

## COPYRIGHT LAW

### *Finch v. Casey*

By Thomas Kjellberg and Robert W. Clarida

**“Before you end up with nothing, let’s make it right now.”  
-- from “Let It Go (Part One),” KC & The Sunshine Band (1975)**

*Finch v. Casey*, 2023 U.S. Dist. LEXIS 20635 (S.D. Fla. Feb. 7, 2023), concerned 99 songs co-written by Richard Finch and Harry Wayne Casey – aka KC – while they were members of KC & The Sunshine Band in the 1970s. Between the mid-1970s and early-1980s Casey and Finch entered into publishing agreements with a major music publisher, and formed Harrick Music Inc., which they co-owned on a 50/50 basis, as their publishing designee. Casey and Finch formally severed all personal and financial ties in 1983 through the execution of a “Property Division Agreement” that divided between them various items of tangible and intangible property that they had previously owned together.

The Agreement provided, *inter alia*, that Finch would transfer to Casey all of his rights in their co-owned copyrights, along with his 50% ownership interest in Harrick Music Inc. Twenty-six years later, in 2012, Finch served a notice of termination under § 203 of the Copyright Act on Casey and Harrick, seeking to terminate the copyright grants that Finch made to Casey in the 1983 Property Division Agreement.

### **The Statutory Framework – Termination of Transfers**

The 1976 Copyright Act, which took effect on January 1, 1978, abandoned the copyright renewal scheme of the (prior) 1909 Copyright Act for works created on or after January 1, 1978. In place of the 1909 Act’s reversion-on-renewal scheme, the 1976 Act substituted provisions for optional termination of copyright transfers and licenses (i.e., grants). Section 203 of the Copyright Act, 17 U.S.C. § 203, gives authors and their statutory successors the option, under

certain conditions and limitations, to terminate grants of transfers or licenses of copyright, or of rights under a copyright, that were made “by the author” on or after January 1, 1978.

Section 203’s termination provisions don’t apply to works made for hire; nor do they apply to dispositions by will, or to utilization of derivative works prepared under a grant before its termination; nor do they affect rights outside the U.S. Copyright Act (i.e., rights under any other federal, state or foreign laws, including the copyright laws of countries other than the United States). And termination is not automatic; termination may be effected only through affirmative action on the part of the author or his or her statutory successors, who must serve an advance notice, signed by or on behalf of all of those entitled to terminate the grant, on the current copyright owner within specified time limits and under specified conditions. The notice must be served at least two years, but not more than ten years, before the effective date of termination (EDT) stated in the notice, and a copy of the notice must be recorded in the Copyright Office before the EDT. The EDT may be any day the author chooses during a five-year period that begins to run 35 years after the date of execution of the grant.

### **Termination Notices and Counter Notices**

Finch’s 2012 Notice of Termination stated an EDT of October 28, 2018 – 35 years and one day after the execution of the Property Division Agreement on October 27, 1983. Casey didn’t respond to the 2012 Notice of Termination, and in 2015 Finch’s new lawyer sent a letter to Casey’s lawyer attaching a copy of the 2012 Notice. Casey did respond to the re-served termination notice, in a May 2015 letter that challenged the validity of the notice and repudiated Finch’s authorship claim over any of the 99 songs. (While the Copyright Act makes no mention of or provision for such challenges, they are sufficiently common to merit a section in the *Compendium (Third) of U.S. Copyright Office Practices*, the Copyright Office’s administrative

manual, which states “When a party serves a notice of termination ... the grantee may respond by sending a letter or other written response that challenges the sufficiency of the notice. The Office refers to this type of document as a ‘counter notice.’”)

Finch didn’t reply to Casey’s repudiation letter/counter notice, and took no further action with respect to the 2012 Notice of Termination or Casey’s challenge to it. And because Finch, for reasons unknown, failed to record the 2012 Notice in the Copyright Office before the stated effective date, it was effectively void: under § 203 recording a termination notice in the Copyright Office before the effective date of termination is a condition to its taking effect.

Fast-forward to September 2019, when Finch’s counsel served another Notice of Termination, stating an EDT of October 1, 2021. On that day Casey’s attorney sent Finch a counter notice that challenged the validity of the 2019 Notice of Termination. And at that point Finch sued seeking a declaration that he validly exercised his termination rights under § 203.

### **The Court’s Opinion**

The question for the court on summary judgment was whether Finch’s DJ action was timely. Section 507(b) of the Copyright Act provides that “No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” Copyright claims accrue differently depending on the nature of the claim. Copyright *infringement* claims are subject to a “separate accrual rule”: “when a defendant commits successive violations, the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete ‘claim’ that ‘accrues’ at the time the wrong occurs.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014).

A copyright ownership/authorship claim, on the other hand, accrues only once, when a reasonably diligent plaintiff would have been put on inquiry notice that her rights were under challenge. As the Second Circuit has noted, “any number of events can trigger the accrual of an ownership claim, including an express assertion of sole authorship or ownership.” And several Circuits have adopted an “express repudiation” rule, whereby an author is on notice as to the potential violation of her rights, and a joint authorship claim accrues, when her authorship is expressly repudiated by her co-author.

Casey, accordingly, argued that in Finch’s case accrual occurred in May 2015, when Casey’s lawyer sent the first counter notice to Finch’s lawyer. Finch argued that Casey’s May 2015 counter notice wasn’t sufficient to place Finch on notice of Casey’s sole authorship claim, so that the statute of limitations on Finch’s claim couldn’t have started to run in 2015. The court disagreed, finding that the undisputed facts showed that as a matter of law Finch’s authorship claim accrued no later than May 2015, and was barred by the Act’s three-year limitations period.

Key to the court’s decision seems to be the fact that, regardless of the EDT, under § 203(b)(2) “[t]he future rights that will revert upon [t]ermination of the grant become vested on the date the notice of termination has been served.” Thus, a § 203 termination notice *when served* is a present assertion of authorship and ownership, and a counter notice may amount to an express repudiation of that claim. The court found that the 2015 counter notice “expressly and directly called into question Finch’s claim of authorship over the songs, as well as his right to effectuate termination under § 203.” (Note that the two are inextricably intertwined, insofar as the right to terminate under § 203 is limited to grants “executed by the author.”) That, in the court’s view, was “certainly sufficient” to place Finch on notice that Casey was affirmatively challenging his

authorship and termination rights with respect to the 99 songs at issue, and to start the statute of limitations clock running on Finch's claim for a judicial declaration to the contrary.

## CONCLUSION

*Finch v. Casey* is one of a handful of cases touching on the interplay between the Copyright Act's statute of limitations, set forth in § 507(b), and the Act's termination-of-transfer provisions, which have their own detailed set of time limits and conditions. It is unclear how widely applicable it will prove to be, and it may be limited to its specific facts. We think it unlikely that a counter-notice, even one that "expressly repudiates" the authorship of the party who served the notice of termination, can automatically start the three-year limitations clock running for the would-be terminator to file an action seeking a declaration that the termination notice is valid. It is easy to imagine a scenario in which that would lead to an anomalous result; e.g., an author serves a notice of termination ten years before the stated EDT, and the grantee promptly serves an "expressly repudiating" counter notice. It seems unlikely that a court would find that the author is required to DJ the grantee seven years before the stated EDT, on pain of losing his or her termination right.

As a final note, it's ironic that Finch's 2012 Notice was void because it wasn't timely recorded, but still ended up costing Finch his claim to joint authorship. So the reader should think twice next time they are tempted to tell a client it "couldn't hurt" to send a termination notice.

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