

Rights Reversions and Terminations of Transfer: Implications for Museums and Other Collecting Institutions

OCEAN Discussion Series

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Outline

- How does the “Termination Right” apply to museums and other collecting institutions?
- Types of collections “at risk” for termination.
- Implications for museums and collecting institutions.

Termination Right and Works of Art

- *Commissioned works*: Section 203 does not apply to if there is a written work-made-for-hire agreement.
- *Artist's Bequests*: Section 203 does not apply to works of art or related materials acquired via the artist's will, or inherited via will and then acquired.
- *Nature of the Artwork and related materials*: Section 203 only applies where there is a copyright license which can be terminated.
- Peter J. Karol, *The Threat of Termination in a Dematerialized Art Market*, New England Law Boston Legal Studies Research Paper Series, Research Paper No. 17-01 (2017).

Object-Based Art vs. Non-Object-Based Art

- Examples of “object-based” art: paintings, sculpture, decorative and other “tangible copies”.
- Material manifestations of conceptual art (object) vs. conceptual art (non-object).
- Audio-visual art (“time-based works” = non-object).
- Copyright in contemporary object-based works is almost always retained by the artist.
- Termination right is only relevant where there is a copyright license.
- Collecting non-object-based art is a relatively new phenomenon – market has only developed in the last forty years.

Termination Right and Object-Based Art

- Traditional object-based art does not present any “termination right” concerns.
- The “public display right” codified in Section 109(c) of the US Copyright Act grants the owner of a *tangible copy* (material object) of a copyrighted work (painting, sculpture, decorative art, etc.) the right to show the work to the public – no permission is needed.
- The Section 109(c) exemption “renders termination largely irrelevant for most collectors.” (Karol, p. 197).

Object-Based Art and Related Materials

- If there is a copyright license, then there is a termination right.
- Museums and collecting institutions may acquire a copyright in object-based art and related materials through negotiation with the artist.
- The copyright transfer must be in writing – sometimes a copyright license is contained in the Deed of Gift or other acquisition document.
- If there is a written transfer of copyright, that copyright license may be subject to termination.

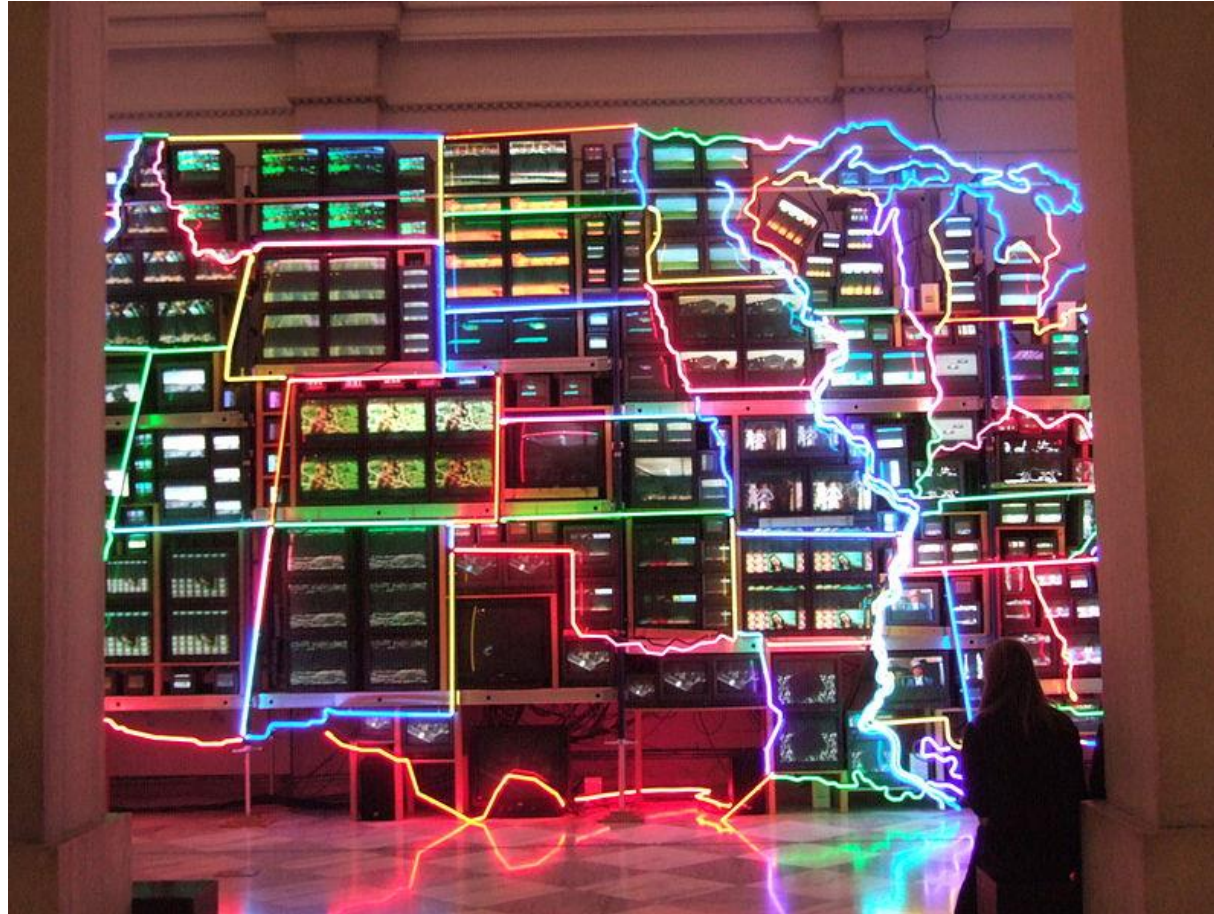
Types of Non-Object-Based Art Potentially Subject to Termination

