

Estate Planning and Copyright

By Kate Spelman and Susan von Herrmann

This article addresses several important questions that estate planners should answer in order to best serve their clients:

1. When is a transfer of a copyright not really a transfer?
2. Why is estate planning different for owners of copyrights?
3. What is necessary to preserve and transfer these assets during life and after death?

We live in a time of abundance. The advent of the Internet and digital copying lowered barriers to market entry, resulting in bottlenecks to the rush to store, distribute, and transmit content. This abundance of content includes much that is protected by copyright law and results in a great deal of commerce. We see and listen to copyrighted material everywhere—from the first screening of a movie in a theatre, to the second screening on a laptop, to the third screening on a smartphone. It is hard to find anyone who does not consume copyrights on a regular basis. The term of a copyright owned by an individual is measured as “life plus 70 years.” The phrase “life plus” is a euphemism for the word “death,” a concept estate planners know well.

Most copyrights are owned by authors, visual artists, musicians, graphic artists, singers, sculptors, and other individuals. Not every copyright has the monetary value that Ted Turner paid (\$780 million) to buy the MGM movie portfolio, but many copyrights have the potential to make money for their owners for a surprisingly long time. For instance, the books *Travels with Charley*, *To Kill a Mockingbird*, *The Joy of Cooking*, *Harriet the Spy*, *Girl with the Dragon Tattoo*, and *Ramona*; the songs “Thriller” and “YMCA”; the movies *Toy Story* and *Harry Potter*; the video games *Tetris* and *Pong*; the photographs of Avadon and Ansel Adams; and many other items of our culture that we enjoy have copyrights that are alive and well, and need care into the future. In a sense, all of us are copyright owners, given the automatic nature of copyright protection. And even if we never produce anything that is marketed commercially, one can never know the future interest in letters, photographs, diaries, and other personal materials.

In the United States, copyright law results in a sort of trick. Since 1978, a copyright *comes into existence* as soon as an “original [work is] fixed in any tangible medium of expression,”¹ but that valid copyright is not *enforceable* until the copyright is registered with the U.S. Copyright Office. A copyright owner needs a U.S. copyright registration in hand in order to enforce the copyright. In this case, the ninth grade civics class admonition that “a right without a remedy is not a right” becomes “a right without a registration is not a right.” Estate planners and others who deal with owners of copyrights should be working with their clients to get copyrights registered early and often.

The window of time during which a copyright registration

may be secured is anytime during the term of the copyright. So, if you are an estate planner, as soon as your client identifies the asset, you can assist the client in facilitating registration. It will never be too late to take this step. On the other hand, there are benefits of registering early: the ability to receive statutory damages and attorneys fees in cases of infringement.

Going through the registration process will require gathering information that an estate planner will find useful. This is the list of information that you will need to complete the short application for copyright registration on the U.S. Copyright Office website:

- The title and nature of the work (e.g., text, music, graphics, software);
- The full name and nationality of the author, together with a statement of the author’s understanding that the work was not created within the scope of an employment contract. If the work was created inside the scope of W-2 employment, then the work is not owned by the individual but is owned by the employer as “work made for hire”;
- The date that the work was created and, if it was published (distributed widely), the date of first publication; and
- Whether the work was adapted or derived from a preexisting work, and if so, what preexisting work.

Once the copyright is registered, the next step is to make sure that all the underlying agreements relating to that work are in one place and docketed for dates and payment schedule.

Generally not on this list is “find a knowledgeable estate planning attorney to assist the client with developing a strategy to maximize the value of the copyright during life and after death,” but it should be. And even if this task makes the to-do list, the unfortunate news is that these lawyers can be hard to find. For reasons fairly easy to understand, most estate planners are more comfortable talking about and planning for real property, business interests, securities accounts, and tangible personal property than they are for intellectual property. But as some very well-known stories have shown us, if proper planning is not done, much of the potential value of a copyright can be lost or misdirected to those whom the creator of the work did not intend to benefit.

