



Estate Planning For Authors and Artists

Ann I. Weber, Esquire

Shatz, Schwartz and Fentin

1441 Main Street

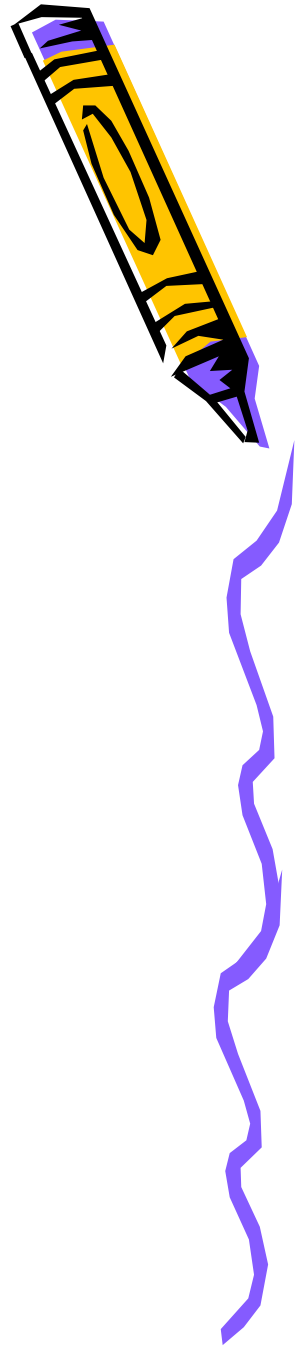
Springfield, Massachusetts 01103

413 737-1131

aweber@ssfpc.com

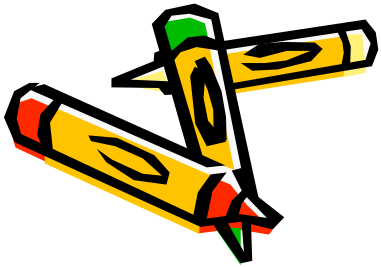


Introduction and Hypothetical



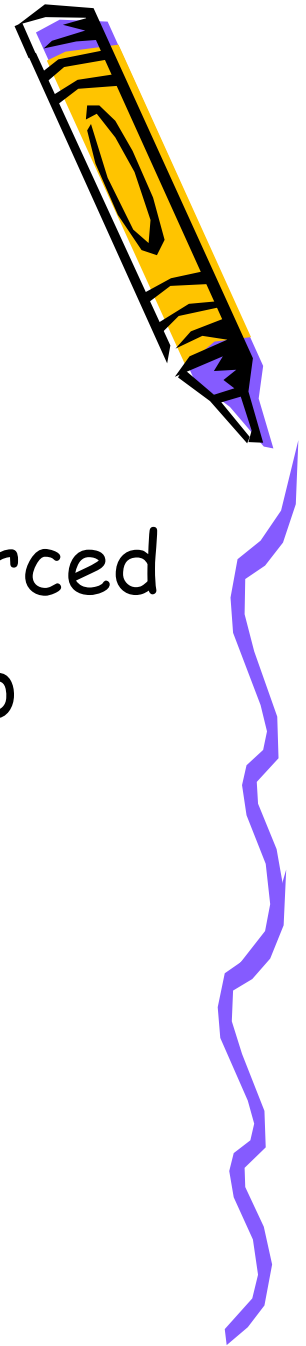
Dudley Doowrite

Author



Dudley's Curriculum Vitae

- Successful writer
- Married currently, previously divorced
- One child from prior marriage, two from current
- Two grandchildren
- Died July 1, 2008



Dudley's Greatest Hits

- The Big Bash Murder: A Detective Bludger Mystery - 1958
- In the Library with the Candlestick: Detective Bludger Strikes Again - 1980
- If I'da Killed You When I Met You, I'd Be Outa Jail By Now: A Detective Bludger Romance - 1985
- And many more ...

