

No. 19-1181

In the Supreme Court of the United States

THE ESTATE OF THOMAS STEINBECK, GAIL KNIGHT
STEINBECK, THE PALLADIN GROUP, INC.,
Petitioners,
v.

WAVERLY SCOTT KAFFAGA,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit*

**BRIEF OF AMICUS CURIAE DIGITAL JUSTICE
FOUNDATION IN SUPPORT OF CERTIORARI**

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INTEREST OF AMICUS CURIAE¹

The Digital Justice Foundation is a 501(c)(3) non-profit dedicated to preserving individual rights in digital spaces. The Foundation focuses on the impact that digital technologies have on civil liberties, personal privacy, individual intellectual-property rights, and individual economic well-being. The Foundation has particular concern for underrepresented users, artists, creators, employees, and innovators, especially those with limited access to law.

The issues raised in the Petition implicate the Foundation’s public-interest mission. Specifically, the termination rights at issue are some of the more complicated and little-known rights in the Copyright Act. To date, these rights have received relatively little attention from this Court. Yet due to doctrinal and social developments, termination rights are currently possessed by the vast majority of American citizens. Some courts, including the Ninth Circuit below, seem to overlook this basic fact.

Since the passage of the 1976 Copyright Act, termination rights have transformed from an esoteric right pertinent to a few prominent copyright holders into an essential individual right for all persons who use the Internet, *i.e.*, nearly all Americans.

¹ No counsel for any party authored this Brief in whole or in part, and no person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the Brief’s preparation or submission. All parties received timely notice and have consented to the filing of this Brief.

Congress democratized copyright through sweeping revisions introduced via the 1976 Copyright Act and a subsequent amendment. The current opt-out, formalities-free copyright regime has ushered in the age of instant authorship—with rights attaching automatically upon a work’s creation. Contemporaneously, the Internet has given rise to a content-creating and copyright-possessing public that routinely grants licenses online through clickwrap terms of service.

In turn, because the Copyright Act’s statutory termination rights apply to those online transfers, the majority of Americans today currently have vesting termination rights. Literally, hundreds of billions of termination rights held by hundreds of millions of Americans are currently vesting—with such rights implicated by this case and others construing copyright’s termination right. A 35-year termination countdown is already ticking on such licenses. Therefore, the precedential impact of decisions implicating the Copyright Act’s termination rights has profound and widespread effects.

As an organization with a public-interest mission of assisting ordinary Americans in exercising these rights, the Digital Justice Foundation is intimately aware of the importance of clarity in this important area of law and writes to speak to the magnitude of this oft-overlooked public interest in the Copyright Act’s termination rights.

SUMMARY OF ARGUMENT

Two fundamental principles of copyright—copyright’s infinite divisibility and copyright’s termination rights that separately apply to each licensed division of a copyright—are essential to seeing the basic errors of the Ninth Circuit below as well as the enormous implications of those errors.

The Ninth Circuit’s error was to conflate a license of publishing rights to a book publisher with a license of rights to the movie industry. It’s such a simple and elementary error that it might seem mundane. And, given that it involves the prominent literary estate of John Steinbeck, it might seem limited in impact to a narrow class of individuals.

Nothing could be further from the truth. Most Americans hold copyrights due to Congress’ relaxation of copyright formalities in the 1976 Copyright Act. Most Americans have licensed their copyrights through terms-of-use licenses to online platforms. And, in turn, the Ninth Circuit’s gross misreading of the 1976 Copyright Act undermines literally billions of inalienable statutory termination rights held by literally hundreds of millions of Americans.

This Court should grant the Petition and correct the Ninth Circuit’s gross statutory error.

ARGUMENT

I. THE PETITION IMPLICATES TWO PRINCIPLES THAT WERE FUNDAMENTAL TO CONGRESS’ 1976 REVISION OF COPYRIGHT.

A. In 1976, Congress permitted the bundle of rights that make up a copyright to be infinitely subdivided.

1. In the 1950s, Congress and the Copyright Office began the decades-long process of revising and modernizing U.S. copyright law. The “massive work necessary for the general revision of the copyright law began in 1955” and culminated with the passage of the 1976 Copyright Act. See Mills Music, Inc. v. Snyder, 469 U.S. 153, 159 (1985). Two fundamental, and then-radical, aspects of that revision are implicated by the Petition.

2. The first is the concept of divisibility. Under the prior regime, *i.e.*, the 1909 Copyright Act, an author could not transfer part of a copyright. For example, an author could not assign to a publisher the publishing rights in a book, but retain for herself the derivative rights to produce a movie based on her book. Under the 1909 Act, such a division of copyright, was “blocked by the doctrine of copyright ‘indivisibility.’” N.Y. Times Co. v. Tasini, 533 U.S. 483, 494 (2001).

