

ARE CREATIVE COMMONS LICENCES FOREVER?:  
AUTHORS' TERMINATION RIGHTS AND OPEN-  
CONTENT LICENSING<sup>†</sup>

*R. Anthony Reese*<sup>\*</sup>

INTRODUCTION

In just a few years, Creative Commons licenses have become increasingly used by copyright owners to grant members of the public certain rights to use their works. If this trend continues, many works licensed on Creative Commons terms may well still be in use under those terms for many years. This raises the possibility that in the 2020s, some authors may begin to consider attempting to terminate the Creative Commons licenses that they previously granted and to recapture the rights they licensed away. This may be possible not under the terms of the licenses themselves, which state that they remain in force for the duration of the licensed work's copyright unless terminated by the licensor for a breach by the licensee, but rather under provisions of federal copyright law that allow the termination of almost any grant of rights by an author to a third party after a period of 35 years. One commentator, Professor Lydia Loren, has suggested, as part of a larger work on the legal status of Creative Commons licenses, that allowing termination of those licenses under these statutory provisions would, by undermining licensees' ability to rely on their licensed rights, be detrimental to the goals of the Creative Commons project which the licenses are designed to implement. Professor Loren has therefore suggested that the statute's termination provisions should not be interpreted to apply to Creative Commons licenses.

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<sup>†</sup> © 2008 R. Anthony Reese.

<sup>\*</sup> Arnold, White & Durkee Centennial Professor of Law, The University of Texas at Austin. I thank participants in presentations at the Information Law Institute at New York University, the Information Society Project at Yale Law School, and the Northwestern IP Colloquium for comments on early presentations on this topic.

This article explores the application of the statutory termination provisions to Creative Commons licenses. After briefly explaining in Part I Creative Commons licenses and the provisions of federal copyright law on termination of transfers and licenses, the article examines in Part II whether and when Creative Commons licenses might fall within the language of the statutory provision, and also to what extent terminability of Creative Commons licenses would be consistent with the policies that led to the enactment of the termination right. Part III then examines Professor Loren's concerns about the potential negative consequences of terminability on the use of Creative Commons licenses, and other possible objections to allowing termination of Creative Commons licenses, and argues that those objections do not justify treating such licenses as not subject to termination. Finally, Part IV considers the likely impact on Creative Commons licenses of holding that the licenses can be terminated under the statute, arguing that the impact may be minor in part because termination will be practically difficult even if legally possible and in part because statutory limitations on the effect of termination rights on grantees who have prepared derivative works will protect Creative Commons licensees who would otherwise probably be most adversely affected by termination.

## I. BACKGROUND: CREATIVE COMMONS & SECTION 203

### A. *Creative Commons Licenses: A Brief Introduction*

Creative Commons was founded in 2001 and released its first set of standard licenses in 2002. Creative Commons explains its mission, of which the licensing project is an important part, as follows: “[A] single goal unites Creative Commons’ current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”<sup>1</sup> In essence, the organization’s view is that current copyright law grants copyright owners, by default, broader and stronger exclusive rights than many authors need and want, and that such default rights hinder many people from using copyrighted works in ways that the works’ authors would not object to. As a result, Creative Commons seeks “to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them—to declare ‘some rights reserved’”<sup>2</sup> rather than “all rights reserved.”

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<sup>1</sup> Creative Commons, *History*, available at <http://wiki.creativecommons.org/History>.

<sup>2</sup> Creative Commons, *History*, available at <http://wiki.creativecommons.org/History>.

Creative Commons licenses are, essentially, six standard form copyright licenses, in which a copyright owner grants anyone who complies with the license terms and conditions certain rights to use her copyrighted work. The various possible combinations of conditions define the six different licenses. All of the licenses allow the user to reproduce and distribute copies and phonorecords of the work, and to publicly perform the work,<sup>3</sup> and all require that the user attribute the work to the original author. Half of the licenses allow only noncommercial use of the work, while the other half allow either commercial or noncommercial use. Two of the licenses do not allow the user to prepare derivative works by modifying the work. The remaining four licenses do allow modification, and two of those licenses require that the modifying user license the resulting modified work to others on the same terms. The various combinations lead to the following set of licenses:

- Attribution<sup>4</sup>
- Attribution Non-Commercial<sup>5</sup>
- Attribution Share-Alike<sup>6</sup>
- Attribution No Derivatives<sup>7</sup>
- Attribution Non-Commercial Share Alike<sup>8</sup>
- Attribution Non-Commercial No-Derivatives<sup>9</sup>

Each license exists in three forms: the full actual license (which Creative Commons calls the “legal code”), a “commons deed” (a plain-English summary of the license provisions), and the “digital code” (a machine-readable expression of the particular license designed to facilitate searching for content licensed on specific terms).

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<sup>3</sup> See, e.g., Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 3, available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>. The licenses do not expressly grant the right to display the work publicly (which is reserved to the copyright owner under 17 U.S.C. § 106(5)), but the licenses’ definitions of the granted rights may be broad enough to cover public display.

<sup>4</sup> See, e.g., Creative Commons, Attribution 3.0 Unported License, available at <http://creativecommons.org/licenses/by/3.0/legalcode>.

<sup>5</sup> See, e.g., Creative Commons, Attribution-NonCommercial 3.0 Unported License, available at <http://creativecommons.org/licenses/by-nc/3.0/legalcode>.

<sup>6</sup> See, e.g., Creative Commons, Attribution-ShareAlike 3.0 Unported License, available at <http://creativecommons.org/licenses/by-sa/3.0/legalcode>.

<sup>7</sup> See, e.g., Creative Commons, Attribution-NoDerivs 3.0 Unported License, available at <http://creativecommons.org/licenses/by-nd/3.0/legalcode>.

<sup>8</sup> See, e.g., Creative Commons, Attribution-NonCommercial-ShareAlike 3.0 Unported License, available at <http://creativecommons.org/licenses/by-nc-sa/3.0/legalcode>.

<sup>9</sup> See, e.g., Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License, available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>.

The licenses themselves specify, with respect to duration, that they are “perpetual (for the duration of the applicable copyright in the [licensed] Work).”<sup>10</sup> The only express provision allowing a licensor to terminate the license permits termination only in the event of breach by the licensee of her obligations under the license (such as, for example, making commercial use of a work licensed only for non-commercial use).<sup>11</sup>

The basic purpose of the Creative Commons licenses is to allow authors and copyright owners to permit uses of their works that copyright law gives them the right to restrict. In essence, copyright owners who license works on Creative Commons terms are choosing not to exercise the full scope of their exclusionary rights under the Copyright Act. An important aspect of this part of the Creative Commons license project is to reduce transactions costs for copyright owners who wish to keep for themselves a smaller bundle of sticks than the one granted to them by statute and for users who wish to use copyrighted works in certain ways. The licenses reduce transactions costs in a number of ways. By allowing copyright owners to signal the availability of a work under the terms of a Creative Commons license—for example, by using, in connection with the online dissemination of the work, a Creative Commons license logo, or a link to the actual license or the “commons deed” summary of the license terms—the copyright owner can herself offer to allow the use of the work on less restrictive terms to all potentially interested users, rather than requiring each potential user to approach the copyright owner individually to request permission. In addition, by making available its standard license forms, Creative Commons reduces the transaction costs that would otherwise be involved in negotiating terms and drafting an agreement between individual users and the copyright owner. And widespread adoption of Creative Commons licenses could reduce transactions costs by creating standard license terms that many copyright owners and potential users already understand, eliminating the need for them to review and seek to understand the particular terms of individually drafted license agreements. The Creative Commons licenses also reduce the actual cost to a user of the licensed uses, since all of the licenses permit the uses that they specify without requiring any payment from the licensee to the licensor.

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<sup>10</sup> Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 7(b), available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>.

<sup>11</sup> Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 7(a), available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>.

*B. Termination of Transfers and Licenses under the 1976 Copyright Act*

Effective in 1978, the United States adopted a mechanism that allows authors to terminate many assignments and licenses of their copyright rights and to recapture the previously granted rights. The primary mechanism, codified in Section 203 of the Act, essentially allows authors or their successors to undo transfers or licenses once 35 years have passed.<sup>12</sup> The termination right, by allowing copyright rights to revert to the author or her successors, continues a policy of reversion that until 1978 had been part of the renewal system in copyright law, which divided copyright protection into two separate terms and vested ownership of the renewal term in the author or her statutorily designated successors, and not in any transferee of the author's ownership of the initial-term copyright. In the revision process that led to the adoption of the 1976 Copyright Act, the renewal system was eliminated in favor of a unitary copyright term. Because renewal was no longer available to effectuate reversion, and because the drafters believed that reversion was still desirable, the statute included a new approach to reversion: granting an author (or her successors) a right to terminate transfers or licenses of her copyright rights. This section examines the operation of the current termination mechanism in greater detail.

Not all grants of copyright rights are subject to termination under Section 203. The provision applies broadly to any grant of a transfer or an exclusive or nonexclusive license of any copyright or any copyright right.<sup>13</sup> But its application is limited to grants that are executed by the author, not by any other persons, and only to grants executed on or after January 1, 1978 and not before.<sup>14</sup> In addition, authors' grants in their wills are exempted, so that only inter vivos transfers are terminable.<sup>15</sup> And termination is not available if a work is made for hire under the copyright act's provisions, so grants of copyright rights in works created by employees within the scope of their employment, and in certain specially

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<sup>12</sup> Another provision, section 304(c), provides a nearly identical termination right, but applies only to transfers or licenses of renewal copyrights executed before January 1, 1978. This limitation means that § 304(c) will not directly apply to any Creative Commons licenses, since those did not exist before 1978 (though § 304(c) might still have an indirect impact on such licenses, as discussed *infra*, TAN \_\_\_\_). This Article therefore focuses on the termination provisions of Section 203, though the close parallels between the two provisions means that the language and history of § 304(c), and cases interpreting it, may be relevant to understanding and applying § 203.

<sup>13</sup> 17 U.S.C. § 203(a).

<sup>14</sup> 17 U.S.C. § 203(a).

