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Abstract

In a 2016 acceptance speech during the Black Entertainment Television (BET) Awards, actor and activist Jesse Williams used the phrase "gentrifying our genius" to refer to the insidious process of misappropriating the cultural and artistic productions of Black creators, inventors, and innovators. In that speech, he poignantly and unapologetically condemned racial discrimination and cultural misappropriation. This Article chronicles the nefarious history of the creative disempowerment of creators of color and then imagines an empowering future for those who successfully exploit their creations by fully leveraging copyright ownership and transfer termination. To that end, I reference the considerable scholarship of Professor K.J. Greene, which explores and challenges cultural misappropriation of Black musicians and composers, and build upon my own scholarship that explores the copyright transfer termination right as a potential legal tool for social and economic justice for creatives of color. I also reference an empirical study titled U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets*, to explore data and extrapolations regarding likely impacts of § 203 terminations since 2013.*

In this Article, I explore the paths of artists who leveraged

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opportunity through assignments and licenses and, later, artists who exercised their termination rights to secure a better deal with the original transferee, terminated and entered into contracts with other transferees, or went it alone and exploited their copyrights on their own. The termination right clearly benefits all copyright creators; however, members of marginalized and disenfranchised communities may stand to benefit even more from the second bite of the copyright apple. I assert that utilizing blockchain's decentralized technology, smart contracts, and non-fungible token standards can better protect Black artists against disenfranchisement at the hands of a codified system of intentional friction to discourage or deny the reclamation of rights.

Accordingly, in Part II, I examine the history in America and throughout the African diaspora of cultural misappropriation and critique the gentrification of Black creative genius. I explore gentrification as it is applied more broadly to real property and then discuss its application to intellectual property, generally, and copyright specifically.

In Part III, I discuss the subject matter of copyright protection and the nature and mechanics of the transfer termination right. Specifically, I examine the history, purpose, and congressional intent of the right, as well as the method and the complexities of timing of notice and termination.

In Part IV, I examine the pre-window fervor and speculation of stakeholder commentators around the likely impact of § 203 terminations prior to 2013. I examine the actual impact since 2013 and a forecast of likely trends, as described in the termination notices study, written by Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham & Genevieve Grant.

Finally, in Part V, I discuss the role that blockchain technology, smart contract code, and non-fungible token standards could play in automating codified protections. Removing the educational and legalistic barriers to exercising one's termination rights and automating the transfer termination process could ensure that all

artists have actual—not theoretical—rights, especially disenfranchised creatives victimized first by powerful industry intermediaries and then by the copyright regime created by those same industry stakeholders (and blessed by Congress) to protect industry, rather than creator, interests.

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I. INTRODUCTION

In a 2016 acceptance speech during the Black Entertainment Television (BET) Awards, actor and activist Jesse Williams used the phrase "gentrifying our genius" to refer to the insidious process of misappropriating the cultural and artistic productions of Black creators, inventors, and innovators.[1] In that speech, he poignantly and unapologetically condemned racial discrimination and cultural misappropriation:

> We've been floating this country on credit for centuries, yo, and we're done watching and waiting while this invention called whiteness uses and abuses us, burying [B]lack people out of sight and out of mind while extracting our culture, our dollars, our entertainment like oil—black gold, ghettoizing and demeaning our creations then stealing them, *gentrifying our genius* and then trying us on like costumes before discarding our bodies like rinds of strange fruit. The thing is though . . . the thing is that just because we're magic doesn't mean we're not real.[2]

Those three power-filled words, "gentrifying our genius," not only confronted the atrocities of creative despoilment committed by those who seek to perpetuate the social construct of whiteness,[3] but they also amplified the incalculable intrinsic value of diasporic cultural contributions. His entire speech also shined a bright light on the dark history of devaluating Black artistry and the simultaneous systemic misappropriation and hyper-

1. *See* Megan Lasher, *Read the Full Transcript of Jesse Williams' Powerful Speech on Race at the BET Awards*, TIME (June 27, 2016, 10:26 AM), https://time.com/4383516/jesse-williams-bet-speech-transcript/ (noting that on June 27, 2016, Grey's Anatomy star and Black Lives Matter activist Jesse Williams delivered a speech at the Black Entertainment Television (BET) Awards to accept BET's Humanitarian Award); *see also* Katie Rogers, *How Jesse Williams Stole BET Awards with Speech on Racism*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/arts/television/bet-awards-jesse-williams.html?_r=0.

2. *2016 BET Humanitarian Award Speech*, GENIUS (June 26, 2016) (emphasis added), https://genius.com/Jesse-williams-2016-bet-humanitarian-award-speech-annotated (providing a transcript of Jesse Williams's speech at the 2016 BET Awards).

3. *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (explaining how the concept of race was engineered and how the concept of whiteness became weaponized and "propertized").

monetization of the same.[4] Both jeered and revered in the same moment.[5] Given the value placed in the United States on property ownership of all kinds as a matter of holding power within society, the ability of historically marginalized people to create, own, and monetize intellectual property in an increasingly digital society is inextricably linked to economic empowerment in the future of wealth.[6]

Property ownership has been linked to personhood itself.[7] Copyright ownership (and its constitutional twin, patent) was deemed so valuable that the Intellectual Property Clause is the only clause to express its intention clearly.[8] Despite impassioned argument and debate over a range of topics at the Constitutional Convention, the Intellectual Property Clause passed "without debate or controversy."[9] Although the Copyright Act focuses more on ownership than authorship, as the Act evolved over time, one way that Congress sought to empower creators to create the transfer termination right in 1976 was to replace the initial and renewal periods of copyright protection.[10]

Owners of copyrighted works created on or after January 1, 1978, were first empowered to begin terminating any transfers of those works on January

4. *See generally* Rogers, *supra* note 1 (reporting Jesse Williams's speech, in which he speaks of white culture misappropriating Black artists' cultural contributions). Professor K.J. Greene examines this pattern in American popular music of bursts of "Black musical innovation and communal creation, followed by dominant culture copying or imitation and appropriation." K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'NS & ENT. L.J. 339, 371 (1998). Professor Greene asserts that this pattern was particularly pronounced in musical genres like jazz and the blues. *Id.* at 371–72.

5. *See* Greene, *supra* note 4, at 368 ("[T]here exist clear patterns of economic exploitation and cultural distortion of the work and forms of minority creators. A strikingly consistent characteristic of cultural appropriation is its one-way direction—white performers obtaining economic and artistic benefits at the expense of minority innovators.").

6. *See id.* at 344 (acknowledging that "[o]wnership of property has long been central to the American experience, and vital to success, status and prosperity in America").

7. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (discussing the relationship between property and personhood). *See generally* Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 49 SAN DIEGO L. REV. 1069 (2012).

8. *See* 1 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 1.01 (1991). The Intellectual Property Clause, found in Article I, Section Eight, Clause Eight of the U.S. Constitution, states that the purpose of the copyright and patent monopolies is "[t]o promote the Progress of Science and Useful Arts." U.S. CONST. art. I, § 8, cl. 8.

9. *See* Greene, *supra* note 4, at 346 (citing Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 114 (1929)).

10. *See* Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefitting Transfers*, 119 W. VA. L. REV. 297, 308 (2016) ("The 1976 Copyright Act, which took effect on January 1, 1978, replaced the two-term system of the 1909 Act with a single term that endured for the life of the author, plus 50 years after the author's death.").

1, 2013.[11] But for the termination right, an artist's rights to literary and artistic works would be forever subject to the control of the original transferee.[12] The copyright transfer termination right is a powerful inalienable, nonwaivable right held by all copyright creators to terminate any lifetime transfer of copyright decades after transfer.[13] However, it seems especially powerful for artists of color who have historically been forced, hoodwinked, and cajoled into parting with all dominion and control over their literary and artistic productions or who were simply unaware of their rights and, therefore, did not fully understand or appreciate the potential value of the rights at issue or the worth of their creations.[14]

The transfer termination right permits authors who transferred ownership of their copyrights, perhaps early in their career, without the benefit of knowing its true value, to reclaim control of, and to monetize, their work beginning thirty-five years after the transfer.[15] This inalienable, nonwaivable right to divest a transferee of the copyright transfer, however, is not automatic.[16] To exercise the right, an author must know of the right's existence and carefully manage the morass of rules regarding the opening of the notice period and timely and effective delivery of notice to the correct parties.[17] Failure to walk this procedural tightrope successfully and within the statutorily prescribed period has significant consequences because the termination right is "use it or lose it."[18]

Victor Willis, a Black man, original member of the Village People, and songwriter of the evergreen karaoke hit *Y.M.C.A.*, is the first artist of any race to successfully terminate the transfer of a post-1977 copyrighted musical composition under § 203 of the 1976 Copyright Act.[19] Willis may have been

11. *See* 17 U.S.C. §§ 203(a), 203(a)(3).

12. *See* Evans, *supra* note 10 ("[The new approach] reflected the reality that copyright creators often have little bargaining power in comparison to corporate assignees.").

13. *See id.* (footnote omitted) ("In response, Congress made explicitly clear in the 1976 Act and again in the 1998 amendment that termination rights are inalienable and unwaivable.").

