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# The Curious Case of the James Brown Estate

Lee-ford Tritt

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## Abstract

*Great musicians are larger than life, and the most iconic of them become members of an elite musical monarchy: Michael Jackson was the King of Pop, Aretha Franklin was the Queen of Soul, and Prince Rogers Nelson was Prince. Similarly, James Brown, the inventor of funk music, landed a seat at this table of legendary musicians. Although lacking a royal honorific, James Brown was "the Godfather of Soul." The Godfather of Soul, though, shared more than musical prowess with these other iconic musicians. The estates of James Brown, Michael Jackson, Aretha Franklin, and Prince all continue to face legal obstacles—years after their deaths—many of which revolve around the artists' copyright interests.*

*In many artists' estates, a problem arises in that copyright law effectively prevents artists from disposing of their copyright interests through common estate planning techniques and, often times, undermines artists' testamentary plans—a phenomenon I have termed "estate-bumping." This disturbing phenomenon has driven an unintended wedge between copyright law and estates law. In effect, estate-bumping enables unintended beneficiaries to rewrite, or "bump," the estate plans of artists like James Brown. Considering the recent trend in musicians selling their musical catalogs—such as Justin Bieber, Bob Dylan, and Bruce Springsteen—the copyright issues that plagued the James Brown Estate will not be the outlier but more likely the norm.*

*Accordingly, this Article uses the James Brown Estate as a lens to explore the concept of estate-bumping and other pertinent issues regarding the estates of copyright creators. As this Article reveals, and the curious case of the James Brown Estate demonstrates, the effects of estate-bumping can be deleterious. Accordingly, by drawing on both estates law and copyright law, this Article addresses real world issues concerning estate planning for artists and suggests recommendations for best practices until the copyright law is amended to eliminate the problem of estate-bumping.*

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## Introduction

Great musicians are larger than life, and the most iconic of them become members of an elite musical monarchy: Michael Jackson was the King of Pop, Aretha Franklin was the Queen of Soul, and Prince Rogers Nelson was Prince. Similarly, James Brown, the inventor of funk

music,[1] landed a seat at this table of legendary musicians.[2] Although lacking a royal honorific, James Brown was "the Godfather of Soul."[3] The Godfather of Soul, though, shared more than musical prowess with these other iconic musicians. The estates of James Brown, Michael Jackson, Aretha Franklin, and Prince all continue to face legal obstacles[4]—years after their deaths—many of which revolve around the artists' copyright interests.[5]

In many artists' estates, a problem arises in that copyright law effectively prevents artists from disposing of their copyright interests through common estate planning techniques and often undermines

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1 *See* Megan Doherty, *The Vault of Soul: James Brown's Electrifying Career*, WERS (Feb. 23, 2021), https://wers.org/the-vault-of-soul-james-brown/ [https://perma.cc/4FMT-Q629].

2 *See* Maiysha Kai, *James Brown's Estate Sells for an Estimated $90 Million: Report*, The Root (Dec. 15, 2021), https://www.theroot.com/james-browns-estate-sells-for-an-estimated-90-million-1848219702 [https://perma.cc/5K5A-HRCH] (remarking that Brown was "one of the greatest legends of the music business").

3 *James Brown Hall of Fame Essay*, Rock & Roll Hall of Fame (1986), https://rockhall.com/wp-content/uploads/2024/03/James_Brown_1986.pdf [https://perma.cc/7HPJ-DSAD]. James Brown had other monikers as well—many self-proclaimed—including "the Hardest Working Man in Show Business," "Mr. Dynamite," "Soul Brother Number One," "the Minister of the New, New, Super Heavy Funk," and "the Original Disco Man." Harry Weinger & Cliff White, *James Brown: Are You Ready for Star Time?*, JamesBrown.com, https://www.jamesbrown.com/pages/the-legacy [https://perma.cc/37JZ-B2QU].

4 Following James Brown's death, his estate was plagued with over one dozen lawsuits that ultimately resulted in over fifteen years of litigation. *See infra* Part I.C; Eamonn Forde, *Death & Taxes: The Michael Jackson Estate, The IRS and Posthumous Celebrity Valuations*, Forbes (May 4, 2021, 12:25 PM), https://www.forbes.com/sites/eamonnforde/2021/05/04/death--taxes-the-michael-jackson-estate-the-irs-and-posthumous-celebrity-valuations/?sh=68301184c390 [https://perma.cc/6C8M-3JNM]; Ben Sisario & Ryan Patrick Hooper, *Four Pages Found in a Couch Are Ruled Aretha Franklin's True Will*, N.Y. Times (July 11, 2023), https://www.nytimes.com/2023/07/11/arts/music/aretha-franklin-will-couch.html [https://perma.cc/K69K-35DH]; Marianne Garvey, *Prince's Estate is Finally Settled After a 6-Year Battle*, CNN (Aug. 3, 2022, 2:02 PM), https://www.cnn.com/2022/08/03/entertainment/prince-estate-settled/index.html [https://perma.cc/6RU9-4AFH]. Some musicians do not see a need for estate planning. *See* Jacob Shamsian, *Snoop Dogg Told Us Why He Doesn't Have a Will: 'I Don't Give a F—- When I'm Dead'*, Bus. Insider (May 5, 2016, 10:05 AM), https://www.businessinsider.com/snoop-dogg-hasn't-left-a-will-butterfly-reincarnate-estate-2016-5 [https://perma.cc/8RSW-87GM].

5 With the explosive growth of the monetary value of copyright interests in the United States, it is surprising that scholars and practitioners have generally ignored the estate-bumping problem. A 2019 report indicated that the output for copyright-intensive industries grew at a faster rate than the entire domestic economy. Further, copyright-intensive industries accounted for $1.3 trillion in the U.S. gross domestic product ("GDP"), 6.6 million jobs, and seven percent of all U.S. domestic output. *See* Andrew A. Toole, Richard D. Miller & Nicholas Rada, U.S. Pat. & Trademark Off., Intellectual Property and the U.S. Economy: Third Edition iii, 3–5 (2019). Copyright estate planning issues have not been completely ignored, though. For some insightful takes, see Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 Harv. J.L. & Tech. 77 (2015); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 Rutgers L.J. 109 (2006); Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. Intell. Prop. L. 163 (1996).

artists' testamentary plans—a phenomenon this Author has termed "estate-bumping."[6] This disturbing phenomenon has driven an unintended wedge between copyright law and estates law.[7] In effect, estate-bumping enables unintended beneficiaries to rewrite, or "bump," the estate plans of artists like James Brown. Considering the recent trend in musicians such as Justin Bieber, Bob Dylan, and Bruce Springsteen selling their musical catalogs, the copyright issues that plagued the James Brown Estate will not be the outlier, but more likely the norm.[8]

Accordingly, this Article uses the James Brown Estate as a lens to explore the concept of estate-bumping and other pertinent issues regarding the estates of copyright creators. As this Article reveals, and the curious case of the James Brown Estate demonstrates, the effects of estate-bumping can be deleterious. Accordingly, by drawing on both estates law and copyright law, this Article addresses real-world issues concerning estate planning for artists and suggests recommendations for best practices until the copyright law is amended to eliminate the problem of estate-bumping.

James Brown had a well-documented tumultuous life.[9] Therefore, it is very easy to hastily dismiss the legal problems surrounding the James Brown Estate as nothing more than a mirror image of Brown's turbulent life. In contrast to the mercurial circumstances surrounding Brown's life, though, "his will was as orderly as a book of prayer," purposely designed to "be everything his life was not."[10] Indeed, on paper, Brown's intent was clear: Brown wanted his legacy to provide

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6 I originally coined the term "estate-bumping" in some presentations in 2005 and an article in 2006. Tritt, *supra* note 5. Estate-bumping describes this phenomenon "because copyright law has the disturbing potential of thwarting, or 'bumping,' an author's dispositive estate plan." *Id.* at 111 n.2. This Article has evolved from this original work.

7 *Id.* at 111. Scholars use a variety of terms to describe this area of law, including estates law and succession law. In short, it covers "the law of wills, the law of intestacy, the law of trusts . . . , the law of charitable foundations, the law concerning 'death taxes,' and . . . aspects of an arcane field of law that lawyers call the law of future interests." Lawrence M. Friedman, Dead Hands: A Social History of Wills, Trusts and Inheritance Law 4 (2009).

8 Erica Banas, *Artists Who Have Sold Their Catalogs in 2022*, 93.3 WMMR Rocks! (Oct. 10, 2022), https://wmmr.com/galleries/artists-sold-catalogs-2022/ [https://perma.cc/G2UG-93GW] ("One of the biggest trends of 2021 was artists selling their catalogs for massive paydays. In 2022, that trend has continued."); *see also* Neda Ulaby, *Why So Many Big-Name Musical Artists are Selling their Musical Catalogs*, NPR (Dec. 22, 2021, 5:10 AM), https://www.npr.org/2021/12/22/1066650388/why-so-many-big-name-musical-artists-are-selling-their-music-catalogs [https://perma.cc/627C-HTCG]. For a list of artists who recently sold their catalogs, see Alan Cross, *A List of Artists Who Have Sold Their Song Catalogs*, A J. of Musical Things, https://www.ajournalofmusicalthings.com/heres-a-running-list-of-artists-who-have-sold-some-or-all-of-their-song-catalogues-to-a-new-breed-of-company/ [https://perma.cc/EJ88-PV23].

9 *See infra* Section I.A.

10 Larry Rohter & Steve Knopper, *Downbeat Legacy for James Brown, Godfather of Soul: A Will in Dispute*, N.Y. Times (Dec. 13, 2014), https://www.nytimes.com/2014/12/14/us/downbeat-legacy-for-james-brown-godfather-of-soul-a-will-in-deep-dispute.html [https://perma.cc/JN2K-EURF].

underprivileged children opportunities Brown had not had during his life.[11] To that end, Brown effectively disinherited his own children, save for some personal property.[12] The bulk of Brown's estate was to fund a charitable trust for the benefit of underprivileged schoolchildren in South Carolina and Georgia.[13] However, with his estate mired in litigation, Brown's intent has not been realized: as of date, not a single scholarship has been issued to anyone.[14] This is because, in addition to the legal issues raised pertaining to pretermitted children and spouses, Brown's estate faced serious legal issues concerning his copyright interests.[15]

The legal issues surrounding the James Brown Estate are curious and sensational. These issues also elucidate the serious legal problems that may arise for artists at death—even when these artists appear to have fastidious estate plans like James Brown. Some of these legal issues arise, in part, due to the disconnect between estates law and copyright law.[16] Other problems may arise due to the disparate nature of the pertinent legal disciplines. Many estate planners are simply unaware of termination rights and many copyright experts may be unacquainted with modern estate planning techniques.

For instance, unbeknownst to many estate planners, copyright law effectively prevents copyright "authors"[17] from disposing of their copyright interests through common estate planning mechanisms—which

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11 *See* Ben Sisario & Steve Knopper, *After 15 Years of Infighting, James Brown's Estate Is Sold*, N.Y. Times (Dec. 13, 2021), https://www.nytimes.com/2021/12/13/arts/music/james-brown-estate-primary-wave.html [https://perma.cc/9SAX-U6LP].

12 Ben Sisario & Steve Knopper, *Dispute over James Brown Estate Largely Ends as Heirs Agree on Plan*, N.Y. Times (July 15, 2021), https://www.nytimes.com/2021/07/15/arts/music/james-brown-estate-settlement.html [https://perma.cc/LS6H-XRE3] ("[Brown] largely excluded his own family from the inheritance, aside from bequeathing his costumes and personal effects to some of his children and providing $2 million to underwrite scholarships for his grandchildren.").

13 Steve Knopper, *James Brown's Will: Is It Inching Toward Closure After 14 Years?*, N.Y. Times (July 15, 2021), https://www.nytimes.com/2020/06/25/arts/music/james-brown-will.html [https://perma.cc/22TU-ULWJ].

14 *Id.* For a discussion of Will contests and the subversion of testator's intent, see Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. Kan. L. Rev. 245, 246–47 (2010) (describing how disinherited family members often contest Wills).

15 Prior to the sale of the estate in December 2021, the value of Brown's estate had been estimated from anywhere between as low as $4.7 million and as high as $100 million, not including disputed copyright termination rights that could be worth tens of millions of dollars. Sisario & Knopper, *supra* note 12.

16 This disconnect between estates law and other areas of law are unfortunately quite common. *See*, *e.g.*, Danaya Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 Cornell J.L. & Pub. Pol'y 1 (2015).

17 Concerning 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. The term "author" seems appropriate when the copyrightable work is a novel but inappropriate when the copyrightable work is a song, a painting, or a film. Nevertheless, all copyright creators are referred to as authors.

may result in supplanting an author's testamentary wishes. This restraint on an author's freedom to dispose of her property at death is not imposed on any other type of property interests in the United States—only copyright interests.[18]

This restraint on donative freedom is codified in the Copyright Act of 1976 ("1976 Act"),[19] which provides authors with a unique "reversionary right" in their copyrightable works. Generally, authors can "take back" previously assigned copyright interests in order to reassign them.[20] This reversionary right is manifested in the termination of transfer rights ("termination rights") found under the 1976 Act.[21] Generally, the 1976 Act provides an author the right to reclaim a previously assigned copyright during a five-year window of opportunity that opens at a date after the original transfer.[22] In theory, termination rights provide authors a "second bite at the apple" by enabling authors to take back previously assigned copyright interests in order to reassign them for a second chance to profit.[23] The 1976 Act does more than grant termination rights to authors, though. The 1976 Act also grants termination rights to a statutorily designated group of heirs (e.g., spouse, children, grandchildren) upon the author's death—heirs not selected by the author.[24] Most notably, authors cannot effectively divest these statutory heirs of termination rights nor alter these statutory heirs' respective interests in termination rights.[25] It is this inability to divest the statutory heirs of their termination rights that has the effect of enabling unin-

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18 Dispositive freedom—the basic principle at stake in this conflict—is the hallmark principle of estates law. *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 10.1 cmt. A (Am. L. Inst. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."). Scholars have tendered a number of justifications for this principle, including that it comports with natural law, encourages wealth accumulation, stimulates industry and productivity, produces happiness, reinforces family ties and, as a practical matter, may be the simplest solution for dealing with property at an owner's death. *See*, *e.g.*, Edward C. Halbach, Jr., Succession—Its Past, Future and Justification: An Introduction to Chapters 1–4, *in* Death, Taxes and Family Property 5 (Edward C. Halbach, Jr. ed., 1977); Tritt, *supra* note 5.

19 Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810).

20 17 U.S.C. § 203.

21 §§ 203, 304.

22 *Id.*

23 *See, e.g.*, Jeanne Hamburg & David H. Siegel, *Terminate Copyright Grants Correctly or Risk Losing Your Rights*, Nat'l L. Rev. (July 30, 2021), https://natlawreview.com/article/terminate-copyright-grants-correctly-or-risk-losing-your-rights [https://perma.cc/9QYR-D59C] (discussing the importance of termination rights in "allow[ing] the individual author . . . to reclaim a valuable copyright if the value of their creative work increases"); Siegel v. Warner Bros. Ent., Inc., 542 F. Supp. 2d 1098, 1139 (C.D. Cal. 2008) (defining the "second bite at the apple" concept created by termination rights in the 1976 Act), *rev'd in part sub nom.* Larson v. Warner Bros. Ent., Inc., 504 Fed. Appx. 586 (9th Cir. 2013).

24 17 U.S.C. § 203(a)(2).

25 *See id.*

tended beneficiaries (even those intentionally disinherited) to bump an author's estate plan.[26] For example, any of James Brown's lifetime assignments of his copyright interests to his charity may be terminated and sold for profit by these unintended beneficiaries who Brown had disinherited. Thus, as in the case of the James Brown Estate,[27] it is copyright law—rather than the author's testamentary wishes—that determines who ultimately has the right to profit from the author's works at the author's death.

The possibility of termination applies to all types of transfers (whether donative or not) except those transfers made by the author's last Will and Testament. For example, a properly executed contract that purports to transfer "all right, title, and interest" in a copyright nonetheless may be terminated. Even if the contract states that the copyright assigned is "in perpetuity" or "for the duration of the copyright term," and the artist "waives the right to terminate," the copyright remains subject to termination rights. Unless the copyright is transferred by the author's Will, termination rights may apply.[28]

For authors, termination rights are a topic of increasing importance. Termination rights can cause a number of problems for estate planners and an author's intended individual and charitable beneficiaries. The consequences of termination rights can be severe—including estate-bumping; adverse income, gift, and estate tax implications; and disqualification of a family member from engaging in transactions with an author's private foundation.[29] Moreover, estate planning problems associated with termination rights are intensified because the statutory provisions are complicated, the regulations offer little insight, and the legislative history is sparse.[30] Therefore, an understanding of termination rights and its conflict with estates law is essential to recognize the impact—and mitigate the potential adverse consequences—of estate-bumping.

Accordingly, this Article examines the conflict between estates law and copyright law, termination rights, and the phenomenon of

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26 For a detailed discussion of the estate-bumping phenomenon under federal copyright law, see Tritt, *supra* note 5.

27 In the case of the James Brown Estate, Brown's statutorily designated heirs, who have legal standing to exercise the termination rights and take back previous assignments, could stand to gain rights worth tens of millions of dollars—as opposed to Brown's charity, Brown's intended beneficiary. *See* Sisario & Knopper, *supra* note 11.

28 *See* Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright*, 27 HARV. J.L. & TECH. 49, 57 (2013) ("[R]ights created by copyright law are usually transferable, waivable, and licensable. The United States Congress has expressed hostility to inalienable rights under copyright law . . . and thus has created very few narrowly tailored exceptions to this rule [including termination rights under the 1976 Act]."); 17 U.S.C. §§ 203(a), 304(c)–(d).

29 *See generally* Tritt, *supra* note 5 (discussing potential consequences of termination rights).