<sup>15</sup> 17 U.S.C. § 203(a).

commissioned works prepared by independent contractors, cannot later be terminated under Section 203.<sup>16</sup>

For the many grants that are subject to termination, the statute provides a five-year period during which termination may take place.<sup>17</sup> Termination can be effected at any point during that window, which generally begins to run “at the end of thirty-five years from the date of execution of the grant.”<sup>18</sup> The statute does provide an alternative rule for calculating when the termination window begins if the grant in question confers “the right of publication” in the work. In that case, the window opens on the earlier of two dates: the end of thirty-five years from the date of the work’s publication under the grant, or the end of forty years after the date the grant was executed.<sup>19</sup> If no termination is effected while the window is open, the transfer or license continues in effect.

The statute also dictates who may decide whether to terminate a grant that is subject to termination. The basic principle of Section 203 is to confer the termination right on the author herself.<sup>20</sup> (If the work is jointly authored, and more than one author signed the grant that is subject to termination, then termination requires a majority of the signers to agree to terminate.<sup>21</sup>)

If an author is dead, however, her right to terminate copyright grants does not become part of her estate and pass by will or intestacy. Instead, the Copyright Act specifies who is entitled to terminate a grant by a deceased author that meets the criteria of Section 203. The statute essentially vests a deceased author’s termination interest in the author’s surviving spouse and/or surviving children or grandchildren. Only if there is no living spouse, child, or grandchild does the statute permit the author’s “executor, administrator, personal representative, or trustee” to exercise the

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<sup>16</sup> 17 U.S.C. § 203(a). The definition of “work made for hire” in 17 U.S.C. § 101 covers both employee-prepared works and certain specially commissioned works, and imposes several formal requirements in order for works in the latter category to qualify. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). If a work is made for hire, then U.S. law considers the hiring party to be the work’s author, and copyright ownership vests ab initio in the hired party, 17 U.S.C. § 201(b), so that there is no transfer from the employee or independent contractor to the hiring party that would be subject to Section 203 in any event, but that latter section is nonetheless explicit in entirely excluding grants in works made for hire from its scope.

<sup>17</sup> 17 U.S.C. § 203(a)(3).

<sup>18</sup> 17 U.S.C. § 203(a)(3).

<sup>19</sup> 17 U.S.C. § 203(a)(3). “This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.” H.R. Rep. No. 94-1476, at 126.

<sup>20</sup> 17 U.S.C. § 203(a)(1).

<sup>21</sup> 17 U.S.C. § 203(a)(1).

termination interest.<sup>22</sup> Rather complicated provisions in the statute govern the proportionate shares of the termination interest that vest in the author's surviving spouse, children, and/or grandchildren, if the author leaves more than one such person, and how those shares may be exercised, but essentially the statute requires action by a majority of those in whom the termination interest is vested in order for the termination to be effected.<sup>23</sup>

If those who control the termination interest wish to terminate the grant during the termination window, the statute specifies the method for doing so. A signed, written notice of termination must be served upon the grantee or the grantee's successor in title, and a copy of the notice must be recorded in the Copyright Office.<sup>24</sup> The notice must specify the date during the termination window on which the termination is to be effective and must be served "not less than two or more than ten years before that date."<sup>25</sup>

Once a proper termination is effective, the U.S. copyright rights that were originally conveyed in the grant revert to the terminating party (or parties),<sup>26</sup> leaving the original transferee (or her successors) unable to continue to exercise those rights without infringing. (U.S. rights other than copyright rights, such as, for example, trademark rights, as well as rights conferred under foreign copyright laws, are not affected by termination.)<sup>27</sup> The terminating party may then exercise the rights herself, or grant them away again.<sup>28</sup> One important limitation on the effect of termination concerns derivative works. If a terminated grantee prepared a derivative work under the terminated grant before termination occurred, then that derivative work "may continue to be utilized under the terms of the grant after its termination."<sup>29</sup> So, for example, if a novelist grants a movie studio the right to make a film version of her novel, and if the studio makes that film version, and if the novelist later terminates the grant to the studio, the studio may continue to exploit the film version, provided it continues to comply with the terms of the original grant from the novelist.

A final important feature of the termination right is its unwaivable, inalienable nature. One could imagine, for example, that a transferee who is

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<sup>22</sup> 17 U.S.C. § 203(a)(2).

<sup>23</sup> 17 U.S.C. § 203(a)(1), (2).

<sup>24</sup> 17 U.S.C. § 203(a)(4).

<sup>25</sup> 17 U.S.C. § 203(a)(4)(A).

<sup>26</sup> 17 U.S.C. § 203(b).

<sup>27</sup> 17 U.S.C. § 203(b)(5).

<sup>28</sup> The statute governs how and when further grants of rights covered by a terminated grant can be made. 17 U.S.C. § 203(b)(3), (4).

<sup>29</sup> 17 U.S.C. § 203(b)(1).

worried about the possibility that a transferring author will come back in 35 years and terminate the transfer might seek to prevent that eventuality by extracting a contractual promise from the transferring author not to exercise her termination right. The statute, however, makes clear that termination “may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”<sup>30</sup> Congress also put into place other mechanisms intended to prevent grantees from diminishing the ability of authors to exercise the termination right. For example, a grantee might try to obtain, at the time of the initial grant or shortly thereafter, a contingent re-grant from the author of any rights that might eventually be recaptured by the author through termination. The statute would thwart the grantee’s effort, however, since it provides that further transfers of reverted rights are generally not valid unless they are made *after* the effective date of the termination.<sup>31</sup>

Section 203’s statutory termination mechanism is a relatively new one in copyright law. Although it was effective in 1978, the fact that transfers cannot be terminated until 35 years after they are made, and notices of transfer cannot be served until 10 years before termination, means that the first notices of termination under Section 203 could only be served in January 2003, and no terminations under the section will be effective until 2013. Consequently, we so far have little experience or judicial or administrative guidance on the operation of Section 203, although there have been a number of judicial decisions interpreting the often identical language of a parallel provision, Section 304(c), which provides termination rights for certain grants of renewal-copyright interests made before January 1978, and those opinions will likely influence the interpretation of Section 203.

## II. APPLYING TERMINATION RIGHTS TO CREATIVE COMMONS LICENSES

With a basic understanding of Creative Commons licenses and the current statutory provisions on termination, we can turn to the interaction of the two. This Part considers whether Section 203 applies to Creative Commons licenses, looking first to whether the language of the statute brings such licenses within the scope of the termination right, and then discussing whether interpreting the statute to allow termination of Creative

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<sup>30</sup> 17 U.S.C. § 203(a)(5). *See also* [Milne, Marvel, Steinbeck, Mewborn] (all interpreting “any agreement to the contrary” provision in Section 304(c)).

<sup>31</sup> 17 U.S.C. § 203(b)(4). An exception allows valid re-grants before the effective termination date, but only if they are made to the original terminated grantee and are made after the service of the notice of termination. *Id.*



Commons licenses would be consistent with the policies behind the termination right.

A. *Are Creative Commons Licenses Subject to Termination Under the Statute?*

Determining whether Section 203's provisions on termination apply to Creative Commons licenses requires evaluating whether a Creative Commons license meets the threshold conditions that the section imposes. Are Creative Commons licenses the types of grant to which Section 203 applies? Termination is allowed for "the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will," as long as the work covered by the grant is not a work made for hire.<sup>32</sup>

Several of these conditions will easily be met by most Creative Commons licenses. All of the licenses were granted after January 1, 1978, thus meeting the date restriction. While it may be possible to grant a Creative Commons license by bequest, virtually all such licenses are granted inter vivos, thus meeting the "otherwise than by will" limitation. While it is possible for a Creative Commons license in a work to be granted not by the author, but by the author's successor as copyright owner, most CC licenses appear to be granted by the author as initial copyright owner. And though some copyright owners granting CC licenses may be licensing works made for hire in which they own copyright by virtue of their status as the party who hired the work's actual creator, many more works made available under CC licenses seem to be ordinary individually or jointly created works that meet the "other than a work made for hire" requirement for termination.

One requirement of Section 203(a) may, however, present a more difficult obstacle to determining whether Creative Commons licenses are subject to termination.<sup>33</sup> The statute allows termination of grants that are "*executed by the author,*" raising the question of whether Creative

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<sup>32</sup> 17 U.S.C. § 203(a).

<sup>33</sup> One other aspect of Creative Commons licenses should not present any obstacle to termination. Although the licenses state that the rights granted are "perpetual," it seems quite clear that the statute contemplates that termination can occur even though the author has promised to grant to rights for a longer period of time, or even for a perpetual period. The clear intent of the statute is to give authors an inalienable, unwaivable right to terminate copyright grants before they would otherwise expire (if they would ever expire). If termination could be avoided merely by stating in the original grant that it is "perpetual," the intricate provisions of Section 203 would essentially become surplus verbiage in the statute.

Commons licenses are in fact “executed.” The execution requirement might be read to mean that a license must be signed in order to be subject to termination. One definition in *Black’s Law Dictionary* of the verb “to execute,” after all, is “to make (a legal document) valid by signing.”<sup>34</sup> Creative Commons licenses are fairly clearly not signed in the traditional sense, and therefore might not meet Section 203’s requirements (though it is possible that Creative Commons licenses might count as signed under federal e-signature legislation that bars discriminating against electronic signatures in favor of traditional handwritten ones<sup>35</sup>).

It is not clear, however, that the term “executed” in Section 203 should be read as requiring an author’s signature. One other common legal meaning of the term “executed” is “carried into full effect.”<sup>36</sup> Creative Commons licenses would presumably meet this definition, at least at the point that some user exercises some right granted in the license under the terms of the grant. At that point the license appears to be carried into effect, in the sense that both the licensor and the licensee have obligations to one another under the license. The fact that the license is not signed (at least in the traditional sense) does not invalidate the license as a matter of copyright law, which requires a signed writing only to validate transfers and exclusive licenses, not nonexclusive licenses such as the Creative Commons licenses.<sup>37</sup>

There is some precedent for reading “executed” in Section 203 as meaning “carried into full effect” rather than “signed.” The Eleventh Circuit has read the term “executed” that way in a case that held that Section 203 applies even to implied licenses, which are neither written nor spoken, let alone signed, but instead are implied from the conduct of the parties to the license.<sup>38</sup> The court in that case rejected the author’s argument that an “executed” license under Section 203 must be in writing, holding instead that “executed” in Section 203 means “carried into full effect,” and that an unwritten, implied nonexclusive license was executed when it went into effect based on the parties’ conduct.<sup>39</sup> The court therefore concluded that the implied nonexclusive license was within the scope of Section 203,

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<sup>34</sup> BLACK’S LAW DICTIONARY 567 (6th ed. 1990).