- “Any high-priced, unchanging artwork requiring on-going permission from the artist to be created, displayed or performed is at risk for copyright termination.” (Karol, p. 202)
- *Price* – due to the high legal cost, it is unlikely that one would pursue termination for a low-value work.
- *Unchanging* – copyright only applies to “tangible expressions” (fixation requirement).
- *Permission* – termination only applies where permission from the copyright owner is required.

Video or Film Art

- Public performance right – permission is required to show the work to the public, so that permission is subject to termination.

Nam June Paik, Electronic Superhighway, American Art Museum (1995-1996)



Instruction and Certificate-Based Conceptual Art

- Certificates and diagrams for conceptual artworks are licenses to create or install copies, and thus are subject to termination.

Sol LeWitt, Wall Drawing from Retrospective, Metz, France (2012)



Text-Based Art Conceptual Art

- Works based on language or text where the work is not limited to one tangible incarnation – problem of copyrightability of short phrases, but if underlying work copyrightable, license may be subject to termination.

Lawrence Weiner, At The Same Moment, Painted on Pilings, East River (2011)



Art that requires substantial replacement of parts

- Replacement results in new copy of work – a license to recreate the work would be subject to termination.

Dan Flavin, Site –Specific Installation, Menil Collection (1996)



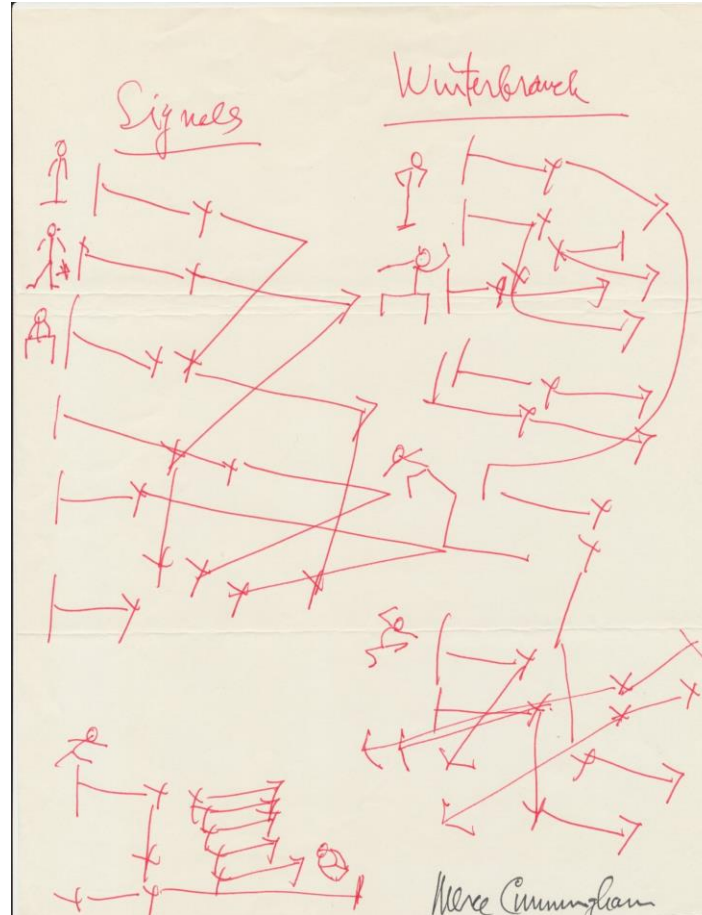
Choreographed Performance Art

- Problem of fixation (e.g. Maria Abramovic).
- Works without improvised elements fixed in video or written notation (e.g. Merce Cunningham) require a public performance license which would be subject to termination.