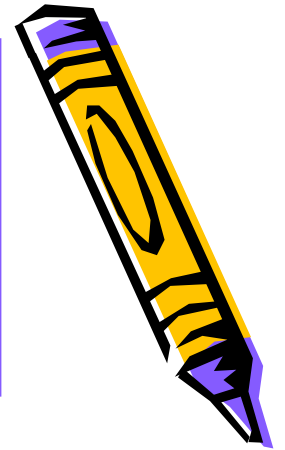


Doris Doowrite

- Dudley's second wife
- Mother of two children from current marriage
- Artist (as yet unpublished)



Children of Dudley and Doris



Stuffy



Swingy



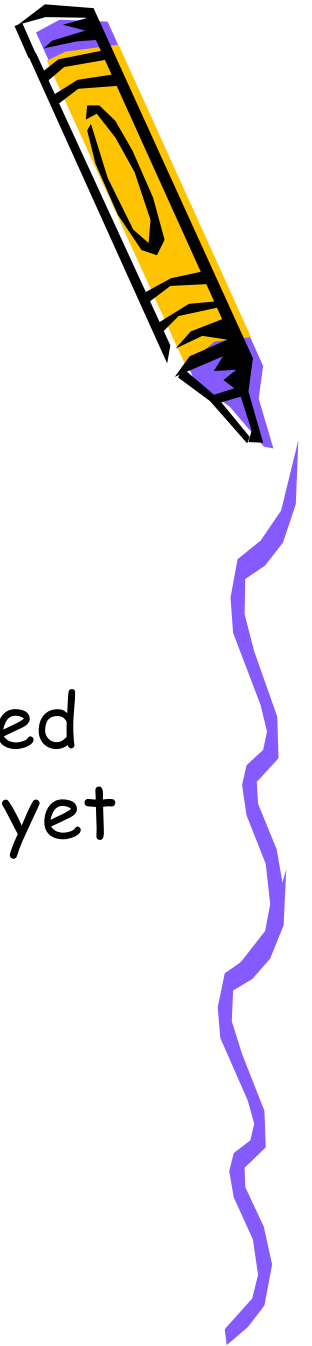
Child of Prior Marriage

- Davinia Golightly
- Looks like her mother
- Donee of Copyright to 1980 *Bludger Mystery*
- Beneficiary of other copyrights in Dudley's estate



The Grandchildren

- Stuffy's Children,
 - Alfred
 - Allywishus
- Ages 7 and 9
- Not known if Swingy has children
- Davinia is married but no children yet



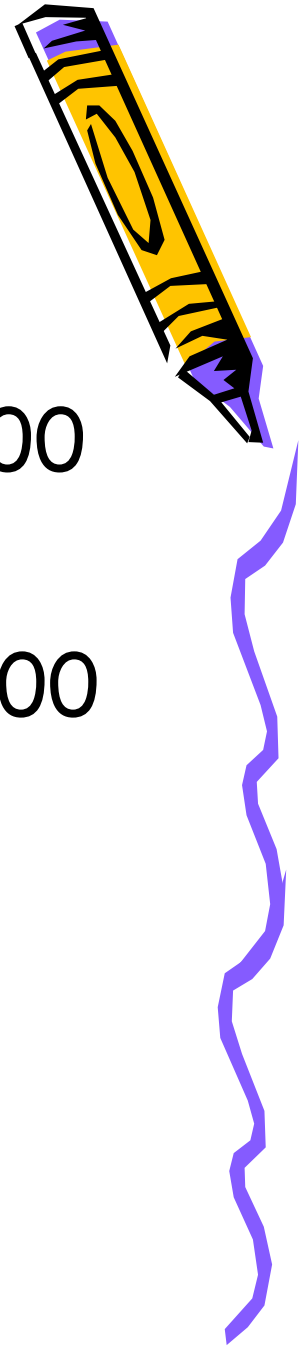
What We Will Cover

- How to value Dudley's copyrights
- The effect of the gift or assignment of Dudley's copyrights
- The effect of Dudley's death on his copyrights
- Who has rights in Dudley's copyrights



Dudley's Estate

- House, jointly with Doris \$ 500,000
- Investments in Trust \$2,000,000
- Copyrights in Bludger Series \$???