30 *See infra* Part II (discussing termination rights).

estate-bumping through the lens of the James Brown Estate. Part I sets the stage of the analysis by providing an overview of the life, death, and estate litigation of James Brown. Having provided a real-world example of estate-bumping, Part II reviews the basic concepts of copyright law and provides a descriptive overview of termination rights. With the framework of copyright law explained, Part III discusses estate-bumping and provides hypotheticals and solutions concerning this phenomenon.

## I. The Life and Death of James Brown

In order to use the James Brown Estate as a springboard to analyze how copyright's termination rights may supplant an author's estate plan, it is necessary to recount the life, death, and estate of James Brown.

### *A. Brown's Life*

American musician James Brown gained international acclaim through his artistic works in the genres of soul and funk. Brown's tremendous influence in these genres ultimately earned him the nickname "the Godfather of Soul."[31] By the end of his fifty-year career, Brown boasted a catalog of 750 songs,[32] had been inducted into the Rock and Roll Hall of Fame, and received prestigious accolades, including a Grammy Award for lifetime achievement, a Kennedy Center Honor, an American Music Award of Merit, and a Pioneer Award for Lifetime Achievement.[33] Today, Brown's most well-known works remain staples of American culture, are frequently used, and continue to inspire musicians.[34] In fact, Brown is so culturally and musically relevant that he continues to hold the title of seventh greatest artist as declared by Rolling Stone.[35]

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31 *See James Brown Hall of Fame Essay*, *supra* note 3.

32 Bill Torpy, *James Brown's Rocky Road to Wealth: Financial Turmoil Part of 'Godfather' Legend*, Atlanta J.-Const. (Jan. 7, 2007), https://www.ajc.com/news/georgia-news/james-browns-rocky-road-to-wealth-financial-turmoil-part-of-godfather-legend/HYSLOH56XFCXNOX4FCQTJCAPPY/ [https://perma.cc/GJC5-SRPU].

33 George Lipsitz, *James Brown*, Encyc. Britannica (Dec. 21, 2021), https://www.britannica.com/biography/James-Brown-American-singer [https://perma.cc/C9XB-DK2Y]; Doherty, *supra* note 1.

34 *See* Chris Sullivan, *15 Facts to Know About James Brown*, GQ Mag. (Apr. 25, 2020) ("James Brown is the most sampled artist of all time, while [his song] 'Funky Drummer' . . . has been purloined some 1,584 times by . . . Sweet T and Jazzy Joyce, Public Enemy, Run DMC, Ice Tee, De La Soul, Jay-Z, Kanye West, Dr Dre and even George Michael, Madonna and Britney Spears.").

35 *See* Rick Rubin, *James Brown*, Rolling Stone: 100 Greatest Artists (Dec. 3, 2010), https://www.rollingstone.com/music/music-lists/100-greatest-artists-147446/ [https://perma.cc/KFH8-LYRM].

However, James Brown's life as an African American and Cherokee man was faced with hardships in the Deep South.[36] Life for Brown began in 1933 in a one-room shack without electricity or running water in rural South Carolina.[37] Nearly stillborn at birth and raised in extreme poverty, it has been said that "James Brown was born to lose."[38] Growing up during the thick of the Great Depression, Brown experienced hardship upon hardship, and from a young age, he spent most of his time alone.[39] As a child, Brown's father physically abused him.[40] After his mother left the family,[41] Brown went to live with his Aunt Honey, who ran a brothel.[42] It was there that Brown "perfected his 'buck dance'—a solo gambol native to North Carolina not unlike tap—to entertain the troops and guide them in to [Aunt Honey's establishment]."[43] While at Aunt Honey's brothel, Brown also first picked up music: piano, guitar, harmonica, and singing.[44]

Once he was old enough, Brown began working odd jobs for pennies.[45] He performed by dancing for the soldiers at Fort Gordon in Augusta, Georgia, picked cotton, shined shoes, and washed cars.[46] Perhaps it was during his youth that Brown's diligent work ethic was first seeded.[47] Later in life, Brown recalled:

> I started shining shoes at 3 cents, then went up to 5 cents, then 6 cents. I never did get up to a dime. I was 9 years old before I got a pair of underwear from a real store; all my clothes were made from sacks and things like that. But I knew I had to make it. I had the determination to go on, and my determination was to be somebody.[48]

Despite his discipline and commitment to hard work, Brown's childhood struggles caused tremendous strife. When Brown was just twelve years old, he was asked to leave school for having "insufficient

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36 *See* John Doran, *James Brown—10 of the Best*, The Guardian (Oct. 28, 2015, 9:43 AM), https://www.theguardian.com/music/musicblog/2015/oct/28/james-brown-10-of-the-best [https://perma.cc/8UHX-7LPM].

37 Sullivan, *supra* note 34. Brown later lived in Beech Island, South Carolina near the Georgia border.

38 Weinger & White, *supra* note 3.

39 *See* Sullivan, *supra* note 34.

40 *See* Doran, *supra* note 36.

41 *See* Sullivan, *supra* note 34 ("[Brown's] mother left [the family] when [Brown] was four after his alcoholic, physically abusive father tried to kill her.").

42 *See id.*; James Brown & Bruce Tucker, James Brown: The Godfather of Soul 8 (2003).

43 Sullivan, *supra* note 34.

44 *Id.*

45 Brown & Tucker, *supra* note 42, at 14.

46 *See id*. at 14, 16, 49.

47 *See id.* at 16.

48 Yvonne Shinhoster Lamb, *Hardworking Godfather of Soul*, Wash. Post (Dec. 25, 2006, 7:00 PM), https://www.washingtonpost.com/archive/politics/2006/12/26/hardworking-godfather-of-soul/df109dd6-14de-466d-b362-1a069355c5e1/ [https://perma.cc/QR4C-G9HD].

clothing" and never returned.[49] This experience led Brown to focus increasingly on singing, and he began developing his musical prowess and artistry in his church choir.[50] However, his teenage years were not trouble free. At the age of fifteen, Brown was arrested for breaking into a car.[51] Although sentenced for eight to sixteen years, Brown served three years in prison, where he organized and led a gospel group.[52] At the same time, Brown made a connection with Bobby Byrd, a singer and pianist who had his own gospel group and later became instrumental to Brown's prolific and commercial musical success.[53]

Following his stint in prison, Brown joined Byrd's music group, which was eventually named the Famous Flames.[54] Brown's talent refused to be overshadowed and he soon began to dominate at the group's performances.[55] In 1956, the Famous Flames found their first great hit in the song "Please, Please, Please," which soon reached number six on the R&B charts.[56] This marked only the beginning of Brown's incredible success. His untiring work ethic fueled the momentum of his career, and by 1958, James Brown and the Famous Flames had a number one R&B hit in "Try Me."[57] Hits followed, including "Lost Someone," "Night Train," and "Prisoner of Love."[58]

Despite his burgeoning music career, Brown could not escape turmoil. Throughout his lifetime, Brown encountered myriad struggles, both business and personal in nature. On the financial end, Brown faced lifelong issues with the Internal Revenue Service ("IRS"),[59] having his home seized and paying at least $28 million in back taxes throughout his life.[60] As for managerial style, Brown has been called an "ill-tempered, inveterate, emotional and physical scrapper" who was prone to bursts

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49 *James Brown, Say It Loud*, Legacy.com (May 3, 2013), https://www.legacy.com/news/james-brown-say-it-loud/ [https://perma.cc/SQP5-DJ4K].

50 *See* James Maycock, *How James Brown Flipped Soul Music on its Head to Create Funk*, PBS (Oct. 29, 2003), https://www.pbs.org/wnet/americanmasters/james-brown-soul-survivor/532/ [https://perma.cc/RXB2-7RUE].

51 *Id.*

52 *See id.*; Sullivan, *supra* note 34.

53 Maycock, *supra* note 50; *see* Brown & Tucker, *supra* note 42, at 35–61.

54 Maycock, *supra* note 50.

55 *See* Weinger & White, *supra* note 3.

56 Doran, *supra* note 36.

57 *Try Me: James Brown*, Lyrics.com, https://www.lyrics.com/lyric/8398123/James+Brown/Try+Me [https://perma.cc/4A6K-9W5B]. "Try Me" was Brown's first major commercial success since "Please, Please, Please" in 1956, and, by 1958, The Famous Flames had already gone through several lineup changes. Opal Louis Nations, *Louis Madison: The Fleetingly Famous Flame*, Now Dig This, March 2004, at 11.

58 *See* Weinger & White, *supra* note 3.

59 *See* Torpy, *supra* note 32.

60 *See id.*

of anger.[61] According to one commentator, "Few musicians who worked with [Brown] stayed the course for long and [they] sometimes parted ways with him acrimoniously."[62]

Perhaps most notably, Brown's family life was volatile, to say the least. Struggles with drug addiction combined with arrests and domestic violence accusations led to regular explosions in "Mr. Dynamite's" personal relationships.[63] During his lifetime, Brown participated in four marriage ceremonies, divorced twice, and had six children.[64] Brown's first marriage was to Velma Warren in 1953 and ended in divorce in 1969.[65] The couple had three sons.[66] One year later, in 1970, James Brown married his second wife, Deidre "Deedee" Jenkins.[67] James and Deidre had two daughters together before divorcing in 1981 after Jenkins came forward with domestic violence allegations.[68] During his third marriage to Adrienne Lois Rodrigues, Rodrigues brought similar charges against Brown following physical violence.[69] The couple reconciled their marriage before Adrienne passed away in 1996.[70]

Not long after the loss of his third wife, Brown met Tomi Rae Hynie, a Janis Joplin impersonator who auditioned to become one of Brown's backup singers.[71] The couple soon became romantically involved and

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61 Livia Gershon, *James Brown's Estate Has Sold After 15-Year Dispute*, Smithsonian Mag. (Dec. 20, 2021) (quoting Geoff Brown, The Life of James Brown 3 (2009)), https://www.smithsonianmag.com/smart-news/james-browns-estate-has-sold-after-15-year-dispute-180979257/ [https://perma.cc/6TTD-ZYF2].

62 Doran, *supra* note 36.

63 *See James Brown*, Biography.com (Apr. 22, 2021), https://www.biography.com/musician/james-brown [https://perma.cc/ZUP4-CKSB].

64 *Id.*; Brown & Tucker, *supra* note 42.

65 Jennifer Fandel, African-American Biographies: James Brown 26 (2003); *James Brown*, *supra* note 63.

66 Fandel, *supra* note 65, at 26.

67 *James Brown*, *supra* note 63; Yamma Brown, *My Father Was James Brown. I Watched Him Beat My Mother. And Then I Found Myself with Someone Like Dad*, Vulture (Sept. 16, 2014), https://www.vulture.com/2014/09/james-brown-beat-wife-yamma-brown-memoir-cold-sweat.html [https://perma.cc/5JRT-QVC3].

68 *See* Brown, *supra* note 67 (Brown's daughter Yamma recounting experiences of James Brown physically abusing Deidre Jenkins); *James Brown*, *supra* note 63.

69 *See Godfather of Soul James Brown Denies Wife's Domestic Abuse Charges*, Jet Mag., Nov. 20, 1995, at 59. Brown filed for divorce after the violent altercation stemming from an argument about Adrienne's drug use, but the couple reconciled. *See id.* Ultimately, the charges were dropped. *See id.*

70 The circumstances of Adrienne's death, at the age of 45, have been considered suspicious, with some alleging that her death was the result of murder for hire. *See* Thomas Lake, *Lost in the Woods with James Brown's Ghost: Was James Brown's Wife Murdered?*, CNN (Feb. 2019), https://www.cnn.com/interactive/2019/02/us/james-brown-death-questions/chapter_02.html [https://perma.cc/BC5W-R86C].

71 *See Interview with James Brown's Widow*, CNN: Larry King Live (Jan. 3, 2007, 9:00 PM), http://edition.cnn.com/TRANSCRIPTS/0701/03/lkl.01.html [https://perma.cc/WM4E-2U34].

she gave birth to a son, James Joseph Brown II, in 2001.[72] Later that same year, the couple participated in a marriage ceremony.[73] Prior to the marriage ceremony, Hynie signed a prenuptial agreement with Brown which "waived any future claim to an interest in Brown's estate, including the right to an elective share or an omitted spouse's share."[74]

Although Hynie signed the marriage license "affirming this was her first marriage,"[75] Brown learned in 2003 that Hynie was previously married and had never divorced.[76] Brown promptly filed to annul his marriage with Hynie.[77]

In the divorce proceedings, Brown asserted that Hynie was legally unable to marry him while Hynie was still married to another.[78] In response, Hynie countered for divorce and subsequent support.[79] The action was eventually withdrawn with Hynie agreeing to "forever waive any claim of a common[-]law marriage to [Brown], both now and in the future."[80] For the remainder of Brown's life, Hynie and Brown continued to be in an on-and-off relationship despite the legal conflict.

By 2006, Brown's health began to decline due to several ailments, and he was ultimately admitted to a hospital in Atlanta.[81] On Christmas Day of 2006, Brown passed away from a heart attack following a week-long battle with pneumonia.[82]

As his loved ones and the world mourned the loss of a tremendous star, a bigger battle was looming on the horizon: over a dozen lawsuits were filed from various people hoping to claim some of Brown's assets—estimated to be worth anywhere from $5 million to over $100 million,[83] including potentially tens of millions of dollars from termination rights arising from Brown's copyrights.[84] Litigation surrounding the estate

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72 *See In re* Estate of Brown, 846 S.E.2d 342, 344 (S.C. 2020).

73 The Supreme Court of South Carolina would later determine that Brown and Hynie had never been legally married. *See infra* note 114 and accompanying text.

74 *In re* Estate of Brown, 846 S.E.2d at 344 n.3.

75 *Id.* at 344.

76 *Id.* In 1997, Hynie participated in a marriage ceremony with a Pakistani native named Javed Ahmed. Both Hynie and Ahmed signed the application for a marriage license even though Ahmed already had three wives in Pakistan. *Id.* at 344–45.

77 *Id.* at 344. In the action Brown filed, Brown asked Hynie to "be required to permanently vacate the marital residence" immediately and to take note of the prenuptial agreement signed before the marriage ceremony. *Id.*

78 Brown raised S.C. CODE ANN. § 20-1-80, which enumerates that "[a]ll marriages contracted while either of the parties has a former wife or husband living shall be void." *Id.* at 351 (emphasis omitted) (quoting S.C. CODE ANN. § 20-1-80).

79 *Id.* at 345.

80 *Id.*

81 Lamb, *supra* note 48.

82 *See id.;* Doherty, *supra* note 1.

83 *See* Gershon, *supra* note 61; Sisario & Knopper, *supra* note 12.

84 According to Adele Pope, a former fiduciary of the James Brown Estate, the then-Attorney General of South Carolina thought that the termination rights would be worth "tens of

would last for more than fifteen years, and litigation continues to date. Therefore, a quick overview of James Brown's estate plan is necessary in order to understand why no scholarships have been given to underprivileged children in South Carolina and Georgia—which would have effectuated Mr. Brown's donative intent.

### *B. Brown's Last Will and Testament and Irrevocable Trust*

In 2000, James Brown duly executed both his last Will and Testament ("2000 Will")[85] and an Irrevocable Trust, which, among other things, created a charitable trust named "The James Brown I Feel Good Trust" ("Trust"). James Brown's stated testamentary intent and objective was to provide scholarships to underprivileged children in South Carolina and Georgia.[86] Brown all but disinherited his family members, leaving them only lesser belongings such as stage costumes, possessions, and trinkets.[87] In addition, Brown left $2 million to be used exclusively for the education of his grandchildren.[88] Notably, the 2000 Will completely excluded both Hynie and the couple's son, as the Will was executed before the alleged marriage and birth of their son.[89]

### *C. Estate Litigation*[90]

Even before Brown's memorial service, the fighting started. Hynie (who claimed to be Brown's surviving spouse) and Brown's family

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millions," but the Attorney General's valuation expert, Roger Miller, estimated the value of the termination rights had only grown to around $8.8 million by 2017. E-mail from Adele Pope, Att'y, Pope Law Firm, to Author (Dec. 8, 2022, 11:11 AM) (on file with Author). In addition, Pope states that in 2011, Russell L. Bauknight—an executor for the estate—told the South Carolina Supreme Court that "*termination rights is all this case is about*." *Id.* (emphasis added). Pope astutely noted that termination rights were important and interesting, but not all the case was about. *Id.*

85 *See* Steve Knopper, *Why Is James Brown's Estate Still Unsettled? Ask the Lawyers*, N.Y. Times (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/arts/music/james-brown-estate-unsettled.html [https://perma.cc/44T4-LN3S]; Sisario & Knopper, *supra* note 12.

86 *See* Sisario & Knopper, *supra* note 11. Brown became committed to supporting youth education following his own foibles with the educational system and involvement with the criminal justice system. *See supra* notes 49–52 and accompanying text.

87 Emily Kirkpatrick, *James Brown's Estate Is Reportedly Almost Settled Nearly 15 Years After His Death*, Vanity Fair (July 15, 2021), https://www.vanityfair.com/style/2021/07/james-brown-estate-disputes-almost-over-15-years-later-lawsuits-children-partners-administrators [https://perma.cc/44B8-CUHP].

88 *Id.*

89 Eriq Gardner, *James Brown Family Feud: Inside a 12-Year Fight Over Bigamy, DNA Tests and Copyright Law*, Hollywood Rep. (Oct. 3, 2018), https://www.hollywoodreporter.com/business/business-news/behind-family-feud-james-browns-100m-estate-1148572/ [https://perma.cc/YZ4C-KE8P].

