

2000

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Original Citation

Michael Henry Davis, The Screenwriter's Indestructible Right to Terminate Her Assignment of Copyright: Once a Story is 'Pitched' a Studio Can Never Obtain All Copyrights in the Story, 18 Cardozo Arts & Entertainment Law Journal 93 (2000)

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THE SCREENWRITER'S INDESTRUCTIBLE RIGHT TO TERMINATE HER ASSIGNMENT OF COPYRIGHT: ONCE A STORY IS "PITCHED," A STUDIO CAN NEVER OBTAIN ALL COPYRIGHTS IN THE STORY

BY
MICHAEL H. DAVIS*

INTRODUCTION

It is probably not quite fraud, though it comes terribly close to it, when motion picture and television production companies convince their writers to part with the rights to their stories when they sign with the companies. Despite contracts that claim the writer has no rights to the resulting script (either because the author has assigned his rights "in perpetuity" or because he has agreed to produce a "work for hire"¹), U.S. copyright law provides many authors, perhaps the vast majority of them, with a future right that cannot be lost and can always be regained, irrespective of any written contract to the contrary.² This is, of course, the termination right,³ which provides that approximately thirty-five years after an initial

* Professor of Law, Cleveland State University College of Law, co-author, *Intellectual Property* (West 1992). The author would like to thank Jim Kay, of the Writers Guild of America, for his selfless assistance, although especially in this case it is necessary to state that none of the views expressed in this article are necessarily shared by him.

¹ A "work made for hire" is —

(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 sound recording, 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. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101 (1997 & Supp. 1999), *amended by* Intellectual Property and Communications Omnibus Reform Act of 1999 § 1011, S. 1948, Pub. L. No. 106-113, 113 Stat. 1536 (1999).

² This is the express language of the statute: "notwithstanding any agreement to the contrary." *Id.* § 203(a)(5); *see also infra* text accompanying note 18.

³ *See* 17 U.S.C. § 203. *See also id.* § 304(c).

assignment the writer has the right to completely terminate that assignment, even if the assignment contains provisions and qualifications to the contrary.⁴

Admittedly, not every writer possesses such a termination right. But the number of writers who do is immensely larger than the studios would like to admit, or are even willing to admit.

Simply put, any writer who presents a written treatment in any form—from the quick “pitch” to the more complex synopsis⁵ to what might amount to a complete screenplay—before actually receiving a commitment from his prospective employer, will have the right to terminate his assignment of rights to that treatment thirty-five years later.⁶ Perhaps most importantly, even if the studio only receives an oral “pitch,” the author can never lose his right to terminate copyright in the underlying story as long as he committed the story to tangible form⁷ (at his home or office, for instance) before delivering the “pitch.”⁸ This is because any resulting script, most likely performed for the studio under a “worker for hire” contract, is nothing more than a derivative of the original treatment.⁹ While it is true that the studio will retain rights to the script, if written as a work for hire, and will thus be the “author” of that script, the studio’s rights will be limited to the script and any spin-offs produced during the thirty-five year period.¹⁰ The writer can regain the right to create other works based on his original treatment, as well as all related rights connected with the original treatment.

This would not be particularly remarkable (because the termi-

⁴ The statute is quite clear about this. See *infra* note 10; *infra* text accompanying notes 15, 16, 23, and 50. Cf. *infra* note 11.

⁵ Apparently, the Copyright Office might be less than willing to register a synopsis. “To be acceptable for copyright registration in unpublished form, a script must be more than an outline or synopsis.” COPYRIGHT OFFICE, LIBRARY OF CONGRESS, CIRCULAR 47, RADIO AND TELEVISION PROGRAMS (1973), cited in Camilla M. Jackson, “I’ve Got This Great Idea for a Movie!” A Comparison of the Laws in California and New York That Protect Idea Submissions, 21 COLUM.-VLA J.L. & ARTS 47, 49, n.14 (1996). But refusal to register is not a bar to either copyrightability or most infringement remedies. See 17 U.S.C. § 411(a). See also *Gucci Timepieces Am., Inc. v. Yidah Watch Co.*, 47 U.S.P.Q.2d 1938 (C.D.Cal. 1998).

⁶ Thirty-five years is an approximation, since the five-year statutory window during which termination can be exercised is linked to one of two dates: the date of assignment, or the date of publication (if any), whichever is earlier. See 17 U.S.C. § 203(a)(3).

⁷ Tangible forms include a written treatment, or as is typically the case, a series of index cards, or even an audio tape.

⁸ The “pitch” is an oral, shortened version of the story the author has written that he presents to studio executives when he attempts to sell the story to the studio for production.

⁹ See 17 U.S.C. § 101 (defining “derivative work”).

¹⁰ The statute contains a kind of savings clause that protects an assignee from losing, due to an author’s exercise of the termination right, the right to continue to use those derivatives that have already been prepared by the assignee. See 17 U.S.C. § 203(b)(1).

nation right has been part of our copyright law since 1976) except that motion picture and television studios and production houses have tried mightily to defeat the termination right and to convince writers, their labor organizations, and through them, the public,¹¹ that writers have no such termination right when they work as "workers for hire."¹² However, as long as the writer has prepared some kind of written summary or treatment prior to being hired by the studio, such studio claims are false. The rest of this article explains why this is so, how the studios have attempted to foreclose the termination right, the possible limits and implications of the writer's termination right in that context, and the likely economic and social effects of a greater awareness of the termination right by writers and studios.

I. THE TERMINATION RIGHT

The 1976 Copyright Act¹³ was, in many respects, a completely new statute. At least formally, it neither pretended nor attempted to build on the 1909 Act.¹⁴ Among many other provisions, the termination right was conceived as a new approach to an old problem—the tendency of young writers to sell their manuscripts far too cheaply, before time and growing reputations could enhance their bargaining positions.¹⁵ Under the termination right, any author who sells rights (such sales being assignments) to his work of authorship retains an indefeasible right to terminate such assignments approximately thirty-five years later.¹⁶ Congress was protec-

¹¹ New "must buy" items are on Manhattan sidewalks these days, where busy corners teem with merchants selling children's books, sunglasses and knockoff designer watches. They are movie scripts, "guaranteed authentic" by a man named Vlady. . . .

Vlady said no one has raised any serious objections, and people who have worked on the films he stocks have been among his customers. That may be because authors retain no copyright claims to scripts once studios have purchased and produced them, said Vito Turso, a spokesman for the Writers Guild of America, East.

Bernard Stamler, *Neighborhood Report: New York Up Close; Screenplays Join 'Rolexes' As Sidewalk Fare*, N.Y. TIMES, Nov. 2, 1997, § 14, at 6.

¹² See *infra* Parts IV.A.–B.

¹³ 17 U.S.C. §§ 101-1332 (1994 & Supp. 1999).

¹⁴ Copyright Act, ch. 320, 35 Stat. 1075 (1909).

¹⁵ The statutory history indicates that this, among other reasons, was the intent of Congress. "Congress wanted to give [the author] an opportunity to benefit from the success of his work and to renegotiate disadvantageous bargains . . . made at a time when the value of the work [wa]s unknown or conjectural and the author . . . is necessarily in a poor bargaining position." SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE OF THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDIES PREPARED PURSUANT TO S. RES. 240, RENEWAL OF COPYRIGHT, STUDY NO. 31, at 125 (Comm. Print 1961) (Barbara Ringer).

¹⁶ See 17 U.S.C. § 203(a)(3).

tive of the author's right to terminate, and expressly stated the intent that no matter what a prospective purchaser might do, the author could not lose his right to terminate.¹⁷

Explained briefly, the 1976 Act establishes an indefeasible right in the author to cancel any and all assignments. Section 203 provides:

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

....

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

....

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of termination. Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

....

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this

¹⁷ "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." *Id.* §§ 203(a)(5), 304(c)(5).

title.¹⁸

Though the termination right appears somewhat radical and certainly paternalistic, it is not such a complete departure from preceding law.¹⁹ In its effort to regulate the ability of an author to imprudently assign all of his rights, it certainly departs from the Anglo-American tradition of freedom of contract, which is intimately a part of the laissez-faire economic traditions and all the political implications that freedom of contract connotes. But it is not the first copyright measure to attempt to prevent such imprudent assignments.²⁰ The 1909 Act incorporated a similar approach by providing for two terms of copyright protection. The second term, which was renewable by the author, was intended to allow the author to recapture a copyright that the author may have improvidently assigned during the first term.²¹ However, as is generally recognized, publishing practices and judicial decisions eventually undermined that scheme so that an author was allowed to assign, along with the first term, the rights to the renewed term.²² In effect, publishers, being no fools, routinely purchased both terms. The 1976 Act was written with that failure in mind, and as a result specifically states that the termination right is to be unaffected by any agreement to the contrary, including an agreement "to make a will or to make any future grant."²³

The scope of this discussion does not include the detailed procedures required in order to effectuate the termination right, nor does it include the many situations in which more than one person's consent may be necessary to terminate, such as in the case of multiple co-authors, or after death, when various family members have statutory rights to terminate. Also not treated here are works originally subject to the 1909 Act, to which authors were granted a termination right to the extent that those 1909 works still enjoyed copyright at the time the 1976 Act entered into force. Aside from those procedural details not addressed here, however, there are

¹⁸ *Id.* § 203.

