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# Protecting an Artist's Legacy with Estate and Intellectual Property Succession Planning


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# Copyright Law Intersects with Texas Probate Law

## I. INTRODUCTION

This article provides a general overview of the following topics: 1) creation, ownership, and rights in a copyrightable work; 2) copyright transfers; 3) copyright terms and renewals; 4) copyright grant termination; 5) characterization of a copyright in a community property state; and 6) Texas probate processes.

## II. COPYRIGHT CREATION, RIGHTS, REGISTRATION, AND INITIAL OWNERSHIP

### A. The Copyright Acts

Copyright arises automatically when an original work is created. A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work. *See* 17 U.S.C. § 101.

"Fixing" an idea in a tangible form could include any of the following circumstances: lyrics written on a napkin; lyrics typed into a word processor and saved as a document; the digital recording of a singer and her guitar on a computer hard drive or portable recorder; the physical drawing of a cartoon character; original creation of computer code progression; or processing a simple photograph. *See id*.

The United States has two different bodies of copyright law that cover how long a work is protected by copyright before the work falls into the public domain.

Works created and published prior to January 1, 1978, or created and registered prior to January 1, 1978, are subject to the 1909 Copyright Act and revisions. Works created after January 1, 1978, or created prior to January 1, 1978, and neither published nor registered prior to January 1, 1978, are subject to the 1976 Copyright and revisions. *See* 17 U.S.C. §§ 302-305.

Under the 1909 Act there is a two-term system of protection. The original term was 28 years from registration or publication and the renewal term was 28 years. If there had not been revisions to the 1909 Act, all works would have become public domain 56 years after registration or publication. Works existing in their first term of copyright under the 1909 Act on January 1, 1978, shall last for the initial 28 years and then shall be renewed for 67 years. Works in their renewal term on January 1, 1978, shall be protected by copyright for 95 years from publication. 17 U.S.C. § 304.

Under current revisions to the 1976 Act, works created on or after January 1, 1978, are protected for the life of the author plus 70 years. Works created, but not published or registered prior to January 1, 1978, are protected for life of the author plus 70 years, but shall not expire before December 31, 2001. The duration of copyright for "works made for hire" is 95 years from publication or 120 years from creation, whichever is shorter. *See* 17 U.S.C. § 302.

We often discuss the U.S. copyright law in a vacuum without grasping just how many works are controlled by the Copyright Act. Total copyright registrations issued from 1790 through 2022 are 40,116,623. *See* U.S. Copyright Office, Fiscal 2022 Annual Report, p. 25. The total number of registrations issued from 1927 through 1977 is 12,124,409. *Id*. The Copyright Office processed 484,253 claims for

registration in fiscal year 2022 including 236 Renewal Copyright Registrations. *Id.* Based on these numbers, the importance of understanding the intricacies of both the 1909 Act and 1976 Act becomes evident.

**B. Rights**

As the holder of exclusive rights, the copyright owner may grant permission to some and prevent others from doing the following five items:

To **reproduce** the copyrighted work in copies or phonorecords;

To prepare **derivative works** based upon the copyrighted work;

To **distribute copies** or phonorecords of the copyright work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

To **perform** the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;

To **display** the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphical, or sculptural works, including the individual images of a motion picture or other audiovisual work; and

In the case of sound recording, to **perform** the copyrighted work publicly by means of a digital audio transmission. *See* 17 U.S.C. § 106. These exclusive rights are subject to Fair Use, Educational Use, and other limitations and exceptions identified in 17 U.S.C. §§107–122.

**C. Registration**

Registration of a copyright in the copyright office is not a condition of securing copyright protection.

Registration of the copyright is necessary prior to the filing of an infringement lawsuit in federal court. *Fourth Estate Public Corp v. Wall-Street. com, LLC*, 139 S. Ct. 881, 586 U.S., 203 L. Ed. 2d 147 (2019).

To bring an action at the Copyright Claims Board for infringement or declaration of non-infringement, you must have either a registration for the work or a pending and complete application for registration. You must have submitted the copyright application information as well as a deposit copy of the work to the U.S. Copyright Office and the required Copyright Office fee. This is different from federal court, where the Copyright Office must have made a decision on your copyright application before you may bring an infringement claim. *See* U.S. COPYRIGHT OFFICE COPYRIGHT CLAIMS BOARD HANDBOOK – STARTING AN INFRINGEMENT CLAIM, Chapter 3A.

If registration is made prior to infringement of the work, attorney's fees are available in addition to selecting between pursuing statutory or actual damages in an action for infringement. If registration is made within five years of publication; the information provided on the registration is accepted by the court as true. *See* 17 U.S.C. §§501-509.

**D. Notice of copyright:**

Under the 1909 Act it was detrimental to your copyright if the work was published without proper notice. The requirement of publication with proper notice carried into the 1976 Act until March 1, 1989 when the U.S. joined the Berne Convention. The law no longer requires use of a copyright notice. IT IS HIGHLY RECOMMENDED THAT YOU CONTINUE TO USE A PROPER COPYRIGHT NOTICE to receive the maximum recovery allowed under the law in the event of litigation.