<sup>35</sup> See 15 U.S.C. § 7001.

<sup>36</sup> BLACK’S LAW DICTIONARY 567 (6th ed. 1990).

<sup>37</sup> 17 U.S.C. § 204 (providing that “transfer of copyright ownership” is invalid “unless an instrument of conveyance, or a note or memorandum of the transfer” is written and signed by copyright owner), § 101 (defining “transfer of copyright ownership” to include assignments and exclusive licenses but not nonexclusive licenses). See, e.g., *Effects Associates v. Cohen*, 908 F.2d 555 (9th Cir. 1990).

<sup>38</sup> *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999).

<sup>39</sup> 182 F.3d at 1294.

despite the lack of any signed writing.<sup>40</sup> Under this view, it seems clear that Creative Commons licenses would be “executed” within the meaning of Section 203, and would therefore be subject to termination.

Certain policy concerns also argue for reading the execution requirement as not requiring a signature. In particular, applying Section 203 only to signed grants might provide a way for transferees to circumvent in part the author’s termination rights by means of oral licenses. Copyright law gives effect to oral licenses, as long as they are nonexclusive; as noted above, only exclusive licenses or copyright assignments are invalid under the copyright statute if they are not in writing and signed by the author. If Section 203 applies only to signed licenses, then oral copyright licenses will never be subject to termination under Section 203, since the oral grants will not be “executed” in the sense of “signed.” This suggests a means by which a transferee can avoid some of the effect of the termination right. For example, when a transferee gets a written transfer of all copyright rights in a work from the work’s author, the transferee could simultaneously get an oral, nonexclusive license to all of the copyright rights from the author (and could perhaps document the oral license with an audio recording).<sup>41</sup> If the author later terminates the signed, written transfer pursuant to Section 203, the transferee could at that point continue to exercise all of the copyright rights in the work, albeit on a nonexclusive, rather than an exclusive, basis.<sup>42</sup> This could significantly diminish the value of the rights recaptured by the author through the termination, since the author could not grant to anyone (other than the original transferee) truly exclusive rights in the work, because the original transferee could always remain in the markets for the work under its nonexclusive license. Exclusivity generally confers greater value on copyright rights, so the author’s inability to grant exclusive rights would generally reduce the amount she will obtain from making a further grant of the terminated rights.<sup>43</sup>

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<sup>40</sup> 182 F.3d at 1293.

<sup>41</sup> The grants might technically need to be sequential, rather than simultaneous. The author would first grant the nonexclusive license, and would then subsequently grant an assignment of the copyright subject to the outstanding nonexclusive license.

<sup>42</sup> It is possible, of course, that a court would prevent such an outcome, if it viewed it as an improper attempt to circumvent the inalienability of the author’s termination right. A court might, for example, hold that the nonexclusive license and the assignment somehow merged, so that the termination of the assignment also served to terminate the nonexclusive license. But nothing in the statute would expressly bar the outcome, and no existing doctrine would dictate the merger of a nonexclusive license and a subsequent assignment.

<sup>43</sup> The statute, of course, already reduces somewhat the value of the terminated rights to the author by providing that derivative works prepared by the original transferee may continue to be used, thereby preventing the terminating party from enjoying (and granting) the right to prepare derivative works on a truly exclusive basis. But this single statutory limitation on the exclusivity of

The text and history of Section 203 show that the provision's drafters wanted to defeat such attempts to curtail an author's (or her successors') ability to exercise the termination right and enjoy the reverted rights as fully as possible. The statute's express provision allowing termination notwithstanding any agreement by the author to the contrary is one example of the concern to prevent attempts to cut off the termination right. The drafters' concern is also clear from an extension of the scope of termination during the drafting process. As originally drafted, the provision only allowed for termination of transfers of copyright ownership—that is, of assignments and exclusive licenses. Early in the revision process, the provision was amended to include nonexclusive licenses as well, and the legislative history makes clear that the change was motivated by the concern that otherwise transferees would attempt to circumvent some of the effects of termination and thereby diminish the value of the termination right to the author or her successors, by getting transferring authors to grant not only an assignment but also a nonexclusive license.<sup>44</sup> But if Section 203 is interpreted to cover only written, signed nonexclusive licenses, then the exact type of circumvention that worried the drafters becomes fairly easy to accomplish, by means of an oral, rather than a written, nonexclusive license. Such an outcome seems contrary to the drafters' intent, and argues against interpreting the requirement that a grant be "executed" as meaning that the grant must be signed.

The arguments in favor of limiting "executed" grants subject to termination only to signed writings seem less persuasive. The section of the Copyright Act that requires transfers of ownership to be in a signed writing in order to be valid, section 204, is entitled "*Execution* of transfers of copyright ownership."<sup>45</sup> Even assuming the relevance of section titles to the interpretation of the Act's operative provisions,<sup>46</sup> it is possible to read that title as simply identifying the general subject matter of the section—how a transfer of copyright ownership is to be executed, or carried into full effect—while the text of the section specifies that in the case of transfers of ownership (but not other grants of copyright rights), the execution must

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reverted rights does not undercut the view that other incursions on that exclusivity would be disfavored.

<sup>44</sup> COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89th Cong., 1st Sess. (House Comm. Print 1965), at 73 ("Non-exclusive grants were included in the right on the strength of the argument that, otherwise, there would be nothing to prevent a transferee from avoiding the effect of the provision by compelling the author to grant him a perpetual, non-exclusive license along with a statutorily limited transfer of exclusive rights.").

<sup>45</sup> 17 U.S.C. § 204.

<sup>46</sup> [Cite.]

occur by means of a signed writing, rather than by other means. This specific requirement for a signature as the means of execution in the context of validity of transfers would not mean that all other instances in which the statute requires or refers to “execution” would necessarily require signatures. This is especially true since the language of the statute not infrequently refers specifically to signatures, indicating that the drafters were quite capable of expressly requiring a signature when they desired to do so.<sup>47</sup>

Another argument against allowing termination of unsigned Creative Commons licenses might be that it will be difficult to determine the precise date on which the license was “executed,” if execution does not mean signed, and the date of execution must be determined in order to determine the window during which termination can be effected. Of course, this may be true even of signed documents, since reading “executed” to mean signed will not ensure that signed documents themselves reflect the date on which they were signed. Even for signed documents, then, recourse to external evidence may be necessary in order to determine the date of execution. The issue may be somewhat simpler in the case of signed grants, since the question to be answered is simply when the grant was signed, while the broader reading of “executed” may require recourse to external evidence in order to determine when the grant was carried into effect, which may be a more difficult event to identify. Still, reading “executed” to mean “signed” will not necessarily avoid difficulties in determining the execution date in order to calculate the termination window.

Indeed, one virtue of the termination mechanism’s five-year window is that it may make precise determination of the date of execution unnecessary. If the evidence indicates, for example, that a grant was executed at some point between January 1, 2000 and June 30, 2000, then a termination with an effective date anywhere between July 1, 2035 and December 31, 2039 would be proper, since the effective date would be within the five-year window of any date during the six-month period in which the grant was executed. At the margins, of course, knowing the

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<sup>47</sup> See, e.g., 17 U.S.C. § 204 (requiring written instrument “signed by the owner” to validate transfer of ownership); 17 U.S.C. § 201(b) (requiring “a written instrument signed by” the parties to alter standard ownership provisions for works made for hire); 17 U.S.C. § 203(a)(4) (requiring written termination notice to be “signed by” the terminating parties in order to be effective); 17 U.S.C. 304(c)(4) (parallel requirement for “signed” termination notice with respect to termination of transfers of renewal interest); 17 U.S.C. § 101 (“work made for hire”) (requiring, in the case of specially commissioned works, that the parties expressly agree in a writing “signed by them” that the work will be made for hire).

precise date will certainly matter, but the five-year termination window (and the eight-year advance notice window) will make it possible for many authors to terminate fairly easily even if they cannot determine precisely when the grant was executed.

In sum, while there is some uncertainty about whether Creative Commons licenses are facially subject to the termination provisions of Section 203, depending on how the word “executed” in that section is construed, there are strong arguments for treating such licenses as executed and subject to termination, as long as they meet the other requirements of Section 203, which will likely be the case for many, if not most, Creative Commons licenses.

*B. Creative Commons Licenses and The Policies Behind Allowing Termination of Transfers and Licenses*

Even if Section 203’s statutory language can be read to subject Creative Commons licenses to termination, do the policies embodied in the termination provisions support allowing Creative Commons licensors to terminate their licenses? Or would allowing termination run contrary to those policies, so that courts should, if the statutory language is ambiguous, chose a construction of Section 203 that would exclude Creative Commons licenses from its scope?

The basic stated policy behind Section 203 is to “safeguard[] authors against unremunerative transfers.”<sup>48</sup> The drafters sought to give authors who had transferred away rights the chance to recapture those rights in order to make more money from them, presumably in most cases by transferring the rights again under better terms. Essentially, the provision is designed to provide a second bite at the apple to authors who initially transfer away valuable rights in return for no more than a mess of pottage. This fundamental goal of the provision can be seen from the early drafting in the revision process that led to the 1976 Copyright Act. The first attempts to address the “reversion problem,” as it was called, would have made copyright assignments by authors effective for no more than 20 years from execution unless the assignment provided for “the continuing payment of royalties commensurate with the uses made of the work or the revenue derived from it,”<sup>49</sup> or would have allowed an author or her successors to sue 20 years after the execution of a transfer to have the transfer reformed or

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<sup>48</sup> H.R. Rep. 94-1476 at 124.

<sup>49</sup> REGISTER’S 1961 REPORT (tentative draft), *quoted in* \_\_\_ KAMINSTEIN LEGISLATIVE HISTORY PROJECT 405.

terminated if “the profits received by the transferee . . . are strikingly disproportionate to the compensation, consideration, or share received by the author or his successors.”<sup>50</sup> Though the drafters later revised the mechanism provided by statute, the impetus behind the termination provision can clearly be seen in these predecessor provisions.

