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WHEN DOES THE RENEWAL TERM VEST: BEFORE AND AFTER THE COPYRIGHT RENEWAL ACT OF 1992

*Jeffrey M. Lowy**

I. INTRODUCTION

The United States copyright statutes are a continually changing body of law. In fact, the present copyright laws are the result of centuries of development.¹ This evolution is most evident in the area of duration and renewal of copyrights. For example, there are presently three relevant copyright duration and renewal schemes. A federal copyright secured on or after January 1, 1978, has a single term of copyright which exists for the duration of the author's life plus an additional fifty years.² A federal copyright secured between January 1, 1964, and December 31, 1977, is subject to a two-tiered durational approach as well as to the renewal provisions of the Copyright Renewal Act of 1992.³ A federal copyright secured prior to January 1, 1964, is subject to a two-tiered durational approach, and there are conflicting views as to when the renewal term vests.⁴

With so much change in such a large body of law, it is no surprise that areas of ambiguity and conflict exist. One such area involves the vesting date of the renewal term of copyright. The controversy over the proper vesting date of the renewal term of copyright has continued for many years,

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1. The United States Supreme Court explains that the first copyright laws created in this country were based upon the English Statute of Anne. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647 (1943) (citing 8 Anne, c. 19 (1709) (Eng.)).

2. 17 U.S.C. § 302(a) (1976). However, a copyright in an anonymous work, pseudonymous work, or a work made for hire exists for the duration of seventy-five years from the year of its first publication or 100 years from the year of creation, whichever expires first. 17 U.S.C. § 302(c) (1976).

3. Pub. L. No. 102-307, 106 Stat. 264 (1992).

4. 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §§ 9.05[A][2], 9.05[C][1][c], at 9-66 to -67, 9-80 (1992).

and case law has only added to the uncertainty.⁵ Determining the proper vesting date is important because it will ultimately establish the the continued existence and the proper owner of the renewal term of copyright.

In response to this conflict, Congress passed the Copyright Renewal Act of 1992.⁶ Although this Act provides a method of determining the proper vesting date of the renewal term of copyright, it only applies to renewals which occur after December 31, 1991.⁷ Therefore, the issue of when the renewal term vests still exists for works initially protected by federal copyright law prior to January 1, 1964, or in other words, for works which must have been renewed by December 31, 1991.⁸

This Article examines the various duration and renewal provisions and defines the proper vesting date for works renewed before and after the enactment of the Copyright Renewal Act of 1992. The main issue addressed is whether the renewal term of copyright for works initially protected by federal copyright law before January 1, 1964, vests upon registration in the twenty-eighth year⁹ or upon commencement of the twenty-ninth year.¹⁰ This narrow question is relevant when three events have occurred: (1) the author assigns his right to the renewal term during the initial term; (2) registration for the renewal term is made in the twenty-eighth year during the life of the author; and (3) the author dies prior to commencement of the twenty-ninth year.¹¹ The outcome of this question

5. Compare *Frederick Music Co. v. Sickler*, 708 F. Supp. 587 (S.D.N.Y. 1989) with *Marascalco v. Fantasy, Inc.*, 953 F.2d 469 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992).

6. Pub. L. No. 102-307, 106 Stat. 264 (1992).

7. *Id.* § 102(g)(1)-(2).

8. NIMMER, *supra* note 4, § 9.05[C][1][c], at 9-80. Nimmer states:

[T]he Copyright Renewal Act of 1992 eliminated the mandatory formality of registration as a condition to subsistence of the 47 year renewal term. The other principal innovation of the 1992 amendment was to declare, for the first time, a Congressionally-mandated time of vesting. This declaration is prospective only. With respect to works that first obtained statutory copyright through 1963—and for which renewal was therefore required by the end of 1991—the new law exerts no impact. For all such works, therefore, the *Marascalco/Sickler* dispute remains alive.

Id.

9. The 1976 Copyright Act provides that all terms of copyright extend to December 31st of the year in which the copyright would otherwise expire, and, therefore, the renewal registration can be made until this time. 17 U.S.C. § 305 (1976).

10. Howard B. Abrams, in his treatise, acknowledges this issue by devoting a section to it entitled, "When Does the Renewal Vest?" 2 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 11.03[C][6], at 11-21 (1991).

11. Although the resolution of the proper vesting date of the renewal term will also determine the rightful claimant as between the author's estate and the author's statutory successors, this will not be the focus of this Article. *Id.*

has great significance because it determines ownership of the renewal term between the author's assignee and statutory successors.

Only two recent cases, each resulting in contrary conclusions, have directly addressed this issue. The first case is *Frederick Music Co. v. Sickler*.¹² After analyzing the plain meaning of the statute, commentator opinions, and judicial dicta, the district court held that the renewal term vests upon registration of the renewal term with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author.¹³ In the second case, *Marascalco v. Fantasy, Inc.*,¹⁴ the issue of when the renewal term vests was also directly addressed. The district court held that an assignment of a renewal right is a mere expectancy that will only vest if the author survives the initial term.¹⁵ The Ninth Circuit Court of Appeals affirmed the decision.¹⁶

This Article argues the position espoused by the court in *Frederick Music*:¹⁷ for works initially protected by federal copyright law prior to January 1, 1964, the renewal term of copyright should vest upon registration with the Copyright Office, in the twenty-eighth year of the initial term,

12. 708 F. Supp. 587 (S.D.N.Y. 1989). The court stated the issue in this case as follows: [W]hether the right to a renewal copyright vests in the author or his assignee on the date when the copyright is renewed during the statutory period prescribed for renewal and during the author's lifetime, or whether it vests only at the commencement of the renewal term, provided the author survives into that term.

Id. at 589. The case involved a conflict regarding the right to the renewal term in the song "Night Train." *Id.* at 588. The plaintiff, Frederick Music Company, claimed the right to the renewal term as an assignee of co-author Jimmy Forrest. *Id.* The defendant, Don Sickler, claimed the right to the renewal term as an assignee of Betty Tardy Forrest, the widow of the co-author. *Id.* The plaintiff registered for the renewal rights in the twenty-eighth year during the life of the author, but the author subsequently died prior to the commencement of the renewal term. *Id.*

13. *Id.* at 592. If the court found against the plaintiff and required that the co-author survive into the renewal term, the copyright may have fallen into the public domain because the co-author's widow never filed for renewal. Alternatively, the widow (or the widow's assignee) may have had a valid renewal based on a constructive trust theory, but because the court found in favor of the plaintiff, this theory was not tested. *Id.* at 589 n.2.

14. 953 F.2d 469 (9th Cir. 1991). The case involved a dispute over the rights to the renewal term of the song "Good Golly Miss Molly." *Id.* In 1956, John Marascalco and Robert Blackwell co-wrote the song. *Id.* Fantasy was the assignee of the renewal right in the song. *Id.* Blackwell died in the twenty-eighth year of the initial term, subsequent to registration for the renewal term. *Id.* at 470. Blackwell's daughters assigned all their interest in the song to Marascalco. *Id.* Plaintiff Marascalco claimed the right to the renewal term, as assignee of Blackwell's one-half interest in the renewal term. *Id.* Defendant Fantasy disputed this claim. *Id.*

15. *Id.*

16. *Id.* at 476.

17. 708 F. Supp. 587.

during the life of the author. This argument is based upon the statutory construction, dicta and opinions of the courts, the majority of the commentators' opinions, and policy considerations. Additionally, this Article will explain when the renewal term vests for works subject to the Copyright Renewal Act of 1992, and will describe the benefits accorded those registering for the renewal term during the twenty-eighth year.¹⁸

II. WHEN DOES THE RENEWAL TERM VEST: BEFORE THE COPYRIGHT RENEWAL ACT OF 1992

A. Statutory Construction

1. The Renewal Provisions in the United States Copyright Statutes Prior to the Copyright Renewal Act of 1992

The present copyright laws in the United States are embodied in the Copyright Act of 1976.¹⁹ All works created on or after January 1, 1978, receive copyright protection for the life of the author plus fifty years after the author's death.²⁰ The 1976 Copyright Act is the first United States copyright statute to have such a durational scheme.²¹ All previous United States Copyright Acts contained a two-tiered durational approach whereby protection was available for two distinct terms of copyright: an initial term and a renewal term.²² The 1976 Copyright Act also provides for these two distinct copyright terms for works already in their initial term of protection on January 1, 1978.²³ Although this Article will interpret the present Copyright Act, much of the analysis will also involve § 24 of the

18. The Copyright Renewal Act of 1992 adopts the "vesting upon registration" approach for the renewal term, which is consistent with the decision in the *Frederick Music* case and the argument made in this Article. NIMMER, *supra* note 4, § 9.05[C][2], at 9-81.

19. 17 U.S.C. §§ 101-810 (1976).

20. *Id.* § 302(a).

21. Dorothy M. Schrader, *Vesting Date of the Renewal Copyright Interest*, 19 BULL. COPYRIGHT SOC'Y U.S.A. 277, 278 (1972). The United States is now in conformity with the duration/renewal approach of other countries. *Id.* "Other countries generally base the term of copyright on the life of the author plus a fixed term of years." *Id.*

22. Copyright Act of May 31, 1790, ch. 25, § 1, 1 Stat. 124; Copyright Act of February 3, 1831, ch. 26, § 2, 4 Stat. 436; Copyright Act of July 8, 1870, ch. 230, § 88, 16 Stat. 212; Copyright Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075.

23. 17 U.S.C. § 304(a) (1976).

1909 Copyright Act,²⁴ a provision virtually analogous to § 304(a) of the 1976 Copyright Act.²⁵

2. The Plain Meaning of the Renewal Provisions Prior to the Copyright Renewal Act of 1992

As explained above, under the 1976 Copyright Act, works initially protected by federal copyright law prior to January 1, 1978, are subject to the two-tiered durational approach.²⁶ The initial term of copyright protection is for a period of twenty-eight years, with a renewal term available for an additional forty-seven years.²⁷ Section 304(a) of the 1976 Copyright Act states as follows:

Copyrights in their first term on January 1, 1978. Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured: Provided, . . . That in the case of any . . . copyrighted work, . . . *the author* of such work, *if still living*, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin *shall be entitled*^[28] to a renewal and extension of the copyright in such work for a further term of forty-seven years *when application* for such renewal and extension *shall have been made* to the Copyright Office and duly registered therein *within one year prior to the expiration of the original term of copyright*.^[29] And provided further, That in default of the registra-

24. The 1909 Copyright Act was re-written in 1947. The text of § 23 of the Copyright Act of March 4, 1909, ch. 320, 35 Stat. 1075, is the same as 17 U.S.C. § 24 (1909).