14. *See* Greene, *supra* note 4, at 368 ("The treatment of Black artists by the music industry and the copyright system reveals a pervasive history of infringement.").

15. *See* § 203(a)(3) ("Termination of the grant may be effected . . . beginning at the end of thirty-five years from the date of execution of the grant.").

16. *See* § 203(a) ("Conditions for Termination").

17. *See id.* (describing the rules authors must follow).

18. *See* § 203(b)(6) ("Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.").

19. *See* Eriq Gardner, *Village People Songwriter Victor Willis Wins Case over Termination of 'Y.M.C.A.' Rights*, HOLLYWOOD REP. (May 8, 2012, 10:32 AM), https://www.hollywoodreporter.com/thr-esq/village-people-ymca-lawsuit-victor-willis-321576

the first, but since 2013, artists from all entertainment industry sectors have served transfer termination notices that were thought, at the time of contract by all parties, to be irrevocable and perpetual.[20] "The list of successful artists includes the late Prince Rogers Nelson (aka Prince), who, after an infamous and legendary 18-year rights battle, reclaimed his music catalog from Warner Brothers beginning with his debut album released in 1978."[21] And most recently, rhythm and blues mega-songstress Anita Baker announced on Twitter that all of her "children" were coming home.[22] After engaging in a contentious rights tug-of-war with her recording company, she successfully reclaimed all her masters under decades-old contracts.[23]

By knowing of, and effectively exercising, their copyright transfer termination rights, Willis, Prince, and Baker all avoided the devastating financial, emotional, psychological, and generational consequences of gentrified genius that Williams spoke of as he accepted the 2016 BET Humanitarian Award.[24] These artistic and business titans exercised their termination power in the full-throated manner of the Black Power movement of the 1960s.[25] They achieved what so many creators of color could not or did

(discussing Victor Willis's successful termination notice). Willis reclaimed a 50% share of the copyright in twenty-four Village People songs. *See* Eriq Gardner, *Jury Decides Village People 'Y.M.C.A.' Songwriter Has 50 Percent Song Share*, HOLLYWOOD REP. (Mar. 5, 2015, 8:39 AM), https://www.hollywoodreporter.com/business/business-news/jury-decides-village-people-ymca-779420/.

20. *See* Evans, *supra* note 10, at 300.

21. *Id.* (footnote omitted); *see also id.* at 300 n.10 (citations omitted) ("Musical icon, producer, singer/songwriter, and performer, Prince Rogers Nelson, was born in Minneapolis, Minnesota on June 7, 1958. He died in his home, known as Paisley Park, of an apparent drug overdose on April 21, 2016. His parents, who predeceased him, were both musicians. He had no spouse or descendants. He also died intestate, joining Amy Winehouse, Sonny Bono, and Steve McNair as mega stars with considerable fortunes who died without a will. For an in-depth critical study of Prince's life and artistry, see generally TOURÉ, I WOULD DIE 4 U: WHY PRINCE BECAME AN ICON (2013).").

22. Anita Baker (@IAMANITABAKER), TWITTER (Sept. 3, 2021, 10:48 AM), https://twitter.com/iamanitabaker/status/1433849361406910465?lang=en.

23. *See* Matthew Allen, *Anita Baker Settles Dispute over Her Master Recordings*, THEGRIO (Sept. 4, 2021), https://thegrio.com/2021/09/04/anita-gets-masters/; *see also* Baker, *supra* note 22 (showing her iconic albums *The Songstress*, *Rapture*, *Giving You the Best That I Got*, *Compositions*, and *Rhythm of Love*).

24. *See* Veronica Toney, *Jesse Williams Gave One of the Most Memorable Speeches in Award Show History [Full Transcript]*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/06/27/jesse-williams-gave-one-of-the-most-memorable-speeches-in-award-show-history-full-transcript/ ("Gentrifying our genius and then trying us on like costumes before discarding our bodies like rinds of strange fruit.").

25. *See generally* Leland Ware, *Civil Rights and the 1960s: A Decade of Unparalleled Progress*, 72 MD. L. REV. 1087, 1087 (2013) (discussing the 1960s and delving into "the events that propelled African Americans from segregation to full citizenship").

not do: they reclaimed control of their creativity and thereby recentered themselves in economic power grounded in property ownership in the United States.[26]

This Article chronicles the nefarious history of the creative disempowerment of creators of color and then imagines an empowering future for those who successfully exploit their creations by fully leveraging copyright ownership and transfer termination.[27] I include those who leveraged opportunity through assignments and licenses, and later, those who exercised their termination rights to secure a better deal with the original transferee, terminated and entered into deals with other transferees, or went it alone and exploited their copyrights on their own.[28] The termination right clearly benefits all copyright creators; however, members of marginalized and disenfranchised communities may stand to benefit even more from the second bite of the copyright apple.[29] I assert that utilizing blockchain's decentralized technology, smart contracts, and non-fungible token standards can better protect Black artists against disenfranchisement at the hands of a codified system of intentional friction to discourage or deny the reclamation of rights.[30]

Accordingly, in Part II, I examine the history in America and throughout the African diaspora of cultural misappropriation and critique the gentrification of Black creative genius. I explore gentrification as it is applied more broadly to real property and then discuss its application to intellectual property, generally, and copyright specifically.[31]

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26. *See* Evans, *supra* note 10, at 299–300 (acknowledging artists who successfully served transfer termination notices). Prince followed in the footsteps of Victor Willis, who was "the first living artist to successfully terminate the transfer of a post-1977 copyrighted musical composition." *Id.* at 299 (discussing Victor Willis).

27. *See* Greene, *supra* note 4, at 356–57 (footnote omitted) ("Blacks as a class received less protection for artistic musical works due to (1) inequalities of bargaining power, (2) the clash between the structural elements of copyright law and the oral predicate of Black culture, and (3) broad and pervasive social discrimination which both devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works.").

28. *See* Evans, *supra* note 10, at 299–300 (discussing artists, like Willis and Prince, exercising their termination rights to reclaim their creative work).

29. *See generally* Greene, *supra* note 4, at 387 (footnote omitted) ("Since copyright is a form of wealth, the pattern of creation by Blacks and appropriation of the fruits of Black performers by the dominant group—whites in America—comprised a wealth transfer away from the Black community.").

30. *See* Ilker Koksal, *The Benefits of Applying Blockchain Technology in Any Industry*, FORBES (Oct. 23, 2019, 5:57 PM), https://www.forbes.com/sites/ilkerkoksal/2019/10/23/the-benefits-of-applying-blockchain-technology-in-any-industry/?sh=7e7a44f849a5 ("With its decentralized and trustless nature, Blockchain technology can lead to new opportunities and benefit businesses through greater transparency, enhanced security, and easier traceability.").

31. *See infra* Part II.

In Part III, I discuss the subject matter of copyright protection and the nature and mechanics of the transfer termination right. Specifically, I examine the history, purpose, and congressional intent of the right, as well as the method and the complexities of timing of notice and termination.[32]

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II. THE HISTORY OF CULTURAL GENTRIFICATION

In this Part, I examine the history in America and throughout the African diaspora of cultural misappropriation and critique the gentrification of Black creative genius.[35] I explore gentrification as it is applied more broadly to real property and then discuss its application to intellectual property generally and copyright specifically.[36]

32. *See infra* Part III.

33. *See* Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham & Genevieve Grant, *U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets*, J. EMPIRICAL LEGAL STUD. (forthcoming) (discussing likely impacts of § 203 terminations); *see also infra* Part IV.

34. *See* Greene, *supra* note 4, at 378 (discussing the historic victimization of Black artists who received "no economic reward for their creations" because they were not adequately protected by termination rights).

35. *See infra* Part II.

36. *See infra* Part II. *See generally Gentrifying Genius: Urban Creators Stripped Bare*, SXSW SCHEDULE (Mar. 14, 2017, 11:00 AM), https://schedule.sxsw.com/2017/03/14/events/type/panel (documenting a discussion on gentrification). On March 14, 2017, I served on a panel at South by Southwest (SxSW) titled "Gentrifying Genius: Urban Creators Stripped Bare." *See id.* Panelists explored the themes raised in an article published by the *Fader* titled *Black Teens Are Breaking the Internet and Seeing None of the Profits*. Doreen St. Felix, *Black Teens Are Breaking the Internet and Seeing None of the Profits*, FADER (Dec. 3, 2015), https://www.thefader.com/2015/12/03/on-fleek-peaches-monroee-meechie-viral-vines. The article explained that, unlike their white counterparts, Black and brown youth—particularly those who are economically disadvantaged—often miss fruitful

German-British sociologist and city planner Ruth Glass is credited with coining the term gentrification in 1964.[37] She describes the process as slow but deliberate: "One by one, many of the working class quarters of London have been invaded by the middle classes . . . . Larger Victorian houses downgraded in an earlier or recent period . . . upgraded once again."[38] Once this process of gentrification is set in motion, explains Glass, it continues "until all or most of the working-class occupiers are displaced, and the whole social character of the district is changed."[39]

The term refers to the process of developers buying real estate in economically distressed or blighted areas—usually urban housing—and developing the area.[40] While some commentators view gentrification as beneficial to displaced poor, marginalized populations,[41] gentrification often increases property values to levels so high that poor residents can no longer afford to live in that area.[42] Rising property values deprive low-income, poor residents of affordable housing and may even force residents into residential insecurity.[43]

In sum, gentrification homogenizes the area; creates opportunity zones and tax incentives to renovate real properties, develop green space, expand employment, educational, and commercial opportunities; and raises the tax base to further develop and support the development.[44] At first blush, these are all laudable and desirable outcomes.[45] However, in the process existing residents and businesses in the area are eventually priced out of opportunities

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and ultimately life-changing opportunities to fully leverage creativity in the online environment that becomes popular (even viral) but nevertheless goes uncompensated and not properly attributed to them. *Id.*

37. *See* THE ENCYCLOPEDIA OF HOUSING 198 (Willem van Vliet ed., 1998).