There are many instances of posthumous ownership of a copyright not having been thought through proactively. Most recently, the works of A.A. Milne and John Steinbeck, as well as the comic books *Spawn*, *Captain America*, *Wonder Woman*, and *Superman*, have been the subject of lawsuits in part because future ownership issues were not addressed.

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If estate planners and copyright lawyers collaborate early to apportion copyright ownership among a content creator's intended beneficiaries, they can avoid expensive and time-consuming litigation necessary to sort out problems later.

Many estate planners have a vague idea of what a copyright is based on knowledge from a bar review course and possibly, but unlikely, an intellectual property course in law school or, more likely, general knowledge that has no relation to their legal training. However, many estate planners do not include a specific question to the client of what copyrights that client owns or has authored.

A copyright is the bundle of rights granted to creators of original work, generally authors and artists, exclusively to display, reproduce, perform, sell, and transfer their original work or derivatives of their work. Simply put, a copyright is the right to copy, and the purpose of the body of law that has grown up around these rights is to regulate this right to copy to ensure that authors and artists receive a fair return for their work and to prevent unauthorized exploitation by others. And as intellectual property lawyers know, but estate planners may not, the law of copyright also applies to literary works other than books, including computer programs; apps; musical works (together with any accompanying words); pantomimes and choreographic works; pictorial, graphic, and other audiovisual works; sound recordings; and architectural works created and fixed in any tangible medium of expression (now known or later developed) on or after January 1, 1978, and all are called "original works of authorship" or "original works" in this article.

A work based on one or more preexisting works (generally called a "derivative work"), such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted, will also be protected as long as the derivative work is original and does not infringe on the copyright of another work. Compilations and collective works are also protected by copyright law. A compilation is the selection and arrangement of preexisting material, whether or not copyrightable subject matter, in such a way that the resulting work as a whole constitutes an original work. A collective work is a compilation of preexisting copyrightable works. Unpublished works are always protected; published works by non-U.S. citizen or domiciliary authors and artists are protected under certain circumstances.

Perhaps one of the most important distinctions for the estate planner to understand is the difference between "original work" and "work made for hire" (WMFH), a defined term in § 101 of the 1976 Copyright Act. Title to WMFH vests in the employer or other person for whom the work was prepared in the scope of W-2 employment. In contrast, independent contractors (ICs) (1099 tax filers) generally own their work. There is often confusion about this distinction between WMFH and IC copyrights, and as a result many arrangements that are ostensibly WMFH are not legally enforceable as such, which means that the creator of the work may own the copyright despite the terms of some overreaching IC agreement, and the estate planner has another asset to plan for.

In order to be successful in protecting the interests of

copyright clients, an estate planner must understand that a copyright is not an indivisible lump, but rather a bundle of separable intangible rights, each conferred by statute on the copyright owner for a limited period of time. Copyright ownership may encompass any or all of the following rights: the right to reproduce the work; prepare derivative works; distribute copies by sale or by rental, lease, or lending; perform the work publicly; perform sound recordings by digital audio transmission; and display the work publicly. A copyright can be divided, "sliced and diced" a variety of ways, and the exclusive rights that comprise the copyright can be exploited by different assignees or licensees in separate ways. For instance, the copyright claimant may sell the entire copyright or merely make grants of particular exclusive rights, such as the right to publish a book while retaining other rights; for example, the right to create derivative works including widely varying products such as movies, video games, ring tones, or shower curtains. Assignment and licensing of rights can be limited geographically and/or for a specific period of time. It takes a written agreement to transfer ownership of a copyright. Moreover, the transfer of the mere storage medium—the physical canvas, DVD, or book—does not transfer the exclusive rights that together comprise copyright.