90 The facts of James Brown's estate provide not only a great springboard for an examination of copyright's termination rights issues in estate planning but would also make a wonderful fact pattern for a trusts and estates exam. Issues would include: the rights to dispose of bodily

members argued over where his body should be laid to rest.[91] Roughly two months after Brown's death, his body was placed in a crypt at his daughter's Beech Island home which Reverend Al Sharpton, a family friend, said would not likely be his final resting place.[92] According to Sharpton, Brown's children decided to use their own money to place Brown's body in the crypt instead of waiting for disputes over his estate to be settled in court.[93]

The contested burial arrangements marked only the start of Brown's postdeath litigation. Following the burial ceremony, numerous individuals claiming to be heirs of Brown emerged along with women claiming to be Brown's ex-wives.[94] In total, over a dozen individuals claimed to be Brown's children.[95] Moreover, an individual born during Brown's first marriage and acknowledged in the 2000 Will as a son, failed a DNA test for being Brown's child.[96] In addition, an individual who was acknowledged as a daughter in James Brown's first divorce was not acknowledged as a daughter in the 2000 Will.[97] And, there were other unacknowledged individuals who passed DNA tests as Brown's children.[98] Further complicating matters, James Brown II was born after James Brown executed his Will, thereby raising the potential of being a pretermitted child.[99] Even more convoluted, the legitimacy of Hynie's marriage to Brown was contested—either Hynie was not a surviving

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remains, spousal status, pretermitted spouse rule, pretermitted child rule, issues regarding heirs at law, and fiduciary duty issues to name a few. I am not sure students would have enough time, though, to discuss so many issues.

91 Disposition of human remains often times lead to disputes among surviving family members. Remains have been afforded only a quasi-property status, with common law norms supplanted by an inconsistent patchwork of inconsistent local statutes. Victoria J. Haneman, *Prepaid Death*, 59 Harv. J. on Legis. 329, 358–60 (2022).

92 *James Brown's Body Placed in Crypt at Daughter's South Carolina Home*, Fox News (Jan. 13, 2015, 2:18 PM), https://www.foxnews.com/story/james-browns-body-placed-in-crypt-at-daughters-south-carolina-home [https://perma.cc/Z48P-MF82].

93 *Soul Singer James Brown Finally Laid to Rest*, CTV News (Mar. 10, 2007, 4:47 PM), https://www.ctvnews.ca/soul-singer-james-brown-finally-laid-to-rest-1.232656 [https://perma.cc/WXK3-BSRQ].

94 *See, e.g.*, *Woman Says She Married James Brown in '53*, Today (Nov. 8, 2007, 3:17 PM), https://www.today.com/popculture/woman-says-she-married-james-brown-53-1C9487782 [https://perma.cc/E9AX-W3DS].

95 E-mail from Adele Pope, *supra* note 84.

96 *Id.*

97 *Id.*

98 *Id.*

99 Although a person may intentionally disinherit children in general, most states have pretermitted child statutes in order for an accidentally omitted child to receive a share of the estate. Most states' pretermitted child statutes protect only children born (or adopted) after the execution of the Will; a few states protect any omitted child. For a state by state survey of pretermitted child statutes, see Restatement (Second) of Prop.: Donative Transfers, § 34.2 Statutory Note (Am. L. Inst. 1992).

spouse or, if she was, then she would potentially be a pretermitted spouse.[100]

Making matters worse, within a year of Brown's death, allegations arose surrounding misappropriation of Brown's personal funds, principally from a Morgan Stanley account which was previously funded by Brown's sale of "Pullman Bonds" (also known as "Bowie Bonds").[101] All of the Trust's original trustees resigned.[102] In 2008, Brown's estate filed separate suits against David Cannon, the manager of the account, and Morgan Stanley in federal court in South Carolina for the alleged draining of millions in assets.[103] Both suits alleged that David Cannon deliberately gained unauthorized compensation from the account and that Morgan Stanley ultimately failed in preventing the draining of assets.[104]

Most significantly, though, Hynie and several of Brown's children filed actions in South Carolina to set aside Brown's 2000 Will and Trust.[105] Hynie sought a share of Brown's estate for both her and James Brown II due to their pretermitted status. The action was filed even though Hynie had previously signed a prenuptial agreement and waived her interests in Brown's estate.[106] Brown's Will and its primary bequest to the charitable trust was defended by the then two fiduciaries, Adele Pope and Bob Buchanan—both of whom were court appointed in 2007 after the original three fiduciaries created some financial irregularities.[107]

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100 *See* Lynnley Browning, *Suit Tangles Issue of James Brown's Estate*, N.Y. Times (Feb. 8, 2008), https://www.nytimes.com/2008/02/08/business/08estate.html [https://perma.cc/B5MT-P4R6]. The law attempts to correct for omissions of surviving spouses in Wills when a testator has married after executing a Will. Under the Uniform Probate Code, "If a testator's surviving spouse married the testator after the testator executed [his] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate the spouse would have received if the testator had died intestate" unless there is express intent to the contrary. Unif. Prob. Code § 2-301 (amended 2019). Ultimately, the concern pertaining to Hynie became moot when the South Carolina Supreme Court determined that Brown and Hynie had never been legally married. *See infra* note 114 and accompanying text.

101 Browning, *supra* note 100.

102 *See id.*

103 Lynnley Browning, *James Brown's Estate Sues Morgan Stanley*, N.Y. Times (Apr. 24, 2008), https://www.nytimes.com/2008/04/24/technology/24iht-brown.1.12301679.html [https://perma.cc/DH3P-UEAQ].

104 *Id.*

105 Sue Summer, *James Brown Trustee Refuses to Release Settlement Terms*, Newberry Observer (July 30, 2021), https://www.newberryobserver.com/news/34861/james-brown-trustee-refuses-to-release-settlement-terms [https://perma.cc/NMG2-3WLQ].

106 *See In re* Estate of Brown, 846 S.E.2d 342, 344 n.3 (S.C. 2020).

107 Summer, *supra* note 105. For an interesting blog concerning many issues involving the James Brown Estate and the charitable trust, including Freedom of Information Act concerns, see Sue D. Summer, *James Brown "I Feel Good" Trust (FOIA Concerns)*, Facebook, https://www.facebook.com/people/James-Brown-I-Feel-Good-Trust-FOIA-Concerns/100046373146229/ [https://perma.cc/HL96-8MDA].

In 2009, then-Attorney General Henry McMaster proposed a settlement plan that would give over half of what Brown had intended to go to charity to go instead to Hynie and other Will contestants.[108] Russel L. Bauknight was appointed fiduciary under this settlement as well.[109] Pope and Buchanan appealed the settlement, and the South Carolina Supreme Court overturned in 2013, calling the settlement a "dismemberment" of Brown's estate plan.[110] Pope requested $2.8 million for a total of over six years she served as a fiduciary as well as work on the appeal, but Bauknight refused to pay.[111]

In 2015, Hynie and her son sold their interests arising from termination rights in the copyrights of five of Brown's songs to Warner Chappell for roughly $2 million—an interest they would only be entitled to as statutory heirs under federal copyright law.[112] Brown's other children sued Hynie and her son over this transaction. This case was settled with Warner Chappell so that the other children would transfer their shares arising from termination rights to Warner Chappell for half of the money.[113] In 2020, however, South Carolina's supreme court ruled that Hynie was not Brown's surviving spouse because she had not annulled her previous marriage—which means that Hynie would not be a statutory heir under the 1976 Act and would not be entitled to any termination rights in Brown's works.[114] Despite Hynie being declared not to be Brown's surviving spouse and therefore not a pretermitted spouse, Brown's other family members continued fighting.

Finally, after over fourteen and a half years and tens of millions of dollars in legal fees, Russel L. Bauknight (the executor), Hynie (even though she was held to not be Brown's spouse), and several of Brown's children and grandchildren reached a settlement agreement on July 9, 2021.[115] The terms of the settlement are secret.[116] It is still unknown how much the charity will actually receive under the settlement, how much Hynie and certain children will receive (all of whom were intentionally disinherited by Brown), and how much the lawyers received. And it is

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108 Summer, *supra* note 105.

109 *Id.*

110 *Id.*

111 *Id.*

112 *See* Knopper, *supra* note 13. See *infra* Section II.D. for an explanation and exploration of termination rights.

113 *See* Knopper, *supra* note 13; *see also* Brown-Thomas v. Hynie, No. 1:18-cv-02191, 2019 WL 1043724 (D.S.C. Mar. 5, 2019).

114 *In re* Estate of Brown, 846 S.E.2d 342, 344, 347 (S.C. 2020); *see also* 17 U.S.C. § 203(a)(2)(A).

115 "The Parties advised the Court that the above action has been settled . . . this action is hereby dismissed without costs and without prejudice." Rubin Order at 1, Brown-Thomas v. Hynie, No. 1:18-cv-02191, 2019 WL 1043724 (D.S.C. Mar. 5, 2019) (No. 342).

116 Summer, *supra* note 105.

curious that Hynie was included in the settlement considering she was deemed not to be Brown's spouse.

In light of this news, the media was quick to declare that the James Brown Estate legal issues were finally resolved.[117] However, conflict still persists. For example, Adele Pope is suing to recover her unpaid fees for six years of service.[118]

In addition, in December 2021, the James Brown Estate sold Brown's music rights, assets, and the control over Brown's name and likeness to Primary Wave Music for an estimated $90 million.[119] *The New York Times* reports that the money will fund James Brown charitable trusts.[120] Interestingly, the executor of James Brown's estate who fostered this sale, Russell L. Bauknight, will work as a member of the board of Primary Wave once the estate is closed.[121] In November 2022, though, The Pullman Group filed a lawsuit in the U.S. District Court in the Southern District of New York against the James Brown Estate and Primary Wave, alleging that the estate brokered a deal in which Brown sold to The Pullman Group the exclusive right to any future refinancing or sale of Brown's assets in exchange for The Pullman Group raising $26 million for Brown.[122]

Moreover, many legal issues remain unresolved concerning the termination rights in Brown's copyrighted songs. For instance, what happens to the money Hynie received as a "surviving spouse" for termination rights to which she was not entitled? Also, under the 1976 Act, who are the statutory heirs entitled to termination rights? Will these statutory heirs exercise termination rights diverting the copyrights away from James Brown's charitable trust even though that would be contrary to James Brown's clear testamentary intent?

As of now, no scholarships have been distributed from the "I Feel Good Trust."[123] And, Brown's statutory heirs under the 1976 Act (including disinherited heirs and unacknowledged heirs) still have the ability to exercise termination rights over Brown's musical works, potentially posing a threat to Brown's clear testamentary intent.[124] In light of the

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117 *See, e.g.*, *Global Settlement in James Brown Estate Case Lengthy Mediation Resolves Decade-Old Litigation over Singer's Estate and Assets*, Caswell Messenger (July 26, 2021), https://www.caswellmessenger.com/news/article_2cbe17f8-ee10-11eb-a2a6-2f1d07710723.html [https://perma.cc/3GQN-QRMM].

118 *See* Summer, *supra* note 105.

119 Sisario & Knopper, *supra* note 11.

120 *See id.*

121 Complaint ¶ 60, The Pullman Grp., LLC v. Bauknight, No. 1:22-cv-09713 (S.D.N.Y. Nov. 15, 2022).

122 *See generally id.*

123 Knopper, *supra* note 13.

124 *See* Sisario & Knopper, *supra* note 12.

looming issue surrounding termination rights, the question remains—is the James Brown Estate *really* settled?

In order to understand why these legal issues are so important to the James Brown Estate and whether his charitable trust will receive the assets from his lifetime of work, an understanding of copyright law and its termination rights is necessary.

## II. Copyright Law

A rudimentary understanding of general copyright characteristics and an exploration of the rules relating to termination rights is needed to appreciate how copyright law can undermine the estate plans of copyright creators.

### *A. Intellectual Property in General*

Intellectual property[125] refers to intangible intellectual creations, such as literary works, artistic endeavors, designs, images used in commerce, and computer code.[126] The creators and owners of intellectual property are protected via three main disciplines of law: copyrights, patents, and trademarks.[127] These laws grant exclusive rights to the creator or owners of intellectual property for a specified period of time. For instance, the Constitution's framers granted monopolies to authors and inventors over their works and creations through copyright and patent law.[128] Similarly, a monopoly on a symbol utilized in connection with the sale of goods or services can be granted through trademark law.[129] Accordingly, these laws enable creators the ability to earn recognition and financial benefit from their creations.

Although "intellectual property" may seem amorphous at first glance—a merger of the intangible products of the human mind

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125 This Article limits its focus specifically to copyright law because only copyright law infringes upon testamentary freedom. For a discussion of estate planning for intellectual property in general, see Ann Bartow, *Intellectual Property and Domestic Relations: Issues to Consider When There Is an Artist, Author, Inventor, or Celebrity in the Family*, 35 Fam. L.Q. 383 (2001).

126 *See What is Intellectual Property?*, World Intell. Prop. Org., https://www.wipo.int/about-ip/en/ [https://perma.cc/U6X8-QEAC]; *see also* Roger E. Schechter & John R. Thomas, Intellectual Property: The Law of Copyrights, Patents and Trademarks 1–7 (2003).

127 In general, copyrights concern artistic and literary works, patents relate to pragmatic innovations and inventions, and trademarks deal with commercial symbols, names, and slogans. Schechter & Thomas, *supra* note 126, at 1; *see also* Alfred C. Yen & Joseph P. Liu, Copyright Law: Essential Cases and Materials 1 (2d ed. 2021).

128 Article I, Section 8, Clause 8 of the Constitution (often called the Intellectual Property Clause) gives Congress the power "[t]o 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."

129 *See* Schechter & Thomas, *supra* note 126, at 3–4.

(such as ideas and expressions) with the notion of tangible personal property[130]—intellectual property assets have undeniable value and significant impact on countries' economies.[131] Moreover, these monopolies have made intellectual property an integral part of wealth accumulation in the United States and abroad.[132] Notably, wealthy entrepreneurs in profitable industries such as computer technology, software, entertainment, telecommunications, and biotechnology depend on intellectual property laws to safeguard the fruits of their labor.[133]

### *B. Copyright in General*

In general, copyright law provides a system of property rights for certain kinds of intangible creations technically known as "works of authorship."[134] Copyright law provides protection to the creators and owners of these original works of authorship. These types of protected works range from traditional works of art (such as literature and paintings) to modern forms of authorship (including sound recordings, movies, computer software, and non-fungible tokens). Although the term "works of authorship" may give a false perception that copyrights have limited impact on global wealth, to the contrary, the evolution of technology and the rise of globalization have dramatically increased copyright's commercial and economic importance.[135] To that end, copyright has experienced an explosive growth in monetary value in the United States.[136]

In the United States, how are these valuable intangible assets protected? In general, copyright law is rooted in the Constitution and regulated exclusively by federal law.[137] The "Intellectual Property

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130 *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.").

131 In 2019, industries in the United States that intensively use intellectual property accounted for 41% of U.S. domestic economic activity, or output. Intellectual property-intensive industries accounted for 63 million jobs, or 44% of all U.S. employment in 2019. Intellectual property-intensive industries accounted for $7.8 trillion in GDP. Trademark-intensive industries were responsible for nearly $7.0 trillion, while the utility patent-intensive and design patent-intensive industries each comprised of nearly $4.5 trillion. The copyright-intensive industries accounted for a little under $1.3 trillion. Toole et al., *supra* note 5, at iii, 3.

132 *See* Meir Pugatch & David Torstensson, U.S. Chamber of Commerce 2022 International IP Index: Compete for Tomorrow (10th ed. 2022) (demonstrating how intellectual property has driven economic prosperity as the world emerges from the coronavirus).

133 Bruce P. Keller & Jeffrey P. Cunard, Copyright Law: A Practitioner's Guide § 1:1.1, at 1-2 (2005).

134 Marshall A. Leaffer, Understanding Copyright Law 4 (7th ed. 2019).

135 Yen & Liu, *supra* note 127, at 5.

136 *See id.*

137 States may not enact copyright protections that conflict with federal law. *See* 17 U.S.C. § 301; *see also* Schechter & Thomas, *supra* note 126, at 11.

Clause" in Article I, Section 8, Clause 8 grants Congress authority 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."[138]

The foremost purpose of the Constitution's Intellectual Property Clause is to advance the public's interest in "progress of science and useful arts" not to benefit any individual "author."[139] To this end, the Supreme Court has said that copyright law should be construed to benefit the public at large rather than to protect individual authors.[140] Therefore, Congress must compromise between the need to encourage intellectual creativity (the interests of authors) with the need to keep intellectual property freely accessible to the public (the stated public purpose of the Constitution).[141]

Granting these limited exclusive rights to these creators is justified by the theory that innovation is spurred if authors can exploit and profit off their works for a determined period of time.[142] In essence, the Framers sought to stimulate the development of arts and other works by granting artists a durational monopoly on the exploitation of their works—which, in turns, enriches society at large.[143]

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138 U.S. Const. art. I, § 8, cl. 8.

139 H.R. Rep. No. 60-2222, at 7 (1909).

140 *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. . . . [T]he primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors." (citation 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).

141 *See* Sheldon W. Halpern, Craig Allen Nard & Kenneth L. Port, Fundamentals of United States Intellectual Property Law: Copyright, Patent, Trademark 1 (3d ed. 2011)*; see also* Kevin J. Hickey, *Copyright Paternalism*, 12 Vand. J. Ent. & Tech. L. 415, 418 (2017) (Congress must also balance "two contractionary conceptions of the author" as both a "hyper-rational economic actor[]" and one who is "unsophisticated, impulsive, or inept").

142 *See* Bartow, *supra* note 125, at 383 ("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."); *see also* Hickey, *supra* note 141, at 416–17 ("The dominant justification for copyright is based upon the notion that authors respond rationally to economic incentives. . . . [and that] without copyright, authors would not create new works . . . ."). For other aspects of copyright law, however, such as termination rights, Hickey argues that paternalism provides a better rationale. *Id.* at 449 ("[T]ermination rights are paternalistic because they operate to protect the author from the consequences of his own contracting decisions."). For a discussion about termination rights, see *infra* Section III.B.

143 There is disagreement among scholars as to whether copyright is necessary to encourage the production of creative works. *Compare* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970), *and* Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. Rev. 75 (1972), *with* Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. Rev. 1100 (1971).