¹⁹ See Copyright Act (1909) (codified as amended at 17 U.S.C. § 24 (1976)).

²⁰ See *id.*

²¹ See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 653 (1943) (citing legislative history of the 1909 Act); Copyright Act, ch. 320, § 24, 35 Stat. 1075 (1909) (current version at 17 U.S.C. § 24 (1994)).

²² See *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960); *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). See also *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir. 1950) (holding that unless an assignment of copyright includes the renewal term, the assignment term is that of the original copyright).

²³ 17 U.S.C. § 203 (1997).

several central features of the termination right which must be understood.

First, although an author may terminate any and all assignments, termination does not affect the right of an assignee to continue to exploit whatever derivative works were actually prepared under the grant prior to termination.²⁴ This was expressly intended to avoid the somewhat uncoordinated results under the 1909 Act, which the United States Supreme Court interpreted as allowing authors to be defeased of their rights to the renewal term by assigning them.²⁵ The Court did not hold that derivative works would be protected in any and all circumstances from an author, or notably an author's estate, who did in fact recover the renewal term.²⁶ To prevent the apparent inequity of a derivative work owner losing rights to a heavily-invested exploitation, the 1976 Act protects completed derivative works from being unseated.²⁷

This is not a minor detail. It means that an author, although newly possessed of his copyrights thirty-five or so years after originally assigning them may have rights of very little value. To the extent that previously-prepared derivative works have exhausted the market, an author who has terminated the assignment of his copyrights may not be able to commercially profit from them. On the other hand, the limits of "prepared" derivative works leave the author many possibilities. For instance, in theory, any number of spinoffs, sequels, or character developments are possible. This is because although the derivative work is safe from the author's termination rights, to the extent that the underlying preexisting work was well-developed and to the extent that the derivative work is truly based upon the underlying work, the author, having regained copyright in that work, has the right to create, or license others to create, new derivative works based on the original work.

On the other hand, there will no doubt be severe, perhaps even fatal, limits upon the author's freedom to exploit the underlying work to the extent that the prepared derivative work(s) adopted new character names, a new title, and, especially, to the extent new matter was added. A canny producer might succeed in limiting the author's freedom by creating during the rewrite process names, titles, and other matter to which public recognition attaches. Such new expressive features, created within the work-

²⁴ See *id.* § 203(b)(1).

²⁵ See *Stewart v. Abend*, 495 U.S. 207, 220 (1990); *Miller Music Corp. v. Daniels, Inc.*, 362 U.S. 373, 375 (1960); *Fisher Co. v. M. Witmark & Sons*, 318 U.S. 643, 645 (1943).

²⁶ See *Stewart v. Abend*, 495 U.S. 207 (1990).

²⁷ See 17 U.S.C. § 203(b)(1).

for-hire relationship, become parts of the specially commissioned work for hire.²⁸

Second, although an author can terminate any and all assignments, and as a result, renegotiate such assignments if he wishes, the effect of the termination procedures is that such an author cannot renegotiate an assignment with anyone other than the original assignee until after termination is effective.²⁹ Since termination cannot be effected without at least a two-year notice, this amounts to a two-year right of first refusal that the first assignee enjoys despite being potentially terminated.

Third, and probably most importantly, it must be repeated that works for hire are not subject to the termination right.³⁰ As a result, most of the battles over termination rights will probably involve attempts to characterize a work as one for hire, thus depriving the author of any right to terminate.

A. "Spec" Materials

To understand how an author could have a work of authorship in which he possesses a termination right when he has been commissioned to produce a work for hire (which, as a matter of law, has no termination right), one must understand the mechanics and terminology of the writing industry. Full-length, finished screenplays start out as something less, or at least something different. Where a screenplay derives from a clearly separate and preexisting work of authorship, such as a novel, short story, or even magazine article, there should be no question that the author of that underlying work possesses an eventual termination right in that underlying work. But more often, screenplays find their ori-

²⁸ As a counseling matter, canny authors and their canny attorneys would be well-advised to insist that as many identifying details as possible from the author's original treatment (such as names, which might be readily accepted, and titles, which are often much more contentious and subject to marketing decisions) appear in the final work so that the author will have more to claim upon termination.

²⁹ The Copyright Act provides:

A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

Id. § 304(c)(6)(D). As will be seen later on, this is a rather important feature of the termination right, especially as it affects industry attempts to circumvent the right. See *infra* text accompanying note 121.

³⁰ By the statute's express terms, the termination right applies only to "any work other than a work made for hire." 17 U.S.C. § 203(a).

gin in a verbal presentation to studio executives. Here, the author presents his "pitch," or shortened version of the proposed work, to the studio. Usually, the author has already prepared his work in some written format, most often in the form of three-by-five index cards.³¹ The most common form is the "step outline," in which the story is told in steps using huge stacks of file cards, sometimes several hundred per stack.³² An alternative is what is currently termed a "treatment," which some consider a mere outline, consisting of ten or twelve pages.³³ What others consider a more traditional "treatment" may amount to as many as 100 double-spaced typewritten pages, but this appears to be a thing of the past.³⁴ One standard industry reference work defines a treatment as "typically 20-40 pages long with plot, characters, locations and samples of dialogue"³⁵ "In the studio system of the 1930s to the 1950s when producers ordered treatments from writers, they were often two hundred to three hundred pages long. The strategy of studio writers was to extract the screenplay from a much larger work so nothing would be overlooked or unthought."³⁶

The fact that authors who create a written version before being commissioned retain a termination right in the final screenplay would not be important were it not for the fact that the vast majority of motion pictures find their start in that way. In 1997, the major motion picture studios produced 146 films.³⁷ Only seven were the product of in-house development.³⁸ Of the remaining 139 films, sixty-two were from "spec scripts."³⁹ Most, if not all, of the writers of those scripts probably believe, and their contracts cer-

³¹ See ROBERT MCKEE, STORY 412 (1997).

³² See *id.*

³³ See *id.* at 414-15.

³⁴ See *id.* at 415 (noting that during the days of the studio system, treatments were "often two hundred to three hundred pages long").

³⁵ Alexander Lindsey, *Lindsey on Entertainment, Publishing and the Arts* (MB) Form 8-1 cmt. 2, at 8-20 (Mar. 1995).

³⁶ MCKEE, *supra* note 31, at 415.

³⁷ See Dan Cox, *H'Wood Hunts 'The Great Idea'*, VARIETY, Feb. 1998, at 1.

³⁸ See *id.*

³⁹ See *id.* The remaining unaccounted for difference between the 146 total films and 62 "spec scripts," 17 "pitches" and only seven "in house" projects, is explained by the fact that a great number of scripts fall under other categories which, though not "in house" are also not, strictly speaking, "spec" projects. These include, for instance, films based on books, articles (a large number and tremendously profitable), and cartoons (which, though small in number, were tremendously profitable in 1997). For purposes of this article, however, it is central to understand that virtually all, if not all, of those other projects, precisely because they are not "in house," may involve underlying works to which the original author may have termination rights. In other words, with the exception of the seven "in house" projects, the studios may lose rights to the underlying works for nearly all their other films in 35 years.

tainly claim, that they sold “all rights” to the studio.⁴⁰ A full twelve percent—seventeen or so—of that year’s films were the products of “pitches” to studio executives, and those films brought in fifteen percent of the year’s revenues.⁴¹ Whether the issue is “spec” scripts in general or “pitches” specifically, authors will eventually own the rights in the underlying works for an impressive majority of all films made, thirty-five years hence, if 1997 is any example of how the film industry works over time. And, there is no reason to think these figures are unrepresentative.

The situation in the television industry seems similar:

During 1988 there were 8,000 to 10,000 pitches at CBS for movies of the week; fifty movies were made, slightly less than the year before. When an author goes in to pitch a movie for television, it would be effective if he left behind a page the network executive could refer to, even though it’s against Writers Guild regulations. (It’s considered speculative writing.) Usually, in a pitch meeting, the executive has a secretary or assistant take notes, then type them up for later reference.⁴²

In terms of the actual process of submitting a “spec” script, there are a wide number of possibilities, but they generally fall into a relatively small number of standard industry categories. Perhaps the most common is the “pitch” whereby a very condensed version of a story is presented to a studio representative in a rather short amount of time.⁴³ On the other hand, the “pitch” is often presented using standard index cards upon which the author has arranged the entire story line, character development, scenes, and even occasional dialog.⁴⁴ Whether prepared first on three-by-five cards, in outline form, or by some other method, it appears certain that the “pitch” contains enough material beyond mere ideas to constitute a copyrightable work of authorship. In one form or another, by the time the author presents his “pitch” to the studio, he has already developed the following elements: story line, plot, characters complete with biography, dramatic conflict, and resolu-

⁴⁰ See *infra* Part IV.