Proper notice consists of three elements. Visually perceptible copies of the work should contain all three of the following elements.

The **symbol** "©" or the word "Copyright" or the abbreviation "Copr."; The **year** of first publication of the work; and The **name** of the owner of the copyright.

As an example: © 2023 Bennett Law Office, PC.

If the copyrighted work is a sound recording, the proper symbol is the letter P in a circle ℗. The P stands for phonograph. *See* 17 U.S.C. § 401.

**E. Initial Ownership**

The copyright in a work protected under the 1976 Copyright Act vests initially in the author or authors of the work. *See* 17 U.S.C. § 201(a). The authors of a joint work are co-owners of copyright in the work. *Id.* When a work is a work made for hire, absent an express written agreement, the copyright is almost always vested in the employer or other person for whom the work was prepared. *See* 17 U.S.C. §201(b).

**III. COPYRIGHT TRANSFERS**

A copyright or any of the individual sub-rights/bundle of rights can be transferred in whole or in part during life or at death. *See* 17 U.S.C. § 201(d). A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. *See* 17 U.S.C. § 204.

It has become standard practice for a successful songwriter to transfer some or all of a copyright to a publishing company, a screenplay author to transfer all of a copyright to a film production company, and a computer programmer to a transfer a copyright to a business in order to fully exploit a copyright. As such, negotiating the transfer of rights in a copyright during the life of an author is likely the most common legal transaction an entertainment or intellectual property lawyer will encounter when representing authors or business entities desiring to obtain such rights.

Furthermore, the 1976 Copyright Act specifically provides that a copyright may be bequeathed by will or pass as personal property by the applicable laws of intestate succession. *See* 17 U.S.C. § 201(d)(1).

As a result, a copyright can be owned jointly, held in trust, transferred for remuneration or by gift during life or transferred at death. A copyright is intangible personal property that can be titled in the name of one or more person or entity, much like real property.

## IV. COPYRIGHT RENEWALS 1909 ACT

### A. Copyright Term

As stated above, under the 1909 Act there were two terms of copyright. The original term of 28 years and a renewal term of 28 years. To secure copyright protection for the renewal term, a renewal copyright application must have been filed during the twenty-eighth year (the final year of the first term.) Timing was critical. If the renewal was filed untimely or not at all, the work was thrust into the public domain. *See* Circular 15, United States Copyright Office, Renewal of Copyright.

In a study prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, it was found that less than ten percent (10%) of all copyrights were renewed and fewer than five percent (5%) of copyrighted books and pamphlets were renewed prior to the completion of this 1961 Copyright Office study.

In 1992, the 1976 Copyright Act was amended in regards to works registered or published between 1964 and 1977 such that a renewal application was no longer required to be filed to keep the work out of the public domain.

The 1976 Act maintained the two-term system for works copyrighted prior to January 1, 1978. Under the 1976 Act, the original 28-year term was maintained and the renewal term was 47 years. The 1998 amendment to the 1976 Act increased the renewal term to 67 years for a total of 95 years of copyright protection. *See id*.

### B. Who Owns/Claims the Renewal?

The courts have determined the renewal term is an expectancy interest and is not a vested right. Because it is an expectancy, the claimant(s) of the renewal term will vary based on certain factors.

If the work is created as a "work for hire," the author relinquishes any claim to the renewal. The employer or party that commissioned the work will claim the renewal.

If the author assigned the renewal term of the work to a third party and the author survives to the start of the renewal term, the assignee will retain the renewal term.

If the author assigns the renewal term of the work to a third party, the third party will own the renewal IF…. the author does not survive to the beginning of the renewal term.

What happens if the author assigns the renewal term and dies prior to the last year of the first term? The renewal term then vests as specified in the 1976 Copyright Act.

It is important to keep in mind if the author predeceases the start of the renewal term, the Copyright Act controls the distribution of the renewal interest, not state intestacy laws or the author's will *See* 17 U.S.C. § 304(c)(2)); *Roger Miller Music, Inc. v. SONY/ATV PUB., LLC,* 672 F.3d 434 (6th Cir. 2012); Bridgeport Music, Inc. v. Smith, 714 F.3d 932, 938 (6th Cir. 2013).

**C. Why File A Renewal Copyright?**

Even though there is no longer a requirement to file a renewal, it is still important to do so. Filing at any time, even after the 28th year, will garner the claimant many benefits. The renewal certificate serves as prima facie evidence of the validity of the copyright during the renewal term and of the facts stated in the renewal. Renewal registration is a prerequisite to statutory damages and attorney's fee in infringement suits and for filing an infringement action.

Filing a renewal is key for controlling the further use of derivative works created during the original term. If the renewal is filed within one year prior of the expiration of the original term, the claimant may terminate any grants for derivative works that were issued during the original term.

