Give Me Liberty and Give me Death: The Conflict Between Copyright Law and Estates Law

Michael Rosenbloum

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl

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

Recommended Citation
Available at: https://digitalcommons.law.uga.edu/jipl/vol4/iss1/7
GIVE ME LIBERTY AND GIVE ME DEATH: 
THE CONFLICT BETWEEN COPYRIGHT LAW 
AND ESTATES LAW

I. INTRODUCTION

United States Estates Law revolves around the policy of testamentary freedom. Just as each individual has the freedom to transfer property inter-vivos, he or she has equal freedom to determine who will receive property upon his or her death. Estates law provides several exceptions to the notion of testamentary freedom, each having underlying policy support. With each exception, estates law protects family members of the decedent from disinheritance. The exceptions to freedom of testation, as determined by the 1969 Uniform Probate Code [hereinafter pre-1990 UPCI, include spouse’s elective share, ¹ pretermitted children,² homestead allowances,³ maintenance or family allowances,⁴ and certain items of household (or exempt) property.⁵

The above list of exceptions to testamentary freedom is not exhaustive. An exception relatively unknown to estate planners is found in section 304 of the Copyright Act of 1976 [hereinafter the 1976 Act].⁶ While section 201 of the 1976 Act states that the ownership of a copyright “may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession,”⁷ section 304 speaks otherwise. While, in general, a copyright interest is treated as personal property and may be transferred by any means of conveyance, for a work created before January 1, 1978, the general rule is deceptive. Section 304 of the 1976 Act codifies an exception to the general rule.

¹ UNIF. PROB. CODE § 2-201 (1969).
² Id. § 2-302.
³ Id. § 2-401.
⁵ Id. § 2-402.
Under the Copyright Act of 1909 [hereinafter the 1909 Act], the predecessor to the 1976 Act, a copyright consisted of two twenty-eight year terms. After the first twenty-eight year term expired, the author could renew his copyright for another twenty-eight year term. The only stated purpose of the two-term system was to give authors a second chance to profit from their creativity had they previously transferred the copyright in their work to a third party. The 1976 Act abolished the two-term copyright and replaced it with a copyright of a duration of the life of the author plus fifty years. However, the 1976 Act retained the two-term system for works copyrighted before January 1, 1978, the date the 1976 Act became effective. Additionally, the 1976 Act extended the second term of preexisting copyrights to 47 years, thus making the total duration of protection for such works 75 years.

Section 24 of the 1909 Act provided that if the author of a copyrighted work was still living when the first copyright term expired, he or she had to renew the copyright in order to receive continued protection. If the author died prior to the end of the first copyright term, his or her widow, widower, or children could renew the copyright. If the author died unwed, childless and testate, only the author's executors, or in the absence of a will, only the author's next of kin, could renew the copyright. Similar language is now found in section 304 of the 1976 Act.

Section 304 of the 1976 Act, which carries over the renewal provision of the 1909 Act, places a serious restraint on a copyright owner's testamentary freedom. The owner of a copyright does not have the freedom to choose the disposition of his or her copyright interest after death. While estates law has protected the decedent's

---

8 Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (current version at 17 U.S.C. § 304 (1994)). The two-term system was codified as early as 1710 in the first English Copyright Statute. 8 Anne, c. 19 (1710) (Eng.). A brief look at the origin of the renewal system is noted below.


11 Id. § 304.

12 Id.


family against disinheritance, copyright law has provided yet another safeguard.

United States Estates Law has historically been governed by state law. Estates law, with a few minor exceptions, does not mandate that specific items of personal property remain within the family. Section 304 of the 1976 Act has mandated that upon certain conditions, copyright, a species of intangible personal property, must stay in the family. United States Copyright Law has impaired the author's testamentary control over his personal property, and as such has unduly interfered with an individual's state law right to testamentary freedom.

This Note will detail the origins of the renewal system and the various rationales for estates law's policy of testamentary freedom. The focus of the Note will then shift to the conflict between copyright law's renewal system and estates law's notion of testamentary freedom. Further, based on the policy rationales underlying the renewal system and testamentary freedom, the author will argue that the renewal provisions found in section 304 of the 1976 Act interfere with estates law in a way Congress never intended. The Note will conclude with a discussion of the future of the conflict between copyright law and estates law, including several measures that estate planners can take to alleviate the conflict.

II. COPYRIGHT LAW

United States Copyright Law owes its origin to the Constitution. Article I, Section 8, Clause 8 provides that "[t]he Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress initially acted upon the copyright power in the First

---

15 Pre-1990 UPC § 2-402 provides that certain items of household property, such as household furniture, automobiles, furnishings, appliances, and personal effects, remain in the family. UNIF. PROB. CODE § 2-402 (1969).

16 U.S. CONST. art. I, § 8, cl. 8. This clause is commonly referred to as the Copyright Clause. The Copyright Clause of the Constitution is also considered the Patent Clause because it affords both copyright and patent power to Congress. Accordingly, the clause is sometimes referred to as the Copyright and Patent Clause.
Congress by enacting "An Act for the Encouragement of Learning."\(^{17}\) Since the codification of the Act by the First Congress, Congress has expanded the rights granted to copyright owners in the subsequent acts and amendments of 1831, 1870, 1909, 1971, and 1976.\(^{18}\)

A. THE ORIGINS OF THE RENEWAL SYSTEM

To comprehend fully the conflict between estates law and copyright, one must have at least a rudimentary knowledge of the origins of the copyright renewal system. Former Register of Copyrights Barbara Ringer once wrote that "[t]he principle of copyright renewal is as old as statutory copyright itself."\(^{19}\) The Statute of Anne, the first English Copyright Statute, stated that the author and his assigns would have exclusive rights in a work for an initial term of fourteen years from the date of publication.\(^{20}\) However, if the author assigned his copyright interest during the first term, all exclusive rights returned to the author, if living, for a further term of fourteen years.\(^{21}\) Copyright renewal was born. The Statute of Anne originated the first of the so-called "contract-bumping'' situations. In essence, if an author assigned his copyright during the first copyright term, the Statute of Anne mandated a return of the copyright interest to the author at the

\(^{17}\) Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831). This act gave the "author 'the sole right and liberty of printing, reprinting, publishing, and vending' his 'map, chart, book or books' for a period of 14 years." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 460 (1984) (quoting Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124).


\(^{19}\) Barbara A. Ringer, Renewal of Copyright, Study No. 31 (1960), in 1 STUDIES ON COPYRIGHT 503, 505 (A. Fisher Mem. ed., 1963).

\(^{20}\) Statute of Anne, 1710, 8 Anne ch. 19 (Eng.).

\(^{21}\) Id. Under the Statute of Anne, there was no conflict between copyright law and testamentary freedom. If the author died during the first copyright term, the work entered the public domain at the end of the first term because only the author was entitled to ownership of the second term.

\(^{22}\) The term "contract-bumping" was coined by Francis Nevins in Francis M. Nevins, Jr., The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide, 35 J. COPYRIGHT SOC'Y 77 (1988).
end of the first term, thereby “bumping” the assignment contract in favor of copyright law.\(^{23}\)

When Congress enacted the first copyright statute, it virtually copied the Statute of Anne’s duration and renewal provisions. The Copyright Act of 1790,\(^{24}\) however, incorporated the holding of the High Court of Chancery in *Carnan v. Bowles*. Accordingly, if the author lived into the second term, an explicit conveyance of term-two rights made during the first term was valid.\(^{25}\)

Arguably, the conflict between copyright law and estates law was not codified by Congress until 1831. In the Copyright Act of 1831,\(^{26}\) Congress radically changed the renewal structure.\(^{27}\) For the first time, a copyright statute provided for alternative takers of the renewal interest if the author died during the first term.\(^{28}\) The Act provided that should the author die during the first term, the author’s “widow and child, or children” could renew the copyright for a further term of fourteen years.\(^{29}\) The Committee on the Judiciary of the House of Representatives claimed that the reason for the change was to prevent the work from falling into the public domain at a time when the author’s “family stand[s] in more need of the only means of subsistence ordinarily left to them.”\(^{30}\) Congress did not include an author’s assignee as an individual who could exercise renewal rights.\(^{31}\) This move appeared to remove

---

\(^{23}\) However, in *Carnan v. Bowles*, the High Court of Chancery held that if the author explicitly assigned term-two rights during term one and lived into the second term, the author could not use the statute to reclaim the copyright. 29 Eng. Rep. 45 (Ch. 1786).

\(^{24}\) Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

\(^{25}\) Id. The statute provided that if the author was still living at the end of the first copyright term, the renewal right could be exercised by the author, his executor, administrator, or assignee. Id. (emphasis added).