⁴¹ See *id.*

⁴² SYD FIELD, *SELLING A SCREENPLAY: THE SCREENWRITER’S GUIDE TO HOLLYWOOD* 177 (1989). The reader should note that in this situation, even if the author had not fixed the story in writing or otherwise, the acts of the secretary here would constitute the authorized fixation necessary to secure the author’s copyright and corresponding termination right. See 17 U.S.C. § 101.

⁴³ See FIELD, *supra* note 42, at 136; MCKEE, *supra* note 31, at 413-14. *Buchwald v. Paramount Pictures, Corp.* is a good example in which a three-page “treatment” was used for the “pitch.” See 13 U.S.P.Q.2d (BNA) 1497 (Sup. Ct. Cal. 1990).

⁴⁴ See FIELD, *supra* note 42, at 136.

tion.⁴⁵ As one industry guide for authors states, "You've got to put in the time and structure your idea, outlining the action and building the character into a narrative story line with beginning, middle, and end."⁴⁶

It appears that the elements of story and character presented in the typical "pitch" have more than enough specificity, or substantive expression, to pass any test of copyrightability.⁴⁷ And, although copyrightability and infringement are separate concepts, it is clear that the typical "pitch" contains enough to support a later claim of infringement as well.

Hand's suggestion that a number of different patterns at different levels of abstraction will fit any work must be combined with Chafee's suggestion that the operative pattern for purposes of determining substantial similarity is one that is in some degree abstract (omitting dialogue, minor incidents, possibly setting, etc.), but is nevertheless sufficiently concrete so as to contain an expression of the sequence of events and the interplay of the major characters.⁴⁸

Since the typical "pitch" appears to satisfy the test of having "an expression of the sequence of events and the interplay of the major characters" sufficient to support an infringement claim, there seems little question, except in the case in which nothing was ever fixed in tangible form (whether on three-by-five cards or otherwise), that, when a studio commissions a screenplay from a "pitch," the underlying pitched story upon which the eventual screenplay is based will be subject to the author's termination right thirty-five years later.

B. *The 1976 Act and the Previous 1909 Act*

An understanding of how the paternalistic termination right is intended to operate can best be gained by examining its roots in the earlier, 1909, copyright statute.⁴⁹ The termination right is simply a more heavily armored, arguably less ambiguous, and much

⁴⁵ See FIELD, *supra* note 42, at 145.

⁴⁶ *Id.*

⁴⁷ It certainly passes Learned Hand's famed abstractions test, in which copyright is only lost when so much is abstracted out of a screenplay or play script that all that is left is mere idea. See *Nichols v. Universal Pictures Co.*, 45 F.2d 119 (2d Cir. 1930).

⁴⁸ See 4 NIMMER ON COPYRIGHT § 13.03[A][1][b], at 13-32.1 to 13-32.2 (1999 ed.) (citations omitted). Chafee's test is an attempted improvement upon, or modification to, the Hand abstraction test. "Judge Hand stated that there was no set principle as to when copying goes beyond ideas to their expression. Professor Zechariah Chafee, starting with the abstractions test, attempted to define such a principle." Michael L. Sharb, *Getting a "Total Concept Feel" of Copyright Infringement*, 64 U. COLO. L. REV. 903, 912 (1993).

⁴⁹ Copyright Act, ch. 320, 35 Stat. 1075 (1909).

more infeasible variation of what the 1909 Act attempted to do through the creation of a pair of twenty-eight year copyright terms. The second term was intended to revert to the author in order to accomplish the same goals as the present termination right, namely, to protect authors from improvident bargains they might reach early in their careers, and collaterally, to allow for the prospect that works of authorship might skyrocket in value far beyond their author's wildest (and earliest) predictions.⁵⁰ That plan, however, was abruptly aborted by a rather infamous Supreme Court decision, *Fred Fisher Music Co. v. M. Witmark & Sons*,⁵¹ in which the Court rejected the clearly paternalistic motives of the 1909 Act in favor of its own latter-day affection for the principles of autonomy, capitalism, and the free enterprise system, saying—probably somewhat disingenuously—that it was not for the Court to “import into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others.”⁵²

It was *Fisher*, in fact, that Congress directly addressed in creating the termination right.⁵³ The Supreme Court had earlier recognized, in *Fox Film Corp. v. Knowles*⁵⁴ that the author had a separate proprietary interest in the second term, which was designed to remediate hasty sales by imprudent and often inexperienced authors. *Fisher* held that the second term was nevertheless defeasible by an author who exercised his power to assign the right to register the second term in the assignee's name.⁵⁵ In other words, under *Fisher*, publishers could obtain from an author not only all rights in the author's first term, but also an enforceable contractual obligation to assign to the publisher the second term as well.⁵⁶

The 1976 Act is designed to prevent such erosions of the au-

⁵⁰ See *Fox Film Corp. v. Knowles*, 261 U.S. 326, 327 (1923).

⁵¹ 318 U.S. 643 (1943).

⁵² *Id.* at 657.

⁵³ See SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. OF THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDIES PREPARED PURSUANT TO S. RES. 240, RENEWAL OF COPYRIGHT, STUDY NO. 31, at 160-63 (Comm. Print 1961) (Barbara Ringer).

⁵⁴ 261 U.S. at 327.

⁵⁵ “Concededly, the author can assign the original copyright and, after he has secured it, the renewal copyright as well.” *Fisher*, 318 U.S. at 645.

⁵⁶ This power to assign the second term to the publisher was later held to be qualified by the requirement that the author be alive at the time of expiration of the first term. See *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *Stewart v. Abend*, 495 U.S. 207 (1990). It is doubtful that the *Fisher* court gave this sufficient attention, but by the time the issue became viable, the Court seemed far more sympathetic to authors and their families, and less so towards publishers. As a result, an exception to the *Fisher* holding was eventually recognized, but with arguable significance in practical economic terms, since except for the possibility of the author's death, publishers could be relatively assured of receiving all possible copyright. More importantly, as a result of *Fisher*, authors lost the admittedly paternalistic protections originally intended.

thor's future right to terminate, and to assure that "[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."⁵⁷ The Act's language is sufficiently broad and clear to prevent another decision similar to *Fisher*, and is unambiguously a "denial to authors of the freedom to dispose of their property" decried by that Court.⁵⁸ The intent of Congress has been respected so far. However, the provision creating the termination right was enacted into law in 1978, and the right does not mature until thirty-five years after initial assignment. Therefore, there has not yet been a substantial amount of litigation on this issue. With the exception of a few cases that have gnawed at the farthest peripheries of the termination right,⁵⁹ it is not clear that the termination right will be respected. In fact, the disaster of *Fisher* may well be repeated. Corporate hope apparently springs eternal from the lawyer's breast. An examination of recent screenwriter agreements evidences either an apparent ignorance of the termination right or an irrepressible belief that it can be defeated again.

II. DERIVATIVE WORKS AND THE TERMINATION RIGHT

As noted above, the exercise of a termination right does not remove the rights to already prepared derivative works.⁶⁰ This feature of the termination right was expressly adopted to avoid the result of the "broad interpretation" in *G. Ricordi & Co. v. Paramount Pictures, Inc.*⁶¹ Under this interpretation, the assignment of a renewal right to the producers of a derivative work would not be effective if the author died before the renewal occurred; this is because the renewal right had not yet vested in the author. Upon his death, his heirs, who would not be bound by the assignment, could renew free from any encumbrances.⁶² The heirs could then, in theory, sue and enjoin the derivative work from further infringements of the renewed copyright term,⁶³ since they would own the renewal period without being subject to any assignments.

⁵⁷ 17 U.S.C. § 203(a)(5) (1997). See also *id.* § 304(c)(5).

⁵⁸ *Fisher*, 318 U.S. at 657.

⁵⁹ For instance, courts have debated whether the written instrument evidencing the agreement—required to create as well as evidence a work for hire (which is immune from the termination right)—must exist at the time of agreement. See *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992).

⁶⁰ See 17 U.S.C. § 203(b)(1).

⁶¹ 189 F.2d 469 (2d Cir. 1951). See *Mills*, 469 U.S. at 183-84 (White, J., dissenting).

⁶² "A copyright renewal creates a new estate, and the few cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright." *Ricordi*, 189 F.2d at 471.