The U.S. Supreme Court ruled in the "Rear Window" case (*Stewart v. Abend*, 496 U.S. 643 (1990)) that any license granted during the original term would only remain in effect if the author survived to the start of the renewal term and the renewal term vested in the author's assignee. The *Rear Window* case involved an Alfred Hitchcock film based upon a book. The author did not survive to the start of the renewal term, so the claimant was able to cut off the derivative rights holder.

The last works to be subject to a renewal term were those works published or registered in 1977. The 28th year for these works was 2005. The final renewal term begins in 2006. Even if your client missed the window to file to cut off the derivative rights holders, it is still important to file the renewal. In 2022, the Copyright Office issued 236 renewal registrations. *See* U.S. Copyright Office, Fiscal 2022 Annual Report, pg 25.

It is VERY IMPORTANT to understand that simply filing the renewal application will not serve as notice to the original copyright claimant or any derivative rights holders.

If you do not notify the original copyright holder and the derivative rights holders, the original term claimant will continue to collect the funds and you will then have to pursue collections from the original term claimant. Depending on the amount of time that has passed from the start of the renewal period and the original term claimant receiving notification, your client may have issues with statues of limitations and laches in securing those past royalties. In 2014, the U.S. Supreme Court reversed and remanded a Ninth Circuit Opinion holding the equitable doctrine of laches does not bar copyright claims that are timely within the three-year limitations period because 17 U.S.C § 507(b) itself takes account of delay. *See Nealy v. Warner Chappell Music, Inc*., 60 F.4th 1325, 1327 (11th Cir. 2023) citing *Petrella v. Metro-Goldwyn-Mayer, Inc*., 572 U.S. at 670-72, 677, 134 S.Ct. 1962. (2014). "The Court identified several reasons that it was unnecessary to apply the doctrine of laches to copyright claims. One of those reasons, the Court said, was that 'Section 507(b)... bars relief of any kind for conduct occurring prior to the three-year limitations period.'" *Id.* at 667, 134 S.Ct. 1962. "The Court explained that, by dint of the statute of limitations, retrospective relief is available to a copyright plaintiff 'running only three years back from the date the complaint was filed.'" *Id.* at 672, 134 S.Ct. 1962.

Please keep in mind the renewal term is only for U.S. rights. U.S. copyright laws have no extraterritorial effect so that outside the U.S. the ownership will remain as under the first term of copyright.

**D. Practice Tip**

The general principle to be gleaned from a discussion about copyright terms and renewals is that close attention must be paid to creation, publication, and registration of a copyright to accurately determine an author's or heir's rights in, and deadlines to renew, a copyright. It's imperative to take active steps to actually reclaim the copyright revenue stream for the remainder of the term.

For more information on the renewal term and practical applications *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101 Chapter 2100 (3d ed. 2021) at https://www.copyright.gov/comp3/.

## V. COPYRIGHT GRANT TERMINATION RIGHTS

### A. Right to Recapture – Pre 1978

The 1976 Copyright Act added 19 years to the term of existing copyrights, for a total of 75 years of protection. Congress further allowed authors or assignees to terminate a grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978. *See* 17 U.S.C. § 304(c). This allowed the "recapture" of the U.S. copyright for the additional 19 years. However, this provision does not apply to works made for hire or transfers made by will or operation of law, or rights outside of the United States.

### B. 56/75 Year Termination (17 U.S.C. § 304)

If you are the author of works copyrighted or published prior to January 1, 1978, or you are a member of the appropriate class outlined by the Copyright Act of said author, a "56-year" termination provision applies.

**1. Who Has The Right?**

If the author assigned the original and renewal term and survived to the start of the renewal term, the renewal term vested in the assignee. The author, or the appropriate class of heirs if the author is deceased, may still terminate the copyright assignment (grant) pursuant to 17 U.S.C. § 304.

**2. Window of Opportunity**

To terminate a transfer under the 56 Year Rule, notice of termination must be properly sent within a five-year window of time beginning at the end of 56 years from the date of registration of the copyright in the work. The notice cannot be more than 10 years prior to the window or less than two years prior to the close of the window. The Copyright Office has issued specific guidelines for the contents of the notice of termination which can be found in 37 C.F.R. § 201.10. By terminating under the 56 Year Rule, the author or heirs will reclaim the work for the maximum remaining years in the copyright. In most cases, that will be 39 years.

How does the math work? Assume our client's hit song "This Is My Retirement" was copyrighted on November 1, 1947. Add 56 years to 1947. That brings us to 2003. Add 5 years to 2003 which is 2008. The window of time is November 1, 2003, to October 31, 2008.

To keep within the not more than 10 year or less than 2-year window, 1993 is the earliest time notice can be sent and 2006 is the latest notice can be sent. So, the latest date the notice can be sent is October 31, 2006, to terminate on October 31, 2008.

If the copyright was published or registered prior to January 1, 1978, and was in its renewal term on October 27, 1998, and the window of time to terminate under the 56-year provision had lapsed, there is a second bite at the apple to terminate. If there was no notice of termination under the 56-year provision, there is a new five-year window in which to terminate beginning 75 years after the original copyright date.

