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## Copyright--Renewal Rights--Executor's Right to Renew Where Author Has Assigned Renewal Rights

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**Copyright — Renewal Rights — Executor's Right to  
Renew Where Author Has Assigned Renewal Rights**

During the original copyright term and prior to the renewal period, the co-composer of the song *Moonlight and Roses* assigned his copyright renewal rights to *P*. The author had no wife or child. His next of kin were three brothers, each of whom executed a like assignment to *P*. Before expiration of the original term, the author died leaving a will which contained no specific bequest concerning the copyright renewal. His residuary estate was left to his nephews and nieces. One of the brothers qualified as executor of the will and in such capacity renewed the copyright for another twenty-eight year term. The probate court decreed distribution of the renewal copyright to the residuary legatees and *D* obtained assignments from them. *P*, a music publisher, sued *D*, another music publisher, for infringement of rights. *D*'s motion for summary judgment was granted, and the Court of Appeals for the Second Circuit affirmed. *P* brought certiorari to the United States Supreme Court. *Held*, affirmed. The Copyright Act treats renewal rights as expectancies until the renewal period arrives at which time the renewal rights vest in one of the four classes of statutory beneficiaries enumerated in the act, and assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 80 Sup. Ct. 792 (1960).

In the United States a statutory copyright exists for a term of twenty-eight years from the date of publication. 17 U.S.C. § 24 (1952). This original term can be renewed for another twenty-eight year term when application by the proper party is made within one year prior to the expiration of the original term. The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Copyright Act and such rights are derived solely and directly from the act, having no existence apart from it. *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1922).

In a discussion dealing with renewal rights, renewal term, and renewal period, a distinction must be observed in the use of these terms. Renewal term refers to the second twenty-eight year period which follows the original copyright term; renewal period refers to the one year period prior to the expiration date of the original term and during which application for the renewal must be made; renewal right pertains to the right granted by section 24

of the Copyright Act to four classes of beneficiaries who can apply for the copyright renewal. Brown, *Renewal Rights in Copyright*, CORNELL L.Q. 460, 468 (1943).

Section 24 provides that the author (or the proprietor in some instances) if still living is exclusively entitled to a renewal of the copyright when he complies with the requirements of application. 17 U.S.C. § 24 (1952). If the author is not alive upon accrual of the renewal period then the right to apply goes to "the widow, widower, or children of the author." If in turn they be not living then the right goes to the author's executor, or in the absence of a will to his next of kin. Section 24 thus provides that the renewal right may be exercised only by one of the four enumerated classes: 1) the author if living; 2) the widow, widower, or children; 3) the author's executor; or 4) in the absence of a will, the author's next of kin. In *Fred Fisher Music Co. v. M. Witmark & Co.*, 318 U.S. 643 (1943), it was held that an assignment by an author of his renewal rights made before the original copyright expired is binding against the author who was living at the time renewal rights accrued. In such a case, the assignee would be precluded from applying for the copyright renewal in his own name since he is not one of the four classes of statutory beneficiaries. Because the right to apply is not assignable, but only the benefits of the renewal term are assignable, the application must be made in the name of the author who will hold legal title to the renewal copyright in trust for the assignee. Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 34 (1955). If the author is living during the renewal period, he alone has the exclusive right to apply for the renewal copyright. 17 U.S.C. § 24 (1952).

The interests granted to the four classes of beneficiaries by section 24 are unequal and disparate. Each class takes in a strict statutory scheme of succession regulated by the fulfillment of conditions precedent. The hierarchy of classes is as follows: first, the author, if living, can renew for his own benefit, or by the *Fisher* case, *supra*, for the benefit of his assignee; second the widow, widower, or children of the author, if the author is not living, for their own benefit; third, if the author died intestate, and there be no surviving widow, widower, or children, then the author's next of kin can renew for their own benefit; fourth, in the alternative of the third class above, if the author died leaving a will, and no surviving widow, widower, or children, then the right to renew accrues

to the executor. But in a case where the author has assigned his renewal rights, for whose benefit does the executor renew, for the benefit of the author's legatees or for the benefit of the author's assignee? The contention that the executor takes for his own benefit is not worthy of consideration. Does the executor receive the renewal right *cum onere* of the testator's assignment, or does he take as trustee for the author's legatees in spite of the prior assignment? This is the question presented by the principal case. The majority opinion of the court in a five to four decision answers this question in favor of the author's legatees.

