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## The Chair's Comments



William Bray

In October of 1999, I attended a CLE in Raleigh entitled Sports and Entertainment Law for the New Millennium. This was the fledgling effort for what ultimately became the Sports & Entertainment Law Section. Seven years later, I am proud to serve as chair of the section, and to invite all of our section members to attend our 2006 CLE, Law in the Fast Lane, which will be held Oct. 12-13 at the Grandover Resort in Greensboro.

Back in 1999, none of us present really knew what to expect. Many attendees, like myself, were young lawyers interested in "getting into" a practice area that—from the outside looking in—can appear more glamorous than it really is (although, let's face it, negotiating a recording contract can be pretty entertaining!).

Other attendees, however, as well as many of the speakers, were attorneys with a desire to create a section representative of a growing area of practice deserving recognition among our peers within the Bar. They invested their time, effort and—most importantly—their knowledge to develop our section, which now acts as a valuable resource of information and contacts to its

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# Termination of Copyright Grants and Related Transfers Under Sections 203 and 304 of the Copyright Act: An Overview

BY ROBERT A. MONATH

A lesser known provision of federal copyright law has been making national headlines recently. Earlier this summer, U.S. District Judge Richard Owen issued a landmark ruling affirming the right of John Steinbeck's heirs to terminate existing publication contracts for some of Steinbeck's best known novels and recapture exclusive publication rights for these works. See **Steinbeck v. McIntosh & Otis, Inc.**, 433 F. Supp. 2d 395 (S.D.N.Y. 2006). The primary statutory basis for Judge Owens's ruling in favor of the Steinbeck heirs was 17 U.S.C. 304(c). This article examines termination of copyright grants and related transfers under Section 304(c), as well as companion Section 203, of the federal Copyright Act.

Initially, it is helpful to review some basic facts about copyright duration since termination provisions are framed in reference to duration.

Under the Copyright Act of 1909 (the "1909 Act"), a registered copyright enjoyed an initial 28-year term, with an additional optional 28-year renewal term, for a total of 56 years of possible copyright protection.

The Copyright Act of 1976 (the "1976 Act"), which became effective Jan. 1, 1978, changed the term of copyright for works created and fixed after Jan. 1, 1978 ("Post-1978 Works") to a single term running for the "life of the author plus 50 years." The 1976 Act preserved the two-term structure for pre-1978 copyrights ("Pre-1978 Works") but extended the second renewal term for Pre-1978 Works by 19 years to 47 years, so that Pre-1978 Works could receive copyright protection for up to 75 years.

In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act (the "Bono Act").

The Bono Act extended the term of Post-1978 Works to "life of the author plus 70 years" and extended the renewal term of Pre-1978 Works from 47 to 67 years, thereby extending the full duration of protection for Pre-1978 Works from 75 to 95 years.

Regarding termination generally, as Nimmer explains:

[T]he termination provisions [Sections 203 and 304 of the 1976 Act] apply to any "transfer" of copyright and to nonexclusive licenses of copyright or of any right comprised in a copyright. A "transfer" includes not only assignments . . . but also exclusive licenses and any other conveyance of copyright or of any exclusive right comprised in a copyright.

3 Nimmer on Copyright 11.02[A].

Put simply, grants of copyright are revocable. The rationale for a revocation right is the concern that, without such a right, authors would remain bound, on a long-term basis, to "bad deals" made early on when the full commercial potential of a work of authorship may not have been foreseeable. Termination provisions afford authors a "second bite of the apple," allowing a songwriter, for example, to re-negotiate the \$100 flat fee paid by a publisher in 1950 for the "irrevocable" assignment of copyright in what later becomes a multi-million dollar hit song.

Exercise of termination rights, though pre-

See **COPYRIGHT** page 3

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## Comments *from page 1*

members.

As I assume leadership of the section for the 2006-07 year, the time is appropriate to recognize the efforts of these section leaders who have brought us to this point, and to look for ways to further develop the section in the years ahead.

During the upcoming fiscal year, I have three goals: (1) to host a successful CLE; (2) to expand membership by 10 percent (approximately 20 members); and (3) to encourage a broader participation of the membership in section affairs, including membership on committees and use of the section's LISTSERV.

