

# Copyright Law

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## Topics:

- The evolving and lengthening duration of copyrights
- Renewal (under the old system) and termination (under the new system) and their complications



(Dates are good for you.)

(Or are they?)

“Bad dates,” from *Raiders of the Lost Ark* (1981)

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## Duration, including renewal

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1790

14-year term for works published with notice, running from registration, extended for another 14 years if a renewal was timely filed.

1831

Extended initial term to 28 years.

1909

Extended renewal term to 28 years.

1/1/78

Changed basic term from 56 years to life of the author plus 50 years.  
(Congress added 19 years to existing renewal terms in the '76 Act and made renewal automatic in a 1992 amendment. 1992 – 28 years = 1964).

1998

Extended terms of all existing copyrights by 20 years (pre-78 works in their renewal term, and post-78 works) and changed basic term for new works to life of the author plus 70 years.

# How long does a copyright last?

## A simple history of the term of copyright

# Duration, including renewal

## Pre-1978: Dual System

## Post-1978: Unitary System

Pre-1928

1928

1/1/78

If published before 1928, the work is now in the public domain

[Why 1928? This is a moving date; now, every year, it advances by one: 1923 → 1924 → 1925 and so on.]

Statutory, limited term copyright applies to **published** and some registered but unpublished works. **Common law protection applies to all other works.**

- (1) Federal statutory copyright available for all works **fixed in tangible media, including pre-1978 works still protected by copyright**
- (2) Common law anti-copying protection **abolished** except for unfixed works (Section 301, preemption of state laws)

Duration, including renewal. For *all* works, read §§ 302, 303, 304

When First Published With Proper Notice

When First Fixed

1928

1964

1/1/78

28-year term running from publication with notice, extended to a total of 95 years IF a renewal was timely filed  
**(28 initial + 28 renewal + 19 under '76 Act + 20 Sonny Bono = 95 years)**

[Note: 2023 – 95 = 1928, meaning that works published in the early 1920s are now moving into the p.d. one year at a time]

28-year term running from publication with notice, extended to total of 95 years automatically  
**(28 initial + 28 renewal + 19 under '76 Act + 20 Sonny Bono)**  
**[Why 1964?]**

- (1) Sole and joint authors: life of the (last surviving) author, plus 70 years
- (2) Anonymous and pseudonymous works and works made for hire: 120 years from creation or 95 years from publication, whichever ends first

***This chart applies CURRENTLY to: works published before 1/1/78, and works created on or after 1/1/78 (§§ 302, 304(a), (b))***

Duration, including renewal. For *all* works, read §§ 302, 303, 304

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If Not Published Before 12/31/2002

- (1) Sole and joint authors: life of the author, plus 70 years
- (2) Anonymous and pseudonymous works and works made for hire: 120 years from creation or 95 years from publication, whichever is shorter,
- (3) BUT term expires no earlier than 12/31/2002**

If Published Before 12/31/2002

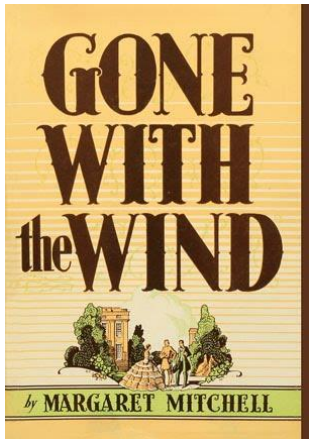
- (1) Sole and joint authors: life of the author, plus 70 years
- (2) Anonymous and pseudonymous works and works made for hire: 120 years from creation or 95 years from publication, whichever is shorter
- (3) BUT term expires no earlier than 12/31/2047**

*This chart applies CURRENTLY to: works created before 1/1/78 but NOT published or registered before 1/1/78 (§ 303)*

Duration, including renewal. For *all* works, read §§ 302, 303, 304

Before 1978

As of January 1 1978



Margaret Mitchell dies in 1948

Her estate renews the copyright in GWTW in 1963, (c) renewal extends from 1964 to 1992

