thereby adversely affecting the capital base at any given time.\textsuperscript{53}

In the eighteenth century, some American legal philosophers embraced the utilitarian approach in advocating the greatest “perfection and happiness” rationale for legal structures. These American philosophers advocated laws that expanded liberty interests so that an individual would be free to “exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections.”\textsuperscript{54} In applying this principle to estates law, Timothy Walker stated that “[a] man may give his property to whomsoever he pleases, to the complete disherison of his children; and however unnatural and inhuman this may appear, it will not affect the validity of the will.”\textsuperscript{55}

Many modern social scientists have advocated a similar theory for testamentary freedom, referred to as wealth maximization.\textsuperscript{56} These philosophers believe that limiting testamentary freedom decreases the value of property and, accordingly, people will accumulate less property thereby decreasing the total amount of capital. Robust testamentary freedom, however, motivates individuals to save and invest. Savings, both direct and indirect, preserve the economy’s capital base, promote employment, and motivate productivity.\textsuperscript{57} Testamentary freedom, therefore, accomplishes the normative goal of the wealth maximization principle.\textsuperscript{58}

Opponents of utilitarianism have proffered various objections to this rationale for testamentary freedom. Adam Hirsch and William Wang discuss various reasons why individuals might accumulate property other than for the pleasure of bequeathing the property at death.\textsuperscript{59} For example, individuals might accumulate wealth for prestige and power.\textsuperscript{60} In fact, these opponents

\textsuperscript{53} Hirsch & Wang, \textit{supra} note 12, at 8. For statements of the principle, see Bentham, \textit{supra} note 52, at 338; Bracton, \textit{supra} note 51.


\textsuperscript{55} Timothy Walker, \textit{Introduction to American Law} 339 (De Capo Press 1972) (1837).


\textsuperscript{57} Atkinson, \textit{supra} note 51, at 34.

\textsuperscript{58} Hirsch & Wang, \textit{supra} note 12, at 8.

\textsuperscript{59} \textit{Id.} at 8-9.

argue that testamentary freedom may lead to a reduction of capital because potential beneficiaries will have less incentive to produce their own personal wealth in expectation of an inheritance.\textsuperscript{61}

Simply proffering other rationales for the motivation to accumulate wealth, however, does not preclude the possibility that the freedom of testation has a wealth maximization effect. And in the end, a utilitarian based rationale for testamentary freedom remains strong today.

c. Orthodox Economics

The orthodox economics justification for testamentary freedom combines a pure natural rights rationale with a nuanced utilitarian justification.\textsuperscript{62} Simply, orthodox economists view testamentary freedom as a natural right sanctioned—but not created—by the state.\textsuperscript{63} This school of thought has a “slippery-slope” rationale for testamentary freedom—“if the state could forbid [property succession, then] it could forbid lifetime gifts as well.”\textsuperscript{64}

Orthodox economists, like René Stoum, dismissed Blackstone’s view that the dead possessed no natural rights to bequeath property because the transmission of property by bequest was not an exercise of the desires of the dead, but rather an exercise of the desires of the living.\textsuperscript{65} In addition to this natural rights acknowledgment, these philosophers also stressed more utilitarian aspects concerning the freedom of testation. Léon Faucher, another orthodox economist, argued that if the institution of bequest did not exist, “it would be necessary to invent it because it maximized happiness.”\textsuperscript{66} Other orthodox economists emphasized that limitations on testamentary freedom would dissipate capital wealth.\textsuperscript{67}

\textsuperscript{61} Hirsch & Wang, supra note 12, at 9.
\textsuperscript{62} This rationale is premised on the same type of discourse found in the Orthodox School of Economic Philosophy.
\textsuperscript{63} Chester, Inheritance and Wealth Taxation, supra note 24, at 81.
\textsuperscript{64} Chester, Inheritance, Wealth, and Society, supra note 24, at 26.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 25–26.
\textsuperscript{67} Chester, Inheritance and Wealth Taxation, supra note 24, at 82.
Though the orthodox economics approach might not remain as prevalent in modern discourse about the principles of free testamentation, the approach provides yet another brick in the broad philosophical foundation for a robust commitment to testamentary freedom.

d. Libertarianism

An additional rationale for testamentary freedom can be found in neo-libertarianism, based on the belief in the complete freedom of the individual. Libertarian philosophers believe that the right to consume property during life necessarily carries with it the implication of an absolute right to control the distribution of property at death.

The focus of the libertarian argument is on the right of individuals to control the succession of their personal property. The rationale is based upon the premise that an emphasis on individual economic production betters all members of society rather than trying to equalize advancement opportunities for all members of society. Their testamentary philosophy rationale can be summarized by one of the more prominent followers, Milton Friedman, who believes that if one "[p]ut freedom before equality . . . you'll get more of both . . . Individual decisions, not societal ones will produce the outcomes most of us want." Another follower, Robert Nozick, states that testamentary freedom is an "essential aspect[] of the absolute liberty which should be accorded to each individual."

Detractors of the libertarian based rationale for testamentary freedom believe that government interventions are necessary in economic markets to try to equalize advancement opportunities for all members of society. Suggesting that the free market does not have the ability to distribute economic benefits fairly, opponents of libertarianism believe limitations upon individual freedom are necessary.

While these opponents raise some valid arguments against a libertarian philosophy generally, the idea that individuals should be free from...
governmental restrictions over the disposition of their property during lifetime and at death has been a bedrock philosophical principle supporting testamentary freedom.

2. Pragmatic Justifications

a. Market for Social Services

A pragmatic justification for testamentary freedom is that the prospect of receiving a bequest creates an incentive for the provision of social services to the testator. In other words, an individual’s power to bequeath or disinherit encourages potential beneficiaries to provide services and care that are beneficial to the testator during his or her lifetime—services that add to the economy as a whole. Thus, testamentary freedom promotes responsibility by encouraging individuals to care for those who, if unprovided for, could become dependent on society. In effect, “bequeathing not only express[es] but beget[s] affection, or at least responsibility.”

Since the thirteenth century, many legal philosophers have argued some version of this theory. Henry de Bracton, for instance, posited that testamentary freedom gives spouses and children an incentive to treat the testator well. In addition, Jeremy Bentham believed that curtailing testamentary freedom could diminish parental control because the testator would have no way of rewarding kindness or punishing cruelty.

Similarly, it has been argued that testamentary freedom promotes family harmony. For instance, Blackstone argued that limiting testamentary freedom made “heirs disobedient and headstrong.” Conversely, curtailing testamentary freedom could undermine family discipline and discourage

73. Id. For an economic analysis, see, for example, B. Douglas Bernheim et al., The Strategic Bequest Motive, 93 J. POL. ECON. 1045, 1058-68 (1985). For debate over the issue, see Maria G. Perozek, A Reexamination of the Strategic Bequest Motive, 106 J. POL. ECON. 423 (1998).
74. Halbach, supra note 22, at 5.
75. Id.
76. WILLIAM M. McGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES § 3.1, at 123-24 (3d ed. 2004).
77. See ATKINSON, supra note 51, at 34; see also JEREMY BENTHAM, THEORY OF LEGISLATION 184-85 (R. Hildreth trans., 1911) ("[W]hen we recollect the infirmities of old age, we must be satisfied that it is necessary not to deprive it of this counterpoise of facitious attractions. In the rapid descent of life, every support on which man can lean should be left untouched, and it is well that interest serve as a monitor to duty.").
78. BLACKSTONE, supra note 32, at *12.
initiative and ambition. For example, children who know they could not be disinherited may feel more free to ignore their parents’ wishes and become spendthrifts or unproductive members of society.  

Critics have challenged this view based on the observation that providing social services generally tends to be inelastic—they are seen in poor families and in rich, irrespective of the inheritance prospects. Just as an assortment of motives drive people to accumulate wealth, so do a variety of motives inspire people to care for each other. Simply, family members will provide care and comfort for elderly family members even with no prospect of inheritance.

Discussions about the inelasticity in the market for social services, however, seems to ignore the intuitive strength of the argument that making benefits contingent on a certain behavior—here, care for those granting the benefits—will naturally inspire that behavior. Thus, while there may be some disagreement from a purely economic standpoint about the mechanics of social services, the causal link between contingent giving and the provision of social services seems sound.

b. Promotion of Intelligent Estate Planning

Yet another pragmatic rationale for testamentary freedom is that it allows for sound estate planning. Generally, testamentary freedom allows for thoughtful estate planning by allowing individuals to account for the various needs of the members of their families. Proponents of this rationale believe that when individuals are responsible enough to take the time to write a thought-out Will or testamentary substitute, it is presumed that individuals more often than not will know better how to dispose of their property than the state. As Blackstone argued, restrictions on testamentary freedom

81. Id.
82. See McGovern & Kurtz, supra note 76, § 3.1, at 123 (arguing that “testamentary freedom . . . permits more intelligent estate planning than the rigid rules of intestate succession”); Nathan, supra note 79, at 19 (“[T]he parent more often than not will know better how to dispose of his property than will the state [which] impos[es] an inflexible blanket rule.”); see also T.H. Green, Lectures on the Principles of Political Obligation 173 (1882); Henry Sidgwick, The Elements of Politics 100-02 (reprinted 4th ed. 1929).
83. Nathan, supra note 79, at 19.
“prevented many provident fathers from dividing or charging their estates as
the exigence of their families required.”

Testamentary freedom allows individuals to account for the differing
needs or special needs of various family members by allowing individuals to
choose the timing and character of the succession of their property. Individuals may rationally want to depart from equal distributions to children
in order to accommodate for each child’s differing needs. If one child has
special needs and will need more expensive care after a testator’s death, a
testator may want to distribute a larger portion of his assets to help provide
for this child or to distribute the assets through a mechanism that would
protect the assets, such as by utilizing a trust agreement. On the other hand, if
one child is more financially successful than the other children, a testator
may want to provide less to the financially successful child. Testamentary
freedom allows individuals the flexibility to account for their children’s
particular needs.

In addition, testamentary freedom allows for the effective timing of
transfers of property. If an individual needs to make lifetime distribution to a
particular family member (i.e., for emergencies, graduate schools, down-
payments on a house, etc.), the testator may want to provide greater
distributions at death to other family members who received no lifetime gifts.
That flexibility would permit overall equality in distributions to family
members while allowing for lifetime distributions to some. In addition,
depending on the character of an individual’s assets, and the fluctuations of
the values thereof, more efficient transfers (for tax or other reasons) may
dictate lifetime gifts over death-time bequests.

Testamentary freedom also allows for the efficient distribution of special
assets. The nature and character of an individual’s various assets may dictate
different estate planning tools. Special assets, like family business interests,
may need to be given to family members with specialized knowledge, business experience or interest, while providing assets of equivalent value,
but of a different character, to the other family members. In addition, it may
be more tax efficient to transfer business entity interests during an
individual’s lifetime, while providing equalizing distributions to other family
members at death. Also, the nature of some assets (such as copyright
interests) may be more effectively managed by centralized control, rather
than giving several individuals co-interests in the same assets. Individuals
may want to create a business entity or trust to help manage these assets, and

84. BLACKSTONE, supra note 32, at *12.
85. See infra Part IV.A (discussing advantages of lifetime gifts over transfers at death).
transfer their interests in the entity or trust to their children at death. Likewise, if a child or spouse is unable to manage certain types of assets or investments, an individual may choose to leave the assets to a trust to be managed by the trustee. The ability to attend to such special family needs, that may not otherwise receive accommodation, is in itself a social virtue.

c. Amenable to Modern Family Dynamics

Similarly, testamentary freedom allows individuals to effectively plan for the succession of their property in relation to the individual’s particular family structure. The concept of the stereotypical American family has changed over time. Currently, divorce rates are high and many individuals have multiple ex-spouses, children from different marriages and children born out-of-wedlock. In addition, unmarried same-sex and opposite-sex couples are becoming more prevalent in the United States. In fact, Massachusetts currently allows for same-sex marriage, Vermont and Connecticut offer same-sex civil unions, Hawaii offers reciprocal beneficiary registration, and California allows domestic partnership

86. In the 1950s and 1960s, the divorce rate never exceeded 2.6%. Since the 1970s, the divorce rate has never fallen below 3.5%, and at times it has reached as high as 5.3%. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 75 tbl.91 (119th ed. 1999). For a general discussion of these family trends, see Sam Roberts, It's Official: To Be Married Means to Be Outnumbered, N.Y. TIMES, Oct. 15, 2006; Eric Schmitt, For First Time, Nuclear Families Drop Below 25% of Households, N.Y. TIMES, May 15, 2001, at A1.


89. Civil unions in Vermont are open only to same-sex couples, but grant many of the same rights and protections as marriage. See VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002). Similarly, civil unions in Connecticut are open only to sex-same partners, allowing same-sex couples the same inheritance rights as married couples. See 2005 Conn. Pub. Acts 10.

90. Under Hawaii law, any “two individuals who are legally prohibited from marrying under state law” are permitted to register as “reciprocal beneficiaries.” HAW. REV. STAT. ANN.
In addition to coupling, family for some individuals might mean a network of nuclear friends or other non-traditional forms of family.

With the changing face of the American family, estate plans have become more complicated as have estate-planning instruments. Individuals typically could have, among other instruments, prenuptial agreements, antenuptial agreements, separation agreements, divorce settlements, and powers of attorney dealing with various property issues. Testamentary freedom provides individuals the flexibility to provide for these modern family exigencies without state intrusion.

d. Administrative Ease

One final justification for testamentary freedom is that it is administratively impossible to effectively curtail an individual’s ability to transfer property—it would be simply impractical to police estates law if some form of testamentary freedom did not exist. If the state were to prohibit succession of property at death, individuals simply would find other means to circumvent the ban and to distribute their property to intended beneficiaries (such as through various forms of lifetime gifts, creation of corporations to pay “salaries” to the intended beneficiaries or low interest loans to the intended beneficiaries). In addition, the result of shifting transfers of property from death-time bequests to lifetime gifts may have adverse social consequences. By forcing an individual to transfer property during lifetime, the individual may end up without proper resources during old age or sickness. As Francis Hutcheson opined, to “[t]ake away this right . . . men must be forced into a pretty hazardous conduct by actually giving away during life whatever they acquire beyond their own probable consumption.”

§ 572C-1 (LexisNexis 2005), which would entitle the couple to many, but not all, of the estate law benefits of marriage, including intestacy and elective share rights, see §§ 560:2-102, 2-202 to 2-214.

91. California’s domestic partnership statute applies to same-sex partners of any age and opposite-sex couples in which at least one of the partners is sixty-two or older. Cal. Fam. Code § 297(b)(5) (West 2004).


93. Francis Hutcheson, A System of Moral Philosophy 352 (Augustus M. Kelley 1968) (1755). Similarly, To attempt therefore to take the disposal out of their hands, at the period of their decease, would be an abortive and pernicious project. If we prevented them from
The foregoing was a brief introduction to the traditional justifications for testamentary freedom. While scholars, theorists, and lawyers may differ about the relative strengths and weaknesses of any particular rationale, the very breadth of jurisprudential justifications for testamentary freedom perhaps explains why testamentary freedom is at the core of succession law in the United States.

C. Testamentary Freedom as a Constitutional Right

In addition to the jurisprudential justifications for testamentary freedom, the ability to dispose of personal property upon death may be a constitutionally protected right, at least to some extent. Recent Supreme Court holdings imply that, under certain circumstances, federal laws that prohibit individuals from bequeathing their property may be unconstitutional. Because copyright is governed exclusively by federal law, a brief discussion concerning the constitutionality of federal limits on testamentary freedom is useful.

Although testamentary freedom has a strong cultural tradition in Anglo-American law, until the 1980s, it was generally understood that the right to transfer property at death was not a constitutionally protected right at all. In *Irving Trust Co. v. Day*, a case regarding the constitutionality of a state's elective share law, the Supreme Court held that the "[r]ights of succession to the property of a deceased, whether by [W]ill or by intestacy, are of statutory creation . . . . Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." As a result of *Irving*, courts adopted the general view that complete testamentary freedom is not a constitutionally provided right.

This generally held view, however, has been questioned following the Supreme Court's decisions in *Hodel v. Irving* and *Babbitt v. Youpee*. In *bestowing it in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation.*


95. *Id.* at 562.
Hodel, a case involving the constitutionality of section 207 of the Indian Land Consolidation Act ("ILCA"), the Supreme Court implied that the right to transfer property at death is a separate, identifiable property right, and if the state deprives the property owner of this right, compensation must be paid to the property owner. Under ILCA, fractional interests in a tract of land within a tribe's reservation were prohibited from passing by devise or intestacy. Rather, the fractional interest had to escheat to the tribe if it represented two percent or less of the total acreage in such tract and had earned less than $100 in the preceding year. The Court found that the government's restriction on a property owner's right to transfer property at death was extraordinary because "the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs" and therefore amounted to a taking without just compensation. It is important to note that the Court severed property ownership into separate, identifiable rights—the right to bequeath property and other rights of property ownership. Curtailing the right to bequeath made this identifiable separate property right valueless and therefore an unconstitutional taking. The Court seems to suggest that although states can regulate and even abolish intestate descent, the right to devise by Wills is constitutionally protected. The Court even notes that "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times. . . . Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional."