Maria Abramovic, At the Museum of Modern Art, New York (2010)



Merce Cunningham, Choreographic Drawing (after 1970)



Sculpture with a Fixed Sound Component

- Analogous to video art – assuming the sound is copyrightable, permission is needed to publicly perform, license subject to termination.

Janet Cardiff, Forty Part Motet, ARoS Aarhus Kunstmuseum, Denmark (2001)



Reasons to Exercise Termination Right

- Relationship between artist and collecting institutions – importance of honoring artistic intent; preservation and accessibility; ethical obligations of museum aligns with artist's interests.
- Potential for artist disagreement with collector or museum.
- Heirs who may have different values, want to extract a settlement, or want to regain control of the artwork.

Implications for Museums

- Accessioning and deaccessioning – what exactly is the museum acquiring?
- Once termination is granted, museum may have to negotiate licenses with multiple parties if it wants to exhibit work.
- *Fair use* may allow some limited post-termination uses.
- Termination does not apply to pre-termination derivatives – museum may be stuck with original version of work.
- Termination does not apply to foreign uses – museum may exhibit in non-US locations.

Impact of Termination on Valuation of Art

- Appraisals for charitable donation and estate tax purposes.
- Limitation on title – artwork subject to termination right should be valued lower than it otherwise would be.
- Perhaps this is already factored into perceptions of the market, or alternatively generally ignored, in either case it would not affect “perception” of value. (Karol, p. 223).

Questions? walt@lehmannplc.com



RIGHTS REVERSION & TERMINATION OF TRANSFER

How Librarians Can Help Authors Rescue Out-of-Print Books from Obscurity



OCEAN Discussion Series
June 17, 2022

Hello!



**Rachel Brooke
&
Brianna Schofield**

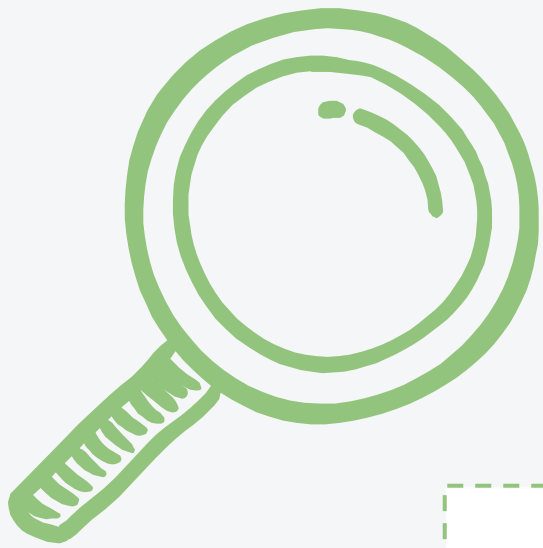
What is Authors Alliance?

- Nonprofit supporting authors who want to get (and keep!) their works in the hands of readers
- Provide educational resources and tools to help authors understand copyright and publishing contracts
- Give voice to authors in policy debates
- Join today! authorsalliance.org/join



