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Copyright Ownership of Joint Works and Terminations of Transfers

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I. INTRODUCTION

Under the terms of section 24 of the Copyright Act of 1909,[1] the death of Oscar Hammerstein in 1960 resulted in the "partnership" of Richard Rogers and (Mrs.) Oscar Hammerstein (and James and William Hammerstein, and Alice Hammerstein Mathias, his children—the latter two by a previous marriage), in the ownership of such works as *Oklahoma*, *Carousel*, and *South Pacific*.[2] Oscar Hammerstein may have wanted it that way, but want it or not, he was powerless under the Copyright Act to change the arrangement. Numerous works are the product of the combined efforts of more than one author. Such joint authorship raises problems of ownership and control that can plague joint authors and their estates. The Copyright Act of 1976[3] replaces the Copyright Act of 1909, and unintentionally allows contemporary Oscar Hammersteins to provide for the control of certain ownership interests,[4] the "termination of transfer" interests, to vest in a joint author. This Article is not intended as a general treatment of all aspects of the new termination of transfer provisions under the 1976 Copyright Act, since there are already at least four such treatments.[5] Rather, it examines one particular aspect of the form of copyright ownership among joint authors: the effect of joint tenancy or tenancy in common[6] on the termination of transfer

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[1] 17 U.S.C. §§ 1-216 (1976) [hereinafter referred to as the 1909 Act].

[2] They may already have signed away their contingent rights in these works. *See infra* text accompanying notes 37-43.

[3] 17 U.S.C. §§ 101-810 (Supp. III 1979) [hereinafter referred to as the 1976 Act]. Both the 1909 Act and the 1976 Act appear in the 1976 United States Code. The 1976 Act, however, appears in the appendix to title 17.

[4] Specifically, the "ownership interests" that can be controlled are those referred to in the 1976 Act as the "termination interest," the 1976 Act's analogue to the renewal term.

[5] *See* 3 M. NIMMER, NIMMER ON COPYRIGHT §§ 11.01-.07 (1981) [hereinafter cited as M. NIMMER]; Curtis, *Protecting Authors in Copyright Transfers: Revision Bill § 203 and the Alternatives*, 72 COLUM. L. REV. 799 (1972) [hereinafter cited as Curtis]; Curtis, *Caveat Emptor in Copyright: A Practical Guide to the Termination-of-Transfers Provisions of the New Copyright Code*, 25 BULL. COPYRIGHT SOC'Y U.S.A. 19 (1977) [hereinafter cited as *Caveat Emptor*]; Stein, *Termination of Transfers and Licenses Under the New Copyright Act: Thorny Problems for the Copyright Bar*, 24 U.C.L.A. L. REV. 1141 (1977).

[6] For a discussion of copyright as community property, see Patry, *Copyright and Community Property: The Question of Preemption*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 237 (1981).

provision.[7]

II. JOINT OWNERSHIP

The question of rights among joint authors has been little explored.[8] In fact, the Copyright Act of 1976 does not use the term "joint authors" or "joint authorship." Rather the term used is "joint work," which is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[9]

Under this definition a joint work is created by both the intention of the authors and the inseparability or interdependence of the parts that creates "a unitary whole." Examples of works of joint authorship are a song or musical production created by the combined efforts of a composer and a lyricist or librettist, or a book written by two authors in a combined effort.[10]

The designation of a work as a joint work has legal significance because of the 1976 Copyright Act provision regarding initial ownership:

> INITIAL OWNERSHIP.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.[11]

Although a single author is the sole initial owner of the entire copyright, the authors of a joint work share some form of co-ownership. The nature of this co-ownership, however, is not specified in the statute.

Under the common law, as modified by state statutes, the two most important forms of co-ownership of property are joint tenancy and tenancy in common. For purposes of this analysis the significant difference between joint tenancy and tenancy in common is the right of survivorship. If one cotenant in common dies, that cotenant's interest in the copyright passes by will or intestacy with the rest of the deceased cotenant's estate.[12] Thus, the legatees or distributees of the deceased cotenant succeed to the cotenant's copyright interest. If, however, the cotenancy is a joint tenancy, when one cotenant dies his interest is extinguished,

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[7] There are actually two termination provisions. The analysis in this Article refers to 17 U.S.C. § 203 (Supp. III 1979). A parallel provision appears in § 304(c). While § 203 applies to copyrights created after January 1, 1978, § 304 extends the terms of copyrights subsisting on January 1, 1978. The termination provisions in § 304(c) are designed to parallel those of § 203, and although some differences in analysis are occasionally required, this Article will treat only the § 203 termination provisions.

[8] The case law relates to various aspects of the rights and duties of co-owners, including joint authors, and predates the 1976 Act. *See infra* notes 16-34 and accompanying text. Nimmer's four volume treatise also discusses the general concept of co-ownership—in fewer than 40 pages. 1 M. NIMMER, *supra* note 5, ch. 6.

[9] 17 U.S.C. § 101 (Supp. III 1979). The 1909 Act did not use any of these terms. 17 U.S.C. § 26 (1976).

Nimmer identifies a number of situations from which, he maintains, a joint work will result. He expansively defines a "joint work" as any work "in which the copyright is owned in undivided shares by two or more persons." 1 M. NIMMER, *supra* note 5, § 6.01. His definition, however, is one of "co-ownership," not of "joint work." Under the § 101 definition, a joint work can be created only by joint authorship, which results in initial co-ownership under § 201(a).

[10] There are numerous questions involved in the determination of what constitutes joint authorship, as contrasted, for example, with separate authorship of parts of a collective work, but that issue is well covered by Nimmer and the case law on which he relies. *See* 1 M. NIMMER, *supra* note 5, ch. 6. *See also* Comment, *Problems in Co-ownership of Copyrights*, 8 U.C.L.A. L. REV. 1035 (1961) [hereinafter cited as Comment].

[11] 17 U.S.C. § 201(a) (Supp. III 1979).