3. Yet, with “the 1976 revision, Congress acted to ‘clarify and improve [this] confused and frequently unfair legal situation’” by rewriting the statute. Id. at 495 (quoting H. R. Rep. No. 94-1476, p. 122 (1976)). The 1976 Copyright Act “rejected the doctrine of indivisibility, recasting the copyright as a bundle of discrete ‘exclusive rights[.]’” Id.

4. Specifically, Congress has codified this bundle of exclusive rights in Section 106: exclusive rights of reproduction, derivation, public distribution, public performance, and public display. 17 U.S.C. § 106(1)-(5).

5. In turn, Congress clarified that this bundle of rights is infinitely divisible, in Section 201(d). Authors may transfer their ownership “*in whole or in part*” by any means of conveyance[.]” 17 U.S.C. § 201(d)(1) (emphasis added). In turn, “[a]ny of the exclusive rights comprised in a copyright, *including any subdivision* of any of the rights specified by section 106, may be transferred[.]” 17 U.S.C. § 201(d)(2) (emphasis added).

6. In other words, Section 201(d) “recognizes the quite natural implications of divisibility”: infinite possible subdivision of the bundle of rights that make up a copyright. See Faulkner v. Nat'l Geographic Enters., 409 F.3d 26, 39 (2d Cir. 2005). For example, “a copyright holder may transfer the right to duplicate to one person, the right to distribute to another, and the right to produce derivative works to yet another.” Automation by Design, Inc. v. Raybestos Prods. Co., 463 F.3d 749, 754 (7th Cir. 2006).

7. Compared with rules limiting the divisibility of real property, copyright divisibility might be viewed as radical. In real property, “the *numerus clausus* principle limits the types, though not the number, of packages into which owners may divide their rights.” Note: A Justification for Allowing Fragmentation in Copyright, 124 Harv. L. Rev. 1751, 1751 (2011). By contrast, there are no legal limits on copyright divisibility.

8. Unfettered divisibility is a superior copyright policy to rigid indivisibility. Divisibility aligns better with copyright's ultimate purposes: "copyright law ultimately serves the purpose of enriching the general public through access to creative works[.]" Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994). Divisibility furthers this purpose by permitting an author who *won't* use some of her rights to license them to someone who *will*, furthering the goal of enriching the general public through access to new creative works.

9. Unfettered divisibility is also a superior policy to an *ex ante* government mandate on how to divvy up copyrights. Because copyright covers a dizzying array of different types of creative works, no "off-the-rack pattern of ownership" can be optimally decided by legislators *ex ante*. Justification for Allowing Fragmentation, 124 Harv. L. Rev. at 1759. Private market participants are "better informed" and "better incentivized" to maximize the value of copyrighted works by negotiating "efficient" divisions of copyrighted works. Id.

10. Perhaps, copyright's divisibility doesn't feel radical. After all, it aligns with American intuitions and values about freedom of contract and that government interventions in marketplaces should, if done at all, stem from particular market failures or overriding policy concerns. The American default norm is unfettered freedom of contract, with which copyright divisibility aligns. Nonetheless, in 1976, Congress' move (from *indivisibility* to *infinite divisibility*) was a radical departure from the then-existing 1909 Act's regime.

11. In sum, copyright divisibility simply means that copyright owners may “fragment their bundles of rights freely.” Id. Thus, it’s a “regime of infinite divisibility.” David Nimmer et al., Symposium: The Metamorphosis of Contract into Expand, 87 Calif. L. Rev. 17, 24 (1999). This infinite divisibility is a key principle implicated by the Petition.

B. In 1976, Congress also established an inalienable right of authors to terminate transfers and licenses of copyright.

1. There’s a second core aspect of the 1976 Act implicated by the Petition: “termination rights[.]” See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

2. As two Registers of Copyright observed, “the 1976 revision of the Copyright Act represented ‘a break with the two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author.’” N.Y. Times Co. v. Tasini, 533 U.S. 483, 495 n.3 (2001). Stated differently, it was the 1976 Copyright Act that took copyright seriously as an individual authorial right.

3. One way the 1976 Act buttressed the position of the individual author vis-à-vis the publisher (or other licensee) was through an “inalienable authorial right to revoke a copyright transfer[.]” Id. This inalienable termination right is codified in Section 203 for transfers and licenses granted “on or after January 1, 1978[.]” 17 U.S.C. § 203(a).

4. For transfers or licenses “executed *before* January 1, 1978,” this inalienable termination right is codified in Section 304(c)-(d). 17 U.S.C. § 304(c)-(d) (emphasis added). The two statutory provisions are quite similar.