⁶³ See *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

The general view by both courts and commentators⁶⁴ was that derivative works were not protected in the event of an author's premature death. In connection with the drafting of the 1976 Act, the former Register of Copyrights testified that derivative works were subject to such attack.⁶⁵ In *Mills Music, Inc. v. Snyder*, the Supreme Court implied that "the broad interpretation" of *Ricordi* might have been an overreaction.⁶⁶ However, the case cited by the Supreme Court⁶⁷ was not decided until after the 1976 Act was promulgated. Thus, one may conclude that the 1976 Act alone caused one court to rethink the arguably draconian treatment that the 1909 Act was earlier thought to give to derivative works. However, such a position is tenable, since an equally prestigious circuit issued a contrary decision two years later, well after the 1976 Act had been fully enacted.⁶⁸

Despite the opinion in *Mills*, it seems clear that the relative clarity of the derivative works exception was both necessary and desirable. Regardless, the new 1976 Act, in adopting the termination right, included the following derivative works exception:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.⁶⁹

The effects of the above provision upon a terminating author are extremely important. If the existing derivative works have exhausted the possible economic value of the copyright, the termination right gives the author very little value. However, the likelihood that existing derivative works truly exhaust the copyright's value are very slim. The fact that studios have tried their best to nullify termination rights⁷⁰ is the best indication that those

⁶⁴ See Seymour M. Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 43 (1955); Melniker & Melniker, *Termination of Transfers and Licenses Under the New Copyright Law*, 22 N.Y.L. SCH. L. REV. 589, 612 (1977); Note, *Derivative Copyright and the 1909 Act—New Clarity or Confusion?*, 44 BROOK. L. REV. 905, 928 (1978).

⁶⁵ See SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE OF THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDIES PREPARED PURSUANT TO S. RES. 240, RENEWAL OF COPYRIGHT, STUDY NO. 31, at 69 (Comm. Print 1961) (Barbara Ringer).

⁶⁶ See *Mills*, 469 U.S. 153, 183 n.7 (White, J., dissenting).

⁶⁷ See *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977) (adopting the more preferable "narrower interpretation").

⁶⁸ See *Russell v. Price*, 612 F.2d 1123 (9th Cir. 1979).

⁶⁹ 17 U.S.C. § 203(b)(1) (1997).

⁷⁰ See *infra* Part IV.B.

with the expertise to judge whether they have anything to lose have answered, *sotto voce*, in the affirmative.⁷¹

III. FOREIGN COROLLARIES TO THE TERMINATION RIGHT

Textually speaking, there seems to be no corollary in other legal systems to the U.S. termination right. In an ongoing phenomenon, the U.S. has been remarkably slow in adopting standards that have been international for decades.⁷² Most other countries had a very long copyright term, either lifetime or lifetime plus some amount of years, while the U.S. was still engaged in the dual twenty-eight year terms specified by the 1909 Act.⁷³ It is only in the last two decades that we have adopted provisions shared by most other countries, and our assimilation is merely due to our desire to become party to the Berne Convention, which demands a term dependent upon the lifetime of the author.⁷⁴ Notably, we have yet to truly comply with one particular and important requirement of Berne that most resembles the termination right; namely, moral rights.⁷⁵

Termination rights are effectively the U.S. corollary to moral rights. The one distinguishing factor of moral rights is that they are not economic rights by definition. Moral rights cannot be transferred, assigned, or alienated in any way.⁷⁶ The essence of moral rights is that the author cannot be defensed of them.⁷⁷ Because some authors, to the extent they had not conveyed away these rights, could make claims sounding in defamation, contract, or even trademark law, the U.S. claimed it had the equivalent of

⁷¹ Record producers recently succeeded in adding their category, sound recordings, to the small list of specially commissioned works (from which the termination right can be excluded) that are eligible for work-for-hire status, underlining the obvious importance of the issue to the entertainment industry. See Intellectual Property and Communications Omnibus Reform Act of 1999, § 1011, S. 1948, Pub. L. No. 106-113, 113 Stat. 1536 (1999) (amending 17 U.S.C. § 101).

⁷² See William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 668 (1996).

⁷³ See *id.*

⁷⁴ See *id.* at 669.

⁷⁵ In fact, the termination right resembles quite strongly, in a formal sense, the continental moral right that authors have over a transfer when the work has been treated, or mistreated, in certain ways. See Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 388 (1993).

⁷⁶ See Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 480 (1968).

⁷⁷ "[I]t is 'perpetual, inalienable, and imprescriptible,' and can be donated to the author's heirs by succession and to third parties by testament." Dane S. Colino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935, 941 (1995).

moral rights when it joined Berne.⁷⁸ However, the unanimous judicial position had long been that the U.S. had nothing similar to moral rights.⁷⁹ One is hard pressed to find any rights belonging to authors that cannot be assigned or waived, except for the termination right.

It is paradoxical that the one so-called moral right incorporated into our copyright law, entitled the "Visual Artists Rights Act of 1990,"⁸⁰ adopted after and in response to our accession to the Berne Convention as a gesture toward our claim that we possess moral rights, is not necessarily a true moral right. Authors can transfer the rights granted by the Act, which is exactly what authors cannot do with a true moral right.⁸¹ The termination right is, however, a kind of moral right. It cannot be transferred or assigned "notwithstanding any agreement to the contrary."⁸²

IV. THE SCREENWRITER'S STATUS

Whether an author has a termination right at all depends upon whether he is a worker for hire. The worker for hire category,⁸³ designed specifically to exclude the possibility of a termination right, potentially embraces screenwriters on two, but only two, bases.

The first basis applies to an employee.⁸⁴ A screenwriter who is employed by a studio, and who writes a script for the studio in the course of such employment, has no termination right.⁸⁵ However, the Supreme Court has held that whether an author is an employee for purposes of worker for hire status is not determined simply by the agreement made between the author and the employer.⁸⁶ Instead, it is a substantive test that inquires into the conditions of employment. To be a worker for hire without a termination right requires that the employee satisfy the classic tests of the master-servant relationship "using principles of general com-

⁷⁸ See *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties and Admin. of Justice of the House Judiciary Comm.*, 100th Cong. 409 (1988); see also *Berne Convention Implementation Act of 1987: Hearings of the Senate Comm. on the Judiciary*, 100th Cong. 535-36 (1988).

⁷⁹ "The Copyright Act provides no recognition of the so-called *droit moral*, or moral rights of authors. Nor are such rights recognized in the field of copyright law in the United States." *Gilliam v. ABC*, 538 F.2d 14, 26 (2d Cir. 1976).

⁸⁰ 17 U.S.C. § 106A (1987).

⁸¹ See 17 U.S.C. § 201(d) ("Any of the exclusive rights comprised in a copyright . . . may be transferred . . ."). Cf. *supra* note 76 and accompanying text.

⁸² 17 U.S.C. § 203(a)(5).

⁸³ See *id.* § 101.

⁸⁴ See *id.*

⁸⁵ The termination right is not applicable to a worker for hire. See *id.*

⁸⁶ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

mon law of agency,”⁸⁷ such as whether the employer dictates the terms and details of the work, whether the employee works a scheduled number of hours and days determined by the employer, whether the employee is provided the tools and place of his employment by the employer, and similar well-known factors.

Although the studio writer of the 1930s might have satisfied some of those factors, the modern screenwriter clearly does not work under such conditions. The modern screenwriter is an independent contractor who works in his own office or home, by his own schedule, and determines almost all the details of his work.⁸⁸ Such an independent contractor cannot be a worker for hire under the employee test.

The second basis is that of the specially commissioned work.⁸⁹ Not all specially commissioned works are included within the work for hire definition. Rather, under the 1976 Act, an infinitesimally small list of potential specially commissioned works are eligible to be treated as works for hire.⁹⁰ For instance, one example that would not be included is a specially commissioned portrait. Thus, painters who produce such works can never be deprived of their right to terminate their copyrights in these works of authorship. The drafters of the 1976 Act were, therefore, subjected to strong industry pressure during the drafting process to include certain categories of works in the work for hire definition. The success of the motion picture lobby is evident, because motion pictures were included in the list of possible specially commissioned works.⁹¹ It is thus clear that if the appropriate procedures and requirements are honored, screenwriters can be specially commissioned so that they do not have termination rights.

⁸⁷ *Id.* The Court explained that the worker for hire status is to be determined by ascertaining:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 751-52.

⁸⁸ The studio system ceased to exist around 1950, and with it so did the idea of writers who were actually full-time employees working on the lot. See McKee, *supra* note 29, at 415.

⁸⁹ See 17 U.S.C. § 101 (defining “work for hire”).

⁹⁰ See 17 U.S.C. § 101; *supra* note 1.

⁹¹ See 17 U.S.C. § 101. There were originally nine categories of works that could qualify as specially commissioned works for hire. On November 29, 1999, sound recordings were added as an additional category. See Intellectual Property and Communications Omnibus Reform Act of 1999, § 1011, S. 1948, Pub. L. No. 106-113, 113 Stat. 1536 (1999) (amending 17 U.S.C. § 101). See also *supra* note 1.