25. NIMMER, *supra* note 4, § 9.05[A][1], at 9-64. "Apart from [the] extension in duration, however, the thrust of the two statutes is identical, so that a construction of one should be deemed to apply to the other." *Id.* "With these purposes in mind, Congress enacted the renewal provision of the Copyright Act of 1909, 17 U.S.C. § 24 (1976 ed.). With respect to works in their original or renewal term as of January 1, 1978, Congress retained the two-term system of copyright protection in the 1976 Act." *Stewart v. Abend*, 495 U.S. 207, 219 (1990).

26. 17 U.S.C. § 304(a) (1976).

27. *Id.*

28. Black's Law Dictionary defines "entitle" as follows: "In its usual sense, to entitle is to give a right or legal title to. To qualify for; to furnish with proper grounds for seeking or claiming." BLACK'S LAW DICTIONARY 532 (6th ed. 1990) (citation omitted).

29. When read in conjunction with § 305 of the 1976 Copyright Act, it appears that the one year period to register for a renewal is January 1 through December 31 following commencement of the twenty-eighth year. BMI, SONGWRITERS & COPYRIGHT QUESTIONS AND ANSWERS 9

tion of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.³⁰

This section's plain meaning indicates that the renewal term vests when registration is made with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author.³¹ Absent an assignment of the right to the renewal term, if the statutory requirements are satisfied, the author is entitled to the renewal term of copyright.³² Therefore, it follows that if the author has made an assignment of the renewal term, his assignee is entitled to the renewal term if the author is alive at the time of renewal registration.³³ Additionally, if the author died prior to registration of the renewal term, then the statutory successors of the creator would be entitled to the renewal, provided that they satisfied the registration requirements.³⁴ The plain meaning rule of statutory construction states that if the language of the statute is clear on its face, there is no reason to interpret the legislative history.³⁵ In *Frederick Music*, the court

(1992).

30. 17 U.S.C. § 304(a) (1976) (emphasis added).

31. *Frederick Music Co. v. Sickler*, 708 F. Supp. 587, 589 (S.D.N.Y. 1989); *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 476 (9th Cir. 1991) (Thompson, J., dissenting), *cert. denied*, 112 S. Ct. 1997 (1992).

32. Schrader, *supra* note 21, at 277. This is true even if the author assigned the right to the initial term of copyright. *Id.* at n.1.

33. *Frederick Music*, 708 F. Supp. at 589; *Marascalco*, 953 F.2d at 476 (Thompson, J., dissenting).

34. *Miller Music Corp. v. Charles N. Daniels, Inc.* 362 U.S. 373, 376 (1960). The Supreme Court Stated:

The hierarchy of people granted renewal rights by § 24 are *first*, the author if living; *second*, the widow, widower, or children, if he or she is not living; *third*, his or her executors if the author and the widow, widower, or children are not living; *fourth*, in absence of a will, the next of kin.

Id. (emphasis in original).

35. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 46.01-.07, at 81-133 (1992 rev.).

The plain meaning rule of statutory construction has also been applied to the 1976 Copyright Act. *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305, 1310 (S.D.N.Y. 1982) ("While there can be no rule against resort to legislative history to aid the construction of the meaning of words . . . however clear the words may appear on superficial examination, it is equally clear that a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself.") (citation omitted)); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1984) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 184 (1984)) ("In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'").

analyzed the plain meaning of § 304(a) of the 1976 Copyright Act and concluded that the language of the statute grants the author an entitlement to the renewal term upon registration.³⁶ The court stated that “the renewal copyright plainly vests in the author or his assignee upon application and registration with the Copyright Office, if the author is still living at the time of such application and registration.”³⁷ Because the court found the statutory language to be unambiguous, it chose not to analyze the legislative history.³⁸ In fact, the court was particularly pleased by the clarity of the language in § 304(a) because both the plaintiff’s and defendant’s briefs stated that the legislative history is silent as to when the renewal term vests.³⁹

In *Marascalco*, the defendant Fantasy also argued that pursuant to the plain meaning of § 304(a), the right to the renewal term should vest in an assignee upon registration in the twenty-eighth year during the life of the author.⁴⁰ Fantasy claimed that the phrase “shall be entitled to” in § 304(a) means that the renewal interest vests “when” registration is made.⁴¹ The Ninth Circuit Court of Appeals disagreed with Fantasy’s understanding of the plain meaning of the statute. Because there was room for different interpretations of the meaning of § 304(a), the court ruled that the statute is not clear on its face.⁴² The court interpreted the phraseology as describing merely a necessary condition to enable the acquisition of the

36. *Frederick Music*, 708 F. Supp. at 589. The court stated:

The language of the statute is clear. If a copyright is renewed by or on behalf of the author during the statutorily provided period, the author becomes “entitled” to the extension of the original copyright. And this entitlement arises “when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein.”

Id.

37. *Id.*

38. *Id.*

39. *Id.* The court cited both the plaintiff’s and the defendant’s briefs and stated:

To this Court, the language of the statute is unambiguous and thus needs no clarification from legislative history—which is fortunate since, as all sides agree, the legislative history is silent on the issue of when renewal rights vest. Given this silence, the Court adheres to the plain meaning of the statutory language.

Id.

40. *Marascalco*, 953 F.2d at 470.

41. *Id.* “Fantasy’s analysis suggests that registration is a sufficient condition for vesting . . .” *Id.*

42. *Id.* at 470-71.

renewal rights.⁴³ Therefore, the Ninth Circuit Court of Appeals rejected Fantasy's plain meaning argument because it believed that the statutory language is susceptible to more than one interpretation.⁴⁴

The language of § 304(a) is unambiguous. The statute clearly states that the renewal term shall vest upon registration. There is no express survivorship requirement.⁴⁵ The *Marascalco* court held that the renewal term does not vest until commencement of the renewal term.⁴⁶ In order to so hold, it was imperative for the Ninth Circuit Court of Appeals to find the plain meaning of the statute to be ambiguous. Finding this ambiguity was necessary to obviate the plain meaning rule so that the legislative history could be analyzed in order to find a survivorship requirement. The Ninth Circuit's finding that there was room for more than one interpretation of the statute was an outcome-oriented reading of the statute which was necessary to overcome the plain meaning. A competent reading of the statute leaves no room for ambiguity, nor a finding of a survivorship requirement.

Dorothy M. Schrader, the Assistant Chief of the Examining Division of the Copyright Office, also argues that the plain meaning of the statute suggests that the renewal term should vest upon registration.⁴⁷ The 1909 Copyright Act explicitly states that the author must be living to renew the

43. *Id.* at 470.

If a renewal interest is to vest at all, it must be perfected by a timely registration application. The clause following "when" addresses itself to the mechanics of filing a timely registration application. So read, the statute suggests that Congress was intent on specifying the time for registration and not the time for vesting.

Moreover, the statutory language must be construed as a whole. The phrase "shall have been made" gives meaning to the word "when." It signifies that filing of a renewal application is a condition precedent to vesting. If, in addition, "when" was intended to indicate vesting of renewal rights, the logical phrasing would be "when application is made" rather than "shall have been made."

Id. at 470-71 (emphasis in original).

44. *Id.* at 471. In its plain meaning argument, Fantasy also claimed that under § 304(b), it is the act of registration which secures the renewal term; therefore, by analogy, the same is true under § 304(a). *Id.* Section 304(b) states, "[t]he duration of any copyright . . . for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured." *Id.* (citing 17 U.S.C. § 304(b) (1976)). The court disregarded this argument because § 304(b) was designed for the unique situation of when a copyright becomes eligible for a renewal within the year before the 1976 Act took effect; therefore, Congress did not address the time-of-vesting issue because it treated the copyright as if it were already in its second term. *Id.*

45. 17 U.S.C. § 304(a) (1976).

46. *Marascalco*, 953 F.2d at 476.

47. Schrader, *supra* note 21, at 298.

copyright.⁴⁸ Obviously, there is some significance to this "if living" requirement. It seems logical that the "if living" requirement refers to when registration is made, because renewal must be made in the twenty-eighth year during the life of the author.⁴⁹ Conversely, it would be illogical for the "if living" requirement to refer to the twenty-ninth year because it is immaterial whether the author is living on the first day of the renewal term if there was no registration in the twenty-eighth year.⁵⁰ Therefore, if the "if living" requirement is to have any significance, the logical interpretation of the statutory language implies that the renewal term should vest upon registration.

3. The Legislative History of the Renewal Provisions Prior to the Copyright Renewal Act of 1992

As previously explained, the meaning of § 304(a) is quite clear: the renewal term vests when registration is made with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author. Although there is currently no requirement that the author survive until the commencement of the twenty-ninth year for the renewal term to vest, early United States Copyright Acts contained such a condition.⁵¹ Even if Congressional intent were analyzed, the legislative history fails to explain why Congress deleted this requirement.⁵²

The vesting date of the renewal term becomes an issue when an author assigns the right to the renewal term of copyright and then dies in the twenty-eighth year. Although not explicitly stated in the statute, the United States Supreme Court has held that an author may convey the right to the renewal term.⁵³ This holding is consistent with the first Copyright Act,

48. Copyright Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075. "[T]he author . . . if still living, . . . shall be entitled to a renewal." *Id.*

49. Schrader, *supra* note 21, at 298.

50. *Id.*

51. Copyright Act of May 31, 1790, ch. 25, § 1, 1 Stat. 124; Copyright Act of February 3, 1831, ch. 26, § 2, 4 Stat. 436.

52. Schrader, *supra* note 21, at 284.

53. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943). The Court held that "the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests." *Id.*

the English Statute of Anne,⁵⁴ which was also interpreted to allow assignments of the renewal term.⁵⁵

For the renewal term to vest, the Statute of Anne expressly required that the author be alive at the expiration of the initial term.⁵⁶ In 1790, Congress enacted the first United States copyright statute.⁵⁷ The duration and renewal provisions of the 1790 Copyright Act were virtually identical to those in the Statute of Anne.⁵⁸ Two terms of copyright were available: an initial term of fourteen years and a renewal term of fourteen years.⁵⁹ Similar to the Statute of Anne, the renewal term would not vest unless the author was still living at the expiration of the initial term.⁶⁰ Additionally, the 1790 Act required the author to comply with the registration requirements within the six month period prior to the expiration of the initial term.⁶¹

54. 8 Anne, c. 19 (1709) (Eng.). See also Schrader, *supra* note 21, at 280.

55. *Fred Fisher*, 318 U.S. at 647-48. "[T]he English courts held that the author's right of renewal, although contingent upon his surviving the original fourteen-year period, could be assigned, and that if he did survive the original term he was bound by the assignment." *Id.*

56. 8 Anne, c. 19 (1709) (Eng.).

[T]he author . . . and his assignee . . . shall have the sole liberty . . . of printing . . . for the term of one and fourteen years . . .

. . . .

[A]fter the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

Id. (emphasis added).