In this regard, Congress protects authors' interests by granting copyright protection to original works of art that are "fixed in any tangible medium of expression."[144] 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.[145] The copyright owner can exercise, assign, or license some or all of these rights or transfer ownership of an entire copyright altogether. Copyrightable works include (1) literary works, (2) musical works, including any accompanying words, (3) dramatic works, including any accompanying music, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and audiovisual works, (7) sound recordings, and (8) architectural works.[146]

Authors have four distinct rights in original works for a finite period of time: (1) the right to reproduce the copyrighted work, (2) the right to prepare derivative works, (3) the right to distribute copies to the public, and (4) the right to perform the works or display the works in public.[147] This period of exclusive exploitation, however, is limited in duration. The 1976 Act (as modified in 1998 by the Sonny Bono Copyright Extension Act) provides that the copyright term of a work created after January 1, 1978, will last for the author's life plus seventy years.[148] When the term of the copyright expires, the work enters the public domain.[149]

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144 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). There is an exception, however, when an employee creates a work for an employer. In such a case, the employer may retain the copyright and be deemed the true owner under copyright law. § 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.

§ 101 (amended 2005).

145 17 U.S.C. § 106. It should be noted, however, that copyright protection does not provide authors with absolute monopolies on the exploitation of their work. 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.*

146 17 U.S.C. § 102(a)(1)–(8). Copyright law protection extends to the original expression of authorship, whether published or unpublished. *See* §§ 102–103.

147 17 U.S.C. § 106(1)–(5).

148 In the case of joint works, the copyright term is measured by the life of the last surviving joint author plus 70 years. In addition, the copyright term for a "work made for hire" (generally, works made by an employee) lasts for a term of 95 years from the date of publication of the work, or 120 years from its creation date, whichever expires first. 17 U.S.C. § 302.

149 *Id.*

### *C. Ownership of the Tangible Work Versus the Copyright*

One copyright concept that is particularly difficult to tackle—and crucially important for estate planning—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). Ownership of the copyright is a separate and distinct property right from the ownership of a physical embodiment of the underlying work.[150] Accordingly, transferring a material copy of the underlying work does not convey a copyright, nor does transferring the copyright interest convey the material object.

For example, an artist who sells her original painting can still—and usually does—retain ownership of the copyright in the painting. This prevents the owner of the physical painting from reproducing it and retaining reproduction rights without first getting permission from the artist—the copyright owner.[151]

In the estate planning context, it follows that if an author's Will bequeaths a beneficiary only the ownership of a physical work of art, then that beneficiary does not receive the copyright interests in the physical art. Simply, the author's Will must specifically provide for such transfer of copyright interests. This is because a copyright interest is a separate and distinct property interest from the physical embodiment of the work.[152] To note, if the copyright is not specifically bequeathed in the author's Will, the copyright will be transferred via the Will's residuary clause,[153] if any. If there is no residuary clause in the author's Will, then the interest will pass under the intestacy laws of the deceased author's domicile at death. Therefore, estate planners must take care in drafting a bequest to be sure that both the tangible work and the

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150 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." 17 U.S.C. § 202. Note that for musicians, as with James Brown, there is yet another wrinkle as "two copyrights . . . are in play: (1) the copyright in the underlying song, which is typically transferred by the songwriter to an outside publisher; and (2) the copyright in the sound recording, which is typically transferred by the recording artist to a record company." Loren E. Mulraine, *Collision Course: State Community Property Laws and Termination Rights Under the Federal Copyright Act—Who Should Have the Right of Way?*, 100 MARQ. L. REV. 1193, 1200 (2017).

151 *See* Kate Spelman & Susan von Herrmann, *Estate Planning and Copyright*, 5 LANDSLIDE 42, 44 (2013) ("Copyright ownership may encompass any or all of the following rights: the right to reproduce the work; prepare derivative works; distribute copies by sale or by rental, lease, or lending; perform the work publicly; perform sound recordings by digital audio transmission; and display the work publicly.").

152 17 U.S.C. § 202.

153 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.

intellectual property rights are conveyed to the intended beneficiary. The two examples below illustrate these issues.

> *Scenario 1*: Sue, a successful artist, is married to Sam. Sue would like to bequeath one of her paintings entitled "The Painting" to a charitable foundation upon her death. At the time of Sue's death, she owned "The Painting" and the underlying copyright associated with it. Sue's Will states: "I give and bequeath my painting entitled 'The Painting' to the ABC Foundation, and the rest of my estate to my husband, Sam." Notably, the copyright associated with "The Painting" will not pass to the ABC Foundation because Sue has only bequeathed the tangible work. Recall that the copyright is a separate property interest that must specifically be bequeathed. Therefore, under Sue's Will, the copyright in the painting will instead pass under the residuary clause to Sam. Accordingly, Sam has the rights to license, reproduce, and profit from the copyright in the Painting.[154]
>
> *Scenario 2*: On the contrary, Sue's Will states: "I give and bequeath my painting *entitled* 'The Painting' and any copyright interests I may own therein to the ABC Foundation, and the rest of my estate to my husband, Sam." As a result, "The Painting" and the copyright associated with it will both pass to ABC Foundation; the underlying copyright interest will not inadvertently pass to Sam.

* * *

Generally, like other types of property owners, an author can exercise or assign any or all of her rights, or transfer ownership of the copyright altogether, during lifetime or at death. However, under the 1976 Act, Congress enacted a unique property right afforded only to copyright authors—a nonassignable right to recapture previously assigned copyright interests.[155] These recapture rights were first implemented through the "renewal system" promulgated in earlier copyright acts, but they are now realized through termination rights under the 1976 Act.

Armed with a general understanding of the basic tenets of copyright interests, an exploration of termination rights is now in order.

### *D. Copyright Recapture*

Copyright recapture precipitates estate-bumping. To understand how recapture may contribute to estate-bumping, it is essential to first

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154 Under the partial interest rules of Internal Revenue Code section 2055(e)(4)(c), the charitable bequest might not qualify for a charitable deduction because the transfer might be deemed a split-interest transfer (i.e., splits the artwork from the copyright). In addition, the "related use" rules may be applicable. Both the partial interest rules and the related use rules are discussed *infra* Section III.B.

155 *See infra* Section III.B.

understand the principle of recapture, the underlying policy, and how it applies under modern copyright law. This Part first describes the principle of recapture before explaining the different structures of recapture that were promulgated under the Copyright Act of 1909 ("1909 Act")[156] and those under the 1976 Act.

The principle that authors should have the right to recapture previously assigned copyrights has a long history in American copyright law.[157] By allowing for copyright recapture, Congress wanted to grant authors a second opportunity to benefit from their works after an original assignment.[158] The policy underlying the copyright recapture system was to protect authors against the superior bargaining positions of entrepreneurs and art patrons interested in acquiring copyrights.[159] Authors often licensed their copyrights for minimal compensation because they had no way of knowing how successful one of their works would become at the time. Consequently, authors, who are in a lesser bargaining position when the future success of their works is unknown, might frequently negotiate contracts that turn out to be bad deals in the long term.[160] As a result, to protect authors, Congress conceptualized a recapture system that "permits the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested."[161]

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156 Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101–1401 (2018)).

157 For a detailed discussion of the historical evolution of the copyright recapture schemes and mechanisms under federal copyright law, see Tritt *supra* note 5.

158 Mulraine, *supra* note 150, at 1201 ("Under traditional, pre-1976 Act law, the renewal term for copyright offered something akin to a second chance for authors, or more precisely for their heirs." (quoting Gary Myers, Principles of Intellectual Property Law 75 (2008))).

159 *See* 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." 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 9.02, at 9–8 (Matthew Bender ed., rev. ed. 1996).

160 Although postdating Congress's action, a notable example of Congress's concern over an author's inferior bargaining position regarding a licensing contract is exemplified by Harper Lee's contract over her book *To Kill a Mockingbird*. In 1960, Harper Lee licensed some of her copyright interests in the book for $2,500 before the book's success, but just two years later the novel was adapted into the eponymous film starring Gregory Peck, and Lee later went on to win a Pulitzer Prize for the book. *See* Michael L. Duffy, *Rights That Go Bump in the Night—Planning and Administering Copyrights in an Artist's Estate*, 31 Prob. & Prop. 24, 26 (2017); Louisa M. Ritsick, *Intellectual Property Issues in Estate Planning and Administration*, Colo. Law., Dec. 2017, at 46, 48.

161 Stewart v. Abend, 495 U.S. 207, 218–19 (1990) (summarizing H.R. Rep. No. 66-2222, at 14 (1909)).

### *1. Renewal Rights*

Prior to the 1976 Act, the recapture system was accomplished through a two-term "renewal system" outlined in the 1909 Act.[162] The duration of copyright protection was divided into two distinct temporal terms. Under the 1909 Act, authors held exclusive rights in a copyright work for an initial term of twenty-eight years and the right to renew the copyright for an additional twenty-eight years.[163] If an author assigned her rights in the copyrightable work during the initial twenty-eight year term, she could recapture her assigned rights by securing a second term of years.[164] In other words, all previously assigned, sold, or gifted copyright interests reverted back to the author in the second twenty-eight year term. In theory, the right of renewal gave an author a second chance to profit from the copyright by canceling any transfer made during the first term and returning the copyright to the author for a second term.

The author only had the right to renew if she was alive at the end of the initial term.[165] However, the work did not automatically fall into the public domain if the author died during the initial term.[166] Instead, the renewal term rights (and any profits derived from the future exploitation of the copyright) passed to a statutorily defined class of heirs (the author's spouse or children).[167] Consequently, the author could not assign or transfer a renewal interest unless he or she survived the expiration of the first term. Any assignment before the renewal interest vested was voidable at the surviving family members' option. For example, if an author assigned or bequeathed the renewal interest (during his lifetime or at death) to a third party outside the statutorily defined class of heirs, including a revocable trust, a private foundation, a partnership or a corporation, and died before the renewal term vested, the author's spouse and children could "bump" the assignment and reclaim the copyright—effectively disregarding the author's intent.

Although Congress intended renewal rights to be unassignable and exclusive to authors and their families,[168] the Supreme Court held

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162 For a discussion of the renewal system and the phenomenon known as Will bumping, see generally Tritt, *supra* note 5; Francis M. Nevins, Jr., *The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide*, 35 J. Copyright Soc'y 77, 114 (1987); Rosenbloum, *supra* note 5.

163 Copyright Act of 1909, Pub. L. No. 349, §§ 23–24, 35 Stat. 1075, 1080–81.

164 *See, e.g.*, Rosenbloum, *supra* note 5, at 169.

165 *See* Tritt, *supra* note 5, at 155–57.

166 *See id.*

167 *See* Katie Joseph, Note, *Copyright's Unconsidered Assumption: Statutory Successors to the Termination Interest (and the Unintended Consequences for Estate Planners)*, 94 Neb. L. Rev. 441, 448–49 (2015) (discussing the legislative history of the 1909 Act and its inclusion of statutory successors); Tritt, *supra* note 5, at 155–56 (discussing the 1909 Act's expansion of the mandated statutory heirs).

168 H.R. Rep. No. 60-2222, at 14 (1909).

in 1943 that an inter vivos assignment of the renewal right during the initial term was valid.[169] This thwarted Congress's intention behind the renewal right system.[170] Therefore Congress would later create a new form of copyright recapture to protect authors and their families—the termination rights.

### *2. Termination Rights*

After the Supreme Court essentially gutted the protections of the renewal system, Congress was not satisfied with the state of copyright law. Therefore, Congress engaged in substantial deliberation regarding the renewal system. While debating the renewal provisions, the corresponding House Report stated that

> [o]ne 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.[171]

Consequently, Congress enacted the 1976 Act,[172] which introduced a new statute with significantly revised copyright duration and a new copyright recapture system.

The 1976 Act substituted the two-term renewal system with termination rights delineated in sections 203 and 304(c) of the Act.[173] Section 203 applies to transfers made on or after January 1, 1978, while section 304(c) pertains to transfers before that date.[174] Specifically, for transfers executed *on or after* January 1, 1978, authors (or the author's spouse, children, or grandchildren) have a five-year period that begins thirty-five years from the execution of the transfer in which they retain an unwaivable right to terminate the transfer of their copyright and reclaim the interest.[175] In essence, there is a thirty-five year window

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169 *See generally* Fred Fisher Music Co., Inc. v. M. Witmark & Sons, 318 U.S. 643 (1943).

170 Mills Music Inc. v. Snyder, 469 U.S. 153, 185 (1985) (White, J., dissenting) (Congress's attempt to grant authors a future copyright interest "was substantially thwarted by this Court's decision in *Fred Fisher Music Co. v. M. Witmark & Sons*.").

171 H.R. Rep. No. 94-1476, at 134 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5650.

172 Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810, and in scattered sections of other titles of the U.S.C.).

173 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.

174 *Compare* 17 U.S.C. § 203, *with* § 304(c).

175 *See* 17 U.S.C. § 203(a)(3) ("[I]f the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier."); 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

where an author (or the author's spouse, children, or grandchildren) can terminate a copyright assignment and regain the interest. For transfers executed prior to January 1, 1978, authors (or the author's spouse, children, or grandchildren) have a five-year period that begins fifty-six years after a work was copyrighted in which they retain the unwaivable right to terminate the transfer and regain any interest.[176]

Termination rights attach to all assignments *except those effectuated by an author's Will*.[177] In other words, the only type of copyright transfer that cannot be terminated by the author's statutory heirs are one that the deceased author executed specifically by Will.

Termination provisions govern transfers of not only ownership interests, but also all forms of "transfer" of copyright[178] or any right included in a copyright.[179] In contrast to renewal rights, termination rights cannot be waived or assigned.[180]

Under the termination system, an author or his or her statutorily defined heirs can reclaim a copyright interest that the author had previously assigned.[181] A few notable examples include the litigation for

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Butthole Surfers, a progressive musical band, orally transferred the nonexclusive right to manufacture and distribute its recordings to Touch and Go Records. *Id.* at 482. The Butthole Surfers later terminated the agreement. *Id*. 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, 485. 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 484–85.

176 17 U.S.C. § 304(c)(3).

177 Termination rights, however, do not apply to works made for hire. *Id.* § 203(a). In addition, a derivative work owner maintains the copyright interests even after a termination of the copyright transfer takes place. *See* 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).

178 *See* 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—gifts in contemplation of imminent death—and inter vivos gifts—gifts during the lifetime of the donor. This encompasses both exclusive and nonexclusive copyright licenses. *See id.* §§ 203(a), 304(c).

> 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.

Nimmer & Nimmer, *supra* note 159, § 11.02 n.4 (citation omitted).

179 *See* Burroughs v. Metro-Goldwyn-Mayer, Inc., 491 F. Supp. 1320, 1324 (S.D.N.Y. 1980), *aff'd*, 636 F.2d 1200 (2d Cir. 1980) (unpublished table decision).

180 *See* Rub, *supra* note 28, at 57; Peter M. Thall, *Terminating Copyrights: Recapturing the Family's Literary Jewels*, 38 Del. Law. 20, 21 (2020).

181 *See* Patrick Murray, Comment, *Heroes-for-Hire: The Kryptonite to Termination Rights Under the Copyright Act of 1976*, 23 Seton Hall J. Sports & Ent. L. 411, 417, 420–22 (2013).

rights to John Steinbeck's work,[182] rights to Superman,[183] and rights to a number of Marvel characters created by Jack Kirby.[184]

Many musicians, such as James Brown, gained the ability to benefit from the exercise of termination rights in 2013, although Brown's first possible termination date from his 1956 hit "Please, Please, Please," was 2012.[185] In light of this, many recording artists have begun questioning whether their output constitutes work for hire.[186] Under the 1976 Act,

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182 In 1938, Steinbeck transferred publication rights in many of his later works (including *Of Mice and Men* and *Grapes of Wrath*) to Viking Press; Penguin later assumed this contract. In 1994, Steinbeck's widow—the sole owner of the copyrights—entered into a new agreement for publication rights in the books. Notably, Steinbeck's two sons from a prior marriage were not party to the agreement. After Steinbeck's widow died in 2003, the surviving son and grandson served notice on Penguin seeking to terminate the 1938 agreement. Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193, 196–97 (2d Cir. 2008).

183 In 1937, the two creators of Superman (Siegel and Shuster) entered into their first licensing agreement with Detective Comics (later DC Comics); the first Superman Comic was published in April of 1938. In 1948, the parties engaged in litigation over an ownership dispute of the copyrighted material and entered into a settlement confirming that DC was the owner. An embarrassing 1975 *New York Times* article led to a third agreement in which Warner Bros (parent company of DC Comics) agreed to pay the creators a "modest" salary in exchange for another declaration that DC Comics owned Superman. In 1997, the Siegel heirs served notice of termination of all these agreements with an effective date of 1999. Though negotiations ensued, this date passed without event. However, both parties agreed to waive an argument of statute of limitations in a tolling agreement to pursue settlement. In the end, negotiations broke down and litigation ensued. Siegel v. Warner Bros. Ent., Inc., 542 F. Supp. 2d 1098, 1106–16 (C.D. Cal. 2008), *rev'd in part sub nom.* Larson v. Warner Bros. Ent., Inc., 504 Fed. Appx. 586 (9th Cir. 2013).

184 Between 1958 and 1963, a freelance artist (Jack Kirby) created many graphic works for Marvel, including such famous characters as The Fantastic Four, The Incredible Hulk, The Mighty Thor, Spider Man, Iron Man, The X-Men, and The Avengers. In 1972, Kirby executed an agreement that purported to transfer any interest he possessed in works created for Marvel; the agreement seemed prophylactic as it did not state that Kirby actually owned a copyright and, in fact, contained a clause acknowledging that the works were created by Kirby "as an employee" of Marvel. Kirby died in 1994, survived by his widow and four children. All the statutory heirs joined in the termination notices under 17 U.S.C. § 304(c), served in 2009. Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720, 724, 733–34 (S.D.N.Y. 2011); Marvel Characters, Inc. v. Kirby, 726 F.3d 119 (2d Cir. 2013).