**3. Notice**

Just as with the claiming the renewals, filing the notice with the Copyright Office is not sufficient to make the original copyright claimant comply and notify any necessary parties. The burden is on the party terminating the grant to make sure these issues are addressed. The notice must be sent to the assignee of the rights and filed with the U.S. Copyright Office prior to the effective date of termination. If notice is either not sent, or is improperly sent, the grant will not be terminated, and the grant, in most situations, will continue until the expiration of the song's copyright.

It is also important to note that reclamation under the 56 Year, 75 Year or 35 Year (discussed below) provisions, does not grant the new copyright claimant the ability to cut off licenses granted for derivative works. This is different than as applied in the renewal situation.

Why do we even need a provision to terminate a grant? Doesn't this kind of provision go against the ability for people to freely contract? The termination right was enacted by Congress in recognition of the "unequal bargaining position of authors" and to enable authors to secure "the monetary rewards of a work that may have been initially undervalued, but which later becomes a commercial success." *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 983 -84 (9th Cir. 2008) citing *Stewart v. Abend*, 495 U.S. 207, 218-219 (1990) and *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172-173 (1985).

For assistance in calculating the window to send the notice, practical application of these code sections, and a suggested form for the Notice of Termination of Copyright Grant, see the COMPENDIUM (THIRD) § 101.1(A), Chapt. 2300 at https://www.copyright.gov/comp3/.

**C. 35 Year Termination**

(17 U.S.C. § 203)

**1. Who Has The Right?**

Under the Copyright Act of 1976, any grant of rights made by the author on or after January 1, 1978 may effectively be terminated by the author (or certain classes of heirs if the author is deceased) during a five year window.

**2. Window of Opportunity**

The window to terminate transfers begins 35 years from the date of publication or 40 years from the date of transfer, whichever is earlier. This is a distinction from the 56/75 Year Rule. Under the 56/75 Year Rule, the time is measured from the date of the copyright registration of the work. Pursuant to the 35 Year Rule, the time is measured from the date of transfer or publication, whichever is earlier. The "35 Year

Termination" does not apply to works made for hire. The notice of termination may not be served more than ten years prior to the start of the window, or less than two years prior to the close of the window.

In the simplest terms, imagine you entered into a single song publishing agreement on January 15, 1978, for the song "That Song is Mine." On January 15, 2003, you could send the appropriate notice to the copyright holder terminating the transfer under the single song agreement for "That Song is Mine" effective January 15, 2013.

Here is how the math works:

- Transfer occurs January 15, 1978
- Add 35 years to 1978 = 2013, plus 5 = 2018 (2013 – 2018 is the five-year window)

In the above example, notice to terminate may be sent as early as January 15, 2003, but no later than January 14, 2016, to fall within the five-year window and to meet the requirement of not being more than ten years or less than two years.

**3. Notice**

The notice must be sent to the assignee of the rights and filed with the U.S. Copyright Office prior to the effective date of termination. If notice is either not sent, or is improperly sent, the grant will not be terminated, and the grant, in most situations, will continue until the expiration of the song's copyright.

**D. Practice Tip**

In 2016, the Copyright Office processed 367 notices terminating transfers of copyrights made in the 1970s, most of which pertained to musical works (U.S. Copyright Office, Fiscal 2016 Annual Report, pg 4).

For assistance in calculating the window to send the notice, practical application of these code sections, and a suggested form for the Notice of Termination of Copyright Grant, see the COMPENDIUM (THIRD) § 101.1(A), Chapt. 2300 at https://www.copyright.gov/comp3/ and this website https://www.copyright.gov/recordation/termination.html accessed on Oct. 17, 2023.

**E. Copyright Law Meets Texas Probate**

What do renewal and termination rights have to do with Texas probate? In Texas, a person has a right to determine who will receive his or her property upon death. TEX. EST. CODE § 101.001. However, federal copyright law preempts state testate and intestate law regarding 1) who inherits the right to renew copyright terms; and 2) who inherits the right to terminate transfers and licenses granted by the author. *See* 17 U.S.C. §§ 203, 301, and 304.

1. In general, for copyrights in their first term on January 1, 1978, renewal rights vest in the following persons in the last year of the initial term of a copyright: (1) the author; (2) if the author is dead, the author's surviving spouse and children, as a class; (3) if there are no surviving spouse or children, the author's executor under his or her will; and (4) if the author left no will, the author's next of kin under state law. *See* 17 U.S.C. §304(a)(1)(C). An author who dies before the vesting of renewal rights cannot direct in a will or other instrument that is to receive his renewal right when it vests.

2. In regard to terminating licenses or grants executed prior to January 1, 1978, where an author is dead, his or her termination interest is owned, and may be exercised, only by the following rights holders:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

17 U.S.C. §304(c)(2).

3. For those copyrights whose termination rights expired prior to January 1, 1978 without terminating, then the termination right to recapture the last 20 years of the copyright vests in (1) the author; (2) if the author is dead, the author's surviving spouse and children, as a class; (3) if there are no surviving spouse or children, the author's executor under his or her will; and (4) if the author left no will, the author's next of kin under state law. 17 U.S.C. §304(d).