The '76 Act adds 19 years to the renewal term

The Sonny Bono Act adds another 20 years to the renewal term

Margaret Mitchell publishes *Gone With the Wind* in 1936

28 years (1936-64)

28 years (1964-92)

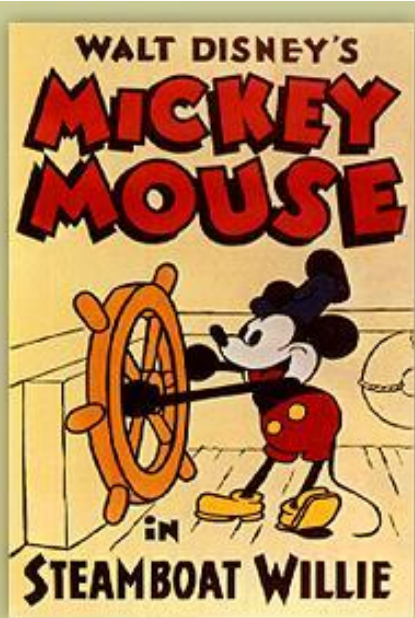
19 yrs (1992-2011)

20 yrs (2011-2031)



Duration, including renewal: Congressional power

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Mickey then  
(1928)

(and sometimes now)

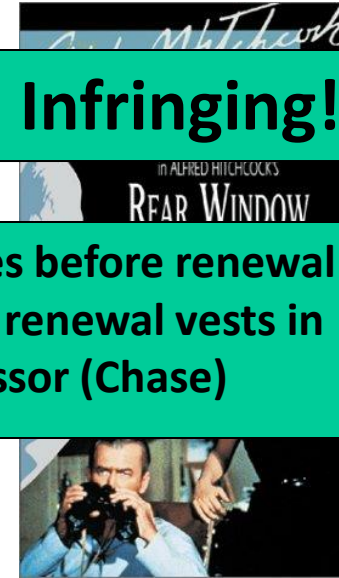
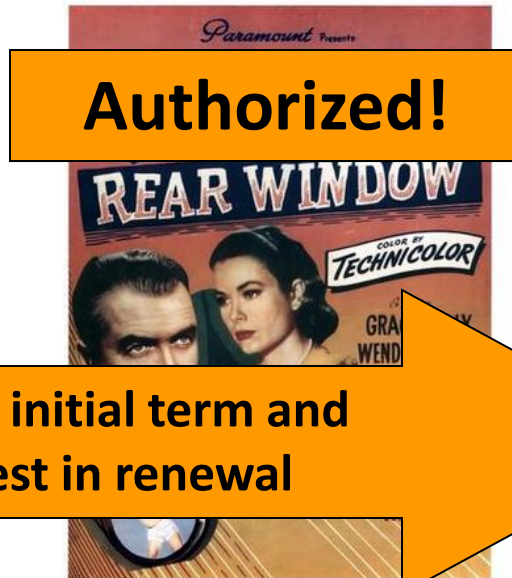
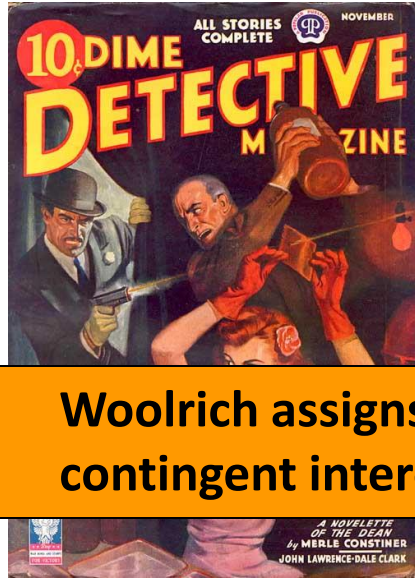
Mickey now

“[W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”