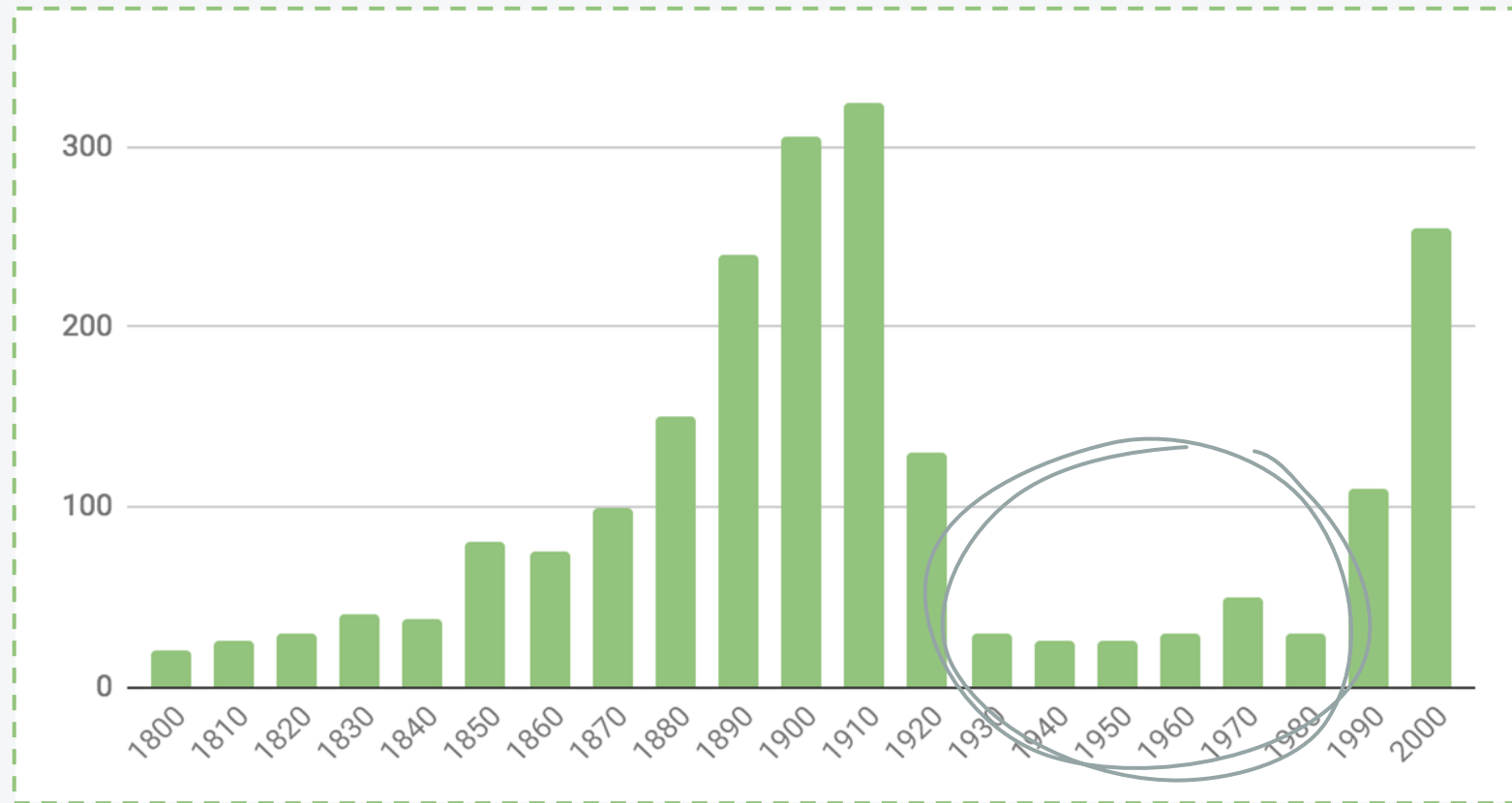
WHY GET RIGHTS BACK?