Among those requirements, however, is that the work be produced pursuant to the commission, and not prior to it.⁹² It is not possible for a work already existing (and therefore already subject to a termination right that cannot be lost “notwithstanding any agreement to the contrary”) to be converted into a specially commissioned work.⁹³ Any agreement subsequent to the work’s creation to convert it into a work for hire would constitute exactly the “agreement to the contrary” that section 203 forbids.⁹⁴ Clearly, once a work is produced by an author, copyright subsists in it from the moment of fixation,⁹⁵ complete with its termination right, and it cannot thereafter become a specially commissioned work.

Thus, pursuant to section 101, the only way a screenplay can become a work for hire is if it results from an agreement by which the author consents to create a specially commissioned work that will be authored as a work for hire.⁹⁶ Most importantly therefore, screenwriters who show up at the producer’s office with preexisting work—whether it be a pitch written on note cards, an outline, or a treatment—can certainly produce a future work as a specially commissioned work that will not be subject to a termination right as a work for hire.⁹⁷ However, the pitch, outline, or treatment itself will never be a work for hire, and will always be subject to the author’s termination right.

What, then, is the relation between the pitch, outline, or treatment (with respect to which the author’s termination right can never be defeased) and the final screenplay produced as a specially commissioned work (that, as a work for hire, cannot be termi-

⁹² For legislative intent, see *1964 Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. 145 (1965) (testimony of Barbara Ringer, former Register of Copyrights), *reprinted in* H.R. REP. NO. 51-374, pt. 5, at 145 (1965). The courts appear unanimous that the parties must agree before creation of the work that it is to be a work for hire. Judge Posner has held, in *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992), that the agreement must also be reduced to writing before the work is created. Others have held that, as long as the agreement precedes creation of the work, it is not fatal if the agreement is not reduced to writing until later. See *Playboy Enters. v. Dumas*, 53 F.3d 559 (2d Cir. 1995). But there is unanimity that the agreement must occur prior to creation.

⁹³ This could be done, presumably, only by agreement—an agreement that is prohibited by the “notwithstanding any agreement to the contrary” language.

⁹⁴ See 17 U.S.C. § 101 (listing items that, if specially commissioned, are works for hire); *supra* note 1. Portraits are not included in the work for hire categories; therefore, such a portrait would not qualify as a work made for hire, simply on the basis of being specially commissioned.

⁹⁵ “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a).

⁹⁶ See 17 U.S.C. §§ 101, 203.

⁹⁷ This could be, in fact, exactly the situation contemplated by the statute’s “work for hire” provision. See *id.* § 101.

nated)? To the extent that the ultimate screenplay is based upon the original pitch, outline, or treatment, the screenplay is a derivative work,⁹⁸ while the pitch, outline, or treatment is called the “underlying work.” The author’s nonassignable and indefeasible right to terminate any assignment of that underlying work will be discussed below.

A. *The Screenwriter’s Contract*

A screenwriter’s contract is not subject to any formal constraints and may adopt whatever substance and form the contracting parties choose, except for the termination right, which cannot be extinguished despite a contrary intention of the parties. Nevertheless, due to various social and historical factors, including the dominant status of the major studios during the past century, most screenwriters’ contracts follow a standard form.⁹⁹ The form has changed over the years, but at all times most screenwriters’ contracts have had a certain uniformity. Uniformity is even more prevalent because most screenwriters and studios are arguably subject to union contracts under the purview of the Writers Guild of America (“WGA”).¹⁰⁰

The WGA’s basic contract, entitled the “1995 Writers Guild of America Theatrical and Television Basic Agreement” (“1995 WGA MBA”), does not mention the termination right. The 1995 WGA MBA treats any work produced within the bounds of its jurisdiction as a work for hire, and thus not eligible for the termination right.¹⁰¹ This treatment is because of the WGA’s view of itself as a labor union and the contract as an industry agreement covering all of its member writers who work as employees under that contract.¹⁰² Whether the WGA is correct about the status of their writers, thus conferring upon them no termination rights under the

⁹⁸ A “‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” *Id.* § 101.

⁹⁹ See generally WRITERS GUILD OF AMERICA, 1995 WRITERS GUILD OF AMERICA THEATRICAL AND TELEVISION BASIC AGREEMENT—ABC, CBS AND NBC (1995) [hereinafter 1995 WGA MBA].

¹⁰⁰ All three television networks (ABC, CBS, and NBC), the major studios, and almost all—numbering several hundred—of the independent producers, are party to the WGA agreement. See *id.* at 1-9.

¹⁰¹ The definition of a “writer” is carefully tailored—whether or not, of course, it matches the actual facts of the employment relationship—to fit the “work for hire” definition: “A ‘writer’ is a person who is: (i) employed by the Company to write literary material . . . where the Company has the right by contract to direct the performance of personal services in writing or preparing such material. . . .” *Id.* art. 1, ¶ (B)(1)(a)(i), at 14.

¹⁰² See *American Broad. Cos., Inc. v. Writers Guild of Am., West, Inc.*, 437 U.S. 411 (1978). “The WGA is a labor union which was certified as the collective bargaining repre-

copyright law, seems problematical, but is beyond the scope of this article. The WGA presumes that substantially all its members are either employees or are specially commissioned to produce works for motion pictures, and therefore, the resulting screen- and teleplays are works for hire under section 101.¹⁰³ Therefore, when writers come to the WGA with pre-existing underlying works, those underlying works are terminable.

The premise of the Writers Guild Contract (that the member-writers are all engaged in works for hire) can be examined without resolving all the implications of a conclusion that the premise might be incorrect.¹⁰⁴ WGA members can create works for hire only under the two conditions previously discussed.¹⁰⁵ Either writers work as employees under the Supreme Court's construction of that status as articulated in *Community for Creative Non-Violence v. Reid*,¹⁰⁶ or they create specially commissioned works under section 101.¹⁰⁷ It is highly doubtful that WGA members are working as employees under the *Reid* test.¹⁰⁸ WGA members, therefore, only become workers for hire from the moment they are specially commissioned, because it is the special commission and not a naked agreement absent that commission, which creates the worker for hire status.

It seems beyond argument that until a WGA member is technically hired to create a specific script, any underlying work already committed to writing, or "fixed in tangible form" as the 1976 Act expresses it, is a preexisting work subject to a termination right that cannot be affected by the MBA.

The WGA probably views its members as continuing employees of the various producing companies that are parties to the 1995 WGA MBA. However, they are not employees in the sense of the section 101 definition of work for hire, because they do not satisfy

sentative of screenwriters in the movie industry." *Marino v. Writers Guild of Am., East, Inc.*, 992 F.2d 1480, 1481 (9th Cir. 1993).

¹⁰³ See 1995 WGA MBA, art. 1, ¶ (B)(1)(a)(i), at 14; *supra* note 97.

¹⁰⁴ These implications would include, for instance, the collective bargaining status of the Guild and the enforceability of the collective bargaining agreement.

¹⁰⁵ See *supra* notes 83-95 and accompanying text.

¹⁰⁶ 490 U.S. 730 (1989).

¹⁰⁷ These are the only two categories of workers for hire allowed by the statute. See 17 U.S.C. § 101 (1997).

¹⁰⁸ While the complete argument of *Reid* is beyond the scope of this article, the reader should understand that *Reid* expressly rejected the test of employee status as being either the right to control or even actual control that had been urged by the respondent in that case. Thus, it does not matter that the studios have the right or actually exercise the right to control what the writers do. *Reid* stands for the proposition that the factors mentioned earlier are decisive, and not solely whether the employer can or does exercise control. See *supra* text accompanying note 87.

any of the requirements set forth in *Reid*.¹⁰⁹ It seems quite probable that the drafters of the 1995 WGA MBA have proceeded on the basis of the old "right to control" test, formerly accepted by many courts,¹¹⁰ but roundly rejected in *Reid*.¹¹¹ The 1995 WGA MBA uses the outmoded "right to control" terminology in defining the status of its members.¹¹² In terms of section 101, WGA members do not become subject to work for hire status until they are commissioned to work on a particular project, and any underlying works they bring to that task remain inalienably subject to the writer's termination right.

1. The Writers Guild "Separation of Rights" and Treatment of Preexisting Underlying Works

One of the relatively novel features of the 1995 WGA MBA is the attempt to provide writers with a right to exploit the work in various areas, particularly publication and dramatic rights, if the production company fails to do so within a defined number of years.¹¹³ This is called "separation of rights."¹¹⁴ If the story or principal characters are dictated by the production company, separation rights are not granted.¹¹⁵ The 1995 WGA MBA explicitly distinguishes between separable matter created by the author and

¹⁰⁹ Although the 1995 WGA MBA attempts to forbid "speculative" writing, it only does so in the context of an explicit request by a signatory company that a writer undertake such speculative, or contingent, assignment. See generally 1995 WGA MBA art. 20, ¶¶ (A), (B), at 195-98. To the extent, however, that a WGA member freely "pitches" a story to a company, the 1995 WGA MBA does not seem to forbid it; more importantly, the Basic Agreement would govern the company-writer relationship, and the MBA simply defines the relationship as one of a work for hire.