38. RUTH GLASS ET AL., LONDON: ASPECTS OF CHANGE xviii (Centre for Urban Studies ed., 1964).

39. *Id.* at xviii–xix.

40. *See id.* at xxvii–xx.

41. *See* J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405–06 (2003) (asserting that gentrification is good, on balance, for the poor and ethnic minorities).

42. *See* GLASS ET AL., *supra* note 38, at xviii.

43. *See* Sandra Feder, *Stanford Professor's Study Finds Gentrification Disproportionately Affects Minorities*, STAN. NEWS (Dec. 1, 2020), https://news.stanford.edu/2020/12/01/gentrification-disproportionately-affects-minorities/ (noting that poor individuals who can no longer afford to live in gentrified areas move out and that among these displaced populations, members of Black communities face fewer options of areas to relocate).

44. *See* Byrne, *supra* note 41 (noting how gentrification increases "the number of residents who can pay taxes, purchase local goods and services, and support the city in state and federal political processes").

45. *See id.* (claiming that the "increases in the number of affluent and well-educated residents is plainly good for cities").

and are forced to move, often without any support for this de facto relocation.[46] The process of devaluing Black creativity is a similar process.[47] The irony is that sometimes these same creations are seen as less than: once misappropriated by white artists who palm them off as their own, songs, dance moves, art, and inventions (a creature of patent) have often experienced increased value.[48]

If we are to learn anything from history, it is clear that racial stratification—both de jure in the days of slavery and Jim Crow and de facto via modern social structure—combined with the structural elements of the copyright regime deny Black artists meaningful ownership of, and compensation for, copyrighted works.[49] Despite the facial neutrality of copyright law, the experiences of creators vary widely based on race.[50] Given the rapid advance and state of the art of technological measures to engage in authorized copying, adaptation, and distribution, possible harms increase greatly in a web 3.0 world.[51]

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46. *See* GLASS ET AL., *supra* note 38, at xviii–xix.

47. *See* Greene, *supra* note 4, at 370 (applying similar reasoning to the music industry). K.J. Greene describes this phenomenon as follows: "Given the context of inferiority fostered by the ideology of separation, it is likely that society would not generally value a work by a minority artist as much as the same work by a white artist." *Id.*

48. *See, e.g.*, Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 794 (2001) ("[Some cultural products] are devalued when appropriated by the majority culture."). Although outside the scope of this Article, a formidable body of scholarship excavates and critiques cultural misappropriation globally. *See, e.g.*, *id.* Scafidi explains that "[d]espite the tremendous economic and social value of community-generated cultural products, the source communities have little control over them." *Id.* at 794 n.4 (noting an exception in the case of Native American cultural products pursuant to the Indian Arts and Crafts Act of 1990, Pub. L. No. 101-664, 104 Stat. 4462 (1990) (amending 25 U.S.C. § 305 and 18 U.S.C. §§ 1158–1159 to make illegal the misrepresentation of goods as "Indian-produced"). *See generally* J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (2011); J. Janewa Osei-Tutu, *Protecting Culturally Identifiable Fashion: What Role for GIs?*, 14 FIU L. REV. 571 (2021); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001); Joseph Straus, *The Impact of the New World Order on Economic Development: The Role of Intellectual Property Rights System*, 6 J. MARSHALL REV. INTELL. PROP. L. 1 (2006); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTELL. PROP. 29 (2008); Peter K. Yu, *World Trade, Intellectual Property and the Global Élites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1 (2002); Paul Kuruk, *Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629 (2007).

49. *See* Greene, *supra* note 4, at 342.

50. *See id.* at 343 (arguing that "[t]he history of Black music in America demonstrates the significant inequality of protection in the 'race-neutral' copyright regime").

51. *See Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1979 (1994) (noting that

III. COPYRIGHT AND THE TERMINATION RIGHT

In this Part, I present the subject matter of copyright protection and the nature and mechanics of the transfer termination right. Specifically, I examine the history, purpose, and congressional intent of the right, as well as the method and the complexities of timing of notice and termination.

Copyright automatically protects literary and artistic works fixed in a tangible medium of expression and that are therefore capable of being copied or otherwise exploited.[52] Copyright subsists for the life of the author plus seventy years after the author's death.[53] The right granted to an author is referred to as a bundle of rights that consists of the exclusive right to copy, adapt, distribute copies, and perform or display publicly.[54] Section 106 also makes clear that the author can also authorize others to exploit any or all rights in the bundle.[55] This occurs by means of transfer by grant or license to one who presumably is better positioned to monetize the rights (an agent, publisher, distributor, or other marketplace intermediary, for example).[56]

Although most creatives are inspired to create literary and artistic works simply to express their creative spark, the Framers of the Constitution created copyright law based on an economic incentive theory.[57] However, the reality that throughout United States history Black artists have received less protection (or in some cases no protection) for their creative expression undermines this theory.[58] The point is made clearer when during the period

"digital technology makes it easier to manipulate existing works, which leads to new possibilities for artists who can harness the technology, but also increases the potential for unauthorized alteration and appropriation of copyrighted works").

52. *See* Copyright Act of 1976, 17 U.S.C. § 102(a).

53. *See* § 302(a); *see also How Long Does Copyright Protection Last?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-duration.html (last visited Nov. 6, 2021) ("For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first. For works first published prior to 1978, the term will vary depending on several factors.").

54. *See* § 106.

55. *See id.*

56. *See Copyright Licensing*, JUSTIA, https://www.justia.com/intellectual-property/copyright/copyright-licensing/ (last visited Nov. 6, 2021) (describing how copyright owners can license or assign their exclusive copyright rights).

57. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (discussing the original intent of the Framers). "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.*

58. *See* Greene, *supra* note 4, at 378.

of enslavement, a Black person herself was regarded as property and, therefore, legally incapable of creating or owning property of her own.[59] The loss of generational wealth is presumably incalculable.[60]

Transfer includes assignments, exclusive licenses, and nonexclusive licenses.[61] Section 101 defines a "transfer of copyright ownership" as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."[62] Regardless of any "agreement to the contrary," an author of a transfer made on or after January 1, 1978, can notify the transferee of her intention to terminate the transfer and reclaim control of her copyright.[63] This termination right is codified in § 203 of the Act.[64] Termination does not, however, apply in the case of a work made for hire.[65] A work for hire, as the name suggests, is a literary or artistic work created within the context of employment or one that is "specially ordered or commissioned" from an independent contractor.[66]

A. The History of the Copyright Transfer Termination Right

Before 1976, Congress attempted to protect authors who had assigned rights through a two-term system that created an initial term of copyright followed by an automatic second term (the renewal term).[67] Congress believed that after the first term, authors and transferees would both have a better idea of the actual value of the work and would negotiate for more favorable terms or, in the alternative, the author could enter into agreements with a new transferee or exploit the rights themselves.[68]

The problem is that transferees would often require, as a matter of course,

59. *See* Keith Aoki, *Distributive and Syncretic Motive in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 740–41 (2007) (discussing ownership of intellectual property created by Black people while enslaved).

60. *See generally* Greene, *supra* note 4, at 357–58.

61. *See* Copyright Act of 1976, 17 U.S.C. § 101 (defining various terms under the Act).

62. *Id.*

63. *See* § 203 ("Termination of transfers and licenses granted by the author").

64. *See id.*

65. *See* U.S. COPYRIGHT OFF., CIRCULAR 9, WORKS MADE FOR HIRE 1, 3 (2012) ("However, the termination provisions of the law do not apply to works made for hire.").

66. *See* § 101; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 742–43 (1989).

67. *See* 1909 Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (current version at 17 U.S.C. §§ 101–1401).