**F. Practice Tip**

The attorney preparing an estate plan or dealing with a deceased's copyright interest after death, must have sufficient knowledge to identify and navigate through the copyright renewal and termination minefield and advise her client accordingly.

## VI. CHARACTERIZATION OF COPYRIGHT AS SEPARATE OR COMMUNITY PROPERTY?

### A. Texas is a Community Property State

In probate proceedings and estate tax evaluations, one must inventory and value property belonging to the estate of a deceased individual. In calculating value, one must look to the character of the property in question. Texas is one of nine community property states. Because Texas is a community property state, all of a decedent's property and property rights owned on the date of death should be characterized as either separate or community.

### B. Community Property - General Rules

The general rule is that, absent a valid written agreement to the contrary, property acquired after marriage is characterized as community property, meaning it belongs to both spouses equally. *See* TEX. FAM. CODE §3.002.

Separate property is often identified as that property that a spouse acquired before marriage or acquired during marriage by gift, devise, or descent. *See* TEX. FAM. CODE §3.001.

Additionally, one must keep in mind that income or growth realized from separate property, including separate intellectual property, is presumed to be community property. *See Alsenz v. Alsenz*, 101 S.W.3rd 648, 653 (Tex.App.—Houston [1st Dist.] 2003, pet. denied).

Thus, the entertainment lawyer - estate practitioner must analyze the character of property at death much the same as a divorce. Although the separate versus community characterization is briefly discussed in this article, the limited scope of this article requires that additional discussion be reserved for a later date.

**C. Practice Tip**

The general principle to remember from this brief discussion is that an attorney representing an executor or heirs of a decedent's estate should properly characterize estate intellectual property as separate or community and value it accordingly. Also, note, that even if the income is characterized as "community property," the non-creating/non-author spouse should not be listed as an author on any copyright applications even if the work was created during the marriage. In this, Texas joins other jurisdictions in which the courts treat the income from intellectual property created during marriage as marital or community property. *See Id*; accord *Rodrigue v. Rodrigue*, 218 F.3d 432, 443 (5th Cir.2000) (wife entitled to half interest in net benefits resulting from copyrighted works created during marriage).

"An author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright but that the economic benefits of the copyrighted work belong to the community while it exists and to the former spouses in indivision thereafter—is consistent with both federal copyright law and Louisiana community property law and is reconcilable under both." *See Rodrigue v. Rodrigue*, 218 F.3d 432, 435 (5th Cir. 2000).

**VI. TEXAS PROBATE**

In the author's opinion, the primary purposes of Texas probate proceedings are to: 1) identify and transfer title to a decedent's real and personal property; 2) address claims of the decedent's creditors; and, 3) determine a decedent's heirs for proper distribution of property. If a copyright is the only asset to be transferred, the potential probate client will demand the most efficient and effective method of transferring title to obtain ownership of a copyright. This article is written for the non-probate practitioner and will briefly identify and comment on the most common methods of effectuating a transfer of title to intellectual property under Texas testate and intestate law.

**A. Testate Distributions – Will Exists**

A testate distribution is one governed by a decedent's valid last will and testament. The following methods of probate are available to those persons who have a valid will on the date of his or her death.

**1. Application for Muniment of Title**

a. Effect

A Muniment of Title Order transfers a decedent's interest in property to the distributees named in a valid will without the appointment of a personal representative and administration of an estate. TEX. EST. CODE §257.102. Obtaining a Muniment of Title Order is less expensive and faster alternative to the more common request for Letters Testamentary and formal appointment of a representative of an estate.

b. Criteria

One may choose to probate a valid will as a Muniment of Title so long as the following major criteria are met:

- the estate of the decedent owed no debts other than those secured by liens on real property;
- there is no necessity for an administration of the estate; and,
- the applicant meets the additional technical criteria listed in TEXAS ESTATES CODE §257.054.

c. General Procedure

In most cases, a Muniment of Title proceeding will require the filing of an application along with a filing fee and attorney attendance at single hearing. The only additional court involvement is the filing of an affidavit of fulfillment of terms of the will, which must be filed by the applicant within 180 days of the date of the Muniment of Title order. This requirement is often waived where the applicant is the sole distributee under the will being probated. TEX. EST. CODE §257.103(b)(1).

d. Time Restrictions

The general rule in Texas is that a will may not be presented for probate more than four years after the decedent's date of death. However, a Muniment of Title proceeding may be used to probate a will if four years have expired since the decedent's death and the applicant was not in default for failing to present the will for probate within the four years allowed by law or if the application to probate the will was filed within four years after death. TEX. EST. CODE §256.003.

e. Practice Tip

Attorneys using a Muniment of Title order to transfer property interests should be aware that many third-parties outside (and inside) of Texas are unfamiliar with this type of order and may initially request to see the traditional "Letters Testamentary" simply because this is their company's policy. Accordingly, the practitioner should contact the legal departments of these third parties who will transfer title to the beneficiaries and confirm prior to the filing of a probate proceeding that the company will accept a Muniment of Title to transfer title to those identified in the will. Failing to do so may result in additional time and costs to convert a Muniment of Title proceeding to the more formal proceeding of requesting Letters Testamentary.