¹¹⁰ See *Brunswick Beacon, Inc. v. Schock-Hopchas Publ'g Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir. 1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984); *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969); *Brattleboro Publ'g Co. v. Winmill Publ'g Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966); *Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983).

¹¹¹ "In sum, we must reject petitioners' argument. Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750 (1989).

¹¹² "A 'writer' is a person who is: employed by the Company to write literary material . . . where the Company has the right by contract to direct the performance of personal services in writing or preparing such material. . . ." 1995 WGA MBA art. 1, ¶ (B)(1)(a), at 14. See also 1995 WGA MBA art. 1, ¶ (C)(1)(a)(ii), at 18. Of course, this is not simply a drafting problem. *Reid* clarified that it is a substantive issue that cannot be resolved, in any way, by a formal process of simply relabelling independent contractors as workers for hire.

¹¹³ See *id.* art. 16, at 145-81.

¹¹⁴ *Id.*

¹¹⁵ See *id.* art. 16, ¶¶ (A)(2)(a), (b), at 145-46.

non-separable matter owing its origin to a different source.¹¹⁶

Given that the industry is renowned for its rapaciousness, this valuable right is without question a considerable accomplishment by the WGA on behalf of its members. Curiously, however, the separation of rights closely resembles some of the results of the termination right, particularly as applied to “professional writers” (a term used in the 1995 WGA MBA) who have come to the production company with a preexisting underlying work.¹¹⁷ Upon termination of copyright assignments, authors would have the right to exploit their works in all areas, including those areas that had not been exploited by the production company at that time. In addition, “merchandising rights,” which are available to many writers,¹¹⁸ are almost certainly among those rights that an author exercising his termination right, would reacquire as a result of terminating an assignment of copyright.¹¹⁹

Why is the 1995 WGA MBA silent as to termination rights? One reason may be that the success of bargaining for separation of rights depended, at least in part, upon authors’ claims that fairness required that an author be able to exploit his creations to the extent that the production company was not doing so. Had the WGA emphasized, or perhaps even mentioned, that authors would have complete rights to exploit their works without regard to collective bargaining, the production companies might well have decided that authors already occupied a favored position, and indeed, that favored position was not even subject to negotiation, since the termination right cannot be alienated. Thus, the termination right in a sense is a potential burden to authors wishing to enhance their positions beyond what the termination right already gives them because they cannot use the termination right as a bargaining chip. Finally, of course, it is clear that the 1995 WGA MBA is a collective bargaining agreement that necessarily views its members as employees of the industry. As such, at least in the eyes of the 1995 WGA MBA, they are workers for hire. Whether this represents a potential sacrifice of their members’ interests in the termination rights to underlying preexisting works is a serious question.

¹¹⁶ “Separable material shall not include any assigned material or source material. . . .” *Id.* art. 16, ¶ (A)(4), at 155.

¹¹⁷ *Id.* art. 16, ¶ (A)(2), at 145.

¹¹⁸ *See id.* art. 1, ¶ (B)(8), at 17.

¹¹⁹ Despite the fact that a terminating author cannot terminate derivative works that have already been prepared, it seems likely that such a terminating author could nevertheless market all kinds of subsidiary creations, such as T-shirts, toys, dolls, and the like, that form a major part of the economic value of motion picture properties. *See supra* note 28.

B. *The Termination Right and Standard Contract Practice*

The motion picture industry has not explicitly recognized the termination right in any of the standard contracts currently in use, despite the fact that the termination right and the 1976 Act are now more than two decades old. Virtually all, if not all, of the standard industry contracts treat the relationship between author and production house as one to which no termination right applies.¹²⁰ Worse, the few which, even if only tangentially, acknowledge the possibility of a termination right treat it as something that can be almost scornfully disregarded or perverted to the production house's advantage.

For instance, in one standard contract governing, of all things, freelance television writers (who more often than most "pitch" their ideas prior to contract), the unacknowledged termination right is treated as if nullified by the creation of a worker for hire relationship.¹²¹ Then, quite amazingly, the contract goes on to provide that if the relationship is found not to be a work for hire, the author agrees to assign all rights to the production house nevertheless, without mention of the fact that if the worker for hire status fails the author automatically gains an inalienable right to terminate:

6. Copyright — Work Made For Hire

The Writer acknowledges and agrees that all copyrightable work product prepared under this Agreement are contributions to a motion picture or other audio visual work, or to a collective work, and as such the work is a "work made for hire" under section 101(2) of the Copyright Act of 1976. All copyrights to the work shall belong to the Company as the statutory author. In the event that the work is deemed by a court of competent authority to no [sic] be a "work made for hire," Writer immediately assigns all right, title, and interest in and to the works prepared under this Agreement.¹²²

This is, of course, somewhat troublesome. While the language of the contract is textually unassailable, its impact and undeniable intent is deceptive. The contract addresses writing "prepared under this agreement," because, in fact, any underlying preexisting work (such as a "pitch") cannot be so included.¹²³ But if it means by this to exclude the pitch from its terms, then the author does

¹²⁰ This is, of course, a direct result of their claims that the writing is a "work for hire."

¹²¹ See Alexander Lindey, 2 Lindey on Entertainment, Publishing and the Arts (CBC) Form 6.03-4.1, at 6-62.1 to 6-62.2 (Oct. 1997).

¹²² *Id.*

¹²³ Such a work would certainly not be specifically commissioned, and, if prepared prior

not need a termination right since the pitch is not being conveyed. If, on the other hand, the contract is intended to include the underlying preexisting work, it cannot thereby be a work for hire, since the pitch was not prepared under any special commission, but instead preceded it. If any part of the agreement fails to be a work for hire, the author cannot grant, and the company cannot bargain for, "all right, title, and interest," since the termination right cannot be conveyed (in fact, it appears to be exactly this kind of agreement that section 203 anticipated when it declared the termination right inalienable "notwithstanding" such agreements).¹²⁴ Yet this is the practice in the entertainment industry and in related industries.¹²⁵

Furthermore, the termination right seldom appears as an important topic in entertainment law treatises. For instance, in one standard industry reference it appears as an afterthought, as a "Practice Comment" in which the termination object is referred to by way of a "caveat," which concludes with the following (somewhat equivocal) advice: "Purchasers should consider the above regarding any transfer of ownership of any copyrighted property."¹²⁶ In the same reference work, readers are warned that the work for hire doctrine does not apply to underlying works; but, despite the fact that the doctrine is an industry standard, the text fails to note that pitches, outlines, and treatments are eligible to be treated as underlying works.¹²⁷

This, of course, will not apply to an underlying novel, short story, or play upon which the movie was based. Such works will be owned by the author, unless they are assigned to the studio or production company. It should be noted that if such underlying works, or rights to such underlying works have been assigned, then the termination provisions of Section 203 or 304 will apply.¹²⁸

By applying this to such discrete categories as novels, short stories, and plays, the text has the effect, however unintended, of fail-

to the contract, similarly could not be a product of an employment relationship. See 17 U.S.C. § 101 (1997).

¹²⁴ See *id.* § 203(a)(5).

¹²⁵ The computer industry also attempts to specially commission software (for instance, as works for hire), and its contracts commonly state that "if it does not qualify as a Work for Hire, Contractor will . . . assign . . . all of his/her rights, title, and interest. . . ." *Work For Hire Agreement*, MULTIMEDIA AND TECHNOLOGY LICENSING LAW REPORT, at 8 (Feb. 1995).

¹²⁶ Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts* (MB) Form 5.01-1 practice cmt., at 5-15 (Oct. 1995).

¹²⁷ See *id.*

¹²⁸ Alexander Lindey, 2 *Lindey on Entertainment, Publishing and the Arts* (West Group) § 5.04[10][mm], at 5-274 (Mar. 1998).

ing to advise the reader that any preexisting underlying work (whether or not it falls into established literary categories, such as novels, short stories and plays) is entitled to the termination right. Because this text specifically addresses the motion picture industry, it seems particularly desirable that it should tell authors of rights about which they may be unaware, in terms that identify, rather than conceal, the full potential of those rights.

Reference works sometimes note that mistakes or bad draftsmanship may cause a work to fail to qualify as a work for hire. But even then, no mention is made of the fact that, upon such failure, the studio can never regain the work such as to avoid termination.

Because television shows would fall under the category of "audiovisual works" commissioning parties of parts of television shows may still be classified as the statutory authors . . . provided that the contract states that the work is to be a "work made for hire." Failure to sign such an instrument will take the commissioned work out of Section 101(2) As a result, the commissioned party will probably not be the statutory "employee," and authorship and ownership will vest with the commissioned artist or writer.¹²⁹

This may seem inoffensive, but it is essential to note that if a work fails to qualify as a work made for hire, most industry contracts treat it as a work in which the author assigns all rights and title to the production house.¹³⁰ As a result, informing the reader that a work may not be a work for hire, without advising the author that, in such an event, the author has an inalienable right to terminate, is not very useful and to the unsophisticated author would very likely be considered deceptive. Furthermore, the above passage does not mention that even if the contract states that the work is one for hire, such a statement does not automatically make it so, nor does it make the commissioning party a statutory author.