\(^{26}\) Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 (repealed 1870).

\(^{27}\) Along with various other changes, the Copyright Act of 1831 extended the first copyright term to twenty-eight years, while the renewal term remained fourteen years. Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. at 436-37.

\(^{28}\) Under the Statute of Anne and the Copyright Act of 1790, if the author died during term one, the copyrighted work entered the public domain at the expiration of the first term.

\(^{29}\) Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436.

\(^{30}\) Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 651 (1943) (quoting Register of Debates, vol. 7, appendix CXIX (1830)). The rationale behind the change was solely to prevent the work from entering the public domain at the end of the first term. Today, due to the advent of automatic renewal, which will be discussed below, there is no threat of the work entering the public domain if the author dies during the first term.

\(^{31}\) Id. at 650.
the holding of *Carnan v. Bowles* from United States Copyright Law. However, in *Paige v. Banks*, the Supreme Court held that if an author assigned the copyright in his work during the first term "forever" and the copyright survived into the renewal term, the assignee was entitled to renew the copyright and own the interest in the second term.

As this Note will show, the sole purpose of the renewal system was to "bump" inter-vivos assignments of copyright and allow the original copyright owner to profit once again from his or her creative work during the renewal term. There are two situations in which copyright law can "bump" a contractual inter-vivos assignment of a copyright interest. First, if an assignment does not explicitly assign term-two rights, the author is entitled to recover the copyright at the end of the first term. Second, even if the assignment explicitly assigns term-two rights, the death of the author during the first term acts to "bump" the original assignment, thus allowing the copyright to pass according to the renewal provision. Legislative history provides that "contract-bumping" was Congress's sole purpose in providing for copyright renewal. The silence of history implies that Congress never realized that provisions for copyright renewal would interfere with an individual's testamentary freedom.

B. THE COPYRIGHT ACT OF 1909

In the early twentieth century, many copyright scholars began clamoring for copyright revision. Much of the criticism of the earlier copyright acts was directed at the renewal system. The criticisms of the renewal system largely were two-fold. First, many thought it unfair that if an author died during the first term without spouse or child that the work would fall into the public domain at the end of the first term. Second, the validity of a term-one inter-vivos transfer of term-two rights remained unclear. The 1909 Act remedied the first criticism by including the

---

32 80 U.S. (13 Wall.) 608 (1871).
33 Id. at 614-15.
34 Ringer, supra note 19, at 508-10.
35 Id. at 508.
36 Id. at 509.
author's executors and next of kin as parties who could renew a copyright if the author died during the first term unwed and childless. As this Note will discuss later, it was not until 1943, however, in the case of Fred Fisher Music Publishing Co. v. M. Witmark & Sons, that the Supreme Court addressed the second criticism.

With the substantial revisions of the Act, the conflict between copyright law and estates law was further manifested. The 1909 Act stated that "copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will." The 1909 Act, however, did not assure the copyright owner complete freedom over the bequest.

The 1909 Act granted copyright owners two twenty-eight year copyright terms. The first term began on the date of first publication; the second term began at the expiration of the first term if proper application for renewal was made with the copyright office during the last year of the first term. Section 24 of the 1909 Act, after providing copyright duration, limited the class of persons who were entitled to renew, and thus own, the copyright's second term. The 1909 Act stated that:

in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years.
If a work was of the type listed above, a conflict of laws did not occur because the author was never entitled to the renewal term. For all other copyrighted works, section 24 delineated a different rule for renewal.

Copyright for works other than those listed in the first part of section 24 could only be renewed by "the author of such work, if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin." Section 24 of the 1909 Act is at the heart of the conflict between estates law and copyright law.

C. THE COPYRIGHT ACT OF 1976

When Congress adopted the 1976 Act, it faced a serious debate over the duration of copyrights. The renewal system from the earlier acts created some serious problems that could be corrected most easily by eliminating the two-term copyright and devising a duration based on the life of the author. In the legislative history of the 1976 Act, Congress stated that the adoption of a new copyright duration was "by far" the most important goal in copyright revision. Congress settled on a new duration for copyright of the "life of the author plus fifty years." However, the new copyright duration only applies to works created on or after January 1, 1978. Congress stated that eliminating the inequities of the renewal system was one of its primary reasons for changing copyright duration to one based on the life of the author.

---

43 Id.
46 Id. Congress did not replace the two-term system for works created prior to 1978 because to do so would have created possible impairments of existing expectations and contractual relations. See Mark F. Radcliffe, Copyright Ownership Issues, in ADVANCED SEMINAR ON COPYRIGHT LAW 1995, at 243 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3941, 1995) (explaining reasons behind choice to maintain two-term system for works created prior to 1978).
One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear
1. **Ownership of Copyright.** The author of a work protected by copyright law is the initial owner of the copyright in that work.\(^4\) Section 202 of the 1976 Act explains that ownership of copyright substantially differs from ownership of the material object in which the work is fixed. Section 202 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."\(^9\) Accordingly, a copyright is not transferred simply by transferring a material copy of the underlying work; nor does transfer of copyright convey property rights in a material object.\(^5\)

2. **Carryover of the Renewal System.** Because the new copyright duration of the life of the author plus 50 years exclusively applies to works created on or after January 1, 1978, Congress included section 304 of the 1976 Act. Section 304 maintains the copyright renewal system for works created prior to January 1, 1978. Accordingly, the renewal system continues to present problems for estate planners.\(^5\)

Along with retaining the two-term system for subsisting copyrights, Congress increased the duration of the renewal term to 47 years, thereby granting copyright owners of works created prior to 1978 a copyright monopoly of 75 years.\(^5\) Section 304 maintained the same procedures for renewal as were found in section 24 of the 1909 Act\(^5\) including the provision that the renewal right was granted only to those falling within the author's statutory successor

---

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. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary.

*Id.* Among the other reasons for change was that life expectancy had dramatically risen between 1909 and 1976, and many authors would live to see the end of their copyright monopoly. *Id.*


\(^9\) *Id.*


\(^5\) However, in 1992, Congress enacted the Copyright Renewal Act of 1992, which eliminated most of the renewal procedures. The Renewal Act will be discussed in more detail below.
Section 304 of the 1976 Act, and its predecessor in the 1909 Act, are the main focus of this Note. The testamentary freedom of copyright owners is undermined by the language of these provisions.

In addition to carrying over the renewal system for works created prior to 1978, Congress retained several other provisions of the 1909 Act. Section 201 of the 1976 Act roughly parallels section 28 of the 1909 Act. Section 201 grants the copyright owner the freedom to transfer the copyright, in whole or in part. It is paradoxical that Congress specifically grants freedom of transfer in section 201, yet codifies section 304 which severely undermines the copyright owner’s freedom to transfer the copyright after death.

3. Divisibility of Copyright. The 1909 Act granted copyright owners several exclusive rights. Under the 1909 Act, however, the copyright monopoly was indivisible, meaning that a copyright owner could not transfer individual exclusive rights to a third party. Upon a transfer of copyright to another, the entire copyright monopoly was transferred. For example, a copyright owner was unable to transfer the exclusive right to prepare a derivative work without transferring all of the exclusive rights granted to the copyright owner in section one of the 1909 Act.

---

54 17 U.S.C. § 304 (1994). As with the 1909 Act, the statutory successor class includes the author if he is still living, the widow, widower, or children if the author is not living, the author’s executors if the author, widow, widower or children are not living, or the author’s next of kin, in the absence of a will. Id.

55 17 U.S.C. § 201(d)(1) (1994). The statute states that “[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.” Id. This language is similar to section 28 of the 1909 Act except for the new provision that copyright may pass through intestacy.

56 Act of March 4, 1909, ch. 320, § 1, 35 Stat. 1075 (current version at 17 U.S.C. § 106 (1994)). Section one of the 1909 Act granted the copyright owner the exclusive right to print, reprint, publish, copy, and vend the copyrighted work, to translate the work or create derivative works, to perform the work publicly, and to reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it is a sound recording.

57 A common example of a derivative work is a movie based on a novel. Under the 1909 Act, if a copyright owner wished to have his novel made into a movie by a third party, he or she was forced to transfer the entire copyright monopoly. Accordingly, the assignee would also have the right to publish and vend copies of the assignor’s novel. Today, the 1976 Act allows copyright to be divided and permits transfer of the exclusive right to prepare derivative works, thereby allowing the copyright owner of the underlying work to maintain
The 1976 Act substantially changed this aspect of copyright law. Section 201(d)(1) of the 1976 Act provides that copyright may be transferred "in whole or in part." Subsection (d)(2) provides that "[a]ny of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title." Thus, a copyright owner may transfer specific rights granted by the 1976 Act without transferring his or her entire monopoly. As with transfers of entire copyright interests, if an author conveys divided rights during the initial term and fails to survive into the renewal term, the renewal provision "bumps" the conveyance whether it was inter-vivos or by will.