As mentioned previously, copyright protection is for a limited time dictated by the U.S. Constitution in Article 1, Section 8, Clause 8, and after that, the work enters the public domain. The duration of a copyright depends upon the status of the work on January 1, 1978. If the work was created on or after January 1, 1978, and is not WMFH, the copyright will last for the author's life plus 70 years. If more than one author created the work, the term is the life of the last surviving author plus 70 years. If the work constitutes WMFH or is anonymous, there is protection for the 95-year period from first publication or 120 years from creation (whichever is shorter).² These rules also apply to works created before January 1, 1978, but not in the public domain or copyrighted by that date.

A major rookie error in estate planning happens when an estate planner assumes that an assignment or other copyright transfer is irrevocable and stops there. U.S. copyright law provides that a copyright may be recaptured, which means a copyright assignment is not necessarily static for the entire term of copyright. Why would the copyright law provide for what amounts to a "take back" or a "do over" opportunity? The law acknowledges that the value of a copyright is usually impossible to know in the early days of the work's exploitation. The chronicles of copyright law are replete with stories such as that of J.K. Rowling, whose work *Harry Potter* was repeatedly rejected by publishers in the beginning; or the Coen Brothers' movie *The Big Lebowski*, a sleeper movie to begin with and a cult shortly thereafter; or the video game *Tetris*, which began as some mathematician's idea of a nonviolent game alternative and became a worldwide best seller. When working with authors and artists (or those who have inherited or may inherit their copyright assets), it's critical for an estate planner to understand this recapture concept, called "termination rights."

There are two clauses in the Copyright Act that address termination rights. One applies only to pre-1978 works and another applies only to post-1978 copyrights. Both clauses

provide that the copyright claimant (the author or artist) retains control over a transferred copyright through the power to terminate the transfer at a future date. In lieu of the renewal rights that existed under prior law, an author or artist, or if deceased, his or her surviving spouse, children, or grandchildren, has a nonassignable, nonwaivable right to terminate most transfers and licenses granted by the author or artist at a defined point in the future. If the author or artist has passed away and has no surviving spouse, child, or grandchild, this right passes to his or her executor, administrator, personal representative, or trustee.³

The purpose of this rule is to give authors and artists and their families a second opportunity to market their works after an original sale of the copyright. Legislative history teaches that the drafters of this legislation were trying to address the injustice that results when a copyright owner assigns a copyright too early in the exploitation cycle to get fair value. For instance, Harper Lee wrote *To Kill a Mockingbird* and accepted exactly and only \$2,500 for her assignment to Scribner. Not one further dime was paid to Harper Lee, who still is alive and supported only by Social Security rather than by some portion of the over \$3 billion in copyright royalties that publishers have made in connection with the sale of her book.

So, what are the rules of copyright recapture? Termination of an assignment of a copyright can be effected at any time during a five-year period beginning at the end of 35 years from the date of the execution of the grant, which means the first post-1978 transfers up for termination will be maturing in 2013. If the author or artist is living, he or she can terminate a copyright assignment by serving written notice on the grantee at least two years before the termination date stated in the notice and recording the notice with the Copyright Office. If an author or artist dies before commencement of this termination period, his or her surviving spouse owns 100 percent of the termination interest unless there are children or grandchildren, in which case the spouse has a 50 percent interest in the termination right and the children and grandchildren have the other 50 percent. If the author or artist has no surviving spouse, his or her children and grandchildren hold the entire termination right, in shares based on their generational assignment. Where termination rights are shared by more than one person, it takes the holders of more than 50 percent of the interest to exercise the termination right, which means that family members need to cooperate with each other. Further, because these rights are nonassignable (and in fact it's impossible to know who will actually hold the rights until the time at which they mature), there's really no way to plan for this ahead of time. Upon the effective date of termination, all licenses and rights in the copyright revert to the author or persons owning the termination interest, including those that did not join in signing the notice. Importantly, there is an exception for any transfer made by "will," but as discussed in some detail below, no explicit exception for any transfer by gift during life or any testamentary transfer pursuant to an instrument other than a will.⁴