As a general matter, allowing an author (or her successors) to terminate a Creative Commons license would seem to be consistent with this policy objective. By granting a Creative Commons license, the author has licensed at least some uses of her work for no remuneration whatsoever. There may well be sound reasons for her to do so at the time she grants the license (just as there may be sound reasons for, say, a novelist to grant a film studio the motion picture rights in her novel for a sum that later turns out to be much less than the rights are worth). But this royalty-free license could obviously substantially cut into the author’s ability to earn a financial return on her work. She will likely find it difficult to demand a royalty at least for uses that a potential licensee could make for free under the terms of the Creative Commons license. So this could well be an instance in which the author later decides that she has granted her rights in exchange for too little compensation, and it seems not unlike an instance in which an author sells her rights to a single transferee for some amount that she later decides is too little. The statute’s policy is clearly to allow the author in the latter situation to change her mind, terminate the transfer, and attempt to resell the recaptured rights, and it is not clear that the same policy should not apply in the Creative Commons situation, even though the author in that situation may have granted rights to many people (rather than just one) and for no royalty (rather than for a small royalty).

Thus, allowing termination of Creative Commons licenses seems consistent with the general policy embodied in the termination provision. Authors who grant Creative Commons licenses may later find that those grants are financially disadvantageous, and may wish to terminate them in order to try to earn greater returns from their works, which is precisely what Section 203 is designed to let authors do. The desire to protect authors from the consequences of unprofitable grants, though, seems to be grounded in at least three more specific author-protective rationales, and it is worth asking to what extent termination of Creative Commons licenses comports with those rationales.

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<sup>50</sup> 1963 PRELIMINARY DRAFT, § 16 (Alternative B). This provision would have required the plaintiff to prove that “the terms of the transfer have proved to be unfair or grossly disadvantageous to the author.” *Id.*

The justification for termination rights is sometimes expressed in terms of relative bargaining power of transferring authors and their transferees. The House Report introduces Section 203 by stating that “[a] provision of this sort is needed because of the unequal bargaining position of authors.”<sup>51</sup> The premise here is presumably that authors are systematically more likely to be in an inferior bargaining position as compared to transferees, and therefore are more likely to strike bargains they find unsatisfactory, so that Congress steps in with Section 203 to allow them, at some point, to undo those bad bargains. This rationale for termination seems unlikely to offer strong support for allowing the termination of Creative Commons licenses. An author who licenses a work under Creative Commons terms typically does not do so as a result of any bargaining process with another party. Instead, the author is generally making a unilateral decision to permit use of her work on the terms of the Creative Commons license she chooses. So to the extent that the statute is in fact designed to address imbalances of bargaining power facing authors of copyrighted works, the use of Creative Commons licenses does not appear to be an instance of the problem that the statute is meant to address, which might counsel against finding Creative Commons licenses to be subject to termination under Section 203.

Of course, even if the provision was motivated primarily by a desire to address a perceived systematic inequality in bargaining power, the statute’s termination right is in no way expressly limited to that situation, but instead applies to all qualifying grants, regardless of whether they resulted from any unequal bargaining power or are in any way substantively unfair.<sup>52</sup> For example, in many circumstances authors may have the upper hand in bargaining over the transfer of rights in their works, particularly if the author is famous or popular, or if the work is part of an already successful series. One suspects, for example, that Stephen King could choose between any number of publishing companies to issue his next novel, and that many of those publishers would be more eager to publish the next Stephen King novel than he would be to contract with any particular publisher. King seems unlikely to be in an inferior bargaining position. Nonetheless, Section 203 by its terms clearly applies even to transfers made by popular, successful authors such as King, who enjoy the upper hand in the negotiations leading to those transfers, even though those are not instances of what may be the core problem for which the section was intended.

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<sup>51</sup> H.R. Rep. 94-1476, at 124.

<sup>52</sup> Some of the proposals made earlier in the 1976 Act revision process for addressing the reversion issue would have been more tailored and specifically limited to situations of unfairness. *See supra*, text accompanying notes 49–50. The termination regime ultimately adopted, however, is not limited to instances of actual or likely unfairness.



Another rationale given for granting authors a termination right is not simply to protect them from an inferior bargaining position, but to recognize that authors face special difficulties in negotiating over transfers of their rights. In particular, the legislative history suggests that the drafters were concerned that authors were often in a poor bargaining position due in part to “the impossibility of determining a work’s value until it has been exploited.”<sup>53</sup> To the extent that this concern motivates the termination provision, allowing authors to terminate Creative Commons licenses may fit quite comfortably within the statute’s rationale. Many works may be released under Creative Commons licenses soon after their creation, before the work has been exploited to any significant degree. Authors who grant Creative Commons licenses in that situation may well have as much difficulty accurately assessing the likely long-term value of their works as do authors who grant assignments or royalty-based licenses in the early days of a work’s existence. It may only be after a Creative Commons-licensed work has been used for some time that an author can determine that a particular work is popular, useful, or otherwise valuable. Thus, an author using a Creative Commons license may, even in the absence of participating in any bargaining over the work, face the problem that the termination provision is designed to address in the view of this rationale: initially licensing (or assigning) the work on financial terms that turn out to be unfavorable once the work’s true worth is revealed through its dissemination. Allowing termination of Creative Commons licenses thus seems to comport with this justification for the termination right.

A third rationale for the termination right is the view that if a work is still commercially valuable 35 years after rights have been granted away, then the work’s long-lived success is more likely due to the author’s contributions to the work than to the grantee’s efforts or contributions, and therefore the author has a stronger claim to benefit from the work’s success in the later years.<sup>54</sup> Again, this rationale seems as likely to apply to works released under Creative Commons licenses as to other transferred works. The fact that a work has circulated under a Creative Commons license that allows royalty-free use may well contribute to a work’s success, but if a relatively large number of works are available on Creative Commons terms, then the success of some Creative Commons works relative to others seems likely to trace back at least in part to the author’s contributions. This

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<sup>53</sup> H.R. Rep. 94-1476, at 124.

<sup>54</sup> [Note that this rationale relates back to the reversionary effect of the renewal provisions, and was more expressly cited in support of those provisions than of the termination provision.]

rationale, in any event, does not deny that other factors may contribute to a work's long-lasting success—in the case of commercial transfers, the transferee's marketing efforts may, for example, play a substantial role. Instead, the judgment is a relative one: if a work remains of value long enough for anyone to be concerned about terminating a transfer or license under Section 203, then the judgment is that the author is *more responsible* for the work's continued success than are other factors. That seems as likely to be true for Creative Commons works as for others, so that this justification for the termination provision would weigh in favor of extending the termination right to Creative Commons licenses.<sup>55</sup>

A final rationale for the termination provision seems to be not about protecting authors from the long-term consequences of her earlier unremunerative transfers, but instead about protecting a dead author's *survivors* from those consequences. The statute clearly embodies this protective rationale, since it dictates that if an author is dead, the right to terminate a grant by the author vests in the author's surviving spouse and/or issue, regardless of the author's wishes as to who (if anyone) should be entitled to terminate her grants. In essence, the statute makes a "forced bequest" of the termination interest on behalf of the author and in favor of her surviving spouse, children, and/or grandchildren.<sup>56</sup> This provision largely follows the earlier regime governing reversion of rights under copyright's renewal provisions from 1831 to 1977, which reflected the view that reversion was designed in part to protect a dead author's immediate family against the consequences of the author's bad bargains at a time when the family might be most in need, since the author would have died and would not be around to provide for the family. This rationale, too, seems as likely to apply in the Creative Commons context as in the context of more typical commercial grants of rights. It would certainly be possible for an author to grant a royalty-free, Creative Commons license in her work, and then to die some years later. If the work turns out to be very popular and valuable, it might be possible 35 years after the license grant for the

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<sup>55</sup> In addition, it seems possible that much of the potential downside of allowing termination would to some extent be self-correcting under this rationale. If a particular work's value is due not to the worth of the work itself, but to the fact that it is available for royalty-free use, then presumably if the work is no longer available on royalty-free terms, users will discontinue its use and substitute another royalty-free work (or pay for another work that is available for the same royalty but that is of higher quality). If a terminating author finds that there is in fact no market for charging royalties for a work that was previously available under a Creative Commons license, she might well proceed to release the work again under a Creative Commons license, since most authors would probably prefer to have their works reach an audience even without being paid than to neither earn any revenue nor have any audience enjoy their works.

<sup>56</sup> Since amendments in 1998, the statute has allowed the author to dispose of her termination interest by will (or intestacy), but only if the author leaves no surviving spouse, child, or grandchildren. 17 U.S.C. § 203(a)(2)(D); Pub. L. 105-298, 112 Stat. 2827 (1998).

author's surviving spouse and children to earn substantial revenue from licensing it on commercial terms. Thus, to the extent that the termination provisions are designed at least in part to provide a dead author's survivors the possibility of earning income from the author's works even though the author long ago transferred away rights in the work, allowing termination of Creative Commons licenses seems in harmony with that intent.

Interpreting Section 203 to apply to Creative Commons licenses thus seems largely consonant with the policies that section implements. While Creative Commons licenses typically do not result from arm's length negotiations in which an author might have unequal bargaining power, the general author-protective and successor-protective rationales seem clearly relevant to many Creative Commons licensing situations, as do the concerns about the difficulty of accurately valuing yet-to-be exploited works and the possibility that a work's long-term value owes more to the author's contributions than to a grantee's.

### III. OBJECTIONS TO TERMINABILITY OF CREATIVE COMMONS LICENSES

This part reviews two sets of possible objections to allowing termination of Creative Commons licenses under Section 203. The first objection has been articulated in the context of arguing for interpreting Creative Commons licenses in ways that allow licensors and licensees to rely on the granted rights and restrictions in order to ensure the usefulness, and increase the flourishing, of the Creative Commons project. The second objection has not yet been raised, but might be anticipated, and revolves around the possibility that in the context of Creative Commons licenses, termination might be more likely than in other contexts to be motivated by ideological, rather than economic, concerns. I argue that neither objection provides sufficient cause for removing Creative Commons licenses from the scope of Section 203.

#### A. *Users' Need to Rely on Creative Commons Status*

As noted above, at least one scholar has expressed concern about the impact on Creative Commons licenses, and the Creative Commons project as a whole, of treating such licenses as subject to termination under Section 203. In her recent article *Building a Reliable Semicommons of Creative Works*,<sup>57</sup> Professor Lydia Loren argues that the termination provisions are

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<sup>57</sup> 14 GEO. MASON L. REV. 271 (2007).

an “impediment to the reliability of the Creative Commons status of a work.”<sup>58</sup> Her observation is part of a larger argument that seeks to establish ways for potential users of works released under Creative Commons licenses—the public at large—to have confidence in the reliability and enforceability of the Creative Commons terms attached to any particular work, as well as for authors who might license their works on Creative Commons terms to have confidence that they can enforce the terms of the particular license they choose.