The dissenting opinion at first glance appears deceptively strong, and indeed, is not without merit concerned as it is with an attempt to apply a modern interpretation consistent with present day public policy to an antiquated section of the copyright code. However, it appears that the dissent fails to give full realization to the controlling principle that the right to renew is not part of the author's estate passing to the executor in his capacity as the author's personal representative, but instead renewal rights and the renewal copyright itself are independent of the author's rights at the time of his death and exist only by reason of the Copyright Act, derived solely and directly from it. *Ballentine v. De Sylva*, 226 F.2d 623, 627 (9th Cir. 1955), *aff'd*, 351 U.S. 570 (1956). The renewal term is separate and distinct from the original copyright; it is a new grant of a property right to a statutory beneficiary and in reality is not an extension of the original copyright. *Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11 (S.D. N.Y. 1939). In effect, the renewal term is the law's second chance given to an author and his family to profit from the fruits of his labor. *Harris v. Coca Cola Co.*, 73 F.2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F.Supp. 859 (S.D. N.Y. 1942).

In the usual case of ordinary succession an executor takes in a representative capacity *cum onere* of the testator's obligations. *Fox Film Corp. v. Knowles*, *supra* at 330. The reasoning of the majority opinion, however, is that the executor is granted renewal rights under the act not as the testator's personal representative, but instead as a trustee of the author's legatees. The majority opinion states that section 24 provides "special rules in derogation of the usual rules of succession" when the author dies. Under this view the executor takes as the statutory designee to carry out the

testamentary wishes of the author. This view appears consistent with the purposes of the statute to allow the author to reap the benefits of his labor if still living, or if not living, then the author's wife or children, or if they be not living, then whomsoever the author designates by will, or if no will, then the author's next of kin. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909). In *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 253 (1st Cir. 1911), the court in commenting upon the intent of Congress stated that the exclusion of the administrator from the statutory scheme of distribution was a "positive illustration of the fact that the intention of the committee was to provide, as a matter of public policy, that *the right of renewal should be personal*, and that the author, or those named as the persons in whom he is most concerned, should not in any way be cut off." (Emphasis added.)

The assignment, in the majority view, was a valid transfer of a contingent renewal right, a mere expectancy, but when the author died prior to the renewal period, the expectancy also died and the assignment was defeated. The assignee, having no greater interest than his assignor, and claiming under the assignor's interest, no longer had any interest at the moment of the assignor's death when the assignor's interest failed.

However logical and consistent the majority opinion may be, still the effect of the decision is to seriously curtail the value of an author's renewal rights since publishers will not be willing to invest too heavily on the contingencies of an author's survival until the renewal period. As the dissent points out, the effect of such decision is to enable an author who has sold his renewal rights to defeat the assignment by a deliberate subsequent bequest of those rights to others in his will and then dying before the renewal period arrives. Although there are several safeguards a purchaser of renewal expectancies may observe, still these precautions cannot fully insure the obtaining of the renewal right. See Comment, 33 N.Y.U.L. REV. 1027, 1032 (1958). Today, public policy would seem to favor the freedom of assignability over the obsolescent policy expressed by Congress in 1909 in section 24 to protect the author from his assumed inability to protect himself regarding business matters. There is no longer any need to protect the modern author as a ward of the government. Today, authors are often well advised of their rights by business managers, agents, attorneys, and others. It would appear, however, that the dissent's method of

modernizing the statute by judicial interpretation would be inconsistent with the statute itself and the principle of stare decisis, and that any revising of the Copyright Act is up to Congress.

*John James McKenzie*

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### Damages — Collateral Source Rule

*P*, a soldier, was severely injured in a collision between the vehicle which he was driving and a vehicle being towed by *D*, and was taken to an army hospital for care and treatment. *D* timely objected to the attempted recovery by *P* of the reasonable value of the hospital and medical services on the grounds that *P* had personally paid nothing therefor and that the United States had borne the expenses thereof. *Held*, following the so-called "modern rule," that *P* could recover the reasonable value of medical and hospital services rendered him without charge by virtue of such services being considered a part of his compensation from the United States. *Gillis v. Farmers Union Oil Co.*, 186 F.Supp. 331 (D.C. N.D. 1960).

The principal case is a recent example of the modern application of the collateral source rule, without mentioning the rule as such. In terse terms the rule is that a defendant who has negligently injured another owes full compensation for the injuries inflicted, and payment for these injuries from a collateral source in no way relieves the defendant of his obligation. *Burks v. Webb*, 199 Va. 296, 99 S.E.2d 629 (1957). Generally, the application of the rule can be divided into three areas: 1) where the plaintiff receives compensation under contracts of employment or insurance policies; 2) where the plaintiff receives wages or medical services which are gratuitously rendered; 3) where the plaintiff has received compensation under workmen's compensation acts or similiar social legislation. The prevailing rule in the United States seems to be that an injured person may recover from the defendant that which he receives under all three areas of the rule. *Standard Oil of California v. United States*, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947). However, different jurisdictions vary in their adoption of the rule. Some states allow recovery under the first and third areas, while refusing recovery under the second; therefore, it is necessary to consider each area separately.