[12] 2 AMERICAN LAW OF PROPERTY § 6.5 (A. Casner ed. 1952) [hereinafter cited as 2 AMERICAN LAW OF PROPERTY].

leaving the surviving cotenants as exclusive owners of the copyright.[13] Since the deceased cotenant's interest is extinguished, there is no interest in the copyright to pass by will or intestacy.

The House Report on the Copyright Act of 1976 makes it clear that prior case law is to govern the relations between co-owners: "There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on this point is left undisturbed."[14] The court-made law is summarized in the next sentence of the Report:

> Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use of [sic] license the use of a work, subject to a duty of accounting to the other coowners for any profits.[15]

The court-made law to which the Report alludes had its American origin in *Carter v. Bailey*.[16] Two partners dissolved their partnership in a book business, and agreed in writing that the copyrights and other property they had formerly owned as partners, they would now own "as individuals, co-owners, co-tenants and tenants in common."[17] One partner sold his interest to a publisher who published and sold the books to which the copyrights applied. The other partner sued for an accounting for profits. The issue before the court was whether the co-owner of a copyright was entitled to an accounting from the other in the absence of any agreement to that effect.[18] Preliminary to the disposition of that issue the court observed that "when he [the author] has embodied his thoughts in manuscript, the latter is his exclusive property having the characteristics of transfer and succession common to personal property. It is an incorporeal right, . . . a distinct, well defined, though intangible legal estate."[19] The court stated that the

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[13] *Id.* § 6.1.

[14] H. R. REP. NO. 1476, 94th Cong., 2d Sess. 121 (1976) [hereinafter cited as 1976 House Report]. S. REP. NO. 473, 94th Cong., 1st Sess. (1976) was the basis for the 1976 House Report.

[15] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121 (1976).

[16] 64 Me. 458 (1874).

[17] *Id.* at 458.

[18] The accounting was denied on the theory that at common law cotenants may each freely use the property. *Id.* at 465. Later case law modified the copyright "tenancy in common" by finding a constructive trust for the benefit of co-owners, and created a right of accounting. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944) (Hand, J.); Ted Browne Music Co. v. Fowler, 290 F. 751, 754 (2d Cir. 1923); Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 646-47 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d cir.), *cert. denied*, 409 U.S. 997 (1972); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165, 167 (S.D.N.Y. 1947); Edward B. Marks Music Corp. v. Wonnell, 61 F. Supp. 722, 727 (S.D.N.Y. 1945); Crosney v. Edward Small Productions, 52 F. Supp. 559, 561 (S.D.N.Y. 1942); Klein v. Beach, 232 F. 240, 247 (S.D.N.Y. 1916), *aff'd*, 239 F. 108 (2d Cir. 1917); Maurel v. Smith, 220 F. 195, 201 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921); Noble v. D. Van Nostrand Co., 63 N.J. Super. 534, —, 164 A.2d 834, 837-38 (1960) (dictum, since the case involved research data). The *Shapiro* decision justified this rule by making the factual determination that one coowner's use of the copyright in an era of mass dissemination may destroy the value of the copyright. 73 F. Supp. at 168; *accord* Crosney v. Edward Small Productions, 52 F. Supp. at 561. Comment, *supra* note 10, at 1044, identifies four theories on which an accounting is allowed:

> 1) a constructive trust where one alone takes the copyright [i.e., the copyright is in the name of only one coauthor] as in *Maurel*; 2) destruction of the property rights by the exploiting co-owner as in *Crosney*; 3) exclusion by the non-exploiting co-owner of the exploiting co-owner as in the "Melancholy Baby" case [Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165 (S.D.N.Y. 1947)], and 4) a broad constructive trust, as in the "12th Street Rag" case [Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569, *modified on rehearing*, 223 F.2d 252 (2d Cir. 1955), *rev'g* 115 F. Supp. 754 (S.D.N.Y. 1953)], based on a fiduciary relationship between co-owners of a copyright when dealing with the jointly owned property.

[19] 64 Me. at 461-62 (1874).

copyright may be assigned to one person, or to more than one person, and concluded that:

> When the assignment is made to more than one, the ownership is not that of partners; although they may enter into any contract of partnership *inter sese*, or between themselves and publishers of their works . . . . In the absence of any contract modifying their relations, they are simply owners in common, as the plaintiff has alleged, each owning a distinct but undivided part which or any part of which alone he can sell, as in the case of personal chattels.[20]

This dictum rejected the business associations model commonly used in tenancy in partnership,[21] and instead adopted a property model based on the law relating to personal chattels and real property.[22]

Later cases adopted this same property approach. Some found it necessary only to describe the ownership in terms of an undivided interest in the copyright.[23] Other courts described the interest as analogous to, "akin to," or bearing "a close resemblance to" a tenancy in common,[24] or used other equivocating language.[25] The presumption today, however, in accord with the 1976 House and Senate Reports, is that "coowners of a copyright [will] be treated generally

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[20] *Id.* at 463.

[21] More accurately, tenancy in partnership is based on the law merchant. 2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.8. This basis, of course, does not preclude the formation of a partnership and the transfer of the copyright to the partnership to be held by the parties as tenants in partnership. *See, e.g.*, Stuff v. La Budde Feed & Grain Co., 42 F. Supp. 493, 497 (E.D. Wis. 1941); Edward B. Marks Music Corp. v. Wonnell, 61 F. Supp. 722, 726-27 (S.D.N.Y. 1945).

[22] A "tenancy in partnership" conclusion would have meant that the court considered coauthors to be partners in a writing venture. Section 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." UNIF. PARTNERSHIP ACT. § 6, 6 U.L.A. 22 (1969). If coauthorship were defined as the carrying on of a business for profit, the copyright could easily be considered partnership property and the partners owners as tenants in partnership.

Had a partnership model been adopted, however, the partnership property would generally be treated as a tenancy in common:

> Under the American view, the partnership realty is impressed with a trust and treated as assets to be applied to the payment of firm debts and to the satisfaction of the equities of the individual partners, if needed for that purpose, but subject to such trust is held by the partners as tenants in common.