5. The underlying rationale for this inalienable termination or revocation right is “the impossibility of determining a work’s value until it has been exploited.” Mills Music, Inc. v. Snyder, 469 U.S. 153, 173 n.39 (1985). Valuing other forms of property—a house, a share in a corporation, an automobile—can be complex but predictions of their value are often far more accurate than predicting which novel will become a best seller, which movie will become a blockbuster, etc.

6. The difficulty of predicting the value of artistic works meant that, as a market reality, individual authors would assign or license works for a small amount because no publisher could be sure that any particular artist would become the next J.K. Rowling or Aaron Sorkin. Yet, if an artist’s work did blow up after licensing the copyright, that artist would be left with a relative pittance. The windfall from their creative excellence would accrue almost entirely to their licensee unless they were already a big name who could insist upon high payment for untested work.

7. After all, the critical and commercial value of copyrighted works does, in fact, vary significantly over time. Prominent examples abound.

8. For example, Moby-Dick, “one of the leading contenders for The Great American Novel—‘the most ambitious book ever conceived by an American writer,’ ‘arguably the greatest single work in American literature’—started life as a critical mockery.” Megan Garber, ‘It Repels the Reader’: Tech Glitches Led *Moby-Dick*’s First Critics to Pan It, The Atlantic (Nov. 15, 2013), <https://bit.ly/2zCqfrK>.

9. It’s not just books. Art connoisseurs will recall that Van Gogh was a failure in his lifetime. Today, he’s one of the greats. Bizet’s Carmen is canonical. When the opera premiered, however, it was widely panned. (One dissenting listener, Tchaikovsky, thought it was a masterpiece.) The point is that artistic works are particularly subject to varying assessments of value over time, and, an inalienable termination right helps to ensure artists and their families won’t live and die in penury—especially those whose works enrich our culture and “promote the Progress of Science and useful Arts[.]” U.S. Const. art. I, § 8, cl. 8.

10. Inalienable termination rights are Congress’ most recent attempt to remedy what Congress saw as an unfair deprivation of artists from the fair remuneration for their works: “When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work.” Stewart v. Abend, 495 U.S. 207, 229 (1990). That renegotiation power is the *raison d’être* of this “inalienable termination right.” See *id.* at 230.

11. Although this animating purpose is simply stated, the actual mechanics of termination are quite complex:

- There are two separate termination provisions, depending if the terminated license or transfer was executed before or after January 1, 1978. Compare 17 U.S.C. § 203 (1978 and after) with § 304(c)-(d) (pre-1978).
- The author exercises the termination right. Yet, if the author “is dead,” then the termination interests are owned and “may be exercised” by a widow, children (or grandchildren, if a child is deceased) as statutory heirs in a scheme that resembles intestate succession. See 17 U.S.C. §§ 203(a)(2), 304(c)(2).
- For post-1978 transfers, the author may terminate the license or transfer 35 years after it is made, with slightly different rules if the transfer or license included publishing rights. 17 U.S.C. § 203(a)(3). For pre-1978 transfers, there are different timelines. § 304(c)(3), (d)(2).
- The terminating author or heirs must provide somewhat complicated notice to the transferee or licensee, 17 U.S.C. § 203(a)(4), delivered and recorded within a certain timeframe, § 203(a)(4)(A), as further detailed by regulation, § 203(a)(4)(B). See also § 304(c)(4).

- The termination rights, and therefore the binding determination of who has the termination rights, only vests upon the service of this statutory notice. See 17 U.S.C. §§ 203(b)(2), 304(c)(6)(B).
- And, of course, the termination right is an inalienable right. Termination of a license or transfer “may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.” 17 U.S.C. §§ 203(a)(5), 304(c)(5).

12. Not only are the actual procedures of termination somewhat complicated, termination itself might feel counterintuitive to the sensibilities of a contemporary American jurist.

13. Termination rights might feel counterintuitive for the very same reason that copyright’s divisibility feels so natural: strong American norms regarding freedom of contract. After all, the very point of the termination right is to terminate a contract freely entered into, *i.e.*, to “subject to termination” any “exclusive or nonexclusive grant of a transfer or license of copyright[.]” 17 U.S.C. § 203(a).

14. Just as freedom of contract makes copyright’s infinite divisibility seem like a natural correlate, freedom of contract also makes copyright’s termination rights feel like a legal aberration.