4. Termination Rights. The renewal provisions created by the 1909 Act gave copyright owners the right to "recover" their copyright after transfer. A copyright owner who transferred his or her copyright during its first term was entitled to renew the copyright and thus effectively recover the copyright after the first term had expired. When Congress enacted the 1976 Act, it wanted to retain the idea of copyright recovery without the rigid requirements of the renewal system.

Section 203 of the 1976 Act grants copyright owners a right to terminate transfers. Congress stated that such a provision was necessary "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." Section 203 allows copyright owners of works created on or after January 1, 1978 to terminate a transfer of copyright, or any copyright interest, at any time during a five-year period beginning at the end of the thirty-fifth

the copyright monopoly in all other exclusive rights granted by the act.

Copyright owners of works created prior to 1978 may exercise their termination right during a five-year period beginning at the end of the fifty-sixth year from the date the copyright was originally secured or beginning on January 1, 1978 if the end of the fifty-sixth year has passed. Termination is not automatic. Rather, specific procedures are necessary effectively to terminate a transfer.

As with the provisions for renewal of copyright found in section 24 of the 1909 Act and section 304 of the 1976 Act, only a class defined by the act may exercise the termination right. If the copyright owner dies during the first term, the termination interest is owned and may be exercised by the author's widow, widower, children or grandchildren. With the termination right, Congress is striving to keep the creativity of the author in his family. The major difference between termination rights and renewal rights for estate planning purposes is that transfers by will or transfers by the copyright owner's successors may never be terminated. Termination rights, therefore, maintain the existence of the "contract-bumping" feature of copyright law by allowing the author or his statutory successor class to nullify existing contracts between the original copyright owner and third parties. However, by disallowing termination of transfers made by will, Congress has

63 17 U.S.C. § 203 (1994). If the transfer contains the right of publication, the five-year period begins at the end of the thirty-fifth year after the date of publication or at the end of the fortieth year after the date of transfer. Id.

64 17 U.S.C. § 304(c) (1994). Accordingly, works created prior to 1978 have a double benefit. First, the renewal system allows the original copyright owner to recover the copyright interest for the renewal term. Second, if the original copyright owner, after recapturing the copyright for the second term, assigns the copyright to a third party, he or she may again recover the copyright beginning at the end of the fifty-sixth year.


66 17 U.S.C. §§ 203(a)(2), 304(c)(2) (1994). If the copyright owner had no children, the widow or widower owns the entire termination interest. If there are surviving children and a widow or widower, he or she owns a one-half interest and the other one-half interest is divided among the living children and the children of any deceased children of the copyright owner on a per stirpes basis. Id. For clarity, it should be noted that termination classes, unlike renewal classes, apply to works created prior to January 1, 1978 and works created on or after January 1, 1978.


bypassed the conflict between copyright law and estates law. 69

5. Preemption With Respect to Other Laws. Section 301 of the 1976 Act provides that Federal copyright law preempts state law. 70 Due to the preemption clause, one could argue that there is not a conflict between the 1976 Act and state probate codes; where Federal copyright law governs, state law must give way. This argument lacks merit, however, because the legislative history of section 301 explicitly states that the purpose of the section is to "preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law." 71 Estates law does not fall into the category of those laws preempted by section 301 because it does not offer protection "equivalent to copyright." 72

III. ESTATES LAW

Estate law is the branch of law that governs the planning and transfer of property at death. The United States Supreme Court, in the case of Irving Trust Co. v. Day, 73 found that donative and testamentary transfers are not constitutionally protected rights, but

69 In addition, testamentary freedom is not impaired by termination rights because if an inter-vivos transfer of copyright, or any copyright interest, is made, the copyright owner no longer owns the copyright or copyright interest. Therefore, as with any other personal property, once the property has been transferred inter-vivos, the same property may not be later transferred by will or pass through intestacy.

70 17 U.S.C. § 301 (1994), which provides in relevant part as follows:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Id. (emphasis added).


72 State granted "common law" copyright is an example of a law that is preempted by Federal copyright law.

rather are statutory in nature. The court also found that the state has the power to "limit, condition, or even abolish" testamentary transfers.

The Supreme Court's ruling in Irving Trust Co. suggests that estates law is to be controlled by state law. An in-depth study of individual states' estates law is beyond the scope of this Note. For present purposes, this Note will examine the pre-1990 UPC, which has been adopted in fifteen states since its enactment in 1969.

A. TESTAMENTARY FREEDOM

Adam Smith once wrote that "[t]o give a man power over his property after his death is very considerable, but it is nothing [compared] to an extension of this power to the end of the world." Following this premise, testamentary freedom underlies United States Estates Law. "It is often said that the principle of testamentary freedom dominates the law of the United States." Historically, the justifications for the notion of testamentary freedom have been several.

First is the belief that individuals have a natural right to bequeath. This view gained judicial recognition in Shriners Hospitals for Crippled Children v. Zrillic, where the Supreme Court stated that the notion of testamentary rights as purely statutory stemmed from feudal England where only the king owned real property. "During the decline of feudalism, Parliament enacted the Statute of Wills to grant citizens the lawful right to devise real property... hence, devising property came to be regarded as a right created by statute, not a 'property' right inherent in the common law of England." Id. at 67. But the court then stated that "[t]hat analysis is inapplicable in our society where feudalism never existed and where property rights rest on an express constitutional foundation that is distinguishable from the common law roots of feudal England." Id. at 68.
Court of Florida stated that the right of testation is not purely a creation of statute but, like property rights, is grounded in natural law. The natural law theory had some opponents. William Blackstone, for example, contended that individuals solely had a natural right to transfer property during life, for he believed that one lost all property rights upon death because nature protects only the living.

A second justification is the belief that testamentary freedom motivates individual saving and investment. This theory revolves around the belief that testamentary freedom adds value to property, and if that value were taken away, there would be less incentive to amass property. Richard Posner calls this theory "wealth maximization." Opponents of this theory offer a variety of reasons for the maximization of wealth other than the motivation to bequeath.

A third rationale given for testamentary freedom is simply that such freedom allows for more intelligent estate planning. Testamentary freedom, according to this theory, allows the testator to weigh the varying needs of his family. One significant problem with this justification is the length of time that often passes between will execution and the death of the testator. Another problem is that many testators put very little time and even less thought into their estate plan.

Yet another justification for testamentary freedom is that estates

---

51 Id. at 67-68.
52 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10-11 (London 1765-69).
53 RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 13-115 (1981). Posner believes that as the value of property decreases, people will accumulate less property. Hence, the total amount of wealth will decrease. Id.
54 See generally JOSIAH WEDGWOOD, THE ECONOMICS OF INHERITANCE 213-216, 232 (Ralph A. Brown ed., 3d ed. 1971) (stating that factors such as power and prestige motivate individuals to gain excess wealth). Wedgwood further believes that testamentary freedom may lead to a reduction of amassed wealth because beneficiaries may forego producing personal wealth in expectation of a devise or inheritance. Id. at 207-08.
56 Id.
58 See generally Mary L. Fellows, In Search of Donative Intent, 73 IOWA L. REV. 611 (1988) (discussing how estates law seeks to find testator's true intent).
law would be difficult to police if it were otherwise. It has been said about property that "[i]f we prevented them from bestowing it in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation." However, a fundamental notion exists in civilized societies that the populace will follow the laws imposed upon them.

The notion of testamentary freedom is at the core of United States Estates Law. The language of the 1976 Act limits the class that can renew a copyright after the first term has expired. The renewal provision has mandated that copyrights in author's works remain in the author's family. As will be discussed below, the Uniform Probate Code and individual states' probate codes have taken great strides to ensure that the family is protected in fundamentally different ways.

B. STATE LAW LIMITS ON TESTAMENTARY FREEDOM

The pre-1990 UPC places several limits upon freedom of testation. While each of the limitations has a distinct policy rationale, the major policy behind each is to protect the family from intentional or unintentional disinherition. Estate planners are bound to know the limitations on testamentary freedom provided in their state's probate code. However, very few estate planners know of the additional limitation imposed by copyright law. Section 304 of the 1976 Act, while providing that copyright must stay in the author's family, disregards state law's already expansive protection of the family.