Loren explains that a goal of Creative Commons is “to create a semicommons of creative works which is characterized by public rights and private rights that are both important and that dynamically interact.”<sup>59</sup> With respect to the reliability of this semicommons, she explains that this requires “reliability for the copyright owner that the private ownership rights are maintained and respected, and reliability for the public that the public use rights are maintained and cannot be revoked.”<sup>60</sup> With respect to the latter aspect of reliability, she is particularly concerned about the possibility of strategic behavior by the copyright owner, such as “the withdrawal of a work by the copyright owner to capture the value of the public use rights.”<sup>61</sup> She gives the following example:

[T]he copyright owner may not have realized the potential commercial value of a particular work when he decided to release the work under a Creative Commons license. If that work becomes widely popular, perhaps due at least in part to the efforts of the public itself, in order to control strategic behavior the author should not be permitted to retract his work from the semicommons and recapture the rights that he gave to the public.<sup>62</sup>

She argues that eliminating the possibility for this kind of strategic behavior is a “vital aspect of a reliable and valuable semicommons,”<sup>63</sup> and that “if retraction [of a work’s semicommons status] is a possibility the value of the whole semicommons is reduced.”<sup>64</sup>

Professor Loren argues that Section 203’s drafters did not contemplate anything like the Creative Commons licensing regime when

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<sup>58</sup> 14 GEO. MASON L. REV. at 318.

<sup>59</sup> 14 GEO. MASON L. REV. at 275.

<sup>60</sup> 14 GEO. MASON L. REV. at 276.

<sup>61</sup> 14 GEO. MASON L. REV. at 275.

<sup>62</sup> 14 GEO. MASON L. REV. at 275.

<sup>63</sup> 14 GEO. MASON L. REV. at 276.

<sup>64</sup> 14 GEO. MASON L. REV. at 277.

they wrote the provision, that the licenses themselves do not contain an execution date that could be used to calculate the opening of the termination window, and that the mechanics of termination will be difficult or impossible for an author who wants to terminate to follow.<sup>65</sup> She therefore proposes that the release of a work under Creative Commons terms should be treated as an act of “limited abandonment,” a new doctrinal category (based on longstanding doctrines of total abandonment of copyright) that would not be a transfer or license and thus not be subject to termination under Section 203. She argues that using this approach to prevent termination “is entirely appropriate both as a matter of statutory construction and as a matter of copyright policy.”<sup>66</sup> On the former ground, she concludes that the statute’s language “make[s] clear that termination should be inapplicable to license grants attached to copies of works that have no dates, no signatures, and no identified parties that the copyright owner could notify of the copyright owner’s intent to terminate.”<sup>67</sup> With respect to policy, she concludes that termination is designed to protect authors “who may have been in a poor bargaining position during an initial transfer of rights,” which is not true of authors who unilaterally grant Creative Commons licenses.<sup>68</sup>

Professor Loren is surely right that potential users of Creative Commons works may be less likely to use those works on the terms offered by the copyright owner if the users cannot rely on the enforceability of those terms and instead must contemplate the copyright owner changing her mind. The language of Creative Commons licenses themselves addresses this by providing that they are “perpetual” and can be terminated by a licensor only on the grounds of a breach by the licensee. Indeed, I share many of Professor Loren’s concerns and agree with many of her suggestions in the article for how to enhance both aspects of the reliability of Creative Commons licenses. I am not convinced, however, that the language or policies of Section 203, or the potential uncertainty it creates for Creative Commons users, justifies treating Creative Commons licenses as not subject to statutory termination.

With respect to statutory construction, I have argued above that the lack of a signature and an express execution date in Creative Commons licenses should not take those licenses out of the scope of Section 203. And while

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<sup>65</sup> 14 GEO. MASON L. REV. at 319.

<sup>66</sup> 14 GEO. MASON L. REV. at 324.

<sup>67</sup> 14 GEO. MASON L. REV. at 325.

<sup>68</sup> 14 GEO. MASON L. REV. at 325.

the requirement that a terminating author serve advance notice on her grantee may make it quite difficult for an author to terminate a Creative Commons license, as I discuss in more detail in the next Part, that difficulty does not mean that the termination provision does not apply to Creative Commons licenses, though it may mean that in many instances it will not be exercised to terminate them. As for Professor Loren's policy arguments, I believe, as noted above, that the rationale for Section 203 extends beyond the nature of bargaining power in two-way negotiations over copyright transfers, and that many of the rationales behind the section would often apply even to an author's unilateral grants of rights such as Creative Commons licenses.

With respect to the larger issue of reliability, I am less concerned than Professor Loren that treating Creative Commons licenses as licenses subject to termination under Section 203 will so significantly undermine their reliability as to require treating them as falling into a separate category not subject to the termination provisions. Allowing authors to terminate Creative Commons licensed-works would surely introduce some uncertainty into the use of those works, since the user would face the possibility that the licensor (or her successors) could, after 35 years, cut off the licensee's right to continue using the work. Such uncertainty, however, is inherent in the termination right and is not unique to Creative Commons licensees. Essentially *all* grantees of copyright interests (at least of works not made for hire) face the same uncertainty.<sup>69</sup> The grantee can be sure of enjoying the granted rights for 35 years, but for no longer, since the termination right introduces the possibility that at that point the granted rights will be recaptured by the author (or her successors).

It is not clear that Creative Commons licensees have a greater need to be certain that their licenses will be valid for the entire remaining life of the work's copyright than do ordinary commercial licensees or assignees.<sup>70</sup> The

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<sup>69</sup> Even if the grantee receives a grant from someone other than the author (and therefore the grant is not itself subject to termination under Section 203, which only applies to grants from the author), as long as the grantee's chain of title traces back to the author, then the grantee faces uncertainty, since the author (or her successors) can terminate the original grant from the author, which would terminate the subsequent grants in the chain. One category of grants that will not involve the uncertainty of termination is grants made after a § 203 termination by the author's successors. Such a grant will not be by the author, and will not have a chain of title that traces back to an *inter vivos* grant by the author, and therefore will not be subject to termination under § 203.

<sup>70</sup> To the extent that several of the Creative Commons licenses allow the user to prepare derivative works, which generally involves an investment of authorial effort on the licensee's part, that is not materially different from many commercial grants which allow, and are often primarily directed to allowing, the grantee to create derivative works. In any event, as discussed in more detail below, *see infra* TAN \_\_\_\_, the statute contains certain protections for grantees who create derivative works, and those protections would apply in the Creative Commons context as in the commercial

possibility that the licensee will not be able to continue using the work after 35 years is the same for the user of a Creative Commons work and for a publisher that pays an author a substantial amount for the right to publish her work.<sup>71</sup> Since the termination right became law in 1978, significant commercial traffic in copyright interests has continued, despite the fact that for the most part buyers and sellers of copyright interests cannot enter into grants that are necessarily enforceable for more than 35 years, and the fact that those commercial grantees can therefore only be sure of their first 35 years of enjoyment of the granted rights.<sup>72</sup> The uncertainty created by the possibility of later termination does not seem to have significantly undermined commercial markets for copyright rights, so it is not clear why it would undermine the Creative Commons project.<sup>73</sup>

One might distinguish Creative Commons licensees and ordinary commercial grantees based on their familiarity with the termination system. It may be that those who are engaged in the ordinary commercial transfer of copyright interests are typically well-advised grantees who will know, as purchasers of copyright interests, that they can only be guaranteed 35 years of transferred copyright ownership free and clear, and that any rights to use the work beyond that period are contingent on a termination not occurring. While that is probably true for large, repeat players in the copyright market (such as movie studios, major record labels, large publishing companies, etc.), it is far from clear that an understanding of the termination provisions and their effect on copyright grants is widespread among the full range of commercial copyright grantees, which probably includes many buyers who are not in the copyright industry full time and are less likely to be familiar with the existence and impact of Section 203. Think, for example, of a small business owner who hires a graphic designer to create a logo for her

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context.

<sup>71</sup> It might appear that termination is more of a problem for the commercial user, who has made a payment or payments to the copyright owner, only to find that she is unable to enjoy the granted interest for the full period in which she expected to do so, than for the Creative Commons user, who is generally not making any out-of-pocket payments to the licensor. However, it is likely that many Creative Commons users will indeed be using the work in ways that do involve time, effort, and investment on the licensee's part (in popularizing the work, for example, or in altering or modifying the work or incorporating it into another work).

<sup>72</sup> Thirty-five years of certain enjoyment by a grantee of a granted federal copyright interest is longer than grantees have ever enjoyed under U.S. law before 1978. From 1831 to 1978, a copyright could only be absolutely assigned for at most the 28 years of a work's initial term; any assigned rights after that date were contingent on the assignor being entitled to the renewal term at the time it accrued. *See* *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). And before 1831, the maximum duration of copyright for a work was 28 years.

<sup>73</sup> Commercial grantees might only enter into transactions for a 35- or 40-year term because of the possibility that they would lose granted rights through termination after that point, but I am unaware of any trend in copyright transactions toward such limited-time transactions.

business and gets an assignment of ownership in the logo's copyright from the artist: one suspects that the business owner is unlikely to be aware that her copyright rights in the logo might be terminated in 35 years.

Even assuming that ordinary commercial buyers are generally better informed about Section 203, and thus can take the post-35-year uncertainty into account in deciding whether to enter into a transaction and on what terms, and that Creative Commons users are not likely to be aware of the possibility of termination, it is not clear that the solution to any problem caused by that lack of awareness is to treat Creative Commons licenses as not subject to termination.<sup>74</sup> A better solution might be to increase awareness of the possibility of termination among potential users of Creative Commons works, so that those users will not be surprised 35 years after licensing the work. Indeed, Creative Commons itself seems likely to have opportunities to explain to potential licensees that their rights (like those of almost all grantees of copyright rights) will be contingent after 35 years. After all, Creative Commons already finds itself to a great extent in the position of explaining to potential users its relatively new licensing model, and in the course of explaining what a Creative Commons license is, how it works, and what uses it allows, the organization could also explain what it means that the licenses are subject to termination under the statute. Indeed, Creative Commons Labs has created an elaborate "Termination of Transfers Tool" (currently online in beta version) to explain statutory termination to authors and their successors who might wish to exercise rights under Section 203.<sup>75</sup> Information from that tool might be adapted and added to the existing information provided on the licensing section of the Creative Commons Web site.