99. Hodel, 481 U.S. at 717-18; see also Dukeminier et al., supra note 19, at 8 ("[T]he Court's opinion appears to rest on the assumption that the right to transmit property at death is a separate, identifiable stick in the bundle of rights called property . . . .").
100. § 207, 96 Stat. at 2519.
101. Act of Oct. 30, 1984, Pub. L. No. 98-608, sec. 4, § 207(a), 98 Stat. 3171, 3173 ("No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death.").
102. Hodel, 481 U.S. at 716.
103. Id. at 717-18.
104. Id. at 718.
105. Id. at 716 (citation omitted).
After *Hodel*, Congress amended section 207 of ILCA by allowing bequests to a statutory successor class of heirs.\(^{106}\) In *Babbitt*, the successor case to *Hodel*, the Supreme Court once again held ILCA unconstitutional.\(^{107}\) The Court opined that by restricting bequests to a statutory class of heirs, "[section] 207 severely restricts the right of an individual to direct the descent of his property"\(^{108}\) and is therefore unconstitutional.\(^{109}\)

The Court's renewed interest in protecting the disposition of property rights through the Just Compensation Clause\(^{110}\) has put into question the general holding of *Irving* that testamentary freedom is not a constitutionally protected right. By applying the tradition of testamentary freedom to ILCA, the Court has placed some doubts as to what remains of the unfettered historical right of individual states to limit testamentary freedom as espoused in the *Irving* case. This brief discussion of a few Supreme Court decisions regarding the limits that federal law may place on the right of individuals to dispose of property at death does not intend to establish convincingly an independent right to testamentary freedom under the U.S. Constitution. The existence of some constitutional moorings for testamentary freedom, however, can only buttress the extensive philosophical and pragmatic justifications already fully entrenched in Anglo-American jurisprudence for ensuring a robust personal liberty interest in the disposition of property upon death.

**D. Exceptions to Testamentary Freedom**

In theory, pure testamentary freedom places no limitations on how an individual chooses to distribute his or her property at death. In almost all states, however, there are statutory limits placed on the freedom of testation, albeit narrow ones and small in number.\(^{111}\) In addition, these limitations reflect reasoned (rather than accidental) public policy choices and do not, in any event, significantly curtail individual liberty. Although the statutes vary in considerable detail from state to state, the 1990 Uniform Probate Code

---

106. Sec. 4, § 207(a), 98 Stat. at 3173.
108. *Id.* at 244.
109. *Id*.
110. U.S. CONST. amend. V.
111. *See WAGGONER ET AL., supra* note 4, at 581.
LIBERATING ESTATES LAW

(provisions are generally representative of the type of legislation found in most common law states.112)

Because there is no federal law of succession in the United States, state estates laws govern property succession.113 To date, every state has created some statutory limitations on the freedom of testation, almost all motivated by public policy concerns regarding the well-being of surviving family members. Generally, under individual states’ estates law, the testator’s spouse is the only family member afforded any type of protection against intentional disinherita
tion—the testator’s children can be completely disinherited114 and are only protected against unintentional disinherita
tion.115

Furthermore, these state limitations on testamentary freedom remain quite limited in scope and effect.116 First, all of them are waivable.117 Second, these limitations are clearly set forth in individual states’ estates law statutes and are therefore commonly known by estate-planning practitioners from


113. Succession law governs all means of the transfer of rights and assets, including death-time transfers. Similarly, estates law is the branch of succession law that governs the planning and transfer of property at death. The Supreme Court, in Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942), held that “[n]othing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.” This ruling suggests that estates law is to be controlled by state law. In Hodel v. Irving, the Supreme Court reaffirmed this notion of state control of estate law by stating:

In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States’ . . . broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause.


114. Setting aside homestead and property allowances, Louisiana is the only state that provides children protections against complete disinherita
tion. Nathan, supra note 79, at 5.

115. In fact, the typical estate plan for married couples is for the deceased spouse to leave the entire estate to the surviving spouse, thereby technically disinheriting children.

116. The limitations on testamentary freedom are so modest, the Third Restatement of Property states, “Property owners have the nearly unrestricted right to dispose of their property as they please.” RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

that state. Accordingly, estate-planning practitioners may be able to "draft around" these limitations or at least account for them when developing estate plans. Finally, these limitations generally do not force specific items of personal property to be bequeathed to a statutory successor class of heirs.\(^{118}\)

Except for these well-known restrictions found in individual states' estates laws, the principle of testamentary freedom, in most cases, controls in each individual's estate planning. As a result, there is generally no mandatory or forced heirship with respect to any specific item of personal property.

As discussed later in this article, one of the justifications for the creation of termination rights in a statutory class of successor heirs is to safeguard an author's spouse after the death of the author.\(^ {119}\) However, as explained more fully below, state estates laws already adequately provide spousal protections. Therefore, the safeguards afforded authors under the 1976 Act are duplicative of protections already found under estates law, and the copyright code's restrictions on testamentary freedom are wholly unnecessary.

In order to understand why termination rights are duplicative of protections already found under state estates law (and therefore are unnecessary), a more detailed review of the common state law limitations on testamentary freedom is necessary.

1. Elective Share

The most important limitation on testamentary freedom in the United States is the surviving spouse's elective share or community property share. In almost all separate-property (i.e., non-community property) states,\(^ {120}\) the

\(^{118}\) Louisiana is the only state that has, to some extent, forced heirship. See Nathan, supra note 79, at 5.

\(^{119}\) See infra Part III.B.

\(^{120}\) In community property states, all property, assets, and income acquired during marriage by the labor of either spouse are owned jointly by both spouses. Community property states do not have elective share laws because, in these states, the marital property system is based on the principle that both spouses, at least theoretically, equally contribute to the marital unit's accumulation of wealth. A surviving spouse is therefore entitled to fifty percent of marital property at death. There are currently eight states with community property (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington) and two states with quasi-community property rules (Alaska and Wisconsin). Interestingly, Alaska permits married residents and non-residents to elect community property treatment for some or all of their assets. See ALASKA STAT. §§ 34.77.010 to 34.77.995 (2004). For a general discussion concerning Alaska's elective community property law, see Alan Newman, *Incorporating the Partnership Theory of Marriage Into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property*
state legislatures have decided that disinheriting a surviving spouse is one of the few instances in which an individual’s testamentary freedom may be curtailed.121 No matter what the individual’s intent, most separate-property states recognize that the surviving spouse has some limited claim against a portion of a decedent’s estate. Increasingly, however, the rationale for the elective share is not one of spousal support; rather it hinges on the concept that marriage is a partnership in which both spouses contribute and have an economic interest.122 The manifestation of this concern for the surviving spouse led to the creation of the so-called “forced” share. Because this forced share is usually expressed as an option or election that the surviving spouse can exercise or let lapse, this option is now commonly referred to as a surviving spouse’s “elective” share. In general, the surviving spouse has an election to either take under the decedent’s Will or renounce the Will and take a fractional share of the decedent’s estate. Unlike the other limitations on testamentary freedom, such as family allowance, homestead, and exempt property allowance, which are discussed below, the spouse’s elective share is subject to the claim against the decedent’s estate.

Under traditional elective-share provisions (including pre-1990 U.P.C. provisions), “a surviving spouse is granted a personal non-transferable right to claim a [fraction] of the decedent’s estate” equal to the spouse’s intestate share (or some fraction thereof).123 This right is even more limited in a few states, where the elective share is not even a right to a fee interest in the decedent’s estate, but only a life interest.124

The U.P.C., however, differs from traditional elective share provisions. The U.P.C. tries to implement a “partnership theory” for the division of marital property at death. The policy behind the U.P.C. elective share


121. The State of Georgia is the only separate-property state without an elective share statute. Supporting this law, Professor Chaffin, an authority on Georgia estates law, argues that the vast majority of testators already provide for their surviving spouse and the elective share allows the surviving spouse to wreck a sound estate plan. Verner F. Chaffin, A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year’s Support and Intestate Succession, 10 GA. L. REV. 447, 463-70 (1976). For an opposing view, see Peter H. Strott, Preventing Spousal Disinheritance in Georgia, 19 GA. L. REV. 427 (1985).

122. See DUKEMINIER ET AL., supra note 19, at 425; WAGGONER ET AL., supra note 4, at 582-83.

123. WAGGONER ET AL., supra note 4, at 592-93; see also DUKEMINIER ET AL., supra note 19, at 438.

124. See, e.g., CONN. GEN. STAT. ANN. § 45a-436 (West 2004); MASS. GEN. LAWS ANN. ch. 191, § 15 (West 2004).
provisions is that the surviving spouse contributed to the decedent spouse’s acquisition of wealth and has earned a portion of it. Under the U.P.C., the size of the spouse’s elective share is dependent primarily on the length of the marriage between the decedent and the surviving spouse. For marriages that have lasted less than 2 years, the elective share is 3%. This increases up to 50% for marriages of 15 years or more. Another feature of the U.P.C. elective share is that the percentage is applied to the value of the augmented estate, which includes the couples combined assets. In addition, the surviving spouse’s own assets are considered first in making up the surviving spouse’s unlimited entitlement, so that the decedent’s assets are liable only if there is a deficiency.

2. Family Allowances

Every state has a statute authorizing a probate court to award a family allowance out of the decedent’s estate to help support the surviving spouse and dependent children during a limited period of time following the decedent’s death (during the decedent’s estate administration). Upon death, “[a] decedent’s assets are frozen for a substantial period [of time] while the estate is administered.” During this time, the decedent’s family may be without funds. To avoid financial hardship during the probate period,

127. Id.
128. Id.
129. Waggone et al., supra note 4, at 596.
131. McGovern & Kurtz, supra note 76, § 3.4, at 135.
family allowance laws have been passed to help maintain the surviving spouse and minor children through the probate process.\textsuperscript{132}

This family protection is allowed regardless of the decedent’s intention of providing for family members. Interestingly, “[t]he family of a decedent is entitled to an allowance even if” the decedent has disinherited these family members.\textsuperscript{133} If the Will provides for the surviving spouse, the surviving spouse can take under the Will and claim the family allowance as well, unless the Will expressly provides that the surviving spouse must elect between the two.\textsuperscript{134} Thus, the family allowance could be in addition to the other interests that pass to the surviving spouse.

3. Homestead Allowance

Another limitation on testamentary freedom designed to protect surviving spouses and minor children is the homestead allowance. The homestead allowance is a family protection devise under which a decedent’s property, up to a certain value (usually consisting of the family residence), is set aside by operation of law for the benefit of the surviving spouse and minor children. Nearly all states have homestead laws designed to help secure the family home to the surviving spouse or minor children.\textsuperscript{135} Generally, state laws grant a surviving spouse or minor children the right to occupy the decedent’s family home for a period of time.\textsuperscript{136}

Unlike most individual states’ estates law, the U.P.C. allowance shifts the exemption from a right of occupancy of realty to a money substitute, which is relatively small and provides little protection. U.P.C. section 2-402 gives the surviving spouse a homestead allowance of $15,000, and, if there is

\textsuperscript{132} Section 2-404 of the U.P.C. covers “minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent.” \textit{Unif. Probate Code} § 2-404(a), 8 U.L.A. 141-42. The allowance is paid to the surviving spouse for the use of the children. \textit{Id.}

\textsuperscript{133} \textit{McGovern & Kurtz, supra} note 76, § 3.4, at 138.

\textsuperscript{134} \textit{Unif. Probate Code} § 2-404(b), 8 U.L.A. 142; see also \textit{McGovern & Kurtz, supra} note 76, § 3.4, at 138.

\textsuperscript{135} See \textit{McGovern & Kurtz, supra} note 76, § 3.4, at 138-39.

\textsuperscript{136} Although homestead laws vary from state to state, generally, the law is designed to help the surviving spouse occupy the family home during the surviving spouse’s lifetime. In some states, homestead is quite substantial in value. \textit{See, e.g., Ark. Const.} art. 9, §§ 4-6 (providing homestead exemption for one-quarter acre of land in cities and eighty acres elsewhere without regard to value); \textit{Fla. Const.} art. 10, § 4(a)(1) (providing homestead exemption for residence of up to one half-acre in municipality, and 160 acres elsewhere). Section 2-402A of the U.P.C. preserves the constitutional right of homestead in those states where it exists. \textit{Unif. Probate Code} § 2-402A (amended 1990), 8 U.L.A. 140 (1998).
no surviving spouse, the same amount is divided among "minor and dependent" children.\textsuperscript{137} Although not granting a right of occupancy, the homestead allowance under the U.P.C. protects all surviving spouses, including renters, owners of mobile homes and decedents who owned no interest in a residence of any sort.

4. Personal Property Allowances

Related to the homestead allowance is the right of the surviving spouse (and sometimes the minor children) to have a claim for a certain amount of tangible personal property from the decedent's estate regardless of the deceased spouse's attempts to devise the property.\textsuperscript{138} One of the main purposes of this exemption of household property is to promote the ease of the administration of the decedent's estate by relieving the "personal representative of the duty to sell household chattels when there are children who will have them."\textsuperscript{139} This is the only succession law provision that requires certain items of personal property to remain with family members, even if it is against the express intent of the testator. Subject to some conditions and limitations, the decedent has no power to deprive the surviving spouse of the exempt items.

Although state exemption property allowances vary from state to state, the U.P.C. is typical in terms of what this type of state estates law would provide. Under U.P.C. section 2-403, the surviving spouse is entitled to $10,000 in the decedent's tangible personal property—which may be a very small sum.\textsuperscript{140} These items are also exempt from creditor's claims.

5. Pretermitted Child Rule

The power to disinherit a child is an underlying implication of the concept of testamentary freedom. In almost every state, a decedent may intentionally disinheret children.\textsuperscript{141} Unintentional disinheretance is another matter. Most states have pretermitted (or omitted) child statutes, based on the

\textsuperscript{137} \textit{Unif. Probate Code} § 2-402, 8 U.L.A. 139-40.

\textsuperscript{138} Dukeminier et al., \textit{supra} note 19, at 422.

\textsuperscript{139} \textit{Unif. Probate Code} art. 2, pt. 4 general cmt., 8 U.L.A. 139. If there is a surviving spouse, he or she takes the allowance, leaving nothing for the minor children. \textit{Unif. Probate Code} § 2-403, 8 U.L.A. 141.

\textsuperscript{140} \textit{Unif. Probate Code} § 2-403, 8 U.L.A. 141.

\textsuperscript{141} Louisiana is the only state where a parent is required to leave a certain percentage of his or her estate to each child. \textit{See} \textit{La. Civ. Code Ann.} arts. 1493, 1495 (2000 & Supp. 2006).
idea that failure to mention a child in a Will was an oversight, so the omitted child should get a share of the estate in order to fulfill the testator's true intent. Most state's pretermitted child statutes protect only children born (or adopted) after the execution of the Will; a few protect any omitted child.⁴

Although some scholars believe that pretermitted child rules are limitations on testamentary freedom, this rule has been developed as a way to interpret the testator's intent—not restrict their power to dispose of their property. Regardless of interpretation, pretermitted child rules have little effect on testamentary freedom.

6. Waivers

The right to an elective share and the other death benefits discussed above may be waived in full or in part by the surviving spouse before or after marriage. U.P.C. section 2-213 allows the surviving spouse, before or after marriage, to waive her right of election and her rights to the homestead allowance, exempt property allowance, and family allowance.

* * *

As discussed above, individual state's estates laws adequately provide limitations on testamentary freedom that protect an individual's spouse against total disinheritance. Therefore, considering the testamentary limitations regulated by copyright law, the safeguards under the 1976 Act are duplicative of state estates laws' limitations and the additional restrictions placed upon an author's interests in copyright are wholly unnecessary.

In addition to providing protections for the family, state estates laws' limitations on testamentary freedom are by far less restrictive than the safeguards under the 1976 Act. Although potentially curtailing testamentary freedom, these traditional state limitations have limited effect in the interference with a testator's intent. As discussed, these traditional limitations are waivable. Other than the elective share, these restrictions involve relatively small amounts. In addition, they are all controlled by state law, so local estate-planning practitioners will be very familiar with them and can plan accordingly. Therefore, estate-planning practitioners can minimize the effect of these limitations on testamentary freedom.

142. For a state by state survey of pretermitted child statutes, see RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, Statutory Note to § 34.2 (1992).
III. COPYRIGHT LAW

A. Foundations and Doctrine of Copyright Law

Although the prior section described what most scholars and estate-planning practitioners generally consider to be the only limitations on testamentary freedom in the United States, an additional and potentially critical limitation is found under the laws of copyright. To the extent that an individual owns copyright interests, the individual's testamentary freedom is undermined by the termination rights located under the 1976 Act.

Fully comprehending the incompatibility of copyright law and testamentary freedom requires a rudimentary understanding of the broad characteristics of personal intellectual property and a basic knowledge of general copyright property characteristics. In addition, an exploration of the origins of the renewal system and the rules regulating termination rights under the 1976 Act is needed before delving into how these particular aspects of copyright law fundamentally undermine testamentary freedom.