68. *See id.*

that the author transfer both terms upfront.[69] This wholesale rights acquisition created an end-run around Congress's intent.[70] Publishers were the essential gatekeeper to access to production, distribution, and exploitation of creativity, especially in a pre-internet world because "authors generally had no option but to assign their rights for both terms of protection."[71] The Supreme Court upheld this disfavored practice in *Fred Fisher Music Co. v. M. Witmark & Sons*.[72] As a result, Congress's intent to confer the benefit of the renewal term on authors and their heirs was, as one Supreme Court Justice remarked in *Mills Music, Inc. v. Snyder*, "substantially thwarted."[73] The right was in name only because it existed in law yet was illusory for all but the most well-positioned copyright creators.[74] So Congress went back to the drawing board.[75] To avoid the end-run rights grab practice under the new unitary system pursuant to the Copyright Act of 1976, Congress included the clause "notwithstanding any agreement to the contrary" to make clear the right is nonwaivable and inalienable.[76]

Copyright transfer termination is not automatic.[77] Rather, it is an affirmative act that requires owners to follow precise notice and timing requirements, explained more fully below.[78] This was a compromise advocated by copyright-intensive industries to limit automatic forfeiture.[79] To comport with the Berne Convention, Congress removed the copyright

69. *See* Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS & ENT. L. 55, 58 (2012) (discussing how authors could recapture their copyright and thereby exploit its long-term value).

70. *See id.* ("[A]uthors with little bargaining power were often required to assign both the initial and renewal copyright terms to publishers in advance.").

71. *See* Brian D. Caplan, *Navigating US Copyright Termination Rights*, WIPO MAG. (Aug. 2012), https://www.wipo.int/wipo_magazine/en/2012/04/article_0005.html.

72. *See* Fred Fisher Music Co. v. M. Whitmark & Sons, 318 U.S. 643 (1943); Moss & Basin, *supra* note 69.

73. 469 U.S. 153, 185 (1985) (White, J., dissenting).

74. *See id.* at 186 ("By going further than necessary to effect the goal of promoting access to the arts, the majority frustrates the congressional purpose of compensating authors who, when their works were in their infancy, struck unremunerative bargains.").

75. *See* Moss & Basin, *supra* note 69, at 58–59 (discussing that due to Congress's intent being "substantially thwarted," the Copyright Act of 1976 was created to, among other things, address this issue).

76. *See* Copyright Act of 1976, 17 U.S.C. § 203(a)(5).

77. *See* Moss & Basin, *supra* note 69, at 60 (stating that "reversion through termination is not automatic under the current Act").

78. *See id.* ("Termination may only be effected through affirmative action.").

79. *See id.* at 59–60 (discussing how the Copyright Act of 1976 was intended to be "a practical compromise" that recognized "the problems and legitimate needs of all interests involved").

formalities that rights holders were required to comply with not only to obtain copyright protection of their work but also to maintain copyright protection.[80]

"The House Report accompanying the 1976 Act explained that '[a] provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.'"[81] Congress noted further that "the unequal bargaining power burdening authors resulted not only from their status, but also from the inherent impossibility of determining a work's value until it has been exploited."[82]

I argue that the termination provisions serve as a de facto formality that impedes the ability of all but the most well-resourced, well-represented, and savvy creatives.[83] It is only those privileged authors who will have the wherewithal and resources to successfully navigate the notice and termination rules to reclaim their copyrights.[84] Given these clear and prescient concerns, the tortuous twists and turns that stand between author and transferee fall far short of Congress's intent to provide authors with a guaranteed opportunity to take a second bite of the proverbial apple.[85]

B. The Mechanics of Notice and Termination

Since 2013, artists from all entertainment industry sectors have successfully served notices and terminated assignments and exclusive licenses that were thought at the time of contract to be irrevocable and perpetual.[86]

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80. *See* Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 585 (1995). "Formalities have long been a hallmark of the American copyright system. Since its eighteenth-century origins, our law has required various steps to be taken in order to obtain and enjoy federal copyright protection." *Id*. at 566.

81. Moss & Basin, *supra* note 69, at 59 (quoting H.R. REP. No. 1476, at 124 (1976)).

82. *Id.* at 80.

83. *See generally* Dylan Gilbert, Meredith Rose & Alisa Valentin, Making Sense of the Termination Right: How the System Fails Artists and How To Fix It, Public Knowledge (Dec. 2019), https://apo.org.au/sites/default/files/resource-files/2019-12/apo-nid271181.pdf (discussing that termination rights can combine with other formalities to create significant hurdles that are difficult to overcome without expensive legal representation).

84. *See id.* at ii ("Creators who lack the financial resources or name recognition needed to engage in lengthy legal and PR battles may be unable to even reach the doorstep of termination.").

85. *See id.* at i–ii (discussing how "something which is supposed to be an inalienable right" is in reality "complex to execute" and entangles artists "in lengthy and expensive litigation," which few of them can afford).

86. *See Q&A with Copyright Grant Termination Expert Lisa A. Alter, Esq.*, AUDITRIX, INC. (Mar. 30, 2014), http://blog.auditrix.net/2014/03/q-with-copyright-grant-termination.html ("An increasing number of authors are exercising their termination rights. Those who do not may simply be unaware

As noted, Congress included the phrase "notwithstanding any agreement to the contrary" to avoid the results under the Copyright Act of 1909, where authors were forced to transfer both the initial and renewal terms to transferees, forever losing control of their rights.[87] This language forces the parties to the negotiating table after decades have passed and the value of the work has become clearer, placing the author in a stronger bargaining position.[88] Sufficient time has also passed for the transferee to exploit the work and, presumably, to receive a reasonable return on their investment.[89]

Owners of copyrighted works created on or after January 1, 1978, were first empowered to begin terminating any transfers of those works on January 1, 2013.[90] However, notice of termination must be served no earlier than ten years and no later than two years before the effective date of termination (the notice period).[91] The notice of the effective date of termination must be in writing and recorded with the Copyright Office before the effective date of termination.[92] However, the statute does not prescribe a set form of notice.[93] Although an author cannot waive her termination right, she can forfeit it if she fails to terminate in an appropriate and timely way.[94] "In practice, many grants of books, screenplays, and other creative works include the right of

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of the opportunity."); Eriq Gardner, *Rock Band Boston Involved in Copyright Termination Fight*, HOLLYWOOD REP. (Mar. 21, 2013, 9:06 AM), http://www.hollywoodreporter.com/thr-esq/rock-band-boston-involved-copyright-430177 ("Many song artists have done the math and filed termination notices to reclaim their works. Now come[] the lawsuits.").

87. *See* Copyright Act of 1976, 17 U.S.C. § 203(a)(5); *see also supra* note 76 and accompanying text.

88. *See* Arnold P. Lutzker et al., *Copyright Office Proposes Rules To Modernize Recordation of Termination Notices*, LUTZKER & LUTZKER LLP (June 23, 2020), https://www.lutzker.com/copyright-office-proposes-rules-to-modernize-recordation-of-termination-notices/ (discussing the effect of Copyright Act of 1976 termination provisions on bargaining power between parties).

89. *See id.* ("[T]he termination right attempts to correct the bargaining imbalance between the author and grantee while also allowing authors to enjoy the later economic success of their works.").

90. *See* §§ 203(a), 203(a)(3) ("Termination of the grant may be effected at any time . . . beginning at the end of thirty-five years from the date of execution of the grant.").

91. *See* § 203(a)(4)(A) ("[T]he notice shall be served not less than two or more than ten years before [the effective date of the termination].").

92. *See* § 203(a)(4).

93. *See id.* (instituting some notice requirements but allowing the Register of Copyrights to prescribe the form of notice "by regulation"). For example, for a transfer that occurred on January 1, 1980, the notice period began in 2005 and ended in 2018 (13 years). *See id.* (describing notice rules). The termination window opened in 2015 and will close at the end of 2020 (5 years). *See* § 203(a)(3) (describing termination rules).

94. *See* Margo E. Crespin, *A Second Bite of the Apple: A Guide to Terminating Transfers Under Section 203 of the Copyright Act*, AUTHOR'S GUILD (2005), https://www.authorsguild.org/member-services/legal-services/terminating-transfers/ (discussing the result of failing to meet statutory requirements for termination).

publication, and therefore will not be eligible for termination until thirty-five years have passed from the date of publication," which in many instances will "be up to several years after the date" the parties executed the publishing agreement.[95] If a work "is not published within five years of the date the grant is executed, the grant may be terminated forty years from the date of execution."[96]

The court's decision in *Scorpio Music S.A. v. Willis* was one of the first to interpret the copyright termination provisions applicable to post-1977 grants.[97] That case involved Village People member Victor Willis's right to recapture control of thirty-three copyrighted songs Willis co-authored, including *Y.M.C.A.*, *Go West*, and *In the Navy*.[98] In January 2011 (honoring the requisite two years' notice), thirty-three years after Willis's transfer of the lyrics he authored, he served a notice to terminate as of 2013 on Can't Stop Productions, Inc., the assignee, and was ultimately successful in his termination bid.[99]

Upon termination, all U.S. copyright interests conveyed under the initial grant revert to the original grantor.[100] Rights in any derivative works prepared as a result of the original transfer and prior to its termination also remain unaffected.[101] Once rights are recaptured, the original creator may prepare or authorize others to prepare new derivative works.[102]

Because Victor Willis and similarly situated artists reclaimed control of their respective copyright interests during their lifetimes, they are free to dispose of their copyrights, as intangible personal property, during their lifetime in any way they choose.[103] Or they can exercise their testamentary freedom, a powerful stick in the bundle of property rights, to transfer property

95. Moss & Basin, *supra* note 69, at 62 n.29 (citing 17 U.S.C. § 203(a)(3)).

96. *Id.* (citing 17 U.S.C. §§ 203(a)(3), 304(c)(4)(A)).