In short, while Creative Commons users will face some uncertainty about their ability to continue using the work after 35 years if Creative Commons licenses are subject to termination, they face essentially the same uncertainty that all other copyright grantees face, and it is not clear that this uncertainty has particular negative effects in the context of Creative Commons licenses that justify treating those licenses differently from other grants for purposes of the termination right. It makes sense to work to make

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<sup>74</sup> If in fact potential users are unaware of the termination right, then as an initial matter it seems unlikely that the applicability of Section 203 to Creative Commons licenses will diminish the ability of potential users to rely on those licenses. That does not mean that the reliability issue is not a real one, however, as many potential users will no doubt become aware of the possibility of termination if some licensors begin to exercise their termination rights. That may mean that termination of Creative Commons licenses will not affect the ability of most users to rely on the licenses for some time yet, but it presumably just delays to some degree the reliability problem.

<sup>75</sup> <http://labs.creativecommons.org/termination/>.



rights granted in Creative Commons licenses as reliable as rights granted in other copyright assignments and licenses, but it is not clear that the former need to be *more* reliable than the latter.

Indeed, to some extent, Creative Commons users may face *less* temporal uncertainty than many other transferees, since the license is structured so that each recipient of a licensed work gets a new license grant from the copyright owner, starting a new 35-year clock. Thus, a Creative Commons licensee can generally count on a full 35 years of enjoyment of the licensed rights before any termination under Section 203 could be effected.<sup>76</sup> In an ordinary commercial license, by contrast, the licensee might not be able to count on a full 35 years to enjoy the licensed right. If a licensee *L* gets rights not from the original author *A* herself but instead from someone to whom the author *A* has transferred her rights (the transferee *T*), then *A* might have granted the rights to *T* some years before *T* granted the license to *L*. As a result, a termination of *A*'s initial grant to *T*, which would effectively terminate *L*'s rights, could happen in fewer than 35 years after *L* received her license.

### *B. Hostility to Ideologically Motivated Termination*

A different objection might be raised to allowing termination of Creative Commons licenses. Many of those who release works under Creative Commons licenses may be doing so at least in substantial part to express an ideological position on current copyright controversies. Part of the premise of Creative Commons is that the default copyright regime is too author favorable and too user restrictive, and that many authors want and need far fewer rights than those granted by current copyright law, which has greatly expanded in recent decades. An author's choice to grant license rights in a work on Creative Commons terms often represents a statement that the current state of statutory copyright is undesirable and an endorsement of Creative Commons as a sort of "demonstration project" to show that a great amount of authorship would still be called forth and disseminated even if Congress granted fewer rights to copyright owners.<sup>77</sup>

To the extent that many Creative Commons licensors are granting licenses for such ideological reasons, allowing termination of such licenses

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<sup>76</sup> As discussed below, TAN \_\_\_ *infra*, this will not be the case if the Creative Commons license itself is offered not by the author but by the author's transferee, since the transfer from the author to the Creative Commons licensor will be subject to termination.

<sup>77</sup> See, e.g., Séverine Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUMB. J. L. & ARTS 271, 279 (2005-2006).

under termination provisions that seem to have been intended largely to protect the commercial interests of authors may seem inappropriate. After all, the paradigm case that the drafters of Section 203 seem to have had in mind is one in which the author makes an initial grant of rights for commercial gain, and later wishes to make a subsequent grant on better commercial terms. Nonetheless, the statute is not expressly limited to transfers made for, or terminations contemplated for, commercial reasons. Indeed, it is certainly possible that an author who has made an initial commercial transfer of a work might later terminate the transfer under Section 203 for entirely noncommercial reasons. For example, the author may decide that the work, created long ago, no longer comports with her artistic vision, or is of such poor quality compared to her later work that she no longer wishes for it to be available. In such a situation, the author could terminate the transfer, perhaps even if the transferee's current exploitation of the work is commercially lucrative for the author, in order not to obtain better commercial terms for the work's exploitation, but to prevent entirely any further use of the work.<sup>78</sup> While such circumstances may not have been at the core of what motivated the inclusion of Section 203 in the statute, it seems clear that the section would allow such a termination.

Also, it is far from clear that possible suspicion about the ideological grounds for a termination should be relevant to determining whether a grant is subject to termination, even for those who want to further the Creative Commons project. After all, it is entirely possible that many authors who previously transferred away rights in their works on commercial terms may later come to adopt an ideological view that favors the Creative Commons approach over the straightforward commercial exploitation of the work. Those authors might choose, essentially for ideological reasons, to terminate their earlier commercial transfers in order to recapture the granted rights and then release the work under Creative Commons terms. Indeed, it is possible that the Creative Commons Labs Termination of Transfers Tool mentioned above might be motivated in part by the hope that some terminating authors will choose to license their recaptured rights on Creative Commons terms. It therefore seems possible that terminations motivated by changes in the author's ideology might benefit the larger Creative Commons project at least as much as they might harm it, at least in terms of the number of works available.

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<sup>78</sup> As I have noted elsewhere, if the work has been distributed to the public in copies or phonorecords prior to the termination, then the first-sale doctrine can help ensure that the work remain available to the public in previously issued copies, even if further use of the work is denied by the owner of the terminate rights. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 BOSTON COLLEGE L. REV. 577, 595-602 (2003).

Finally, one might be concerned about the fact that termination will often be exercised not by an author, but by the author's statutory successors. One can imagine a situation where an author, perhaps at least in part for ideological reasons, releases a work under a Creative Commons license. If the work becomes very popular and has potential commercial value, and if the author has died when the time for termination arrives, the author's surviving spouse or children, who might not share the author's ideological views (or who might not hold them as strongly as the author, at least in the face of the temptation of lucre), might seek to terminate the Creative Commons license in order to reap greater commercial benefits from the work. While such an exercise of termination might seem to violate the deceased author's interests that ought to bar such termination, the ability of surviving spouses and children to trump a deceased author's intentions (ideological or otherwise) through the termination right is built in to the statute's grant of a deceased author's termination right to the surviving spouse and/or children rather than to any successor chosen by the author, just as it was built in to the similarly structured copyright renewal provisions which the termination system replaced.<sup>79</sup> The nature of the statute's termination right means that termination may be a battlefield on which interfamily ideological (or other) differences are fought out, in both the Creative Commons and commercial grant contexts. Thus, the potential that statutory successors will hold different views about the Creative Commons project than did the author who granted Creative Commons licenses, and that those different views may motivate termination, does not provide a strong reason for disallowing termination of such licenses.

In sum, the nature of Creative Commons licenses does not make them inherently unsuitable for termination. While it is true that allowing termination will mean that Creative Commons licensees cannot be certain that their right to use a licensed work will continue through the entire term of that work's copyright, this uncertainty is no different than that which faces any transferee or licensee under the termination regime adopted in the 1976 Act. And it is not clear that Creative Commons licenses need greater certainty about the temporal scope of their rights than do other, often commercial, grantees. In addition, the fact that the choice to grant, or to terminate, a Creative Commons license might be motivated for noncommercial reasons—or that the motive for a termination might be

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<sup>79</sup> See, e.g., *Saroyan v. William Saroyan Foundation*, 675 F.Supp. 843 (S.D.N.Y.1987), which held that despite author William Saroyan's expressed intent in his will that his renewal copyrights be enjoyed by the defendant foundation for the benefit of charitable and educational entities rather than by his estranged children, the statutory renewal provisions' order of renewal beneficiaries was non-discretionary and vested the renewal rights in the children, not in the beneficiary of the author's will.

inconsistent with the motivation for the original grant of the Creative Commons license—does not distinguish Creative Commons licenses from other grants that are clearly and properly subject to termination.

#### IV. THE LIKELY IMPACT OF TERMINABILITY ON CREATIVE COMMONS LICENSES

Even if Creative Commons licenses are subject to termination under Section 203, it is not clear how significant an impact terminability would have on such licenses and, in particular, on the decisions of potential users about whether to take such licenses in the face of the possibility of future termination. It seems possible that terminability might not substantially undermine the reliability of Creative Commons licenses, or interfere with the goals of Creative Commons, for at least three reasons. First, while Creative Commons licenses may formally be subject to termination under Section 203, the statutory provisions will likely make it difficult or impossible for authors to exercise their termination rights as a practical matter. Second, even if terminations do occur, the statute already includes protections for those who might seem to be most vulnerable to termination, and most likely therefore to shy away from taking a Creative Commons license in the face of possible termination—licensees who use a licensed work in the preparation of their own derivative work in which they invest substantial authorial resources of their own. And finally, some possibility of termination of Creative Commons licenses will exist, clouding a licensee's certainty about the period in which she will be able to enjoy the licensed rights, even if Creative Commons licenses themselves are not subject to Section 203, since some Creative Commons licenses may be granted by parties who are themselves transferees of the copyright ownership in the licensed work from that work's author, who may come back and terminate the transfer to the Creative Commons licensor. This Part discusses each of these three issues in more detail.

##### A. *Practical Difficulty of Effectively Terminating Creative Commons Licenses*

As a practical matter, allowing termination of Creative Commons licenses under Section 203 may have little impact on the Creative Commons project, because it is possible that there will be relatively few effective terminations of such licenses.

First, many Creative Commons licenses will likely go unterminated because the licensing author, or her successors, will choose not to terminate

the license. In some cases, this may be because the author released the work under Creative Commons terms in part for ideological reasons, and the author may well, after 35 years, continue to adhere to the same ideological position. In other cases, the author may find that the benefits of having the work freely distributed (such as, for example, the exposure that it brings the author) justify in the author's mind the continued use of the work on Creative Commons terms, rather than on more restrictive or directly commercial terms that might be imposed if the author recaptured the licensed rights through termination. In still other cases, the licensed works will simply not be of sufficient continued interest or potential commercial value to make it worth the trouble for the author or her successors to terminate the licenses. This does not eliminate the uncertainty created by terminability, since there are likely to be some works that are sufficiently valuable after 35 years that the author may exercise her termination rights, but it may reduce somewhat the magnitude of the uncertainty.