Factors Affecting the Value of Dudley's Copyrights

- Whether copyright is "active"
- Projected annual sales
- Projected "market" royalty rate
- Projected economic life of copyright
- Discount for present value of future earnings



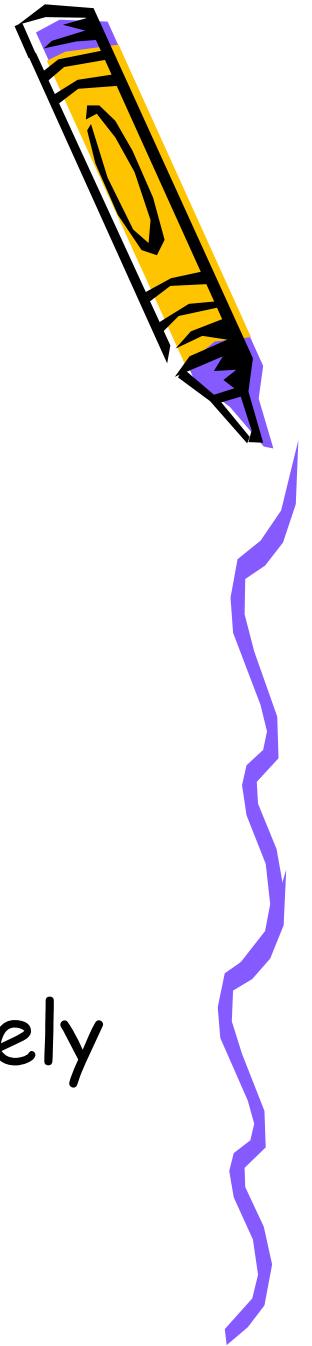
Other Rights Affecting Valuation

- Previous licenses, assignments or gifts
- Outstanding advances
- Termination rights in statutory heirs
- Applicable law based on when work was created, before or after Jan. 1, 1978



Do Not Try This At Home, Because...

- Copyrights consist of a bundle of separate rights,
- Each is divisible, and
- Each right must be valued separately



The Bundle of Rights, Can Include...

- Right to reproduce the work
- Right to prepare derivative works
- Distribution rights by sale, rental, lease or loan
- Right to perform the work publicly
- Right to perform sound recordings
- Right to display the work publicly
- Film rights, TV rights, play rights, foreign rights, etc.



Moral:

If your estate is taxable, i.e., greater than \$1,000,000 for Massachusetts or \$2,000,000 for federal tax, or

- If valuation affects distribution, i.e., "my copyrights to Davinia and equal \$ amount to Stuffie and Swingy",

Hire a qualified appraiser



Beware Tax Issues

- Income tax
 - If rights given away before death, upon later sale by donee, 100% taxable income
- Example:
 - Davinia sells 1980 copyright given to her by father in 2001
 - If value as of date of sale is \$100,000, Davinia has \$100,000 of ordinary income (max 35% rate)
 - \$35,000 income tax owed by Davinia



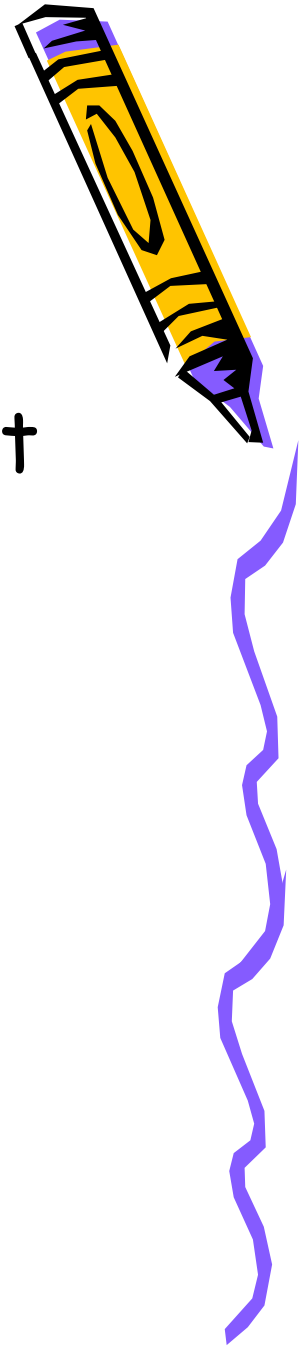
Income Tax Basis for Assets Passing Through Estate

- If Davinia had inherited the copyright and sold it for \$100,000, zero tax because
- Income tax basis equal to value at Dudley's date of death, and
- Capital gains tax (max 15% rate) applies only to the excess over date of death value