1. Intellectual Property in General

Intellectual property is a term used to signify intangible yet legally protected products of the human intellect. At first glance, the phrase "intellectual property" may seem counterintuitive, because it combines the transient products of human creativity (ideas and expressions) with the concept of tangible personal property. Yet, the value of intellectual property assets is very real. For copyrights and patents, the Framers of the Constitution provided authors and inventors durational monopolies on their works and inventions. Similarly, trademark law provides a monopoly on the use of the mark as it relates to particular goods or services. As a result of these monopolies, intellectual property has become an increasingly important

---

143. Copyright interests are the only property interest subject to federally mandated restraints on testamentary freedom.
144. The three main categories of intellectual property include copyright, patent, and trademark. This Article limits its focus specifically to copyright law because only copyright law infringes upon testamentary freedom.
145. Bartow, supra note 11, at 383.
146. See White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially) ("[I]n copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak.").
aspect of wealth accumulation in the United States and abroad. For instance, some of the most profitable industries (computer technology, software, entertainment, telecommunications, and biotechnology) and its wealthiest entrepreneurs rely heavily on intellectual property laws to protect the products of their labor.

2. Copyright in General

In general, copyright law in the United States is constitutionally based and entirely governed by federal law. Article I, Section 8, Clause 8 of the U.S. Constitution provides that Congress shall have power, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This clause is commonly referred to as the Copyright Clause because it grants Congress the power to enact copyright laws.

The Constitution’s clear primary purpose is not to benefit a particular “author” or “inventor,” but to promote the public’s interest in the “Progress of Science and useful Arts.” As a structural observation, this constitutional power is far more narrowly drawn than other constitutionally created powers under Section 8, like the powers to “lay and collect Taxes,” “borrow Money,” “regulate Commerce,” “coin Money,” and “declare War.” In fact, the framers outlined with great specificity both the substance and objectives of copyright law. As one commentator notes, this constitutional power is “subject to the limitation that [Congress] could not enact a provision which plainly did not and could not tend to promote the progress of science and the useful arts.” To this end, the Supreme Court has instructed that the Copyright Act should be construed to benefit the public at large rather than to protect an individual author.

147. See Shapiro & Hasett, supra note 3, at 16.
149. States may not enact copyright protection that conflicts with federal law. 17 U.S.C. § 301 (2000).
151. H.R. Rep. No. 60-2222, at 7 (1909); see also Keller & Cunard, supra note 148, § 1:2.1, at 1-10 to 1-11 (arguing that copyright law should protect the author only to the extent necessary to advance the public interest).
152. See U.S. Const. art. 1 § 8, cls. 1-3, 5, 11.
154. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . The sole interest of the United States and the primary object in conferring the monopoly lie
The general theory underlying the creation and protection of intellectual property rights is that individuals will expend more time and creative energy in innovative pursuits and be induced to disseminate learning in society if authors are given the benefit of exclusive ownership in their works. By essentially granting an author a durational monopoly on the exploitation of their works, the Framers provided an incentive for authors to enrich and develop arts. Therefore, when copyright is granted to the author, it rewards the labors that “promote the Progress of Science and useful Arts.”

Congress protects interests in copyright, pursuant to its constitutional grant of power, by extending legal rights to “original works of authorship” that are “fixed in any tangible medium of expression.” For a limited period of time, the owner of a copyright has the exclusive right to reproduce, adapt, publish, perform or display the copyrightable work. The copyright owner can exercise, assign or license some or all of these rights or transfer ownership of an entire copyright altogether. By establishing a time period in which individuals can exploit and profit from intellectual creations, more

in the general benefits derived by the public from the labors of authors.” (citation and internal quotation marks omitted); see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Goldstein v. California, 412 U.S. 546, 555 (1973); Mazer v. Stein, 347 U.S. 201, 219 (1954).

155. Bartow, supra note 11, at 384 (“The general theory underlying intellectual property law is that individuals will expend more time, energy, and resources in innovative, creative pursuits if the fruits of their endeavors are likely to lead to financial rewards.”). Note that this rationale is very similar to the utilitarian and wealth maximization jurisprudential rationales for testamentary freedom.


157. 17 U.S.C. § 102(a) (2000). Copyright law protection extends to the original expression of authorship, including works of literature, drama, music, art, film, TV, computer software, and certain other intellectual works, both published and unpublished. See id. §§ 102-103.

158. Id. § 102(a).

159. Id. § 106 (2000 & Supp. 2002). It should be noted, however, that copyright protection does not provide authors with absolute monopolies on the exploitation of their work. In fact, at times individuals might be able to use copyrighted works without an author's permission while not committing an act of copyright infringement. See id. § 107 (2000). Under the “fair use” doctrine, which is explicit in copyright law, an individual can make “fair use” of someone else's copyrighted work if the use is scholarly, for purposes of news reporting, criticism or various other reasons, as long as the use is deemed fair and reasonable under the particular circumstances. Id.
individuals will be inspired to undertake creative endeavors, which, in turn, benefit the public in general.

Copyrights vest initially in the author or authors of the copyrightable work. If there is only one author of a copyrightable work, then that author solely owns the copyright in the work. If multiple authors jointly created the copyrightable work, then they are all co-owners of the copyright in the work. However, in the case of a work made for hire, the employer or other person for whom the copyrightable work was prepared (and not the actual creator) may be deemed the author (and therefore the owner) of the work for the purposes of copyright law.

From an estates law point of view, one copyright concept that is particularly difficult to tackle concerns the difference between the ownership of a copyright interest and the ownership of the material object in which the work is fixed (i.e., the physical copyrightable work). The ownership of the copyright is a separate and distinct property right from the ownership of a physical embodiment of the underlying work. Accordingly, a copyright is not conveyed simply by transferring a material copy of the underlying work, nor is the material object conveyed by transferring the copyright interest. For example, an artist may sell an original painting but still retain ownership of the copyright in the painting—the owner of the physical painting cannot make reproductions of the painting without the authorization of the copyright owner, but the copyright owner may make reproductions of the image without permission of the owner of the physical painting. Likewise, the recipient of a letter is the owner of the physical paper on which the letter was written and, accordingly, may sell or destroy the letter. The author of the letter, however, owns the copyright and controls the letter's reproduction and publication. Therefore, for estate law purposes, the

160. See id. § 201(a).
161. Id.
162. Id. § 201(b). “Work made for hire” is defined in copyright law as either (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .
Id. § 101 (amended 2005).
163. Current copyright law, as enacted by the 1976 Act, states that “[t]ransfer of ownership of any material object . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object.” Id. § 202.
164. Rosenbloum, supra note 14, at 171.
copyright will not pass according to a testator’s Will under a specific bequest of the underlying work itself, unless specifically stated, because a copyright is a separate and distinct property interest from the physical embodiment of the work. If the copyright is not otherwise specifically bequeathed, the copyright will pass with the testator’s residuary clause, if any, or under the intestacy laws of the testator’s domicile at death. Care must be taken when the author wishes to bequeath to the same recipient his tangible works as well as the intellectual property with which the work is associated.

Armed with a general understanding of the basic characteristics of the property rights of copyright interests, an exploration of the evolution of termination rights is now in order. The examination of the origins of termination rights is needed in order to fully comprehend the incompatibility of copyright law and testamentary freedom.

B. History of Will-Bumping and Birth of Estate-Bumping

An understanding of the incompatibility of copyright law and the principle of testamentary freedom requires an historical discussion of the reversionary systems provided under American copyright law. Pursuant to the Copyright Clause, Congress has passed several statutory copyright schemes “to promote the progress of science and useful arts” by protecting an author’s economic interests in copyright. One mechanism Congress enacted to promote the sciences and arts is the creation of a unique property right afforded only to copyright authors—a non-assignable reversionary right to previously assigned copyright interests. These reversionary rights were first implemented through the renewal system promulgated in earlier copyright acts and are now realized through termination rights under the current copyright act. To understand completely how the renewal system and termination rights evolved, and, accordingly, how they conflict with testamentary freedom, an analysis of the evolution of these statutory schemes is needed.

1. Statute of Anne (1709)

The principle that authors should have reversionary rights in previously assigned copyright interests has a long history in Anglo-American copyright

---

165. A residuary clause is a provision in a Will that disposes of any remaining estate assets after satisfying the testator’s specific bequests and devises.
law. In fact, granting authors reversionary rights in their works has its roots in the first English copyright statute, the Statute of Anne.\textsuperscript{166}

The Statute of Anne divided the duration, or time period, in which copyright protections would last into two distinct terms. The Statute of Anne granted the author (and the author's "Assignee, or Assigns") the exclusive rights in copyright for an initial term of fourteen years from the date of publication.\textsuperscript{167} If the author assigned his copyright during the initial term and survived this term, all rights in the work reverted to the author for a second term of fourteen years, or a "renewal term."\textsuperscript{168} Hence, the copyright renewal system was created.

The policy underlying the renewal system grew from the unequal bargaining positions between authors and entrepreneurs interested in acquiring copyrights.\textsuperscript{169} Not knowing how successful their works may ultimately become, authors often sold their copyright for minimal compensation.\textsuperscript{170} As a result, entrepreneurs often realized substantial profits relative to the author's minimal compensation. Accordingly, Congress granted authors a unique second chance to profit from their work by creating a second term of copyright protection free of any previous assignment made during the initial term.\textsuperscript{171} To be clear, the statutory intent was to revest copyright ownership in the author during the renewal term even if, during the initial term, the author had sold all property interests in the copyright to another individual or entity. This concept is currently referred to as

\begin{itemize}
\item \textsuperscript{166} 1709, 8 Ann., c. 19 (Eng.). The act was declared to be "for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors." \textit{Id.} The preamble clarifies that the purpose of the act was "for the Encouragement of learned Men to compose and write useful Books." \textit{Id.}
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} See \textsc{H.R. Rep.} No. 60-2222, at 14 (1909) ("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 and lives beyond the [initial] term... your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right."). This paternalistic approach stemmed from the widely held view that publishers and other large corporate entrepreneurs would naturally have superior bargaining positions. In reality, "unlike real property... [a copyright] is by its very nature incapable of accurate monetary evaluation prior to its exploitation." \textsc{Melville B. Nimmer & David Nimmer}, \textsc{Nimmer on Copyright} § 9.02, at 9-30 (1996).
\item \textsuperscript{170} \textsc{Keller & Cunard}, supra note 148, § 7-4, at 7-13 to 7-14.
\item \textsuperscript{171} See \textsc{Nimmer & Nimmer}, supra note 169, § 9.02, at 9-29.
\end{itemize}
“contract-bumping”172 in that the copyright law intentionally “bumps” contractual assignments of copyright interests.

Contract-bumping seems to be the clear intent of the renewal system under the Statute of Anne.173 In order to make contract-bumping feasible, however, the author must be precluded from assigning or waiving renewal term rights. If it were permissible to assign or waive this right to renew, a buyer of any copyright interest would insist upon the author waiving any such renewal right. In the English case of Carnan v. Bowles,174 however, the High Court of Chancery ruled that if the author, during the initial term, explicitly assigned or waived the rights of the renewal term, the author could not use the statute to reclaim, or bump, the copyright assignment if he lived into the renewal term.175 Therefore, contract-bumping was not absolute despite the clear intent of the Statute of Anne.

Although intentionally creating a potential conflict between contract law and copyright law, the Statute of Anne did not create a conflict between estates law and copyright law because the author’s survival of the initial term was a prerequisite of the vesting of renewal rights. In other words, if the author died during the initial term, any previous assignment or bequest of any remaining copyright interest was protected until the end of the initial term, after which, the copyright simply fell into the public domain.176 In addition, if the author survived the initial term, the author could freely assign or bequeath the revested copyright interests until the end of the renewal term.177 Conversely, if the author died during the initial term, the author could not assign or bequeath the renewal rights because the author’s survival of the initial term is a prerequisite to the renewal term’s existence.178 Therefore, the copyright law under the Statute of Anne did not undermine the author’s testamentary intent concerning his or her rights in a copyrightable work.

The Statute of Anne created the two-term renewal system for copyright works and tried to establish a contract-bumping regime that would allow authors a second chance to profit from their works. The contract-bumping

172. The term “contract-bumping” was coined by Francis M. Nevins in The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide. See Nevins, Magic Kingdom, supra note 14, at 89.
173. See id. at 82.
174. (1786) 29 Eng. Rep. 45 (Ch.).
175. Id. at 46-47.
176. Nevins, Magic Kingdom, supra note 14, at 82.
177. Id.
178. Id.
regime, however, was not completely effective because courts allowed authors to assign away their renewal rights, thereby undermining the reversionary aspects of the Statute of Anne. Even though the Statute of Anne codified the renewal system, however, it did not create a conflict between copyright law and testamentary freedom. It is only later in the history of copyright law that reversionary rights began to interfere with the freedom of testation. Nevertheless, it remains essential to address the source of renewal rights at this very early stage in order to understand both that copyright law and testamentary freedom need not conflict and that the development of the current copyright code which undermines testamentary freedom is at odds from the historical beginnings of renewal rights themselves.

2. The Copyright Act of 1790

In 1790, soon after ratification of the Constitution, "An Act for the encouragement of learning" was passed during the First Congress (the "1790 Act").\(^{179}\) Inspired by the Statute of Anne, Congress wanted to grant authors a second opportunity to benefit from their works after an original assignment. Accordingly, the 1790 Act virtually duplicated the Statute of Anne's two-term renewal system.\(^{180}\)

In general, the 1790 Act stated that authors and their assigns held exclusive rights in a copyright work for an initial term of fourteen years beginning upon the work's date of publication.\(^{181}\) If authors assigned their rights in the copyrightable work during this initial term, the authors could later recapture these assigned rights by securing a second term of fourteen years. To secure a second term, the authors had to be alive at the end of the initial term and had to duly exercise their renewal right.\(^{182}\) In other words, all previously assigned, sold or gifted copyright interests reverted back to the author in the second term. Thus, the renewal system was implemented in the United States.

Similar to the Statute of Anne, there was no conflict between testamentary freedom and copyright law under the 1790 Act. If the author died during the initial term, any initial term rights held by the author passed by his or her Will.\(^{183}\) Any rights that the author transferred for the initial term

\(^{179}\) Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (repealed 1831).

\(^{180}\) Rosenbloum, supra note 14, at 167.

\(^{181}\) Nevins, Magic Kingdom, supra note 14, at 83.

\(^{182}\) Id.

\(^{183}\) § 1, 1 Stat. at 124.
remained with the transferee. At the end of the initial term, the copyright fell into the public domain extinguishing all rights associated with the copyright. Any transfer of rights for the renewal term essentially adeemed because no renewal term was available due to the author's death.

Further, the 1790 Act did not conflict with testamentary freedom when an author survived to secure the renewal term. Authors were free to transfer rights to the renewal term during both the initial term and renewal term. As discussed above, however, the author had to live into the renewal term in order for the transfer of renewal term rights to vest in the transferee. If the renewal term rights had vested in the author, those rights would simply pass by Will upon the author's death.

3. The Copyright Act of 1831

The Copyright Act of 1831 (the "1831 Act") dramatically changed the renewal system structure in two important ways. First, even though the 1831 Act generally kept the two-term renewal system, the renewal term was no longer conceptually thought of as an extension of the initial term, but rather as a legally separate and independent right. Second, the copyright statute provided, for the first time, that a statutorily-created successor class of heirs could exercise the renewal term rights if the author died during the first term.

184. Id.
185. Id.
186. Id.
188. The 1831 Act increased the initial term to twenty-eight years while maintaining the fourteen-year renewal term.
189. In Pierpont v. Fowle, 19 F. Cas. 652 (C.C.D. Mass. 1846) (No. 11,152), the court opined that, as a result of the 1831 Act, the renewal term was a distinct legal entity from that of the initial term: "[I]t is rather like a new interest obtained by one after the original interest had expired," id. at 660.
190. § 2, 4 Stat. at 436. Another revision to the copyright statute was in response to legal precedent. In order to improve the bargaining position of authors, Congress intended that copyright law "bump" copyright assignments executed during the copyright's initial term insofar as the conveyance purported to extend into the renewal term—similar to the original intent of the contract-bumping regime under the Statute of Anne. The 1831 Act tried to remove the holding of Carnan v. Bowles, (1786) 29 Eng. Rep. 45 (Ch.), from American copyright law, which undermined the contract-bumping intent under English copyright law, id. at 46. Yet, similar to the English courts, the Supreme Court in Paige v. Banks, 80 U.S. 608 (1871), held that if an author, prior to 1831, "forever" assigned the copyright in his work during the initial term and the author survived into the renewal term, the author was bound by his conveyance, id. at 614-15. As a result, the assignee was entitled to renew the copyright and
With the creation of a statutorily-mandated successor class of heirs, the conflict between testamentary freedom and copyright law was codified. Under the 1790 Act and the Statute of Anne, a work would fall into the public domain at the end of the initial term if the author died during the work's initial term. Under the 1831 Act, however, if the author died during the initial term, the work did not automatically fall into public domain but, instead, the renewal term rights (and any profits from the future exploitation of the copyright) passed to the statutory successor class (regardless of the author’s intent), which consisted of the author’s surviving spouse and children. As a result, this statutory successor class could supersede the intent of an author’s inter vivos transfers by taking back assignments made by the author prior to his or her death. Only if the author had no surviving spouse or children, or if nobody exercised the renewal right, would the work pass into the public domain. Because the renewal term right was considered a legally separate and independent right, Congress, in effect, granted to these statutory heirs a contingent remainder property right subject to a condition precedent.