**2. Application for Letters Testamentary**

a. Effect

In contrast to the Muniment of title proceeding, an application for the issuance of Letters Testamentary is the most familiar and traditional method of transferring title of a deceased individual's interest in real and personal property when a valid will exists. This method is most often used when the decedent had debt and an administration is needed to handle the creditor's claims or to satisfy a third-party's requirement that it deal only with a court-appointed representative of a decedent's estate. The effect of obtaining Letters Testamentary is the appointment of a fiduciary, identified as the Executor of the Estate of the [Decedent] who is authorized to round up the probate and non-probate property of the decedent, value it, resolve creditor claims, and distribute the property to the beneficiaries. TEX. EST. CODE § 301.

b. General Procedure

In most cases, a proceeding for the issuance of Letters Testamentary will require the filing of an application along with a filing fee and attorney attendance at single hearing. *See* TEX. EST. CODE § 256. Unlike the Muniment of Title, the application for Letters Testamentary requires the appointment of an executor, who is a fiduciary, to gather estate probate assets, appraise their values, file an inventory and appraisement of estate assets, notify creditors and beneficiaries, pay debts, distribute assets to the beneficiaries. *See* TEX. EST. CODE § 351. This can be done as an independent (without court supervision or approval) or as a dependent administration (action requiring court approval). *See* TEX. EST. CODE § 401. Obviously, an independent administration costs less. However, there are situations where a dependent administration and court approval of an executor's actions is desired. These situations include insolvent estates and estates where the beneficiaries are in conflict with the executor. Due to the preparation and filing of an inventory, appraisement and list of claims, this method of probate is more expensive and less private. Nonetheless, it is the most complete and secure method to handle an estate.

**3. Family Settlement Agreement**

All parties interested in an estate of a deceased person may enter into a family settlement agreement memorializing their agreement to settle current or anticipated disputed issues. Texas courts favor Family Settlement Agreements and will enforce them. *Shepard v. Ledford*, 962 S.W.2d 28, 32 (Tex. 1998).

All persons who have an actual or potential interest in the settlement of the dispute must join in the family settlement agreement. The agreement may be filed in the county records. It is often prudent to file a lawsuit over the dispute and resolve it by a family settlement agreement. Such action lends strength to any claim that the settlement was entered into to merely avoid taxes.

**B. Intestate Distributions – No Will**

An intestate distribution is one governed by the Texas intestacy laws because no valid will exists. The following methods of probate are most commonly used for those persons who do not have a valid will on the date of his or her death.

**1. Family Settlement Agreement.**

As mentioned above, all interested parties may enter into a family settlement agreement concerning the distribution of the property in an estate. However, it is prudent to first have a court determine who the legal heirs of a decedent are prior to entering into a family settlement agreement. This action can prevent future liability to the unknown heir climbing out of the woodwork to collect a share of the estate. Once again, it is prudent to confirm with the person or entity granting a title transfer that a Family Settlement Agreement will suffice to transfer title.

**2. Small Estate Affidavit.**

When dealing with intestacy, the simplest and least costly means of transferring title to personal property and a homestead through the probate system is the preparation and filing of a Small Estate Affidavit. *See* TEX. EST. CODE § 205.001-205.009.

a. Effect

A Small Estate Affidavit, when approved by the court, acknowledges the identity of a decedent's heirs as stated in the affidavit and their respective shares of the decedent's personal and homestead property. *See* TEX. EST. CODE § 205.001.

b. Procedure

The Small Estate Affidavit is filed with the Probate Clerk along with a death certificate and reviewed by the court for conformance with the law. Upon meeting the statutory requirements, the affidavit is approved by the court without a hearing and an Order Approving the Small Estate Affidavit is often prepared and filed by the court. The Order declares the distributees right to receive property of the decedent, to the extent that those assets exceed the liabilities of the estate.

c. Limitations of Use

Practitioners should note that a Small Estate Affidavit is only available in a solvent estate; *i.e*., when the assets of the decedent's estate, exclusive of homestead and exempt property, exceed the known liabilities of the estate. Furthermore, the estate's non-exempt assets (including cash) cannot exceed $75,000.00. Exempt assets are those exempt from forced execution under Chapter 42 of the Texas Property Code and that pass by will or intestacy to decedent's surviving spouse, minor child or unmarried child who lived in the decedent's home. A Small Estate Affidavit does not transfer title to real property that is not a homestead. *See* TEX. EST. CODE § 205.008(b).

Although a Small Estate Affidavit does not adjudicate the separate or community character of property, it can contain specific factual data used to later characterize the property.