57. Copyright Act of May 31, 1790, ch. 25, § 1, 1 Stat. 124. The United States Constitution explicitly gives Congress the power to enact a copyright statute. U.S. CONST. art. I, § 8. "The Congress shall have Power . . . To promote the Progress of science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" *Id.*

58. Copyright Act of May 31, 1790, ch. 25, § 1, 1 Stat. 124.

59. *Id.*

60. *Id.* This section states as follows:

[T]he author . . . and any other person who hath . . . acquired the copyright . . . shall have the sole right and liberty of printing, reprinting, publishing and vending . . . for the term of fourteen years . . . And if, at the expiration of the said term, the author . . . be living, . . . the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years: Provided, he or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

Id. (emphasis added).

61. *Id.*

The Copyright Act of 1831, like its predecessors, made the right to the renewal term contingent upon the author surviving the initial term.⁶² As in the Copyright Act of 1790, registration for the renewal term was required within six months of the expiration of the first term.⁶³ However, the Copyright Act of 1831 extended the duration of the initial term to twenty-eight years, while maintaining a fourteen year renewal term.⁶⁴ The 1831 Act also contained an important change: it provided for a successor class to the author, a group which was entitled to claim the renewal interest if the author did not survive the initial term.⁶⁵

The Copyright Act of 1870⁶⁶ initiated a significant change that is crucial to the determination that the copyright renewal term should vest upon registration with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author. The Copyright Act of 1870, unlike all prior copyright acts, did not expressly require that the author be living "at the expiration of the aforesaid term of years" in order for the renewal term to vest.⁶⁷ The Copyright Act of 1870 simply stated that a living author has the right to the renewal term, upon registration within six months before the expiration of the first term.⁶⁸ In other words, the 1870

62. The Copyright Act of February 3, 1831, ch. 26, § 2, 4 Stat. 436 states:

[T]he author . . . and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut, or engraving, in whole or in part, for the term of twenty-eight years

Id.

The Act further states:

[I]f, at the expiration of the aforesaid term of years, such author, . . . be living, . . . or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, . . . or, if dead, then to such widow and child, or children, for the further term of fourteen years: Provided, That the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copyrights, be complied with in respect to such renewed copyright, and that within six months before the expiration of the first term.

Id. (emphasis added).

63. *Id.*

64. *Id.*

65. *Id.*

66. Copyright Act of July 8, 1870, ch. 230, § 88, 16 Stat. 212.

67. *Id.*

68. The Copyright Act of July 8, 1870, ch. 230, § 87, 16 Stat. 212 states that "copyrights shall be granted for the term of twenty-eight years" Section 88 of the Act states:

[T]he author, . . . if he be still living, . . . or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second

Copyright Act omitted the express survivorship requirement contained in the previous copyright acts. The express survivorship requirement has never been reinstated in any subsequent copyright act.⁶⁹ The renewal provisions of the Copyright Act of 1909 are similar to that of the 1870 Act, with one notable exception: the 1909 Act extended the duration of the renewal term to twenty-eight years and described a larger class of statutory successors.⁷⁰

In *Frederick Music*, the defendant, through an analysis of the history of the renewal provision, attempted to prove that an author must survive into the renewal period in order for the renewal term to vest.⁷¹ After examining prior copyright acts, the court rejected the defendant's argument because, while the Acts of 1790 and 1831 expressly conditioned vesting of the right to the renewal term upon the author's survival into the renewal period, the Act of 1870 did not include such a requirement.⁷² The court concluded that "[an] analysis of copyright provisions prior to the Act of 1870 is irrelevant, as it is the affirmative renewal concept of that act—not the language of earlier acts—which is substantially carried forward to the present law."⁷³

In *Marascalco*, the Ninth Circuit Court of Appeals also analyzed the legislative history of the renewal provision and acknowledged that all

time, and complying with all other regulation in regard to original copyrights, *within six months before the expiration of the first term.*

Id. (emphasis added).

69. Copyright Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075; Copyright Act of October 19, 1976, 17 U.S.C. 304(a) (1976).

70. Copyright Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075.

[T]he copyright secured by this Act shall endure for twenty-eight years from the date of first publication, . . . provided . . . *the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.*

Id. (emphasis added).

71. *Frederick Music*, 708 F. Supp. at 589.

72. *Id.* at 589-90.

73. *Id.* at 590. The *Marascalco* court examined the *Frederick Music* case and took issue with the fact that the *Frederick Music* court rejected the legislative history prior to the 1870 Act as "irrelevant." *Marascalco*, 953 F.2d at 475.

Copyright Acts prior to 1870 explicitly required that the author survive the initial term in order for the renewal term to vest.⁷⁴ In addition, the court recognized that since the Act of 1870, all copyright acts have abandoned this explicit requirement of survivorship.⁷⁵ Nevertheless, the court stated that the better view is that § 304(a) of the 1976 Copyright Act implicitly reflects the vesting language of earlier statutes that required the author to survive the initial term in order for the renewal term to vest.⁷⁶ Although the 1870 Statute abandoned the express requirement of survivorship, the court cited several commentators in support of the proposition that Congress, in enacting the 1870 Act, intended no substantial change to the renewal provisions of the 1831 Act.⁷⁷

Without any analysis, the Ninth Circuit Court of Appeals relied upon Nimmer as support for its proposition.⁷⁸ Nimmer, a well respected author in the area of copyright law, states that the most persuasive case authority supports the view that the renewal term vests upon commencement of the twenty-ninth year.⁷⁹ In support of this, Nimmer refers to *Fred Fisher Music Co. v. M. Witmark & Sons* to bolster the notion that Congress intended the renewal provisions of the 1909 Act to continue as they previously existed.⁸⁰ Nimmer acknowledges that the Copyright Acts of 1790 and 1831 required that the author be living at the expiration of the initial term in order to be entitled to the renewal term.⁸¹ After recognizing that the Act of 1870 discontinued this express requirement of survivorship, Nimmer states that "[t]here is, however, no indication of an intent to depart from this requirement as stated in the earlier copyright laws."⁸² Nimmer concludes that although Congress discontinued the express requirement of

74. *Marascalco*, 953 F.2d at 471-72 (citing the Statute of Anne, the Copyright Act of 1790, and the Copyright Act of 1831).

75. *Id.* at 472 (citing the Copyright Act of 1909 and the Copyright Act of 1976).

76. *Id.* at 471.

77. *Id.* at 472 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.05[C], at 9-60 (1991); BARBARA A. RINGER, RENEWAL OF COPYRIGHT (1960), reprinted in SEN. JUDICIARY COMM., 86TH CONG., 2D SESS. 107, COPYRIGHT LAW REVISION STUDY NO. 31, 111-12 (1961) (citing *De Sylva v. Ballentine*, 351 U.S. 570, 576 (1956)); CONG. GLOBE, 41st Cong., 2d Sess. 2854 (1870) (statement of Mr. Jenckes); 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT § K, at 77 (E. Brylawski & A. Goldman eds., 1976) (statement of Mr. Hale) (quoted in *Stewart v. Abend*, 495 U.S. 207, 220 (1990))).

78. *Marascalco*, 953 F.2d at 472 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.05[C], at 9-60 (1991)).

79. NIMMER, *supra* note 4, § 9.05[C][1][a], at 9-74.

80. *Id.* (citing generally *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943)).

81. *Id.*

82. *Id.*

survivorship contained in the earlier Acts, the 1870 Act and all subsequent Acts carry forward this requirement because the *Fred Fisher Music* Court stated that the renewal provisions of the 1909 Act were a continuation of prior copyright laws.⁸³

Nimmer's reliance upon the *Fred Fisher Music* case is misplaced.⁸⁴ As Nimmer points out, the Court in the *Fred Fisher Music* case said that the 1909 Act intended the renewal structure to continue as it previously existed.⁸⁵ The problem with such reliance is that the *Fred Fisher Music* case dealt with the issue of alienability of the renewal term.⁸⁶ Therefore, the Supreme Court's opinion with regard to the continuity of previous copyright law was in reference to alienability, not the proper vesting date.⁸⁷ Because the 1870 Act did not depart from the 1831 Act on the issue of alienability of the renewal term, the Court in *Fred Fisher Music* did not even consider the 1870 Act.⁸⁸ Schrader stated that "any court proposing to rule on the vesting issue must consider carefully the altered

83. *Id.* § 9.05[C][1][a], at 9-75.

84. Schrader, *supra* note 21, at 295-98; *Marascalco*, 953 F.2d at 477 (Thompson, J., dissenting).

85. NIMMER, *supra* note 4, § 9.05[C][1][a], at 9-74.

86. Schrader, *supra* note 21, at 296-97.

The Court [in *Fisher*] concluded that the present law embodied the same policy on alienability of the renewal expectancy as the earlier statutes. Nimmer, while conceding that the statement in *Fisher* regarding continuity of renewal policy was *not* made with reliance to the vesting issue, nevertheless finds support in the general comment in *Fisher* for his view that the requirement of survivorship in the Statute of Anne, the Act of 1790, and the Act of 1831 continues in the present law.

Id. (emphasis in original). The *Marascalco* court also examined this issue:

The *Fisher* court based its conclusion on an extensive analysis of the statutory history leading up to the 1909 Act. In particular, the Court relied heavily on language of a House Committee Report stating that the law should be framed "as is the existing law." This analysis, however, was undertaken for the sole purpose of determining whether an author may assign his renewal expectancy. As a result, the Court did not consider the Act of 1870. It did not need to consider that Act because there was no departure in it from the Act of 1831 on the issue of assignability of the renewal expectancy. Thus, the Court never considered Congress' deletion of language requiring survival until commencement of the renewal term. As the Supreme Court made clear in *Stewart v. Abend*, *Fisher* was silent concerning the time of vesting.

Marascalco, 953 F.2d at 477 (Thompson, J., dissenting).

87. Schrader, *supra* note 21, at 297. "As Nimmer concedes, the *Fisher* Court made no direct comment on the vesting issue with respect to the present law." *Id.*

88. *Id.*

language of the Act of 1870, which dropped the reference to survival of the author to the expiration of the first term.”⁸⁹

Thus, the *Marascalco* court incorrectly relied upon Nimmer as support for the notion that the renewal term should vest upon commencement of the twenty-ninth year. Nimmer’s theory depends on *Fred Fisher Music*, a case which considered the issue of alienability and did not analyze the Copyright Act of 1870. Additionally, the United States Supreme Court has explicitly stated that “[n]either *Miller Music* nor *Fred Fisher* decided the question of when the renewal rights vest”⁹⁰

The *Marascalco* court cited a passage from an article authored by Barbara A. Ringer, a former Register of Copyrights, as support for the notion that the Copyright Act of 1870 retained the same renewal provisions of prior Copyright Acts.⁹¹ In her article, Ringer makes the following sweeping statement: “[I]n the next revision of the U.S. copyright law in 1870, the renewal provisions of the Act of 1831 were retained without substantial change, and in the fragmentary history there is no indication that any change was considered or even suggested.”⁹² Ringer’s statement fails to support the notion that Congress did not intend the 1870 Act to change the renewal provisions. Ringer’s statement is a single sentence analysis of the 1870 Act that includes no discussion of the deletion of the survivorship requirement.⁹³ Additionally, as the majority concedes, Ringer ultimately concludes that the renewal term vests upon registration.⁹⁴

The Ninth Circuit Court of Appeals relied upon a statement made in the legislative history as support for the notion that the creators of the 1870

89. *Id.*

90. *Stewart v. Abend*, 495 U.S. 207, 220 n.2 (1990).