Furthermore, the 1831 Act did not specify how the renewal rights were to be divided among the statutory class. While the intent was to provide for the family generally, it seems that the interests of the individuals in the class were not considered. Thus, bequests of copyright interests, even to those within the statutory class, were not guaranteed to follow the author’s testamentary intent, resulting in an additional limitation on the author’s testamentary freedom.

own the interest in the second term rights, thereby limiting the effectiveness of contract-bumping. Id. at 615.

191. § 2, 4 Stat. at 436.

192. In White-Smith Music Publishing Co. v. Goff, 187 F. 247 (1st Cir. 1911), the court of appeals stated that the 1831 Act “broke up the continuity of title, and gave the right of renewal to the widow or child or children. . . . Here, then, was an entirely new policy, completely disbelieving the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title eo nomine in the persons designated.” Id. at 250.

193. An interest will be classified as contingent if its taking possession is subject to a condition precedent, or contingent as to an event. On the other hand, Congress might have created a vested remainder property interest subject to total divestment. A vested remainder subject to total divestment occurs when the remaindermen are ascertainable and their interest is not subject to any condition precedent, but their right to possession and enjoyment is subject to being defeated by the happening of some condition subsequent—here, the condition subsequent being the author surviving the initial term. Regardless, Congress has created a real property interest in the statutory heirs.
The main policy reason for creating a statutory class of heirs was to provide protection for surviving family members after the author’s death.\textsuperscript{194} If an author died during the initial term, Congress wanted to prevent the work from arbitrarily falling into the public domain when, because of the author’s death, “his family stand in more need of the only means of subsistence ordinarily left to them.”\textsuperscript{195} As the Supreme Court has noted, “The evident purpose of [the renewal provision] is to provide for the family of the author after his death. Since the author cannot assign his family’s renewal rights, [the renewal provision] takes the form of a compulsory bequest of the copyright to the designated persons.”\textsuperscript{196}

Unfortunately, Congress did not consider the effect that creating a separate property interest in a statutorily mandated successor class of heirs would have on the author’s testamentary freedom. By excluding the author’s assignee or assigns as part of the successor class members, copyright law could bump the testamentary intent of an author because the statutory heirs potentially could exercise the renewal rights and bump any inter-vivos assignments or testamentary bequests of copyright interests. Therefore, by creating a statutorily mandated successor class of heirs, Congress unintentionally, but severely, restricted a copyright owner’s testamentary freedom\textsuperscript{197} and thus created the phenomenon currently referred to as “Will-bumping.”\textsuperscript{198}

\textbf{a. The Basic Problem of Will-Bumping}

By mandating a non-discretionary hierarchy of individuals who are entitled to the renewal term rights, the 1831 Act severely limited an author’s

\footnotesize{\textsuperscript{194} However, surviving family members already are protected under states’ estate law. \textit{See supra} Part II.D. Query why the federal government deemed that copyright interests should be the only property right afforded extra protections for surviving family members?

\textsuperscript{195} Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 651 (1943) (citation and internal quotation marks omitted).

\textsuperscript{196} De Sylva v. Ballentine, 351 U.S. 570, 582 (1956).

\textsuperscript{197} The legislative history demonstrates that Congress’s purpose in creating the renewal system was to increase the bargaining positions of authors. In addition, legislative history shows that the creation of the statutory class of heirs was intended to protect the author’s family after the death of the author. The silence in the history concerning the newly created conflict with testamentary freedom implies that Congress never realized that a renewal system with a statutory class of successors could severely curtail an author’s ability to control the disposition of his or her copyright interest.

\textsuperscript{198} The term “Will-bumping” was coined by Francis M. Nevins in \textit{The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide}. Nevins, \textit{Magic Kingdom}, \textit{supra} note 14, at 78.
otherwise unfettered right to make inter vivos or testamentary transfers of copyright interests, and it had the ability to thwart an author’s Will and disrupt an otherwise well-crafted estate plan. Initially, the right to renewal vested in the author if he or she was living at the beginning of the renewal term.\textsuperscript{199} If the author lived to renew a particular work and died in the work’s renewal term, the remainder of the renewal term rights passed under the usual rules of testamentary succession or a state’s intestate law.\textsuperscript{200} However, if the author died during the initial term, his or her Will governed only the remainder of the initial term rights and the renewal rights did not pass under the usual rules of testamentary succession or a state’s intestate law. Rather, renewal rights automatically vested in a mandated statutory class of heirs and these statutory heirs could retake ownership of the copyright.\textsuperscript{201} Therefore, it is copyright law rather than the author that determined who ultimately profited from the copyrighted work.

The Will-bumping problem arose because the hierarchy of the statutory class of heirs created under the 1831 Act could not be altered by the author. If the renewal rights did not vest in the author, the members of the statutory class of heirs took ownership of the renewal term rights regardless of any gifts made by the author or any bequests in the author’s Will. For example, if the author died in the initial term, survived by a spouse and/or children, copyright law—and not the author’s Will—governed the disposition of renewal term rights regardless of any bequests of copyrights in the author’s Will. Even if the author had more than sufficiently provided for the spouse and children with non-copyright assets, the copyright law diverted all rights back to the statutory class. Accordingly, an author who died during the initial term of copyright could neither contract away nor bequest away his or her statutory successor class of heirs’ rights to the renewal term of a copyright. In effect, Congress created a federally mandated, or forced, estate plan for copyright renewal rights similar to the concept of forced heirship.\textsuperscript{202}

\begin{itemize}
\item \textsuperscript{199} Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436, 436 (repealed 1870).
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Will-bumping’s effect of limiting an author’s testamentary freedom not only ignores an author’s clear testamentary intent, it potentially creates federal transfer tax problems involving inter-vivos gifts and the marital or charitable deductions. For example, as a result of copyright law, a surviving spouse may only have a terminal interest in a copyright. In addition, an inter-vivos gift to charity of copyright may be disqualified as a split interest gift. These implications, however, are outside the scope of this Article.
\end{itemize}
b. Will-Bumping Scenarios

Will-bumping is a clear example of how copyright law interferes with the testamentary freedom of an author. Copyright law has the ability of nullifying an author's dispositions of property during life and at death. Understanding Will-bumping helps clarify exactly how and when copyright law restricts testamentary freedom. Therefore, a more detailed review of two common Will-bumping scenarios is in order.

i. Devise to Non-Statutory Heir

A common scenario is the situation where an author devises by Will his or her copyright interests to an individual or entity other than a member of the statutory class of successor heirs. For example, Sam, a bio-technology engineer who owned multiple copyright interests in works he created, was married to Sue. After amassing substantial wealth, Sam died, bequeathing all of his copyright interests to a charitable organization for needy and sick children and leaving the remainder of his large estate (consisting of non-copyright interests) to his wife, Sue. Sam and Sue had no children.

Under this scenario, copyright law clearly collides with Sam's testamentary freedom, by frustrating his testamentary intent and destroying his estate plan. Even though the charity will be the owner of the various copyright interests until the initial term expires, the copyright interests will vest in the statutory class of heirs after the initial term. Accordingly, the renewal system bumps Sam's Will and the charitable organization's ownership of the copyright interests. Copyright law causes the renewal term interests to pass to Sue instead. If Sam had lived through the initial term, Sam's Will would have governed the disposition of the copyright interests for the renewal term and (i) Sam's testamentary intent would have been realized, (ii) the charity would have benefited, and (iii) Sue would have been adequately provided for by the remainder of Sam's large estate.

203. The same outcome would result if Sam had transferred by gift his copyright interests to the charitable foundation during his lifetime, but did not survive the initial term.

204. In the case of Saroyan v. William Saroyan Foundation, 675 F. Supp. 843 (S.D.N.Y. 1987), involving a copyright ownership dispute between a testamentary beneficiary of copyright interests and the statutory successor class of heirs, id. at 843, the court held that the federal copyright code mandated non-discretionary uniform treatment of the renewal provisions, id. at 845. In Saroyan, the decedent, William Saroyan, had bequeathed "all copyrights, rights to copyright and literary property in published or unpublished work" to the William Saroyan Foundation (a charitable trust benefiting charitable and educational activities). Id. at 843. After the expiration of the initial term, however, Saroyan's estranged
ii. Devise to Statutory Heirs

The second scenario applies where an author devises copyright interests to a member or members of the successor class of heirs, but allocates the copyright interests in proportions different than mandated by the renewal system (or excludes some of the members of the successor class of heirs altogether while providing for others). For example, Sam has substantial wealth consisting of copyrights. Sam is married to Sue, and they have two adult children. Sam’s Will devises all of his copyright interests to Sue for life, and remainder to his children. Sam dies and is survived by Sue and their two adult children.

Under this scenario, copyright law severely restricts the effectiveness of Sam’s bequest of the larger portion of copyright interests to his wife, Sue. Sam might have legitimate reasons why he may want to financially benefit his wife over his children. However, this disposition conflicts with the way courts have interpreted the proportions to which members of the statutory class of heirs are entitled.

In general, authors may wish to differentiate within the successor class of heirs because of the various needs or other variables of the members of the class. For example, authors may wish to leave a larger share of their copyright interests to a surviving spouse and a smaller share to their children. Or, if an author is not survived by a spouse, the author may wish to leave a larger portion of copyright interests to a special needs child or a smaller portion to a financially sound child. The renewal provision, however, restricts the testamentary freedom of authors who may want to leave their renewal term interests to a member of the statutory class of heirs in different proportions.

Although copyright law is clear concerning the identity of the members of the statutory successor class of heirs, copyright law is less clear concerning how to apportion the copyright renewal interests among these members. Recall that the members of the statutory successor class of heirs who have the highest renewal priority are the author’s widow or widower, children moved to renew the copyright of the work The Cave Dwellers, thereby “bumping” the bequest to the charitable foundation. Id. at 844. The foundation challenged the renewal, claiming that the children’s estrangement from their father and Saroyan’s clear testamentary intent foreclosed the children’s claim to the renewal term interests. Id. The court, however, held that there was nothing in the language or structure of the renewal provisions to provide a basis for denying rights to an author’s statutory successor class of heirs. Id. at 845.
child or children. There is no guidance concerning how to apportion renewal rights among this class of heirs.205

The 1831 Act accomplished Congress’s goal of preventing a work from inadvertently falling into the public domain at the end of a copyright’s initial term by creating a statutory class of renewal successors. The legislative history concerning the 1831 Act seems to indicate that Congress was trying to protect surviving family members in the event an author died during the initial term.206 The silence in the legislative history, however, concerning the statute’s restrictions on testamentary freedom indicates that Congress did not understand the impact of the revised renewal system on testamentary freedom.207 Regardless of congressional intent in 1831, the conflict between copyright law and testamentary freedom slipped into American copyright law.

4. The Copyright Act of 1909

Criticism of the renewal system led to the next major revision to the copyright code in 1909 (the “1909 Act”).208 This criticism of the renewal system fell into two categories.209 First, it seemed unfair that a work would

---

205. This problem was manifested in De Sylva v. Ballentine, 351 U.S. 570 (1956), a copyright ownership dispute between an author’s surviving spouse and the author’s illegitimate child, id. at 572. In De Sylva, the Court had to decide whether “widow, widower, or children” constituted one class or two classes. Id. at 573-74. The widow of the decedent (songwriter George De Sylva) routinely renewed each of the copyright interests in the decedent’s work as they became due. Id. at 572. Stephen Ballentine, the decedent’s illegitimate son, sued for his share in the renewal terms of the decedent’s works. Id. The widow did not dispute whether Ballentine was the decedent’s son, but contended that Ballentine had no right to share in the renewal terms. Id. at 573. One argument proffered by the widow was that an author’s “widow” constitutes a separate and distinct successor class of heirs with priority over the author’s “children,” which in itself is a separate and distinct class. Id. The Supreme Court unanimously held that the author’s “widow, widower, or children” was a single class of successor heirs. Id. at 580; id. at 584 (Douglas, J., concurring). The Supreme Court expressly declined to opine about the proper allocation among the members of a successor class of heirs that consists of both a surviving spouse and children (e.g., equal shares to each member of the class as tenants in common, division of shares based on individual states’ intestate law, one-half to the widow and one-half in equal shares to the children, or a life estate in the widow with the remainder interest to the children in equal shares). Id. at 582. Interestingly, there was no discussion in the opinion concerning to whom the decedent bequeathed his copyright interests in his Will.

206. See id. at 582.

207. See id.


209. For a discussion of the history of these debates, see Barbara A. Ringer, Renewal of Copyright, in 1 STUDIES ON COPYRIGHT 503, 508-11 (Arthur Fisher Memorial ed. 1963).
fall into the public domain at the end of the initial term if an author died during the initial term without a surviving spouse or child. Second, the provisions governing the inter-vivos transfers of renewal term rights during the initial term were unclear (i.e., whether the renewal provisions bumped an author’s inter-vivos assignment of renewal term rights). Thus, Congress set out to address these concerns.

Initially, Congress considered abolishing the renewal system in favor of a unitary copyright term. After several vastly different bills were proposed, however, Congress settled on the concept that authors would be financially burdened, while the publishing community would be greatly benefited, if the renewal system and its contract-bumping features were abolished. Therefore, the 1909 Act retained the two-term renewal system.

The 1909 Act remedied the first criticism about the previous act—that the work fell into the public domain at the end of the initial term if the author died during the initial term without spouse or children—by expanding the mandated class of statutory heirs. The 1909 Act stated that a copyright could only be renewed “by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author’s executors, or in the absence of a [W]ill, his next of kin.”

---

210. Id. at 508.
211. Id. at 509.
212. Id.
213. As one commentator noted, the second term of fourteen years to the author or to his widow or children is always a distinct and important advantage to him, and never a disadvantage, because if the author has made an improvident bargain with his publisher for the first term, its disadvantages may be redressed by the bargain for the second term with a surer knowledge of the selling value of the work. The proposed law altogether omits this salutary provision, and under it the publisher will acquire, and the author will forever part with, the entire interest in the work not only for the contingent term during life but also for the absolute term of thirty years from his death, unless the author reserves to himself the ownership of the copyright, which rarely happens. WM. A. JENNER, THE PUBLISHER AGAINST THE PEOPLE: A PLEA FOR THE DEFENSE 61 (1907).
214. The 1909 Act granted authors an initial copyright term that lasted twenty-eight years from the date of first publication but extended the renewal term to twenty-eight years if the copyright owner renewed in a timely fashion. Rosenbloum, supra note 14, at 169. Whether the work was ever published had an effect on copyright protection duration as did the date of the first publication, if any, since copyright protection was previously keyed to publication rather than creation of a work.
216. Id.
built in the general idea found under the 1831 Act that a work should not pass into the public domain if the author dies during a work's initial term, assuming appropriate successors were available.\textsuperscript{217} The 1909 Act improved on the 1831 Act, however, by including the author's executor or next of kin in the statutory successor class.\textsuperscript{218} As a result, if the author died during the initial term of a work, the renewal term rights would pass to someone in the statutory successor class in any situation.

Even though the 1909 Act granted that a "copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by [W]ill," the 1909 Act did not assure the copyright owner complete freedom of testation over the bequest.\textsuperscript{219} For example, if an author died during the initial term survived by a spouse and a child from a previous marriage, and the author bequeathed his copyright interests to his child from the previous marriage and provided for his surviving spouse out of his non-copyright assets, the 1909 Act still would govern the disposition of renewal term rights in the copyright interest—not the author's Will. Thus, the statutorily mandated successor class bumped the intent of the author's Will, thereby furthering the "Will-bumping" phenomenon under copyright law.\textsuperscript{220}

As for the second criticism of the previous act—concerning the implications of an inter-vivos assignment of renewal term rights during the initial term—the legislative history suggests that Congress thought it was precluding the author, during the initial term, from any power to convey or waive renewal rights.\textsuperscript{221} Congress intended for an author to have the ability to bump any assignment of copyright interests made during the initial term (i.e., contract bumping). The American courts would have served the purpose well had they held that an author could not transfer or waive renewal rights during the initial term.\textsuperscript{222} However, in \textit{Fred Fisher Music Co. v. M. Witmark & Sons},\textsuperscript{223} a case involving the renewal term rights in the song "When Irish Eyes Are Smiling," the Supreme Court held that the renewal term rights could be transferred inter-vivos during the initial term.\textsuperscript{224} In essence, the

\begin{itemize}
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id. § 42, 35 Stat. at 1084.
\item \textsuperscript{220} It seems ironic that Congress would specifically grant an author the freedom to transfer by Will, yet codify restrictions that severely undermine the effectiveness of the author's Will.
\item \textsuperscript{221} Nevins, \textit{Magic Kingdom}, supra note 14, at 92.
\item \textsuperscript{222} Nevins, \textit{Little Copyright Dispute}, supra note 14, at 921.
\item \textsuperscript{223} 318 U.S. 643 (1943).
\item \textsuperscript{224} Id. at 657-59.
\end{itemize}
Court had interpreted the 1909 Act in a similar way as the 1831 Act was interpreted in *Paige v. Banks*—that an author did have the right, during the initial term, to assign renewal term rights and be bound by the assignment.