2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.8; *see also* UNIF. PARTNERSHIP ACT, §§ 8, 25, 26, 31(4), 40, 6 U.L.A. 114, 326, 349, 376, 468 (1969). An interesting hypothetical question is raised. If coauthors were initial co-owners as tenants in partnership, would the work be a "work made for hire" under § 201(b), in which case the partnership would be the "author" rather than the partners; or, would authority flow through to the partners on the theory that there is no such legal entity as a partnership? If authorship flows through, and there is a third partner in the venture whose sole contribution is marketing, would he be a coauthor? The answers to these questions would have a impact on such issues as the duration of the copyright, which is measured by the life of the author; on the rights to license the copyright, which depend on whether it belongs to the individuals or to the partnership; and on the claims to proceeds from use of the copyright.

[23] *See, e.g.*, Pye v. Mitchell, 574 F.2d 476, 480 (9th Cir. 1978); Donna v. Dodd, Mead & Co., 374 F. Supp. 429, 430 (S.D.N.Y. 1974); Maurel v. Smith, 220 F. 195, 201 (S.D.N.Y. 1915) (Hand, J.), *aff'd*, 271 F. 211 (2d Cir. 1921) (this case introduced the idea of joint authorship to American law); *see also* Herbert v. Fields, 152 N.Y.S. 487, 489-90 (1915).

[24] Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 646 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); Sweet Music, Inc. v. Melrose Music Corp., 189 F. Supp. 655, 657, 659 (S.D. Cal. 1960); Noble v. D. Van Nostrand Co., 63 N.J. Super. 534, —, 164 A.2d 834, 838 (1960) (dictum because the case involved research data).

[25] Silverman v. Sunrise Pictures Corp., 273 F. 909, 914 (2d Cir. 1921) ("assuming tenancy or ownership in common" and compares with the principles of tenancy in common), *modified*, 290 F. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1923); Klein v. Beach, 232 F. 240, 245 (S.D.N.Y.) ("the co-owners, or, as some cases say, the tenants in common"), *aff'd*, 239 F. 108 (2d Cir. 1917).

as tenants in common."[26]

The courts found tenancies in common in order to support one of two legal conclusions: (1) that one co-owner, or the licensee of one co-owner, cannot be liable to another co-owner as an infringer for the use of the copyright;[27] or (2) that the act of one co-owner in filing for a renewal copyright is the act of all.[28] Arguably these same conclusions would flow from the finding of a joint tenancy, but only two courts have considered that estate in a copyright.

In *Stuff v. La Budde Feed & Grain Co.*,[29] Stuff and Wilson combined to do an illustration known as "The Original Optimist." A certificate of copyright registration was issued to "Stuff and Wilson." The court expressly asked: "But what form of title did they hold?"[30] Answering its own question, the court stated:

> No words of survivorship appear in the grant to indicate that Stuff and Wilson held as joint tenants. Joint estates, with their attendant incident of survivorship, are no longer favored by the law, and will not be found unless the parties, by specific language evidencing that intent, indicate the desire to create such an estate. . . . The principle applies to estates in personalty as well as to estates in land. . . . No language can be found in either the certificate of copyright or the copyright notice inscribed on the copies of the illustration offered for sale evidencing any intent to create an estate in joint tenancy.[31]

The court in *Edward B. Marks Music Corp. v. Wonnell*[32] made a similar point:

> I am not impressed, however, neither do I hold with the contention of Mattie Shanks that the survivor was to take all. In other words that this was to be a joint tenancy with the right of survivorship. . . . Passing on a question of this kind and in determining as to the intention of the parties, one must look at the surrounding circumstances. . . . I certainly can't conceive that they had in mind that if divorced there would still be a right of survivorship. It seems to me it would be inequitable to hold here that this oral agreement [that the survivor was to take all] made between the two was ever intended to cover such a situation. Such oral agreements are frowned upon by the Courts and should only be enforced when they have been established by evidence so strong and clear as to leave no doubt and when the result of enforcing them would not be inequitable or

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[26] 1976 House Report, *supra* note 14, at 121; *accord*, Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165, 167-68 (S.D.N.Y. 1947); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859, 865, 868 (S.D.N.Y. 1942) (separate cases in the same opinion); Stuff v. La Budde Feed & Grain Co., 42 F. Supp. 493, 497 (E.D. Wis. 1941); Brown v. Republic Prod., 156 P.2d 40, 40-41 (Cal. App.), *aff'd*, 26 Cal. 2d 867, 161 P.2d 796 (1945); Brown v. Republic Prod., 156 P.2d 42, 43 (Cal. App.), *aff'd*, 26 Cal. 2d 874, 161 P.2d 798 (1945); Denker v. Twentieth Century-Fox Film Corp., 10 N.Y.2d 339, 344, 179 N.E.2d 336, 337, 223 N.Y.S.2d 193, 195 (1961); Nillson v. Lawrence, 148 A.D. 678, 679-80, 133 N.Y.S. 293, 295 (1912); *see* authorities cited in Noble v. D. Van Nostrand Co., 63 N.J. Super. 534, —, 164 A.2d 834, 838 (1960).

[27] *See* Picture Music Inc. v. Bourne, Inc., 314 F. Supp. 640, 646 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); Sweet Music, Inc. v. Melrose Music Corp., 189 F. Supp. 655, 659 (S.D. Cal. 1960); Brown v. Republic Prod., 156 P.2d 40, 41 (Cal. App.), *aff'd*, 26 Cal. 2d 867, 161 P.2d 796 (1945); Brown v. Republic Prod., 156 P.2d 42, 43 (Cal. App.), *aff'd*, 26 Cal. 2d 874, 161 P.2d 798 (1945); Noble v. D. Van Nostrand Co., 63 N.J. Super. 534, —, 164 A.2d 834, 837-38 (1960) (dictum, because this case involved research data); Denker v. Twentieth Century-Fox Film Corp., 10 N.Y.2d 339, 345, 179 N.E.2d 336, 337, 223 N.Y.S.2d 193, 195 (1961).

[28] *See* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165, 167 (S.D.N.Y. 1947); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859, 868 (S.D.N.Y. 1942).