1. Spouse's Elective Share. Virtually all common law property states have elective share statutes. Georgia is the only common law property state that does not have an elective share statute. Instead, Georgia has a species entitled "year's support." Under this system, the surviving spouse and minor children are entitled to an undetermined amount to maintain their standard of living for a period of twelve months from the death of the decedent. Application is made for a certain amount, and if the amount is unchallenged, that amount is set aside for the surviving spouse and minor children. If the amount is challenged, the applicant has the burden of proving the amount necessary for a year's support. See GA. CODE. ANN. §§ 53-5-1, 53-5-2 (1995) (providing for year's support).
do not have elective share provisions because in these states, surviving spouses are automatically entitled to fifty percent of property obtained during marriage.91 The comment to the pre-1990 UPC stated that "[o]ptional sections adapting the elective share system to community property jurisdictions were contained in the preliminary drafts, but were dropped from the final Code."92 The provision would have applied to situations where a married couple had amassed little property during marriage.

Generally, elective share laws provide that a surviving spouse can, in the case of an unfair inheritance, elect to take a statutory share of the decedent's estate. The pre-1990 Uniform Probate Code grants the surviving spouse a one-third share of the decedent's augmented estate93 with certain limitations.94 The policy underlying the elective share system is to protect the spouse against an intentionally or unintentionally unfair inheritance.95

Section 304 of the 1976 Act grants the widow, widower, or children, if living, the sole power to renew and, consequently, own the copyright after the author's death. This provision guarantees the surviving spouse not only one-third of the decedent’s augmented estate, but a substantial portion of the copyright interest in all of the decedent’s copyrights which were in their first term upon the decedent’s death. Under certain circumstances, the fairness of section 304 cannot be questioned. For example, if the decedent died with the copyrights and very little other property, it would be equitable to grant the surviving spouse at least a share of the

---

91 There are presently eight community property jurisdictions in the United States: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.
93 The augmented estate is defined as the total of: all of the testator’s estate, all of the testator’s donative transfers, and everything transferred to the surviving spouse through the will, gift, or trust. UNIF. PROB. CODE § 2-201 (1969).
94 Id. § 2-201, which reads:
   (a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.
   (b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent’s domicile at death.
renewal rights. However, elective share and community property would dictate the same result. 96

If the decedent’s estate was comprised of valuable copyright interests as well as other valuable property, under current copyright and estates law, the surviving spouse would be entitled to between one-third and one-half of the probate property, 97 and at least a share of the copyright interests. The result in this hypothetical is inequitable because the surviving spouse will receive a windfall that leaves the other will beneficiaries or heirs with only the remainder of the probate property. The classification of windfall is not intended to imply that the surviving spouse is undeserving of the “take.” Rather, in this situation, the surviving spouse is sufficiently provided for through her elective share and the decedent’s testamentary freedom is curtailed.

2. Pretermitted Children. Pre-1990 UPC section 2-302 provides that if a testator fails to provide for any of his or her children who were born or adopted after the execution of the will, those children receive an intestate share of the testator’s estate. 98 Intentional disinherintance of a child is allowed in most jurisdictions. 99 Accordingly, if it appears from the will that the omission was intentional, if the testator had one or more children at the time of execution and devised substantially all of his estate to the other parent, or if the testator provided for the pretermitted child outside the will, the general rule does not apply and the omitted child may not claim an intestate share. 100 Some jurisdictions automatically revoke a will if a child is born after execution of a will which lacks a provision for the contingency. 101

3. Homestead and Family Allowances. Pre-1990 UPC sections

96 In a case where virtually the entire estate consists of copyright interests, the elective share laws or community property laws would provide that the surviving spouse be entitled to a share of the copyright interests.
97 Typically, it is one-third in common law property states and one-half in community property states.
99 Louisiana is the only state where a parent is required to leave a certain share of his or her estate to each child. See LA. CIVIL CODE ANN. art. 1493, 1495 (West 1995) (providing concept of legitime).
100 UNIF. PROB. CODE § 2-302 (1969).
101 See, e.g., GA. CODE ANN. § 53-2-76 (1995) (providing that birth of child, marriage, or divorce revokes will unless provision is made in contemplation of event).
2-401 and 2-403 confer upon the surviving spouse or dependent children the right to certain sums of money or property out of the decedent's estate. Both allowances have priority over all other claims to the estate. The homestead allowance provides $5000 to the surviving spouse or dependent children if there is no surviving spouse. The family maintenance allowance entitles the surviving spouse or dependent children to a reasonable amount of money out of the estate for maintenance during will administration. One of the main rationales behind these two entitlements is to guarantee that small estates remain with the surviving spouse and dependent children.

4. Exempt Property. Perhaps the most important of the statutory exceptions to testamentary freedom for the present discussion is the provision for exempt household property. Under pre-1990 UPC section 2-402, the surviving spouse, and if no surviving spouse, then dependent children, are entitled to $3500 of household property. Like the homestead and family allowances, the claim to exempt property has priority over all other claims to the estate.

A primary purpose of section 402's exemption of household property is to "relieve the personal representative of the duty to sell household chattels when there are children who will have them." Section 402 is the only estates law provision that requires certain items of personal property to remain in the family. The renewal provision of the 1976 Act likewise attempts to keep copyright, a form of intangible personal property, in the family. The major conflict between these two provisions is that the purpose behind the exempt property provision is to promote the ease of will administration, while the 1976 Act solely serves to keep a form of personal property within the family.

102 UNIF. PROB. CODE §§ 2-401, 2-403 (1969). If there is a surviving spouse, he or she takes both allowances, thus leaving nothing for the dependent children. Id.
103 Id.
104 Id. § 2-401.
105 Id. § 2-403.
107 UNIF. PROB. CODE § 2-402 (1969). Exempt property includes household furniture, automobiles, furnishings, appliances, and personal effects. Id.
108 Id.
109 Id.
The limitations on testamentary freedom imposed by the pre-1990 UPC and individual states' probate codes are sufficient to ensure the family a proper "take" from the estate of the decedent. The elective share provisions in common law property jurisdictions typically provide the surviving spouse with one-third of the decedent's augmented estate. In community property states, the surviving spouse is entitled to one-half of all marital (or community) property. While one can argue that the surviving spouse and dependent children should be entitled to more than the statutory shares, the renewal provision of the 1976 Act is simply a superfluous addition to the list of limitations already imposed by state law.

C. INTESTACY LAWS

Though of less importance to our present discussion, it is important to note the conflict between intestacy laws and the renewal system of the 1976 Act. The comment to the pre-1990 UPC states that the purpose of intestacy laws is "to reflect the normal desire of the owner of wealth as to disposition of his property at death." In general, intestacy laws provide for the surviving spouse and other heirs of the decedent. The order of descent under the pre-1990 UPC is the surviving spouse, the surviving issue of the decedent, the parents of the decedent, the issue of the parents of the decedent, and then other kin.

When an individual dies without a valid will, the laws of our society provide for takers consistent with the perceived wishes of decedents. Intestacy law directs the passing of property when the decedent's true wishes are unascertainable. Section 304 of the 1976 Act, unlike intestacy laws, seeks to direct the descent of personal property inconsistently with the decedent's wishes when the decedent's true intentions are ascertainable.

IV. INTER-VIVOS TRANSFER OF THE RENEWAL TERM

Under the 1909 and the 1976 Acts, a copyright owner has been free to transfer a copyright inter-vivos by any means of convey-

ance.\textsuperscript{112} Prior to the codification of the 1909 Act, a concern was raised about the inter-vivos transfer of term-two rights during the first term of a copyright. The language of the 1909 Act provided that "[c]opyright secured under this title . . . may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright."\textsuperscript{113} With the use of the preceding language, Congress did not address the concern. But, in the landmark decision of \textit{Fred Fisher Music Co. v. M. Witmark & Sons},\textsuperscript{114} the Supreme Court held that the renewal term could be transferred inter-vivos.\textsuperscript{115}

In \textit{Fred Fisher Music Co.}, a copyright owner of a song transferred his copyright to music publisher, M. Witmark & sons. The transfer contract, signed May 19, 1917, stated that the copyright owner assigned to Witmark "all rights, title and interest" in the copyrighted work.\textsuperscript{116} The contract further provided for the conveyance of "all copyrights and renewals of copyrights and the right to secure all copyrights and renewals of copyrights in the [song], and any and all rights therein that I [copyright owner] or my heirs, executors, administrators or next of kin may at any time be entitled to."\textsuperscript{117} On August 12, 1939, the first day of the twenty-eighth year of the first copyright term, Witmark applied for and registered the renewal copyright. Eleven days later, the original copyright owner applied for and registered the renewal and later assigned the renewal term to Fred Fisher Music Company on October 24, 1939. Fred Fisher Music Company then began to publish and sell copies of the song. Witmark learned of Fred Fisher's actions and brought suit to enjoin the conduct.