97. *See* Scorpio Music S.A. v. Willis, No. 11-cv-01557-BTM-RBB, 2012 WL 1598043 (S.D. Cal. May 7, 2012).

98. *See id.* at *1 (discussing the hit songs for which Willis sought reinstatement of copyright interests).

99. *See id.* at *1, *7 (dismissing Can't Stop Productions' claim for declaratory judgment that Willis did not have vested copyright interests).

100. *See* Copyright Act of 1976, 17 U.S.C. § 203(b) (stating that "upon . . . termination, all rights under this title that were covered by the terminated grants revert to the author" or other person owning the interest).

101. *See* § 203(b)(1).

102. *See* § 203(b)(1)–(2) (noting the effects of termination).

103. *See* § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law.").

at death.[104] Testamentary transfers are integral to a creative's ability to create generational wealth and essential for Black creatives, in particular, to begin to eradicate and overcome—not only the income—but the racial wealth gap in America.[105]

IV. TERMINATION NOTICES DATASET STUDY

In this Part, I examine the pre-window fervor and speculation of stakeholder commentators around the likely impact of § 203 terminations prior to 2013 and the actual impact since 2013. Additionally, I identify and consider a forecast of likely trends, as discussed in the *Termination Notices* dataset study.[106]

Although copyrighted works are not required to be registered for rights to exist,[107] transfer termination notices are required to be in writing and filed with the Copyright Office.[108] The registration requirement ensures that a database of termination information exists.[109] Before the 2013 notice period window opened, the comments and concerns of practitioners, commentators, and stakeholders ran the gamut; but most opined that the impact would be significant and dramatically impact how copyrighted works were exploited thereafter.[110]

A great void existed, however, in a lack of aggregation and extrapolation of the data to assess empirically driven conclusions and predictions until 2021

104. *See id.* ("The ownership of a copyright may be . . . bequeathed by will or pass as personal property by the applicable laws of intestate succession.")

105. *See generally* Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black–White Wealth Gap*, BROOKINGS (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/.

106. *See* Yuvaraj et al., *supra* note 33 (describing the results of studies based on two different datasets of copyright termination notice records).

107. *See* Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It*, 28 BERKELEY TECH. L.J. 1459, 1467–68 (2013) (explaining how registration—a copyright formality required pursuant to the 1909 Act—is no longer a condition precedent to a grant of rights).

108. *See* § 203(a)(4)(A) ("A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.").

109. *See Notices of Termination*, U.S. COPYRIGHT OFF., https://www.copyright.gov/recordation/termination.html (last visited Nov. 6, 2021) (outlining the procedures and requirements for registrations that must be made with the U.S. Copyright Office).

110. *See* Richard Busch, *The Battle over Copyright Termination—And the First Round Goes to . . .*, FORBES (June 12, 2012, 9:48 AM), https://www.forbes.com/sites/richardbusch/2012/06/12/the-battle-over-copyright-termination-and-the-first-round-goes-to/#76baafb82982 (referring to the date the first round of § 203 terminations became effective). Busch summed up the then impending date of January 1, 2013, as "Judgment Day." *Id.*

when four authors completed an exhaustive excavation of the data in the first large-scale study of copyright termination notice records from the U.S. Copyright Office.[111] The result is two new open-access datasets and evidence of some insightful preliminary data.[112] As I predicted in *Statutory Heirs Apparent?*,[113] the study shows a notable surge in interest in copyright transfer terminations, led by some high-profile artists, as well as artist advocates, user-groups (for example, the gallery, library, archive, and museum sectors), and policymakers (especially in the European Union, South Africa, and Canada).[114]

Despite the availability of termination notices filed with the Copyright Office, the database system itself has numerous flaws that make accessing and analyzing the information quite difficult.[115] For example, "[t]he paucity of empirical research on the U.S. termination right may be a product of the difficulty of accessing and analy[z]ing the data. [The data] is contained within an ageing system[,] which can be difficult to [search]."[116] In addition, the search page itself "does not permit users to download multiple records at once."[117] Nonetheless, the authors were able to construct datasets to deduce activity volume and patterns and to begin to derive trends.[118] They classified the data into types of records, allowing for inconsistent recordation methods and "poor metadata hygiene," common for pro se filings, and "captured 3,306 § 203 termination notice records, corresponding to 42,280 distinct titles."[119]

Although the datasets are a welcomed access point to key termination

111. *See* Dotan Oliar, Nathaniel Pattison & K. Ross Powell, *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2219–20 (2014) ("[T]he Copyright Office's database does not offer a bulk data download, instead only allowing users to find records by entering individual search terms.").

112. *See* Yuvaraj et al., *supra* note 33 (manuscript at 40). The study focused on both § 203 and § 304 notices, but the scope of this paper focuses on the former—those terminations beginning on or after January 1, 2013. *See id.*

113. *See* Evans, *supra* note 10, at 297.

114. *See* Yuvaraj et al., *supra* note 33 (manuscript at 3). Reversion creates an opportunity for aligned interests between creators and end-users to ensure access to, and enjoyment of, cultural artifacts that rightsholders often lose interest in after a work's commercial viability wanes. *See id.* (manuscript at 3–4) (noting that "the unusual unity provides a rare opportunity to create meaningful change").

115. *See id.* (manuscript at 8–9).

116. *Id.* (manuscript at 8).

117. *Id.*

118. *See id.* (manuscript at 19) (discussing the results of the authors' "preliminary descriptive analyses").

119. *See id.* (manuscript at 15).

data, they do have their limits.[120] First, a termination notice is just that: notice.[121] Notice does not guarantee that the grant of rights will, in fact, be terminated.[122] In fact, they are often used to encourage bargaining, the type envisioned by Congress when it enacted the termination right as a second bite of the apple.[123] Second, the notice may not be legally binding.[124] Notices are not required to be in a particular form, but they can be struck down or fail for a variety of reasons.[125] Third, in the vain of "garbage in, garbage out," the records are riddled, in some cases, with inaccuracies and inconsistencies.[126] Fourth, the authors acknowledge that their data-gathering methodology may not have captured all relevant data.[127] Nonetheless, this Herculean effort is formidable and serves as a valuable contribution to the empirical study of copyright transfer terminations in the United States to benefit stakeholders and policymakers around the world.[128] The study findings focus on three areas: (1) "[t]he number of notices filed, and how that has evolved over time"; (2) "[t]he different types of works being subject to termination notices over time"; and (3) "[c]haracteristics of the creators or heirs filing for termination."[129]

120. *See id.* (manuscript at 18–19) (discussing limitations to the datasets).

121. *See id.* (manuscript at 18) (describing other outcomes besides termination that might occur after notice is given, such as "counter-notice").

122. *See id.* (stating "a termination does not necessarily take place just because a termination notice is issued" because the notice may be challenged or revoked).

123. *See* GILBERT ET AL., *supra* note 83, at 10–11 (explaining that Congress sought to improve bargaining power for authors by allowing them to "leverage the imminent threat of rights termination").

124. *See* Yuvaraj et al., *supra* note 33 (manuscript at 18) (stating "recordation on the Catalog does not make a termination notice legally binding" because "[t]he filing parties may have made critical errors in the notices that render them unenforceable").

125. *See id.* (discussing various ways notices can fail).

126. *See id.* (stating records can have typographical and grammatical errors as well as inconsistencies in the data itself).

127. *See id.* ("[W]hile we followed the search advice provided by the Copyright Office, our program may not have captured every single relevant record or filtered out every irrelevant record.").

128. *See id.* (manuscript at 4) ("This paper introduces two new datasets that make available virtually complete data on termination notices filed in the [United States] between its institution in 1978 and 2020. It also sets out findings from our preliminary analysis of these data[] and suggests how they might be put to further use by scholars, policymakers[,] and industry.").

129. *Id.* (manuscript at 19).

A. Number of Notices

The data show spikes in filings of § 203 termination notices in years 1978, 1988, and 2000.[130] The authors observed "a gradual increase per year from 2003 (the first year in which those notices could be validly filed) until they began increasing much more rapidly in 2010" but "a substantial drop-off in the number of both § 203 notices issued and the number of titles subject to them from 2016–2019."[131]

B. Types of Works Subject to Termination

Performance art, especially musicals, "and texts accounted for the greatest share of registered works in the registration database,"[132] while"[s]ound recordings made up less than 5% of registrations, but more than 31% of the total works subject to termination notices."[133] "Works of performing arts were also over-represented (42% of registrations; 66% of works subject to § 203 termination notices)."[134] However, "text works made up almost 40% of registrations but less than 3% of works subject to termination notices."[135] Finally, "[w]orks of visual arts accounted for 13% of registered works (13%)," yet they were rarely "subject to termination notices (0.04%)."[136]

C. Who Is Filing Termination Notices

The authors list the top ten creators by the number of titles subject to § 203 termination and the percentage of all titles subject to § 203 termination.[137] The list is illuminating and begins with George Clinton, one of the most sampled artists of all time (1413/2.49%).[138] The second is the Philadelphia

130. *See id.* ("These data appear to show spikes in filings of § 203 termination notices (and the numbers of works affected) in 1978, 1988, and 2000.").