[29] 42 F. Supp. 493 (E.D. Wis. 1941).

[30] *Id.* at 497.

[31] *Id.*

[32] 61 F. Supp. 722 (S.D.N.Y. 1945).

unjust.[33]

Both courts assume that ownership can be by joint tenancy, but both express the contemporary disfavor for joint tenancy, and find inadequate evidence to support such a conclusion. In the leading copyright treatise, Nimmer agrees: "Joint owners may by contract render their relationship that of a joint tenancy, with right of survivorship, but such a relationship is not favored by the law and will not be found in the absence of specific language evidencing such an intent by the parties."[34] With no evidence to support a contrary conclusion, and recognizing Nimmer's special use of the term joint owners,[35] it appears equally true for original ownership by joint authors as for other co-owners, that although disfavored, copyright ownership may be in joint tenancy.[36]

III. TERMINATIONS OF TRANSFERS

The 1909 Copyright Act provided an original term of twenty-eight years and a renewal term of twenty-eight years.[37] If a co-owner died during either copyright term, the ownership of the remainder of that term depended on whether the co-owners were joint tenants or tenants in common. If they were joint tenants, the survivor owned the entire estate, since the interest of the deceased joint tenant ceased. If they were tenants in common, the successors in interest of the deceased cotenant succeeded to that cotenant's interest.

If, however, a co-owner died during the original term, ownership of the renewal term was determined by the copyright statute, regardless of the type of ownership during the original term.[38] Since the renewal term of the copyright was a separate grant, the author had only an alienable[39] contingent interest in the renewal copyright.[40] The contingent interest vested only if the author was alive at the commencement of the renewal term.[41] If the author died prior to such vesting, however, then by the terms of section 24 of the 1909 Copyright Act the "widow, widower, or children of the author," or if none of them were living, "the author's executors, or in the absence of a will, his next of kin," took the renewal term when it commenced.[42] Because the author did not own the contingent renewal interest of the widow, widower, or other statutory successor, he could not alienate it from them.

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[33] *Id.* at 727-28.

[34] 1 M. NIMMER, *supra* note 5, § 6.09.

[35] *See supra* note 9.

[36] *But see infra* note 72.

[37] 17 U.S.C. § 24 (1976). The renewal term commenced immediately upon expiration of the original term, provided that, during the final year of the original term, application for renewal was made by "the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin." *Id.*

[38] Miller Music Corp. v. Daniels, 362 U.S. 373, 378 (1960).

[39] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 656 (1943).

[40] Silverman v. Sunrise Pictures Corp., 273 F. 909, 911, 912-13 (2d Cir. 1921), *modified*, 290 F. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1922); Picture Music Inc. v. Bourne, Inc., 314 F. Supp. 640, 644 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); Sweet Music, Inc. v. Melrose Music Corp., 189 F. Supp. 655, 657 (S.D. Cal. 1960).

[41] This statement glosses over the problem of when the author's interest in the renewal copyright vests: at the time the author could apply for the renewal copyright, at the time he does apply for the renewal copyright, or at the time the renewal copyright begins. Because the issue is not crucial to this analysis, it is not treated here. *See* 2 M. NIMMER, *supra* note 5, § 9.05 [C].

[42] Thereby essentially creating two renewal interests as alternative contingencies. *See supra* note 37.

The alienability of their own renewal interests by the author and other holders of the contingent interests in the renewal copyright was largely responsible for the termination of transfer provisions that appear in the 1976 Copyright Act.[43] The 1976 Copyright Act replaced the twenty-eight year original term and the twenty-eight year renewal term with a single grant for a term of life of the author plus fifty years.[44] It also added a right to terminate any grant or license executed by the author and not made by will.[45] This right of termination was expressly made inalienable.[46] The House Report states the reasons for the termination provision, section 203, as follows:

> The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.[47]

The author can effect this termination, or "[w]here an author is dead, his or her termination interest is owned, and may be exercised by his widow or her widower and his or her children or grandchildren," the grandchildren taking per stirpes.[48] Although the renewal interest under the 1909 Copyright Act passed to the executor or next of kin in the absence of a widow, widower or children, under section 203 of the 1976 Copyright Act the termination interest fails in the absence of a widow, widower, children or grandchildren.[49] On the other hand, under the 1909 Copyright Act a renewal interest could not pass by will or intestate succession. The right of termination under the 1976 Copyright Act similarly cannot pass by will or intestate succession. The statutory takers of the termination inter-

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[43] *See* Curtis, *supra* note 5, at 799-820.

The Supreme Court in Fred Fisher Music Co v. M. Witmark & Sons, 318 U.S. 643 (1943), was unwilling to accept the policy argument that under the 1909 Act authors ought to be protected from their own improvidence and the author's contingent interest in the renewal copyright declared inalienable. The Court stated that it was unwilling "to recognize that authors are congenitally irresponsible, . . . [and] frequently . . . so sorely pressed for funds that they are willing to sell their work for a mere pittance." 318 U.S. at 656. Congress apparently was less reluctant.

[44] 17 U.S.C. § 302(a) (Supp. III 1979). In the case of joint works the term is the life of the last surviving joint author, plus 50 years. *Id.* § 302(b). In the case of works for which the life of the author cannot be an effective measure (anonymous works, pseudonymous works, and works made for hire), the term is 75 years from publication or 100 years from creation, whichever period expires first. *Id.* § 302(c).

[45] 17 U.S.C. § 203 (Supp. III 1979). Subsection (a) provides in relevant part:

> CONDITIONS FOR TERMINATION.—
> In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, . . . otherwise than by will, is subject to termination . . . .
> . . . .
> (3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant or [under certain circumstances, up to] forty years from the date of execution of the grant.

[46] 17 U.S.C. § 203(a)(5) (Supp. III 1979) provides: "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." Section 1203(b)(4) provides: "A further grant, or agreement to make a further grant . . . is valid only if it is made after the effective date of the termination [unless made between those serving notice of termination and the original grantee after the serving of notice of termination]."