Litigation regarding the scope of Congress's power to change copyright law:  
Eldred v. Ashcroft  
(U.S. 2003)

# Duration, including renewal, and transfer: effect of the renewal

## Stewart v. Abend (U.S. 1990)



**Authorized!**

**Infringing!**

**Woolrich assigns initial term and contingent interest in renewal**

**W. dies before renewal vests; renewal vests in successor (Chase)**

**1942:** Woolrich writes "It Had to Be Murder"

**1954:** "Rear Window" produced

**1969:** Chase Manhattan renews the copyright and (in 1971) assigns it to Abend

**1968:** Woolrich dies

**1945:** Woolrich assigns movie rights to Hitchcock and Stewart

**1983:** "Rear Window" re-released; Abend sues

**The Terminator:** He'll be back.

In copyright, sellers, grantors, assignors, & licensors can come back, too, and re-claim their copyrights & copyright interests, decades later.

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(1) What is a **transfer** of copyright?

(2) What is a **termination** of a transfer?

(3) **When** can an author (cf. not necessarily a copyright owner) terminate a transfer?

## Termination of transfers

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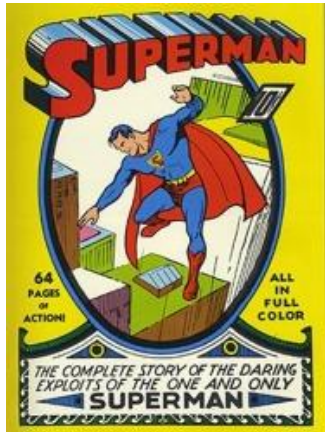
What is a transfer of copyright?

What is a termination of a transfer?

When can an author terminate a transfer?

A “grant” of a transfer of an interest in copyright includes any sale or assignment of all or any part of the copyright, any exclusive or non-exclusive license, and/or any mortgage or hypothecation (such as using the copyright as collateral for a loan)

17 U.S.C. § 101



## Termination of transfers

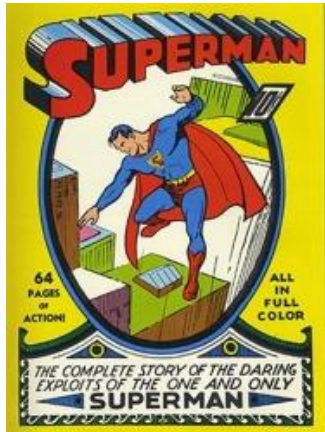
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What is a transfer of copyright?

What is a termination of a transfer?

When can an author terminate a transfer?

Upon the effective date of termination, all rights covered by the terminated grants revert to the author or others owning termination interests, subject to certain protections for those who prepared derivative works in reliance on the initial grant.



## Termination of transfers

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What is a transfer of copyright?

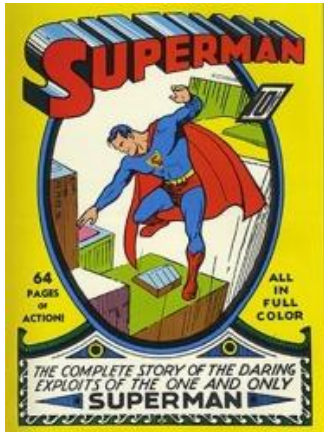
What is a termination of a transfer?

When can an author terminate a transfer?