15. There are more counterintuitive aspects to the termination rights. Most legal issues are subject to the “ordinary principles of waiver and forfeiture.” See McDonough v. Smith, 139 S. Ct. 2149, 2156 n.3 (2019). Even Americans’ most cherished rights are subject to waiver or forfeiture: “No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases[.]” E.g., Yakus v. United States, 321 U.S. 414, 444 (1944); see Michigan v. Harvey, 494 U.S. 344, 346 (1990) (“constitutional rights waiver form”).

16. Yet, by contrast, copyright’s termination right is *inalienable*. The copyright author or their statutory heirs retain this right “notwithstanding any agreement to the contrary[.]” 17 U.S.C. § 203(a)(5). Therefore, to an American jurist used to the ordinary alienability of even fundamental rights, an *inalienable* right is an oddity.

17. In addition, disputes about termination rights might feel stale to some. Terminations begin to occur 35 years after a contract was signed. 17 U.S.C. § 203(a)(3). This 35-year term is well beyond the three-year limitations period for copyright infringement actions, 17 U.S.C. § 507(b), and is even longer than certain statutes of repose, see CTS Corp. v. Waldburger, 573 U.S. 1, 16 (2014) (holding 10-year North Carolina statute of repose not preempted). To the lawyer or judge who is used to claims going stale within a few years of accrual, maybe a decade, claims litigated thirty-five years after a transfer might feel positively ancient.

18. For example, in articulating the view that laches should be applicable to copyright-infringement suits for money damages, three Justices of this Court expressed the concern that a “20-year delay in bringing suit could easily prove inequitable[.]” *Petrella v. MGM, Inc.*, 572 U.S. 663, 689 (2014) (Breyer, J., dissenting). Termination rights, by comparison, accrue after a 35-year delay. That the inalienable termination provisions kick in after 35 years might feel odd to those accustomed to shorter timelines.

19. Of course, copyright takes the long view. The current term of copyright protection for an individual author is life plus 70, *i.e.*, “the life of the author and 70 years after the author’s death.” 17 U.S.C. § 302(a). Viewed with this timeframe in mind, it’s clear that the 35-year termination period might give an author and her heirs multiple opportunities to renegotiate the value of their works. It’s an eminently rational statutory tool to ensure creative individuals reap fair rewards.

20. Yet viewed far from this core purpose and, in comparison to other legal doctrines, termination feels like an outlier. Freedom of contract, ordinary principles of waiver and forfeiture, and usual promptness of claims make terminations rights feel counterintuitive. This counterintuitive feeling might be why lower courts have expressed such resistance to applying the termination rights in the manner that Congress has instructed via the text of the 1976 Copyright Act.

21. It is these two principles—infinite divisibility and inalienable termination—that are implicated by the Petition and the Ninth Circuit’s error below.

II. THE NINTH CIRCUIT ERRED BELOW IN A WAY THAT UNDERMINES THESE PRINCIPLES OF DIVISIBILITY AND TERMINATION.

1. The two principles discussed above—copyright’s infinite divisibility and copyright’s termination rights that separately apply to each licensed division of a copyright—are essential to seeing the basic errors of the Ninth Circuit below. See Section I, *supra*.

2. Basically, since a copyright is a bundle of rights, each portion of that bundle licensed creates a unique and separate termination right. Just as a copyright can be infinitely subdivided through licenses, that same copyright can have infinite associated termination rights. For an author with such culturally prominent works as John Steinbeck, it’s unsurprising that there would be multiple grants and, as a result, multiple termination rights associated with the many grants.

3. In turn, because ownership of termination rights vests only when notice of the termination is served, 17 U.S.C. §§ 203(b)(2), 304(c)(6)(B), it’s possible that entirely different statutory heirs will receive the vested termination right for different grants under the same copyright.

4. The Ninth Circuit panel below simply didn’t get these basic and fundamental (albeit counterintuitive) points about termination rights. Instead, it admonished Gail Steinbeck for the dizzying complexity and divisibility of Congress’ statutory termination rights. Kaffaga v. Estate of Steinbeck, 938 F.3d 1006, 1014 (9th Cir. 2019) (“This has to end.”).

5. Yet the Ninth Circuit’s analysis is a flagrantly wrong-headed application of collateral estoppel predicated on a complete misunderstanding of statutory termination rights. In essence, the Ninth Circuit held that one adverse decision as to one termination right (pertaining to a 1938 grant of publishing rights) was preclusive as to all other licenses or grants with other parties, under separate contracts, pertaining to other exclusive rights. See 17 U.S.C. § 106(1)-(5) (separate and distinct enumeration of exclusive rights to reproduce, prepare derivatives of, publicly distribute, publicly perform, and publicly display a copyrighted work).