[47] 1976 House Report, *supra* note 14, at 124.

[48] 17 U.S.C. § 203(a)(2) (Supp. III 1979).

[49] One might also note that if a state were to recognize homosexual marriages, § 24 would have allowed the renewal interest to vest in the survivor, whereas § 203 ostensibly limits the termination interest to "his widow" or "her widower."

est, however, take only that interest. The author may bequeath the copyright itself to whomever he chooses. Since there is no separate renewal grant, the entire copyright then passes to the beneficiary under the bequest.

Section 203(a) provides further that the termination interest, which is inalienable and which cannot pass by will or intestacy, applies only to "the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author . . . otherwise than by will."[50] There are two important reservations in this provision.[51] First, it applies only to transfers and licenses, not to ownership interests that are retained by the author. The concept of a license has a substantial background in the law of property. It has been developed, somewhat independently, in the law of copyright as well.[52] The concept of a "transfer of copyright ownership" is new in the 1976 Copyright Act. It is defined in section 101 as "an assignment, mortgage, exclusive license,[53] or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."[54] Section 201(d)(1), which is captioned "Transfer of Ownership," provides that: "[T]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession."[55] The concept of "transfer or license" is very broad. It should still be noted, however, that the owner of the termination interest may terminate only transfers and licenses, and not copyright interests that have never been alienated by the author. Unlike the renewal interest, which was a separate grant of copyright, the termination interest is merely a right to terminate grants of transfer or license that have already been made.

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[50] 17 U.S.C. § 203(a) (Supp. III 1979).

[51] In addition to the reservations discussed in the text there are two other express reservations. First, § 203 termination does not apply to a "work made for hire," *i.e.*, a work made within the scope of one's employment or certain specially ordered or commissioned works that are contractually recognized as being made for hire. 17 U.S.C. § 101 (Supp. III 1979). Second, it applies only to transfers "executed" after the effective date of the 1976 Act. Section 304(c) is designed to cover transfers executed prior to that date. Nimmer, however, demonstrates that a grant of common-law copyright executed prior to that date is not subject to termination under either provision. 3 M. NIMMER, *supra* note 5, § 11.02[A][1].

[52] There is some difference between the use of the term "license" in connection with real property and its use in connection with copyright law. In real property a license is revocable at will. 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 428 (1967). An irrevocable "license" is an easement. *Id.* ¶ 427. In copyright law (an incorporeal right in tangible personal property) the term license is applied to both revocable and irrevocable grants of temporary use. The important point, as will become apparent below, is that the law of copyright licensing developed because of the need to avoid parting with an ownership interest.

Under the 1909 Act, copyrights were considered indivisible; one could not alienate less than the whole copyright. Because copyrights generally are not exploited by the authors themselves, it was important that the author be able to grant rights to another without being forced in every instance to give up the entire copyright. This was accomplished by licensing. A crucial question then developed as to whether a particular transaction was a license or an assignment. If it was a license, then the author had not parted with ownership of any part of the copyright.

Section 201(d)(2) of the 1976 Act abolishes the doctrine of indivisibility by providing that any of the exclusive rights granted by section 106, or any subdivision of any of those rights, can be transferred and owned separately. The Act, however, preserves the distinction between a transfer and a nonexclusive license. For a discussion of the issues involved in copyright licensing and the doctrine of indivisibility, see 3 M. NIMMER, *supra* note 5, § 10.01.

[53] There is some redundancy in the termination provisions. Termination applies to "the exclusive or nonexclusive grant of a transfer or license," and the term "transfer of copyright ownership" is defined to include the exclusive license.

[54] 17 U.S.C. § 101 (Supp. III 1979).

[55] *Id.* § 201(d)(1).

The second reservation to section 203(a) is that the right of termination does not apply to transfers by will or transfers not executed by the author. Section 203(a) expressly states that it applies to the grant of a transfer or license "otherwise than by will." By its terms it precludes the termination of a bequest. It also precludes the termination of any transfer by intestate succession or otherwise by operation of law, since such a transfer would not be "executed by the author."

For example, the author's entire copyright interest might be left by will to the author's mother. The termination interest passes by statute to the author's widow or widower, and children or grandchildren. Assume the author has no widow, widower, or grandchildren, and only one surviving child. Unlike the 1909 Copyright Act, the 1976 Copyright Act gives no copyright interest to the statutory "successors," in this case the child. The author's mother receives "by will" the entire copyright interest. Because it is made "by will," the author's child may not terminate the transfer. Further, the author's child may not terminate any future transfer of that interest by the author's mother, since such a transfer would not be "executed by the author."

Consider the same case, but assume that while living the author made a transfer of publication rights to a publisher. Also assume that by the author's will the mother takes the royalties under the publication contract. Since the transfer of publication rights to the publisher is a "transfer," under section 203 the statutory successors to the termination rights may terminate that transfer. Section 203(b) provides that "upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests," with certain limitations.[56] This use of the word "revert" is confusing.[57] Because the will left the copyright to the mother, one would expect the mother to hold any reversionary interest. It seems clear, however, that the provision intends the "reversionary interest" to be in the statutory successors to the termination interest.[58]

This means that an author may pass by will or intestate succession any interest he has not otherwise transferred, but any interest the author has transferred is subject to a contingent termination interest held by the statutory successors. Stated another way, the author may pass to anyone he chooses any copyright interest with which he has not already parted. Any interest with which the author has parted, however, may be "reclaimed" by the owner of the termination interest—the author, if he survives, or the statutory successors if the author does not survive. Therefore, since the author in the example above parted with the publication rights, that copyright interest may be "reclaimed" by his surviving child. When that happens, the contractual royalties going to the author's mother—not a copyright interest—will no doubt cease.[59] Despite the legal struc-

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[56] *Id.* § 203(b).

[57] "A reversion is the interest remaining in the grantor, or in the successor in interest of a testator, who transfers a vested estate of a lesser quantum than that of the vested estate which he has." 1 AMERICAN LAW OF PROPERTY, *supra* note 12, § 4.16.