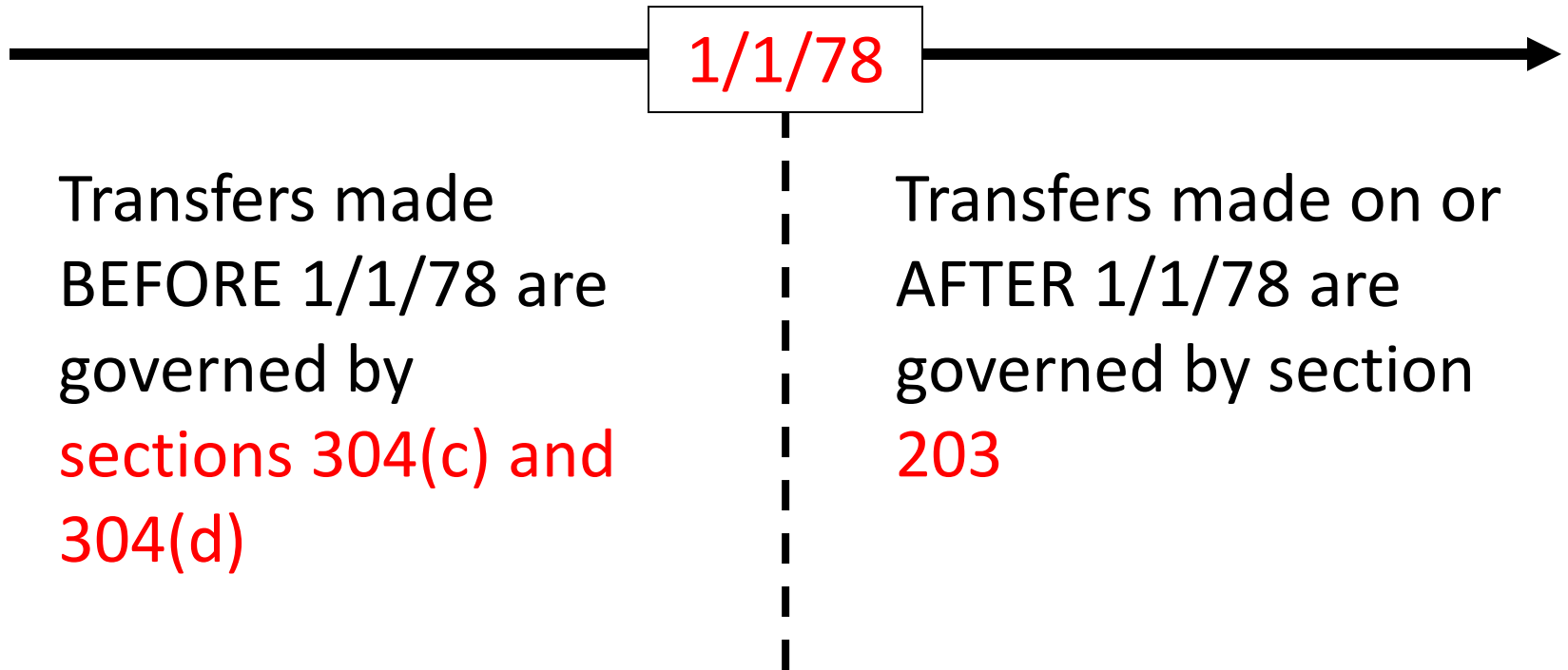
The timing of termination depends on the timing of the grant (i.e., the transfer).

Sections 203 and 304(c) are relevant.

The termination window is open  
\*now\* for post-1978 grants.




### Step 1: When was the transfer executed?



***TIP: Examine termination provisions for \*any\* inter vivos transfer. Works made for hire are not eligible.***





### § 203/Post-1978 transfers

Who can terminate?