The Case of the Missing Books

New Editions of Books Available on Amazon



based on research by Prof. Paul Heald

Motivations to Get Rights Back



James O'Donnell

Wanted out-of-print
book to be available:
made openly available
online



David Ullman

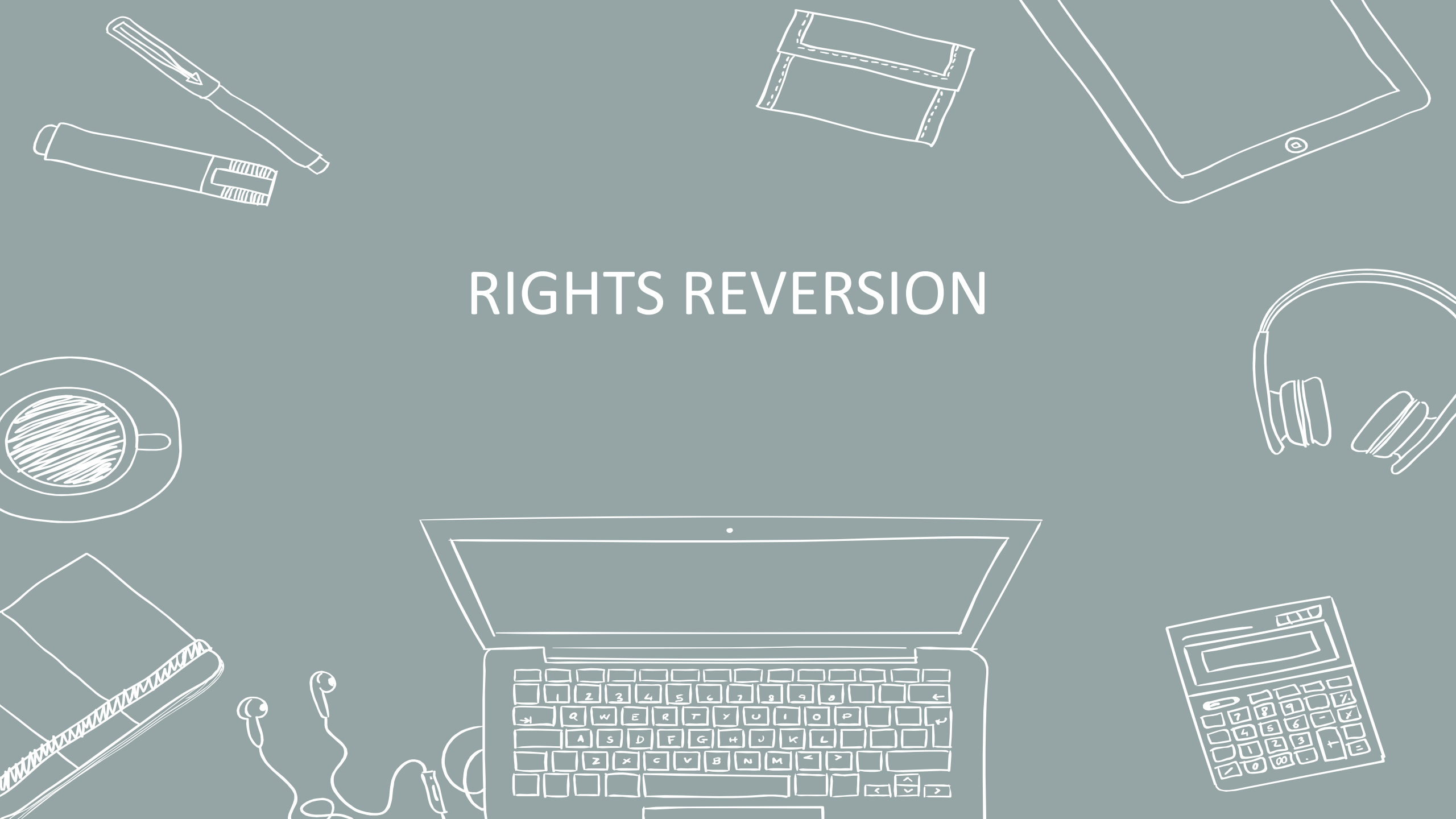
Wanted to reduce costs
for readers: self-published
textbook at a lower price
point

Why Librarians?



Anita Walz

RIGHTS REVERSION





Publication Contracts and Reversion Clauses

- Publication contracts govern the relationship between author and publisher.
- Publication contracts may contain a reversion clause that specifies when an author can obtain a reversion.

Getting Rights Back



Exercising a clause in a publication contract (often called a “reversion clause”) that permits an author to regain some or all of her rights when a triggering condition is met.



Negotiating to regain rights in the absence of a reversion clause (or when the triggering conditions for the reversion clause are not met).