[58] Note that the statutory successors take only what was transferred. If the author transferred the right to publish for 50 years, and only 15 years of that term remain, those rights "revert" to the mother from the statutory successors at the end of the remaining 15 years of the term.

[59] In *Caveat Emptor*, *supra* note 5, at 62-64, the author raises the possibility that as a condition of the termination, the owner of the termination interest must assume the obligation of such payments to the copyright owner, but concludes that the owner of the termination interest "should not be required to continue the royalty payments."

ture of the transaction, what has happened is that the royalty interest is transferred from the author's mother to the author's child despite the author's express bequest to the contrary.

IV. JOINT AUTHORS AND THE TERMINATION INTEREST

Section 203(a) of the 1976 Copyright Act provides that:

> In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.[60]

There is no reason to suppose that joint authors are any less interested in the well-being of their families than are sole authors. The selection of a joint author, however, implies some degree of professional trust in the coauthor. A joint work is often ongoing, requiring periodic revision or supervision in its use by others. An author might wish to entrust this responsibility to a coauthor rather than to the widow or widower and children or grandchildren, who might well have no interest or experience in the author's work. In addition, the surviving joint author might wish to be free from having to deal with the deceased coauthor's statutory successors. Yet, any grant that is made by the joint authors is subject to section 203 termination. Contractual protections among joint authors and with the publisher, which provide that the authors are to have control over the selection of editors or screen writers, or the selection of future joint authors to assist in future revisions, may come to nothing if statutory successors are thrust upon a surviving joint author.

Section 203 itself provides some protection. Although the termination interest of a deceased joint author may be exercised by those "entitled to exercise a total of more than one-half of that author's interest," termination requires the assent of a "majority of the authors." The statutory successors of one joint author are never a majority of the joint authors, since one is not a majority of two, and therefore statutory successors may not effect a termination. In the case of three joint authors, two would have to die before non-authors could effect a termination against the will of the surviving joint author. There is, however, a very real possibility of non-authors blocking a termination. Assume that there are two joint authors and that the surviving joint author, after thirty-five years of unsatisfactory relations with the publisher, chooses to terminate the transfer. Termination requires a "majority" of the authors who executed the transfer. Since one of two is not a majority, and since the statutory successors of a deceased author may exercise the deceased author's termination interest "as a unit," the surviving joint author must obtain the cooperation of the owners of "a total of *more than* one-half of that [deceased] author's interest" in order to terminate.[61] The widow or widower owns exactly one-half of that author's interest in a case in which any child or grandchild survives.[62] The publisher, therefore, can block termination by se-

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[60] 17 U.S.C. § 203(a)(1) (Supp. III 1979).
[61] *Id.* (emphasis added).
[62] *Id.* § 203(a)(2).

curing the agreement of the owner of only one quarter of the termination interest (either the widow or widower, or children or grandchildren), despite the desires of the sole surviving author.

An even more disquieting situation is possible under the new Act. Suppose the deceased joint author leaves no surviving widow or widower, child or grandchild. Section 203 requires a majority of the authors who executed the grant to terminate it. If an author is dead, the author's termination interest may be exercised by the statutory successors. When there are no statutory successors, however, no provision is made for the contingent termination interest to vest elsewhere. The termination interest fails, but no relief is afforded from the requirement that a majority of the authors exercise the termination. The sole surviving author is powerless to terminate the transfer. Termination is impossible.[63]

How might these problems be avoided? A transfer by will is excluded from termination, but as noted above, that exemption applies only to interests not previously transferred. Even if a joint author lacked the inhibition that prevents most joint authors from asking to be made the beneficiary of their coauthor's copyright interest,[64] this device would not allow control of termination interests in rights already transferred.

One commentator has proposed that in a situation, like that posed in part III above, in which the author's mother receives royalties under a publishing contract but the author's surviving child (the sole statutory successor) has termination rights, the author's mother might agree with the publisher to an early termination of the contract followed by a new contract.[65] This agreement, it is asserted, begins a new thirty-five year period before termination can be exercised by the statutory successor. The problems with this proposal debilitate it. First, it is dependent on the publisher, who has no reason to terminate the contract early unless the new agreement will be more favorable than that which he could negotiate with the author's child. Thus, the author's mother and the author's child are competing with one another, bidding down the price to their own detriment and to the benefit of the publisher. Second, there is a serious question under contract law whether such a voluntary revision of the contract would be considered a new transfer unless the transferor is free at some time not to make a new transfer to the transferee.[66] If the transferor is free to withhold a future transfer, the publisher-transferee has nothing to gain from the early termination.

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[63] Of course, the publisher could agree contractually to a termination, but the author is powerless to cause a termination. Section 203(b)(6) provides that: "Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title." 17 U.S.C. § 203(b)(6) (Supp. III 1979).

The very unfairness of this situation might prompt a court to conclude that despite the language of § 203, a majority of the surviving authors may exercise termination rights when an author has died leaving no statutory successors. Such a construction would be consistent with the purpose of Congress to safeguard authors against unremunerative transfers.

[64] There is a list of problems that needs to be considered if one proposes to use this device. Some of these problems might be overcome by the use of mutual wills. This does not overcome the issue of good taste. If, however, good taste is not an obstacle, an extreme solution is for the joint author to ask the coauthor to adopt him and to avoid marriage and children, thereby becoming the statutory successor.

[65] Curtis, *supra* note 5, at 827, 829.

[66] 3 M. NIMMER, *supra* note 5, § 11.07. Conceptually, there is also a problem with an early voluntary termination by anyone other than the author. If the purpose of § 203 is to give to the statutory successors that with which the author has parted, should anyone not the author be allowed to deprive the statutory successors of that interest?

Joint authors can avoid this problem of control over termination rights because they are different from other co-owners of copyright. Joint authors are the "initial" owners of the copyright;[67] they are not owners by transfer. As such, their ownership cannot be divested by a termination of transfer. Upon the death of a joint author the termination interest passes to that author's statutory successors regardless of whether the initial ownership of the copyright is in joint tenancy or in tenancy in common. The type of tenancy, however, makes a significant difference in what is transferred.