91. *Marascalco*, 953 F.2d at 472 (citing BARBARA A. RINGER, RENEWAL OF COPYRIGHT (1960), reprinted in SEN. JUDICIARY COMM., 86TH CONG., 2D SESS. 107, COPYRIGHT LAW REVISION STUDY NO. 31, 111-12 (1961)).

92. BARBARA A. RINGER, RENEWAL OF COPYRIGHT (1960), reprinted in SEN. JUDICIARY COMM., 86TH CONG., 2D SESS. 107, COPYRIGHT LAW REVISION STUDY NO. 31, 111-12 (1961).

93. *Marascalco*, 953 F.2d at 477 (Thompson, J., dissenting).

94. *Id.* at 473, 477 (Thompson, J., dissenting). Ms. Ringer stated in part as follows:

(3) As soon as a valid renewal claim is registered, the renewal is “vested in interest”—that is, there is a “present fixed right of future enjoyment.”

(a) At this point the rights of the group entitled to claim are determined and indefeasible, and the contingent rights of the other statutory classes are cut off and destroyed. The death, during the renewal year, of the registered claimant or of any other entitled to claim, will not affect the validity of the renewal, the rights of the other members of the class, the rights of assignees, or the rights of his own heir or legatees.

Ringer, *supra* note 92, at 186.

Act did not intend any change from previous Acts.⁹⁵ According to the legislative history of the 1909 Act, "The right of renewal is contingent. It does not vest until the end [of the original term]. If [the author] is alive at the time of renewal, then the original contract may pass it, but his widow or children would not be bound by that contract."⁹⁶

This quote represents very limited authority for the proposition that the creators of the 1870 Act intended no substantial change. Mr. Hale is a publisher who made the above statement before a joint Senate and House committee which was analyzing several proposals for revising the Copyright Act.⁹⁷ The committee heard no discussion regarding the vesting date of renewal rights.⁹⁸ Additionally, this passage is misleading. The bracketed language, "of the original term," was added by the Supreme Court in *Stewart v. Abend*.⁹⁹ The actual quote reads as follows: "The right of renewal is contingent. It does not vest until the end."¹⁰⁰ The word "end" was never defined by Mr. Hale. Therefore, this quote has little value when it is read in context.¹⁰¹

The *Marascalco* court also cited the following statement from the legislative history of the 1870 Act to support its claim that this Act preserved the renewal provisions as they had previously existed: "The committee . . . [has] carefully preserved every existing right [contained in extant copyright law] . . ."¹⁰² However, this legislative history has limited value because it did not include any discussion of the renewal provisions or of the deletion of the survivorship requirement.¹⁰³ Therefore, even if the legislative history of the renewal provisions was analyzed in order to help understand the intent of § 304(a), no persuasive authority is found to contradict the plain meaning of the statute.

95. *Marascalco*, 953 F.2d at 473.

96. *Id.* (citing 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT § K, at 77 (E. Brylawski & A. Goldman eds., 1976) (statement of Mr. Hale) (quoted in *Stewart v. Abend*, 495 U.S. 207, 220 (1990) (bracketed material included))).

97. *Marascalco*, 953 F.2d at 477 (Thompson, J., dissenting).

98. *Id.*

99. *Id.* (citing 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT § K, at 77 (E. Brylawski & A. Goldman eds., 1976) (statement of Mr. Hale) (quoted in *Stewart v. Abend*, 495 U.S. 207, 220 (1990) (bracketed material included))).

100. 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT § K, at 77 (E. Brylawski & A. Goldman eds., 1976) (statement of Mr. Hale).

101. *Marascalco*, 953 F.2d at 477 (Thompson, J., dissenting).

102. *Id.* at 472 (citing CONG. GLOBE, 41st Cong., 2d Sess. 2854 (1870) (statement of Mr. Jenckes) (alteration in original)).

103. Schrader, *supra* note 21, at 280 (citing CONG. GLOBE, 41st Cong., 2d Sess. 2679-83, 2854-58, 2872-80, 4819-27 (1870)).

*B. Case Law Analysis of the Renewal Provisions
Prior to the Copyright Renewal Act of 1992*

Many courts, in dicta, have discussed the proper vesting date of the renewal term.¹⁰⁴ The language of virtually every court implies that if the issue of the proper vesting date were before it, the court would hold that the renewal term of copyright should vest upon registration with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author. In *Frederick Music*, the court discussed and cited dicta from many cases supporting the view that the renewal term should vest upon registration.¹⁰⁵ In *Marascalco*, the court discussed the dicta of several of the United States Supreme Court decisions but disregarded most of the lower court decisions.¹⁰⁶

1. Early Cases Interpreting the Renewal
Provisions of the 1909 Copyright Act

In *White-Smith Music Publishing Co. v. Goff*,¹⁰⁷ a music publisher, claiming that it had a vested right, attempted to register for the renewal term of copyright. The court affirmed the decision for the respondents and held that only the author, his family, or his executors could ordinarily apply for an extension.¹⁰⁸ Although this case is one of the first involving the renewal provisions of the 1909 Copyright Act, the court indicated that the right to the renewal term vests in the twenty-eighth year. The court stated, in part, "[I]n connection with the renewal, the persons who control the right thereto, whether widow, widower, or the author himself, may, during the

104. See generally Schrader, *supra* note 21, at 284-94.

105. *Frederick Music*, 708 F. Supp. 587, 590 (S.D.N.Y. 1989) (citing *Miller Music Corp v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375 (1960); *Miller Music Corp v. Charles N. Daniels, Inc.*, 158 F. Supp. 188, 192 (S.D.N.Y. 1957); *Rossiter v. Vogel*, 134 F.2d 908, 911 (2d Cir. 1943); *Picture Music v. Bourne, Inc.*, 314 F. Supp. 640, 644 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir. 1972), *cert. denied*, 409 U.S. 997 (1972); *Davis v. DuPont de Nemours & Co.*, 240 F. Supp. 612, 626 (S.D.N.Y. 1965); *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253, 257 (S.D.N.Y. 1962); *Tobias v. Joy Music, Inc.*, 204 F. Supp. 556 (S.D.N.Y. 1962); *Rose v. Bourne*, 176 F. Supp. 605, 610 (S.D.N.Y. 1959), *aff'd*, 279 F.2d 79, 80 (2d Cir. 1960), *cert. denied*, 364 U.S. 880 (1960); *Carmichael v. Mills Music*, 121 F. Supp. 43, 45 (S.D.N.Y. 1954); *Tobani v. Carl Fischer, Inc.*, 33 N.Y.S.2d 294, 296 (N.Y. App. Div. 1942), *aff'd on other grounds*, 289 N.Y. 727 (1942); *Capano Music, Div. of Britone v. Myers Music*, 605 F. Supp. 692, 695 (S.D.N.Y. 1985).

106. *Marascalco*, 953 F.2d at 474.

107. 187 F. 247, 247-48 (1st Cir. 1911).

108. *Id.* at 249.

year prior to the expiration of the existing term nominated in section 24, assign the right to renewal, so that the then proprietor may make the new registration required, and take out the extension in his own name."¹⁰⁹ This passage indicates the court's belief that renewal rights vest during the twenty-eighth year. The court did not imply that such right was contingent upon the author surviving the twenty-eighth year.

In *Silverman v. Sunrise Pictures Corp.*,¹¹⁰ the plaintiff held the rights to the renewal term of copyright in the novel "At the Mercy of Tiberius" as assignee of the next of kin of the author. The defendant threatened to produce a photoplay based on the underlying work.¹¹¹ The court reversed the district court's denial of an injunction against the defendant.¹¹²

In its analysis, the court indicated that it interprets the vesting date of the renewal term to be upon registration in the twenty-eighth year. The court stated: "If, however, the author lives to within the statutory year, he may certainly exercise his [renewal] right, assign it, or bequeath it; and if he dies in the year, but before registration, it is for his executors to function."¹¹³

In *Tobani v. Carl Fischer, Inc.*,¹¹⁴ the wife of a composer assigned her renewal rights to a publisher for consideration of \$5,000 to be paid within thirty days after the composer's death. The wife predeceased her husband and the representatives of the estate sought to recover the \$5,000.¹¹⁵ The publisher argued that the contract should be read as only requiring payment of the \$5,000 if the composer predeceased his wife.¹¹⁶ The court ruled in the estate's favor, holding that the contract did not contain an implied condition of survivorship.¹¹⁷ In its opinion, the court analyzed the Copyright Act and concluded that the renewal term should vest upon registration.¹¹⁸ The court stated:

The right of renewal is dependent upon whether the composition belonged to and was published by an employer or the author If in the author, *the right to renew accrues upon application during the last year of the original term*, and is limited to

109. *Id.*

110. 273 F. 909, 910 (2d Cir. 1921).

111. *Id.*

112. *Id.* at 914-15.

113. *Id.* at 913.

114. 33 N.Y.S.2d 294, 297 (N.Y. App. Div. 1942).

115. *Id.* at 295.

116. *Id.* at 297.

117. *Id.* at 298.

118. *Id.* at 296.

those enumerated in the Act, including the author, and in the event of his death, the widow, despite any attempted assignment by the author during the original term of copyright.¹¹⁹

It seems clear that this court would find that the renewal term of copyright should vest upon registration in the twenty-eighth year of the initial term because the court made no mention of a survivorship requirement.

The case of *Von Tilzer v. Jerry Vogel Music Co.*¹²⁰ involved a copyright infringement claim of seven songs. The second cause of action involved a dispute over the right to the renewal term in the song "I Want a Girl Just Like the Girl Who Married Dear Old Dad."¹²¹ Dillon, the lyricist, assigned his interest in the renewal term to the plaintiff and subsequently made a similar assignment to the defendant.¹²² The court held as follows:

Since Dillon was living on the first day of the twenty-eighth year of the original term, the 1911 assignment by him to the plaintiff corporation vested in it all his renewal rights and gave it the exclusive right to publish the song not only during the original term but also during the renewed term.¹²³

The language used by this court indicates that the renewal term vested in the plaintiff by virtue of the prior assignment, in the twenty-eighth year of the initial term. The court made no mention of a further survivorship requirement.

2. United States Supreme Court Cases Interpreting the Renewal Provisions of the 1909 Copyright Act

In *Fred Fisher Music Co. v. M. Witmark & Sons*,¹²⁴ the Supreme Court analyzed the 1909 Copyright Act and held that authors may assign their interest in the renewal term of copyright. While explaining the issue in this case, the Court defined § 24 of the 1909 Copyright Act.¹²⁵ The following definition implies that if the question were before the Supreme

119. *Tobani*, 33 N.Y.S.2d at 297 (emphasis added).