or

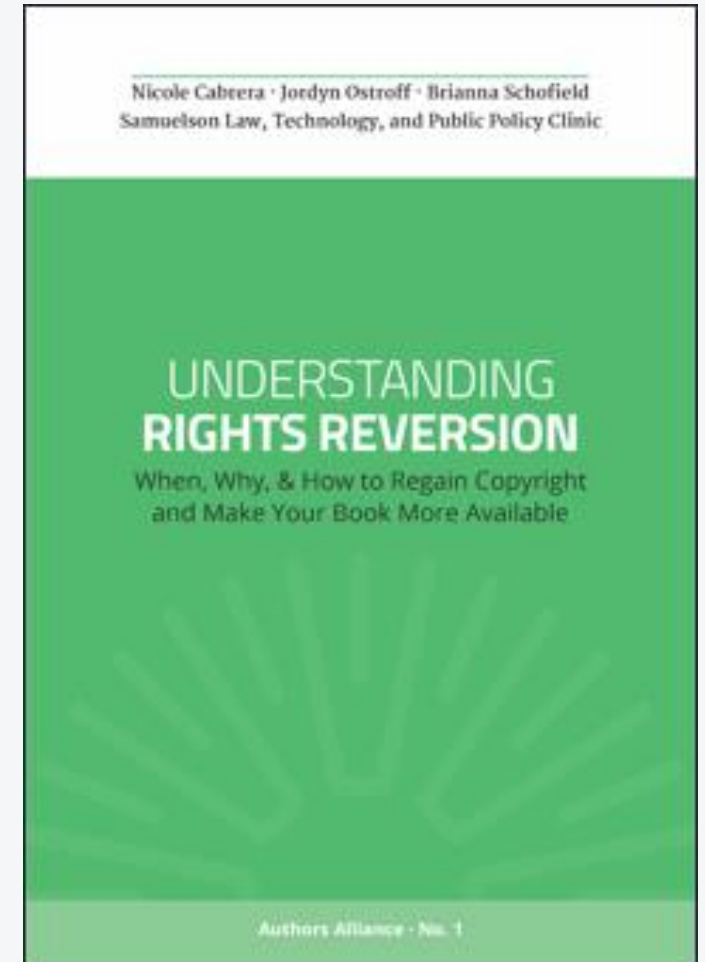


Reaching another kind of agreement or a compromise that realizes the author’s goals.