185 *See* Kike Aluko, Note, *Terminating the Struggle Over Termination Rights*, 10 HARV. J. SPORTS & ENT. L. 119, 119 (2019); Ann Bartow, *Using the Lessons of* Copyright's Excess *to Analyze the Political Economy of Section 203 Termination Rights*, 6 TEX. A&M J. PROP. L. 23, 29 (2020) ("The first wave of Section 203 terminations began in 2013 . . . ."). Brown's first possible termination date, however, was 2012 because his 1956 hit "Please, Please, Please" was under the previous termination rights regime.

186 *See* Bartow, *supra* note 185, at 29–31. The question of work for hire has also been seen with authors attempting to exercise their own copyright termination rights, such as in the case of the film *Friday the 13th*. After the screenwriter of the film, Victor Miller, gave notice and attempted to exercise a section 203 termination, the production company claimed Miller had been an employee at the time he wrote the screenplay, which means the screenplay was a work for hire. The Second Circuit rejected this argument, holding instead that Miller was an independent contractor and eligible to exercise the section 203 termination right. Horror Inc. v. Miller, 15 F.4th 232, 236 (2d Cir. 2021).

a work for hire is not included under copyrighted works an artist can reclaim through termination rights.[187] Today, sound recordings are not generally considered works for hire, so an artist can reclaim the underlying copyrights of sound recordings in accordance with the 1976 Act.[188] There are a number of questions about how the contracts artists make with recording companies potentially make artists employees, and, in turn, makes their art works for hire.[189] However, this Article will not analyze those questions, turning instead to other issues of copyright termination.

Given the recency of musicians' ability to exercise termination rights and that most musicians settle issues about their contracts and termination rights outside of court, case law on this issue is relatively scarce. For example, in 2017, Paul McCartney filed a federal lawsuit asking for declaratory judgment against Sony/ATC claiming ownership of songs he wrote with the Beatles, including "Hey Jude," "Yesterday," and "I Want to Hold Your Hand."[190] He filed suit in a New York District Court, arguing that the 1976 Act's provision requiring works to be returned to their creators fifty-six years after the original copyright applies to the Beatles songs.[191] This would mean that McCartney was entitled to the copyrights in 2018, but the parties settled in a confidential agreement.[192] Another musician that sought to terminate previously sold copyrights was Victor Willis, who had written, among many other songs, "YMCA," "In the Navy," and "Go West"—which were made famous by the Village People and, for YMCA, chanted at sports arenas around the world.[193] The license holder alleged that the songs were works made for hire, and

187 17 U.S.C. § 203(a).

188 *See* Aluko, *supra* note 185, at 122; Bartow, *supra* note 185, at 31–34; David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. Copyright Soc'y 387 (2001).

189 *See generally* Nimmer & Menell, *supra* note 188 (discussing the work for hire phenomenon in depth).

190 *See Sir Paul McCartney Sues Sony over Beatles Songs*, BBC News (Jan. 19, 2017), https://www.bbc.com/news/entertainment-arts-38675147 [https://perma.cc/9A5W-CXJP]; Daniel Sanchez, *56 Years Later, Paul McCartney Wants His Beatles Songs Back*, Digital Music News (Jan. 19, 2017), https://www.digitalmusicnews.com/2017/01/19/paul-mccartney-sony-atv-the-beatles/ [https://perma.cc/ZU5J-YS3Z].

191 *See Sir Paul McCartney Sues Sony over Beatles Songs*, *supra* note 190.

192 Jonathan Stemple, *Paul McCartney Settles with Sony/ATV over Beatles Music Rights*, Reuters.com (June 30, 2017, 12:31 PM), https://www.reuters.com/article/us-people-paulmccartney/paul-mccartney-settles-with-sony-atv-over-beatles-music-rights-idUSKBN19L2ET [https://perma.cc/TY3E-QKAQ].

193 Scorpio Music S.A. v. Willis, No. 11-cv-1557, 2012 WL 1598043, at *1 (S.D. Cal. May 7, 2012).

that Mr. Willis could not unilaterally serve notice of termination being just one of the credited co-authors.[194] Mr. Willis ultimately prevailed in court and regained ownership of the copyrights.[195]

Regardless of if the author is a writer, musician, or artist, his or her termination rights must be executed properly within designated time periods. This allows the author (or the author's spouse or children) to recapture any remaining value in the copyright interest. In practical terms, even if the artist specifically sold all of his rights and interests in a copyright, the artist (or the author's spouse, children, or grandchildren) could still terminate the transfer and take back the copyright without having to compensate the assignee.

*a. When Transfers May Be Terminated*

The 1976 Act has two sections on termination rights: section 203 and section 304. Section 203 governs copyright transfers made *on or after* January 1, 1978.[196] This section authorizes authors—or an author's spouse, children, or grandchildren—to terminate any transfer or assignment of copyright during a five-year window of opportunity that begins thirty-five years from the date of the transfer.[197] Section 304(c) governs transfers *before* 1978.[198] Section 304 permits termination during a five-year window of opportunity that begins fifty-six years after the work was copyrighted.[199] Notably, the 1976 Act makes termination rights inalienable, which means transfers of termination rights by authors or by heirs have no legal effect.[200] This Article focuses on section 203 termination provisions—transfers made on or after January 1, 1978.[201]

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194 *Id.* at *5.

195 *Id.*

196 17 U.S.C. § 203.

197 *Id.* Copyright transfers executed on or 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 could commence in 2013 (i.e., 1978 plus 35 years).

198 17 U.S.C. § 304.

199 *Id.*

200 Benjamin Newell, Note, *Saving the Next Superman: An Alternative Approach to the Taxation of Copyright Termination Rights*, 21 J. Intell. Prop. L. 379, 382 (2014).

201 Sections 203 and 304(c) share significant commonality concerning termination rights, particularly excluding termination of grants made by a Will. One of the main differences, however, is that section 304(c) applies to grants made by the author and any statutorily defined heirs, while section 203(2) applies exclusively to grants executed by the author. The difference in the statutory requirements for termination between transfers made before 1978 and transfers made in or after 1978 is the basis for the issues central to several high-profile termination cases, including some of A.A. Milne's copyrights in Winnie the Pooh, some of John Steinbeck's copyrights in later works, and Eric Knight's copyrights in Lassie. *See* Milne *ex rel.* Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005); Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008); Classic Media, Inc. v. Mewborn, 532 F.3d 978 (9th Cir. 2008). For pertinent discussions concerning how the courts are interpreting the differences, see Joshua Beldner, Note, *Charlie Daniels and "The Devil"*

Authors, or their spouses, children, or grandchildren, must affirmatively exercise termination rights during the applicable time frame.[202] Remember, the provisions specifically exclude the termination of transfers made by Will and, under section 203, only apply to transfers implemented by the author and not the author's devisees or assignees.) Complicated rules govern when and how the termination right must be exercised. In general, termination under section 203 "may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of the execution of the grant[]"[203] If the author dies prior to vesting of the termination rights, the right to terminate passes to the author's statutory class of heirs, as does the right to the reversionary interest.[204]

To effectuate termination, the author (or the author's spouse, children, or grandchildren) must serve the grantee with written notice that states the effective date of termination (the effective date must fall within the prescribed five year period).[205] The notice must be "served not less than two or more than ten years" prior to termination date.[206] In essence, section 203 creates a thirteen-year window of opportunity for termination notice.

It is important to differentiate between the vesting of the right to terminate, the vesting of the potential ownership in the soon-to-be terminated copyright, and the actual ownership of the copyright after termination to determine who has the right to terminate and who will receive the copyright at the applicable termination date. Remember, an author's interest to the right to retake the copyright vests when timely notice is served on the grantee,[207] which can occur up to ten years before

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*in the Details: What the Copyright Office's Response to the Termination Gap Foreshadows About the Upcoming Statutory Termination Period*, 18 B.U. J. Sci. & Tech. L. 199 (2012); *see also* Michael J. Bales, Note, *The Grapes of Wrathful Heirs: Terminations of Transfers of Copyright and "Agreements to the Contrary,"* 27 Cardozo Arts & Ent. L.J. 663 (2010).

202 To effectuate a termination of previously transferred copyrights, proper notification is required as dictated by both the copyright statute and the Register of Copyrights. 17 U.S.C. §§ 203(a)(4)(B), 304(c)–(d); 37 C.F.R. § 201.10 (2005). If the proper notification is not made during the mandated term, the author will lose the ability to recapture the copyright that had been granted. 17 U.S.C. § 203(b)(6).

203 17 U.S.C. § 203(a)(3). If the grant covers the right to publication, however, the five-year period begins on the earlier of thirty-five years from the date of publication or forty years from the date of execution. *Id.*

204 *Id.* § 203(b)(3).

205 *Id.* § 203(a)(4)(A). Section 203(a)(4) requires compliance with other formal requirements of notice as well.

206 *Id.* A copy of the notice also must be recorded in the Copyright Office before the effective date of termination. *Id.*

207 To effectuate a termination of previously transferred copyrights, proper notification is required as dictated by both the copyright statute and the Register of Copyrights. 17 U.S.C. §§ 203(a)(4)(B), 304(c)–(d); 37 C.F.R. § 201.10 (2005). If the proper notification is not made

commencement of the five-year termination period.[208] But, the actual copyright interests themselves do not revert to the author (or the statutorily defined class of heirs) until the applicable termination date.[209] This can create a time gap between the service of the notice of termination and the actual termination date.

For instance, an author can serve notice of termination ten years before the copyright is terminated. The author now has a vested interest in the soon-to-be terminated copyright, but the author does not own the copyright until the actual termination date. This time gap can create some issues.[210] If the author dies after serving notice of termination *but before* the termination date, does the copyright pass according to the author's wishes as part of the author's estate or do the statutorily defined class of heirs get to re-serve notice of termination and receive the property upon the termination date?

A properly effectuated termination notice restores ownership of a copyright to all those with termination rights as of the date the notice was filed. Therefore, if an author serves a notice of termination, but dies prior to the date of repossession, the copyright passes to the author's estate rather than to the statutorily defined class of heirs.[211] In contrast, if the author survives to a date when he or she could have served a termination notice but dies without serving one, the statutorily defined class of heirs gain the right to serve such notice and take the reversion at the applicable termination date.[212] After the actual termination date, the terminator (whoever this may be) becomes free to commercially exploit the copyright or transfer it to others.

### *b. Which Transfers May Be Terminated*

Any exclusive or nonexclusive transfer of copyrights, or of any right under a copyright, may be terminated if the transfer meets all

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during the mandated term, the author will lose the ability to recapture the copyright that had been granted. *See* 17 U.S.C. § 203(b)(6).

208 17 U.S.C. § 203(a)(4)(A). Basically, written notice of termination must be served upon the grantee or the grantee's successor two to ten years before the effective date of the termination set forth in the notice. A copy of the notice also must be recorded in the Copyright Office before the effective date. *Id.*

209 17 U.S.C. §§ 203(b)(2), 304(c)(6)(B).

210 For example, in 2015, James Brown's daughter Venisha, with a majority of Brown's acknowledged and DNA-proven children, exercised termination rights to become effective between 2015 and 2023, but died in 2018, after the termination rights had vested. *See* Brown-Thomas v. Hynie, No. 1:18-cv-02191, 2019 WL 1043724, at *2–3 (D.S.C. Mar. 5, 2019).

211 *See* Bourne Co. v. MPL Commc'ns, Inc., 675 F. Supp. 859, 862 (S.D.N.Y. 1987) (stating that vested rights under a terminated grant passed to the author's estate when the author died after notice of termination had been served but before rights under the terminated grant reverted), *modified and amended by* 678 F. Supp. 70 (S.D.N.Y. 1988).

212 17 U.S.C. § 203(a).

the requirements of the termination provisions.[213] Termination rights are very difficult to lose and cannot be contracted away, waived, or assigned.[214] These termination rights apply to all transfers and assignments *except for transfers effectuated by the author's Will*.[215] In contrast to the renewal system, the only type of copyright transfer that cannot be terminated or bumped by the author's statutorily defined class of heirs is one executed by the author's Will. Basically, inter vivos, or lifetime transfers, remain bumpable.

*c. Who May Terminate Transfers*

An author can exercise termination rights so long as he or she survives beyond the start of the window of opportunity to serve notice of termination. But if the author passes away (before the window of opportunity to serve the notice of termination opens or, after the window has opened but before the author actually serves notice of termination) the termination right—as well as the right to any reversionary interest in the copyright—is inherited by the author's statutorily defined class of heirs (the author's spouse, or descendants). Termination rights only pass by operation of law to the author's spouse, children, or grandchildren: the author may not give or bequeath termination rights to anyone outside the statutorily defined class of heirs, and any gift or bequest of termination rights is subject to "bumping." This operation evidences Congress's intent to give the benefits of copyright recapture to authors' statutorily defined class of heirs, rather than the author's assignees or devisees.

Generally, the author's statutorily defined class of heirs consists of the surviving spouse,[216] children, and grandchildren, if any. If no members of the first class are found, the author's benefits of copyright recapture are assigned to the author's executors, administrators, and trustees.[217] If the author dies leaving only a spouse[218] (i.e., and no children or grandchildren), the spouse takes the entire termination interest.[219] If

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213 Under 17 U.S.C. § 203(a), termination rights apply exclusively to grants executed by the author, not grants made by the author's devisees or assignees (unlike 17 U.S.C. § 304(c) terminations).

214 *See* Bartow, *supra* note 125, at 395.

215 *See* 17 U.S.C. §§ 203(a), 304(c)–(d). In addition, as mentioned above, termination rights do not apply to works made for hire. *See supra* notes 186–89 and accompanying text.

216 For federal copyright purposes, 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." 17 U.S.C. § 101 (emphasis added).

217 *Id*. § 203(a)(2).

218 It is noteworthy that the South Carolina Supreme Court held that Hynie was not a surviving spouse. *See In re* Estate of Brown, 846 S.E.2d 342, 344 (S.C. 2020).

219 17 U.S.C. § 203(a)(2)(A)*; see also* Keller & Cunard, *supra* note 133.

the author dies leaving only children or grandchildren[220] (i.e., and no surviving spouse), the entire termination interest is divided among the children and grandchildren on a *per stirpital* basis—an equal share for each child, with a deceased child's share divided among the deceased child's descendants.[221] The deceased child's interest can be executed by majority action of his or her surviving children.[222] If the author dies leaving both a surviving spouse and children or grandchildren, the spouse takes half of the termination interest, while the remaining half interest is divided among the author's children on a *per stirpital* basis.[223] The many ways an author's termination rights can pass show that estate planning lawyers should be sure to know who the author's spouses, children, and grandchildren are and should be able to identify them.[224]

The majority of the statutory defined class of heirs must agree to exercise any termination right.[225] If the author is survived by a spouse and children, therefore, termination rights can only be exercised by the surviving spouse joined with one of the surviving children. If the author is survived only by children, conversely, termination rights can be exercised by a majority of those surviving children. If there are only two statutory heirs, they must both agree to exercise termination. Where there is more than one statutory heir, the termination right is divided and apportioned among the statutory heirs by statute.[226]

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220 The statute defines "grandchildren" as the "surviving children of any dead child of the author." *See* 17 U.S.C. § 203(a)(2)(B). For a discussion of issues regarding the concept of family and heirs in estate planning, see Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. Rev. 367 (2009).

221 17 U.S.C. § 203(a)(2)(B)–(C).

> The House Report provides the following example of how per stirpes representation works: An author dies, leaving a widow, two living children and three grandchildren by a third child, now dead. The widow . . . takes 50% of the termination right. The two living children each take 16 2/3% (50% divided by three), and the three grandchildren each take approximately 5 1/2% (16 2/3% divided by three). In order to terminate the author's inter vivos grants, the widow and at least one of the children or two of the grandchildren must act (the grandchildren's collective 16 2/3% interest can be exercised only if a majority of them consent).

Keller & Cunard, *supra* note 133, at 7-34; *see also* H.R. Rep. No. 94-1476, at 125–26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5741.

222 17 U.S.C. § 203(a)(2)(C); *see also* H.R. Rep. No. 94-1476, at 125–26.

223 17 U.S.C. § 203(a)(2).

224 To best identify these heirs, an estate planning attorney can ask a client questions similar to the following: Do you have any copyrighted works? Have you assigned your interest in that copyrighted work? Was a family member, like a spouse or parent, a creator? Have they every created a copyrighted work? *See* Spelman & von Herrmann, *supra* note 151.

225 17 U.S.C. § 203(a)(1).

226 *Id*. § 203(a)(2).

The above review of the pertinent copyright statutes and termination rights rules bring into focus inherent problems with termination rights from an estates law perspective. Most important, for purposes of this Article, termination rights curtail donative freedom and have the potential to undermine otherwise well-crafted estate plans of copyright creators.[227] The author's statutorily defined class of heirs' ability to terminate copyright assignments under certain circumstances enables these unintended beneficiaries to "bump" an author's estate plan and terminate copyright assignments, other than those made by the Will. Although estate-bumping does not apply to transfers by Wills per se, estate-bumping could nevertheless undermine other contemporary estate planning techniques. Moreover, for charitably inclined copyright creators like James Brown, termination rights undermine lifetime gifts of their copyrights to charities. Simply, if the author dies before the termination rights become exercisable, it remains copyright law rather than the author's donative wishes that determines who has the right to profit from the author's creative endeavors. Therefore, a better understanding of the estate-bumping phenomenon is in order.

## III. Estate-Bumping

Having reviewed the technical aspects of termination rights, a brief discussion of contemporary estate planning techniques (other than Wills) and an examination of corresponding real-world hypotheticals are necessary to understand the adverse effects that the copyright statue has on seemingly well-crafted estate plans of copyright creators.