120. 53 F. Supp. 191 (S.D.N.Y. 1943).

121. *Id.* at 194.

122. *Id.*

123. *Id.*

124. 318 U.S. 643, 657 (1943). The copyrighted work in conflict was the song "When Irish Eyes Are Smiling." *Id.* at 645.

125. *Id.* at 643-44.

Court, it would hold that the renewal term should vest upon registration in the twenty-eighth year, during the life of the author. The Court stated:

Under § [24] of the Copyright Act of 1909, . . . a copyright in a musical composition lasts for twenty-eight years from the date of its first publication, and the author can renew the copyright, if he is still living, for a further term of twenty-eight years *by filing an application for renewal within a year before the expiration of the first twenty-eight year period.*¹²⁶

This definition expresses the Supreme Court's interpretation of the requirements for securing the renewal term. Had the Court believed that there was an additional requirement of survivorship into the twenty-ninth year, its discussion would have certainly included this additional element. Based upon this definition and the lack of any language implying that this entire process is only contingent upon survival into the twenty-ninth year, the Supreme Court would apparently support the premise that the renewal term vests upon registration with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author.

In *Miller Music Corp. v. Charles N. Daniels, Inc.*,¹²⁷ the author of the song "Moonlight and Roses" died prior to the twenty-eighth year of the initial term. The case involved a conflict between the author's assignee of the renewal term and the executor of the author's estate, each claiming the right to the renewal term.¹²⁸ The Supreme Court held that the renewal rights accrued to the executor of the estate rather than the assignee.¹²⁹ In its discussion, the Court made the following statement, which has been interpreted and discussed by many courts and commentators: "An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period."¹³⁰

Because the Court did not define "renewal period," the above statement does not decisively resolve the question of when the renewal term should vest. The Court may have intended "renewal period" to mean the first day that the author could register for renewal, i.e., the first day of the twenty-eighth year. Conversely, the court may have intended "renewal

126. *Id.* (emphasis added).

127. 362 U.S. 373, 374 (1960).

128. *Id.*

129. *Id.* at 377-78.

130. *Id.* at 375. The interpretation of "renewal period" is discussed throughout this Article.

period" to mean the first day of the actual renewal term, i.e., the first day of the twenty-ninth year.¹³¹

3. Subsequent Cases Interpreting the Renewal Provisions of the 1909 Copyright Act

In *Rossiter v. Vogel*,¹³² the plaintiff, the prior assignee of the renewal term of copyright in the song "Some of These Days," sought a judgment ordering defendant, the subsequent assignee of the renewal term, to transfer the renewal to him and to enjoin defendants from further use. The court reversed and remanded the summary judgment granted in the plaintiff's favor because it found issues of fraud and inadequate consideration.¹³³ In its discussion, the court stated that "[t]he renewal right does not strictly accrue until the filing of an application in the twenty-eighth year of the original term, and the renewal itself does not thereafter become effective until the first day of the twenty-ninth year."¹³⁴

Although this wording is ambiguous, the court indicates that the right to renew accrues upon registration in the twenty-eighth year, and this right is not effective until the twenty-ninth year.¹³⁵ Therefore, this statement can simply be interpreted to mean that the renewal term vests in the owner upon registration, but he or she obviously may not exercise such rights until the renewal period begins—the first day of the twenty-ninth year.¹³⁶

131. As will be discussed, most courts and commentators have interpreted "renewal period" to refer to the period during the twenty-eighth year. Nimmer interprets "renewal period" to signify the second term of copyright. NIMMER, *supra* note 4, § 9.05[C][1][a], at 9-74. In *Marascalco*, the court discussed the *Miller Music* "renewal period" and acknowledged that there has been much disagreement over its meaning. *Marascalco*, 953 F.2d at 474.

132. 134 F.2d 908, 910 (2d Cir. 1943).

133. *Id.* at 912. Ultimately, the Second Circuit affirmed the district judge's decision that the plaintiff's assignment was unenforceable based upon lack of consideration. *Rossiter v. Vogel*, 148 F.2d 292, 292-94 (2d Cir. 1945).

134. *Rossiter*, 134 F.2d 908, 911 (2d Cir. 1943).

135. *Id.*

136. See Schrader, *supra* note 21, at 293.

The meaning of this passage is not completely free from doubt, but the most likely interpretation is that the comments support vesting of the renewal interest by the act of registration. The Court clearly emphasized the significance of the registration act, and seemed to say that the renewal vests in interest on that date and is reduced to possession on the first day of the 29th year after publication. Thus use of the phrase "renewal right" is somewhat unfortunate since this phrase is so close to the phrase "right of renewal." The latter definitely refers to the right to apply for renewal registration. Obviously, the Court means something other than the right to apply when it uses the phrase "renewal right" because it says the "renewal right" *accrues*

In *Carmichael v. Mills Music*,¹³⁷ the plaintiff sought a declaratory judgment regarding the right to the renewal term of fourteen songs. The court considered whether a justiciable controversy existed with regard to the songs that were still in the initial term of copyright.¹³⁸ The court held that there was a justiciable controversy.¹³⁹ The court discussed § 24 of the 1909 Copyright Act and stated as follows:

[I]f the author is not living at a time one year prior to the expiration of the original term of copyright, then designated successors are entitled to the renewal, and an assignment of a renewal expectancy rests upon the author's survival until the time of the accrual of renewal rights.¹⁴⁰

It is probable that "accrual of renewal rights" refers to the twenty-eighth year because this court does not seem to require that the author survive the initial term.

In *Rose v. Bourne, Inc.*,¹⁴¹ two composers and the executor of a deceased composer brought suit against a publisher regarding the right to the renewal term in the song "That Old Gang of Mine." The district court held and the Second Circuit Court of Appeals affirmed that the publisher had the right to the renewal term because the composers had effectively assigned the song for the initial and renewal terms.¹⁴² In this case, the district court appears to have expressed its belief that the renewal term vests upon registration. The district court stated that "[u]nless defective under the special rule as to expectancies, . . . the title of the assignee is complete and perfect at the instant the application in the name of the author is registered."¹⁴³ In addition, the Second Circuit Court of Appeals interpreted the *Miller Music* "renewal period."¹⁴⁴ The court referred to the *Miller Music* "renewal period" and then stated that "[i]n this case, the renewal period began on [the first day of the twenty-eighth year]"¹⁴⁵

upon filing of an application. Consequently, "renewal right" seems to mean the renewal interest, and this "accrues" or vests upon filing of a valid application during the 28th year of the original term.

Id. (emphasis in original).

137. 121 F. Supp. 43, 44 (S.D.N.Y. 1954).

138. *Id.* at 45.

139. *Id.* at 46.

140. *Id.* at 45.

141. 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F.2d 79 (2d Cir. 1960).

142. *Id.*

143. *Id.* at 610.

144. *Rose v. Bourne, Inc.*, 279 F.2d 79 (2d Cir. 1960) (citing *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375 (1960)).

145. *Id.* at 80. See also Schrader, *supra* note 21, at 285.

The Second Circuit supported the lower court's belief that the renewal term should vest upon registration when it said, "[t]herefore we affirm Judge Dimock's conclusion that appellee, having made a timely filing for renewal, is the present legal owner of the renewal copyright."¹⁴⁶ Taken as a whole, both *Rose* decisions favor the idea that the renewal term should vest upon registration with the Copyright Office.

In *Tobias v. Joy Music, Inc.*,¹⁴⁷ the plaintiffs, authors of the song "Miss You," brought an action to determine the ownership of the renewal term of copyright. The defendant claimed the right to the renewal term as successor in interest of a 1929 assignment.¹⁴⁸ The court held that the 1929 instrument was a valid assignment and that the defendant was the sole owner of the renewal term.¹⁴⁹

The *Tobias* court demonstrated its support for the notion that the right to the renewal term vests upon registration in the twenty-eighth year during the life of the author. In its discussion, the court made reference to the *Miller Music* "renewal period"¹⁵⁰ and then stated that "[h]ere, the renewal period began on [the first day of the twenty-eighth year]; and since it is apparent that all three authors were alive on that date, the right to renewal thereupon vested in the assignee under the terms of the contract."¹⁵¹ The court did not indicate that the entire process of vesting the renewal term was also contingent upon survivorship.

In *Cresci v. Music Publishers Holding Corp.*,¹⁵² a composer, his widow, and daughters assigned to the publisher their renewal expectancies. The two daughters alleged that the assignments were void because their father had conspired with the publisher to obtain their assignments.¹⁵³ Further, the daughters claimed that through this conspiracy, the father persuaded them to execute the assignments by false and fraudulent misrepresentations.¹⁵⁴ The court held that there was no basis for federal jurisdiction and that the state courts were the appropriate venue for such questions.¹⁵⁵ The *Cresci* court favored the view that the proper vesting

146. *Rose*, 279 F.2d at 81.

147. 204 F. Supp. 556 (S.D.N.Y. 1962).

148. *Id.* at 557.

149. *Id.*

150. *Miller Music*, 362 U.S. at 375.

151. *Tobias*, 204 F. Supp. at 559.

152. 210 F. Supp. 253, 254-55 (S.D.N.Y. 1962). The case involves a conflict over 65 copyrighted songs. *Id.*

153. *Id.* at 255

154. *Id.*

155. *Id.* at 260.

date of the renewal term is upon registration.¹⁵⁶ In its discussion, the court asserted that "[t]he renewal right does not accrue until the filing of an application in the twenty-eighth year of the original term."¹⁵⁷

This court also interpreted *Miller Music*,¹⁵⁸ and stated:

It is plain that it was the intention of Congress in enacting [§ 24] to provide that the renewal rights of a copyrighted work *would inure to the benefit of the author if living at the time when application for renewal could be made*, and, if not, to his widow or children or the other persons designated in the statute in the appropriate order of succession.¹⁵⁹

The court also had the opportunity to comment on the precise issue at hand.¹⁶⁰ The daughters questioned whether the assignee lost the right to the renewal term with respect to eleven of the sixty songs, where the author died in the twenty-eighth year but after registration.¹⁶¹ Although the court did not decide this issue, it referred to *Rose v. Bourne, Inc.*¹⁶² and stated that "[t]he point is of very doubtful merit in the light of the language of § 28."¹⁶³ If the issue were before this court, it appears that the court would find that the renewal term of copyright should vest upon registration

156. *Id.* at 258. See also Schrader, *supra* note 21, at 285.

157. *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253, 257 (S.D.N.Y. 1962).

158. 362 U.S. 373 (1960).

159. *Cresci*, 210 F. Supp. at 258 (emphasis added).

160. *Id.* at 259.