131. *Id.*

132. *Id.* (manuscript at 23).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.* (manuscript at 29) (illustrating Table 8, which concerns the "top 10 creators by number of titles affected by termination notices under . . . § 203").

138. *See* Bridgit Brown, *George Clinton Has Produced Some of the Most Sampled Funk Beats in the History of Music and Berklee College of Music Is Showing Him a Little Love*, BAY STATE BANNER (Feb. 6, 2012), https://www.baystatebanner.com/2012/02/06/george-clinton-has-produced-some-of-

International Records duo, Kenny Gamble and Leon Huff (1136/2.69%).[139] The authors conclude that the great majority of filings come from musicians and songwriters in the music sector.[140]

Perhaps the most revealing—and yet daunting—conclusion the authors make is that U.S. termination laws are of little value to artists across the board.[141] Without automatic reversion and a shorter period before authors can even begin the process of termination, most of the value of the copyrights has long been extracted before the notice period begins.[142] The exceptions are the truly exceptional artists with global recognition, star power, and perennial hits (recall Victor Willis, Prince, and Anita Baker, discussed above).[143] Although "[t]he Copyright Office . . . initially proposed that the U.S. termination law should operate automatically 25 years after transfer," entertainment industry lobbyists vehemently opposed this proposal and convinced Congress to accept its version of the law's draft.[144] Unsurprisingly, the language was substantially amended in ways that made the process unduly lengthy (not to begin before thirty-five years), unreasonably complex (even for an intellectual property lawyer), and extremely costly (tens of thousands of dollars for attorney's fees and, perhaps, court costs), with the ever-present threat of a permanent loss of rights if the artist fails to comply.[145]

I argue that termination rights should operate automatically.[146] I propose

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the-most-sampled-funk-beats-in-the-history-of-music-and-berklee-college-of-music-is-showing-him-a-little-love/; Yuvaraj et al., *supra* note 33 (manuscript at 29).

139. *See* Yuvaraj et al., *supra* note 33 (manuscript at 30).

140. *See id.* (manuscript at 31) ("These results suggest musicians and songwriters . . . file termination notices in respect of the largest number of works.").

141. *See id.* (manuscript at 38).

142. *Cf. How Royalty Earnings Change over Time*, ROYALTY EXCH. (Nov. 3, 2020), https://www.royaltyexchange.com/blog/how-royalty-earnings-change-over-time (examining 5,000 songs over a period of eight years and finding that royalty earnings began falling after a period of three years to a stable level mostly driven by streaming earnings).

143. *See supra* notes 19–22 and accompanying text (discussing Willis, Prince, and Baker, who all exercised their copyright transfer termination rights).

144. *See* Yuvaraj et al., *supra* note 33 (manuscript at 38) (claiming that "the draft law was substantially amended" after industry lobbying). William Patry explained that the author's affirmative duty to follow precisely the complex and confounding termination rules reflects a "weakening" agreed to by "authors, distributors, the Copyright Office, and Congress." William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 921 (1997). Further, Patry explained that "[t]hese termination proposals were strongly objected to by distributors and strongly defended by authors[] and became, in the words of the Copyright Office, 'the most explosive and difficult issue in the revision process.'" *Id.* (footnote omitted).

145. *See* Yuvaraj et al., *supra* note 33 (manuscript at 38).

146. *See* GILBERT ET AL., *supra* note 83, at ii–iv (proposing six solutions to the problems with the Copyright Act, including making termination rights vest automatically).

that programmable blockchains created to run smart contracts and decentralized applications are viable and appropriate technological means to provide this automation of performance and enforcement as a form of decentralized autonomous termination.[147] Additionally, non-fungible token standards could be used to digitally represent verifiable, secure ownership, increase liquidity markets, and allow artists to participate in secondary market revenue opportunities, manage licensing, fan engagement, and avail themselves of a range of monetization opportunities made possible by this emerging technology.[148]

This proposal is both consistent with the Copyright Office's original focus on automatic reversion of rights and achievable with the current state of the technological art.[149] Despite blockchain's origins in providing a peer-to-peer cash system for cryptocurrencies, noted commentators aptly describe blockchain technology as "an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually *everything* of value."[150] Viewed through that more expansive crypto-asset lens, programmable blockchains, smart contract code, and NFT standards can ensure that all artists can fully realize the economic opportunities created by transfer-termination rights, especially Black creatives who historically lack access to the information, capital, and legal representation necessary to successfully navigate the considerable barriers that have and will continue to disenfranchise far too many Black artists.[151]

147. *See infra* Part V (introducing blockchain technology, smart contract code, and non-fungible token standards).

148. *See* Tonya M. Evans, *The Genesis of Creative Justice: Disintermediating Creativity*, 26 LEWIS & CLARK L. REV. (forthcoming 2022).

149. *See* Chase A. Brennick, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, 93 N.Y.U. L. REV. 786, 791–92 (2018) (discussing the history of reversion rights and how, "[i]n the 1960s, the Copyright Office considered shifting copyright law . . . . The proposal generated immediate opposition, with copyright transferees . . . arguing that reversions are paternalistic"). *See generally* Michelle Adams, *In with the New, but Out with the Old?*, U. MIAMI L. REV. (Apr. 11, 2021), https://lawreview.law.miami.edu/blockchain-smart-contracts/ (discussing the significant role that smart contracts, cryptocurrency, NFTs, and other blockchain features will have in the future).

150. Nick Bawa, *It's Time To Explain Blockchain*, FORBES (Jan. 31, 2019, 7:45 AM) (emphasis added), https://www.forbes.com/sites/forbestechcouncil/2019/01/31/its-time-to-explain-blockchain/?sh=1e3a1509621d (noting that technology gurus Don and Alex Tapscott provided this comprehensive definition of blockchain).

151. *See* GILBERT ET AL., *supra* note 83, at 3 ("Whatever policies Congress ultimately pursues, the goal should be to create a system that both enables artists and the general public to understand how the right functions and that helps artists effectively use their termination right as they see fit.").

V. AUTONOMOUS TERMINATIONS VIA BLOCKCHAIN, SMART CONTRACTS, AND NFTS

In this Part, I discuss the role that blockchain technology, smart contract code, and non-fungible token standards can play in automating codified protections. Removing the educational and legalistic barriers to exercising one's termination rights and automating the transfer termination process would ensure that all artists have actual—not theoretical—rights, especially disenfranchised creatives victimized first by powerful industry intermediaries and then by a legal process created by those same industry stakeholders to protect industry, rather than creator, interests.[152]

A. Blockchains

Blockchains are databases of time-stamped, append-only digital transaction information maintained by a decentralized (or distributed) network of computers instead of one centralized server.[153] Blockchains differ from earlier versions of the world wide web that were fully centralized client-servers where information flowed from server to client computers.[154] The early decentralized web involved numerous mini client-servers, featuring end-users as both recipients of information and also creators and publishers.[155] However, information is still largely siloed by three private, global companies: Amazon, Microsoft, and Google.[156]

152. *See* GILBERT ET AL., *supra* note 83, at i–ii (claiming that although the termination right is "supposed to be an inalienable right," termination is virtually nonexistent due to the problems that "plague the system").

153. *See What Is Blockchain Technology?*, LIQUID (Oct. 18, 2018), https://blog.liquid.com/what-is-blockchain-technology (describing blockchain as a "distributed database that's decentralized," in which "many computers or 'nodes' . . . connect," that is "designed to be an 'append-only' data structure" and include "timestamp as well as transaction data"). Blockchains record the sender, receiver, and amount of every transaction, as well as balances in each wallet that interacts with the blockchain. *See* SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1, 2, 6 (2008) ("The public can see that someone is sending an amount to someone else, but without information linking the transaction to anyone.").

154. *See* PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW: THE RULE OF CODE 2, 16–17 (2018).

155. *See id.* at 16–17 (describing how by the turn of the twenty-first century, new peer-to-peer networks emerged where each participant in the network was both a supplier and consumer of resources).