Estate-bumping is a phenomenon created and promulgated under federal copyright law. As previously discussed, authors do not have the power to strip or alter termination rights that vest in the statutorily defined class of heirs. The only exception to termination rights is transfers made by the author's Will. As a result, lifetime assignments by the author may be "bumped" by the author's statutorily defined class of heirs if the author does not live long enough to exercise his or her termination rights or survives the window of opportunity to serve a notice of termination. Though termination rights do not apply to transfers executed by Will, a conflict between copyright law and donative freedom exists because of the practical implications of the termination rights provisions.[228] The 1976 Act fails to carve-out similar exceptions for other

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227 Other inherent problems include but are not limited to termination rights rendering ineffective the purposes behind state's spousal rights protections and community property systems; termination rights making state's family protections inefficient and duplicative; termination rights making parts of copyright law ineffective; and termination rights possibly being unconstitutional. For a discussion concerning these other inherent problems, see Tritt *supra* note 5, at 182–90.

228 For an opposing view of termination rights vis-à-vis donative freedom, see Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62

types of donative transfers, which have testamentary effect, such as Will substitutes (e.g., revocable trusts), inter vivos trusts, gifts to charities, and other modern estate planning mechanisms. Estate-bumping, therefore, is a creature of copyright law.

From an estates law perspective, estate-bumping is gravely problematic in that it undercuts the concept of donative freedom. Donative freedom, the guiding star of estates law,[229] is broader than a simple freedom to bequest one's property. Donative freedom encompasses several but interconnected property rights: the right to give or devise property during life or at death; 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.[230] The nature of termination rights precludes authors from using optimal estate planning techniques, dictating the timing and character of their donative transfers, and, in many situations, limits to whom authors can transfer their copyright interests.[231]

Despite the prominence and importance of copyrights, there seems to be a fundamental gap in knowledge concerning the potential harm of termination rights to well-crafted estate plans among estate planners and copyright attorneys. Because estate planning practitioners are often unaware of termination rights and some copyright practitioners are not familiar with modern estate planning techniques, the potential of the copyright law bumping an author's carefully prepared estate plans looms large in many situations. Estate planning practitioners often utilize common estate planning techniques in transferring copyrights because they are unaware of the estate-bumping effects of termination rights. This leaves many authors' estates vulnerable, such as with the James Brown Estate.

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Fla. L. Rev. 1329 (2010). Loren states that "[s]ome have criticized the termination provisions as interfering with an author's freedom to dispose of her estate. However, . . . the termination right is more properly characterized as a new estate. . . . As a new estate, a termination right does not interfere with any ownership rights of the author." *Id.* at 1347–48.

229 It is generally held that the overarching jurisprudential foundation of American estates law is donative freedom. *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 10.1 cmt. a (Am. L. Inst. 2003). For further discussions on the doctrine of donative freedom, see Tritt *supra* note 5, at 115–40; Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 Ala. L. Rev. 273, 280–85 (2010).

230 Lawrence W. Waggoner, Gregory S. Alexander, Mary Louise Fellows & Thomas P. Gallanis, Family Property Law: Cases and Materials on Wills, Trusts, and Future Interests 7 (3d ed. 2002).

231 In addition, termination 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 transfers. 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. *See* Tritt, *supra* note 5, at 167–69.

Accordingly, some common estate planning methods (other than Wills) must be discussed to see the potential conflict between copyright law and estate planning. By foreclosing the effective use of these common estate planning methods, copyright law places unique estate planning limitations on copyright creators. An author's estate plan and testamentary intent effectively can be set aside by these restrictions on donative freedom. Although not all encompassing, this list of common estate planning techniques highlights the disruptive effects that estate-bumping has on an author's estate plan.[232]

### *A. Revocable Trusts*

In many states, revocable trusts (sometimes called "living trusts") are increasingly used in place of Wills for the management and distribution of an individual's assets at death.[233] Therefore, a 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. Simply, in many jurisdictions in the United States, the Will is no longer the primary dispositive estate planning instrument of an individual's assets—the revocable trust has become the dispositive instrument of choice.[234]

A revocable trust is a Will substitute that disposes of an individual's assets at death.[235] Revocable trusts have gained in popularity in large part because of the advantages they offer over Wills.[236] Revocable

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232 For a full treatment of the various ways in which termination rights can bump an author's estate plans (including gift and estate tax planning and the use of family holding companies), see generally Tritt, *supra* note 5.

233 *See* KATHRYN G. HENKEL, ESTATE PLANNING & WEALTH PRESERVATION: STRATEGIES & SOLUTIONS ¶ 7.03 (2023).

234 *See* WAGGONER ET AL., *supra* note 230, 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 modem estate-planning practice."); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (1984) ("[T]he revocable trust is the fundamental device that the estate-planning bar employs to fit the carriage trade with highly individuated instruments . . . .").

235 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. *See* HENKEL, *supra* note 233, ¶ 7.03.

236 For a general discussion concerning the advantages and disadvantages of revocable trusts, see DEBORAH S. GORDON, KAREN J. SNEDDON, CARLA SPIVACK, ALLISON ANNA TAIT & ALFRED L. BROPHY, EXPERIENCING TRUSTS AND ESTATES 633–40 (2d ed. 2021); *see also* SUSAN N. GARY, JEROME

trusts usually do not pass through probate court administration, making them more time and cost effective while providing privacy by taking the instrument out of the public records.[237] In contrast, when a Will is used as the testamentary instrument, the Will must pass through the probate process, which is public in nature, creating many practical disadvantages for certain individuals.[238] For example, children may receive disproportionate shares of an estate or be disinherited entirely. A testator may even leave significant assets to friends, coworkers, or caretakers. An individual may be gay and desire to avoid potential Will contests from heirs under the state's intestacy scheme by keeping the dispositions of assets private or out of a Will.[239] A revocable trust provides an advantage by keeping an estate plan private and hiding the composition of the estate's assets from the public.

Revocable trusts have specific benefits concerning elder law by easing complications that arise from the incapacity of the grantor. A trustee can manage the assets of a funded revocable trust for the benefit of the grantor if the grantor is incapacitated without needing to go through the costly process of appointing a court-supervised guardian.[240]

Revocable trusts provide further advantages. A trustee can move to manage securities, pay expenses, and make distributions immediately after a grantor's death, bypassing the need for a lengthy probate process.[241] Further, the trust often provides protection against creditors after the grantor's death by denying creditors any opportunity to attach the trust property.[242] Finally, the court supervision required for actions involving Wills is not required for revocable trusts.[243] The process of appointing, removing, and resigning trustees, as well as altering the trust's situs (for instance, to reduce state income tax), can be carried out with greater ease and cost-effectiveness.[244]

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Borison, Naomi R. Cahn & Paula A. Monopoli, Contemporary Approaches to Trusts and Estates 430–39 (2022).

237 *See* Joel C. Dobris, Stewart A. Sterk & Melanie B. Leslie, Estates and Trusts: Cases and Materials 511–12 (2d ed. 2003).

238 *See* Henkel, *supra* note 233, ¶ 7.02; *see also id.* ¶ 7.03 (discussing revocable trusts).

239 Historically, those in the LGBTQ community have faced discrimination during the probate process. Before same-sex marriage was legal, couples who wanted to leave their estate to their surviving partner faced potential Will contests. Relatives left out of the Will would contest the Will as invalid. *See, e.g.*, *In re* Kaufman, 266 N.Y.S.2d (App. Div. 1966) (family successfully contested Will leaving testator's estate to his same-sex partner as invalid under undue influence).

240 *See* Henkel, *supra* note 233, ¶ 7.03[2].

241 *See id.*

242 *See id.* ¶ 7.03[5].

243 *See id.* ¶ 7.03[4].

244 *See* Deborah S. Gordon, *Forfeiting Trust*, 57 Wm. & Mary L. Rev. 455, 475–76 (2015) (describing benefits of inter vivos trusts in modern estate planning, including privacy, administrative convenience, continual management, and increased jurisdictional flexibility).

Copyright interests would be very appropriate assets with which to fund a revocable trust. Termination rights, however, will attach to any transfer—even to a revocable trust—unless it is effectuated by an author's Will.[245] Transfers to or by a revocable trust are not considered transfers "by Will," so all dispositions by a funded revocable trust may be subject to the estate-bumping aspects of termination rights.[246] Notably, one commentator has suggested—though without citation to a source—that a court might interpret the "by Will" provision of the termination statute to include transfers by Will substitutes, including revocable trusts.[247] Even if the interpretation to the plain meaning of the statute was open for interpretation—until the uncertainty is clarified—estate planners should not gamble with their client's copyright interests. Funding a revocable trust with copyright interests may expose the client's estate to the harsh results of estate-bumping.

The following scenario serves to demonstrate the potentially problematic interplay of a revocable trust and termination rights:

> *Scenario 3:* Jonny is a successful musician and is married to Lillian. Jonny has a large estate consisting of his valuable copyright interests in his music among other valuable assets. Jonny has children from both a prior marriage and his marriage with Lillian. Jonny and Lillian visit an estate-planning practitioner who sets up a revocable trust and a pour-over Will for Jonny. The lawyer recommends that Jonny fund the trust during his lifetime (i.e., Jonny puts assets in the trust during his life rather than waiting for the pour-over Will to do it upon his death). This is common practice and allows the settlor to take full advantage of the trust. When Jonny dies, the revocable trust

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245 1 Ralph E. Lerner & Judith Bresler, Art Law: The Guide for Collectors, Investors, Dealers, & Artists 1440 (4th ed. 2012).

246 *See* Gordon, *supra* note 244, at 475–76. *See generally* Langbein, *supra* note 234.

247 Lerner & Bresler, *supra* note 245, at 1440 ("The question remains whether a will substitute . . . escapes any claim of termination after the artist's death. . . . It appears from the legislative history that Congress was attempting to eliminate the concept of will-bumping and that a court could interpret the term 'the will' to include a revocable trust."). Following this logic, though, all donative lifetime transfers arguably could fit within the "by Will" exception to the termination rules—which would be a wonderful result and eliminate the concept of estate-bumping altogether. A revocable trust is testamentary in nature in that it disposes of an individual's assets at death. And a revocable trust basically is the alter ego of the grantor—during the grantor's lifetime, the trust can be revoked or amended by the grantor at any time. For these reasons, and more, revocable trusts are analogous to a testamentary transfer at death by Will. But transfers to a revocable trust are actually lifetime transfers (not deathtime) and, in many ways, are seemingly no different than donative transfers to an irrevocable trust or private foundation or an established charitable organization. Under these estate planning techniques, though, the property owner generally could not resend the donative transfer (similar, in ways, to nondonative assignments). Without spilling too much ink, there are many aspects of revocable trusts that make them distinct from Wills. And the plain language of the statute states by "Wills." Although this Author would favor an interpretation of the statute to include all donative transfers, this Author would not want his client's estate to be the test case.

> establishes a continuing trust that provides for the children from his prior marriage with the copyright interest while his wife Lillian takes the rest of his estate. This estate plan provides for the family members while avoiding potential conflicts between the children from the two marriages.
>
> Unfortunately, the estate-bumping aspects of the termination rights may destroy this well-prepared and thoughtful estate plan. Funding a revocable trust during Jonny's lifetime was not a transfer "by Will." Lillian and her children will have the required majority vote to bump Jonny's estate plan and retake the copyrights from the continuing trust for his children from his previous marriage. As a result, Jonny's children from his previous marriage will not benefit nearly as much as Jonny had intended (although they will still benefit some as they are part of the statutorily defined class of heirs).
>
> Note the difference between a funded revocable trust and an unfunded revocable trust. Had Sam used a pour-over Will to fund the revocable trust at death and not funded his revocable trust during his lifetime, this would have been a transfer "by Will," and his estate would be free of any unintentional estate-bumping. Funding a revocable trust by Will, though, would deprive Jonny of many of the benefits of using a revocable trust in the first place.

Although it may be easy to suggest that copyright creators should simply use Wills rather than revocable trusts, this would deprive copyright authors of the many advantages of the revocable trust structure and severely restrict 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 and will advise their clients to fund them, at least in part, during their lifetimes.

### *B. Noncharitable Lifetime Transfers*

There are many reasons why an author may make lifetime gifts of their copyright interest. Lifetime gifts have tremendous tax advantages. In addition, the creation and use of a family holding company to unify management and control of the copyright interests could be an excellent business and estate planning tool if funded with the author's copyright interests. However, if any author makes lifetime gifts of copyrights and dies before the termination rights vest in the author, the lifetime transfers may be bumped by the author's statutory heir.

Moreover, once copyrights are transferred during the lifetime of the author, a corresponding specific bequest under the author's Will affirming the transfer may not be enough to insulate the copyrights from the frustrating effects of estate-bumping.

> *Scenario 4:* Sue transfers the exclusive interests of all her copyrights to her revocable trust. Upon her death, the revocable trust will distribute the copyright interests to the ABC Foundation. By Will, Sue bequeaths any and all of her copyright interests, including any reversionary and recapture interests, to the ABC Foundation and the residuary of her substantial estate to her children. Sue specifically states in her Will that it is her intent that all of her copyrights be given to the ABC Foundation. After Sue's death, the revocable trust distributed the copyright interests to the ABC Foundation. Sue did not live long enough to exercise any termination rights. However, Sue's statutory heirs may still terminate the assignment to the ABC Foundation. Sue's bequest under her Will of the copyright interest is useless. At Sue's death, she does not own any copyright interests to bequeath under her Will (Sue had already transferred her copyright interests to the revocable trust). Sue's Will may only dispose of the property she actually owns at her death, which does not include the copyrights. An author cannot rebequeath her previously assigned copyrights to circumvent the termination rules.

### *1. Tax Benefits*

The United States imposes a federal wealth transfer tax regime on the lifetime and deathtime gratuitous transfers of property from one individual to another, particularly concerning inheritance and gifts. Today, this tax regimes consists of the estate,[248] gift,[249] and generation-skipping transfer taxes.[250] The federal government levies estate taxes on the total value of an individual's estate at the time of their death, with certain exclusions, credits, and deductions in place.[251] Gift taxes apply to transfers of assets during one's lifetime, beyond specified exclusions, credits, and deductions.[252] Both estate and gift taxes share a unified credit, which sets a lifetime limit on tax-free transfers. Although the federal government imposes these taxes, individual states may also have their own estate or inheritance taxes, adding an additional layer of complexity to the overall transfer tax landscape. Estate planning and strategic use of exclusions, credits, and deductions are common approaches to mitigate the impact of transfer taxes and preserve wealth for future generations.

Making lifetime gifts (as opposed to deathtime transfers) offer many tax benefits,[253] especially when availing the use of the annual

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248 I.R.C. § 2051.

249 *Id*. § 2503.

250 *Id*. § 2601.

251 *See id*. §§ 2051–2058.

252 *See id*. § 2503.

253 Even if the lifetime gift is subject to transfer tax, lifetime gifts are generally tax-favored compared to deathtime transfers because the effective gift tax rate is lower than the effective

exclusion and applicable credit. In addition to avoiding the transfer tax, both the applicable credit and annual exclusion remove income and appreciation of assets from an author's gross estate for tax purposes. However, statutory heirs of a copyright interest may bump lifetime gifts by an author if the author dies prior to the vesting of the termination rights. Therefore, copyright authors cannot avail themselves of these tax benefits to which every other property owner may avail themselves.

*a. Annual Exclusion*

Some types of lifetime gifts can avoid transfer taxes. Currently, the federal transfer tax code allows every person a gift tax exclusion of $18,000 per year per donee.[254] This means a person may give up to $18,000 every year to as many people as she wants, and these transfers would not be subject to gift taxes. In addition to avoiding the transfer tax, utilizing the annual exclusion has the additional benefit of removing the income and appreciation of these assets from the author's future gross estate for estate tax purposes. Annual exclusion gifts can be made to any individual and is not just limited to immediate family.[255] Typically, copyright interest would qualify for the annual exclusion if gifted outright or placed in a specially structured trust. Unfortunately, lifetime gifting runs afoul to the termination rights regime.

> *Scenario 5:* Kaitlyn is married to John and has been married once before. Kaitlyn has three adult married children from her previous marriage and one adult married child from her current marriage to John. Kaitlyn has a large estate which includes copyright assets. To avoid paying large amounts in taxes on her estate at death, Kaitlyn has decided to gift her copyright assets to her family through annual

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estate tax rate. 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 with the $6,666,666 from the lifetime gifts—that is an additional $1,866,666 of transfer tax paid by making a transfer at death rather than making the transfer during her lifetime. Thus, from a transfer tax perspective, lifetime gifts are preferable. *See* I.R.C. § 2503(b).

254 *Frequently Asked Questions on Gift Tax*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes [https://perma.cc/88EN-LA6V]; *see also* I.R.C. § 2503(b). The annual exclusion amount is adjusted for inflation. *Id*. § 2503(b)(2).

255 *See id*. § 2503(b)(1).

> lifetime gifts. Kaitlyn can gift $18,000 in copyright interest to each child and child's spouse totaling $144,000 per year. If Kaitlyn does this consistently over a period of ten years, she can avoid transfer taxes on $1,440,000 from her estate without needing to file any gift tax return.[256]
>
> However, the estate-bumping effects of copyright law will again cause problems for an author attempting to utilize this common estate planning method. In our example, Kaitlyn has furthered her testamentary intent in a tax efficient manner and provided for her family equally to avoid conflict at her death. Unfortunately, termination rights have the potential to set aside Kaitlyn's estate planning. If Kaitlyn dies prior to the termination rights vesting in her then the statutory heirs could bump the estate plan. Just John and his one child would be enough to void the lifetime gifts and grant John a piece of the copyright interest thus reducing the shares Kaitlyn gifted to her children from her previous marriage. This provides many opportunities for conflict, confusion, and manipulation.[257] Whether Kaitlyn made outright transfers or put the copyright interests into trusts there is the potential for bumping Kaitlyn's testamentary intent.[258]

### *b. Applicable Credit*

The $18,000 annual exclusion can be used in conjunction with an "applicable credit amount" to exempt an individual's lifetime transfers up to $13,610,000 from federal gift and estate tax.[259] 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 copyright interests to utilize the applicable credit during life,

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256 This is in addition to the tax-free future appreciation in value of these assets once outside of Kaitlyn's estate.

257 As the James Brown Estate litigation shows, a failure to properly and promptly determine heirs enhances the chances for confusion related to termination rights.