One way in which production houses try to insure that the work they are purchasing is a work for hire, free from any termination right, is to hire an outside writer through the writer's "loan-out company."¹³¹ Loan-out companies, originally designed for tax purposes, are the vehicles by which production companies acquire the

¹²⁹ Alexander Lindey, 2 Lindey on Entertainment, Publishing and the Arts (West Group) § 6.07[3][oo], at 6-194 to 6-195 (Mar. 1999).

¹³⁰ See, e.g., Alexander Lindey, 2 Lindey on Entertainment, Publishing and the Arts (CBC) Form 6.03-4.1, at 6-62.1 to 6-62.2 (Oct. 1997).

¹³¹ See Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879 (1995). As a matter of legal form, the production house contracts with the loan-out company, but in actuality, it is dealing with the loan-out company's sole stockholder—the writer.

services of a writer who, employed by his own loan-out company, is already a worker for hire. Unfortunately for the production houses, however, it is not clear that such writers are truly employees under the work for hire doctrine, especially under *Reid*.¹³² Such writers are probably employees for purposes of the tax code,¹³³ but, because they are not within the common law agency rules articulated by *Reid*,¹³⁴ the works they produce are probably not works for hire. It is clear, however, that production companies have not considered this, because the standard loan-out agreement between a writer and his own loan-out company provides that:

Employee hereby grants, transfers and sets over to Corporation, and Corporation shall be entitled to and shall own solely and exclusively, forever and without limitation and for all purposes, each and every and all rights and interests of any and every kind and character whatsoever in and to all of the results and proceeds of Employee's services hereunder.¹³⁵

The commentary to this term is quite explicit in explaining that its language is designed "so that the loan-out company can in turn make a grant of rights to a production company."¹³⁶

Perhaps the termination right is too new to be recognized in its full dimensions, even at this late date. Perhaps it takes effect too far in the future to be considered important by many authors. But even the one area where such long-range planning is normal, tax and estate planning, standard reference works seem to give the termination right short or no shrift. For instance, one such work poses the following questions:

[D]oes the right of termination make it impossible, for gift tax purposes, for the author to make a gift of part or all of the copyright, since the author may exercise the right of termination at some future date so as to retrieve the transferred copyright? Does the right of termination make it impossible for the author to sell the copyright, for income tax purposes, for a similar reason?¹³⁷

According to this standard industry treatise, "[t]he short, most

¹³² *Reid* makes it clear that determination of employee status is to be governed by common law agency rules, and not by, for instance, the tax code. See *Reid*, 490 U.S. at 750-51; *supra* text accompanying note 84.

¹³³ See LaFrance, *supra* note 131, at 929-51.

¹³⁴ See *supra* note 108.

¹³⁵ Alexander Lindey, Lindey on Entertainment, Publishing and the Arts (MB) Form 7-1 cl. 11, at 7-15 (Sept. 1991).

¹³⁶ *Id.* Form 7-1 cmt. 11, at 7-15.

¹³⁷ Norman M. Rosenberg, *Tax and Estate Planning For Authors*, in Alexander Lindey, Lindey on Entertainment, Publishing and the Arts (MB) ¶ 59.01[1], at 59-6 (Sept. 1994).

probable answer to these questions is 'no'.¹³⁸ But in all likelihood, that answer is neither probable nor short, and all such tax questions might have to be answered by taking into account the difference in value between the assignment of copyright free of a termination right (that is, as a work for hire) and the copyright potentially shortened by termination.

Even where the possibility of an underlying work is expressly recognized, the industry still seems unwilling to recognize the impossibility of acquiring all rights in the work. A standard reference work, in discussing the 1995 WGA MBA, notes two possibilities: an author is either specially commissioned to work on something provided by the production house, or "the writer owns the underlying literary property and assigns it to the producer."¹³⁹ In the latter case, the treatise says, "the producer may have to acquire ownership in the underlying property on which the writer has based, or intends to base, the screenplay."¹⁴⁰ Once more, no mention is made of the fact that, in that circumstance, the producer can never acquire the property free of the author's termination right.

In virtually every industry contract, an author is required to provide a "Certificate of Authorship," which asserts that the author owns copyright in any underlying work, and conveys all rights to the production house.¹⁴¹ This, of course, is either inconsistent with the existence of a termination right or, at the least, is less than candid in that regard. The Certificate of Authorship, a standard part of virtually all industry contracts, is expressly designed to satisfy the requirement in section 101 that work for hire status be manifested by a written agreement for specially commissioned works.¹⁴² But the language of the standard Certificate of Authorship is far more problematic than its express purposes would dictate. The Certificate states that, "all literary material of whatever kind or nature . . . submitted and to be submitted by Writer . . . in connection with a motion picture . . . was written and will be written by Writer as a work-made-for-hire . . . specially ordered or commissioned."¹⁴³

¹³⁸ *Id.*

¹³⁹ Steve Breimer, *What to Know about the Legal Provisions Contained in Scriptwriting Assignment Contracts*, in ENTERTAINMENT, PUBLISHING, AND THE ARTS HANDBOOK 404-05 (Viera et al., eds., 1997).

¹⁴⁰ Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts* (MB) ¶ 8.01, at 8-4 (Mar. 1995).

¹⁴¹ See Breimer, *supra* note 139. See also Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts* (MB) Form 8-2 cl. 1(a)(1), at 8-96 (Mar. 1995).

¹⁴² See 17 U.S.C. § 101.

¹⁴³ Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts* (MB) Form 5-9 cl. 1, at 5-42 (Dec. 1996).

The problem with this language is that it treats the work as one specially ordered or commissioned, and thus a work for hire, yet it expressly attempts to cover preexisting underlying works by using the words "submitted" and "was written." Clearly, such preexisting works cannot have been specially commissioned in all cases; it is exactly this type of preexisting underlying work that this article addresses. Therefore, despite this written agreement, the author to whom it applies cannot be deprived of his termination right.¹⁴⁴ Nevertheless, these certificates are apparently routinely used to attempt to convert into works for hire all kinds of preexisting works which, as a matter of law, cannot ever become such works for hire.¹⁴⁵

Frequently, a production company may issue to an author a letter of intent, which will then be included in a package assembled to gain financing for the project.¹⁴⁶ Although the letter of intent is generally legally unenforceable on its own, the terms of such a letter of intent tend to demonstrate how the industry views preexisting works, and indicate a general ignorance of termination rights. The typical letter of intent claims the production company will acquire "all exclusive visual media rights, title and interests, of every kind and character whatsoever . . . in perpetuity and throughout the universe"¹⁴⁷ No matter how legally unenforceable the letter is, once it is understood that a letter of intent covers, by definition, only preexisting works, the incredibly broad reach of its language is simply inexplicable. It is certainly the letter of intent, covering only preexisting works, which, of all documents, should address in some way the fact that the author will retain the right to terminate some thirty-five years later.

The ignorance or studied disregard of the termination right by the entertainment industry is not so different than that of the legal profession generally. In a guide by the Association of the Bar of the City of New York¹⁴⁸ that is "intended for lawyers who are not actively engaged in . . . entertainment law, but who occasionally are involved . . . and for non-lawyers who have an interest . . . " the

¹⁴⁴ See 17 U.S.C. § 203(a)(5). There is always the possibility that the Certificate of Authorship merely confirms a previous agreement to produce a specially commissioned work. If so, its ambiguity and potential for abuse demonstrates why Judge Posner, and others, are of the view that the written document as well as the agreement should precede any work done for hire. See *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992).

¹⁴⁵ See *infra* text accompanying note 135.

¹⁴⁶ See Breimer, *supra* note 139.

¹⁴⁷ Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts* (MB) Form 5-8 cl. 1, at 5-39 (Dec. 1996).

¹⁴⁸ COMMITTEE ON ENTERTAINMENT AND SPORTS LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *GUIDE TO THE ACQUISITION OF RIGHTS* (1990).

existence of underlying works is treated in depth, but the termination right is never mentioned. Worker for hire status is also discussed, and where the author is not for hire, the guide suggests that the author "may be required to transfer rights to the producer pursuant to an 'acquisition agreement.'"¹⁴⁹ The potential unfairness of this, is of course, not limited to authors, but also applies to unsophisticated producers (so-called "independents," for instance) who may be misled about the potential breadth of what rights may be acquired. The unfairness to producers (whose economic calculations never extend as far as thirty-five years into the future) of course, is certainly far less than that to authors (who, thirty-five years later, may well have an interest in terminating or renegotiating their assignments).

In the few cases in which modern industry contracts directly address the termination right, there is an attempt—surely unenforceable—to turn it to the production house's advantage, most notably by attempting to convert it into a right of first refusal.