Here's what estate planning lawyers *should be doing* for their clients who have interests in copyrights, clients who are content creators or who are children, grandchildren, or

spouses of content creators: Know who these clients are. This requires a basic understanding of copyright law, or at least the ability to identify clients whom the law aims to protect—creators and their families. Here are some questions to add to the standard intake form for new clients:

- Have you ever created a copyrighted work? Are you an author, photographer, songwriter, jingle writer, poet, graphic artist, software code writer, video game creator, animator, or mural painter?
- Have you ever assigned a copyright interest?
- Was your spouse, parent, or grandparent a musician, filmmaker, writer, artist, entertainer, or anyone in the arts field?
- Has your spouse, parent, or grandparent ever created a copyrighted work or assigned a copyright interest?

The first two questions are important in order to determine what rights the client has to assign to others; the second two questions are important to determine what rights the client might have by virtue of being a "statutory heir" of the content creator, specifically, termination rights.

Make friends with an intellectual property lawyer. Estate planning lawyers, no matter how interested they are in this topic, undoubtedly will need help interpreting these rules, and need to be trained to check in with their favorite intellectual property lawyers when they see these assets. Estate planners generally focus on transfer of assets to intended beneficiaries, either during life or at death. With copyrights, more is at stake—these assets must be handled in a way that protects their value long term. A lack of knowledge of the rights that exist, particularly termination rights, can result in loss of value for the creator and his or her family, and can lead to malpractice claims against you and your firm.

Get past these basic misconceptions about copyright: (1) that copyright is like the family jewels or furniture that can be posthumously parceled out; (2) that copyright is one indivisible lump instead of an asset that can be separated into different rights of copyright (e.g., to copy, distribute, create derivative works, publicly perform, and publicly display); and (3) that a copyright, without any exertion of effort in the future, will continue to produce fabulous royalties for heirs. Interests in copyrights may be divided in many ways. The first step when doing estate planning for an author or an artist is to figure out what the client currently owns and what rights he or she has assigned. A creator of work may have made a complete assignment of all of the copyright holder's rights in a given work. This will give the assignee the right to publish the work, create derivative works, and grant licenses to others to do the same. Alternatively, the creator of the work may have granted a license that conveys only certain rights to exploit the copyrighted work; for example, in a specific geographical location, for a term of years, or by a particular subject matter. In order to do proper planning, it's critical that the planner understand what's available to transfer.

Avoid these basic mistakes: (1) failing to register a copyright with the U.S. Copyright Office; (2) failing to protect or plan for termination rights in an intentional way; (3) relegating copyrights and royalty streams to the residuary clause in an estate plan instead of calling out and addressing these assets

specifically; (4) failing to provide for moral rights; (5) failing to understand the use of literary trusts; (6) failing to consider future management issues when designing bequests; (7) attempting to express intent without means to implement that intent (for instance, delegating exploitation responsibility to people not up to the task rather than providing for a copyright trust managed by skilled professionals); (8) failing to deal with dwindling profit and cash flow issues; (9) failing to provide for generational transition points, both in management and ownership; and (10) failing to locate and review the underlying agreements that relate to the management and exploitation of the works (such as publishing agreements).

Recognize that federal copyright law, while designed to protect artists and authors and their families from being locked into contractual arrangements that are not fair to them long term, can actually hamper their use of common estate planning strategies, and communicate the associated risk of the use of these techniques to the client. The reason for this is that the termination rights provisions of the 1976 Act apply generally to *any transfer* of a copyright or of any right comprised in a copyright.