258 The annual exclusion only applies to gifts of "present interests." I.R.C. § 2503(b)(1). 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. *See id.*

259 *What's New—Estate and Gift Tax*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax [https://perma.cc/8SRA-9MW6]. Every individual receives a credit against federal gift and estate taxes (over and above the annual exclusion). I.R.C. § 2505(a)(1).

however, could potentially expose these transfers to being bumped by unintended beneficiaries.

> *Scenario 6:* Joe and Nicole are married. Nicole has a large estate including many valuable copyright assets. Joe and Nicole have four children, one of whom requires special care due to health concerns. Joe passes away and Nicole sets up a lifetime trust to ensure the child who needs special care is taken care of in case there are any delays in the probate process. Nicole funds the trust with the copyright interests utilizing the applicable credit amount. This method of estate planning also allows Nicole to place her copyright assets under the same management and control while also removing the appreciation of the assets from her taxable estate. Nicole's transaction has no gift tax consequences. When Nicole dies, her estate can be bumped by her statutory heirs if Nicole's termination rights have not vested in her.

As demonstrated, even the most basic of tax advantageous estate planning strategies are precluded from copyright owners.

### *2. Family Holding Companies*

A family holding entity can be used effectively in estate planning for copyright interests.[260] Where an author intends to give their copyrights over to multiple people, first sheltering them in a business entity can provide unity in management and control over the copyrights. If a business entity is not used to shelter the copyrights, then multiple heirs would obtain co-ownership of the copyrights, which could lead to disfunction and exploitation that harms the value of the copyrights.[261]

Typically, when a copyright is bequeathed to more than one heir, the ownership becomes fractured and administrative problems arise.[262] The administrative problems result from management and control of the copyright being divided amongst different people. The individual co-owners cannot use the copyrights nor grant licenses to others without the consent of the other co-owners.[263] Consequently, authors should seek to avoid split management by consolidating control over the copyrights in a family holding entity.[264] Additionally, an author would

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260 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.

261 Cherly E. Hader, *Making the Intangible Tangible: Planning or Intellectual Property*, 29 EST. PLAN. 574, 575–76 (2002).

262 Richard E. Halperin, *Vehicles for Artists' Holding and Transferring of Copyrights*, 22 COLUM.-VLA J.L. & ARTS 435, 440 (1988).

263 *Id.*

264 James Brown's estate plan provided for all his copyright interests to be managed within a single trust with three trustees. A settlement brokered by the Attorney General, however, provided that the Attorney General and Hynie would share management decisions. *See* Summer, *supra* note 105; E-mail from Adele Pope, *supra* note 84.

probably prefer control to be consolidated in someone who is an expert in maximizing the value of copyrights.

A family holding entity has additional benefits as it facilitates gift giving, allows the entity to benefit from economies of scale, qualifies for special tax provisions,[265] shifts income among family members, and protects the assets from claims of creditors. Moreover, a family holding entity permits an individual to transfer limited interests of the family holding company (and thereby the underlying assets) to others in a tax efficient manner. The value of these transferred interests utilized to calculate the gift tax would equal the value of the pro rata share of the assets held in the family holding entity decreased by a "valuation discount" derived from the characteristics of the interests.[266]

The benefits that family holding entities provide through consolidation of control and management make them a great option for transferring copyright interests. By utilizing a family holding entity an author could prevent fragmentation of copyright interests while maintaining the benefits of special tax provisions and economies of scale. Because these transfers are lifetime and not "by Will," however, copyright creators may not avail themselves to this highly beneficial technique without subjecting them to the possibility of being terminated in the future.

### *C. Charitable Gifts*

Charitable planning is often a major component of an author's estate plan, as was the case for James Brown's "I Feel Good" trust. Donative transfers to certain charities are treated favorably under the federal tax regime. There are many ways to take advantage of the charitable deduction—making gifts and bequests to charitable entities, creating charitable trusts, and establishing private charitable foundations, to name a few. Therefore, it is essential to become familiar with the income tax charitable deduction under I.R.C. § 170, the gift tax charitable deduction under I.R.C. § 2522, the estate tax charitable deduction

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265 *See* I.R.C. § 303 (providing redemption of corporate stock to pay estate taxes of decedent shareholder); *id*. § 6166 (providing deferment of full payment of estate taxes where value of interest in closely held business exceeds 35% of adjusted gross estate).

266 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 courts and the IRS as appropriate for transfers of noncontrolling interests in closely held entities, including (1) 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 (2) a lack of marketability discount that reflects the absence of any real market for the transferred interest. *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).

under I.R.C. § 2055, modern charitable planning techniques, and the private foundation rules.[267]

### *1. Income Tax Charitable Deduction*

For federal income tax purposes, an individual who itemizes his or her deductions may deduct a percentage of his or her charitable contributions of money or property made to, or for the use of, qualified charitable organizations.[268] Generally, qualified organizations include nonprofit groups that are religious, charitable, educational, scientific, or literary in purpose, or that work to prevent cruelty to children or animals.[269]

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267 An extensive discussion of charitable tax deductions, charitable planning techniques, and the private foundation rules are beyond the scope of this paper.

268 The percentage of the allowable income tax charitable deduction varies according to (1) the classification of the charity receiving the donation and (2) the type of property being donated. Generally, the income tax deduction for gifts to "public charities" (described in I.R.C. § 170(b)(1)(A)) or private operating foundations (as described in I.R.C. § 4942(j)(3)) is limited to 50% of adjusted gross income ("AGI"), but the deduction is limited to 30% of AGI for gifts of appreciated capital gain property. I.R.C. § 170(b)(1)(C). The income tax charitable deduction percentage for gifts to private foundations is limited to 30% of AGI but is limited to 20% for appreciated capital gain property. I.R.C. § 170(b)(1)(B), (D).

269 A charitable contribution is defined in I.R.C. § 170(c)(1) as a contribution or gift to or for the use of a state, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, made exclusively for public purposes, and in I.R.C. § 170(c)(2) as a contribution or gift to a corporation, trust, or community chest, fund, or foundation described in I.R.C. § 501(c)(3). Contributions to I.R.C. § 501(c)(1) organizations, corporations organized under acts of Congress that are instrumentalities of the United States, are deductible under I.R.C. § 170(c)(1). Contributions to I.R.C. § 501(c)(4) organizations are deductible under I.R.C. § 170(c)(1) if made to the organization for the use of a state, a possession of the United States, or any related political subdivision, the United States, or the District of Columbia, if the contributions are made exclusively for public purposes. In general, an individual may deduct a charitable contribution made to, or for the use of, any of the following organizations that otherwise are qualified under I.R.C. § 170(c) of the Internal Revenue Code:

1. A state or United States possession (or political subdivision thereof), or the United States or the District of Columbia, if made exclusively for public purposes;

2. A community chest, corporation, trust, fund, or foundation, organized or created in the United States or its possessions, or under the laws of the United States, any state, the District of Columbia or any possession of the United States, and organized and operated exclusively for charitable, religious, educational, scientific, or literary purposes, or for the prevention of cruelty to children or animals;

3. A church, synagogue, or other religious organization;

4. A war veterans' organization or its post, auxiliary, trust, or foundation organized in the United States or its possessions;

5. A nonprofit volunteer fire company;

6. A civil defense organization created under federal, state, or local law (this includes unreimbursed expenses of civil defense volunteers that are directly connected with and solely attributable to their volunteer services);

For authors wanting to donate their work to public charities, there are two income tax rules concerning charitable deductions that should be of special concern. First, for income tax purposes, a work of art and its copyright are not treated as two distinct properties like they are treated under federal copyright law and for estate and gift tax purposes.[270] Therefore, to qualify for the charitable income tax donation, the author must donate the work and the copyright.[271] Second, the amount of a charitable deduction for a contribution of ordinary income property is limited to the basis of that property in the hands of the donor.[272] Works of art created by the artist are ordinary income property.[273] Therefore, the income tax charitable deduction for a work of art created by the donor effectively is limited to the cost of materials used in the creation of the work of art.[274]

> *Scenario 7:* A well-established artist creates a painting. The cost of the materials, including the paint and canvas, was $200. The painting could sell at a gallery for $5,000. The artist donates the painting

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7. A domestic fraternal society, operating under the lodge system, but only if the contribution is to be used exclusively for charitable purposes;

8. A nonprofit cemetery company if the funds are irrevocably dedicated to the perpetual care of the cemetery as a whole and not a particular lot or mausoleum crypt.

The IRS provides an online Tax Exempt Organization Search system that allows users to select an exempt organization and check certain information about its federal tax status and filings at *Tax Exempt Organization Search*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Select-Check [https://perma.cc/TPB9-YVGG].

270 *See* I.R.C. § 170(f)(3); Treas. Reg. § 1.170A-7(b)(1)(i).

271 *See* I.R.C. § 170(f)(3); Treas. Reg. § 1.170A-7(b)(1)(i). The author's failure to donate both the work of art and the copyright will preclude any income tax charitable deduction under the partial interest rule of I.R.C. § 170(f)(3). *But see* I.R.C. §§ 2055(e)(4), 2522(c)(3), which treats the work of art and the copyright as separate and distinct interests for gift and estate tax purposes (discussed below).

272 *See* I.R.C. § 170(e)(1)(A), (f)(3); Treas. Reg. § 1.170A-4.

273 Treas. Reg. § 1.170A-4(b)(1) (defining ordinary income property to include "a work of art created by the donor").

274 If the artist gives a work of art as a gift to an individual who turns around and donates the art to a museum, the individual's charitable deduction is limited as it would have been for the artist—cost of materials. *See* I.R.C. § 1015(a). However, the work of art is not ordinary income property in the hands of a person who inherits the art from the deceased artist's estate because of the basis step up for inherited property. *See* I.R.C. § 1014(a)(1) (the basis of the artwork would be calculated as its fair market value at the time of the decedent's death). Therefore, if the beneficiary of the inherited art gifts it to a museum, the beneficiary may use the fair market value of the art in calculating the charitable deduction within the applicable percentage limitations discussed *supra* note 268. In addition, an individual who purchases a work of art and later donates it to a public charity may use the full fair market value of the work of art in calculating the charitable deduction within the applicable percentage limitations discussed *supra* note 268. *See* Treas. Reg. § 1.170A-1(c)(1). In both of the latter cases, however, the donation must be made to a qualified charity and the donation must satisfy the "related use" rules, which basically require that the use of the donated property by the charitable organization be related "to the purpose or function constituting the basis" for its tax-exempt status. *See* I.R.C. § 170(e)(1)(B).

> and the underlying copyright to a museum. The artist's income tax charitable deduction is limited to $200—the costs of the materials. Because the artist is required to donate both the work of art and the copyright to qualify for an income tax charitable deduction and because the income tax charitable deduction will be limited to cost of materials, the artist might consider selling the work of art to a collector, retain the copyrights, and donate cash to the museum.

### *2. Gift and Estate Tax Charitable Deduction*

Although authors may receive limited income tax benefits for lifetime donative gifts, authors may receive very favorable gift and estate tax treatment for donative transfers. Generally, gratuitous transfers to qualified charities are unlimited and not subject to gift or estate taxes because of charitable contribution tax deductions.[275] For example, an author may claim a deduction on the estate tax return for the full fair market value of any of the author's created works of art bequeathed to a qualified charity. Moreover, the charitable deduction is not limited to the author's costs of materials, as it is for income tax purposes, and the amount of the deduction is not subject to any percentage limitations, as it is for income tax purposes.[276] Further, where an author makes a charitable contribution of art, the art and the copyright therein will be treated as separate and distinct properties for *estate and gift tax* charitable deductions (unlike how it is treated for income tax purposes).[277] Finally, if the author makes a donative transfer of a self-created work of art and the underlying copyright therein, the author or the author's estate will be entitled to a gift or estate tax charitable deduction if the art and the copyright is gifted and bequeathed to a charitable or public organization described in I.R.C. § 2522(a) or I.R.C. § 2055(a) (which includes private foundations).[278]

There are special rules for attaining a gift or estate tax charitable deduction for certain types of transfers of copyrighted property—specifically the partial interest rules of charitable transfers of copyrighted property.[279] The donative transfer of property must be to a qualified organization, which under I.R.C. § 2055(e)(4)(D) means any organization

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275 *See* I.R.C. §§ 2055, 2522.

276 *See id.*; *supra* note 268.

277 I.R.C. §§ 2055(e)(4), 2522(c)(3). Accordingly, a charitable estate and gift tax deduction is allowed for a transfer of art to a qualified charity whether or not the copyright is simultaneously transferred to the charity.

278 *See* I.R.C. §§ 2055, 2522.

279 *See id.* §§ 2055(e)(4), 2522(c)(3). I.R.C. § 2055(e)(4) sets out the specific rules for donative contributions of partial interests in property, while I.R.C. § 2522(c)(3) merely articulates that rules similar to those under I.R.C. § 2055(e)(4) apply for donative contributions of partial interests in property for gift tax charitable deduction purposes.

described in I.R.C. § 501(c)(3) other than a private foundation.[280] Moreover, to qualify for a charitable deduction under I.R.C. § 2055(e)(4)(D), the use of the property by the donee organization must relate to the purpose or function constituting the basis for the donee organization's exempt status.[281] It is important to note that the requirements for a qualified organization under I.R.C. § 2055(e)(4)(D) are *not* identical to the permissible qualified charities enumerated in I.R.C. § 2055(a).[282] Due to the uncertainty over which provision ultimately controls, there is some uncertainty over which provision ultimately controls obtaining a gift or estate tax charitable deduction, so great care should be taken for any work of art that might be given or bequeathed to an organization that satisfies I.R.C. § 2055(e)(4)(D) but not I.R.C. § 2055(a).[283]

### *D. Artist-Endowed Foundations*

Artist-endowed foundations are one commonly used way for an author to avail himself or herself of the enormous benefits of the gift or estate tax charitable deduction.[284] If an author has an established market for his or her works that can be devoted after the author's death to the administration of a private foundation and its charitable purposes, the author may wish to create a private foundation.

Artist-endowed foundations typically receive works of arts and the underlying copyrights (among other assets) to be used in fostering a public understanding of the author's creative principles, the genre in which the artist worked, and the artist's artistic achievements. Ownership of the author's copyrights is essential if the artist-endowed foundation's charitable purpose is to be realized by programs intended

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280 A private operating foundation is excluded from the definition of private foundation. I.R.C. § 2055(e)(4)(D).

281 I.R.C. § 2055(e)(4)(C). If the author owns both the work of art and the copyright, and the author only wants to make a donative transfer of the work of art (not the copyright), it needs to be to a qualified charity under I.R.C. § 2055(e)(4)(D), and the art must be for a use related to the charity's exempt purpose.

282 *See* I.R.C. § 2055(a), (e)(4)(D).

283 If the author owns both the work of art and the copyright, and the author only wants to make a donative transfer of the work of art (not the copyright), the transfer needs to be to a qualified charity defined under I.R.C. § 2055(e)(4)(D), and the use by the donee organization of the work of art needs to be related to the donee organization's exempt purpose. If the author wants to make a combined donative transfer of both the work of art and its underlying copyright, the author should not need to be concerned with the related use rules. If a donor only owns the work of art (and not the underlying copyright), the donor does not need to be concerned with these issues unless the donor disposed of the underlying copyright in order to avoid the partial interest rules. *See* Treas. Reg. § 20.2055-2(e)(1)(ii)(e); *see also* Treas. Reg. § 1.170A-7(a)(2)(i).

284 For an insightful overview of estate planning issues and tips for artist-endowed foundations, see Christine J. Vincent, *Notes on Estate Planning for Artists Endowing a Private Foundation*, Aspen Inst. (2019), https://www.aspeninstitute.org/wp-content/uploads/2020/01/AEFI-Notes-on-Estate-Planning-for-Artists-2019.pdf [https://perma.cc/4EQN-5RFH].

to increase public access to and knowledge about the author's works.[285] This typically involves activities that require the use and stewardship of copyrights, such as publications, exhibitions, and licensing of images and text.[286]

Termination rights create serious issues for artist-endowed foundations: estate-bumping and complications with the private foundation rules.

### *1. Estate-Bumping*

Termination rights attach to all assignments except those effectuated by an author's Will. Therefore, all lifetime transfers—even donative in nature—may be bumped by the author's statutory heirs if the termination rights do not vest in the author before death.[287] Accordingly, estate-bumping can undermine an author's charitable intent despite the noble gesture of a charitably inclined author.

Unfortunately, the subversion of authors' intent regarding funding a charitable foundation occurs far too often. For example, Ray Charles's children are attempting to exercise their termination rights over the Ray Charles Foundation.[288] Seven children filed notice under the 1976 Act to reclaim ownership rights of songs written or cowritten by Ray Charles.[289] In the 1950s, Charles signed Musician Services Agreements with Atlantic Records, which stated that he was a hired employee who would record songs "subject to Atlantic's approval."[290] These agreements also stated that Atlantic Records would have complete control over Charles, that Atlantic Records owned the recordings produced by Charles, and that Charles would exclusively work for Atlantic Records.[291] Progressive Music Publishing Company, which Atlantic Records owned and controlled, also employed Charles and owned songs that Charles wrote for Progressive.[292] Although Charles renegotiated his agreements in 1980 and began receiving royalties and significant cash payments, the Foundation argued that the change in agreement did not also signal an ownership change.[293] In 2002, Charles wrote agreements with each of his children limiting their inheritances to $500,000.[294] Charles died eighteen months after those agreements were made, and he left all of

285 *See id.* at 5–6.

286 *See id.*

287 *See* 17 U.S.C. § 304(c).

288 Ray Charles Found. v. Robinson, 919 F. Supp. 2d 1054, 1059–60 (C.D. Cal. 2013).

289 *Id.* at 1060.

290 *Id.* at 1059.

291 *Id.*

292 *Id.*

293 *Id.* at 1060.