6. In other words, the Ninth Circuit viewed the copyright in the termination context as a single property that cannot be divided, *i.e.*, as though Congress had not taken pains to clarify that copyright itself, and, further, each individual right under the copyright could be licensed (and therefore terminated) separately. See 17 U.S.C. § 201(d)(1)-(2).

7. The decision below, Kaffaga v. Estate of Steinbeck, rests on an earlier decision about collateral estoppel, Steinbeck v. Kaffaga, 702 F. App’x 618, 619 (9th Cir. 2017). 938 F.3d at 1013. In turn, that earlier decision held that two Second Circuit decisions collaterally estopped Petitioners from “their ability to terminate and exploit copyrights of Steinbeck’s literary works” whatsoever. 702 F. App’x at 619.

8. It's hard to see how. One Second Circuit decision doesn't even purport to decide termination rights. See generally Steinbeck v. Steinbeck Heritage Found., 400 F. App'x 572 (2d Cir. 2010). Instead, it decided a series of contract-related claims under a 1983 settlement agreement:

- whether that contract created a fiduciary duty for Elaine Steinbeck, id. at 575-576;
- whether that contract created a fiduciary duty by a literary agent, id. at 576-577;
- whether Elaine Steinbeck was promissorily estopped from certain acts, id. at 577-578;
- whether Elaine Steinbeck unjustly enriched herself, id. at 578; and
- who had the contractual right to terminate, *i.e.*, to fire, the literary agent, id. at 578-579.

None of these issues remotely touches on statutory termination rights, so it's hard to see how it would collaterally estop later decisions about the statute.

9. Indeed, this Second Circuit decision never cites to Sections 203 or 304. Therefore, how it could collaterally estop later litigation on statutory termination rights is downright mystifying. It's especially mystifying when Congress took pains to point out that termination rights could not be contracted around, *i.e.*, that termination rights "may be effected notwithstanding any agreement to the contrary[.]" 17 U.S.C. §§ 203(a)(5), 304(c)(5).

10. Simply put, a decision on *contractual* rights cannot collaterally estop a *statutory* issue, especially one that expressly forbids the interference of contracts.
11. The other Second Circuit decision clearly doesn't estop Petitioners entirely because copyright is *divisible*. That decision essentially permitted Elaine Steinbeck, John Steinbeck's widow, to contract around her stepsons' statutory termination rights. See generally Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193, 196 (2d Cir. 2008).
12. Yet, taking that decision as true for the purposes of collateral-estoppel analysis, it's clear that this second decision merely construed the effect that a 1994 license had upon the termination rights for an earlier 1938 license. See id. at 196-197. It's not a global decision as to *all* termination rights for *all* rights of *all* works written by John Steinbeck—yet that's how the Ninth Circuit treated this other Second Circuit decision.
13. After all, the dispute below pertains to termination rights about the “develop[ment of] screenplays for, among other things, a remake of *The Grapes of Wrath* and *East of Eden*[.]” Kaffaga, 938 F.3d at 1012.

14. In other words, the rights at issue in the case below pertain to writing screenplays and making and performing movies, *i.e.*, the statutory rights to “prepare derivative works[,]” 17 U.S.C. § 106(2), and to “perform” them “publicly[.]” 17 U.S.C. § 106(4).
15. In marked contrast, the second Second Circuit decision was about a publishing deal for printing and distributing books, *i.e.*, the statutory rights to “reproduce the copyrighted work[,]” 17 U.S.C. § 106(1), and to “distribute copies [...] to the public[,]” 17 U.S.C. § 106(3).
16. It takes a massive statutory oversight to conclude that a decision about termination of one set of exclusive rights under one contract is preclusive as to another set of rights under other contracts. Indeed, it takes a court to forget that copyright is *divisible* and termination rights track a copyright’s division. That’s what the Ninth Circuit overlooked below. Tired of statutory complexity, it resurrected the long-dead doctrine of copyright indivisibility in all but name, punishing and (wrongly) admonishing one side.
17. Perhaps, this would be a forgivable mistake were it limited to the parties to this case. It isn’t. Such a holding would unfairly, unduly, and against the express language of the statute undermine a key aspect of the 1976 Copyright Act. See Section I, *supra*.