Author, widow, children  
(descendants per stirpes),  
executors

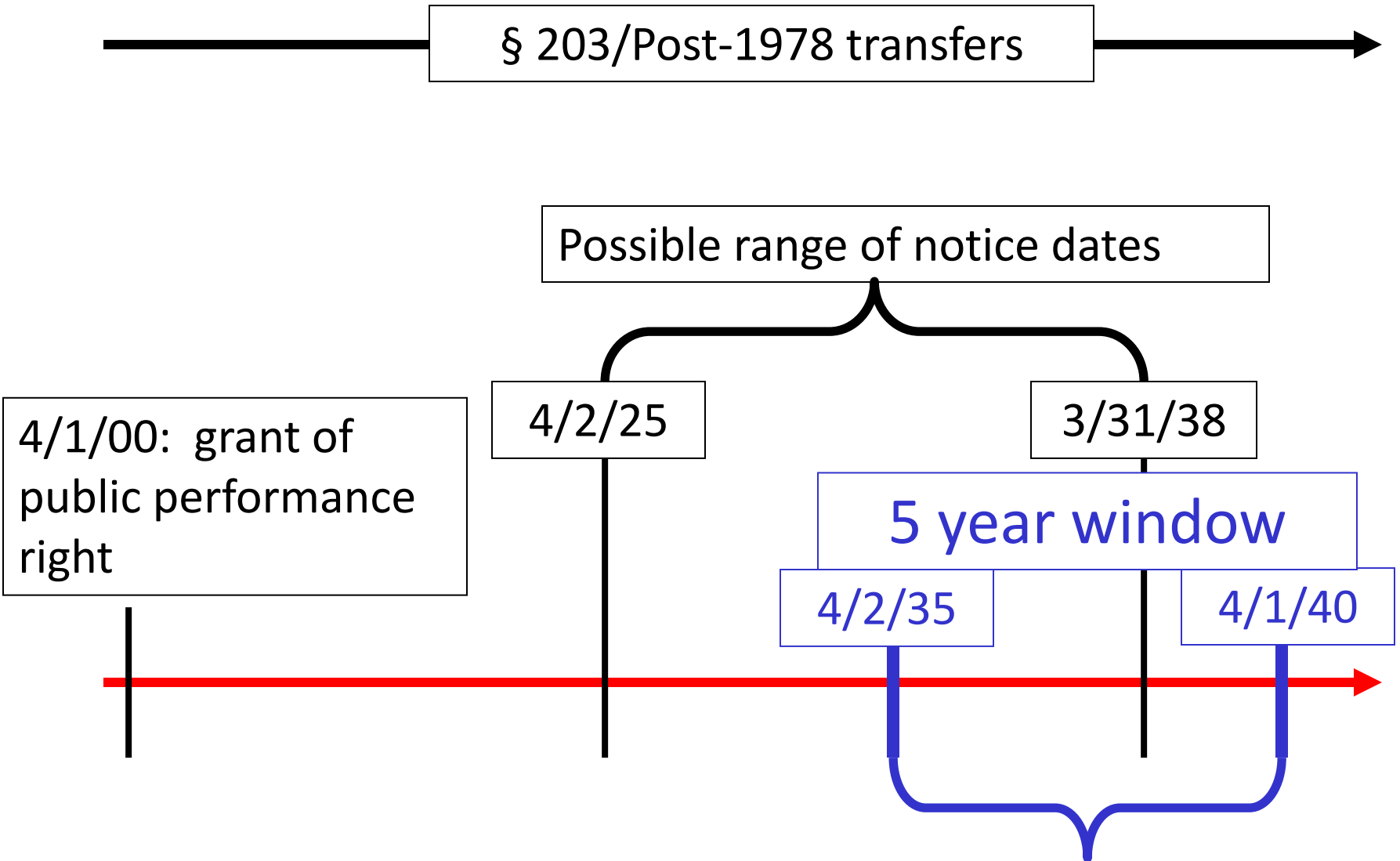
When can they  
terminate?

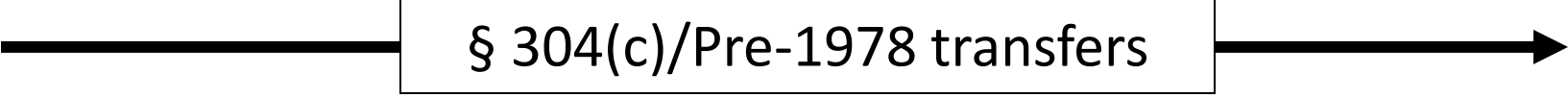
5 yr window beginning at end of 35 yrs  
from execution of the grant (exception:  
if grant is a first publication grant; then  
window opens earlier of 35 yrs after  
pub., or 40 yrs from grant). Must serve  
notice not less than 2 nor more than 10  
yrs before termination date

What is the policy  
behind termination?