161. *Id.* The court stated as follows:

Finally, plaintiffs seek to invoke jurisdiction under § 1338(a) because it appears from the answer to the amended complaint (though not from the amended complaint itself) that, as to 11 of the more than 60 compositions involved here, [the father] had died during the 28th year of the original term, after the application for renewal had been filed but before the commencement of the renewal term itself on the first day of the 29th year. This, say the plaintiffs, raises the question of whether under the copyright laws, a composer's assignee loses its right to the renewed copyright if the composer dies after an application for renewal under the assignment from the composer is filed during the twenty-eighth year but before the renewal term actually commences.

Plaintiffs claim that this question has never been decided and was left open both by *Miller Music Corp. v. Charles N. Daniels, Inc.*, *supra*, where the author died before the commencement of the twenty-eighth year, and by *Fred Fisher Music Co. v. M. Witmark & Sons*, *supra*, where the author was alive at the commencement of the twenty-ninth year when the renewal term commenced.

Id.

162. 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F.2d 79 (2d Cir. 1960).

163. *Cresci*, 210 F. Supp. at 259. Section 28 states, "[c]opyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will." 17 U.S.C. § 28 (1909).

with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author.

*Davis v. DuPont de Nemours & Co.*¹⁶⁴ involved a complex copyright infringement suit. The plaintiff claimed that his copyrighted dramatization of Edith Wharton's novel "Ethan Frome," originally produced on Broadway, was infringed by a television version sponsored, televised, produced, and written by various defendants.¹⁶⁵ The court held that all of the defendants were liable for copyright infringement.¹⁶⁶ In its discussion, the court made the following statement:

It is settled that an author's renewal right to his copyrighted work is a mere expectancy and that an assignee of the copyright and the renewal rights retains no interest beyond the initial period of copyright if the author is not alive at the beginning of the renewal period—i.e., the last year of the initial copyright term.¹⁶⁷

This statement represents strong support for the contention that the proper vesting date for the renewal term is in the twenty-eighth year. Additionally, a citation to *Miller Music*¹⁶⁸ and *Rose*¹⁶⁹ followed this statement. Such reference further bolsters the notion that the Miller Music "renewal period"¹⁷⁰ pertains to the twenty-eighth year, not the twenty-ninth year.

In *Picture Music, Inc. v. Bourne, Inc.*,¹⁷¹ the plaintiff claimed, as an assignee of the alleged co-author, a one-half ownership interest in the renewal term of copyright in the song "Who's Afraid of the Big Bad Wolf." The defendant claimed to own the right to the entire renewal copyright.¹⁷² The court found for the defendant, holding that there was no merit in the plaintiff's claim of joint ownership and, therefore, that the plaintiff had no rights to the renewal term.¹⁷³ In its discussion, this court also clearly said that the author need only live into the twenty-eighth year, not the twenty-ninth year, for the renewal term to vest.¹⁷⁴ The court stated that "[i]f the author lives into the 28th year of the original period, the renewal copyright, a distinct and separate estate from the original term,

164. 240 F. Supp. 612 (S.D.N.Y. 1965).

165. *Id.* at 614-15.

166. *Id.* at 629-30, 632.

167. *Id.* at 626 (emphasis added).

168. *Miller Music*, 362 U.S. at 375.

169. *Rose*, 176 F. Supp. at 605.

170. *Miller Music*, 362 U.S. at 375.

171. 314 F. Supp. 640, 644 (S.D.N.Y. 1970).

172. *Id.*

173. *Id.* at 653.

174. *Id.* at 644.

vests in him. He may, of course, dispose of the renewal by contract before or after the renewal term commences."¹⁷⁵

4. Judicial Dicta Which Supports Vesting Upon Commencement of the Renewal Term

One case has stated in dicta that the renewal term vests upon commencement of the twenty-ninth year. In *Arlen v. Commissioner*,¹⁷⁶ a composer and his wife received a \$50,000 loan from a music publisher as consideration for their assignment of renewal rights in forty-six musical compositions. The composer and his wife claimed that the \$50,000 was borrowed money and, thus, not taxable income.¹⁷⁷ The Commissioner contended that this loan was a royalty advance and taxable as ordinary income.¹⁷⁸ The court held that the \$50,000 received was a loan and not a "sham."¹⁷⁹ The court interpreted "renewal period" to be that period beginning in the twenty-ninth year.¹⁸⁰ The court stated:

An assignment by an author of the renewal rights to a copyright made before the original copyright expires is valid against the world if the author is alive at the commencement of the renewal period. Likewise, each member of the successor class must survive the expiration of the original term in order to obtain a vested interest in the renewal copyright term. Any attempted assignment by any one of the class who fails to survive the expiration of the original term of the copyright is void.¹⁸¹

This case affords very limited authority for the proposition that the renewal term of copyright should vest in the twenty-ninth year for the following reasons: (1) the vesting date of the renewal term of the copyright was not at issue in this case; rather, the court analyzed the Copyright Act

175. *Id.*

176. 48 T.C. 640, 644 (1967).

177. *Id.*

178. *Id.* at 644-45. Although notes were given for the \$50,000 loan, the Commissioner claimed the \$50,000 paid "was intended as advance royalties and that the giving of the notes was unrealistic and a sham." *Id.*

179. *Id.* at 648-49. The court stated that, "[t]he notes in the instant case were negotiable, unconditional, could have been discounted by the payee at any time, and were issued for a business purpose." *Id.*

180. *Id.* at 646.

181. *Arlen*, 48 T.C. 640, 646 (1967) (citing generally *Fred Fisher Music Co. v. M. Witmark & Sons* 318 U.S. 643 (1943); *DeSylva v. Ballentine* 351 U.S. 570 (1956); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960)).

solely to establish a valid business purpose to make the loan, i.e., that due consideration was being paid because the renewal term was a contingent interest;¹⁸² (2) the case was decided by the Tax Court which is not well versed in the intricacies of the Copyright Act; and (3) the court only analyzed the United States Supreme Court renewal cases and did not address any of the lower court decisions that have since interpreted these cases.¹⁸³

The *Arlen* case was considered by the *Frederick Music* Court as authority after it determined that "[t]he issue of when renewal rights vest was irrelevant to that decision, and the case involved tax, not copyright considerations."¹⁸⁴ The court in *Marascalco* also disregarded the persuasiveness of the *Arlen* decision.¹⁸⁵

C. Commentators' Opinions

The issue of the proper vesting date of the renewal term has also been a topic of discussion among commentators. While Nimmer takes the position that the renewal term vests upon commencement of the twenty-ninth year,¹⁸⁶ the majority of commentators contend that the proper vesting date is upon registration with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author.¹⁸⁷ Nimmer

182. *Id.* at 647. The court stated: "Thus, there was a very real and valid business purpose for making the advance of \$50,000 to petitioner in the form of a loan evidenced by negotiable, unconditional promissory notes." *Id.* See also Schrader, *supra* note 21, at 287.

183. *Arlen*, 48 T.C. at 644 (citing generally *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943); *DeSylva v. Ballentine*, 351 U.S. 570 (1956); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960)). As explained in this Article, the lower courts have generally interpreted the *Miller Music* "renewal period" to mean that the renewal term should vest upon registration in the twenty-eighth year. See also Schrader, *supra* note 21, at 287.

184. *Frederick Music*, 708 F. Supp. 587, 591 (S.D.N.Y. 1989) (citing *Arlen v. Commissioner*, 48 T.C. 640 (1967)).

185. *Marascalco*, 953 F.2d at 475. "*Arlen* was decided by a court whose area of special expertise is tax, not copyright, law. Further, *Arlen* reached its conclusion without any discussion of whether another competing interpretation of 'renewal period' might exist." *Id.*

186. NIMMER, *supra* note 4, § 9.05[C][1][a], at 9-74.

187. 1 PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW AND PRACTICE § 4.8.1, at 451 (1989) ("The plain language of section 304(a) suggests that vesting occurs on the date the renewal is registered Although no judicial decision is precisely on point, dicta in several cases decided under the 1909 Act support this conclusion."); April V. Rayner, *Copyright Succession: Traps Lurking in the Renewal System*, L.A. DAILY J., June 10, 1988, at 6 ("[T]he registration date receives the most support by both courts and commentators Therefore, this author recommends that the courts adopt the date of renewal registration as the vesting date."); ALAN LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 75

claims that because the *Miller Music* reference to "renewal period" cites *Fred Fisher Music*, it indicates "that the Court in *Miller* used the phrase 'renewal period' as synonymous with the renewal term of copyright."¹⁸⁸

Schrader cites *Miller Music* and the lower court cases interpreting *Miller Music* as support for her contention that the renewal term should vest upon registration.¹⁸⁹ Schrader also points to the lower court decision

(5th ed. 1979) ("There is nothing in the statute to imply that the renewal claimant must live out the year before such new copyright becomes vested in his assignee."); CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION, COMPARATIVE ANALYSIS OF THE ISSUES 123 (1973) ("In the first period, protection lasts for 28 years; then, during the 28th year, this protection may be extended for 28 more years, if the renewal is applied for by one of the persons specified in the statute."); Schrader, *supra* note 21, at 287 ("This article takes the position that the renewal interest vests upon timely application to the Copyright Office by the proper statutory claimant."); BARBARA A. RINGER & PAUL GITLIN, COPYRIGHTS 62 (rev. ed. 1965) ("If the assignor is living during the twenty-eighth year of the copyright, the assignee may file a renewal application in the assignor's name and thereby secure effective ownership of the renewal copyright."); COPYRIGHT LAW REVISION, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, chap. V, at 51 (Comm. Print 1961) ("Copyright expires after the initial term of 28 years, unless it is renewed during the last year of that term."); Ringer, *supra* note 92, at 186 ("As soon as a valid renewal claim is registered, the renewal is 'vested in interest'—that is, there is a 'present fixed right of future enjoyment'."); Seymour M. Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 26 (1955) ("It would seem that under the present law the date of application is the crucial date. If a timely application is made, the death of the applicant prior to the beginning of the renewal term will not defeat the rights of his heirs, legatees or assigns."); Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 527 (1945) ("If a childless author applies for renewal during the twenty-eighth year, and then dies before its end, can his widow get the renewal as against his assignee? Probably not, on the ground that the author's right vests on his application."); Theodore R. Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 733 (1944) ("[I]t would seem that survival until the end of the basic term is unnecessary and that, once vested, the renewal term cannot be divested by the death of the applicant."); Sidney J. Brown, *Renewal Rights in Copyright*, CORNELL L.Q. 459, 473 ("Frolich and Schwartz in their treatise suggest that if the author makes an assignment during the last year of the first term and then dies, the assignee and not the persons enumerated in the statute would get the new term. It is submitted that this would not be so unless the author or his assignee in the author's name had already obtained the renewal at the time of the assignment.").

188. NIMMER, *supra* note 4, § 9.05[C][1][a], at 9-75. Nimmer states the following as support for his conclusion:

This for the reason that the *Fisher* opinion repeatedly points to renewal provisions of the Acts of 1790 and 1831 requiring survivorship to the "expiration" of the original term of copyright, and then concludes (although not with specific reference to this point) that the renewal provision under the 1909 Act was not intended to constitute a substantive departure from earlier law.