Recognizing that authors and artists should have the ability to decide who receives their property after death, the law includes a specific exception for transfers by “will,” which although still a part of our vernacular, actually constitutes a somewhat antiquated estate planning tool. In this day and age, the vast majority of testamentary transfers are made via living trusts, which both avoid probate and allow for management of assets during the incapacity of the owner of the assets. In addition, many well-advised authors and artists have transferred their copyrights to entities such as limited liability companies and limited partnerships, both for ease and continuity of management and to facilitate the use of wealth transfer strategies that benefit from discounts (available to minority interests in business entities, based on the minority owner’s lack of control and the absence of a market for the interest). Others have transferred their interests to inter vivos trusts or charitable foundations. Based on a literal reading of the 1976 Act, at a point 35 years after they are made, all of these transfers are subject to termination by the author’s or artist’s statutory heirs—his or her spouse, children, and grandchildren—or in the absence of these family members, his or her executor, administrator, personal representative, or trustee. There is a risk, therefore, that a transfer of a copyright interest that is made pursuant to one of these techniques will be vulnerable to undoing at a later date, particularly if the beneficiary of the transfer is other than a statutory heir. To make things even more complicated, the determination of the statutory heirs is not made until such time as the rights can actually be exercised.

For example, suppose a recording artist makes a number of recordings between 1980 and 2000.⁵ He transfers his copyright interests in these recordings to a limited liability company and provides in his living trust that his interest in the limited liability company will pass to his brother upon his death. His children, who under the terms of the living trust were to receive other assets (assume real estate and securities), arguably have the power to unwind these transfers to the limited liability company and to the brother during the termination period, the five-year period commencing 35 years after

they were made. The only way for the artist to definitively override these rights of the children would have been to provide for the transfer of his copyright interests to his brother in his will, which, as any estate planning lawyer knows, will trigger a probate. The first rule in modern estate planning is to avoid probate at all costs, so it is unlikely that the recording artist’s estate planner is going to go this route by default.

There is certainly an argument that Congress did not intend to deprive artists and authors of the right to do intelligent and efficient estate planning when it enacted the 1976 Act. Indeed, the inclusion of a carve-out for transfers made by will was intended to give the creator of a work the ability to decide where the rights in the work go after his or her death. With January 1, 2013, looming large on the horizon, it is highly likely that these rules will soon be tested. Optimally, they will be interpreted in a way that honors the original intent of the 1976 Act. Until that happens, however, authors and artists should make transfers (other than by will) with the knowledge that those transfers may be unwound by statutory heirs at some point in the future.

Understand the income tax treatment of the results of an artist’s or author’s personal efforts. A copyrighted work is not a capital asset in the hands of the creator or anyone whose basis is determined in whole or in part by reference to creator’s basis, which means all income that the work generates (even in a sale) is ordinary income.

Know the advantages of lifetime gifting; perhaps the most important decision to be made when doing an estate plan for an author or artist is whether the plan should include lifetime gifts either utilizing the annual exclusion (currently \$13,000) or lifetime exemption (\$5.12 million in 2012, reverting to \$1 million in 2013 unless additional legislation is enacted).

First, the planner must determine the value of the transferred intellectual property. An appraisal will be necessary to support this value, and the statutory heir issues (described above) should be carefully considered in determining this value.

Next, the planner must determine the best vehicle for the transfer. Outright? In trust? Through a partnership, limited liability company, or corporation? To a charitable lead or remainder trust? Is it better from a tax perspective to hold on to assets so that they are includible in the author’s or artist’s taxable estate at death, resulting in a step up in basis and conversion to capital asset status? Among the considerations favoring lifetime gifts: (1) completed gifts made before death are not included in the author’s or artist’s estate at death, provided the author or artist retained no interests in or powers over the property, and all appreciation that occurs after the gift is removed without transfer tax; (2) if donees are in a lower income tax bracket than the artist or author, tax savings could result because income will be taxed at a lower rate; (3) where the author or artist has clear donative goals for lifetime transfers to family, friends, and charity; (4) where the author or artist has sizable assets in excess of that required for his or her lifestyle; (5) the ability to use a variety of techniques that leverage lifetime gifts—grantor retained interest trusts, grantor retained annuity trusts (GRATs), charitable lead trusts (CLTs), and charitable remainder trusts (GRATs and CLTs are particularly attractive right now given the