The question posed to the Supreme Court was whether the 1909 Act nullified the agreement between the copyright owner and Witmark to assign the renewal term of the copyright during the

\textsuperscript{114} 318 U.S. 643 (1943).
\textsuperscript{115} \textit{Id.} at 659.
\textsuperscript{116} \textit{Id.} at 645.
\textsuperscript{117} \textit{Id.}
first term.\textsuperscript{118} The Court found that, under the 1909 Act, a general assignment of copyright did not assign any rights to the renewal term.\textsuperscript{119} However, the Court held that if a copyright owner makes a reasoned choice to assign the renewal term of the copyright during the first term, the 1909 Act does not nullify that agreement.\textsuperscript{120} The court did not discuss the potential consequences had the copyright owner died during the first term.

In 1960, the Supreme Court decided the case of \textit{Miller Music Corp. v. Charles N. Daniels, Inc.}\textsuperscript{121} The issue in \textit{Miller Music} was whether an inter-vivos transfer of a renewal term in a copyright was valid if the original copyright owner died prior to the end of the first term.\textsuperscript{122} The court held that an assignment of the renewal term is solely a valid assignment of an expectancy interest.\textsuperscript{123} If the original copyright owner dies prior to the end of the first term, the expectancy interest is never realized.\textsuperscript{124} Accordingly, when an author makes an inter-vivos assignment of the renewal term and dies during the first term, members of the statutory class described by section 24 of the 1909 Act are the true owners of the renewal right.

In 1992, Congress amended the 1976 Act with the codification of the Copyright Renewal Act of 1992.\textsuperscript{125} The Renewal Act automatically confers renewal in the appropriate successor or successors when the first term ends. Under the Renewal Act, if a renewal application is filed during the twenty-eighth year of the first term by a member of the appropriate statutory successor class, the renewal term will vest in that individual at the beginning of the twenty-ninth year, even if the individual dies before the renewal term begins.\textsuperscript{126} Accordingly, all assignments made by that individual of the renewal term interest will be effectuated.

Prior to 1992, copyright law had never defined the precise

\begin{itemize}
\item \textsuperscript{118} \textit{Id.} at 647.
\item \textsuperscript{119} \textit{318 U.S.} 643, 653 (1943).
\item \textsuperscript{120} \textit{Id.} at 657-58.
\item \textsuperscript{121} \textit{362 U.S.} 373 (1960).
\item \textsuperscript{122} \textit{Id.} at 374.
\item \textsuperscript{123} \textit{Id.} at 377.
\item \textsuperscript{124} \textit{Id.} at 378.
\item \textsuperscript{126} \textit{Id.}
\end{itemize}
moment when renewal rights vest in the author of a copyrighted work. Once the renewal rights vest in the author, he or she is free to make inter-vivos and testamentary conveyances of the renewal right. Prior to the 1992 amendment, courts differed on the issue of when the renewal term was deemed to have vested. The United States District Court for the Southern District of New York, in *Frederick Music Co. v. Sickler,* held that renewal rights vested on the date of renewal registration, which could occur at any time during the twenty-eighth year of the first term. The Ninth Circuit conversely held in *Marascalo v. Fantasy, Inc.* that the renewal rights vest in the author only if he or she survives into the renewal term. Nimmer proposed yet another option. He stated that it might be held that renewal vests in the author only if he or she lives into the renewal term and had previously filed for renewal.

The situation described in *Miller Music,* above, is a "contract-bumping" situation. Copyright law has disregarded the intentions of copyright owners to assign both terms of copyright during the initial term if the copyright owner dies during the initial term. In such a case, copyright law mandates that the statutory class provided by the copyright act is entitled to the renewal interest. The same conceptual analysis applies where a copyright owner dies during the first term leaving a will which devises the copyright outside of the statutory class. As a result, copyright law strips the copyright owner of a work created prior to 1978 of the right to transfer all of his interest in the copyright, both inter-vivos and upon death.

V. SECTION 304 OF THE 1976 ACT

Provisions for copyright renewal are presently found in section 304 of the 1976 Act. Section 304(b), which is of little impor-

---

128 Id. at 592.
129 953 F.2d 469 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992).
130 Id. at 476.
131 DAVID NIMMER, NIMMER ON COPYRIGHT § 9.05(c) at 79-80 (1995).
tance to the present discussion, extends the renewal term to forty-seven years for copyrights in their renewal term as of January 1, 1978. The focus of this Note, however, is on copyrights that were still in the first term in the beginning of 1978. Works copyrighted as early as 1950 fall into the category of works that were in their first term when the 1976 Act became effective. However, for present purposes, this Note focuses on works copyrighted between 1968 and December 31, 1977. These works are still in their first term, and as such are subject to the rules of renewal found in section 304 of the 1976 Act.

Section 304(a) outlines the statutory successor class who has the power to renew a copyright. The class description is identical to that designated in section 24 of the 1909 Act. Under current copyright law, only the author, his or her widow or widower,......

---

133 Recall that the Supreme Court in *Miller Music Corp. v. Charles N. Daniels, Inc.* stated that the renewal term simply was an expectancy interest in the hands of the copyright owner during the first term. 362 U.S. 373, 375 (1960). However, once a copyright is renewed, the copyright owner is free to transfer the renewal term by will or inter-vivos assignment under section 201 of the 1976 Act. 17 U.S.C. § 201 (1994).

134 17 U.S.C. § 304 (1994), which provides in relevant part:

(a) Copyrights in Their First Term on January 1, 1978.

(1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of-

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 47 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work-

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author, shall be entitled to a renewal and extension of the copyright in such work for a further term of 47 years. *Id.*

children, executors, or next of kin may renew a copyright. By limiting the class members who may renew the copyright, Congress has stripped the copyright owner of the freedom to transfer his or her copyright by will or otherwise.

Under the 1909 Act, and until recently, the 1976 Act as well, members of the statutory class who were able to renew copyright had to follow certain procedures to renew a copyright. Before 1992, if a copyright owner failed to renew his copyright by following the procedures prescribed under copyright law, the copyright expired and entered the public domain. The Copyright Renewal Act of 1992 alleviated this inequity. According to the Renewal Act, which has been incorporated into section 304 of the 1976 Act, renewal registration is no longer a condition precedent to renewal and extension of copyright. Although registration is no longer required, section 304 provides certain benefits if a renewal application is made.

VI. "WILL-BUMPING"

Along with creating "contract-bumping," Congress's stated purpose in the enactment of the copyright renewal provision, the renewal provision has also created "will-bumping." This Note will show that Congress did not realize the conflict between copyright's

136 The executors of the author's will serve as fiduciaries for the will beneficiaries. Accordingly, the executors do not personally benefit from the renewal right; they merely renew for the benefit of the author's devisees.
137 In the absence of a widow, widower, children, or will, the author's next of kin may renew the copyright. State intestacy laws will determine who among this class may renew and in what proportion these individuals shall share the copyright interest.
139 Copyright Office statistics showed that only 20% of all copyrights registered with the copyright office were eventually renewed.
141 If registration of copyright renewal is made during the last year of the first term, a certificate of renewal registration constitutes prima facie evidence as to the copyright's validity and of the other facts stated in the certificate. In addition, statutory damages and attorneys fees may be awarded in an infringement action if copyright renewal was registered prior to the infringement. Id.
142 The term "will-bumping" was coined by Francis Nevins in Francis M. Nevins, Jr., The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide, 35 J. COPYRIGHT SOC'Y 77 (1988).
renewal provisions and estates law's notion of testamentary freedom. With the codification of the Copyright Renewal Act of 1992, Congress eliminated some of the inequities of the renewal system. If the inequities of the "will-bumping" phenomenon are to be relieved, Congress must once again amend the 1976 Act.

The term "will-bumping" pertains to several situations where a conflict arises between estates law and copyright law. First, the term applies to the typical situation where an author of a work created prior to 1978 devises his or her entire copyright interest to a person or persons other than the surviving spouse, children, executors, or next of kin. Another scenario is where the author, by will, devises the copyright interest to a member or members of the statutory successor class, but does so in unequal fashion. Yet another "will-bumping" situation occurs when copyright law interferes with a will of one of the author's statutory successors to the renewal right. Before discussing the different "will-bumping" situations, the origins of "will-bumping" should be explored.