18. It would do so in a manner that affects the rights of hundreds of millions of Americans.
See Section III, *infra*.

III. TERMINATION RIGHTS PRESENT AN ISSUE OF NATIONAL IMPORTANCE AND URGENTLY REQUIRE THIS COURT'S CLARIFICATION.

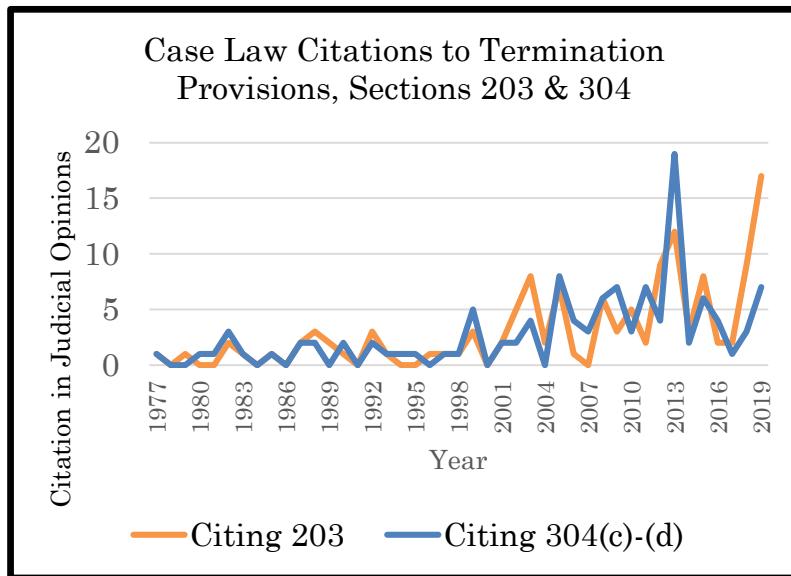
1. In recent years, there's been more litigation over termination. That's to be expected. By statutory design, termination rights had remained relatively dormant until somewhat recently: "The termination right for the first eligible works [licensed on or after January 1, 1978] did not vest until January 1, 2013." Waite v. UMG Recordings, Inc., 2020 U.S. Dist. LEXIS 56198, *4 (S.D.N.Y. Mar. 31, 2020).

2. To exercise termination rights, the assigning author must terminate her grant within a five-year window, which usually begins 35 years after the original grant. See 17 U.S.C. § 203(a)(3). In turn, "because the 35-year period began with grants made in 1978, opportunities to execute termination notices under § 203 started to accrue for the first time on January 1, 2013." Ray Charles Found. v. Robinson, 795 F.3d 1109, 1113 (9th Cir. 2015). Now in 2020—42 years after the 1976 Act's effective date of January 1, 1978—copyrighted works are increasingly entering their termination window.

3. For that reason, an industry group has noted to this Court the emerging importance of termination rights—and the urgency of this Court's clarity. Specifically, the Authors Guild prognosticates that "terminations under §203 will create a new wave of litigation[.]" See Authors Guild Br. 9.

4. Indeed, measured empirically, the Authors Guild prediction holds water. As the below graph of cases citing to 17 U.S.C. §§ 203 and 304(c)-(d)

demonstrates, more and more courts have had to construe the “complex statutory regime” surrounding termination rights. See Baldwin v. EMI Feist Catalog, Inc., 805 F.3d 18, 19 (2d Cir. 2015). A graphical representation of this trend is shown below:



As seen from the graph, there’s an unsteady but sizeable uptick in cases citing to the relevant termination provisions. There’s been meaningful percolation in the lower courts and an upward trend in the number of cases implicating termination rights.

5. What’s happened so far, however, is only the tip of the iceberg. That’s why it’s so important for this Court to grant the Petition and clarify a key aspect of termination rights.

6. Perhaps surprisingly, most Americans already own multiple copyrighted works. Most Americans have licensed their copyrighted works online. And,

because most Americans have licensed their works, their 35-year termination clocks are already ticking. These basic observations might be less than apparent because they arise from the complex interaction of two intersecting developments—one doctrinal and one technological.

7. The Digital Justice Foundation writes separately to address easy-to-overlook aspects of termination that make them a matter of national importance to all Americans—not merely professional authors.

8. First, take the doctrinal development. Congress has democratized copyright ownership. Through the 1976 Copyright Act, Congress revised U.S. copyright law in a then-radical way to bolster the rights of artists vis-à-vis publishers. See Section I, *supra* (discussing then-radical concepts of copyright divisibility and termination rights). As another then-radical aspect of this revision, the 1976 Copyright Act reduced the bureaucratic paperwork and legalese necessary to obtain property rights in copyrighted works.

9. Under the predecessor statute, the 1909 Act, authors risked losing all rights in their copyrighted work if they failed to punctiliously comply with formalistic requirements. Artists were required to navigate a persnickety placement of the © symbol. E.g., OA Bus. Publs., Inc. v. Davidson Publ. Co., 334 F.2d 432, 434 (7th Cir. 1964) (rejecting © notice placed on third page of publication). Then, they had to register the work with the Copyright Office, *i.e.*, the administrative state.