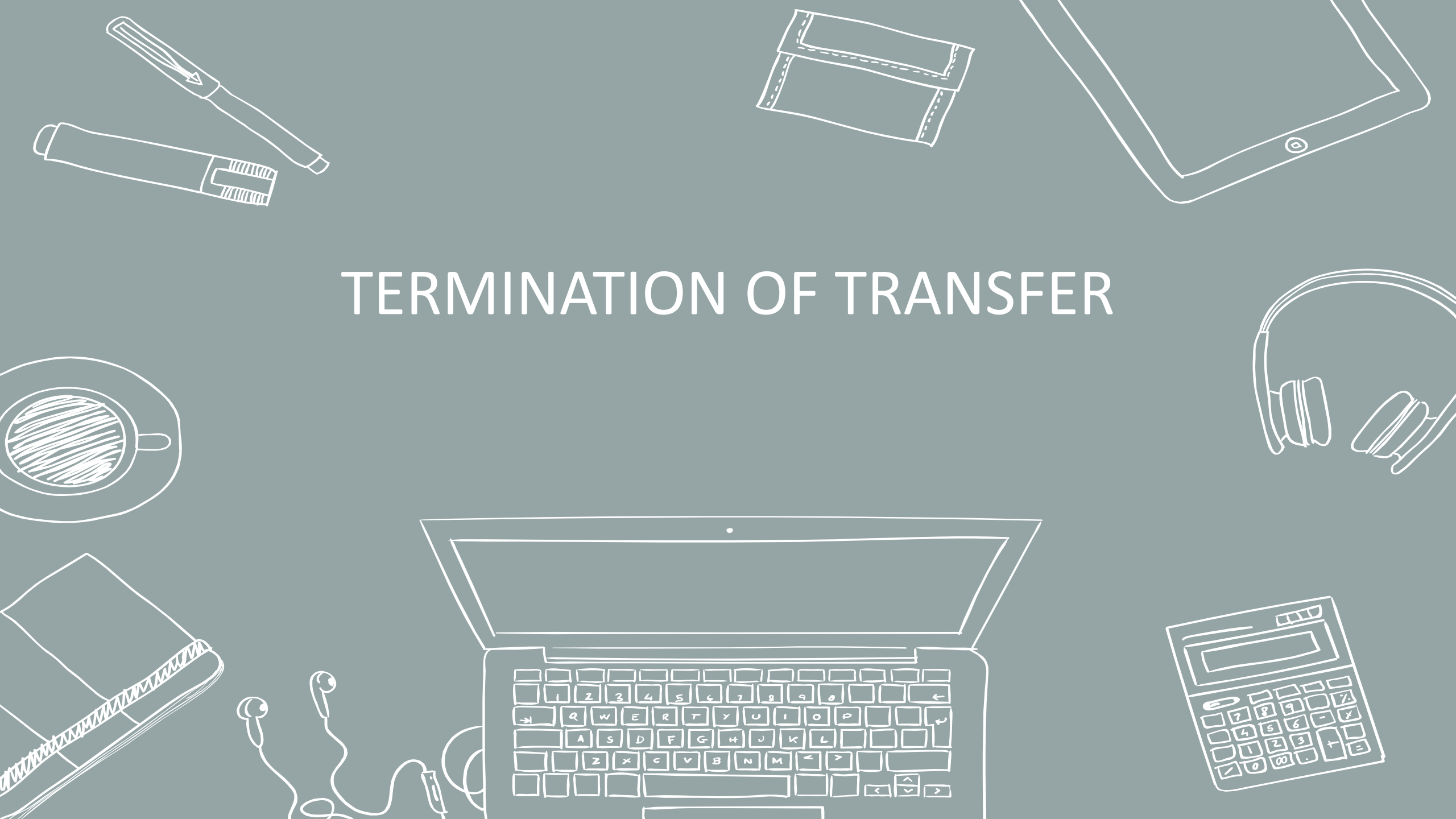
Further Resources: Authors Alliance

- Guide to Understanding Rights Reversion
- Templates for writing rights reversion letters
- ...and more

authorsalliance.org/resources/rights-reversion-portal/



TERMINATION OF TRANSFER



Termination of Transfer

- Statutory right to get your rights back after a period of time passes
- § 203, § 304(c) or § 304(d) of the U.S. Copyright Act
- Five-year window starts 35, 40, 56, or 75 years from triggering event, depending on circumstances
 - E.g., Under § 203, a transfer executed on or after Jan. 1, 1978, agreement is generally terminable 35 years from date it was signed (or, if it covers the right to publish the work, 35 years from publication or 40 years from execution, whichever ends earlier)

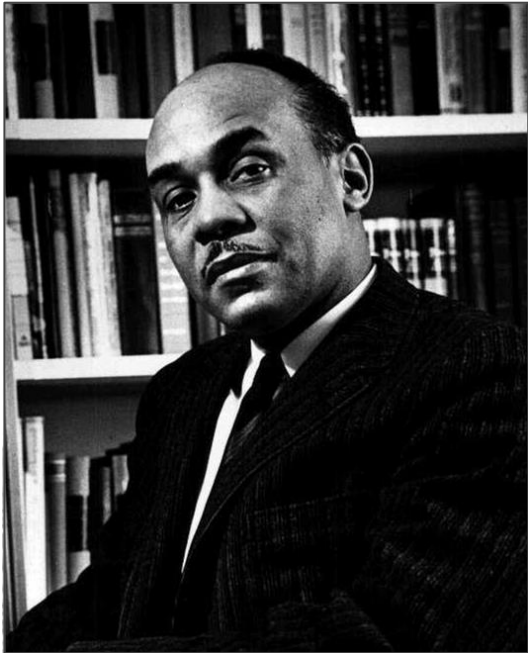


Termination of Transfer



- In order to effectuate a termination right, authors must serve notice on the party whose grant is being terminated 2-10 years before the termination date.
- AND send a copy of that notice to the U.S. Copyright Office, together with a cover letter (form TCS) and \$125.

Why a Statutory Right?



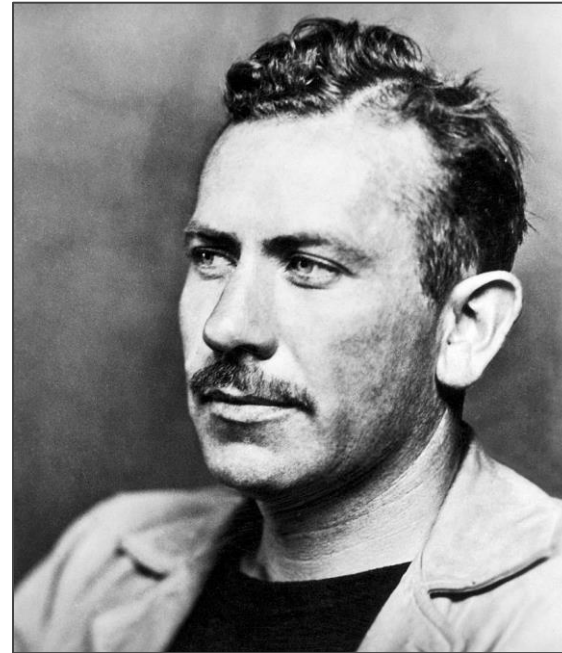
Ralph Ellison

Photo by United States Information Agency
staff photographer



Margaret Mitchell

Photo by New York World-Telegram and the Sun
photographer Aumuller, AI



John Steinbeck

Photo by McFadden Publications, Inc.;
no photographer credited



Margaret Wise Brown

Photo by Consuelo Kanaga



IS THE ToT TOOL USEFUL TO ME?