A. THE ORIGINS OF "WILL-BUMPING"

As stated above, the renewal system has been a part of United States Copyright Law since the first copyright statute was enacted by Congress only three years after the ratification of the Constitution.143 "Will-bumping" has been a part of United States Copyright Law since the Copyright Act of 1831. Since that time, however, no court has held specifically that the author's will is "bumped" if the author dies during the first copyright term, survived by a spouse or children, and leaves the copyright in a work outside the statutory successor class. Nevertheless, Nimmer and other copyright authorities agree that "will-bumping" exists.144

The first cases to discuss the connection between copyright renewal and the law of wills made it clear that the courts could not

---

143 See Act of May 31, 1790, Ch. 15, § 1, 1 Stat. 124 (providing for an initial term of fourteen years and a renewal term of a further fourteen years). Under the Copyright Act of 1790, there was not a will-bumping problem because the renewal right could only be exercised by the author if still living.

144 See DAVID NIMMER, NIMMER ON COPYRIGHT, § 9.04 at 54-64 (1995) (discussing copyright renewal rights in author and successor classes).

https://digitalcommons.law.uga.edu/jipl/vol4/iss1/7
find any legislative intent for copyright law to interfere with estates law. For this reason, courts were forced to use strict statutory interpretation. In the earliest case, *Danks v. Gordon*, the court did not reach the merits of the plaintiff's case because the court held that a suit for copyright royalties was a contract cause of action and not one "arising under" federal copyright law. The court, in dictum, stated that even if proper jurisdiction existed, the plaintiff, as a fiduciary of the copyright owner's estate, did not have standing to sue because the author's copyrights had been previously renewed by his surviving spouse and children, who were members of the statutory successor class. Accordingly, after the renewal, only the members of the statutory successor class had standing to sue for copyright infringement.

The next case to arise was *Silverman v. Sunrise Pictures Corp.* The case involved a novel written by Augusta Evans Wilson. The author died during the first copyright term childless, unwed and testate. The author's will left the copyright in the work to several members of her family. In 1915, when the time for renewal arose, the executors of the will had been discharged. Under the renewal provision, the author's executors were the class entitled to renew the copyright. Two of the author's surviving sisters filed for renewal as the author's next of kin. Several years later, Silverman contacted the author's family in hopes of making a movie of the novel. Silverman obtained assignments of the renewal term not only from the two sisters that filed for renewal, but also from everyone who fell into the class of the author's next of kin. At the same time, Sunrise Pictures was planning a movie from the same novel and claimed that the novel was in the public domain. Silverman sued Sunrise Pictures in the United States District Court for the Eastern District of New York to enjoin Sunrise Pictures from making the film.

---

145 272 F. 821 (2d Cir. 1921).
146 Id. at 827.
147 Id. at 826.
148 Id. at 825.
149 273 F. 909 (2d Cir. 1921), *cert. denied*, 262 U.S. 758 (1923).
150 Recall that the author's next of kin is the proper statutory successor class only if the author dies without a will.
The District Court denied the injunction and the Second Circuit reversed and remanded. The Second Circuit held that if an author dies unwed and childless during the first copyright term, the will is "bumped" in favor of the author's next of kin. This result was strange because there was no mention of the author's executors, who are the correct successor class when an author dies unwed, childless and testate. The court further held that where the appropriate successor class is the author's next of kin, the class members take as tenants in common, so that if one member renews the copyright, the renewal benefits the entire class. The case was remanded to the District Court with orders to grant the injunction.

While Silverman was on remand, Fox Film Corp. v. Knowles went before the United States District Courts for the Southern and Eastern Districts of New York. The facts of this case differ substantially from the facts in Silverman, yet as will be seen, the outcome of this case affected the eventual outcome of Silverman. Knowles dealt with the estate of Will Carleton, the author of several poems in the late nineteenth century. In 1901, Carleton filed for renewal of the copyrights of his works. At the time, the renewal term of copyright was only fourteen years. With the codification of the 1909 Act, Congress allowed an extension of the renewal term for subsisting copyrights to twenty-eight years if an application for such extension was made with the Copyright Office. Carleton died in 1912 devising all of his property to Norman Goodrich, who was also named the executor of Carleton's estate.

In 1915, Goodrich applied for the extension for one of Carleton's works. Goodrich then died, devising all of his property to his wife. Fox Film Corporation decided to make a film of Carleton's work

---

151 Silverman, 273 F. at 910.
152 Id. at 914.
153 Id. at 913.
154 Id. at 913.
155 Id. at 915.
156 275 F. 582 (S.D.N.Y 1921), 274 F. 731 (E.D.N.Y. 1921).
158 None of the several opinions in this case suggested that Carleton left a widow or children.
and purchased the copyright from Goodrich's widow. At the same time, Knowles had written and produced a play based upon the same work. Fox sued Knowles for infringement. Knowles claimed that the work was in the public domain. When the Second Circuit handed down its opinion in Silverman, Knowles moved to dismiss the suit on the grounds that because Carleton died prior to the extension of the renewal term, he could not devise the extended renewal term by will and that, accordingly, the only persons who were entitled to the renewal term extension were Carleton's next of kin. The District Courts dismissed the suits and the Second Circuit affirmed.\(^{159}\)

Fox then applied for a writ of certiorari. The Supreme Court agreed to hear the case and unanimously reversed the Second Circuit.\(^{160}\) The Supreme Court held that if an author dies unwed, childless and testate, only the author's executors are entitled to renew the copyright because an author's will can never be disregarded in favor of the author's next of kin.\(^{161}\)

Following the Supreme Court's decision in Knowles, the District Court's final order in Silverman again came before the Second Circuit on appeal.\(^{162}\) The Second Circuit, relying on the Supreme Court's decision in Knowles, held that where an author dies unwed, childless and testate, the only person entitled to renew the author's copyrights is the author's executor.\(^{163}\) However, if the executor failed to renew the copyrights, timely renewal by any of the author's next of kin is valid and acts to the benefit of the entire class.\(^{164}\) If none of the next of kin renewed the copyright, the work would enter the public domain at the end of the first term. The ruling of Knowles remains the law today. The ruling of Silverman, however, is of questionable validity after the codification of the 1992 amendment, which provides for automatic renewal. The 1992 amendment acts to vest ownership of the renewal term automatically in the appropriate statutory successor class.

\(^{159}\) Fox Film Corp. v. Knowles, 279 F. 1018 (2d Cir. 1922), rev'd, 261 U.S. 326 (1923).

\(^{160}\) Fox Film Corp. v. Knowles, 261 U.S. 326 (1923).

\(^{161}\) Id. at 329-30.


\(^{163}\) Id. at 805.

\(^{164}\) Id.
Accordingly, in a situation like that in Silverman, ownership of the renewal term would automatically vest in the author's executors when the first term expires.

In the legislative history of the Copyright Act of 1790 and subsequent copyright acts, only one rationale for the renewal system has been advanced. Congress realized that when a conveyance of copyright was made during the first term, neither the assignee nor assignor could possibly know the extent of success and profitability of the copyrighted work. Accordingly, the author or the statutory successors should be given a second chance to profit from the work. This rationale is convincing when protecting the author from unwise inter-vivos conveyances for consideration and allowing the author to profit once again from his creativity. The rationale is not convincing when extended into estates law because the author's devise is clearly not motivated by the desire for personal economic gain. The silence of the legislative histories of the various copyright statutes and the clear "contract-bumping" purpose of the copyright renewal provision evidence Congress's lack of intention for the copyright renewal provision to interfere with an individual's freedom of testation.

B. A "TYPICAL" SITUATION

This section of the Note focuses on the typical situation where a copyright owner devises a copyright interest outside the statutory successor class. In such a situation, the renewal provisions "bump" the author's will in favor of the statutory successors. Consider the following hypothetical situation.

Jane Smith, a singer-songwriter, was married to John Smith. In 1975, Jane wrote and recorded a popular song entitled "The Dead Hand." By the early 1980's, Jane became a concerned environmental advocate. Jane Smith died in 1985, leaving a will that devised the copyright in the song to Greenpeace and the rest of her

165 Ringer, supra note 19, at 521; Nimmer, supra note 144, § 9.02 at 28.
166 Under current copyright law, the song written by Jane Smith is granted copyright protection as soon as it is fixed in a tangible medium of expression. 17 U.S.C. § 102 (1994). Accordingly, Jane's initial copyright term begins in 1975 and runs for twenty-eight years. 17 U.S.C. § 304(a) (1994).
large estate to her husband John. Who is entitled to the copyright interest?

The situation described above is typical primarily for one reason. Very few estate planners know of the special rules regarding copyright renewal. The simple answer to the question posed is that Greenpeace is the owner of the copyright interest until the first term expires in 2003. However, under the Copyright Renewal Act of 1992, which is now incorporated into the 1976 Act, the copyright renewal term automatically vests in the statutory successor class when the first term expires. Accordingly, at the end of 2003, the 1976 Act "bumps" Jane's will, and ownership of the copyright interest in the renewal term passes to John Smith and Jane's children (if any), if still living, if not, to Jane's executors as fiduciaries for Jane's will beneficiaries.