Id.

189. Schrader, *supra* note 21, at 300-01.

in *Miller Music* to support her view that the Supreme Court intended "renewal period" to mean the period during the twenty-eighth year.¹⁹⁰

In the light of the policy of the act with respect to renewal right, "expectancy" means that any right to renewal which the author may have is entirely contingent upon the author's survival until the commencement of the twenty-eighth year. Since this is so, an author's assignment of his renewal rights in futuro can effectively transfer such rights to the assignee only if the author survives until the commencement of the twenty-eighth, or last, year of the original term. If the author survives he becomes vested with an absolute power to renew under the statute, and the prior contingent assignment in turn vests such renewal rights in the assignee.¹⁹¹

Therefore, in affirming the *Miller Music* decision, the Supreme Court most likely intended the reference to "renewal period" to mean the period of time during the twenty-eighth year.¹⁹²

Schrader's position that the renewal term should vest upon registration is based upon "the significance of the registration act under Section 24, the apparent support of *Miller v. Daniels*, and the clear support in the dicta of most copyright cases touching on the vesting issue."¹⁹³ Schrader supports her conclusion by acknowledging that the 1870 Act deleted the express requirement of survivorship contained in the previous copyright acts.¹⁹⁴ Because there is no legislative history addressing this language change, Schrader suggests that there was an inconsistency between the apparent requirement of survivorship "when coupled with" the requirement of

190. *Id.* (citing *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F. Supp. 188, 190 (S.D.N.Y. 1957)).

191. *Id.* (citing *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F. Supp. 188, 192 (S.D.N.Y. 1957) (emphasis added)).

192. *Id.*

193. *Id.* at 298 (emphasis omitted).

194. Schrader, *supra* note 21, at 283-84.

Arguably, the deletion of this phrase was a deliberate act by Congress to remove any question about the significance of survivorship after the statutory formalities have been complied with. Unfortunately, no committee report was printed, and the debate in Congress did not include any discussion of the renewal provision, let alone discussion of the reason for deletion of the reference to survivorship to the expiration of the original term.

Id. (citing CONG. GLOBE, 41st Cong., 2d Sess. 2679-83, 2854-58, 2872-80, 4819-27 (1870)). But see *Marascalco*, 953 F.2d at 472 (citing a section of these Congressional debates in support of its conclusion that Congress intended no substantial change to the renewal provisions of the 1831 Act).

fulfilling the statutory formalities before the expiration of the original term.¹⁹⁵ Therefore, the drafters may have "decided to remove even the implied 'requirement' of survivorship and clearly . . . permit the renewal interest to vest upon compliance with the requisite formalities."¹⁹⁶

D. Policy Arguments

1. Fairness

The vesting date of the renewal term is important because it will determine further rights to a copyright as between the author, his or her assignee, and his or her statutory successors. The "vesting upon registration" view is the fairest interpretation of § 304(a) because the rights of all of these parties will be determined on this date.¹⁹⁷ If the "vesting upon commencement of the renewal period" view were followed, the rights of the interested parties would be uncertain during the period between registration and the beginning of the twenty-ninth year. Congress probably did not intend such an impractical alternative.¹⁹⁸

The main purpose of the two-term copyright durational scheme is to benefit the author.¹⁹⁹ Upon the author's death, any such benefit passes to the statutory successor.²⁰⁰ At first glance, it appears that the later the vesting date of the renewal term, the greater the chance that the statutory successor will be able to obtain the right to the renewal term. However, because the copyright will be lost to the public domain if the statutory successor does not renew, this is not always the case.

195. Schrader, *supra* note 21, at 284.

196. *Id.*

197. Kupferman, *supra* note 187, at 733-34.

198. GOLDSTEIN, *supra* note 187, § 4.8.1, at 451-52.

199. Ringer, *supra* note 92, at 111-12 (citing H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909)).

It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.

Id. at 121 (citations omitted).

200. 17 U.S.C. § 304(a) (1976).

Statutory successors may not renew for the following reasons: they are unaware of their status as statutory successors of a copyright, they are unaware that there is a renewal requirement, or they may not think about renewing the copyright while mourning the death of the author. A most alarming problem may occur if the "vesting upon the twenty-ninth year" approach is followed. Suppose the author registers for his renewal term and then dies on the last day of the twenty-eighth year. If this were to occur, the statutory successor obviously would not have time to register for the renewal term before the end of the twenty-eighth year and the work would fall into the public domain.²⁰¹ Many commentators have cited this sequence of events as one of their reasons for supporting the "vesting upon registration" view.²⁰² If the renewal term were to vest upon registration, renewed copyrights would not accidentally fall into the public domain.

Therefore, the act of registration, which extends the copyright for a second twenty-eight year term should also vest the renewal interest so that legal relationships and rights of all parties will be determined and there will be no risk that a renewed copyright will fall into the public domain.²⁰³ In *Marascalco*, the court considered these policy arguments. While conceding that these are serious concerns, the court determined that "they are not enough to disturb the reading that best comports with statutory intent."²⁰⁴

2. Copyright Law Must Also Protect Publishers

The primary purpose of copyright is to benefit the author.²⁰⁵ The monopoly created by copyright gives the author the opportunity for great financial gain. In reality, it is often the publisher who owns the copyright and pays royalties to the author.²⁰⁶ The result is that the author is indirectly benefited by the ability to assign the copyright to the publisher.²⁰⁷ Because the publisher is necessary for the author to achieve

201. Schrader, *supra* note 21, at 299-300 (citing 28 Op. Att'y Gen. 162 (1910)). This is likely because the Copyright Office only enters renewal claims on behalf of the proper statutory claimant. Therefore, the renewal must be made in the author's name and registration cannot be made in all possible future claimants to avoid this situation from occurring. *Id.* at 300.

202. GOLDSTEIN, *supra* note 187, § 4.8.1, at 452; Rayner, *supra* note 187, at 6; Schrader, *supra* note 21, at 299; Kupferman, *supra* note 187, at 733-34.

203. Schrader, *supra* note 21, at 298-99.

204. *Marascalco*, 953 F.2d at 476.

205. Chafee, *supra* note 187, at 506.

206. *Id.* at 508.

207. *Id.* at 509.

success, the publisher must also benefit from the copyright.²⁰⁸ Therefore, the publisher's interest must also be considered when creating and interpreting copyright laws.²⁰⁹ Although the publisher reaps large benefits from best-selling works, they also lose a great deal of money on unsuccessful material.²¹⁰ Allowing the renewal term to vest upon registration furthers the publisher's interest. In providing an earlier vesting date, the publisher will be vested with more renewal terms, and is provided with a single date which finalizes the rights of all interested parties.²¹¹

III. WHEN DOES THE RENEWAL TERM VEST: AFTER THE COPYRIGHT RENEWAL ACT OF 1992

A. Statutory Construction

In 1992, President George Bush signed into law the Copyright Amendments Act of 1992.²¹² Title I of this Act is referred to as the Copyright Renewal Act of 1992.²¹³ The main purpose of the Copyright Renewal Act of 1992 is to provide a system of automatic renewal of copy-

208. *Id.*

[I]t does cost a good deal to print a book and to attract buyers. Even if an author could afford to publish his own book, he would not do the job well. And if the publishers did not get the benefit of the copyright monopoly, it would be hard for an author to find a publisher to bring out the book. Once the book was launched and became a success, any authorized competitor would eagerly jump into the market because his advertising would be low. He could reap where he had not sown. Both authors and readers would be helpless without publishers.

Id.

209. *Id.*

210. Chafee, *supra* note 187, at 509.

No doubt the return to a publisher from a particular book which becomes a bestseller may be far above the customary six percent. But we mustn't concentrate our gaze on this one book. Publishing is close to gambling. Many of the same publisher's books never pay back his original outlay. Only an occasional killing makes it possible for us to read a number of less popular but perhaps more valuable books. If we look at the rate of return on all books published by any firm, it does not seem excessive. Few publishers become millionaires. Thus copyright is necessary to make good publishers possible.

Id. at 509-10 (emphasis omitted).

211. This analysis applies to publishers and producers of all art forms, including music and film.

212. Pub. L. No. 102-307, 106 Stat. 264 (1992).

213. *Id.*

rights.²¹⁴ This legislation effectively resolves the dispute as to the proper vesting date of the renewal term for the relevant copyrights.

As previously explained, the renewal provisions of the 1976 Copyright Act contain areas of ambiguity which have resulted in conflicting court interpretations. In fact, Senate and House Reports considering the Copyright Renewal Act of 1992 both referred to the 1976 Copyright Act renewal provision as "one of the worst features of the present copyright law" with "unclear and highly technical requirement[s]" and "the cause of inadvertent and unjust loss of copyright."²¹⁵ Therefore, the Copyright Renewal Act of 1992 eradicates the problems associated with determining when the renewal term vests and, thus, provides a more definite method for determining the proper owner of the renewal term of copyright.

1. The Copyright Renewal Act of 1992

The Copyright Renewal Act of 1992, which prospectively became effective on June 26, 1992, only applies to copyrights secured during the fourteen year period between January 1, 1964, and December 31, 1977.²¹⁶ A copyright secured after December 31, 1977, has a single term of copyright which exists for the duration of the author's life plus an additional fifty years,²¹⁷ while a copyright secured prior to January 1, 1964, remains subject to the split of authority created by the *Frederick Music* and *Marascalco* decisions.²¹⁸ Therefore, the dispute as to when the renewal term vests remains relevant for works created before December 31,

214. H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 167 (1992). The Legislative History describes several justifications for this legislation as follows:

First, the sanction for failure affirmatively to renew (that is, permanent and irretrievable loss of copyright protection) is unduly harsh. Second, there has been a showing that innocent parties inadvertently suffer such a loss. Third, the bill will not impair existing "expectancies" or contractual interests in the renewal term. Fourth, the bill will limit sanctions and facilitate socially beneficial activities involving copyrighted works prior to an original term or a renewal registration. Fifth, the bill promotes registration as a prerequisite to lawsuit as being in the public interest.

Id. at 174.

215. H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 169 (1992), quoting S. REP. 473, 94th Cong. 1st Sess. 117-18 (1975); H. R. REP. NO. 1476, 94th Cong., 2d Sess. 134 (1976).

216. § 102(g)(1)-(2), 106 Stat. at 266.

217. 17 U.S.C. § 302(a) (1976). However, an anonymous work, pseudonymous work or a work made for hire exists for the duration of 75 years from the year of its first publication or 100 years from the year of creation, whichever expires first. 17 U.S.C. § 302(c) (1976).