Law in the Fast Lane is, we feel, going to be a special and informative event. I strongly encourage all members of the section to attend. Speakers will include representatives of NASCAR, Roush Racing and Speed TV, among others. The focus of the seminar is on the world of motorsports, and more specifically NASCAR. With the vast majority of NASCAR teams located in North Carolina, we are uniquely situated to service a growing and exciting industry. It is our intent with Law in the Fast Lane to offer a "big picture view" of many of the main legal issues arising from a practice in this area.

As for membership, I am asking all members of the section to encourage ONE person to consider joining during the upcoming year. Our membership has held steady at approximately 200

lawyers for several years, so in order to meet my goal of a 10 percent increase, we need only 20 new members.

Lastly, I am issuing an open invitation to the membership to contact me to discuss ways in which to participate in the section. My phone number is (704) 523-7777, and my e-mail address is [wbray@braylaw.com](mailto:wbray@braylaw.com). We are always looking for members to undertake leadership roles, and our committees are a great place to start. Among other things, we are currently seeking a newsletter editor. There are several other key positions to fill, however, so do not hesitate to contact me to discuss your interest.

On a personal note, I am proud to serve the section over the course of the upcoming year. Back in 1999, as an attendee hoping to learn something about this engaging area of practice, I knew nothing about music publishing agreements or driver contracts in NASCAR. Since then, with the help of many lawyers I met through this section, I can honestly say that the majority of my practice is in "sports & entertainment."

Our section offers something unique within the North Carolina Bar Association. But, like anything else, you get out of it only what you put into it. I encourage all of us to put in as much as you can—we will all benefit from that sort of collective effort. □

## From the Editor

I hope all of you have had a wonderful summer! I know I have. This summer, I spent many weekends at the lake. During these weekends, I watched my 13-year-old cousin get into fishing—specifically catfishing. It wasn't long before my cousin's large catfish catches were documented by photos and posted on a "fishing blog" created by his proud father. When I first heard the term "blog," I thought these family members were referring to something like an ink stain. However, I soon realized that this "blog" was a new term for an Internet site where you could update and log information daily, but also retain the aged postings, kind of like an online journal.

Becoming more aware of blogs, I stumbled on a few that might be of interest to some of you. I have listed a few of the titles below and encourage you to become a blogger, too. Who knows, we may just have a section blog in our future!

- ♦Sports Law Blog: "All things legal relating to the sports world." <http://sports-law.blogspot.com/>
- ♦Keeping Score: "The media and women's sports." [http://ijo.typepad.com/keeping\\_score/](http://ijo.typepad.com/keeping_score/)
- ♦SPORTSCentral: "Original Sports Fan Commentary." <http://www.sports-central.org/>
- ♦Law Blog: "The Wall Street Journal on law and business and the business of law." <http://blogs.wsj.com/law>

If you have a blog or an article that you would like to share with the section, please contact me at [Connerlawfirm@ctc.net](mailto:Connerlawfirm@ctc.net). We are currently looking for articles for the next newsletter, and I would like to hear from you!

—Taylor L. Conner, Editor

## Copyright *from page 1*

sented as a simple two-step process of serving and filing a Notice of Termination, actually involves compliance with a series of statutory formalities and consideration of often complex underlying copyright questions. Indeed, an entire book could probably be written on the subject. However, even without mastering the logistics of termination or the legal nuances of issues arising thereunder, entertainment counsel can benefit greatly just by being aware of these provisions and their transactional ramifications. In particular, here is a brief overview of some principal points:

### Five-Year Windows

Termination rights are not continuing in nature but only arise during specified five-year time periods or “windows of opportunity.” Failure to exercise termination within the applicable window extinguishes the termination right. Post-1978 Works are governed by Section 203, which confers a one-time recapture opportunity between years 35 and 40 after execution of the grant (or between years 40 and 45 in certain instances where publication has been delayed). Consequently, Post-1978 Work terminations will not begin taking effect until 2013 (35 years after 1978). Pre-1978 Works are governed by Section 304(c), which provides two separate five-year recapture periods at the end of 56 years and 75 years, respectively, from the date copyright was originally secured. The Section 304(c) termination windows track the successive copyright term extensions for Pre-1978 Works established under the 1976 Act and the Bono Act.

### Rights Are Inalienable

Termination rights are exercisable “notwithstanding any agreement to the contrary.” They are inalienable and cannot be waived, assigned, devised or otherwise transferred. This transferability prohibition, while designed to protect authors, can create serious estate planning problems, especially for estranged families. If an author dies prior to the vesting of termination rights, which is common, these rights automatically vest in the statutory heirs listed in Sections 203 and 304(c), namely, the author’s surviving spouse, children, and, in some instances, grandchildren. With respect to termination interests, authors with statutory heirs cannot disinherit any particular statutory heir or place these rights in a family trust.