5. The Copyright Act of 1976

When Congress adopted the Copyright Act of 1976 (the "1976 Act")—the current copyright statute—again there was considerable debate over the renewal system. In deliberating the renewal provisions under the 1976 Act, Congress noted, "One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright." As a result, Congress passed the 1976 Act, a comprehensive new statute with the adoption of a new copyright duration.

a. The Death of Will-Bumping

Under the 1976 Act, the renewal system still applies for pre-1978 works, in that section 304 of the 1976 Act carries over the two-term renewal system for works created before January 1, 1978. In addition, the 1976 Act maintains the same procedures for renewal rights as were found...

---

228. Congress stated that the adoption of a new copyright duration was "by far" the most important goal in copyright revision. H.R. REP. No. 94-1476, at 133 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5749.
230. Congress did not replace the two-term system for works created prior to 1978 because to do so would have possibly impaired the obligations and expectations under existing contracts.
231. The 1976 Act, however, increased the renewal term to forty-seven years. Pub. L. No. 94-553, § 304, 90 Stat. at 2573.
in the 1909 Act, including the provision that granted the renewal rights only to the author, if living, or, if not living, to the statutorily mandated successor class. Accordingly, the Will-bumping phenomenon continues for pre-January 1, 1978 works.

The renewal system only applies to works in their initial term on January 1, 1978—works copyrighted as early as January 1, 1950 (1978 - 28 year initial term = 1950). For practical purposes, however, the renewal system currently applies only to works created from 1976 through December 31, 1977 (i.e., works created pre-1978 that are currently in their initial 28 year term). Section 304(a) applies to any transfer of renewal rights including transfers to third party licensees for adequate and full consideration and any

Rather, the renewal of works in their first term as of January 1, 1992 is automatic. Accordingly, for works published and copyrighted between January 1, 1964 and December 31, 1977, "an application [for renewal] is not a condition of the renewal and extension of the copyright in a work for a further term" (i.e., works copyrighted pre-1964 are not subject to the automatic renewal provisions). Copyright Renewal Act of 1992 § 102(a), 106 Stat. at 265. Likewise, if the author dies during the work's initial term, the renewal rights automatically vest in the statutory successor class of heirs when the initial term expires.

233. Section 304 provides, in relevant part:

(a) Copyrights in Their First Term on January 1, 1978.
(1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.
(B) In the case of—
   (i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or
   (ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,
   the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.
(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—
   (i) the author of such work, if the author is still living,
   (ii) the widow, widower, or children of the author, if the author is not living,
   (iii) the author's executors, if such author, widow, widower, or children are not living, or
   (iv) the author's next of kin, in the absence of a will of the author,
   shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

donative transfers for estate planning purposes, including later transfers by an author's heirs.\textsuperscript{234}

Although the 1976 Act carries over the renewal system for pre-1978 works, the limitations on testamentary freedom caused by the renewal system are quickly drawing to a close. As noted earlier, Will-bumping occurs only for pre-1978 works in which the renewal rights have not vested in the author. Accordingly, "(a) . . . the last possible publication date for a work coming under the [renewal system] was December 31, 1977, (b) . . . the initial term of copyright protection . . . last[s] for twenty-eight years, [which was December 31, 2005 (end of 1977 + 28 years)] and (c) . . . the statute of limitations [for claims concerning renewal term interests] extends for three years."\textsuperscript{235} Therefore, it seems that Will-bumping will cease to be a problem on December 31, 2008.\textsuperscript{236}

However, this is not cause for complete celebration. Will-bumping is just one testamentary problem posed by copyright law, despite commentator's opinions to the contrary. In fact, commentators seem to believe that after 2008 there will be no conflict between copyright law and testamentary freedom at all. For instance, one commentator has stated that "[i]n 2005, all works . . . will have entered their renewal term, and thus authors will have complete testamentary control over the disposition of their copyright interests."\textsuperscript{237} Another commentator has noted that "[t]he days of copyright law's meddling with authors' testamentary freedom are drawing to a close.\textsuperscript{238}

Because copyright commentators maintain that the conflict between the copyright law and testamentary freedom has been resolved, a false sense of security has arisen, perhaps exasperating the significance of the conflicts that remain. Copyright commentators have long expounded that estate-planning practitioners were unfamiliar with copyright law to the detriment of creative individuals. Ironically, it is now the copyright commentators' unfamiliarity with current estate-planning techniques that may be causing problems for creative persons. If copyright commentators are free from concern over testamentary intents of the authors, and estate planners are unfamiliar with

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{234} See Keller \& Cunard, supra note 148, § 7:4.2, at 7-15.
\item \textsuperscript{235} Nevin, Little Copyright Dispute, supra note 14, at 930.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Rosenbloom, supra note 14, at 188-89.
\item \textsuperscript{238} Nevin, Little Copyright Dispute, supra note 14, at 931; see also Nevin, Magic Kingdom, supra note 14, at 114 ("[A]t the close of business on December 31, 2005 . . . the window of vulnerability will have shut tight and the will-bumping phenomenon will have faded forever into history.").
\end{enumerate}
\end{footnotesize}
the copyright code, both communities will be in for a surprise in 2013 when terminations first become effective and the era of “estate-bumping” begins.

b. The Birth of Estate-Bumping

The 1976 Act abandoned the two-term renewal system altogether as to works created on or after January 1, 1978 and replaced it with an extended single term of copyright protections based on the life of the author. Generally, for works created after January 1, 1978, copyright protection lasts the entire life of the author plus an additional seventy years.

Another revision to copyright law concerned the transferability of indivisible exclusive rights under the copyright law. While, under the 1909 Act, a copyright was indivisible—meaning that a copyright owner could not transfer to any particular individual exclusive right without transferring all of the exclusive rights granted to a copyright owner—the 1976 Act provides that a copyright may be transferred “in whole or in part.” Specifically, “[a]ny of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately,” and these rights “may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by [W]ill or pass as personal property by the applicable laws of intestate succession.” Section 301 of the 1976 Act also provides that federal copyright law preempts pertinent state law. The legislative history states that the purpose of this provision “is to preempt and abolish any rights under the common law or statutes of a State that are

239. Congress stated that one reason for the change was that life expectancy had dramatically risen between 1909 and 1976 and many authors would live to see the end of their copyright monopoly. H.R. REP. No. 94-1476, at 134 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5750.

240. The major exception to this general rule is for works made for hire (generally, works made by an employee), which last for a term of 95 years from the date of publication of the work, or 120 years from its creation date, whichever expires first. Originally, the 1976 Act limited the duration to life plus 50 years; however, the Sonny Bono Copyright Term Extension Act (the “Sonny Bono Act”) extended this to life plus 70 years. Pub. L. No. 105-298, tit. I, § 102, 112 Stat. 2827, 2827 (1998) (amending 17 U.S.C. § 302 (2000)).

241. Rosenbloum, supra note 14, at 172.


243. Id. § 201(d)(2).

244. Id. § 201(d)(1).

245. Id. § 301.
equivalent to copyright and that extend to works coming with the scope of
the Federal copyright law.\textsuperscript{246}

The most important revision to copyright law, however, is that the 1976
Act grants authors and their statutory successors the non-waivable right to
terminate previous copyright assignments after the lapse of a prescribed
period of time in order to recapture any remaining value in the copyright
interest (i.e., to provide an escape mechanism for authors who assigned away
their copyright interests before the full value of the interest was apparent).\textsuperscript{247}

Even though Congress was eliminating the two-term system in favor of a
single-term system, Congress wanted to preserve the unique reversionary
rights of authors. Congress still recognized the need of “safeguarding authors
against unremunerative transfers. . . . because of the unequal bargaining
position of authors, resulting in part from the impossibility of determining a
work’s value until it has been exploited.”\textsuperscript{248} The renewal structure, however,
was found to be an unsatisfactory means of achieving reversion for authors.\textsuperscript{249}

Rather than granting renewal rights by terminating an original
copyright term to be followed by a second legally separate and independent
term, reversion now occurs by granting authors, or their statutory successor
class of heirs, the unwaivable right to terminate prior assignments during the
sole copyright term\textsuperscript{250} in order to recapture any remaining value of the work.
Thus, the termination provisions under the 1976 Act constitute an attempt at
granting reversionary rights to authors while trying to improve upon the
problems of the renewal provisions.\textsuperscript{251}

5746. Due to the preemption clause, one could argue that there is no conflict between federal
copyright law and individual states estate law. But see Rosenbloum, supra note 14, at 175
(“Estates law does not fall into the category of those laws preempted by section 301 because
[estates law] does not offer protection equivalent to copyright.” (internal quotation marks
omitted)).

\textsuperscript{247} For a general discussion concerning the termination rights provisions, see Frank
R. Curtis, Caveat Emptor in Copyright: A Practical Guide to the Termination-of-Transfers
Provisions of the New Copyright Code, 25 BULL. COPYRIGHT SOC’Y U.S.A. 19 (1977); Marc
R. Stein, Termination of Transfers and Licenses Under the New Copyright Act: Thorny


\textsuperscript{249} See, e.g., Nimmer & Nimmer, supra note 169, § 9.03, at 9-32. The renewal
system was clumsy and difficult. In addition, it created a possibility that works would
inadvertently fall into the public domain by failing to renew. Finally, it was weakened by
Supreme Court decisions recognizing the validity of assignments of renewal rights prior to
their vesting.

\textsuperscript{250} 17 U.S.C. § 203(a)(5).

\textsuperscript{251} Nimmer & Nimmer, supra note 169, § 11.01[A], at 11-3 to 11-4.
The termination rights provisions are found under sections 203 and 304(c) of the 1976 Act.\textsuperscript{252} Section 203 governs transfers made on or after January 1, 1978, while section 304(c) governs transfers before that date.\textsuperscript{253} More specifically, for transfers executed on or after January 1, 1978, authors have an unwaivable right to terminate the transfer and recover the interest during a five-year window of opportunity that begins thirty-five years from the execution of the transfer.\textsuperscript{254} In other words, thirty-five years after a copyright assignment, an author can terminate that assignment and retake the interest. For transfers executed before January 1, 1978, authors have an unwaivable right to terminate the transfer and recover any interest during a five-year window of opportunity that begins fifty-six years after the work was copyrighted.\textsuperscript{255}

Termination rights attach to all assignments except those effectuated by an author's Will.\textsuperscript{256} Accordingly, termination provisions govern transfers of not only ownership interests, but also of any "transfer" of copyright,\textsuperscript{257} including any exclusive and nonexclusive licenses of copyright\textsuperscript{258} or any

\textsuperscript{252} For the most part, the termination rights provisions under sections 203 and 304(c) overlap. Hence, the discussion will be applicable to transfers under both sections 203 and 304(c), unless otherwise noted.

\textsuperscript{253} Compare 17 U.S.C. § 203, with § 304.

\textsuperscript{254} Id. § 203(a)(3) ("[I]f the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier."); see Walthal v. Rusk, 172 F.3d 481, 483-84 (7th Cir. 1999) (considering whether transfers that are both unspecified in duration and silent as to termination are covered by section 203). In Walthal, the Butthole Surfers, a progressive musical band, orally transferred the nonexclusive right to manufacture and distribute its recordings to Touch and Go Records. Walthal, 172 F.3d at 482. The Butthole Surfers later terminated the agreement. Id. at 482-83. Because a contract of unspecified length is terminable at will under Illinois law, Touch and Go argued that section 203 preempted state contract law on this issue and created a minimum thirty-five year period for any transfer of copyrights. Id. at 483. The Court of Appeals for the Seventh Circuit rejected this contention, noting that is not in keeping with the pro-author policy behind the termination provisions. Id. at 484.

\textsuperscript{255} 17 U.S.C. § 304(c)(3).

\textsuperscript{256} Termination rights, however, do not apply to works made for hire. See id. § 203(a). In addition, a derivative work owner maintains the copyright interests even after a termination of the copyright transfer takes place. Paula Lindsey Wilson, Rejection of the New Property Right Theory as Viewed Through the Rear Window: Stewart v. Abend, 24 CREIGHTON L. REV. 155, 173-75 (1990).

\textsuperscript{257} 17 U.S.C. §§ 203(a), 304(c). A "transfer of copyright ownership" is defined by the 1976 Act to include any "conveyance" or "alienation." Id. § 101 (amended 2005). This includes gifts causa mortis—a gift in contemplation of imminent death—and inter vivos—a gift during the lifetime of the donor.

\textsuperscript{258} See id. § 101.
right comprised in a copyright. Unlike renewal rights, termination rights are non-waivable and non-assignable, which completely preserves the concept of contract-bumping. "Not even a specific, well [drafted contract] by an author to forgo the termination right is binding on [the author]."

Similar to the renewal system, the termination rights provisions prescribe a non-discretionary hierarchy of individuals who are entitled to terminate previously transferred copyright interests in the event that the author does not survive until the vesting date. If the author survives to the vesting of the

Non-exclusive grants were included in the right [of termination] on the strength of the argument that, otherwise, there would be nothing to prevent a transferee from avoiding the effect of the provision by compelling the author to grant him a perpetual non-exclusive license along with a statutorily limited transfer of exclusive rights.

KELLER & CUNARD, supra note 148, § 7:5.2, at 7-22 (citation and internal quotation marks omitted).

260. KELLER & CUNARD, supra note 148, § 7:5.2[A], at 7-22.
261. Bartow, supra note 11, at 402.
262. Section 203 of the United States Code, provides, in relevant part:
(a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or non-exclusive 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, otherwise than by will, is subject to termination under the following conditions:
(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. . . .
(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:
(A) The widow or widower owns the author’s entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author’s interest.
(B) The author’s surviving children, and the surviving children of any dead child of the author, own the author’s entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author’s interest is divided among them.
(C) The rights of the author’s children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author’s children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.
(D) In the event that the author’s widow or widower, children, and grandchildren are not living, the author’s executor, administrator, personal representative, or trustee shall own the author’s entire termination interest.

termination right, he or she has the right to the reversion of the assigned interest. If the author dies prior to vesting of the termination rights, the right to terminate passes to the author's statutory class of successor heirs, as does the right to the reversionary interest.

Ownership rights do not vest at the commencement of the termination period, but rather when timely notice is served on an assignee, which can occur up to ten years before commencement of the termination period. The actual copyright interests themselves, though, do not revert to the author (or the statutory heirs) until the applicable termination date. A properly effectuated termination restores ownership of a copyright to all those who possessed termination rights as of the date the notice of termination was filed. Therefore, if an author serves a notice of termination, but dies prior to the applicable termination date, the copyright will pass to the author's estate, not to the statutory successor class of heirs. If the author survives to a date at which he or she could serve a termination notice, but dies without serving one, the statutory successors, and not the estate, gain the right to serve such a notice and take the reversion at the applicable termination date. After the actual termination date, an author is (or the statutory heirs are) then free to commercially exploit the copyright or transfer it to others.

Generally, the author's statutory successor class of heirs consists of the author's widow or widower, children, and grandchildren, if there are any, and executors, administrators, or trustees if there are not. If the author dies
leaving only a surviving spouse (and no children or grandchildren), the surviving spouse owns the author’s entire termination interest. If the author dies leaving only children or grandchildren (and no surviving spouse), the author’s entire termination interest is divided among his or her children and grandchildren on a per stirpetal basis (which means an equal share for each child, with a deceased child’s equal share being divided among the deceased child’s descendants). The interest of a dead child can be executed only by majority action of his surviving children. If the author dies leaving both a surviving spouse and children or grandchildren, the surviving spouse owns one-half of the author’s termination interest, and the remaining one-half interest is divided among the author’s children and grandchildren on a per stirpetal basis. Finally, if the author dies leaving no surviving spouse, children or grandchildren, the termination right vests in the author’s executor, administrator, personal representative or trustee. Where there is more than one statutory heir, the termination right is divided and apportioned among the statutory heirs by statute.

The exercise of a termination right requires agreement by statutory heirs who own more than half of the termination interest. Therefore, if the author is survived by a spouse and children, because a surviving spouse only owns one-half of the author’s termination interest, the surviving spouse must

270. “The author’s ‘widow’ or ‘widower’ is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.” Id. § 101 (2000) (amended 2005) (emphasis added).
271. Id. § 203(a)(2)(A) (Supp. 2002).
273. Id. § 203(a)(2)(B)-(C).
278. Id. § 203(a)(1) (2000).
join with at least one child in order to effectuate a termination. If the author is only survived by children, then a majority of these children must join in a termination. So, if there were only two statutory heirs, each can disrupt the other's plans for termination. Thus, this mandated hierarchy could encourage manipulation and strategic behavior on the part of the statutory heirs for either emotional or financial reasons.