10. The 1909 Act’s regime essentially required all artists to hire lawyers or agents to “opt-in” to

property rights: the 1909 Act operated under “an ‘opt-in’ system of copyright in which protections were only available to those who affirmatively acted to secure them.” Kahle v. Gonzales, 487 F.3d 697, 699 (9th Cir. 2007).

11. Before the 1976 Act, creation of a work was not enough to qualify that work for copyright. Creators had to take active steps to register their works with the Copyright Office. The inefficiency and unfairness of this system were widely acknowledged. Just as we don’t expect every employee to be required to consult an employment attorney before starting a new job, many found it unfair and inefficient to expect legally unsophisticated artists to navigate bureaucracy and legalese as a precondition to intellectual-property rights in their art.

12. The 1976 Copyright Act and a later 1988 amendment fixed this problem by abolishing the opt-in system.

13. Instead, Congress ushered in “an ***opt-out*** regime that grants rights automatically” and that decidedly democratized copyright protection. Brad A. Greenberg, More Than Just a Formality: Instant Authorship and Copyright’s Opt-Out Future in the Digital Age, 59 U.C.L.A. L. Rev. 1028, 1031 (2012) (emphasis added).

14. The 1976 Copyright Act created a statutory regime under which “copyright attach[ed] not upon a work’s publication but upon its fixation in a tangible medium of expression.” Paul Goldstein, Goldstein on Copyright § 3:3 (2020 update); see 17 U.S.C. § 102(a). The 1976 Act also abolished the registration

requirement as a prerequisite for property rights. 17 U.S.C. § 408(a) (“Registration Permissive”); see Jane C. Ginsburg, The US Experience with Copyright Formalities: A Love/Hate Relationship, 33 Colum. J.L. & Arts, 311, 324-327 (2010) (chart showing evolution of copyright formalities since 1710).

15. In 1988, Congress went a step further. It unanimously passed, and President Reagan signed into law, the Berne Convention Implementation Act. See Publ. L. No. 100-568 (1988). That law no longer required artists to fulfill *any* formalities to obtain copyright protection. Congress merely retained some formal requirements as preconditions to suit, see 17 U.S.C. § 411(a), or to certain remedies, see 17 U.S.C. § 412. Yet no affirmative step (beyond creating the work itself) was needed to secure copyright protection for the author.

16. Congress’ relaxation of formalities ushered in an era of instant authorship. Copyright protection now attaches at the moment of a work’s creation. As this Court has unanimously observed, an “author gains ‘exclusive rights’ in her work immediately upon the work’s creation[.]” Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 887 (2019). Today, copyright protection “exists automatically as soon as a work is fixed[.]” Neri v. Monroe, 726 F.3d 989, 990 (7th Cir. 2013) (emphasis added).

17. Thus, doctrinally, Congress made copyright protection much more accessible for ordinary citizens by quite radically relaxing formal prerequisites to copyright protection.

18. **Second**, technological advance since the passage of the 1976 Copyright Act has meant that many more Americans—indeed a sizeable majority of them—have been taking advantage of their newfound rights.

19. In an age of instant authorship, copyright has become an intellectual-property regime that readily recognizes (and potentially remunerates) any contributions to culture, whoever made them. Such doctrinal innovations came just in time because, as a result of the Internet and other digital technologies, there has been an exponential expansion in both the number of expressions made and in the number of citizens expressing themselves in online environments. See Gregory Keenan, Copyright Humanism, Phenomenal World (2019), <https://phenomenalworld.org/analysis/copyright-humanism> (discussing “age of instant authorship”).

20. The age of instant authorship has democratized copyright. Under the current copyright system, a “letter, a conversation, a shopping list has full copyright protection from the moment it is written down, with no need for registration, deposit, notice, or examination in the Copyright Office.” Paul Goldstein, Copyright’s Highway, 19 (2003 2d ed.). As the law was beginning to recognize more contributions to culture, Americans writ large were beginning to take to expressing themselves online by creating new copyrighted works on the Internet.

21. Online, users fix these copyrighted expressions whenever they post content, resulting in a newly owned copyrighted work: “Virtually all of the photographs on flickr, videos on YouTube, and postings in

the blogosphere, as well as routine business memos and email messages, are original works of authorship that qualify for copyright protection automatically by operation of law[.]” Pamela Samuelson, Too Many Copyrights?, 54 Communications of the ACM 29, 29 (2011).²

22. These two developments—the relaxation of copyright formalities and the move of most Americans to online sharing of creative works—have enormous implications for the termination right.

23. Today, copyrighted works are created en masse by a content-creating public. These works are widely distributed across the Internet. To achieve that aim, individuals routinely license their copyrighted works when they upload them, via clickwrap terms of service. For example, every time an individual uploads an image to Facebook, that person is granting a license to Facebook. In turn, that license is subject to termination like any other license.