### Broad Scope

Termination rights are not limited to tradition-

al entertainment areas such as books, plays and music. Copyrights in all categories of works are subject to termination, including architectural plans, advertising copy, photographs, logos and artwork.

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### Work-for-Hire Exception

Works made for hire are expressly exempted from Section 203 and Section 304(c) termination provisions. Specifically, works created by employees in the scope of their employment are not subject to termination. In addition, specially commissioned works covered by an express work-for-hire agreement that comprise one of the nine statutorily enumerated work-for-hire categories, such as audiovisual works, are also exempted. Accordingly, commissioning entities engaged in integrated multiple media projects, such as a coordinated marketing campaign across a range of media, may wish to treat the video component of such campaign as a separate project and create an audiovisual work first. In this way, content can be acquired on a work-for-hire basis and will not be subject to termination.

### Derivative Works Limitation

The termination provisions exempt certain derivative uses from termination. Specifically, derivative works prepared under license prior to termination may continue to be used under the terms of the original license notwithstanding termination. The exemption “seeks to protect public access to the derivative work as well as the rights of persons who have invested in creating the derivative work.” **Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.**, 155 F 3d 17 (2d Cir. 1998)

### Due Diligence

Whenever a transaction involves the sale or transfer of copyrights, it is advisable to consider the applicability of termination rights. The copyright grant in an agreement may state that the author “sells, assigns, transfers and delivers to grantee all rights, title and interest in the work, including, but not limited to, the right to own and secure copyrights therein throughout the entire world, and to have and to hold the said copyrights and any and all rights of whatsoever nature thereunder existing, or which hereafter may come into being, including any and all renewals and extensions of copyrights, for the entire duration thereof.” However, despite this broad conveyance language, the grantee’s effective rights exclusivity in the foregoing example may really last only 35 years, given the possibility of termination.

To supplement the foregoing, you may also wish to consult the following recommended resources:

- ♦3 Nimmer on Copyright 11.01 *et seq.*
- ♦Copyright Office Circular 15: Duration of Copyright
- ♦Kohn on Music Licensing, Third Edition by Al Kohn and Bob Kohn. *Chapter 9: Duration of Copyright, Assignments of Copyright and Licenses.* □

MONATH IS A SOLO PRACTITIONER IN SALISBURY WHO SPECIALIZES IN INTELLECTUAL PROPERTY MATTERS, SPECIFICALLY COPYRIGHT AND TRADEMARK LAW. MONATH HAS REPRESENTED A NUMBER OF MUSICAL ARTISTS, PUBLISHERS AND AUTHORS. PRESENTLY HE SERVES AS COUNSEL TO CHAPEL HILL-BASED HINSHAW MUSIC.

# Sporting News Update

## Aug. 9, 2006

Roger Goodell is the new **NFL commissioner**. He was the unanimous choice of the league's 32 owners and replaces outgoing commissioner Paul Tagliabue.

## Aug. 26, 2006

For the first time in over 68 years, the **Tennessee Walking Horse National Celebration** officials called off the World Grand Championship class finale after inspectors from the United States Department of Agriculture (USDA) disqualified five of the eight horses due to evidence of illegal soring, which is prohibited by the Horse Protection Act of 1971. Horses and trainers from around the world came to Shelbyville, Tenn., and paid a \$2,000 entry fee to compete in this prestigious event. Twenty-six thousand spectators were on hand, and it has been reported that the three horses that did pass inspections are obviously very upset and are considering what legal recourse they may have against the Tennessee Walking Horse National Celebration, which called off the event.

## Sept. 10, 2006

The **Detroit Shock** beat the Sacramento Monarchs 80-75 in the WNBA Championship. A crowd of more than 19,000 were on hand at Joe

Louis Arena, and it was Detroit's second WNBA title in the past four years.

## Sept. 13, 2006

New York Islanders just signed goaltender **Rick DiPietro** to a 15-year, \$67.5 million deal that will run through the year 2022 when DiPietro will be 40 years old. The deal is believed to be the longest term player contract in NHL history, although Wayne Gretzky had a 21-year deal that included some personal service stipulation. There's no service stipulation in DiPietro's deal.