extremely low interest rate environment); (6) gifts by a wealthy author or artist to a U.S. citizen federally recognized spouse may result in lower overall tax by allowing the spouse to utilize his or her effective exemption amount and take advantage of lower marginal rates; (7) gifts may reduce the value of the assets remaining in the author's or artist's estate by qualifying the assets for a valuation discount; and (8) if tax is going to be paid, gift tax is cheaper because it is "tax exclusive" (meaning the gift tax may be paid with funds not subject to the tax), while estate tax is "tax inclusive" (meaning the estate tax is paid with funds subject to the tax).

Recognize the benefits of leaving assets to heirs at death. A big advantage is basis step up at death and conversion of assets to capital assets in the hands of the estate beneficiary. Balance this against estate tax due if the estate is taxable. Also, tax is due on the appreciation of assets from the date a lifetime transfer could have been made.

Consider the benefits of holding copyrights in corporations, partnerships, and limited liability companies: (1) can reduce overall transfer tax burden while transferring all or a portion of the artist's or author's copyrights to his or her desired beneficiaries; (2) can provide for management of the copyrights, during the creator's life and after his or her death, which in turn can minimize conflicts among co-owners and provide for unified development and control that might not happen if interests are divided; and (3) may facilitate use of estate tax deferral mechanisms, specifically Internal Revenue Code (I.R.C.) § 6166, which is available for assets that constitute closely held business interests if the interests comprise 35 percent or more of the gross estate of a deceased author or artist.

Consider charitable gifts (either outright or to a split-interest trust), and know the special rules that apply to gifts of interests in copyrights. Gifts to charity are eligible for income tax charitable deductions under I.R.C. § 170, the gift tax charitable deduction under I.R.C. § 2522, and the estate tax charitable deduction under I.R.C. § 2055. In particular:

- A donor who owns both a work of art and the copyright must donate both to charity in order to qualify for an income tax charitable deduction, because artwork and copyright are not treated as two distinct properties as they are under federal copyright law and for estate and gift tax purposes.

- Similarly, if an owner of a copyright royalty wishes to donate the right to receive the royalty stream to charity to avoid inclusion in his or her gross income, he or she must also assign the source of the royalty income (the copyright) to the charity as well. If he or she does not, the royalty income will be included in the donor's gross income even though it is paid to charity. The donor will get a charitable deduction for the royalties paid, but this is less advantageous from a tax standpoint than excluding the income altogether.
- There are limitations on the income tax charitable deduction available for contributions of copyrights to charity, as the deduction cannot exceed the lesser of the donor's basis and fair market value plus additional amounts based on "qualified donee income."
- Since 1982, for estate and gift tax purposes, artwork and its copyright are treated as separate properties for the estate and gift tax charitable deduction. So it's possible to donate a work of art or its copyright to charity without the other and still receive an estate or gift tax charitable deduction for what has been donated. Please note that there are special rules, both in the income tax area and in the estate and gift tax area, when copyrights and artwork are donated to private foundations.

When considering lifetime transfers, do not forget about the power of the statutory heirs to potentially unwind the transfers! Sometimes this won't be a concern, such as where the transfers are made to those who would be statutory heirs and it's possible to make that determination at the time of the transfer. In other situations, where the recipients of transfers would never qualify as statutory heirs, the planning must be done quite carefully in order to be successful. ■

Endnotes

1. 17 U.S.C. § 102(a).
2. *Id.* § 302.
3. *Id.* §§ 203, 304.
4. *Id.*
5. See *Scorpio Music S.A. v. Willis*, No. 11cv1557 (BTM), 2012 WL 1598043 (S.D. Cal. May 7, 2012).