Unique to termination rights is the ability of an author to pass copyright interests to anyone by Will without the possibility of having the bequest bumped by statutory heirs. In other words, unlike the renewal system, termination rights do not apply to transfers by Will. The only type of copyright transfer that cannot be terminated by the author's statutory heirs is one that a deceased author executed by Will.

Similar to renewal rights, though, the author cannot strip members of the statutory class of heirs of termination rights or alter the size of the interest that vests in any particular statutory heir. In other words, an author cannot redistribute termination interests among her statutory heirs. As a result, any inter vivos assignment (even a donative assignment) that an author makes can be terminated by her statutory heirs if the author does not live long enough to exercise or ignore termination rights.

Under section 203(a)(5) of the 1976 Act, licenses and transfers of copyrights executed after January 1, 1978, began to vest in 2003 (for grants made in 1978) and the first wave of actual terminations under this statutory provision can be expected to occur in 2013 (1978 + 35 years). Notice of termination for works created in 1978 could have already begun as early as 2003.

Obviously, Congress was trying to alleviate some of the problems associated with Will-bumping under the 1976 Act. In fact, some scholars argue that disallowing termination of transfers made by Will maintains the

279. Bartow, supra note 11, at 403.
281. The 1976 Act was modified again under the Sonny Bono Act by extending by twenty years the various copyright terms that had been adopted under the 1976 Act. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, § 102(b), 112 Stat. 2827, 2827 (1998) (amending 17 U.S.C. § 302). In addition, the Sonny Bono Act revised the 1976 Act by providing that, where the time for terminating an assignment of copyright had passed, an author would have a new opportunity to terminate and claim the rights of the additional twenty years added by this Act. Id. § 102(d)(1)(D), 112 Stat. at 2828 (amending 17 U.S.C. § 304). Also, the Sonny Bono Act expands the statutory successor class of heirs under the termination right provisions to include administrators, personal representatives, and trustees. Id. § 103, 112 Stat. at 2829 (amending 17 U.S.C. §§ 203(a)(2), 304(c)(2)).
282. See generally supra Section III.B.5.
benefit of contract-bumping while bypassing the detriments of Will-bumping. These scholars, however, ignore contemporary estate planning techniques and testamentary tools. In fact, the conflict between copyright law and testamentary freedom continues under the 1976 Act because of the practical implications of the termination rights provisions. The difference between termination rights and renewal rights is that transfers made by Will—and Will alone—may never be terminated, but all other transfers are potentially subject to being bumped. Because inter vivos donative transfers can be nullified by an author’s statutory successor class of heirs, an author’s testamentary freedom is severely limited and the author’s overall estate plan is subject to being bumped by unintended beneficiaries. Although the bumping would not apply to Wills per se, the bumping could nevertheless undermine an author’s estate plan. If the author dies before the termination right becomes exercisable, it remains copyright law rather than the author’s testamentary intent that determines who has the right to terminate and profit from his creative endeavors. Accordingly, I have dubbed this problem “estate-bumping.”

IV. THE BASIC PROBLEMS WITH ESTATE-BUMPING

There are several inherent problems with termination rights. First and foremost (for purposes of this article), termination rights severely curtail testamentary freedom and have the potential of undermining an otherwise well-crafted estate plan. Second, the revisions under the 1976 Act render ineffective the purpose behind the creation of the statutory heirs system. Third, termination rights are inefficient and duplicative of family protections provided under state law, which could potentially devalue copyright interests. Finally, termination rights are possibly unconstitutional.

A. Conflicts with Testamentary Freedom

The idea that copyright law no longer conflicts with testamentary freedom is dead wrong. Copyright commentators who believe “[t]he days of copyright law’s meddling with authors’ testamentary freedom are drawing to a close” ignore the nature and practice of modern estate planning. In fact, copyright law still dramatically interferes with an author’s testamentary

283. A new concept that builds upon Professor Nevins’ work on Will-bumping.
284. Pardon the pun.
285. Nevins, Little Copyright Dispute, supra note 14, at 931.
freedom. The fact that termination rights do not apply to transfers executed “by Will” does not mean there is no longer a conflict between the copyright law and testamentary freedom. The copyright code fails to carve-out similar exceptions for other types of transfers which have testamentary effect, such as Will-substitutes and other modern estate planning mechanisms, which have become the predominate estate planning tools in the United States.

In many jurisdictions, the same risks of bumping a testamentary plan will continue under the system of termination rights as it did under the renewal system. As discussed earlier, testamentary freedom is simply not the right to leave property by Will, but is the right to choose who receives your property, control the nature of the transfer, determine the timing of the transfer, and decide other aspects effectuating an individual’s testamentary intent. Similar to the problems of Will-bumping under the renewal system, termination rights have the potential to nullify estate plans, which would be otherwise completely unobjectionable on any sound policy basis, because termination rights have the potential to undermine the author’s testamentary intent. Because of the nature of termination rights, authors are now precluded from using the most efficient and effective estate planning techniques, controlling the timing and nature of their donative transfers, and,

286. As noted earlier in Section II.A of this Article, far more property passes by Will-substitutes than by Will in the United States. DUKE MINIER ET AL., supra note 19, at 9; see also VOLLMAR ET AL., supra note 4, at 111 (proposing that the dramatic rise in the usage of Will-substitutes in the twentieth century is due to the public perception that will-substitutes are “a convenient and inexpensive alternative to lawyers, wills, and probate”). See generally John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 HARV. L. REV. 1108, 1109-15 (1984) (discussing the rise of Will-substitutes).

287. See supra note 18 and accompanying text.

288. Sadly, Congress seems completely deferential concerning an author’s testamentary intent. As one court stated in the context of the termination rights provisions, these provisions are:

[N]ot necessarily . . . for the effectuation of the author’s “intent.” If the author’s intent were the paramount concern of the statute, then no termination of any kind would be allowed, because most authors presumably “intend” to make the assignment that is the very object of . . . [the] termination provisions. Thus, there is a limit on the weight that courts should attach to the author’s subjective desires, and it is in this sense that the “otherwise than by will” language should be understood. Granting supremacy to the author’s intent as against the rights of the widow and children would obviate the reason that Section 304(c) is in the Copyright Act to begin with and distort the deliberate legislative choice made by Congress, unless the grant of copyright renewals was made by [W]ill in the first instance.

in many circumstances, are practically limited to whom they can transfer their copyright interests.\(^{289}\)

Because estate-planning practitioners are unaware how the copyright law creates a federal incursion on testamentary freedom, and because some copyright commentators seem to believe that the bumping aspects of the copyright law have been significantly reduced, there is a greater potential of the copyright law “bumping” an author’s carefully prepared estate plans, perhaps leaving estate-planning practitioners open to claims of malpractice. Estate-bumping can occur when termination rights circumvent dispositive estate planning instruments (other than Wills). Termination rights can restrict copyright authors from using the most tax advantaged estate planning techniques by prohibiting the author from determining the timing and the character of the transfer, and precluding the author from using family holding companies and partnerships as part of their estate plan. If estate-planning practitioners do not know about the estate-bumping effects of termination rights, they will continue to plan copyright authors’ estates using common estate planning techniques, not realizing that they are exposing authors’ estates to vulnerability.

A brief discussion of the estate planning mechanisms (other than Wills) through which testamentary freedom flows is necessary in order to understand the adverse effects the copyright statute has on testamentary freedom. By foreclosing the availability of these mechanisms, the copyright law places extreme limitations on testamentary freedom and has the potential to destroy an author’s estate plan and undermine the author’s testamentary intent. This list is not exhaustive of all the ways termination rights conflict with testamentary freedom, but the discussion demonstrates the pervasiveness of estate-bumping for some of the most common, modern estate planning techniques.

\(^{289}\) In addition, these rights call into question the very nature of any donative transfer of copyrights—whether the transfer is an irrevocable transfer, a revocable transfer, or a split interest. Generally, an analysis of gifts, sales, and other transfers for gift and estate tax purposes is partially based upon the irrevocable nature of such transfer. The right to terminate a grant therefore raises multiple issues, which include the valuation of the right to terminate, the inclusion of assets in the estate of a decedent possessing the right to terminate, and the effect, if any, on certain intended irrevocable transfers, such as charitable and marital deductions.
1. Revocable Trusts

Although some copyright commentators believe that the problems associated with Will-bumping will shortly cease to exist, copyright owners in many jurisdictions are in for a rude awakening in 2013, when terminations of copyright assignments first become effective.90 The belief that termination rights do not have a deleterious effect on estate planning because these rights do not attach to transfers “by Will” lacks understanding of current testamentary instruments. In many jurisdictions in the United States, the Will simply is no longer the primary dispositive estate planning instrument of an individual’s assets. Rather, in these jurisdictions, a revocable trust, also sometimes referred to as a “living trust,” is used for the management and distribution of an individual’s assets at death.91 Therefore, for practical purposes, in these jurisdictions, there will be no difference between Will-bumping under the renewal system and the effects of estate-bumping by termination rights.

A revocable trust provides for the disposition of an individual’s assets at death and serves as a Will-substitute. “The revocable trust is one of the most popular nontestamentary devices,” and is quickly becoming the testamentary instrument of choice in many states, including California, Florida, and New York (all of which have large intellectual property industries).

290. See supra note 281 and accompanying text.
291. See DUKEMINIER ET AL., supra note 19, at 299 (“Revocable inter vivos trusts have come into widespread use . . . .”); WAGGONER ET AL., supra note 4, at 500 (“Inter vivos trusts, particularly revocable trusts, are staples of the estate planner’s inventory.”); id. at 752 (“Today, without doubt, private trusts . . . sit at the core of modern estate-planning practice.”); Langbein, supra note 286, at 1113 (“The revocable trust is the fundamental device that the estate-planning bar employs to fit the carriage trade with highly individualized instruments . . . .”).
292. The creator of the revocable trust, sometimes referred to as a “grantor” or a “settler,” transfers title of certain assets to the revocable trust. During the grantor’s lifetime, the trust can be revoked or amended by the grantor at any time. At the grantor’s death, the assets held by the trust pass according to the trust instrument and thus avoid the probate process. The revocable trust agreement works in conjunction with a “pour-over” Will, a Will that merely directs that any assets still in the grantor’s name should pour-over and be disposed of in accordance with the terms of the revocable trust agreement. Accordingly, the revocable trust agreement contains most of the substantive and dispositive provisions that are normally found in a Will.
293. KATHRYN G. HENKEL, ESTATE PLANNING AND WEALTH PRESERVATION: STRATEGIES AND SOLUTIONS ¶ 7.03, at 7-6 (abr. ed. 1998). See generally id. ¶ 7.03 (discussing revocable trusts).
Revocable trusts are popular due to their significant advantages over Wills. One great advantage of revocable trusts is that they are generally not subject to court-supervised probate administration. Therefore the process is more cost-effective and the instrument is usually not included in public court records. In contrast, when an individual dies with only a Will, the Will is probated and an inventory of the probate assets is generally required to be filed with the court. Both the Will and the inventory of assets are generally matters of public record—there for all to see. However, there are many reasons why individuals may appreciate privacy. For example, an individual may be disinheriting a child or leaving assets to children in disproportionate shares. In addition, an individual may be leaving assets to a friend or co-worker and would not want others misconstruing their intentions. Others may be gay and want to keep the dispositions of assets private or out of a Will to avoid a potential Will contest by heirs under the intestacy laws of the state. Putting the dispositive provisions of an estate plan into a revocable trust will keep the dispositions private and will hide the composition of the estate’s assets from the public eye.

Revocable trusts also provide estate planning and elder law opportunities to eventual incapacity of the grantor. For instance, if a grantor of a funded revocable trust becomes incapacitated, the trustee can manage the assets for the incapacitated individual’s benefit free from the otherwise necessary appointment of a costly court-supervised guardian.

There are other advantages to using a revocable trust as well. Immediately upon the grantor’s death, a trustee is in a position immediately to manage securities, pay expenses, and make distributions to beneficiaries without the delay of probate. In addition, creditors should not be able to attach trust property after the grantor’s death. Finally, trusts created under a revocable trust agreement are generally not subject to the court supervision that is required for many actions involving trusts under a Will, such as the appointment, removal, and resignation of trustees and changing situs of the trust, should that become advisable (for example, to reduce state income tax).

Denying an author the ability of using funded revocable trust agreements is a major incursion of an author’s testamentary freedom. The effects of

294. For a general discussion concerning the advantages of revocable trusts, see JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS 511-12 (2d ed. 2003).
295. See id.
296. See HENKEL, supra note 293, ¶ 7.02, at 7-3.
297. See DUKEMINIER ET AL., supra note 19, at 317 (“Many persons are reluctant to have a spouse or parent formally adjudicated an incompetent.”); see also HENKEL, supra note 293, ¶ 7.03, at 7-7.
termination rights on dispositions by revocable trusts will be as harsh as the renewal system is on dispositions by Will. Because transfers by revocable trust are not transfers "by Will," all dispositions by a funded revocable trust will be subject to the estate-bumping aspects of termination rights.

For example, Sam is in his second marriage, and is now married to Sue. Sam has children from the previous marriage as well as children from his marriage with Sue. Sam has substantial wealth consisting of valuable copyright interests and other valuable assets. Sam and Sue have retired to Florida. Sam's new estate-planning practitioner drafts a revocable trust and a pour-over Will for Sam, which is common in Florida. On his lawyer's advice, Sam funds the revocable trust. Upon Sam's death, the revocable trust establishes a continuing trust for his children from the previous marriage with the copyright interests while the rest of his assets pass to Sue, who will later provide for his children with Sue. This structure would avoid potential conflicts between Sue and Sam's children from the previous marriage at the time of Sam's death, while adequately providing for all family members. Unfortunately, this well-prepared estate plan may be destroyed by the estate-bumping aspects of the termination rights. Sue and her children will have the required majority vote to bump Sam's estate plan and retake the copyrights from the continuing trust. Although Sam's children from the previous marriage will still benefit from the copyright interests (they are also part of the statutory successor class of heirs), the children will not benefit to the extent Sam had intended.

Although one might argue that copyright owners should only use Wills and not revocable trusts, this edict would deprive copyright authors of the many advantages of the revocable trust structure—severely restricting authors' testamentary freedom in ways other property owners are not restricted. In addition, because most estate-planning practitioners are unfamiliar with copyright law, estate-planning practitioners will continue to use revocable trust agreements, blissfully unaware of what awaits around the corner. An author's inability to use a standard estate planning instrument, such as a revocable trust, is an inexcusable intrusion on an author's testamentary freedom.

298. Copyright interests are very appropriate assets with which to fund a revocable trust because of the benefits from consolidating the management and control of copyrights under a trust. See infra Part IV.A.3 (discussing details concerning the benefits of consolidating management and control of copyrights).
2. Lifetime Transfers

Another example of how termination rights trample an author's testamentary freedom is when these rights deprive an author of the tremendous tax advantages of lifetime transfers. Lifetime gifts are highly tax-favored transactions. An author can take advantage of the annual $12,000 tax exclusion per donee. In addition, by properly utilizing the applicable credit amount during an author's lifetime, the author may gift a certain amount of assets free of transfer tax. Both the annual exclusion and the applicable credit amount have the additional benefit of removing the income and appreciation of these assets from the author's future gross estate for estate tax purposes. Finally, even if subject to transfer tax, in general, lifetime gifts are highly tax-favored as compared to transfers at death because the effective gift tax rate is lower than the effective estate tax rate, and, once again, "[a]ny income and appreciation accruing from the gifted property from the date of the gift forward escape . . . [further transfer] taxation to the donor." Sadly, these tax advantageous techniques are not as effective for authors. If an author makes lifetime gifts of copyright interests and dies before the termination rights vest in the author, the statutory heirs may potentially bump these lifetime gifts.

a. Annual Exclusion

Certain lifetime gifts are not subject to transfer taxes. Under current federal transfer tax law, every individual is allowed gift tax exclusions of $12,000 per year per donee. The "annual exclusion" applies to gifts of "present interests." Generally, an outright gift of copyright interests would qualify if it was given to an individual, to certain specially-structured trusts, or to a family business entity. Because the annual exclusion applies to each donee, the ability to diminish transfer tax liability is significant.