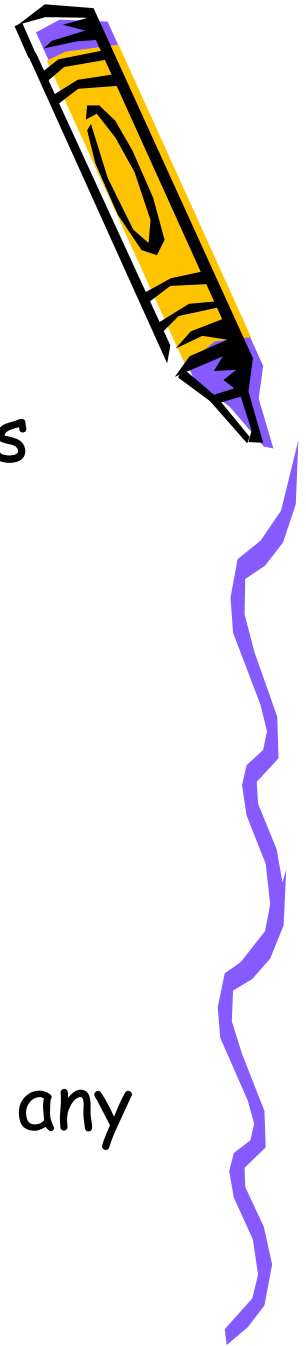
Example

- Davinia inherits copyright valued at \$100,000
- Later sells it for \$200,000
- Capital gain tax of \$15,000 (max)
- If received as gift and later sold, ordinary income tax of \$70,000



Estate Tax

- Estate tax return must be filed if gross estate exceeds filing limits
 - \$1,000,000 Mass.
 - \$2,000,000 Federal (\$3,500,000 in 2009)
- Taxable gifts added back to determine value of gross estate
- Value of Dudley's estate for estate tax purposes is increased by the amount of any taxable gifts



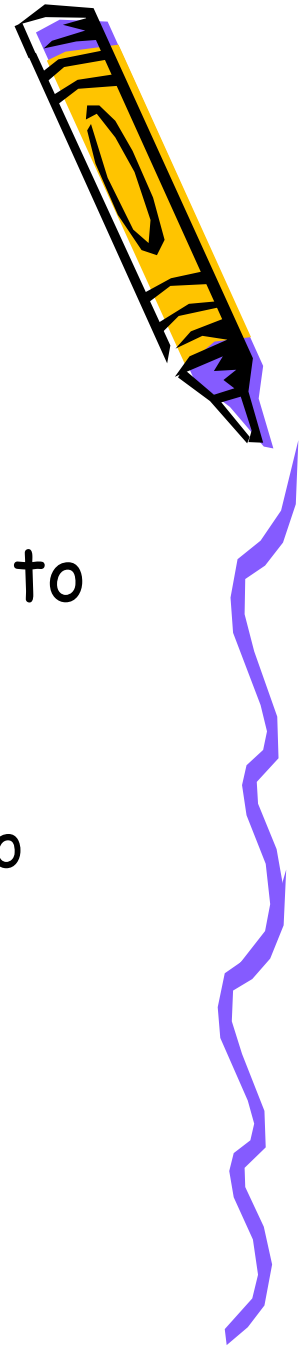
Gift Tax

- Gift tax:
 - Based on value at date of gift, subject to exclusions
 - \$12,000 per donee annual exclusion (\$13,000 in 2009)
 - \$1,000,000 lifetime exemption
- Gift to Davinia of \$100,000 reduces Dudley's lifetime exemption to \$988,000 (\$1,000,000 - \$12,000)



Back To Our Story... Dudley's Estate Plan

- Will: Stuff to Doris
Balance to Trust for Doris, then to
Stuffy and Swingy
- Transfers before he died
 - Copyright to 1980 Bludger Mystery given to Davinia
 - Assignment of other copyrights to his publisher for the life of the works