218. NIMMER, *supra* note 4, § 9.05[A][2], at 9-66 to -67.

1963, or in other words, for works which must have been renewed by December 31, 1991.²¹⁹ Furthermore, the Copyright Renewal Act of 1992 does not apply to any court proceedings pending as of June 26, 1992.²²⁰

Section 102 of the Copyright Renewal Act of 1992 states in part as follows:

(a) Duration of Copyright: Subsisting Copyrights.—Section 304(a) of title 17, United States Code is amended to read as follows:

(a) Copyrights in first Term on January 1, 1978.—

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

....

[1](C) In the case of any other copyrighted work, . . .—

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

....

shall be entitled to a renewal and extension of the copyright in such work for a further term of 47 years.

....

[2](B) *At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, which—*

(i) *if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or*

(ii) *if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.*

219. *Id.*

220. § 102(g)(3), 106 Stat. at 266.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 47 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) *Such application is not a condition of the renewal and extension of the copyright* in a work for a further term of 47 years.²²¹

2. When Does the Renewal Term Vest

The Copyright Renewal Act of 1992 deletes the prerequisite of filing a renewal application with the Copyright Office in the twenty-eighth year as a condition of obtaining rights to the renewal term, thereby avoiding the conflict as to whether the renewal term vests upon registration or upon commencement of the renewal period.²²² The Copyright Renewal Act of 1992 provides that if there has been no registration for the extended term, the forty-seven year renewal term will automatically vest at the end of the original term of copyright.²²³

Although the Copyright Renewal Act of 1992 creates a system of automatic renewal, a strong inducement to register for the renewal period remains.²²⁴ If registration is secured during the twenty-eighth year, the right to this extended term vests upon the beginning of the renewal term in the person entitled at the time the renewal application is made.²²⁵ If there is no registration during the twenty-eighth year, the renewal term is secured by the automatic renewal provision, and the right to the extended term vests in the person entitled to the renewal term on the last day of the initial term

221. § 102(a), 106 Stat. at 264-65 (emphasis added) (quotation marks omitted).

222. H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 172 (1992).

223. *Id.*

224. *Id.* at 171.

225. § 102(a)(2)(B)(i), 106 Stat. at 265; H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 172 (1992).

of copyright.²²⁶ Therefore, if there has been no registration for the renewal term during the twenty-eighth year and an author who has assigned both terms of copyright is alive at the end of the initial term of copyright, his or her assign may enforce their contractual right to the renewal term of copyright. Alternatively, if there has been no registration for the renewal term during the twenty-eighth year and an author who has assigned both terms of copyright dies prior to the end of the initial term, his or her statutory successors will be entitled to the renewal term. Even though the Copyright Renewal Act of 1992 provides a system of automatic renewal, the renewal term will not ultimately vest in an assignee unless registration has been made in the twenty-eighth year during the life of the author.

3. Procedural Benefits Accorded Those Registering for the Renewal Term

Despite the creation of a system of automatic renewal, the prior concept of renewal registration is not wholly discarded.²²⁷ Several benefits are provided for a copyright owner who registers for the renewal period.²²⁸ For example, if renewal registration is made during the twenty-eighth year, the owner of a derivative work is prevented from continued exploitation of the derivative work and the certificate of registration is prima facie evidence as to the validity of the renewal copyright.²²⁹

As stated, one benefit accorded those registering for the renewal term of copyright involves the right to continued use of derivative works. In *Stewart v. Abend*,²³⁰ the assignee of the original and renewal terms of copyright created the film "Rear Window," a derivative work based upon the original copyright. Because the author died before the renewal term vested, the United States Supreme Court affirmed the Ninth Circuit Court

226. § 102(a)(2)(B)(ii), 106 Stat. at 265; H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 172 (1992).

227. The Renewal Act allows for registration to be made during the twenty eighth year, or any time during the renewal period, but the benefits accorded those who register for the renewal term will vary depending upon the timeliness of the registration. § 102(a)(3)(A)(i)-(ii), 106 Stat. at 265.

228. NIMMER, *supra* note 4, § 9.05[B][2], at 9-69. "Even as to works governed by the Copyright Renewal Act of 1992, the best practice is to register the renewal claim in the [twenty eighth year]." *Id.*

229. § 102(a)(4)(A), (B), 106 Stat. at 265-66.

230. 495 U.S. 207, 211-12 (1989). See also Michael R. Diliberto, *Looking Through the "Rear Window": A Review of the United States Supreme Court Decision in Stewart v. Abend*, 12 LOY. L.A. ENT. L.J. 299 (1992).

of Appeals' decision, holding that the motion picture company could not continue to exploit its derivative work.²³¹ The Copyright Renewal Act of 1992 provides that if renewal registration is made during the twenty-eighth year, the rule of *Stewart v. Abend* remains in force, and the owner of a derivative work is prevented from continued exploitation of the derivative work, absent a license.²³² Alternatively, the Copyright Renewal Act of 1992 provides that if no registration for the renewal term is made during the twenty-eighth year and, therefore, the renewal term is obtained by the automatic renewal provision, then a derivative work prepared pursuant to a grant made during the initial term may continue to be exploited during the renewal term.²³³

Another benefit accorded those registering for the renewal term of copyright involves the evidentiary weight accorded the certificate of registration. In *Epoch Producing Corp. v. Killiam Shows, Inc.*, the Second Circuit Court of Appeals held that the certificate of renewal registration was not prima facie proof of the facts stated therein or of the validity of the renewal copyright.²³⁴ The Copyright Renewal Act of 1992 provides that if registration for the renewal term is made after the twenty-eighth year, the rule in *Epoch* remains in force, and the evidentiary weight given to the certificate of registration will be within the discretion of the court.²³⁵ Alternatively, if registration for the renewal term is made during the twenty-eighth year, the certificate of registration constitutes prima facie evidence as to the validity of the copyright in the renewal term.²³⁶

The Copyright Renewal Act of 1992 provides an author the opportunity to register for the renewal term even if no registration has been made for the original term of copyright; however, the Register of Copyrights may request information with respect to the existence, ownership, or duration of the copyright for the original term.²³⁷ This opportunity for an author to

231. *Stewart*, 495 U.S. at 216.

232. § 102(a)(4)(A), 106 Stat. at 265. "This incentive to make renewal registration parallels the derivative works clause of the termination provisions of section 203 and 304(c) of title 17[sic], United States Code." H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 180 (1992).

233. § 102(a)(4)(A), 106 Stat. at 265. The statute expressly prohibits the creation of additional derivative works. *Id.*

234. *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 745-46 (2d Cir. 1975).

235. *Id.*

236. § 102(a)(4)(B), 106 Stat. at 266.

237. § 102(b)(1), 106 Stat. at 266. This section states as follows:

(b) Registration.—(1) Section 409 of title 17, United States Code, is amended by adding at the end the following:

"If an application is submitted for the renewed and extended term provided for in section 304(a)(3)(A) and an original term registration has not been made, the

"cure" his or her failure to register the copyright will ensure authors all available remedies for infringements occurring after registration.²³⁸

IV. CONCLUSION

In response to the *Frederick Music* and *Marascalco* conflict, Congress created the Copyright Renewal Act of 1992. Although the Copyright Renewal Act of 1992 has resolved many of the vesting conflicts created by the prior Copyright Acts, the amendment is only applicable to copyrights initially protected by federal copyright law during the fourteen year period between January 1, 1964, and December 31, 1977.²³⁹ As explained, the split of authority created by the *Frederick Music* and *Marascalco* decisions remains in force for works initially protected by copyright law prior to January 1, 1964.²⁴⁰

Although pursuant to the Copyright Renewal Act of 1992 the renewal term does not technically vest until commencement of the renewal term, the time of registration is the determinative date.²⁴¹ Therefore, as recommended in this Article, the Copyright Renewal Act of 1992 is more reflective of the "vesting upon registration" view than the "vesting upon commencement of the renewal period" view.²⁴² This "vesting upon registration" view should also be followed for copyrights secured before January 1, 1964.

A copyright is a valuable right given to the author. As explained, the author is allowed to assign both the initial and renewal terms of this copyright.²⁴³ Although the author must be alive when this copyright is renewed during the last year of the initial term of copyright for works

Register may request information with respect to the existence, ownership, or duration of the copyright for the original term."

Id. (emphasis added).

238. H. R. REP. NO. 379, 102d Cong., 2d. Sess. 166, 173 (1992).

239. § 102(g)(1)-(2), 106 Stat. at 266.

240. NIMMER, *supra* note 4, § 9.05[A][2], at 9-66 to -67.

241. § 102(a)(2)(B)(i), 106 Stat. at 265. This section states in part:

At the expiration of the original term . . . the copyright shall endure for a renewed . . . term . . . if an application . . . has been made . . . within 1 year before expiration of the original term . . . shall vest . . . upon beginning of such further term, in any person . . . entitled . . . to the renewal . . . at the time the application is made . . .

Id. (emphasis added).

242. NIMMER, *supra* note 4, § 9.05[C][1][c], at 9-81. "Thus, at the same time that the Copyright Renewal Act of 1992 nominally adopted *Marascalco's* pro-heir time of vesting, in reality the upshot is much more in line with *Sickler's* pro-grantee result." *Id.*

243. *Fred Fisher Music*, 318 U.S. 643, 657 (1943).

initially protected by federal copyright law before January 1, 1964, § 304(a) of the 1976 Copyright Act does not require that the author survive until the beginning of the renewal term.²⁴⁴

In order to avoid the plain meaning of § 304(a) of the 1976 Copyright Act, the Ninth Circuit Court of Appeals, in the *Marascalco* case, unconvincingly determined that the statute was not clear on its face.²⁴⁵ This reading of the statute enabled the Ninth Circuit Court of Appeals to go beyond the plain meaning of the statute and interpret the legislative history. After acknowledging that there is no longer an express survivorship requirement in the statute, the court determined that the renewal provisions still contain the substance of the early copyright acts that contained a survivorship requirement.²⁴⁶ Although no legislative history was cited to explain why Congress deleted the survivorship requirement, the court determined that there is still such a requirement because a case deciding the issue of alienability of copyright stated that the renewal provisions of the 1909 Act were a continuation of prior copyright laws.²⁴⁷ However, the authority which supports the *Marascalco* holding is unpersuasive.

The renewal term for federal copyrights secured prior to January 1, 1964, should vest upon registration with the Copyright Office, in the twenty-eighth year of the initial term, during the life of the author. The plain meaning of the statute, the lack of legislative history explaining why the survivorship requirement was deleted, the strong dicta and the overwhelming commentary all support this view. Additionally, the "vesting upon registration" approach will finalize the legal rights of all the interested parties, avoid unnecessary and accidental loss of copyrights to the public domain, and recognize the publisher's interest in copyright. Finally, the "vesting upon registration" approach is consistent with the renewal provisions embodied in the Copyright Renewal Act of 1992.

244. 17 U.S.C. § 304(a) (1976).

245. *Marascalco*, 953 F.2d at 470-71.

246. *Id.* at 471.

247. *Id.* at 472.