For example, Sue is in her second marriage, and is now married to Sam. Sue and Sam have one adult, married child from their marriage. Sue has three children from the previous marriage, all of whom are married. Sue has

299. See discussion infra note 302 (annual exclusion).
300. See discussion infra note 306 (applicable credit amount).
301. Id.
302. I.R.C. § 2503(b) (2000). The annual exclusion amount is adjusted for inflation from an initial $10,000 amount from 1998. Id. Currently, the annual exclusion amount is $12,000 per donee per year.
303. See id. § 2503(b)(1).
accumulated great wealth in copyright and other assets. She has decided to pursue an annual gifting regime of the copyright assets to her family, to avoid increasing the size of her taxable gross estate at death. Sue can give $12,000 in value of the copyright interests to each child and to each child-in-law for a total of $96,000 per year. If Sue maintains this gifting regime for only ten years, Sue can exclude $960,000 from her estate without paying any transfer tax and without ever filing a gift tax return.\(^{304}\)

Once again, copyright law’s estate-bumping deprives an author from using this tax savings mechanism. Here, Sue pursued a tax efficient transfer technique while furthering her testamentary intent of providing for all her children equally in an effort to prevent family turmoil at her death. Unfortunately, these lifetime gifts are subject to termination rights. If Sue should die before the termination rights vest in her, Sue’s statutory heirs could bump Sue’s estate plan. If Sam is alive at the time termination rights vest, Sam and his one child could terminate the lifetime gift of copyrights, thereby giving Sam a share in the copyright interests and decreasing the size of the interests held by the children of Sue’s previous marriage. If Sam is not alive, Sue’s children from the previous marriage could bump Sue’s estate plan by terminating her previous transfers of copyright interests. Thus, there is great potential for manipulation and family turmoil. This potential of bumping Sue’s testamentary intent would occur regardless of whether Sue gifted these interests outright to her children and their spouses, or if Sue transferred these rights into trusts for the benefit of her descendants in order to consolidate control and management of the assets.\(^{305}\) Because of the termination rights, a majority of Sue’s statutory successor class of heirs can terminate copyright assignments and thwart Sue’s testamentary intent. Moreover, annual exclusion gifts can be made to individuals other than immediate family members. Sue may want to take advantage of this tax-free transfer technique to transfer copyright interests to siblings, parents, friends

\(^{304}\) This is in addition to the tax-free future appreciation in value of these assets once outside of Sue’s estate.

\(^{305}\) In general, transfers in trust are not present interest because the beneficiary of the trust does not have the “unrestricted right to the immediate use, possession, or enjoyment of property or the income from property.” Treas. Reg. § 25.2503-3(b) (as amended in 1983). One technique used to qualify a transfer of property to a trust for the annual exclusion is by granting one or more beneficiaries the right to withdraw the property from the trust for a limited period of time. See Crummey v. Comm’r, 397 F.2d 82, 83 (9th Cir. 1968). This withdrawal right, for practical purposes, grants the beneficiary the immediate possession of the trust property, thereby qualifying the transfer as a present interest. The IRS has recognized that a withdrawal power creates a present interest if there was no agreement between the grantor and the beneficiaries that the beneficiaries will not exercise the withdrawal power.
or family investment companies. Unfortunately, in all these situations, the transfers have the potential of being bumped by Sue’s statutory class of successor heirs.

The effect of estate-bumping could be catastrophic from an estate planning point of view and obviously could undermine an individual’s testamentary freedom. Once again, termination rights allow the statutory class of heirs to bump an effective transfer tax strategy that all other property owner’s enjoy.

b. Applicable Credit

In addition to the $12,000 annual exclusion, every individual has an “applicable credit amount” that shelters life-time transfers up to $1,000,000 from federal gift tax.\(^{306}\) The amount of an individual’s applicable credit amount not used by lifetime gifts may be available to shelter transfers taking effect at death from estate tax. Using the applicable credit amount to make lifetime taxable gifts, however, permits post-gift income and appreciation on the transferred property to escape transfer tax instead of being subject to transfer tax as part of the estate.

For example, Sue and Sam are married. Sue has accumulated great wealth in copyright assets and other assets. She and Sam have four children, one of whom has special needs and costly medical concerns. Upon Sam’s death, Sue decides to create a lifetime trust for the benefit of her child with special needs in order to avoid any financial hardships that may occur from potential delays during the probate process. Sue funds the child’s trust with her copyright interests in an amount equal to her applicable credit amount. She chooses to fund the trust with copyright interests because she wisely wants to consolidate management and control of these assets as well as remove the appreciation of the assets from her estate. This transaction has no gift tax consequences. Sue dies leaving the remainder of her estate to her

---

306. I.R.C. § 2505(a)(1) (2000 & Supp. 2001). Every individual receives a credit against federal gift and estate taxes. In 2005, this credit could be used to transfer up to $1,000,000 free of federal gift tax (over and above the annual exclusion gifts) and $1,500,000 free of federal estate tax. Compare I.R.C. § 2505(a)(1) (Supp. 2001), with I.R.C. § 2010(c) (Supp. 2001). Under the Economic Growth and Tax Reconciliation Act of 2001, substantial changes were made to the federal transfer tax system. The applicable credit amount for federal estate tax purposes is scheduled to increase to $2,000,000 in 2006 through 2008, and increase again to $3,500,000 in 2009. I.R.C. § 2010(c). A total repeal of the estate tax is scheduled to be in effect in 2010 (the gift tax is currently not slated for repeal). The applicable credit amount for federal gift tax purposes, however, is not scheduled to increase in future years above its current $1,000,000 level.
other children by Will. Sue was comfortable that she had adequately and effectively provided for all of her children. Sue was wrong. This well-structured estate plan is subject to being bumped by Sue's statutory heirs. If termination rights do not vest in Sue, Sue's other children can terminate the transfer of the copyright interests into the trust thereby bumping Sue's testamentary intent.

Thus, termination rights interfere with authors' ability to provide for their families as they see fit. They do not allow authors to balance the various needs of their family members and plan the most effective estate plan to achieve their goals. As just demonstrated, this intrusion on testamentary freedom can have very harsh and unfair results.

c. Payment of Gift Tax

Even if an individual has already exhausted the applicable credit amount, it is often more tax efficient to make lifetime gifts to beneficiaries and actually pay gift tax than to leave property to them at death. Although the federal estate tax and gift tax are currently imposed at the same rates, it is often preferable to have a transfer subject to gift tax than estate tax. Generally, the tax base for estate and gift taxes to which the unified tax rate is applied is different. The gift tax is imposed on a tax exclusive basis, whereas the estate tax is imposed on a tax inclusive basis. That is, for lifetime gifts, the amount of a gift is defined as the value of the transferred property, excluding any gift tax imposed on the transfer (i.e., there is no tax on the tax). However, for transfers at death, the estate tax base includes all property owned at death, including any amount used to pay the estate tax (i.e., the tax is imposed on the transferred property before tax and is payable out of the transferred property). To illustrate, assume Sue had $10,000,000 and the gift and estate tax rates are 50%; Sue could make a gift to her children of $6,666,666 and pay $3,333,333 of gift tax (the tax is 50% of what the children receive). However, if Sue died with the $10,000,000 and left everything to her children, that $10,000,000 bequest would result in a $5,000,000 estate tax (50% of what Sue owns at death). As a result, Sue's children would receive only $5,000,000 as compared to the $6,666,666 from the lifetime gifts—that is an additional $1,866,666 of transfer tax paid by Sue.

307. See Boris I. Bittker et al., Federal Estate and Gift Taxation 22 (9th ed. 2005) (“[F]or a transfer of a given amount, the effective burden of the estate tax is substantially heavier than that of the gift tax, even though both taxes are imposed at the same nominal rates.”); Henkel, supra note 293, ¶ 8.01, at 8-2 (“[G]ifts are highly tax-favored as compared to transfers at death.”).
making a transfer at death rather than making the transfer during her lifetime. Thus, from a transfer tax perspective, lifetime gifts are preferable.

In addition to the different effective rates of gift and estate taxes, the lifetime gifts have another advantage over transfers at death—the transfer tax-free nature of the income and appreciation on assets transferred during an individual’s lifetime. Generally, all income from and appreciation of property transferred during an individual’s life escapes future gift and estate tax.

Once again, termination rights preclude the effective use of this tax advantageous mechanism for transferring property. Lifetime gifts, even donative in nature, are subject to termination rights. Therefore, even the most basic of tax advantageous estate planning strategies is precluded from copyright owners. Any lifetime transfer of copyright is subject to the potential of estate-bumping. If the termination rights do not vest in the donor, the donor’s statutory heirs can terminate the lifetime transfer of copyrights. Again, this is a draconian restriction on an author’s testamentary freedom.

3. Family Holding Entities

An excellent estate planning tool for copyright interests is the creation of a family holding entity. Unless an author has only one heir, or is planning to give all his or her copyright interests to one beneficiary, some sort of business entity can be used to unify management and control over the copyright interests (and other assets) after the author’s death. Without unified management and control, the co-owners of the copyrights could compete to exploit the copyrights, which could impair the value of the copyrights.

Generally, copyright ownership becomes fragmented when the copyright is gifted or bequeathed to more than one beneficiary (or reverts back to more

---

308. Henkel, supra note 293, § 8.03, at 8-5 (“[T]he rate on the income and appreciation of the gifted assets after the gift is made is hard to beat.”).

309. Much has been written recently on the use of family holding companies in estate planning, discussing the valuation discounts associated therewith and the retained interest issues pertaining to the inclusion of the value of the entity in the transferor’s gross estate. It is beyond the scope of this paper to review these considerations.

310. Like any operating business, a family holding company may take one of a variety of forms, including general partnerships, limited partnerships, corporations (which may or may not elect S status under the tax law), limited liability companies, business trusts or proprietorships. This Article does not consider choice of entity issues (i.e., whether corporations, partnerships or limited liability companies are the best entity to hold and manage copyright interests).

than one member of the statutory class of successor heirs). 312 "Fragmentation of copyright ownership creates very serious administrative problems because it results in" the inconsistency of management and control of the copyright. 313 Each joint owner of the copyright, without the consent of the other co-owners, can exploit the work individually, or grant nonexclusive licenses to others. 314 In addition, the more important grants—the grants of exclusive rights in copyright—require all the co-owners to agree. 315 Fragmented management and control of a copyright obviously is not the most efficient and effective means to maximize the value of copyrights. Effective marketing of copyrights could be inhibited if the co-owners are unable to reach an agreement on marketing strategy. 316 Therefore, an author may want to consolidate management and control for the efficient exploitation of copyright. In addition, the author may prefer to consolidate management and control in the hands of an individual who has sufficient expertise in the exploitation of the copyright. 317 Therefore, consolidating control allows the copyright to be marketed more efficiently and effectively.

The author can prevent fragmentation of ownership and control simply by transferring the ownership of the copyrights to a family holding entity before death. In addition to centralizing management and control, this mechanism facilitates gift giving, allows the entity to benefit from economies of scale, qualifies for special tax provisions, 318 shifts income among family members, and protects the assets from claims of creditors. In addition, a family holding company also permits an individual to transfer limited interests of the family holding company (and thereby the underlying assets) to others in a tax efficient manner. For gift tax purposes, the value of these transferred interests would be equal to the value of the pro rata share of the assets held in the family holding entity reduced by a "valuation discount" derived from the characteristics of the interests. 319

313. Id.
314. Id.
315. Id. at 440-41.
316. Hader, supra note 311, at 576.
317. Id.
319. The transfer tax valuation discounts applicable to transfers of nonvoting or minority interests in a family holding company would be those generally recognized by the
The consolidation of management and control under family holding entities makes this mechanism ideal for transfers of copyright interests. In addition, the valuation discounts make gifts of family holding entity interests an ideal way to maximize the advantages of annual exclusion gifts, the unified credit amount, and taxable transfers. Unfortunately, termination rights subject the use of this technique to the possibility of estate-bumping. Once again, the conflict between copyright law and testamentary freedom produces harsh results and deprives copyright authors of an estate planning mechanism used by other property owners.

4. Charities

Gifts to charity are treated favorably under the federal tax regime. No gift or estate tax is imposed upon a gratuitous transfer to qualified charities because these transfers qualify for the “charitable contribution” deduction. In addition, an individual may be entitled to an income tax deduction for gifts of property to charity.

There are many ways to take advantage of the charitable deduction, including outright gifts to charitable entities, the creation of charitable remainder trusts and charitable lead trusts, and the creation of private foundations or public charities. Unfortunately, an author’s charitable
courts and the IRS as appropriate for transfers of non-controlling interests in closely-held entities, including (i) a minority discount that reflects the inability of the transferee member to participate in managing the company and to control distribution and liquidation decisions and (ii) a lack of marketability discount that reflects the absence of any real market for the transferred interest. Although the appropriate size of the discount should be determined by an independent valuation appraiser, the combined effect of the two discounts usually will result in a reduction in value in the range of 20% to 40%, and discounts up to 50% have been upheld. Therefore, when an individual transfers interests in the family holding entity, the value of the interests will be devalued for transfer tax purposes, thereby allowing the individual to get a bigger bang for the tax buck. See Harwood v. Comm’r, 82 T.C. 239, 268 (1984) (holding 50% discount allowed based on lack of control, lack of marketability, and restrictions on transferability), aff’d, 786 F.2d 1174 (9th Cir. 1986) (unpublished table decision).

322. See I.R.C. § 170 (amended 2006). For example, if an individual makes a $50,000 gift to charity, the individual may be entitled to a $50,000 income tax deduction (subject to certain limitations depending upon the type of charity and depending on the individual’s gross income).
intentions can be circumvented by the statutory class of heirs if the author does not live long enough to have the termination rights vest.

For example, if Sam makes an inter vivos donative gift of all his copyright interests to a charitable entity and also bequests by Will any remaining copyright interests to the same charity, but dies before termination rights vest in Sam, Sam's statutory successor class of heirs can bump the charitable gift and take ownership of the copyright interests. If Sam dies before exercising his termination rights, he does not own any copyright interests, and nothing passes to the charity. Therefore, estate bumping would thwart Sam's charitable intention and deprive the charity of expected assets.

5. Modern Family Concerns

a. Prenuptial Agreements

Generally, the law permits two individuals to agree upon how their property will be treated during marriage, upon the event of divorce and at death. These agreements can be entered into before marriage (prenuptial or pre-marital agreements) or after marriage (postnuptial or ante-nuptial agreements). It is common for individuals to enter prenuptial agreements if one or both have, or expect to have, large estates or if one or both have children from a previous marriage. Although courts will scrutinize the circumstances under which the agreement was entered, the agreement will usually be enforced if the parties complied with the requirements of the state. Often, the agreement provides for the disposition of property upon the death of a spouse; a spouse will often waive the elective share and other marital rights for some present consideration.

For example, consider if Sam and Sue execute a prenuptial agreement, whereby Sam will pay Sue $2,000,000 on the date of their marriage (each

323. In another example, Sam permanently licenses a portion of the exclusive interests of a copyright to a corporation for an income stream, but retains other exclusive interests of the copyright. By Will, Sam bequeaths all of his copyright interests to a charity. After the author's death, only Sam's retained interests pass to the charity. The exclusive interests that were permanently licensed to the corporation remain with the corporation because the author did not live long enough to exercise any termination rights. However, in this scenario the statutory class of heirs may still terminate the assignment to the corporation. When the statutory heirs exercise their termination rights, the interests licensed to the corporation will pass to the statutory class of heirs and not to the charity as Sam intended.

324. Henkel, supra note 293, ¶ 39.01, at 39-2 ("The requirements of marital property agreements are governed by state law . . . ").
their second) and Sue waives alimony payments if they divorce and waives her elective share and other marital rights. Sam has children from a previous marriage. Sam and Sue get married and Sam pays Sue $2,000,000. Sam and Sue have one child. Sam creates a funded revocable trust, which ultimately benefits all of his children. Sam funds the trust with most of his assets, including valuable copyright assets. If the termination rights do not vest in Sam before his death, Sue and her child could terminate the transfer of copyrights to the revocable trust and economically benefit from the copyright interests despite Sue being paid a substantial sum for waiving all her interest in Sam's property. This is an extremely unfair intrusion into an author's testamentary freedom.

b. Blended and Nontraditional Families

Stepfamilies are on the rise in the United States.\textsuperscript{325} In a second marriage, if one or both spouses have children from a previous marriage, a number of significant issues exist. In every blended family, there are intrinsic conflicts because of the family structure. Some conflicts in blended families are often inevitable (1) between the children from a previous marriage and the parent's new spouse and (2) between the children of the previous marriage, the children from the parent's new spouse's previous marriage, and any children the second marriage may produce. These conflicts can arise on both the financial and the emotional level. Having the flexibility to structure the disposition of property through inter vivos gifts and transfers at death can help soothe some of these inevitable conflicts.

Termination rights, however, severely limit the estate planning techniques that an author may use to avoid potential conflicts between family members. Any lifetime dispositions are subject to estate-bumping. The requirement that there must be a majority of statutory heirs to terminate and to manage the copyright after termination is ripe for conflict in blended families. The surviving spouse must be joined by at least one child in the decision making process. Mandating that the surviving spouse and all children have termination rights forces children from a previous marriage and the surviving spouse into otherwise avoidable conflicts.

Modern families also consist of couples, either of the same or opposite sex, who live together in committed relationships but outside the legal

\textsuperscript{325} In fact, one commentator notes that "[o]ne out of every three Americans is now a stepparent, a stepchild, a stepsibling, or some other member of a stepfamily." Jan Larson, \textit{Understanding Stepfamilies}, \textit{AM. DEMOGRAPHICS}, July 1992, at 36, 36.
framework of traditional marriage. Many same-sex couples prefer to use funded revocable trusts for dispositive provisions instead of a Will due to privacy concerns and to protect against potential Will challenges. As discussed previously, however, revocable trusts are subject to estate-bumping. In addition, under the copyright law, an author’s same-sex partner (legally married or not) is excluded from the statutory class of successor heirs.