24. Today, digital platforms, such as Facebook, acquire licenses from users and publish these works widely to fellow citizens. Such online platforms routinely obtain licenses from users for such copyrighted works. Take Facebook’s terms of service, which provide an example of a digital-publishing platforms’ terms:

² Some, like Professor Samuelson, have questioned the wisdom of Congress’ approach. Nonetheless, the legal implications of the current statutory scheme are well-settled and have dramatically expanded most Americans’ copyright interests.

[W]hen you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, **you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license** to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content[.]

Terms of Service, facebook, <https://www.facebook.com/terms.php> (emphasis added).

25. Like many online terms of services, Facebook's terms effect a broad license. Nonetheless, all such terms of service are still subject to termination rights. "Under U.S. law, a contractual assignment, no matter how expansively phrased, is still subject to the termination right." Ennio Morricone Music Inc. v. Bixio Music Grp. Ltd., 936 F.3d 69, 73 (2d Cir. 2019). That's because termination rights are inalienable; they exist "notwithstanding any agreement to the contrary[.]" 17 U.S.C. § 203(a)(5).

26. In that sense, the lower courts have often been missing the forest for the trees. They've been envisioning the termination right as (an annoyingly complex) esoteric right instead of a basic right that is held by nearly all Americans. Indeed, it is submitted that even if some of the Justices of this Court do not have vesting termination rights in online posts, all of their Clerks probably do (and may even be unaware of such rights).

27. "Few people realize that many contracts that purport to transfer 'all right, title and interest' in a

copyright can be terminated by the author of the copyrighted work after thirty-five years (in some cases), after fifty-six years (in other cases), and sometimes even after seventy-five years.” Brown-Thomas v. Hynie, 412 F. Supp. 3d 600, 607 (D.S.C. 2019).

28. And, when one takes a moment to ponder it, the scope and scale of these termination rights are astonishing. Take one type of copyrighted work for one large Internet company: photos posted to (and licensed to) Facebook. By 2011, users had uploaded more than 150 **billion** photos to Facebook. Elizabeth G. Porter, Taking Images Seriously, 114 Colum. L. Rev. 1687, 1690 (2014).

29. By September 2013, the number had risen to 250 **billion**, with 350 million additional photos posted a day. Shawn Michelle Smith & Sharon Sliwinski, Photography and the Optical Unconscious 3 n.9 (2017). And, nearly 7 out of 10 American adults is a Facebook user. John Gramlich, 10 Facts about Americans and Facebook, Pew Research Center, <https://pewrsr.ch/2z4prMn> (May 16, 2019).

30. The terms-of-service licenses for nearly all of these photos posted to Facebook (other than for works made for hire) are subject to termination. Their termination clocks are currently ticking. And that’s just one Internet platform. Literally hundreds of millions of Americans hold literally hundreds of billions termination rights online.

31. In the aggregate, these termination rights are enormously valuable. Even seemingly trivial individual copyrighted works can be incredibly valuable property in the aggregate. Indeed, such user-created

copyrighted works are the lifeblood flowing through the veins of the Internet. By publishing and sharing their original fixed expressions online, “an amazing number of people offer an amazing amount of value over networks.” Jaron Lanier, Who Owns the Future? 9 (2014). So, even if one thinks a single photo posted to Facebook is trivial, 250 billion and counting aren’t.

32. In this sense, termination rights are an issue of national importance. What courts say about the termination right affects the scopes of rights in hundreds of billions of copyrighted works licensed online by hundreds of millions of Americans.

33. Moreover, because of the administrative complexity, termination rights require clarity so that rights organizations can assist ordinary Americans in the assertion of their rights. That can only be done if the law is made quite clear, ideally by this Court.

34. Indeed, whether the termination right covers a copyrighted work of the highest art or the simplest of online posts, the underlying purpose of this inalienable right is still fundamentally important. It permits licenses made long ago to be renegotiated on terms that are fitting for the proven value of the work. Such a purpose fits any manner of copyrighted work—because the point is we cannot *ex ante* know what art is great art or what copyrighted works are valuable copyrighted works until they stand the test of time.

35. Justice Holmes once remarked that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” Bleistein v. Donaldson

Lithographing Co., 188 U.S. 239, 251 (1903). With the creation of the termination right through the enactment of the 1976 Copyright Act, Congress took Justice Holmes' wise words to heart.

36. When deciding on the scope of termination rights in the Steinbeck literary estates, the Ninth Circuit overlooked that it was speaking about an inalienable right held by nearly all Americans. This Court should grant the Petition and clarify termination rights for the betterment of the public interest.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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