The Termination of Transfer (ToT) tool helps authors understand the termination of transfer provisions of U.S. copyright law, which allow authors to regain copyright to creative works they have previously signed away, even if their contracts say otherwise



AUTHOR CREATES WORK



Art



Academic



Literature



Music



Film

AUTHOR TRANSFERS RIGHTS



TIME PASSES



AUTHOR TERMINATES TRANSFER TO GET RIGHTS BACK



AUTHOR GETS A SECOND CHANCE

to do things like share the work with the public or renegotiate a contract



LEARN MORE ABOUT EXERCISING YOUR ToT RIGHTS AT [RIGHTSBACK.ORG](https://rightsback.org)



**Authors Alliance/Creative Commons
Termination of Transfer Tool (ToT Tool) at rightsback.org**

Termination of Transfer Tool

Statutory termination eligibility:

- Was the transfer a part of a will?
- Was the work created within the scope of the author's employment?
- Was the work created in response to a special order or commission?

Possible public domain work:

- When was the work created?
- Was the work published? If so, when?
- Does the work have a copyright notice?
- Was the work registered with the U.S. Copyright Office?

Timing of termination window:

- When was the work created?
- Was the work published? If so, when?
- Was the work registered? If so, when?
- When was the agreement signed?

Transfer by Will

It is unlikely that works with the characteristics provided would have a termination right. The information provided indicates that the agreement or transfer in question is a will. Transfers of copyright interests that occur by will cannot be terminated. Please consult a licensed attorney to determine whether the copyright assignment was transferred by a will and whether a termination right in fact exists for a given work.

Public domain work

Works with the characteristics provided would likely be in the public domain. Because works in the public domain are not protected by copyright, the termination of transfer provisions are inapplicable. Please consult a licensed attorney to determine whether a work with the characteristics provided are in the public domain and whether a termination right in fact exists for a given work.

Termination Type	Under § 203
§ 203 notice window	2006-2019
§ 203 termination window	2016-2021

Termination of Transfer Tool

Termination of Transfer Information Sheet Creative Commons and Authors Alliance

This is an information sheet generated by the Termination of Transfer tool developed by Creative Commons and Authors Alliance (last reviewed October 5, 2017). The information provided here is intended solely for educational purposes and does not constitute legal advice. Only a licensed attorney can properly evaluate the circumstances specific to each copyrighted work and determine whether a transfer of copyright is terminable.

If you believe that you may have a right to terminate a transfer of copyright, you should consult an attorney. Neither Authors Alliance nor Creative Commons provide legal advice, and your use of the Termination of Transfer Tool does not create an attorney-client relationship.

For more information, check out the FAQ at <https://rightsback.org/faq/>.

Information Sheet Date: 25th July 2018

Results

Potentially Eligible for termination Under § 203

Thank you for using the Termination of Transfer Tool. Works with the characteristics provided potentially are eligible for termination during the windows specified in the PDF information sheet. Please free to check out the FAQ for additional information. Please consult a licensed attorney to better understand the complexities of copyright termination and to determine whether a termination right fact exists for a given work.

Flags

Understanding the § 203 termination window

When a transfer made in or after 1978 is eligible for a termination, it will be under section 203 of the Copyright Act. In these circumstances, the termination window opens 35 years after the transfer and lasts for five years. However, if the author granted publication rights, the test is a little different. In those cases, the five-year termination window opens either 35 years from publication or 40 years from the transfer—whichever comes first.

Details

Creation Year	1990
Effective Grant Year	1990
User Entered Grant Year	1990
Termination Type	Under § 203
§ 203 notice window	2015-2028
§ 203 termination window	2025-2030

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§ 203 notice window	2015-2028
§ 203 termination window	2025-2030

For agreements on or after January 1, 1978

If an author first published a work between
1984-1997,
the notification window could now be open!

(assuming publication rights were included, the work was published within 5 years of the grant, and the work is eligible for termination)

For agreements prior to January 1, 1978

If copyright was secured between

1963-1976,

the notification window could now be open!

(assuming the work is eligible for termination)

Termination of Transfer: Notice Templates

- In order to effectuate a termination right, authors must serve notice on the party whose grant is being terminated 2-10 years before the termination date.
- Authors must also submit a copy of that notice of termination to the U.S. Copyright Office, with cover form and fee.
- Templates for and information about notices of termination available at:
authorsalliance.org/resources/termination-of-transfer/