If not for the renewal provision of the 1976 Act, the result would be quite different. Jane Smith's will would control, thereby fulfilling her testamentary intent. In such a case, Greenpeace would be the sole owner of the copyright interest for both the remainder of the first term and for the entire renewal term. John Smith would be adequately provided for by the testamentary bequest of the remainder of Jane's rather large estate. The inequities of the "will-bumping" phenomenon are quite apparent in this situation.

C. A SECOND "WILL-BUMPING" SITUATION

We have now seen how the 1976 Act "bumps" the author's will if the will devises the copyright interest outside the statutory successor class. The focus now shifts to a situation where the

---

167 For the purposes of this hypothetical, assume the copyright interest was valued at $100,000 and the remainder of Jane's estate was valued at $1,000,000 at the time of Jane's death.


170 Had Jane Smith devised nothing to her husband, elective share provisions or community property laws would have only entitled John Smith to as much as fifty percent of Jane's estate. In the present hypothetical, however, John receives not only the $1,000,000 testamentary bequest, but also the renewal term of the copyright interest Jane had devised to Greenpeace.
author's will devises the copyright interest to some, but not all members of the statutory successor class, or to all members of the class but in an unequal apportionment. The question posed in this situation is whether the renewal provision of the 1976 Act will accord the author even this minimal amount of testamentary freedom.

The first concern in such a situation is to determine which members of the statutory successor class are entitled to the renewal right. Recall that the members of the statutory successor class under section 304 of the 1976 Act include the author's widow, widower or children, the author's executors as fiduciaries for all will beneficiaries if the author dies unwed, childless and testate, and the author's next of kin if the author dies unwed, childless and intestate.\textsuperscript{171} If the appropriate successor class is the author's executors, copyright law does not affect the allocation of the copyright interest. Rather, the language of the author's will determines the appropriate takers, and the executors are to effectuate the author's intent. Similarly, if the appropriate successor class is the author's next of kin, copyright law is not the determinant of the allocation of the copyright interest amongst the members of the class. In this situation, the author dies intestate, and the applicable state intestacy laws determine the allocation of the author's copyright interest.

If the appropriate successor class is the author's widow, widower or children, the apportionment of the copyright interest is not quite as apparent. Suppose that when Jane Smith died in 1985, she was survived by her husband John and two grown children. Jane's will devised her copyright interest to her husband John for life, remainder to her two children. Would copyright law allow this allocation?

The Supreme Court's decision in DeSylva\textit{ v. Ballentine}\textsuperscript{172} suggests not.\textsuperscript{173} The issue in DeSylva was whether "widow, widower or children" constitutes one or two classes under the renewal provisions of the 1909 Act.\textsuperscript{174} The facts of DeSylva are

\textsuperscript{172} 351 U.S. 570 (1956).
\textsuperscript{173} The answer would remain "no" if Jane's will had devised the entire renewal right to her husband instead of creating a life-tenant/remainderman situation.
\textsuperscript{174} DeSylva, 351 U.S. at 572.
quite intriguing. After the death of songwriter George DeSylva, his widow routinely renewed the copyrights in his works when time for renewal arose. After DeSylva’s death, Stephen Ballentine, claiming to be DeSylva’s illegitimate son, sued in Federal District Court for his share in the renewal terms of the works that were in their first term when DeSylva died. DeSylva’s widow did not dispute Ballentine’s claim to be her late husband’s son, but she nonetheless claimed that Ballentine had no right to share in the renewal terms.

The widow’s first argument was that under the renewal system, the author’s “widow or widower” was a separate and distinct class from the author’s children, and as such had priority over all other claimants. The widow’s secondary argument was that even if the author’s “widow, widower or children” constituted only one class, an illegitimate child of the author was not included in the statutory successor class. The Supreme Court held that the author’s “widow, widower or children” was a single class and that state parentage law will govern whether an illegitimate child is a member of the statutory successor class.

The Supreme Court’s ruling in DeSylva must not be read too broadly. The Court did not decide the correct shares to be given to the members of the “widow, widower or children” class. A court has never heard this issue, and accordingly, the appropriate apportionment has never been determined. If a surviving spouse is the only member of the class, he or she exclusively is entitled to the renewal rights. Similarly, if the class consists of a number of children and no surviving spouse, a court would likely rule that each child takes equally.

If the class consists of a number of children and a surviving spouse, however, a court would have several options. First, the court could determine apportionment based on the state’s laws of

---

175 Id. at 573. In essence, DeSylva’s widow claimed that an author’s children are only entitled to renew the author’s copyrights after the widow or widower’s death.

176 Id. at 580.

177 Id. at 580-81. At the time of DeSylva, many state intestacy statutes allowed illegitimate children to inherit from their natural father only if the father married the child’s mother and recognized the child as his own. In 1977, the Supreme Court found such statutes to be an unconstitutional denial of equal protection. Trimble v. Gordon, 430 U.S. 762 (1977). Since 1977, the law has treated illegitimacy much more favorably. An example is the 1990 Uniform Probate Code, which allows a child to inherit from his or her biological parents regardless of their marital status. UNIF. PROB. CODE § 2-114 (1990).
intestate succession. If intestacy laws are used, the allocation of renewal interests would differ from case to case because states have varying patterns of descent. Second, the court could award the surviving spouse a one-half interest and the children the other one-half interest. Yet another alternative would be to allocate an equal share to each member of the class. Regardless of the choice the court makes, if the author’s will devises renewal rights inconsistently with that plan, the author’s will is “bumped” in favor of the renewal provisions. Accordingly, an author is not only barred from devising his renewal rights outside the statutory successor class, but is likewise barred from determining an apportionment of the renewal interest to the members of the appropriate class.

Another common example of a situation where the author’s will provides an allocation of copyright that differs from the renewal provisions is where the author creates a testamentary trust. Again suppose Jane Smith died leaving a husband and two grown children. However, instead of creating a life tenancy for her husband with the remainder going to her children, Jane created a testamentary trust designating her husband as the income beneficiary for life, with the corpus passing to her children upon the husband’s death. In this situation, Jane has attempted to determine the allocation of the copyright interest in a way that differs from the renewal provisions of the 1976 Act. Is such an allocation valid?

Again, no court has conclusively held in the negative, but the Second Circuit’s opinion in Bartok v. Boosey & Hawkes, Inc. implies that a testamentary trust of this sort is invalid. The preliminary facts of Bartok are largely irrelevant to the present discussion, but the holding sheds some light on the allocation problem. The author’s will provided that all income from his works was to be paid to his wife during her life and to his children after his wife’s death. Under a prior agreement, Boosey & Hawkes

178 523 F.2d 941 (2d Cir. 1975).
179 The preliminary issue before the court was whether the work in question was a posthumous work. If so, the correct statutory successor class would be the copyright proprietor, not the author’s “widow, widower or spouse.” See generally § 24, 35 Stat. 1075 (1909) (providing statutory successor classes for different types of copyrighted works).
180 523 F.2d at 942 n.2.
paid royalties to the decedent's estate, and the estate paid the royalties directly to Bartok's widow. The court held that for the remainder of the widow's life, royalties would be paid equally to the widow and children of the decedent.\footnote{181}

The rulings of the courts in Desylva and Bartok can be read to indicate that an author cannot deprive his children, whether legitimate or illegitimate, of their renewal entitlement as prescribed in section 304 of the 1976 Act. Thus, under the current state of the law, an author may not allocate his renewal interests in a way that conflicts with section 304 of the 1976 Act. The problem is exacerbated because no court has determined the proper allocation of the copyright interest under the 1976 Act's renewal provision. Accordingly, estate planners must realize that this area of copyright law remains unsettled. This details yet another way that copyright law conflicts with an individual's state law guarantee of testamentary freedom.

D. A FINAL "WILL-BUMPING" SITUATION

The final "will-bumping" scenario does not involve the will of the author. Rather, it involves the will of a member of the author's statutory successor class. If an author dies during the first copyright term, his or her will controls who owns the remainder of the first copyright term. Suppose an author dies survived by a spouse and no children. The author devises all his property including his copyright to the surviving spouse. What happens to the ownership of the renewal term if the spouse dies before renewal rights vest?