156. *See* Mike Robuck, *Report: Amazon, Microsoft and Google Account for Half of All Major Hyperscale Data Centers*, FIERCE TELECOM (Jan. 27, 2021, 12:56 PM), https://www.fiercetelecom.com/telecom/report-amazon-microsoft-and-google-account-for-half-all-major-hyperscale-data-centers. The author explains: "Not surprisingly, the companies with the broadest data center footprint are the leading cloud providers[:] Amazon, Microsoft, Google[,] and

Blockchain protocols consist of a mix of existing technologies in a novel way—namely, the internet, peer-to-peer networks, and public-private key cryptography with digital signature.[157] In addition to the append-only nature of distributed ledgers, blockchains are disintermediated and borderless.[158] Open-access blockchains are permissionless and fully transparent.[159] The first blockchain—the Bitcoin blockchain—was created by a pseudonymous person or group of people named Satoshi Nakamoto in January 2009.[160] Satoshi created Bitcoin to facilitate a peer-to-peer digital cash system that was verifiable, secure, and not beholden to any "trusted third party" (government or bank, for example, to track and settle transactions).[161]

Although blockchain's first use was to secure and record encrypted peer-to-peer Bitcoin transactions and balances, distributed ledger technology has proven to be a multipurpose technology with countless other potential applications.[162] Blockchains are useful in any industry that benefits from a decentralized method of verifying and securing data, including copyright-intensive industries.[163] Notable benefits related to copyright include the administration and distribution of copyright-protected works.[164] They can also be an effective mechanism for enforcing the artist's resale right as an alternative to collective management organizations.[165] The technology, however, raises a host of questions and challenges that may arise from such

IBM. Each has 60 or more data center locations with at least three in each of the four regions of North America, APAC, EMEA[,] and Latin America." *Id.*

157. *See* DE FILIPPI & WRIGHT, *supra* note 154, at 2–3.

158. *See id.* at 33.

159. *See id.* at 31.

160. *See* NAKAMOTO, *supra* note 153, at 8 ("We have proposed a system for electronic transactions without relying on trust.").

161. *See id.* at 1 ("What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party.").

162. *See* Sebastian Pech, *Copyright Unchained: How Blockchain Technology Can Change the Administration and Distribution of Copyright Protected Works*, 18 NW. J. TECH. & INTELL. PROP. 1, 2 (2020) (footnotes omitted) ("The underlying technology, blockchain, is not only supposed to revolutionize the financial industry[] but also transform almost every part of our lives . . . .").

163. *See id.* (claiming that blockchain could be useful for "real estate transactions, voting, car leasing and sales, supply chain management, and healthcare").

164. *See id.* at 50 (stating that "blockchain technology can fundamentally change the traditional structure of content administration and distribution to the benefit of right holders, exploiters, consumers, and the public").

165. *See* Zhao, *Fulfilling the Right To Follow: Using Blockchain To Enforce the Artist's Resale Right*, 39 CARDOZO ARTS & ENT. L.J. 239, 268 (2021).

use.[166]

B. The Ethereum Virtual Machine and Smart Contracts

In 2013, Vitalik Buterin released the Ethereum White Paper that envisioned a different type of blockchain than the Bitcoin blockchain, one designed to function as a virtual computer operating system capable of running applications like a computer runs software programs.[167] The Ethereum Virtual Machine (or EVM), commonly known at that time as Blockchain 2.0, launched in 2015.[168] The EVM is powered by smart contracts—bits of computer code that operate on "if, then" input/output sequencing and serve as a powerful tool of disintermediation that automates performance and enforcement of terms without the need for a trusted third party to facilitate the transaction.[169]

Smart contracts[170] are not a new concept. Nick Szabo first proposed fully or partially self-executing, self-enforcing software code in 1994, which he referred to as smart contracts.[171] As a graduate of George Washington University Law School, Szabo was well-versed in the language of the law.[172] He used the term "contract" intentionally, although smart contracts do not automatically qualify, as a matter of law, as legally enforceable agreements that satisfy the elements of mutual assent (evidenced by an offer and

166. *See* Pech, *supra* note 162, at 1–2; *see also* DE FILIPPI & WRIGHT, *supra* note 154, at 45–46 (highlighting the benefits and challenges of blockchain technology).

167. *See* Vitalik Buterin, *Ethereum Whitepaper*, ETHEREUM, https://ethereum.org/en/whitepaper/ (Oct. 29, 2021).

168. *See* Camila Russo, *Sale of the Century: The Inside Story of Ethereum's 2014 Premine*, COINDESK, https://www.coindesk.com/markets/2020/07/11/sale-of-the-century-the-inside-story-of-ethereums-2014-premine/ (Sept. 14, 2021, 2:29 AM).

169. *See* DANIEL T. STABILE, KIMBERLY A. PRIOR & ANDREW M. HINKES, DIGITAL ASSETS AND BLOCKCHAIN TECHNOLOGY: U.S. LAW AND REGULATION 216 (2020).

170. *See* Stuart D. Levi & Alex B. Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2018), https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/ (defining smart contracts). A smart contract is "computer code that automatically executes all or parts of an agreement and is stored on a blockchain-based platform." *See id.*

171. *See* Nick Szabo, *Smart Contracts*, PHOENTIC SCI., AMSTERDAM (1994), https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html. Szabo is a computer scientist, legal scholar, and graduate of George Washington University Law School. *See Meet the Speakers*, UNIV. ARK., https://blockchain.uark.edu/nick-szabo/ (last visited Nov. 6, 2021).

172. *See Meet the Speakers*, *supra* note 171.

acceptance), consideration, legality, and legal capacity.[173]

Szabo described smart contracts as "a computerized transaction protocol that executes the terms of a contract."[174] The problem he sought to remedy via smart contracts was primarily the cost of doing business globally.[175] He focused initially on the transactional friction found in persistent issues of "jurisdiction, security, and trust" and the corresponding "costs of developing, maintaining, and securing [business] relationships."[176] Further, he envisioned a world that streamlined and revolutionized global business transactions by replacing paper and people with open-source code.[177]

Szabo wanted to replace lawyers and other intermediaries in the facilitation of business relationships, traditionally memorialized by written agreement (although legally enforceable agreements can also be created by oral agreement).[178] A further goal was to make contract breach prohibitively expensive.[179] Szabo touted the benefits of smart contracts to include cost savings for businesses, consumers, and public entities that seek to leverage digitally autonomous agreements to replace traditional performance, enforcement, and dispute resolution mechanisms with automated computer algorithms.[180] He centered his research at the intersection of economics and cryptography to develop automated processes that encompassed "[t]he

173. *See* 17 C.J.S. *Contracts* § 1 (2021) (defining a contract as "an agreement which creates an obligation" that involves "competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation"); Szabo, *supra* note 171.

174. Szabo, *supra* note 171. Protocol is defined as "a set of rules or procedures for transmitting data between electronic devices, such as computers." *See* Editors of Encyclopedia Britannica, *Protocol*, BRITANNICA, https://www.britannica.com/technology/protocol-computer-science (last visited Nov. 6, 2021).

175. *See* Nick Szabo, *Formalizing and Securing Relationships on Public Networks*, SATOSHI NAKAMOTO INST. (1997), https://nakamotoinstitute.org/formalizing-securing-relationships/ (discussing how smart contracts may prompt another revolution in global business).

176. *Id.*

177. *See id.*

178. *See id.*

179. *See id.* ("The basic idea behind smart contracts is that many kinds of contractual clauses (such as collateral, bonding, delineation of property rights, etc.) can be embedded in the hardware and software we deal with, in such a way as to make breach of contract expensive (if desired, sometimes prohibitively so) for the breacher."). This goal is contrasts with the role of efficient breach in contract jurisprudence. *See generally* Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777, 777 (2012) (asserting that "efficient breach theory, properly understood, is not inconsistent with parties' complying with their deontological obligations").

180. *See* Szabo, *supra* note 171 ("Smart contracts reduce mental and computational transaction costs, imposed by either principals, third parties, or their tools."). *See generally* Zachary L. Catanzaro & Robert Kain, *The Revolution Will Be Memorialized: Selected Blockchain-Based Smart Contract Use Cases*, 49 FLA. BAR J. 52, 52 (2020).

contractual phases of search, negotiation, commitment, performance, and adjudication," with a decided "emphasis on performance."[181]

In the same way that smart contract code can automate contract performance and enforcement and disintermediate centralized finance, it can replace manual copyright transfer termination processes to remove artificial formality-like codified barriers to the full enjoyment and commercial exploitation of a copyrighted work.[182] Congress justified the termination right "on both economic and morals grounds" as giving protection to artists who transferred rights early in their careers before establishing themselves or having a clear picture of the value of their creativity.[183] In an age where high-value intellectual and digital property presents a new means for disenfranchised artists to achieve economic gains in this generation and the next, it is critically important to discover ways to leverage decentralized and automated algorithmic processes to disintermediate creativity and de-gentrify Black genius.

C. Non-Fungible Tokens

Non-fungible tokens (NFTs) are cryptographically secured assets used to establish ownership and control over another asset.[184] Because of projects like CryptoKitties,[185] NBA Top Shot,[186] and CryptoPunks,[187] NFTs are currently most associated with digital art and collectibles by means of URL reference to the digital asset stored via a decentralized storage system like the Interplanetary File System (IPFS).[188] Unlike their fungible cryptocurrency

181. Szabo, *supra* note 171.

182. *See, e.g.*, Pech, *supra* note 162, at 37 ("By using smart contracts, the transfer of rights can be executed directly between right holders and potential users, like exploiters or consumers. A right holder can determine price and other conditions in advance, and a potential user can obtain these rights without any further negotiation.").

183. *See* GILBERT ET AL., *supra* note 83, at 10–11.