## Lawyers in Sporting News

Local Cabarrus County Attorney Susan E. Schneider will be playing for the Orange County Polocrosse Club at the American Polocrosse National Championships, her first national level bid. Schneider points out that the American Polocrosse Association National Championships will be held at Southfork Ranch, in Parker, Texas, on Oct. 6-8, 2006. You can check out the sport and see where the Dallas television show was filmed at the same time. This should be the largest National Championships ever with over 200 players expected to compete.

An Australian blend of two ancient games, polocrosse is quickly catching on in this country as a fun and inexpensive equestrian sport for the

whole family. Polocrosse combines the galloping game of polo—first played in Asia over 2,000 years ago—with the centuries-old, throw-and-catch sport of lacrosse.

Today there are close to 400 polocrosse clubs in Australia and more than 6,000 players around the world. Local polocrosse clubs exist throughout the country. Schneider's club, the Orange County Polocrosse, is very active, drawing its members from across the state and as far away as Kings Mountain, N.C., Clemson, S.C., and Virginia.

"Texas has the highest concentration of top-level players at this time," Schneider says. "But we have top-level players in North Carolina, with three clubs around the state. Our membership is creeping up to around 400 nationally."

Several colleges, including Duke University and University of North Carolina, have started polocrosse teams. On Sept. 16-17, 2006, the Dartmouth College Polocrosse Team will join Duke and UNC in the first-ever intercollegiate match to be held at Orange County Polocrosse Club, Crooked Creek Farm, Hurdle Mills, N.C. Contact David Brooks, (919) 732-8483, [ddbcsutoms@aol.com](mailto:ddbcsutoms@aol.com), for more information.

If you want to get out and see how the game is played, the American Polocrosse Association Web site lists upcoming tournaments around the country at [www.americanpolocrosse.org](http://www.americanpolocrosse.org). □

## Make Plans to Attend!

### Law in the Fast Lane

Sports and Entertainment Law Section Annual Meeting, Oct. 12-13  
Grandover Resort and Conference Center, Greensboro  
For more information and to register, call 800-228-3402 or 919-677-8745.  
Register by 5 p.m. on Oct. 5 and receive the Early Bird tuition discount!

### Sport and Recreation Law Association Annual Conference

The Sport and Recreation Law Association Annual Conference will be hosted by the department of Exercise and Sport Science at the University of North Carolina at Chapel Hill on Feb. 28 - March 3, 2007.

The Sport and Recreation Law Association's purpose is to further the study and dissemination of information regarding legal aspects of sport and recreation. Approximately 150 professionals including sport management faculty, academic administrators, athletic directors, recreation professionals and practicing attorneys will participate in the conference.

As a member of the North Carolina Bar Association Sports and Entertainment Law Section, we invite you to attend the conference.  
Contact [www.srlaweb.org](http://www.srlaweb.org) or [sportlaw@unc.edu](mailto:sportlaw@unc.edu) for registration information.

# CLE: Come, Learn Electronically

BY RAY RUPPERT

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## Telephone Seminar

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To participate in a telephone seminar, simply register in advance for the seminar. You are given a telephone number and a Web site to download the materials and at the appropriate time, dial in to the telephone seminar and listen to a live speaker. Each program is designed to allow for a question-and-answer period. Since this is a live program, it also does not count against the four-hour limit on earning CLE online.

*“Webcasting is the broadcasting of a live CLE program over the Internet. Since the program is live, there is no four-hour limit on earning CLE credit.”*

## CLEonTheGo

As of February, your CLE Department is now offering you a fourth means of obtaining CLE electronically. You may now download an audio track of a CLE program to your MP3 player or iPod. This new means of downloading CLE, called **CLEonTheGo**, enables you to actually take the CLE program with you as you travel. You can now listen to a CLE program in your car or while traveling on a plane or train. Like CyberCLE, downloadable manuscripts are included for you to follow the program and to retain for future use. Like CyberCLE, CLEonTheGo is considered online CLE, and you are limited to a maximum of four hours of credit per year, regardless of the online method used to obtain those four hours.

## CeLEStacks

Another new service now available from the NCBA is **CeLEStacks**, your online library source for CLE manuscript chapters. This service is “word searchable” by practice area or program. If you are doing legal research and all you need is a chapter—not an entire book—simply log on, purchase and download whatever you need from over 200 selections. Each of the manuscripts is printable so you can have a hard copy once you purchase it.


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