This situation arose in Capano Music, Inc. v. Myers Music, Inc.\footnote{182} Capano Music involved ownership of the renewal term in the song "Rock Around the Clock." The song was co-authored by Max Freedman and James Myers in 1953.\footnote{183} In 1962, Max

\footnote{181} Id.  
\footnote{183} Id. The first copyright term began in 1953 and ran until December 31, 1981. See 17 U.S.C. § 305 (1994) (providing that copyright term expires at end of calendar year in which it would otherwise expire). Prior to the codification of the Copyright Renewal Act of 1992, a copyright could be renewed at any time during the twenty-eighth year of the first copyright term. See 17 U.S.C. § 304 (1994) (providing requirements for renewal of subsisting
Freedman died, devising his interest in the song to his wife, who notably was also the executor of the will. Freedman's widow died on December 28, 1980, three days before the copyright could be renewed. Her will devised the copyright interest in the song to her sister, Mollie Goldstein. Goldstein failed to renew the copyright, but co-author James Myers renewed the copyright. The court found that Myers's renewal benefited the successor to Max Freedman's interest. The issue presented to the court was to determine Freedman's appropriate successor.

The court interpreted section 304 of the 1976 Act very narrowly in reaching its conclusion. The court held that the renewal rights did not vest in Freedman himself, or his widow (individually or as executor of Freedman's estate) because both were dead at the appropriate vesting point. Accordingly, the renewal rights passed to Freedman's next of kin. Mollie Goldstein owned the copyright interest in "Rock Around the Clock" until the expiration of the first term on December 31, 1981. After that date, copyright ownership passed to the author's next of kin. In this situation, the copyright renewal provisions "bumped" the will, not of the author, but of the author's widow, who succeeded to copyright ownership after her husband's death. *Capano Music*, therefore, stands for the proposition that whenever the author's spouse, children and executors die during the first copyright term, the wills of the successor class members are "bumped" in favor of the author's next of kin.

**VII. THE FUTURE OF "WILL-BUMPING"

As stated above, the provision for copyright renewal and "will-bumping" will expire in 2005. In 2005, all works copyrighted under the 1909 Act will have entered their renewal term, and thus authors will have complete testamentary control over the disposition of their copyright interests. Because the days of the renewal system are numbered, it is unlikely that Congress will act to
remedy the inequities that undoubtedly exist in the administration of a copyright owner’s estate.

One should also note that Congress has never acknowledged that a conflict of laws exists. Accordingly, before Congress will amend the 1976 Act to alleviate the problem of “will-bumping,” the problem must be brought to its attention. Congress probably will not recognize the conflict until a court holds that copyright law “bumps” an author’s will if the author devises his copyright interest outside the statutory successor class. Although commentators agree that such a result is inevitable, with only nine years before the renewal provision becomes defunct, the chance of a case arising with proper facts is remote.

Until the renewal system ceases to exist, however, estate planners must recognize that copyright law imposes a limit on a copyright owner’s testamentary freedom. Armed with this knowledge, the estate planner can attempt to override the renewal provision’s limitations in certain situations. The following discussion is invaluable for estate planning purposes.

The first measure that can be taken only applies to a testator who dies unwed and childless. In such a situation, the will of the testator should name a corporate executor who presumably will exist when the time for renewal arises. Under the Copyright Renewal Act of 1992, when the time for renewal arises, ownership of the renewal term will automatically vest in the executor. The executor, acting as fiduciary, will then distribute the renewal term to whomever the author’s will designates as the appropriate taker. The estate planner should remind the client that this estate plan is only valid if the client is unwed and childless at death.

As discussed above, if the testator is married and/or has children, the renewal provision will ordinarily provide the appropriate successor[s] to the author’s renewal interest. However, there is one way the estate planner can circumvent the renewal provision of the 1976 Act. If a client wishes to devise his copyright interest outside the statutory successor class or wishes to, for example, create a life

---

188 Arguably, copyright law has had a “will-bumping” effect since 1831. However, in the 165 years since the codification of the Copyright Act of 1831, no court conclusively has held that a devise outside the statutory successor class is “bumped” by copyright law.
tenant/remainderman situation, there is a solution. The Supreme Court’s ruling in *Fred Fisher Music Co.*\(^{189}\) suggests that statutory successor class members may assign their renewal expectancies to the author for valid consideration. If such assignments are made, and the assignors live into the renewal term, the assignments are valid and binding, just as the author’s valid assignment of term two rights is valid if he or she lives into the renewal term.\(^{190}\) The author then should be free to make an inter vivos assignment or devise the renewal term in the copyright to whomever he or she pleases.\(^{191}\) Again, the estate planner must warn the client that this type of plan will be invalidated if new members are introduced into the class after the execution of the will.\(^{192}\)

The two plans described above prevent the “bumping” of an author’s will. If the will in danger of being “bumped” is not the will of the author, but the will of a statutory successor, the estate planner’s options are limited. If the author is survived by a spouse or children, only those living when renewal rights vest may share in the renewal interest. Accordingly, if the spouse or children die before renewal rights vest, any devise of renewal rights is per se invalid.

If, however, the author dies unwed, childless and testate, the appropriate successor class is the author’s executors, who renew as fiduciaries of the will beneficiaries. Under the court’s ruling in *Silverman*,\(^{193}\) the author’s next of kin may only renew the author’s copyright if the author’s executors fail to renew. Under the present system of automatic renewal,\(^{194}\) as long as the author’s executors are still serving when the time for renewal arises, the

\(^{189}\) 318 U.S. 643 (1943).

\(^{190}\) If an assignor does not survive into the renewal term, the assignment is inconsequential because the assignor is no longer a member of the statutory successor class.

\(^{191}\) Since the Supreme Court’s decision in *Fred Fisher Music Co.*, many copyright assignees have insisted that the author’s spouse and children assign their renewal term expectancies. DAVID NIMMER, NIMMER ON COPYRIGHT, § 9.06(C) (1995).

\(^{192}\) The United States Supreme Court, in *Desylva v. Ballentine*, included illegitimate children in the statutory successor class if the law of the testator’s domicile recognizes illegitimate children as heirs under the state’s intestacy laws. A problem could arise for the estate planner if the author has an illegitimate child, but does not wish to recognize the child. 351 U.S. 570, 580-81 (1956).

\(^{193}\) 273 F. 909 (2d Cir. 1921), cert. denied, 282 U.S. 758 (1923).

\(^{194}\) See text accompanying note 125, supra.
renewal term vests in the executors as fiduciaries for the author’s will beneficiaries. Consequently, the beneficiary’s will should control even if the beneficiary dies prior to the vesting of the renewal rights. The role of the estate planner in this situation is to ensure that the author’s executors continue to serve until all copyrights have been renewed.

If the author dies unwed, childless and intestate, the author’s next of kin is the appropriate successor class. If the will in question belongs to an author’s next of kin, the estate planner is powerless to prevent the “bumping” of the will in favor of the renewal provisions. If a member of the next of kin class dies prior to the vesting of the renewal right, the member is no longer entitled to the renewal right.

The estate planner’s primary weapon in the fight against “will-bumping” is a well-informed client. Armed with proper information, the estate planner often can effectuate his or her client’s intent. Although it may be impossible to ensure that the renewal provisions will not affect the author’s will, the estate planner must inform the client of the possibilities. Today, very few estate planners are aware of the conflict between copyright law and estates law. To avoid possible malpractice actions and to better help their creative clients, estate planners must be aware of the “will-bumping” phenomenon.

VIII. CONCLUSION

Testamentary freedom is a notion deeply embedded in the society of the United States. In limiting the categories of individuals with the power to renew a copyright after the author’s death, section 304 of the 1976 Act and its predecessors in earlier copyright legislation undermine the creative individual’s right to testamentary freedom. A thorough search of legislative histories reveals that the copyright law’s conflict with estates law was never intended. Nevertheless, courts and commentators, focusing on strict statutory interpretation, have unanimously recognized such a conflict.

The copyright renewal provision has a relatively short life span. By 2005, all works copyrighted prior to the codification of the 1976 Act will have entered their renewal terms, and hence, the renewal provision will no longer be a problem for copyright owners and
their estate planners. Due to the renewal provision's lack of longevity, and the fact that no court has heard the precise issue, Congress likely will not amend copyright law to remedy the inequities that certainly exist. Accordingly, to argue that Congress should act would be a futile endeavor.

The purpose of this Note has not been to argue that Congress should amend copyright law to prevent "will-bumping." Rather, this Note details the "will-bumping" phenomenon and indicates that although Congress never intended such an inequitable result, "will-bumping" is indeed a reality. Further, several means are discussed to reduce the potential of a "will-bumping" situation. Thus, to plan the estates of creative individuals properly, copyright owners and their estate planners must be aware of the renewal provision's limitation on testamentary freedom and that measures can be taken to prevent the "bumping" of an author's will.

MICHAEL ROSENBLOUM