“Second bite at the apple” for  
authors, analogous to renewal  
terms

# Termination of transfers: an example





§ 304(c)/Pre-1978 transfers

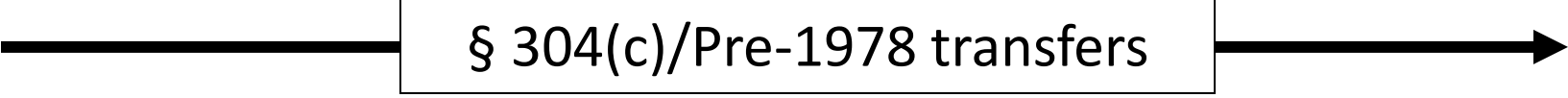
## Who can terminate?

If grant was by author: termination OK by author, widow, children (descendants per stirpes), executors

If grant was by someone else, only the grantor (not even the grantor's heirs!) can terminate the grant

## When can they terminate?

Termination is for the last 39 years; 5 yr window beginning at end of the 56<sup>th</sup> year from the date of copyright; must serve notice not less than 2 nor more than 10 yrs before termination date



§ 304(c)/Pre-1978 transfers

### Which grants are eligible?

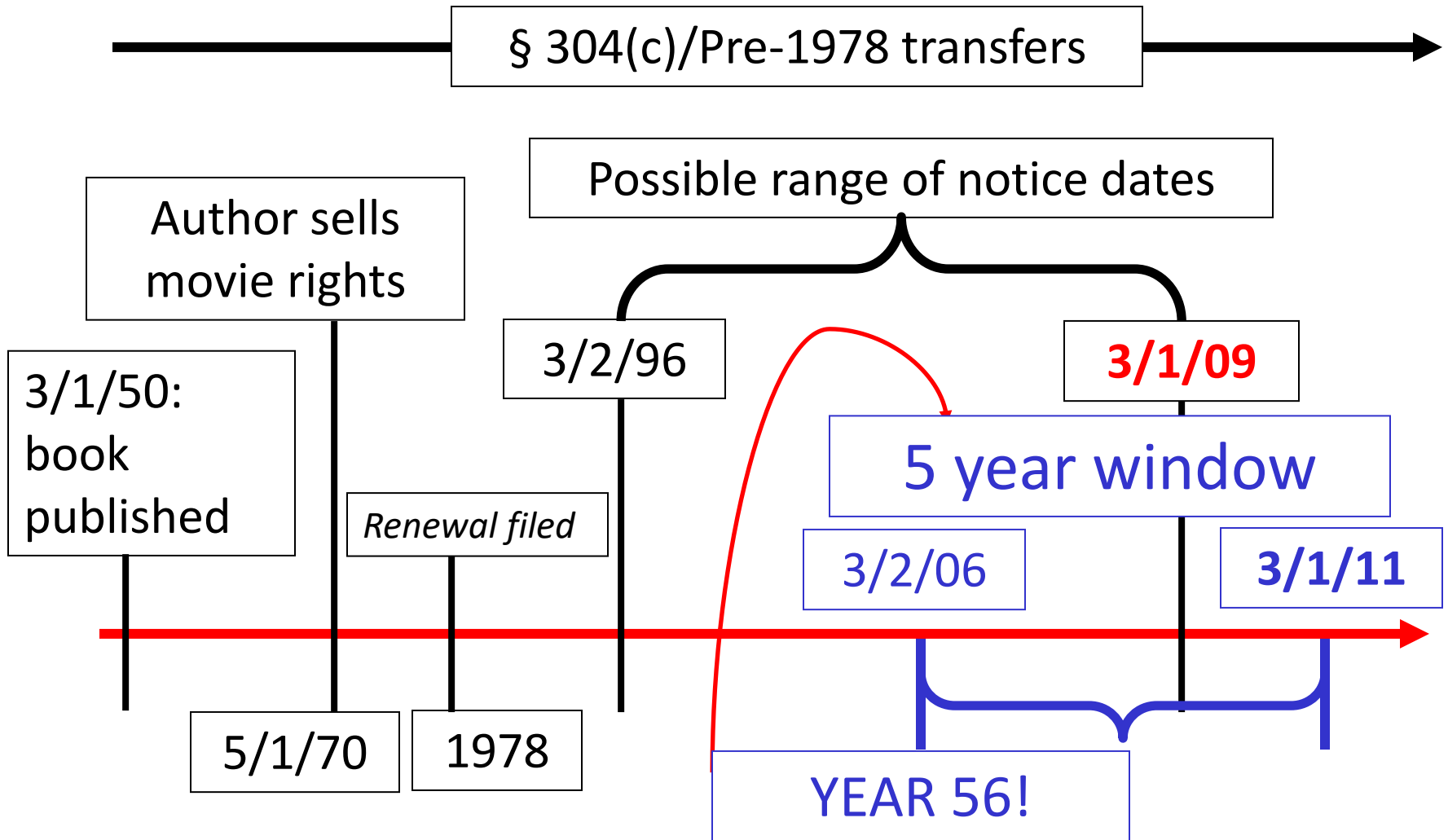
- Transfers made BEFORE 1/1/78
- Only applies to transfers of the renewal term
- Transfers made by authors, widows, children, executors
- Does NOT apply to works made for hire, or to transfers by will