The owner of property can transfer no more than is owned. If *A* holds a life estate measured by *A*'s life, *A* cannot transfer that property to *B* for a period to exceed *A*'s life. The same principle applies to joint tenants. If *A* and *B* are joint tenants, and *A* licenses *C* to use the property, that license must cease at *A*'s death. It must cease because *A*'s interest in the underlying property is extinguished at *A*'s death.[68]

Consider the case in which *A* and *B* are joint authors and initial owners as joint tenants of a copyright. Suppose *A* and *B* license a publisher to publish their work. Upon *A*'s death the license from *A* to the publisher ceases since *A*'s interest in the underlying property ceases,[69] but *B*'s license to the publisher remains effective. When the termination period arrives, *A*'s statutory successors have no subject on which to exercise termination rights. *A* has not transferred any copyright interest to *B* because death extinguished *A*'s interest.[70] (If *A* had, e.g., sold his copyright ownership to *B* there would have been a transfer.) Moreover, since *A*'s license to the publisher ceased when *A*'s interest in the property was extinguished, there is no license to terminate under section 203. An additional effect of the joint tenancy in copyright ownership is that upon *A*'s death, *B* holds the entire termination interest in the license to the publisher, because only the license from *B* to the publisher continues. In summary, the termination interest of *A*'s statutory successors is cut off as to *B*'s interest because there was no transfer from *A* to *B*, and it is cut off with respect to *A*'s license to the publisher because that license was terminated by *A*'s death. Since the termination of transfer provision does not create a property interest, but only allows for the "reclaiming" of interests previously "transferred," the form of property ownership among joint authors can prevent statutory successors to the termination interest from terminating agreements between authors and their licensees.[71]

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[67] 17 U.S.C. § 201(a) (Supp. III 1979).

[68] *See infra* note 69.

[69] The license cannot extend beyond the term of *A*'s ownership since *A* cannot grant what he does not own. *See* J. SCHOULER, A TREATISE ON THE LAW OF PERSONAL PROPERTY § 163 (5th ed. 1918) [hereinafter cited as J. SCHOULER]. *See also supra* text accompanying note 13; De Haro v. United States, 72 U.S. 599, 627 (1866) (dictum). But, questions of estoppel may be raised if *B* has accepted payment under *A*'s license.

[70] This principle is explicated as follows:

> The right of survivorship is not considered to be a type of future interest. It is based on the concept that the estate is held by a fictitious entity made up of the cotenants collectively and that the entity continues so long as any of the joint tenants survive. When the first joint tenant dies, his individual right to share possession and enjoyment ceases. His heirs or devisees take nothing because the individual cotenant has no estate of inheritance to pass on to them. The deceased tenant's estate is extinguished on his death; the estate continues in the survivor or survivors. The last survivor, of course, owns the whole estate in severalty because he no longer shares the estate with the former cotenants.

2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.1.

[71] While there is no reason to believe that Congress ever contemplated this use of joint tenancy in

V. USE OF JOINT TENANCY AS A PLANNING DEVICE

Joint authors wishing to use joint tenancy as a planning device to avoid the termination interests of others must consider several points. First, they should agree on joint tenancy as the form of ownership before creation of the work. Since joint tenancy is disfavored, an agreement to hold as joint tenants entered into after creation of the work may be viewed as a transfer. As such it is subject to section 203 termination. Second, the agreement need not be in writing,[72] but since joint tenancy is disfavored, good practice dictates putting the agreement in writing. The court in *Stuff v. La Budde Feed & Grain Co.* found a tenancy in common, noting that the authors had not indicated in the registration or the notice of copyright that they intended to hold as joint tenants.[73] Therefore, it is advisable to state the nature of ownership in both the copyright registration and the written agreement among the authors. In an abundance of caution one might also add the statement to the copyright notice.

Third, a number of jurisdictions have abolished by statute the right of survivorship.[74] In such jurisdictions there is no practical difference between joint tenancy and tenancy in common, and the above analysis fails. In other jurisdictions special words are required to create a joint tenancy.[75] Joint authors must look carefully at the joint tenancy laws in their jurisdiction.

Fourth, compared with tenancy in common, joint tenancy is a fragile estate. At common law joint tenancy required the four unities of time, title, interest, and possession. The joint tenancy must vest at the same time in all joint tenants, all joint tenants must take by the same instrument, and they must have the same interest as to share and duration.[76] Although some of these strict requirements have been modified in recent years,[77] care must be taken to observe the formalities of joint tenancy. Particularly troublesome is the requirement that both ten-

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conjunction with the termination of transfer provision, such use is consistent with § 203 because that section recognizes an exception for transfers by will, and joint tenancy is commonly used (to the horror of estate planners) as a substitute for disposition by will.

[72] 2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.4.

[73] 42 F. Supp. 493, 497 (E.D. Wis. 1941).

[74] The following states currently have statutes that purport to abolish either joint tenancy or the right of survivorship: KY. REV. STAT. § 381.120 (1970); N.C. GEN. STAT. § 41-2 (1976); PA. STAT. ANN., tit. 68, § 110 (Purdon Supp. 1981-82); TENN. CODE ANN. § 64-107 (1976); VA. CODE § 55-20 (1981); W. VA. CODE § 36-1-19 (1966). Although Alaska has abolished joint tenancy with respect to realty, ALASKA STAT. § 34.15.130 (1962), it has not abolished it with respect to personalty.