Perhaps more importantly, as noted above, the mechanics of termination may substantially limit its exercise with respect to Creative Commons licenses even in cases in which the author or her successor does want to terminate the license. As discussed above, termination requires the service of written notice on the grantee in order to be effective. In the case of "open dissemination" licensing such as Creative Commons, where a work is typically made available (often online) for royalty-free use by anyone who wishes to use it, there may often be dozens or hundreds or thousands of licensees of a popular work. In those cases—which seem likely in many cases to cover the works that will remain valuable after 35 years—it seems unlikely that the author or her successors will be able to locate and serve notice on all, or even large numbers, of her licensees. Thus, it would seem that many Creative Commons licenses, even of works of continued value, will likely never be terminated.

But the termination mechanics may not pose a complete hurdle to some termination, even for popular works. The author most likely would be able to serve notice on those who are publicly using her work in some prominent way. After all, those will be the users who are easiest to locate, especially as search functions improve (including perhaps allowing searches for nontextual works by audio or visual fingerprinting techniques, etc.). And while termination might be most likely in such cases, it may also be most appropriate there. Those users, after all, seem most likely to be the ones that might substantially diminish the author's ability to earn money from her work, since the public availability of the work from these licensed users

would likely be in competition with the author. The licensee might be making commercial use (if the license allows it), in which case the licensee may be making money by using the work, and allowing the author to renegotiate the initial bargain (under which the author is not sharing in the commercial user's revenue) seems entirely consistent with the most prominent rationale for the termination right of giving authors a chance to escape from unremunerative transfers. Even if the licensee is making noncommercial use and therefore isn't directly making money from the work, such use is likely to interfere with the author's opportunity to get payment in return for the use. Thus, the instances in which termination is most likely to be feasible (given the service of notice requirement) may be the instances in which termination would be most consonant with the reasons for allowing termination in the first place.

Even if termination notices are properly served in some cases on prominent users of a Creative Commons licensed work, the attempt to terminate may not be effective as a practical matter because of what might be described as the "self-replicating" nature of Creative Commons licenses. Each license allows the licensee to distribute copies of the work to the public, and to publicly perform the work. The license also provides that each time the licensee distributes or publicly performs the work, the *licensor* offers a license to the recipient on the same terms and conditions.<sup>80</sup> I call this aspect of Creative Commons (and other open-content licenses) "self-replicating": once a work is offered under a Creative Commons license, any licensed copy of the work can call forth additional licenses, even if the author herself never directly disseminates the work any further.<sup>81</sup>

This continuing obligation of the licensor to offer new licenses to those to whom copies of the work are distributed may hinder an author's ability to terminate Creative Commons licenses in two ways. First, it may mean that

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<sup>80</sup> See, e.g., Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 8(a), available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>. As the FAQ on the Creative Commons Website explains, "Creative Commons licenses attach to the work and authorize everyone who comes in contact with the work to use it consistent with the license. This means that if Bob has a copy of your Creative Commons-licensed work, Bob can give a copy to Carol and Carol will be authorized to use the work consistent with the Creative Commons license. You then have a license agreement separately with both Bob and Carol." Creative Commons, *Before Licensing*, available at [http://wiki.creativecommons.org/Before\\_Licensing](http://wiki.creativecommons.org/Before_Licensing).

<sup>81</sup> The licenses expressly contemplate this, noting that the licensor "reserves the right to release the [licensed] Work under different license terms or to stop distributing the Work at any time" but that "any such election will not serve to withdraw this License (or any other license that has been, or is required to be, granted under the terms of this License), and this License will continue in full force and effect unless terminated" for breach by the licensee. See, e.g., Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 7(b), available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode> (emphasis added).

many of the author's licenses have different effective dates, thus complicating the calculation of the termination window and the timing of service of notices of termination. If, as discussed above, the execution date of a Creative Commons license is the date that it comes into legal force and effect, that would seem likely to be when a licensee accepts the license by making use of the work as provided in the license—such as, for example, downloading a copy of the work.<sup>82</sup> If a third party posts an author's Creative Commons licensed work on a Website, and if a different user of the Website downloads a copy of the work each week over the course of several months or years, under the terms of the Creative Commons license, each download appears to result in a new license grant from the author to the downloading user, with a new execution date, and a new date on which the termination window for that license will open.<sup>83</sup>

The “self-replicating” nature of Creative Commons licenses may also hamper effective terminability if the author cannot in fact locate and serve a termination notice on *every* person who has received a copy of her work under the Creative Commons terms. Imagine that an author posts a copy of a Creative Commons licensed work on her Web site for one week, and 100 people download it during that week, but do not engage in any further public dissemination of the work. Then assume that 35 years later, the author manages to locate, and serve proper termination notice on, 99 of the original licensees, but is not able to locate the last licensee before the termination window closes. The one remaining license has not been terminated (and is no longer subject to termination), and under the terms of that license (which is still in force), any time the unterminated licensee distributes the licensed work, the author is obliged to offer the recipient of the work a license on the same terms and conditions as the original Creative Commons license. Thus, the single unterminated user could presumably post the work on her Web site, and the 99 terminated licensees could then download copies from the Web site, and resume enjoying the right to use the work on the same terms as their original, terminated Creative Commons licenses.<sup>84</sup> On this view, then, as long as a single Creative Commons license

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<sup>82</sup> Downloading a copy of a copyrighted work would constitute a reproduction of the work, and would infringe the copyright owner's exclusive right of reproduction, 17 U.S.C. § 106(1), unless authorized by the owner or excused by some statutory provision, such as fair use.

<sup>83</sup> Because the license provides that the downloading user is offered a license from the original Creative Commons licensor, and not a sublicensee from the original licensee who is directly making the work available to the downloading user, the downloading licensee does not appear to be in a chain of title from the original licensee such that termination by the author of the license to the original licensee would be effective to terminate the rights of the downloading user.

<sup>84</sup> If, as suggested above, Creative Commons licenses are executed whenever a user downloads a copy of the work, then the possibility of “rolling” termination dates may mean that even if an author

to a work remains unterminated (which seems likely to happen in many cases of popular works, since so many copies will have been disseminated), the author seems unlikely to be able to use her termination rights to cut off enjoyment of the work on Creative Commons terms, even if her time, effort, and money succeeds in terminating many or most of the licenses that she granted.

Thus, even if Creative Commons licenses are subject to termination under Section 203, as a practical matter it may be difficult or impossible even for those authors (or successors) who want to terminate the Creative Commons licenses that they (or their predecessors) granted to do so effectively.

### *B. Protection for Users Who Prepare Derivative Works*

Concerns about potential negative effects of terminability on the Creative Commons project may be at their zenith with respect to Creative Commons licensees who wish to use licensed works in the preparation of their own derivative works.<sup>85</sup> Four of the six current Creative Commons licenses allow licensees to prepare derivative works based on the licensed work. A licensee who exercises that right may invest substantial authorship of her own in producing a derivative work that incorporates both the licensed work and her own creative contributions. If the author of the underlying work subsequently terminates the Creative Commons license to the derivative work author, we might be concerned that the second author will be unable to exploit, or permit others to exploit, her own authorial contributions in the derivative work. After all, if the owner of the copyright in the derivative work no longer has the right to use the underlying work, then unless she can separate her contributions from the original author's contributions so that the derivative author's contributions can be used on their own, it will be difficult or impossible to use the derivative work without infringing on the copyright in the underlying work.<sup>86</sup> While this is of concern for derivative uses generally, it may be of special concern in the context of the Creative Commons, since one of the organization's goals

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locates *all* licensees and serves all of them sequentially as each window for service of notice opens, there may always be yet-untersminated licensees who can continue to disseminate the work, thus allowing each terminated user to relicense the same work on the same terms, thus starting a new 35-year period before termination can be effected.

<sup>85</sup> A "derivative work" is a work of authorship that is based upon a preexisting work and that recasts, transforms, or adapts that work. 17 U.S.C. § 101 ("derivative work"). The owner of copyright in a work has the exclusive right to prepare derivative works based on her own work, so that someone who wants to use a Creative Commons licensed work as the basis for a derivative work needs permission of the copyright owner (or some statutory authorization, such as fair use).

<sup>86</sup> See, e.g., *Stewart v. Abend*, 495 U.S. 207 (1990).



appears to be fostering “remixing” of copyrighted works, and other forms of user authorship, and if potential users fear that at some future point they will be unable to utilize the derivative works that they create, then they may be unwilling to invest the time and effort in the derivative authorship that the Creative Commons project is designed to facilitate and encourage.

Section 203, however, already embodies a concern for transferees who create derivative works, and its provisions seem likely to offer Creative Commons licensee-derivative authors sufficient protection. The drafters recognized that grantees who are derivative authors have different interests than other types of grantees and that the termination right could have particularly negative consequences for them.<sup>87</sup> As a result, an effective termination by an author (or her successors) does not end a grantee-derivative author’s entire right to use the licensed work in derivative works. The statute provides a limitation on the reversion of rights after termination:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.<sup>88</sup>

Thus, the existing terms of the statutory termination provisions offer Creative Commons licensee-derivative authors protection against what might be the most serious downside of termination in the Creative Commons context—the potential dampening effect that the fear of eventual termination could have on potential users’ willingness to engage in remixing and derivative authorship.<sup>89</sup> A Creative Commons licensee contemplating using the licensed work as the basis for her own work can have some assurance that even if the licensor decides, 35 years down the line, to terminate the license, the user will still be able to exploit her derivative work based on the licensed work, and will not be foreclosed from full enjoyment of her own authorial investment in the derivative work.<sup>90</sup>

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<sup>87</sup> See, e.g., H.R. Rep. 94-1476, at 127 (describing § 203(b)(1) as an “important limitation” on the termination right).

<sup>88</sup> 17 U.S.C. § 203(b)(1).

<sup>89</sup> One issue that might arise for Creative Commons licensed works in the context of the derivative work limitation on termination is whether “the terms of the grant” under which the derivative work can continue to be utilized include the Creative Commons licensor’s obligation to license the underlying work to anyone to whom the derivative work creator licenses the derivative work.

<sup>90</sup> Termination will limit the licensee’s rights to some extent, since the licensor will no longer enjoy the right to prepare *further* derivative works. This limit, however, is primarily forward looking,

To the extent that terminability of Creative Commons licenses might be feared to have a negative impact on potential licensee-derivative authors, and to the extent that such an impact would be particularly negative in the context of the Creative Commons project's goals of furthering the flourishing of a culture of reuse and remixing, the existing statutory limitation on the effect of termination on the rights of a grantee in a derivative work prepared under a terminated grant would seem largely to mitigate that feared negative impact.