Public policy is to permit recapture of extra 39 years added by '76

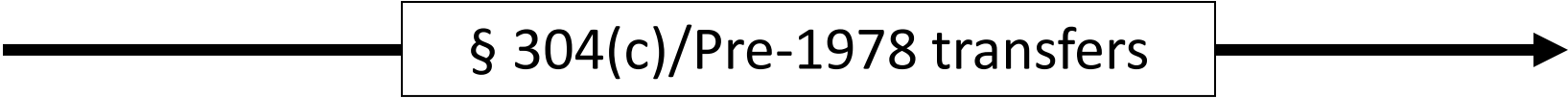
and '98 statutes (19 years and 20 years) (similar to but not identical

to “second bite at the apple” policy under § 203)

# Termination of transfers: an example



The last 5-year window for 304(c) terminations closes at the end of 2034, so the last notice date is 2032 – i.e., soon. Section 304(c) will be a statutory relic.



§ 304(c)/Pre-1978 transfers

Note distinct but related policy purposes:

### Section 203:

Nontransferable right to terminate 35 years after a grant, where the grant was executed by the author during the unitary term. Author gets “***second bite at the apple***” akin to design of original renewal system.

### Section 304(c):

Provides author and statutory heirs a nontransferable, nondescendable right to terminate a grant concerning the ***extensions to the renewal term***, where the grant was executed by the author or by the statutory heir to the renewal term

## Termination of transfers: Sonny's revenge

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Who was Sonny Bono?

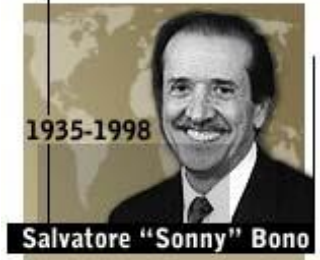


Mid-1960s Sonny and Cher

## Termination of transfers: Sonny's revenge

§ 304(d)

The § 304(d) window is *closed*, but prior exercise of § 304(d) rights may affect current © ownership.



Which grants are (*were*) eligible?