294 *Id.*

his rights for his works to the Ray Charles Foundation.[295] Ray Charles's children filed thirty-nine copyright termination notices (pursuant to 17 U.S.C. § 304(c)) on a number of individuals and entities interested in Ray Charles's work, including Warner Chappell, which used to be Progressive.[296]

The Foundation moved for declaratory judgment, invalidating the termination notices.[297] The court went on to say that the Foundation had no standing to assert claims seeking to invalidate the defendant's notices of termination because the Foundation is not considered an author, statutory heir owning a termination interest, or a grantee of a transfer.[298] The Ninth Circuit found that the Foundation did have standing, so it reversed the dismissal of the lower court and remanded the case for further review.[299] Although this case was dismissed on a federal standing issue, it still serves as a great example of how estate planning that did not take into account the potential for estate-bumping can result in problems later on and impede the testator's intent to donate to a charitable foundation. In this case, there is a risk that the Ray Charles Foundation will lose some or all of the donation Ray Charles intended to give to it.

### *2. Private Foundation Complications*

Termination rights can also add unintended complexities for a donee charitable organization (or donee charitable split-interest trust) that receives the author's copyrights. For a private foundation (or a charitable split-interest trust), termination rights may create a situation that causes a private foundation (or charitable split-interest trust) to run afoul of the private foundation rules promulgated under I.R.C. §§ 4941 through 4945. Most notably, termination rights may cause a private foundation to run afoul of the prohibition on self-dealing promulgated under I.R.C. § 4941.

The prohibition on self-dealing is probably the most important private foundation provision for authors establishing foundations or charitable trusts. I.R.C. § 4941 imposes an excise tax on certain transactions (acts of self-dealing) between a private foundation (or charitable trust) and certain "disqualified person[s]," including substantial contributors to the foundation, managers of the foundation, and members of the families of such persons, including spouses, children, and grandchildren.[300] The concern with such transactions is the potential for the

295 *Id.*

296 *Id.*

297 *Id.*

298 *Id.* at 1072.

299 Ray Charles Found. v. Robinson, 795 F.3d 1109, 1124 (9th Cir. 2015).

300 *See* I.R.C. §§ 4941, 4946.

misuse of the foundation's funds for the benefit of disqualified persons. An excise tax is imposed on the disqualified person who engages in acts of self-dealing,[301] and a tax may be imposed on the foundation's manager who knowingly participates in self-dealing.[302] Additional taxes may be imposed if the self-dealing act is not corrected.[303] No tax is imposed on the foundation.[304]

The excise tax applies to a number of transactions between a foundation and a disqualified person—sales or exchanges, leases, loans, the furnishing of goods or services, payment of compensation, payments to government officials, and the transfer of private foundation assets.[305] The transaction being fair and reasonable does not insulate the transaction from the prohibition on self-dealing (except in limited instances for reasonable compensation).[306] The tax also applies to certain indirect transactions with disqualified persons.[307]

Disqualified persons are generally (1) persons who are related in some way to the organization and (2) persons who are related to such persons.[308] This includes substantial contributors to the foundation, managers of the foundation, and members of the families of such substantial contributors and managers.

Artist-endowed foundations should pay due caution to these rules. The exercise of termination rights of copyrights that were transferred during the author's lifetime to a revocable trust and then distributed after the author's death to the foundation—as was the intent of the author's estate plan—may inadvertently trigger the excise tax on self-dealing transactions. An author's heirs are deemed "disqualified persons" and prohibited from entering into most business-related transactions with the foundation. A disqualified person exercising his termination right could be labeled as engaging in an act of self-dealing concerning the foundation, which would subject the disqualified person and the foundation's manager to excise taxes. In addition, compensating statutory heirs for declining to exercise the termination rights would be prohibited. Further, if statutory heirs were members of the foundation's governing body, which is not unusual, other questions might arise apart from the private foundation rules. For example, members of a governing body have a fiduciary duty of loyalty, regulated by state attorneys

301 *Id.* § 4941(a)(1).
302 *Id.* § 4941(a)(2).
303 *Id.* § 4941(b).
304 *See id.* § 4941(a).
305 *See id.* § 4941(d).
306 *See id.* § 4941(d)(2).
307 *See id.* § 4941(d)(1).
308 *See id.* § 4946(a) for the definition of disqualified persons for the purposes of § 4941.

general, to act solely in the best interest of the charitable organization.[309] The act of exercising the termination rights to the detriment of the foundation's interests may be a breach of this fiduciary duty.

> *Scenario 8:* Sue, a well-established and wealthy artist, creates a private foundation for charitable purposes, which she names the ABC Foundation. Sue is unmarried and has 3 children. Sue periodically makes lifetime charitable gifts of cash to the ABC Foundation for operating expenses and other charitable purposes. Worried about her lack of estate planning, Sue executes a revocable trust agreement that, upon Sue's death, transfers any and all of Sue's artwork and the underlying copyrights to the ABC Foundation. Sue next executes a Will that specifically bequests any remaining artwork and their underlying copyrights to the ABC Foundation and the residuary of her estate (a very substantial amount) to her children. After the execution of the documents, Sue properly funds the revocable trust with all of her artwork and any and all underlying copyrights (i.e., Sue transfers ownership of the art and copyrights to the revocable trust). Shortly thereafter, Sue dies. Accordingly, the Trustee of Sue's revocable trust transfers all of the art and the underlying copyrights to the ABC Foundation. Sue's children inherit a substantial estate consisting of noncopyright assets. A few scenarios could play out based on Sue's estate planning and copyright laws in place.
>
> First, Sue's children may be able to bump the intended charitable gift to the ABC Foundation and take outright ownership of the copyright interests themselves. Sue's transfer of her copyright interests to the revocable trust was technically a lifetime transfer, not by Will. If Sue dies before exercising her termination rights or before the respective windows to serve termination notices on the various copyrights close, Sue's children may duly serve termination notices and retake the copyrights from the ABC Foundation in addition to the substantial inheritance they already collected. In addition, Sue's bequest under her Will of the copyright interest is useless. At Sue's death, she does not own any copyright interests to bequeath under her Will. Sue had already transferred her copyright interests to the revocable trust. Sue's Will may only dispose of the property she actually owns at her death, which does not include the copyrights. Therefore, nothing will pass to the ABC Foundation under Sue's Will. And, sadly, the copyrights and Sue's estate plan are subject to being bumped.
>
> Second, Sue's children are deemed disqualified persons under the private foundation rules. In light of this, the act of exercising the termination right may be deemed an act of self-dealing by Sue's children. In addition, were Sue's children to be members of the ABC Foundation's governing body, which is not unusual, other questions might

309 *See, e.g.*, John H. Warren III, *Liability for Directors of Nonprofit Corporations*, S.C. Law., Mar. 2017, at 44.

arise apart from the private foundation rules. For example, would the act of exercising the termination right to the detriment of the ABC Foundation's interests be considered a breach of fiduciary duty?

### *E. Valuation*

The U.S. federal government imposes an excise tax at an individual's death.[310] Such tax has come to be commonly known as the "death tax," or "estate tax."[311] Whether a decedent's estate is taxed by the federal government depends on if applicable deductions,[312] gift taxes payable,[313] Applicable Exclusion Amount,[314] and other credits adequately cover the value of the taxable estate. The calculation begins by taking the gross estate value[315] and deducting amounts provided for in the Internal Revenue Code.[316] This provides the value of the taxable estate.

The sum of the value of the taxable estate and adjusted taxable gifts made in life by the decedent provides the tax base of the estate. The tax base is multiplied by the applicable tax rate to find tentative tax due—however, the applicable exclusion amount, gift taxes payable, and amount of other credits available are subtracted from the tentative tax due to finalize the amount of estate tax payable.[317] However, the calculation on finding estate value is subjective and complex. For example, the Estate of Michael Jackson valued Jackson's name and likeness to be $160 million less than the IRS's valuation.[318]

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310 I.R.C. § 2001(a) provides that "[a] tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States."

311 Darien B. Jacobson, Brain G. Raub & Barry W. Johnson, Internal Revenue Serv., The Estate Tax: Ninety Years and Counting 118 (2007).

312 I.R.C. § 2051.

313 *Id*. § 2055.

314 *Id*. § 2010.

315 The gross value of an estate not only includes the value of property owned by the decedent at death but may also include property transferred that still has "strings attached." I.R.C. § 2036(a)–(b) (including transfers with retained life estates or retained control); *id*. § 2037 (including transfers with retained reversionary interests); *id.* § 2038 (including revocable transfers); *id*. § 2041 (including general powers of appointment in favor of the decedent). Other potential inclusions include annuities, joint interests in property, life insurance proceeds, and qualified terminable interest property trusts. *Id*. §§ 2039, 2040, 2042, 2044.

316 Common deductions from the gross estate include marital bequests, charitable bequests, and death taxes paid to a state. I.R.C. §§ 2055, 2056, 2058 (though note that special rules apply to marital bequests where the decedent's spouse is not a U.S. citizen).

317 I.R.C. § 2051.

318 Eamonn Forde, *Death & Taxes: The Michael Jackson Estate, The IRS And Posthumous Celebrity Valuations*, Forbes (May 4, 2021), https://www.forbes.com/sites/eamonnforde/2021/05/04/death--taxes-the-michael-jackson-estate-the-irs-and-posthumous-celebrity-valuations/?sh=2fb0768a4c39 [https://perma.cc/UZE8-JB56]. A deeper dive into valuation for copyrights is beyond the scope of this paper. For in depth analysis of valuation, see generally Leandra Lederman, *Valuation as a Challenge for Tax Administration*, 96 Notre Dame L. Rev. 1495 (2021); Ryan Chapa,

Fortunately for most decedents, this estate tax will not impact their estate because the Applicable Exclusion Amount is currently large enough to cover the vast majority of estates in the United States.[319] However, for those estates which the estate tax still impacts, the tax burden is significant. The tax rates are progressive up to the value of $1,000,000 but switches to a flat 40% tax afterwards.[320] Therefore, it is imperative for individuals with sizeable estates to adequately plan in consideration of these heavy tax implications.

Naturally, some assets are more difficult to value than others. Copyrights have proven to be perfect examples of assets that are problematic in valuation, as their true value is not fully recognized until exploited in full and complications may arise surrounding termination rights. Congress enacted the 1976 Act and instituted protections "allowing creators or their successors to terminate a copyright transfer."[321] Particularly, the 1976 Act provides that the "exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by Will is subject to an immutable right of termination."[322] Because the right of termination is immutable, the right is not subject to alteration and will irrevocably lapse if not exercised within the statutory time period.[323]

One can see why copyrights may be difficult to value, as their maximum value is not always fully realized, but termination rights to such copyrights throw another layer of complexity into the valuation. An illustration of this is found in the present case in the differing valuation of the James Brown Estate. Bauknight has offered the value of the James Brown Estate as a mere $5 million at the date of his death.[324] Pope and Buchanan, the trustees when James Brown's estate federal tax return was filed, valued Brown's assets at about $85 million, largely due to copyright termination rights.[325]

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Comment, *Nothing Is Certain in Life "Except Death and [Then] Taxes,"* 19 Hous. Bus. & Tax. L.J. 308 (2019); Audrey G. Young, *Use of Foreseeable Postmortem Events in Valuing Estate*, 42 Est. Plan. 13 (2015).

319 I.R.C. § 2010(c). Approximately 0.14% of estates pay any estate tax. *Key Elements of the U.S. Tax System*, Tax Pol'y Ctr. (Jan. 2024), https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax [https://perma.cc/UL3S-96NJ].

320 I.R.C. § 2001(c).

321 Ritsick, *supra* note 160, at 48.

322 *Id.* (quoting 17 U.S.C. § 203(a)).

323 *Id.* The termination right must be executed "either 35 years from the date of the transfer or, if the grant covers the right of publication, the earlier of 35 years after publication or 40 years after the execution of the transfer." *Id.*; *see also* 17 U.S.C. § 203(a)(3).

324 Summer, *supra* note 105.

325 Sue Summer, *Unreleased Documents Leave Questions About $90 Million Sale*, Newberry Observer (Mar. 21, 2022), https://www.newberryobserver.com/news/37296/unreleased-documents-leave-questions-about-90-million-sale [https://perma.cc/QFD6-SU9P].

### *F. James Brown's Estate Revisited*

Applying these termination rules to the James Brown Estate, it is clear that the legal woes are far from over. Russell L. Bauknight, the executor of the Brown Estate and trustee of the charitable trust thereunder, relayed to the supreme court of South Carolina that "termination rights is all that this case is about,"[326] though termination rights apply only to Brown's U.S. royalties. The then-Attorney General believed that the termination rights were worth millions of dollars—his valuation expert opined that the termination rights were worth about $8.8 million in 2017.[327] Although there have been many allegations that Bauknight and the Attorney General have purposefully been undervaluing Brown's assets by a substantial margin,[328] it is obvious that the termination rights are of substantial value. It is also evident that Brown's clear and undisputed testamentary intent was to use his assets to fund his charitable trust to provide scholarships for needy children. In addition, it was Brown's intent to disinherit Hynie and his children, other than some token bequests to some of his children and the scholarship money for his grandchildren. However, Brown's testamentary intent has been frustrated and the charitable trust has been harmed because of copyright law intrusion upon donative freedom and estates law.

Because James Brown did not live long enough for termination rights to vest in him, his statutory heirs are entitled to the termination rights. Hynie is not a statutory heir because copyright law looks to state law to define surviving spouse, and the supreme court of South Carolina has held that Hynie was not Brown's spouse.[329] However, Hynie has already profited off termination rights before the Court's decision. Also, Hynie is part of the overall settlement agreement, thereby undermining Brown's wishes. As for the statutory heirs, copyright law will look to Brown's descendants by blood and adoption. Copyright law ignores the significance of whether Brown acknowledged children in the Will or even knew of their existence. In addition, the individual who was identified in the Will as a son but failed the DNA test might not be an heir for copyright termination purposes. The unacknowledged individuals who passed the DNA test, meanwhile, may be considered heirs. Finally, adding another complexity to the Brown estate, because some

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326 *Supra* note 84.

327 *Supra* note 84.

328 *See* Sisario & Knopper, *supra* note 11.

329 The South Carolina Attorney General's 2008 decision to treat Hynie as the spouse of James Brown and to assert that Hynie and her son controlled the right to exercise termination elections despite strong evidence that she was not Brown's spouse was voided by the South Carolina Supreme Court in 2013, but Hynie continued to pursue her spousal claim until 2020 when the supreme court held that she was not Brown's spouse. *See* Wilson v. Dallas, 743 S.E.2d 746 (S.C. 2013); *In re* Estate of Brown, 846 S.E.2d 342, 344 (S.C. 2020).

of Brown's children have died and, therefore the deceased children's termination rights passed to the deceased children's descendants, there are new players involved in the litigation over termination rights.

In addition, termination rights may lead to gamesmanship, alliances, and lawsuits concerning the makeup of the class of statutory heirs, which may undermine the intent of the author. The exercise of termination rights requires an agreement by the majority of interests in the termination rights. This will create family disharmony and substantially increase the already hefty legal fees related to this estate. Moreover, some of the statutory heirs were not part of the settlement agreement and may be aggrieved that they were not compensated as well as others. Yet, despite the settlement agreement and, sadly, Brown's Will, the statutory heirs can terminate any assignments from which the charitable trust could have profited to distribute scholarships to needy children in South Carolina and Georgia.

Beyond the more obvious impact that termination rights have in undermining donative intent, because many authors are charitably inclined like Mr. Brown, termination rights may cause charitable trusts to run afoul of the private foundation rules, as discussed above. Termination rights may inadvertently trigger the excise tax on self-dealing transactions. An author's heirs are deemed "disqualified persons" and prohibited from entering into most business-related transactions with the foundation. A disqualified person exercising their termination right could be labeled as engaging in an act of self-dealing concerning the foundation, which would subject the disqualified person and the foundation's manager to excise taxes. In addition, compensating statutory heirs for declining to exercise the termination rights would be prohibited—though it is unknown if any of Brown's heirs were compensated for declining to exercise their termination rights in the future due to the secret nature of the settlement agreement. Other questions might arise apart from the private foundation rules. For example, members of the charitable trust's governing body have a fiduciary duty of loyalty and a duty to avoid conflicts of interests. Therefore, the secret settlement agreement must have been entered into by the trustee solely in the best interest of the charitable trust.

At the end of the day, termination rights may undermine not only Brown's donative intent but also deprive the charity and the children of South Carolina and Georgia of potential money for scholarships. Simply, the estate-bumping aspects of termination rights destroyed Brown's estate plan.

## Conclusion

As evidenced today with the litigation concerning the James Brown Estate, the injection of copyright law into estate planning has severe

consequences for authors who hold interests in copyrighted works and wish to transfer those interests during their life or upon their death. The exercise of termination rights often has the practical effect of thwarting the well-conceived, well-executed efforts of estate planners and disregarding the intent of testators. In modern estate planning, the ability of a statutorily defined class of heirs to bump a testator's intent has far-reaching public policy implications and has the potential to hinder the use of widely accepted estate-planning techniques. Until the copyright law is revised, only an understanding of termination rights and their potential estate-bumping effects, along with a reasoned approach to estate planning in this context, can help estate planners avoid exposing valuable copyright estates to estate-bumping.

The termination rights exception for transfers made "by Wills" provides an author with a narrow remedy to estate-bumping. Although an author might not be able to take advantage of more sophisticated or beneficial estate planning techniques, at the minimum, an author's Will should specifically address copyrights to take advantage of this safe harbor. Until the uncertainty as to whether the statutory interpretation of the "by Will" exception could be interpreted broadly enough to include Will substitutes like revocable trusts, prudence should lead an author and his or her counsel to deal with copyrights outside of the trust context. Moreover, an author should be cautious concerning any lifetime transfer of a copyright to other testamentary-like instruments, including revocable trusts or charitable trusts, until the permutations of the 1976 Act are better understood or revised. Be forewarned . . . once the copyrights are transferred during the lifetime of the author, a specific bequest under the author's Will may not be enough to insulate the copyrights from the frustrating effects of estate-bumping.