184. *See* Jeff Neasmith, *6 Industries that NFT's Are Disrupting*, TROON TECHS. (June 29, 2021), https://troontechnologies.com/6-industries-that-nfts-are-disrupting/ ("Non-fungible tokens or NFTs are cryptographic assets on blockchain with unique identification codes and metadata that distinguish them from each other.").

185. *See* CRYPTOKITTIES, https://www.cryptokitties.co/ (last visited Nov. 6, 2021).

186. *See* NBA TOP SHOT, https://nbatopshot.com/ (last visited Nov. 6, 2021).

187. *See CryptoPunks*, LARVA LABS, https://www.larvalabs.com/cryptopunks (last visited Nov. 6, 2021).

188. *See* Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219, 262 n.222 (2019) ("The IPFS is a P2P hypermedia protocol designed to make the web faster, safer, and more open. . . . The four problems IPFS endeavors to solve are: (1) the inefficiency and expense of the HTTP [i]nternet protocol; (2) the daily destruction of [i]nternet history; (3) to halt and counteract

counterparts, NFTs are verifiably unique.[189] Additionally, NFTs provide the holder the ability to sell or otherwise transfer that token with a digital signature.[190] Each copyright is also unique, and ownership of a real-world asset is possible by "tokenizing" the asset to be managed and exploited as an NFT.[191] However, one of the important (but limiting) characteristics of NFTs is their indivisibility.[192] Nonetheless, technology to enable fractionalized NFTs that permit divisibility (and dramatically increase liquidity) is on the rise.[193]

A relatable way to understand the relationship between the non-fungible token and the referenced asset the token represents is to consider the relationship between a deed to a house and the house itself.[194] The deed is not the house.[195] However, the deed is the way the owner of record can evidence ownership to exercise control and exploit the requisite rights and privileges.[196]

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the hyper-centralization of the current [i]nternet's current iteration; and (4) to enable resilient networks that are not wholly dependent on '[i]nternet backbone connectivity.'").

189. *See NFTs: Redefining Digital Ownership and Scarcity*, SOTHEBY'S (Apr. 6, 2021), https://www.sothebys.com/en/articles/nfts-redefining-digital-ownership-and-scarcity ("Non-fungible tokens . . . are verifiably scarce and unique.").

190. *See* Robyn Conti & John Schmidt, *What You Need To Know About Non-Fungible Tokens (NFTs)*, FORBES, https://www.forbes.com/advisor/investing/nft-non-fungible-token/ (May 14, 2021, 12:17 PM) (noting that each NFT "has a digital signature that makes it impossible for NFTs to be exchanged for or equal to one another").

191. *See generally Real-World Asset Tokenization: A New Form of Asset Ownership*, REALT, https://realt.co/real-world-asset-tokenization-a-new-form-of-asset-ownership/ (last visited Jan. 1, 2022) ("Asset tokenization refers to the act of turning the ownership of a real-world item into a digital token.").

192. *See* Diego Geroni, *Understanding the Attributes of Non-Fungible Tokens (NFTs)*, 101BLOCKCHAINS (Sept. 1, 2021), https://101blockchains.com/nft-attributes/ ("One of the foremost traits of non[-]fungible tokens refers to indivisibility. . . . Indivisibility implies that you cannot divide an NFT into smaller tokens, and you need to purchase the whole NFT for owning an item.").

193. *See, e.g.*, Brady Dale, *NFT Rally Paves Way for Fractionalization and Derivatives*, DEFIANT (Aug. 24, 2021), https://thedefiant.io/nfts-fractionalization-derivatives/ ("Fractional.art turns one NFT into a set of ERC-20 tokens with built in rules around coordinating a sale of the FT."). Fractional.art is a company that facilitates this process by issuing ERC-20 (fungible) tokens as ownership units of an ERC-721 or other non-fungible token standards. *See id.*; FRACTIONAL.ART, https://fractional.art/ (last visited Nov. 7, 2021). Numerous startups are entering the fractionalized NFT space. *See id. See generally* Jamie Redman, *Breaking NFTs to Pieces: These 4 Projects Are Fractionalizing Grimes, Banksy, Cryptopunk NFTs*, BITCOIN.COM (July 30, 2021), https://news.bitcoin.com/breaking-nfts-to-pieces-these-4-projects-are-fractionalizing-grimes-banksy-cryptopunk-nfts/.

194. *See generally* Teo Spengler, *What Does the Deed to a House Mean?*, SF GATE, https://home-guides.sfgate.com/deed-house-mean-95428.html (Dec. 27, 2018) (explaining that "[i]n a typical home-sale situation, both the seller and homebuyer sign the [deed] agreeing to the transfer of the property").

195. *See id.* ("A deed is evidence of a homeowner's rights to a home.").

196. *See, e.g.*, *Property Ownership and Deed Recording*, CAL. STATE BD. EQUALIZATION 1, 4,

In addition, like a deed, an NFT's transactional history is recorded.[197] However, that recordation is done in a far more secure manner—the transactions are recorded (in nonproprietary scenarios) on public, permissionless, immutable digital ledgers (blockchains).[198]

NFTs offer provable ownership and provable scarcity.[199] They also increase opportunities for liquidity (as unique assets tend to be more illiquid) and access to global markets.[200] In light of the historical imbalance of copyright ownership and monetization noted herein, these nascent technologies present new opportunities to level the playing field for all artists, especially those who have been systematically prevented from full and meaningful access to, and participation in, capital markets born of property created with the mind.[201]

VI. CONCLUSION

Often poor economic conditions, discriminatory practices, misappropriation, and unscrupulous representation have led to unconscionable deals (even by music industry standards) that have left even the most prolific and successful artists destitute and indebted, or simply with no attribution, compensation, or deal.[202] However, a decentralized autonomous termination right could level the negotiating playing field,

https://www.boe.ca.gov/proptaxes/pdf/Ownership_DeedRecording.pdf (last visited Nov. 7, 2021) ("When properly executed, delivered and accepted, a deed transfers title to real property from one person (the *grantor*) to another person (the *grantee*).").

197. *See Investing Trends 101: What Are NFTs?*, ALLY (June 9, 2021), https://www.ally.com/do-it-right/investing/what-is-an-nft/ (stating that "an NFT's entire transaction history is recorded and available for public viewing").

198. *See* John Wanguba, *Are NFTs the New Paradigm for Intellectual Property Assets?*, CRYPTO VIBES (Aug. 18, 2021), https://www.cryptovibes.com/blog/2021/08/18/nft-intellectual-property-assets/ (noting that an NFT's transactional history is recorded "on the blockchain, a distributed digital ledger that supports immutable records of transactions").

199. *See Has Crypto Entered "NFT Summer"?*, COINBRIEFS (Aug. 1, 2021), https://www.coinbriefs.com/2021/08/01/has-crypto-entered-nft-summer/ (asserting that NFTs "offer provable scarcity and ownership by recording data on a blockchain").

200. *See* Oliver Dale, *Drops: Unlocking Liquidity in Liquidity-Starved NFT Art & Collectibles Market*, BLOCKONOMI (Sept. 3, 2021), https://blockonomi.com/drops-guide/ (highlighting that the art and collectibles market needs an increase in liquidity for NFTs because "[h]aving access to adequate liquidity is essential for any financial market").

201. *See How These Black Creatives Are Cashing in on NFTs*, POCIT, https://peopleofcolorintech.com/front/how-these-black-creatives-are-cashing-in-on-nfts/ (quoting NFT artist Andre O'Shea as saying, "As a Black artist, NFTs means leveling the playing field and taking the keys away from traditional gatekeepers in the art world").

202. *See* Greene, *supra* note 4, at 357–58, 391–92.

neutralize the impact of predatory and discriminatory practices, remove rent-seeking gatekeepers, and give Black artists a true second bite at the proverbial apple.[203]

With an automated, decentralized, and de-gentrified system, these artists can finally raise a proverbial fist and achieve true entrepreneurial and economic power by successfully leveraging their rights early in a creative work's life cycle and then confidently reclaiming copyright decades later after the work has had a sufficient opportunity to prove its value and worth.[204] Aspirational, but attainable via decentralized autonomous copyright termination.[205]

203. *See* Samraweet Yohannes, *Power Imbalance in the Art World Gets a Shake Up Thanks to NFTs*, CBC (Mar. 12, 2021, 3:44 PM), https://www.cbc.ca/radio/spark/power-imbalance-in-the-art-world-gets-a-shake-up-thanks-to-nfts-1.5941280 (describing how NFTs are leveling the playing field and allowing artists to take control of their sales, which has been economically democratizing and beneficial for Black artists).

204. *See NFTs Break Barriers, Create Community for Struggling Black Artists*, BLACKINFOTODAY (Sept. 30, 2021), https://blackinfotoday.com/nfts-break-barriers-create-community-for-struggling-black-artists/ (illustrating how "[t]he arrival of the cryptocurrency boom created a new growth sector that allowed [Black] artists to have more ownership over their works and increase their earning potential using NFTs to create original pieces").

205. *See* Tonya M. Evans, *Decentralized Autonomous Copyright Termination* (forthcoming 2022).