Because all of the distributes must sign the affidavit, this method often fails to work where family members cannot cooperate in the execution of the document and subsequent payment of debts and distribution of assets. In this scenario, a mediation may be considered before moving forward with alternative methods of intestate probate.

**3. Determination of Heirship.**

a. Effect

A Determination of Heirship is a judicial determination of the lawful heirs of a decedent who died without a will and the shares that each inherits. TEX. EST. CODE Chapters 202 and 203.

b. Process

Although only one applicant is needed, all the decedent's known heirs must be made a party to the proceeding. *See* TEX. EST. CODE § 202.008. If some heirs do not formally join in the proceeding, they must waive service or have accepted service of citation by registered or certified mail. *See* TEX. EST. CODE § 202.051, 202.054. The citation must be posted and a citation on unknown heirs must be published in the county of the proceeding. *Id.*

c. Ad Litem Required

Furthermore, the court must appoint an attorney ad litem to represent the interests of unknown heirs and heirs with a disability. *See* TEX. EST. CODE § 202.009.

d. Hearing

After the applicable notice periods expire and the attorney ad litem investigates the applicant's claims, a hearing is held to present testimony by two disinterested witnesses as to the life and family history of the

decedent. The attorney ad litem then testifies as to the efforts and results of her investigation into the family history.

e. Judgment Declaring Heirs

Assuming no surprises, the court issues a judgment based on the evidence presented declaring the names and addresses of the decedent's heirs and their respective interests in the real and personal property of the decedent. Provided there is no necessity for an administration (meaning two or more debts against the estate or otherwise need for a representative), the court's order will provide sufficient authority for the transfer of decedent's property to the declared heirs. *See* TEX. EST. CODE § 202.201.

A Determination of Heirship is useful to clarify heirs after four years have passed since the decedent's death.

**C. Pre-Death Planning Techniques**

Several techniques are available to avoid probate or reduce the public information disclosed in probate proceedings.

a. Revocable and irrevocable trust agreements;
b. Community property survivorship agreements; and
c. Formation of a business entity and transfers of intellectual property interests to the entity having business succession and/or dissolution plans.

**D. Resources**

The following resources are attached to this article:

a. A checklist for planning during the musician/artist/songwriter's lifetime.
b. A checklist for when a client inherits copyrights.
c. An intake checklist for when you have a new client who has inherited music and sound recording copyrights.
d. A chart created by Judge Guy Herman, Travis County Probate Court No. 1 to help guide you through the Texas intestacy laws.

**CONCLUSION**

As the Texas entertainment industry grows and Texas residents continue to create and retain ownership rights in intellectual property, Texas attorneys will increasingly encounter a decedent's estate containing intellectual property ownership in the form of an interest in a copyright. These estates will range from authors newly established in their career to those with careers spanning more than fifty years, and everything in between.

Copyright interests are personal property and can be an extremely valuable asset. In Texas, a person has a right to determine who will receive his or her property upon death. However, federal copyright law preempts state testate and intestate law in regards to 1) who inherits the right to renew copyright terms; and, 2) who inherits the right to terminate transfers and licenses granted by the author.

Accordingly, intellectual property attorneys, entertainment lawyers, estate planners, and probate practitioners must be able to identify copyright renewal and copyright grant termination issues to adequately represent their clients.

In addition, entertainment lawyers will likely find themselves with a probate matter and, as such, need to have a basic knowledge of Texas probate practice and procedure to properly advise their clients and transfer title to copyrights in the least time and in a cost-efficient manner.

## CHECKLIST FOR PLANNING AHEAD FOR A MUSICIAN/ARTIST/SONGWRITER

Planning for a musician's estate involves specific considerations related to their musical assets and intellectual property. Here are some suggestions for a musician's estate plan:

**1. Identify Your Assets:** Compile a list of your musical assets, including compositions, recordings, sheet music, lyrics, sound recordings, instruments, equipment, and any future royalties.

**2. Copyrights and Licensing:** Specify how your music and copyrights should be managed and licensed after your passing. Decide who has the authority to license your music and for how long.

**3. Music Catalog:** Create a catalog/docket of your compositions and sound recordings with detailed descriptions and any relevant copyright, royalty, contracts, licensees, assignments.

**4. Appoint an Executor:** Designate a trusted individual or professional executor to oversee your musical estate, manage your music catalog, and handle financial matters.

**5. Beneficiaries:** Determine who will inherit your assets, whether it's family members, fellow musicians, music institutions, or a combination of these.

**6. Music Legacy:** Consider establishing a foundation, trust, or endowment to support music education, charities, or causes you care about, preserving your musical legacy.

**7. Valuation:** Have your musical assets appraised to determine their current value, especially if you have valuable instruments or memorabilia.

**8. Tax Planning:** Consult with a financial advisor to minimize estate taxes, which can be significant for musicians with valuable intellectual property.

**9. Legal Documents:** Create a will, living will, and power of attorney documents. You might also explore the use of a revocable living trust to avoid probate. And consider if an IP Holding Company or IP Asset Trust makes sense for your estate plan.