- Transfers made BEFORE 1/1/78, and
- Copyright in renewal term as of 10/28/98, and
- § 304(c) right not exercised and had expired as of 10/28/98
- Five year window beginning at end of 75 years from the original date of copyright; 2/10 yr notice rule applies
- Public policy is to permit recapture of extra years added by '98, where § 304(c) right had expired w/o exercise





# Termination of transfers: status of derivative works prepared before termination

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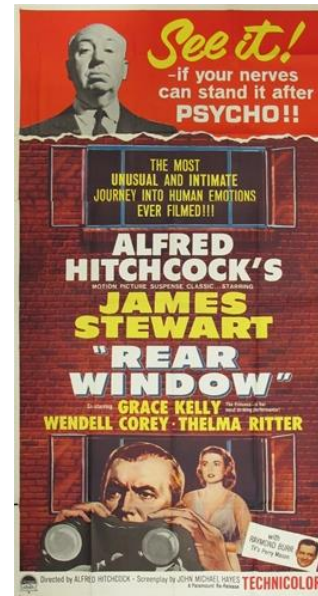
## Section 203(b)(A)(1):

- If prepared under the authority of the grant before termination, then creator can continue to use under terms of grant
- No preparation of new derivative works after termination



## Section 304(c)(6)(A):

- If prepared under the authority of the grant before termination, then creator can continue to use under terms of grant
- No preparation of new derivative works after termination
- Applies to 304(d) terminations also



## Termination of transfers: **emerging issues**

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**Who can terminate transfers?** Works prepared as “works made for hire” are not subject to termination provisions; litigation challenges the standing of parties sending termination notices on the grounds that they were “employees” under 1909 law.

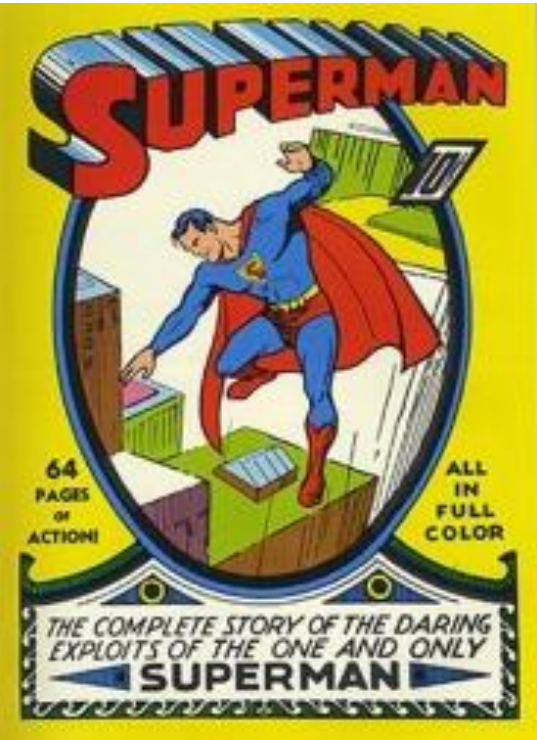
**What “works” are properly subject to termination notices?** Given absence of registration requirements, any given “product” may include many different copyrightable “works” that were not identified separately in initial transfers, such as characters.

**What is the impact of prior re-negotiations?** Can the termination right be waived in advance? Can a transferor (or his heirs) terminate a transfer even if the initial deal has already been renegotiated and extended past the date of the termination window? (Nb. different heirs may take different views.)

**Status of related trademarks is unchanged. (But see *Dastar v. Twentieth Century Fox*)**

## Termination of transfers

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Character copyrights and other “works within works” (smaller works such as characters that live inside larger works such as films) are especially tricky because of difficulties in identifying what works of authorship are covered, and when they were published.

*Siegel v. Warner Bros. Entm't, Inc.* (C.D. Cal. 2009)

(heirs of Jerry Siegel entitled to exercise termination of assignment of rights to the original Superman character – the first two weeks’ worth of strips - b/c that material was not a work made for hire)

(Warner Bros. continued to fight and eventually prevailed in late 2016 over all of the termination claims alleged by the Siegel heirs and the Shuster heirs on the basis of prior settlement agreements in 1992 (Shuster) and 2001 (Siegel). That result ended 20 years’ worth of litigation.)