[75] For example, ALA. CODE § 35-4-7 (1975) and S.C. CODE ANN. § 21-3-50 (Law. Co-op. 1976) require an express statement of the intention to provide for right of survivorship; TEX. REV. CIV. STAT. ANN., PROB. CODE § 46 (Vernon 1980) requires a written agreement for there to be a right of survivorship; and ILL. ANN. STAT., ch. 76, § 1 (Smith-Hurd 1966) requires a statement that the tenancy is not a tenancy in common. Many states require an express statement of intent to create a joint tenancy. *See, e.g.*, GA. CODE ANN. § 85-1002 (3722) (Supp. 1980). The safest language to use may be "*A* and *B* as joint tenants with right of survivorship, and not as tenants in common." Technically this may not be a correct statement of *A* and *B*'s interests, since they are owners, not tenants, of the personalty. *See* J. SCHOULER, *supra* note 69, § 154. Nonetheless, the term "joint tenants" is less ambiguous as to intent than is the term "joint owners." *See* 2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.3; J. SCHOULER, *supra* note 69, § 156. A more accurate statement, suggested by Professor Wythe Holt, would be "*A* and *B* as joint owners, taking as joint tenants with right of survivorship and not as tenants in common."

[76] 2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.1. The fourth unity, the unity of possession, applies equally to joint tenancies and to tenancies in common, and provides that each co-owner has a common right to possess and enjoy the property.

[77] *Id.* § 6.3. For example, *A*, the owner of Blackacre, in many jurisdictions may now transfer Blackacre to *A* and *B* as joint tenants. Prior to statutory recognition of such a transaction, the joint tenancy failed because there was no unity of time, *A* owning prior to *B*.

ants must own equally. One may not hold a three-quarter interest and the other a one-quarter interest.[78] In addition, the joint tenancy may be destroyed by a conveyance by either party.[79] If *A* transfers his interest, the joint tenancy ceases since the unities of time, title, and interest are destroyed. If joint authors wish to prevent the destruction of the joint tenancy, they should agree by contract not to make such transfers.

A junior joint author who is concerned about future involvement with a senior joint author's statutory successors should recognize that joint tenancy is impartial. If the junior joint authors dies first, the senior joint author succeeds to the entire interest in the property. This is probably what the authors would want, but they should be careful to provide fully for their families by contract, recognizing that either joint author may die first.

Finally, the preceding analysis arguably applies to other transfers of copyright as well as to licenses, provided the transfers are handled carefully. There are, however, a number of obstacles created by transfers of ownership that are not created by licensing. As noted above, a transfer of ownership by one joint tenant destroys the joint tenancy because the unity of interest is destroyed. Because the copyright is, at least for some purposes, a bundle of separate pieces of property,[80] if joint tenants part with the same interest for the same period of time, and by the same instrument, the unity of interest is maintained. If this is done, however, termination of the transfer requires assent of "a majority of the authors who executed it."[81] If one joint author dies, arguably that joint author's interest ceases. The transferee therefore holds only the transfer of the survivors, and the survivors could terminate. The problem with this argument is that it treats all transfers as licenses.[82] If in fact the joint tenants parted with ownership in such a way that the duration of that interest is not measured by or dependent upon the life of the deceased transferor, the present status of the owner or owners of the residue is irrelevant, and the assent of a majority of those who executed the transfer, or their successors, is required for termination.[83]

To avoid this last problem the joint authors may choose to license a publisher, rather than to transfer ownership.[84] In addition, to avoid both the argument that a majority of the licensors is required to effect termination, even though the interest of one licensor has ceased, and the argument that an exclusive license constitutes a parting with ownership that severs the joint tenancy,[85] the joint

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[78] *Id.* § 6.1. In Lord Bracton's words, they were seized "pur my et pur tout." *Id.*

[79] *Id.* § 6.2.

[80] 17 U.S.C. § 201(d)(2) (Supp. III 1979) provides that "[a]ny of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately."

[81] *Id.* § 203(a)(1).

[82] See *supra* note 52 for a discussion of the proposition that a copyright license does not transfer an ownership interest in the copyright. Since it is established that no ownership interest is transferred by license, it follows that a license would not sever a joint tenancy. The implication is equally clear, however, that an assignment could effect a severance. The question of the nature of the assignment necessary to effect a severance of a joint tenancy is not yet settled in the law of real property. *See* 2 AMERICAN LAW OF PROPERTY, *supra* note 12, § 6.2.

[83] The author in 3 M. NIMMER, *supra* note 5, § 10.02, discusses whether there is one copyright or many. The issue is whether all transfers are conceived as essentially licenses, with the term "ownership" intended only to allow the "owners" to prosecute their own claims for infringement, or whether the "owners" of parts of the copyright are in fact owners of separate property.

[84] *See supra* note 82.

[85] 17 U.S.C. § 101 (Supp. III 1979) includes the exclusive license in the definition of the term "transfer of copyright ownership." The literature referenced in notes 82 and 83, *supra*, however, should satisfy one

tenants may each enter a separate licensing agreement with the publisher, each agreeing not to license anyone else.[86] The license from *A* then terminates on *A*'s death, and the publisher is operating only under the license from *B*.

VI. SUMMARY AND CONCLUSION

Generally courts have treated co-owners of copyright as tenants in common, but the reasons for such treatment permit the parties, by a clear expression of intent, to choose joint tenancy instead. The significance of such a choice is that successors in interest of a deceased tenant in common would succeed to that tenant's interest, whereas a deceased joint tenant's interest would be extinguished, leaving the surviving joint tenant sole owner of the copyright.

Section 203 of the 1976 Copyright Act creates a right in certain statutory successors, after the author's death, to terminate transfers made by the author. Since the termination interest is inalienable, it can defeat the wishes of the author as to the disposition of his copyright. The termination interest of the statutory successors, however, can be circumvented by joint authors who initially choose to own their copyright as joint tenants. Since the interest of a joint tenant is not transferred, but ceases, there is no transfer to terminate and all rights under it cease with it. Joint tenancy, however, is a fragile estate and is not available in all jurisdictions. Therefore it should be used only after careful advance planning.

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that the definition does not dispose of the question whether an exclusive license severs the joint tenancy. Probably it does not.

[86] Neither license would be an exclusive license since one cotenant cannot grant an exclusive license. 1 M. NIMMER, *supra* note 5, § 6.10.

Although it is not important to this analysis, the agreement not to license anyone else is arguably not a transfer at all. 3 *Id.* § 11.07. Even if it is a transfer, it is difficult to imagine, upon the termination of an agreement not to license, what rights "revert" to one who possesses no other interest in the copyright.