As the preceding analysis makes glaringly clear, copyright law continues to severely limit a copyright author’s testamentary freedom. The estate-bumping phenomenon caused by termination rights, in effect, prohibits an author from using the most effective estate planning tools and efficient tax planning strategies, to the detriment of the author’s best interests. In addition, it does not allow an author the flexibility to adjust an estate plan to family needs and desires. Thus, termination rights and estate-bumping problems not only undermine testamentary freedom, but unwittingly limit the role of sound judgment in estate planning.

B. Ineffectiveness of Copyright Law

1. Original Intent Undermined

The main policy reason for creating a statutory class of heirs was to provide protection for surviving family members after the author’s death. However, the statutory successor provisions no longer benefit from this purported justification. Under current copyright law, copyright interests do not fall into the public domain after an author’s death nor do termination rights attach to transfers by Will. This simple change in law undermines the focus of the original intent behind the creation of the statutory class. Copyright reversion is no longer a compulsory bequest. Therefore, the statutory heir provisions are no longer effective with regard to their original purpose.

328. See De Sylva v. Ballentine, 351 U.S. 570, 582 (1956) (“The evident purpose . . . is to provide for the family of the author after his death. Since the author cannot assign his family’s renewal rights, [it] takes the form of a compulsory bequest of the copyright to the designated persons.”).
One could argue that the original intent of these provisions was to create
a type of federal intestacy provision.\textsuperscript{329} If this was the intent, however, then
the provisions would be subordinate to the author’s express disposition—in
other words, these provisions would function only in the absence of a devise
or gift, which they do not as currently drafted.\textsuperscript{330}

2. Circumventing Copyright Law with Will Contracts

Current copyright law may be ineffective in yet another way. A party
licensing a copyright interest can simply request that the license expire at the
author’s death and then insist that the author execute a contract whereby the
author would promise to bequeath all copyright interests. Generally, a contract to make a Will or to bequeath certain property is valid, assuming the requirements for a valid contract are met.\textsuperscript{331} Questions
regarding the validity of a Will contract are questions of contract law and not
estates law. The contract instrument cannot be probated (as a Will) if the
bequest is not made, but a cause of action against the estate can arise if the
contract is not performed.\textsuperscript{332} Therefore, if the author does not bequeath the
licensee the copyright interest, the licensee may sue for breach. If the author
left the licensee the copyright interest by Will, the statutory class of heirs
could not terminate the transfer, thus undermining the objective of granting
an author’s family a second bite at the apple.

\textsuperscript{329} However, each state has intestacy statutes and the creation of a federal intestacy
hierarchy would be redundant and inefficient.

\textsuperscript{330} The statutory successor provisions cannot benefit from the argument that the class
of heirs are the author’s likely beneficiaries and the author is otherwise incapable of protecting
his or her interests. For example, in Saroyan v. William Saroyan Foundation, the court held
that William Saroyan’s bequest of copyrights in his work to a private foundation was
ineffective in light of the superior nature of the statutory heirs. 675 F. Supp. 843, 845-46
(S.D.N.Y. 1987). The Foundation claimed that Saroyan had a bad relationship with his
children and that Saroyan deliberately disinherited them. See id. at 844. The court held that the
renewal rights belong to his children “regardless of the author’s own wishes.” Id. at 846.


\textsuperscript{332} For further discussion of the validity of Will contracts, see McGovern & Kurtz,
supra note 76, § 4.9, at 226-34; Waggoner et al., supra note 4, at 669-75; Eugene F.
Scoles et al., PROBLEMS AND MATERIALS ON DECEDEENTS’ ESTATES AND TRUSTS 245-49 (6th
ed. 2000).
C. Inefficiency of Copyright Law

1. Duplicative

In addition to driving a wedge between copyright law and estates laws, the mandatory statutory class of successor heirs provisions duplicate state law protections and are therefore unnecessary. The purpose underlying the creation of the statutory successor class of heirs is the protection of family members. Congress protects an author's family members essentially by granting them reversionary rights if the author should die before the rights vest in the author. States' estates laws already provide protections for surviving family members through spousal rights and community property laws. There is no need to provide an additional protective element for families of authors. The renewal system provides an additional mechanism, which combined with state estates law protections of family members, grants an unprecedented and unintended windfall to family members who are already protected under a state's estates law. For instance, consider if an author's estate consisted of valuable copyrights and other assets. Under current copyright and estates law, the surviving spouse not only could exercise the "elective share" against the author's estate (claiming a one-third to one-half interest in the author's estate), but also could later exercise the renewal rights on the copyrights. By doing so, the surviving spouse would receive a greater percentage of the estate value than the elective share intended. In addition, suppose a married couple had executed a prenuptial or ante-nuptial agreement, whereby each party waived any spousal rights to separate and marital property, and also waived all spousal protections provided under state law (i.e., elective share, homestead, etc.). Under current law, a surviving spouse could nevertheless terminate any copyright interest that the deceased spouse transferred during life. By doing so, the surviving spouse will have diminished the other beneficiaries' shares of the author's estate through the use of termination rights.

2. Arbitrary Nature of Timing

The arbitrary nature of the timing of an author's death demonstrates the absurdity of the termination of transfer rights and their conflict with testamentary freedom. The timing of an author's death plays an important role in determining the extent of an author's testamentary freedom over

333. See supra Part III.B.
copyright interests, with respect to when termination rights vest. Because notice of termination can be sent up to ten years early, if the author lives twenty-five years after the grant and serves the required notice the year before death, the termination rights vest in the author thereby preventing the vesting of termination rights in the members of the statutory class of heirs.\textsuperscript{334} This would be the case even if the author died the day after properly serving termination notice—more than nine years before the actual termination date. However, if the author died at the same time after the assignment of copyright, but this time without properly serving notice of termination, any assignments—gifts and even certain attempted bequests—can be bumped by the statutory class of heirs. Simply, if the window of opportunity for terminating prior assignments begins on January 1, 2015, the author could exercise termination rights in January, 2005. If the author dies in 2006, the rights pass to the author’s estate. If the author failed to exercise termination rights in January, 2005 (figuring there were ten years to exercise the termination right) and dies in February, then the author’s statutory heirs take the termination rights. The arbitrary timing of the vesting of termination rights creates differing dispositive treatment of the estates of different authors.

3. Inconsistent Restraints on Authors

If the author does not have a widow, widower, or surviving descendants, the author’s executor, administrator, personal representative, or trustee receives the termination rights. If an author makes lifetime gifts, an executor may terminate any transfer of copyright interests made by the author and then convey ownership of the copyrights in accordance with the author’s testamentary intention. This is because an executor has a duty to “distribute the estate of the decedent in accordance with the terms of any probated and effective [W]ill.”\textsuperscript{335} On the other hand, an author who is survived by a spouse or descendant cannot rely on his statutory heirs to follow his or her testamentary intent because the heirs have no duty to abide by the Will. Therefore, the testamentary freedom of an author who is survived by a spouse or child is more limited than one who is not.

\textsuperscript{334} This is not a solution to the estate-bumping problem, however, because estate-bumping would still occur in the estates of authors who did not survive until the vesting period or those who did not timely serve notice before their deaths.

4. Devaluation of Copyright Interests

Termination rights devalue the economic value of copyright interests. Congress has a constitutional mandate “[t]o promote the Progress of Science and useful Arts.” Congressional authority to grant copyrights rests on the premise that the provision of a financial incentive “promote[s] the Progress of Science and useful Arts.” In other words, the prospect of financial remuneration stimulates artistic creativity, which in turn will benefit public knowledge. Termination rights, however, arguably diminish and devalue the property interests of copyright owners and deprive the public of access to creative works (except to the extent and at the price that the statutory successor chooses to establish).

Currently, copyright law takes significant control over the disposition of copyright interests away from authors, bars authors from using the most efficient and effective estate planning techniques, precludes authors from implementing the most tax advantageous strategies, and prevents authors from benefiting from centralizing management and control of their copyright interests under corporations, partnerships, and trusts. Denying these benefits, which are available to other personal property individuals might own, unnecessarily devalues copyrights as a property interest.

Moreover, the statutory heir provisions constrict an author’s ability to exercise any artistic control over the manner of publication and exploitation of his or her work at or after death. As Justice Frankfurter recognized, “If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need.” If the interest created by the statutory successor class of heirs takes precedence over the author’s desires, that author has lost a claim of ownership and control of his or her creative work, unless the author survives the vesting date.

It has been argued, however, that testamentary freedom promotes production, creativity, and investment. Allowing an author the pleasure of bequeathing or gifting his or her property could induce an author to create more works.

338. See discussion supra Part II.B.
D. Unconstitutionality of Copyright Law

1. Outside Scope of Copyright Power

In addition to all the other problems associated with termination rights, they may be unconstitutional as well. Under the Copyright Clause of the U.S. Constitution, Congress does not have the power to create exclusive property rights to non-authors who claim adversely to the author's express wishes. The Constitution states with some specificity that Congress has the power "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." The Supreme Court has repeatedly emphasized that authorship is the source to copyright and that the protection of creative and intellectual endeavors is the sole justification for the copyright estate.

In fact, this congressional limitation was made clear in the Trade-Mark Cases. Under these cases, the Court held that the Copyright Clause did not grant Congress the authority to enact a complete intellectual property regime unless its protection was limited to authors or those claiming under authors. A federal trademark statute was beyond the power conferred by

---

339. Congress created termination rights through the exercise of the powers granted under the Copyright Clause. This Article does not address whether Congress has the power to create termination rights for a statutory class of heirs under its Commerce Clause powers.

340. U.S. CONST. art. I, § 8, cl. 8. Justice Story opined that "[t]he power, in its terms, is confined to authors and inventors; and cannot be extended to the introducers of any new works or inventions." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 559, at 403 (abr. ed. 1833). In addition, one commentator wrote, after the passage of the 1909 Act:

Copyright can only, under the Constitution, be given to authors . . . By a further process of construction, the word "author" includes assigns or legal representatives of an author . . . On the other hand, the Constitution would seem to exclude the granting of copyright to one who is not the author or does not claim under the author.

WELL, supra note 153, at 44-45 (footnotes omitted).

341. See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363-64 (1991) (holding that the Copyright Clause did not permit protection of the routine arrangement of names and telephone numbers in the white pages of a phone book because the constitutional limitation that copyright be granted only to authors presupposes that the author to whom copyright was granted exercised some minimal degree of creativity); see also United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60-61 (1884).

342. 100 U.S. 82 (1879).

343. See id. at 94. The Court reserved the question of whether a congressional exercise under the Commerce Clause would support trademark legislation because Congress had not invoked that power. Id. at 95.
the Copyright Clause because rights under trademark law depended on priority of appropriation rather than intellectual labor.\textsuperscript{344} The Court opined that while the word "Writings" may be liberally construed, the Copyright Clause limited Congress to protecting "the fruits of intellectual labor,"\textsuperscript{345}

Conferring termination rights on the statutory heirs regardless of the author's contrary intent (or regardless of an author's actual attempt to disinherit a statutory heir) grants copyright interests to an individual who is neither an author nor an individual who can claim under the author. The creation of a statutorily mandated class of heirs seems to contradict the constitutional mandate of securing "to Authors . . . the exclusive Right to their . . . Writings." The "Right" created under the termination rights provisions of the copyright code are clearly not the author's.

One court has opined about the constitutionality of the statutory class of heirs under copyright law. Notably, this case involved an exercise of renewal rights rather than termination rights. In \textit{Venegas-Hernandez v. Peer},\textsuperscript{346} a case involving a copyright infringement action by a songwriter's children against the songwriter's widow, the United States District Court for the District of Puerto Rico held that copyright law governed ownership of copyright interests rather than the testamentary disposition attempted by the deceased author.\textsuperscript{347} Plaintiffs argued that Congress overstepped its limited constitutional authority of granting exclusive copyright protections to authors by creating the statutory class of heirs.\textsuperscript{348} The court opined that the plaintiffs could not logically make this argument because the plaintiffs (like the widow claiming under the statutory heir provisions) were not authors and could only benefit from the congressionally created renewal terms.

Plaintiffs cite "testamentary freedoms." However, the rights to renewal here do not arise from the Plaintiffs' testament, but from an explicit right granted by the Copyright Act after the death of an author prior to vesting. Plaintiffs have been granted a right to renewal here by the same statutory provisions that they are, in effect, asking to void in preference of testamentary intent.\textsuperscript{349}

The court also identified that because copyright renewal terms are distinct and separate estates, an author has no ability to bequeath the renewal

\begin{itemize}
\item \textsuperscript{344} \textit{Id.} at 94.
\item \textsuperscript{345} \textit{Id.} (emphasis omitted).
\item \textsuperscript{346} 283 F. Supp. 2d 491 (D.P.R. 2003).
\item \textsuperscript{347} \textit{See id.} at 497.
\item \textsuperscript{348} \textit{Id.} at 496.
\item \textsuperscript{349} \textit{Id.} at 497 (citation omitted).
\end{itemize}
term by testament if the author did not survive until the interest vested in the author.\textsuperscript{350}

Regardless of its logic, the court’s legal reasoning in Venegas-Hernandez is not applicable to termination rights. Copyright duration is no longer confined to a two-term renewal system, but rather a single extended term. Unlike renewal rights, termination rights do not create a distinct and separate property interest—the copyright term is continuous. Therefore, a testamentary freedom argument carries much greater weight and accordingly the creation of termination rights in the statutory heirs is beyond the scope of Congress’ copyright power. The claim of a statutory heir is not based on the consent of the author, any creative contribution to the production of the intellectual work on behalf of the statutory heir, or any commitment that the income will be used to promote science. Therefore, Congress stepped outside of the Copyright Clause in their creation of termination rights.

2. A Potential Taking

Under the 1976 Act, an author can sever and transfer in whole or in part any one in the bundle of property rights comprised in copyright. If termination rights are one in the bundle of various rights comprised in copyright law, an author should be able to freely transfer this right, and any deprivation of this right may constitute a taking similar to the testamentary limitations found in \textit{Hodel v. Irving} and \textit{Babbitt v. Youpee}.\textsuperscript{351} However, if termination rights are not a copyright interest, but rather a separate property right distinct from the underlying copyright, then Congress clearly overstepped its limited constitutional power under the Copyright Clause. The creation of statutory heirs under the termination rights provisions of the copyright law generates a conflict between an author’s claim to property ownership in his or her work and a non-author’s claim of ownership. An interpretation of the termination provisions that gives preference to express dispositions made by an author (whether by Will or gift) over the interests of a statutory heir seems more in line with Congress’ constitutional mandate.

\textsuperscript{350} \textit{See id.} at 497 \& n.1.
\textsuperscript{351} \textit{Hodel}, 481 U.S. 704 (1987); \textit{Youpee}, 519 U.S. 234 (1997). Both cases involved a federal statutory limitation on the testamentary freedom of property owners, similar to the way termination rights limit copyright authors’ testamentary freedom. For a discussion of \textit{Hodel} and \textit{Youpee}, see supra Part II.C.
In 2013, copyright authors will begin to feel the full impact of the unintended destructive nature of termination rights. Despite the belief among some copyright scholars that the conflict between copyright law and testamentary freedom no longer exists, the estate-bumping effects of termination rights will soon be at hand. As a result, copyright authors will either be severely limited in creating efficient and effective estate plans or will unknowingly execute estate planning instruments that may be subject to the nullifying effects of estate-bumping. Either result is unacceptable.

The copyright code can be minimally revised to reconcile the conflict between copyright law and estates law, while furthering the rationales for termination rights and testamentary freedom. The theory behind termination rights and the theory behind testamentary freedom are not naturally at odds—both have the goal of maximizing the value of property. Termination rights are intended to grant authors a second chance to profit from their works after an original transfer of copyright. In essence, the goal is to increase the profitability from copyrights, not limit donative transfers. The problem is that termination rights, with their corresponding statutory class of successor heirs, cast too large a net. The provisions are drafted so broadly that termination rights apply to all transfers, whether for the author’s profit or not.

The copyright code can be amended to decrease the conflict between copyright law and testamentary freedom in two ways, both having the same effect. This can be accomplished without undermining the reasons for creating reversionary rights for authors in the first place. First, the copyright act provision which already specifically extinguishes termination rights (of the statutory heirs) for copyrights transferred by Will could be expanded to extinguish termination rights for transfers of copyrights by any other Will-substitutes, testamentary substitutes, or donative transfers. Second, the copyright act could be amended so that the statutory heirs can only exercise termination rights regarding copyrights transferred for profit or for bona-fide business purposes. Either amendment preserves the basic copyright principle that authors should have a second chance to profit from their works. These amendments focus on reversionary rights after an author’s death; the amendments will respect more fully the author’s testamentary freedom. Absent such amendments, the current copyright act will soon herald a new era of estate-bumping that unwittingly frustrates and diminishes the liberty interests of copyright authors.