### *C. Creative Commons License Grants by Non-Author Copyright Owners*

Regardless of whether the possibility of terminating Creative Commons licenses will have a significant negative impact on the Creative Commons project, it is important to recognize that even if such licenses are treated as not subject to Section 203—for example, if they are held not to be within the section's ambit because they are not “executed,” or if they are treated as Professor Loren suggests not as “licenses” but as limited abandonments of copyright—the termination provisions will nevertheless potentially interact with the Creative Commons project. The most conspicuous possibility for such interaction involves situations in which a Creative Commons license is granted not by a work's author, but by a subsequent copyright owner of the work. Creative Commons licenses clearly contemplate this possibility. They are written to provide a grant of rights from the “Licensor,” generally defined in the license as “the individual, individuals, entity or entities that offer(s) the Work under the terms of this License,”<sup>91</sup> and defined separately from the “Original Author.”<sup>92</sup> In order to validly grant copyright rights under a Creative Commons license, the licensor must, of course, own the rights being granted. But the licensor need not have acquired those rights by means of creating the work and thereby, as the author, being vested by statute with the initial ownership of the work's copyright.<sup>93</sup> Instead, the

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though it obviously may reduce to some extent the derivative author's ability to use her own authorial contributions in the derivative work.

<sup>91</sup> Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 1(d), available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>.

<sup>92</sup> “‘Original Author’ means, in the case of a literary or artistic work, the individual, individuals, entity or entities who created the Work or if no individual or entity can be identified, the publisher; and in addition (i) in the case of a performance the actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore; (ii) in the case of a phonogram the producer being the person or legal entity who first fixes the sounds of a performance or other sounds; and, (iii) in the case of broadcasts, the organization that transmits the broadcast.” Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported License § 1(e), available at <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>.

<sup>93</sup> 17 U.S.C. § 201(a) (“Copyright in a work protected under this title vests initially in the author

licensor may have acquired ownership of the copyright by transfer from the author. In such a case, the author's transfer of copyright to the Creative Commons licensor will almost always be subject to termination under Section 203 (at least where the transfer was inter vivos and after 1977). Such a termination by the author (or her successors) will cut off rights that the terminated transferee granted to other parties during her ownership of the work's copyright, since the original transferee could not have granted greater rights than she herself acquired, and her rights after the potential termination period were always contingent on a termination not taking place.<sup>94</sup>

While it seems at the moment that most Creative Commons licenses are granted by the authors themselves, it also seems likely that not all the licenses are granted by authors. As a result, even if Creative Commons licenses themselves are held not to be subject to termination under Section 203, it is quite possible that terminations of transfers pursuant to that section may nonetheless serve to disrupt some Creative Commons license grants. As a result, whatever negative effect that the possibility of termination will have on the reliability of Creative Commons licenses will not be entirely eliminated by treating those licenses as not subject to Section 203. Even if the license itself is not subject to termination, a potential user of a Creative Commons licensed work would not be able to escape the possibility of termination without determining that the Creative Commons licensor of the work is in fact the work's author, and not merely its copyright owner through assignments from the author.<sup>95</sup>

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or authors of the work.”).

<sup>94</sup> The statute recognizes this effect, by allowing service of a notice of termination upon “the grantee or the grantee’s successor in title.” 17 U.S.C. § 203(a)(4). It is unclear whether, in the Creative Commons context, a terminating author would need to serve notice on all of the parties to whom the original transferee had granted nonexclusive licenses. *See Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 634 (2d Cir. 1982) (Newman, J., concurring); PAUL GOLDSTEIN, 1 GOLDSTEIN ON COPYRIGHT § 5.4.2.3, at 5:123 to 5:124 (3d ed. 2005) (concluding that nonexclusive licensee is probably not “successor in title” on whom notice must be served).

<sup>95</sup> In addition, even if Creative Commons licenses are held not terminable under Section 203, this may not prevent the reversion of rights in other jurisdictions. The Creative Commons licenses grant licensees worldwide rights, but the territorial nature of copyright means that a licensee’s rights in other countries will typically be governed by that country’s law. While the termination provisions are apparently unique to U.S. law, the reversion principle is not unknown. Canadian law, for example, has a reversion mechanism (which originated in British law, but has since been eliminated from United Kingdom copyright). *See, e.g., Ken Cavalier, Potential Problems with Commonwealth Copyright for Posthumous Poets and Other Dead Authors*, 52 J. COPYR. SOC’Y 225 (2005). Section 14(1) of the Canadian copyright statute provides that if an author assigns a copyright (or grants any interest therein) otherwise than by will, any rights conveyed by the author will revert to the author’s estate 25 years after the author’s death (that is, for the last 25 years of the copyright term, since Canadian copyright lasts for 50 years after the author’s death). Thus, it is possible that even if courts hold that an author cannot terminate a Creative Commons license under Section 203, users who wish

## CONCLUSION

There are good arguments, as a matter of statutory interpretation and of copyright policy, for interpreting Section 203 to apply to Creative Commons licenses and to allow the termination of those licenses when that section's requirements are met. As a practical matter, it is not clear that effective termination of Creative Commons licenses will be easy or even possible under Section 203. But it may prove possible, at least in some cases, for authors or their successors to terminate such licenses, and that possibility may undermine, to some degree, the confidence that potential users of Creative Commons-licensed works have in their ability to rely on the terms of the license. The uncertainty generated by the possibility of termination, however, is not unique to Creative Commons licenses, but is instead a necessary consequence of the statutory termination regime. It is not clear that Creative Commons users are entitled to greater certainty than other copyright licensees or transferees about the length of time during which they can enjoy the copyright rights granted to them. As a result, the user's need for certainty does not, in my view, provide a strong argument for reading Section 203's language so as not to cover Creative Commons licenses or for treating the release of Creative Commons works as not constituting a "license" that comes within the section's scope.

To the extent that Congress, in enacting Section 203, was concerned about grantees attempting to use innovative mechanisms in order to escape the consequences of termination, court decisions that carve Creative Commons licenses out of the scope of the termination right might be troubling. While the Creative Commons license may not be a mechanism for avoiding the termination right, a court that carves out an exception for Creative Commons licenses may be more tempted in the future to find ways to interpret other transactions in copyright rights as falling outside the scope of the termination right. Under the 1909 Act, the Supreme Court's decision in the *Fred Fisher* case holding that future contingent renewal-term rights could be assigned in advance was seen as severely undercutting the reversionary policy that Congress adopted in granting renewal rights to authors and their successors, rather than to assignees.<sup>96</sup> In drafting the 1976 Act, Congress attempted to make clear its intention that authors (or their successors) not be deprived in advance of their ability to terminate their grants, hoping to leave courts with less room to undercut the reversionary

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to exercise the "worldwide" rights granted in the license may face uncertainty about their continued ability to do so for the entire term of the license in countries such as Canada.

<sup>96</sup> [Cites.]

policy than it had left them in its drafting of the 1909 Act. Thus, the statute provides that termination “may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant,”<sup>97</sup> and also voids any purported grant of rights covered by a termination if the purported grant is made before the notice of termination is served.<sup>98</sup> The possibility that a court would interpret an entire category of copyright grants as falling outside the scope of Section 203—for example, by deciding that Creative Commons licenses constitute limited abandonments and not actually any transfer or license—raises the possibility that courts will find ways to carve out of Section 203’s ambit other forms of copyright grants, contrary to Congress’s intent to ensure authors the opportunity to recapture rights granted away in all kinds of ways. Those who want to preserve as robust a termination right as possible, while minimizing the impact of the termination right on Creative Commons licenses, might therefore prefer that an author (or her successors) not be able, as a practical matter, to terminate such a license under Section 203 because the procedures for termination are simply incompatible with the form of the license, rather than having a court actually interpret the statute to exclude Creative Commons licenses from the scope of Section 203.

On the other hand, considering the interaction between Creative Commons licenses and the termination right might point instead to another possible approach. If the policies behind the termination right are important and, as I have suggested, are generally relevant to Creative Commons licenses, then the fact that effective termination of Creative Commons licenses will be practically difficult if not impossible may not seem to be a good effect that protects users of the licensed works from the possible negative consequences of termination, but rather a bad effect that prevents authors from being able to benefit from the advantages that the termination right was intended to give them. That could suggest that it might be useful not to think about ways to insulate the use of Creative Commons licenses from termination, but rather about ways to adapt the termination mechanism to make it more practicable to terminate Creative Commons licenses than it is likely to be under current law. This could help ensure that authors who use Creative Commons licenses are not effectively deprived of the ability to exercise the termination rights that they enjoy with respect to all other licenses.

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<sup>97</sup> 17 U.S.C. § 203(a)(5).

<sup>98</sup> 17 U.S.C. § 203(b)(4).

One could imagine various mechanisms for making termination of Creative Commons licenses more practical. For example, the statute could provide that anyone whose Creative Commons license is actually terminated pursuant to a notice under Section 203 would not be entitled to take a Creative Commons license in the same work from any other (unterminated) party who makes the work available under a Creative Commons license, but would instead be required to obtain permission for further use of the work from the party that terminated the license and recaptured the granted rights. A more elaborate process might involve a system to attach an identification number to each Creative Commons licensed work. The number could identify the date that the work was first made available, and could be included in the license itself, as well as being available in searchable databases. Termination might then be accomplished not by service on each individual grantee, but by recording a notice of termination in databases of licensed works, so that anyone with a copy of the work and the identification number could calculate whether the window for recordation of a termination notice had opened or closed, and could search the database to discover whether the license for that particular work had been terminated.<sup>99</sup> These are very preliminary, tentative ideas that would clearly require substantial additional thought and discussion, but they demonstrate that if the practical difficulty of effectively terminating Creative Commons licenses under the current statutory mechanism is perceived as negative rather than positive, it may be possible to develop a system that makes termination more practicable and is as sensitive as possible to the needs of Creative Commons licensees, even if not giving those licensees certainty that they can enjoy the licensed rights for the entire copyright term as stated in the license.

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<sup>99</sup> Although the statute gives the Copyright Office authority to prescribe regulations governing the “form, content, and manner of service” of termination notices, 17 U.S.C. § 203(a)(4)(B), it seems clear that the system outlined here would go beyond the Office’s authority in promulgating regulations that implement the statutory directive that notice be served “upon the grantee or the grantee’s successor in title,” *id.* at § 203(a)(4), so that action by Congress would be necessary to set up such a system.