If, pursuant to any copyright or similar law, Owner becomes entitled to exercise any right of . . . termination . . . and Owner exercises the termination right, then, from and after the date that Owner has the right . . . Purchaser shall have the first right to purchase from Owner the recaptured rights If Purchaser shall acquire from Owner all or part of the recaptured rights, then Owner agrees to enter into a written agreement with respect thereto.¹⁵⁰

This provision, however, constitutes exactly that "agreement to the contrary" notwithstanding which section 203(5) declares termination can still be effected.¹⁵¹ The unenforceability of this provision is made even more clear by the inconsistency of its terms with the express terms of section 203(6)(D), which provides that terminated assignees can negotiate for a new assignment immediately after notice of termination is provided, while others must wait a minimum of two years until termination is actually effected.¹⁵² The combination of these two provisions would seem to make it clear that the right of first refusal in this industry contract is barred by both the letter and spirit of the 1976 Act.

¹⁴⁹ *Id.* Introduction, at 3.

¹⁵⁰ 4 THOMAS D. SELZ, ENTERTAINMENT LAW F-59 (2d ed. 1992).

¹⁵¹ See 17 U.S.C. § 203(5).

¹⁵² See 17 U.S.C. § 203(6)(D).

V. THE TERMINATION RIGHT AND ACTUAL INDUSTRY PRACTICE

Actual entertainment industry contracts, following the lead of the practice treatises,¹⁵³ routinely adopt one or more of the approaches articulated in the treatises in order to avoid, disguise, or, worse, violate the termination right. So, for instance, one recent contract with Walt Disney Studios contains the following onerous provision on “Rights”:

WDPc shall own, and Artist hereby acknowledges WDPc’s ownership of, all known or hereafter existing rights of *every kind throughout the universe, in perpetuity* and in all languages, pertaining to the Work (including, without limitation, the copyright therein and any renewals or extensions thereof) for all now known or hereafter existing uses, media, and forms, including, without limitation all motion picture, literary, dramatic, musical, stage, mechanical, merchandising, publishing, radio, free or pay television, videotape, video disc or other video device, sequel, remake, ancillary, and allied rights in the Work, and the foregoing is inclusive of a full assignment to WDPc thereof. *If the Work is based on an idea or other material created by Artist (the “Property”), then Artist hereby grants WDPc, subject to any applicable requirements of the MBA hereinafter identified, the same rights in the Property as WDPc has in the Work, and the compensation payable to Artist hereunder includes payment therefor. All rights in and to the Work or Property transferred hereunder to WDPc shall apply with equal force to any and all drafts, arrangements, adaptations, dramatizations, redrafts, revisions, or other versions of the Work or Property written or created by Artist or with Artist’s consent.*¹⁵⁴

The force and attempted reach of these Disney provisions is nothing short of stunning. Aside from the typically broad boilerplate language, the claim to preexisting underlying works (“an idea or other material created by Artist” as well as “any and all drafts, arrangements, adaptations, dramatizations, redrafts, revisions, or other versions of the Work or Property written or created by Artist”) is a barely concealed grab for material that the 1976 Act clearly reserves to the author with an indefeasible interest secured

¹⁵³ One might presume that practice treatises actually follow the lead of actual practice; but this is wrong for at least two reasons. Practitioners consult treatises when drafting contracts, and although the treatises certainly adopt provisions from contracts already written, this is clearly a two-way street. But treatises also contain commentary, as well as forms, and the role of commentary in shaping industry contracts, as well as sensitivities, cannot be ignored.

¹⁵⁴ Walt Disney Pictures, Writer Standard Terms and Conditions, ¶ B.2.(a) (emphasis added) (on file with the *Cardozo Arts & Entertainment Law Journal*).

by the termination right.¹⁵⁵ In short, the Disney Rights clause is an attempt to deny the very existence of the author's termination rights in preexisting underlying works and, as such, is a deception that borders on fraud. The provisions, to the extent they attempt to frustrate the termination right, are of course unenforceable and invalid. But an author, reading the available treatises, guides, or the 1995 WGA MBA would never know that.

Other major studio contracts embrace the same kind of callous and cavalier contempt for authors' rights. For instance, the standard MGM Screenplay Option and Purchase Agreement, grants the studio the

[o]ption to acquire right, title, and interest, throughout the universe in perpetuity, in and to that certain original screenplay titled "____" . . . including without limitation, all contents thereof, *all prior drafts thereof*, the theme, title and characters thereof, the copyright thereof, and all renewals and extensions of such copyright.¹⁵⁶

This seems to be very similar to the Disney language in its attempt to deny the existence of an indefeasible author's right in all underlying works that predate an agreement under which the author is commissioned to produce future, but certainly not past, works as works for hire. Even independent production houses, which might be presumed to treat their writers with more deference, seem to embrace the same grasping spirit. One project sponsored by the renowned Sundance Institute uses the standard "Certificate of Authorship," which declares that, "[a]ll literary material (the 'Screenplay') *submitted* and to be submitted by me . . . *was written* and will be written by me as an employee-for-hire . . . and as work-made-for-hire specially ordered or commissioned by Producer."¹⁵⁷

This is so, despite the fact that the option was for a screenplay that was already completed. Copyright in such a project cannot make it a work for hire, and the producers, despite their best, or

¹⁵⁵ This is a result, of course, of the "notwithstanding any agreement to the contrary" language of the statute. See 17 U.S.C. § 203(a)(5) (1997).

¹⁵⁶ Metro-Goldwyn-Mayer Pictures, Inc., Short Form Option Agreement (emphasis added) (on file with the *Cardozo Arts & Entertainment Law Journal*).

¹⁵⁷ Kalkaska, Inc., Option to Acquire All Motion Picture and Allied Rights Ex. A (1995) (emphasis added) (agreement related to a screenplay, *The Opportunist*, on file with the *Cardozo Arts & Entertainment Law Journal*). See Thom Geier, *Walken Takes Advantage of 'Opportunists'*, HOLLYWOOD REPORTER, Nov. 6, 1998 (the script was "[d]eveloped through the Sundance Filmmakers Lab . . ."). A variation of the standard Certificate states: "all the results and process of such services . . . *are* and will be a work made for hire" Breimer, *supra* note 139, at 405 (emphasis added).

worst, efforts, cannot destroy the author's termination rights through such a declaration. Again, such provisions are clearly unenforceable.

What is the significance of an author having a termination right in an underlying pitch, treatment, or outline (whether or not the production house contract ignores the termination right or, worse, attempts to deny or pervert it) when already prepared derivative works will be immune to any termination? Such an author, owning the underlying work, would have the opportunity to write or license sequels based on the original pitch, outline, or treatment.¹⁵⁸ He would have the opportunity to market merchandise based on the underlying work, even though the owners of the derivative work might also have rights to continue to sell already prepared merchandise. He would have the right to use characters and plot lines and new works based on the underlying work, even though those characters and plot lines were also present in already prepared derivative works. In short, authors who originally pitched their stories to production houses will have the opportunity, through the termination right, to exploit the underlying work and, effectively, to compete with the derivative work. Given that, at the very least, such an author will have something of value with which to renegotiate her contract with the production house, even with respect to the already prepared derivative works.

CONCLUSION

The termination provisions of the 1976 Copyright Act were meant to benefit authors who find themselves, typically or stereotypically, in disadvantageous bargaining positions. The entertainment industry, at least in its television and film branches, places writers in a relatively disadvantaged situation. Those writers, moreover, commonly have termination rights that cannot be extinguished. The practices of the industry, however, are such that the termination right is unrecognized, or worse, concealed. The attempts to bypass, avoid, or overcome legitimate termination rights seem clearly barred by the 1976 statute.¹⁵⁹ Importantly, many television and movie industry writers present pitches, treatments, or story outlines to production companies, the assignments of which will be terminable approximately thirty-five years after assign-

¹⁵⁸ See *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir.1982) (demonstrating opportunities available to an author who can, unlike in that case, successfully terminate as to both underlying story and character).

¹⁵⁹ See 17 U.S.C. § 203(a)(5) (1997).

ment.¹⁶⁰ At that time, authors and their attorneys should be aware that termination rights may exist in theretofore unrecognized underlying works, despite the fact that the derivative works already prepared may be immune to the termination right. The termination rights, aside from those derivative works, may be extremely valuable, giving writers opportunity to exploit them or to renegotiate their earlier assignments.

¹⁶⁰ As noted earlier, this article proceeds on the basis of works that were created after the effective date of the 1976 Act. However, as noted earlier, the 1976 Act extended protection for all works produced under and still protected by the earlier 1909 Act, and gave them all a termination right for the last 19 years of those extended terms (recently extended by the so-called Sonny Bono Copyright Term Extension Act for an additional 20 years, *see* 17 U.S.C. § 304). Therefore, the import of this article is applicable to many works, which are now in their last terms under the 1909 Act. Authors and their lawyers should be aware of these termination rights.