**10. Succession Planning:** If you have musical collaborators or bandmates, discuss how joint works will be managed and if they can continue performing under the band's name.

**11. Digital Assets:** Specify what should happen to your music files, websites, social media accounts, and any digital recordings you've created.

**12. Music Instruments, Equipment, Recording Studio:** Indicate who should receive your instruments and equipment, and whether they are intended for personal use or preservation.

**13. Music Publishing and Sound Recordings:** If you have music publishing interests or sound recording interests, detail your plans for these assets and any rights you may own or control.

**14. Right of Publicity:** You can convey this asset during your lifetime or by will. Who do you want to control your name, image, and likeness after you die? Who is exercising this right during your lifetime?

**15. Trademarks:** Are these held in your individual name or already in an entity or IP Asset Holding Company you control?

**16. Communication:** Make sure your loved ones know about your estate plan and where to find important documents related to your musical assets.

**17. Legal Counsel:** Consult an attorney experienced in music estate planning to ensure that your plan complies with relevant intellectual property and estate laws.

**18. Tax Attorney/Financial Advisor:** Have your estate and music business attorney coordinate with a tax attorney and financial advisor to make sure your wishes are implemented with a minimum tax burden.

**19. Regular Updates:** Periodically review and update your estate plan to reflect changes in your music career and personal circumstances.

A well-thought-out estate plan helps protect your creative legacy, ensures your copyrights, other assets, and your name image and likeness are managed according to your wishes, and provides for your loved ones and any charitable causes you wish to support.

## CHECKLIST FOR INHERITED MUSIC COPYRIGHTS

This checklist can help you navigate the process of inheriting music copyrights and provide you with the next steps to help you receive royalties you may be owed.

1. **Obtain a clear understanding of what rights you have inherited:** Review the documents related to the inheritance of the copyrights, including any agreements, contracts, and licenses.

2. **Make sure you are the beneficiary/heir of the copyrights or other assets:** You will need to provide an attorney a copy of the death certificate, will, trust, and details on the person that died and information on their potential heirs so it can be determined who inherited the rights.

3. **Hire an expert:** Consider hiring a music industry expert, such as a music lawyer with an understanding of copyright law and estate planning, to assist you in navigating the process.

4. **Run a search with the US Copyright Office to determine what is registered.**

5. **Register the copyrights with the US Copyright Office and/or record a transfer of title if the works are already registered.**

6. **Track usage/existing licenses:** Create a docket of all the licenses you are aware of and a docket of potentially any unlicensed uses. This helps you identify potential royalty streams and potential infringements.

7. **Contact the estates department of the royalty collection societies:** Determine if the songwriter or music publisher was a member of ASCAP, BMI, SESAC, or GMR and The MLC. Contact relevant royalty collection societies to ensure they are aware of your ownership and that you are receiving the appropriate royalties.

8. **If you inherited sound recording copyrights:** You should contact SoundExchange to determine if you are entitled to collect artist or sound recording digital public performance royalties.

## INHERITED SONG/SOUND RECORDING CATALOG ADMINISTRATION
## INTAKE LIST

- ☐ Legal services agreement
- ☐ Signed current W-9 for client
- ☐ Change of address HFA
- ☐ Change of address for PRO: ASCAP, BMI, SESAC, GMR
- ☐ Change of address record labels
- ☐ Change of address foreign associates
- ☐ Letter of direction for HFA
- ☐ Letter of direction for record labels
- ☐ Letter of direction for foreign associates
- ☐ Letter of direction for SoundExchange
- ☐ Letter of direction for The MLC
- ☐ Letter of direction for PRO: ASCAP, BMI, SESAC, GMR
- ☐ Member or Join PRO: ASCAP, BMI, SESAC, GMR
- ☐ Member or Join Sound Exchange: sound recordings; producer; artist
- ☐ AFM Intellectual Property Rights Distribution Fund (non-featured artist musician that is distributed by AFM instead of Sound Exchange)
- ☐ Right of Publicity – Register with Texas Secretary of State. Sec. 26.002. Property Right Established.
- ☐ Social Media and digital assets – who has control/passwords/assets
- ☐ Review client generated song file list and/or sound recording list
- ☐ Review and compare BMI/ASCAP/SESAC generated song file list
- ☐ Review discography/cut/release/song list
- ☐ Review physical or digital song files for copyright; renewal; assignments; contracts
- ☐ Review and download listing from Copyright office records
- ☐ Compile and create song docket
- ☐ Compile and create sound recording docket
- ☐ Compile and create copyright application/renewal/termination docket
- ☐ Filings with Copyright Office to reflect current ownership
- ☐ Assignment documents
- ☐ Death Certificate – multiple originals
- ☐ Probate/Letters Testamentary
- ☐ Trust Agreement - created during lifetime or “pour over” from will?
- ☐ Will – specific bequests or residuary clause?
- ☐ Corporate Entity docs reviewed
- ☐ Potential heirs/copyright owners identified