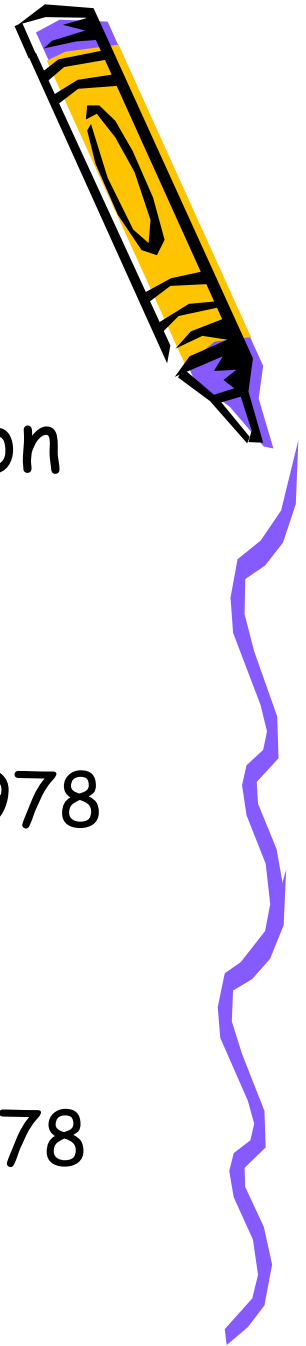
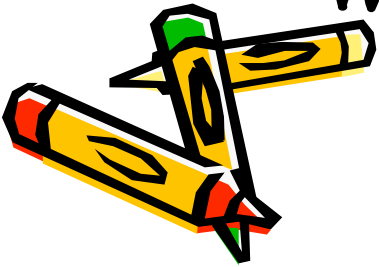
Will Dudley's Estate Plan Be Carried Out?

- Copyright law names "statutory heirs" - Doris, Stuffy, Swingy and Davinia
- Statutory heirs have the right to "terminate" prior gifts or assignments under certain circumstances, unless
- Dudley has exercised this right prior to death



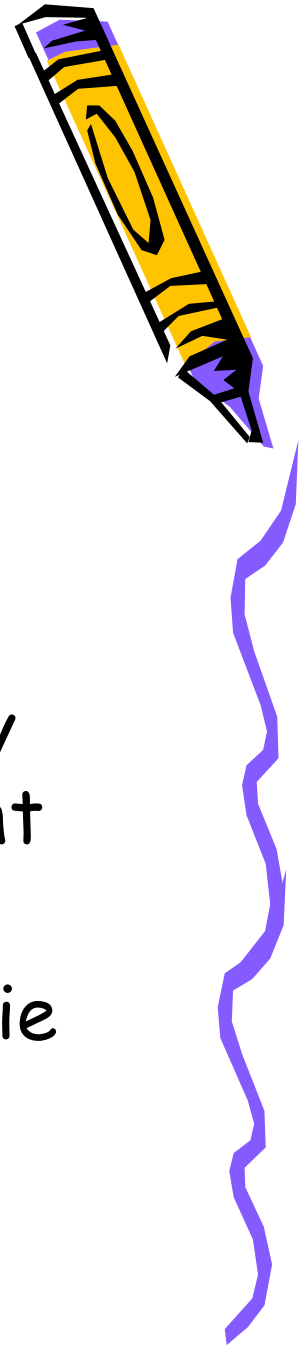
Copyright Laws

- Authorized by the U.S. Constitution
- 1909 Copyright Act
 - Works created prior to January 1, 1978
- 1976 Copyright Act
 - Works created on or after Jan. 1, 1978



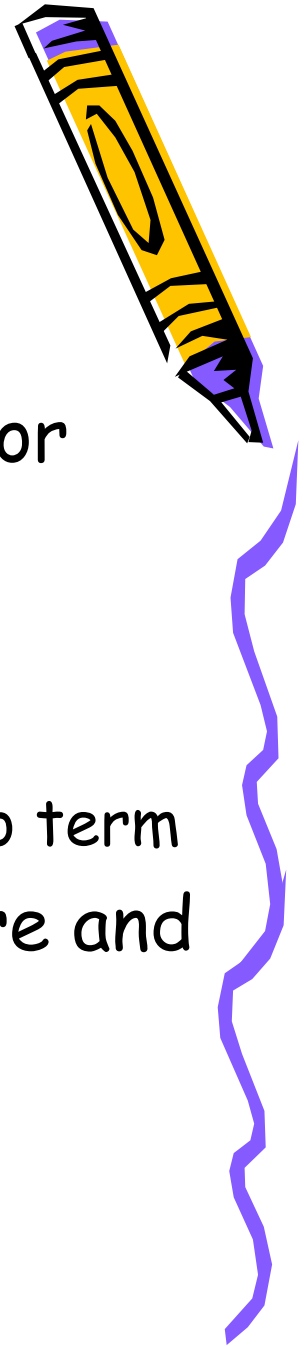
1909 Copyright Act; Works prior to Jan. 1, 1978

- Duration of copyright
 - 28 years from date of publication
 - Renewable for additional 28 years
- Second chance in authors and statutory heirs to terminate and revalue copyright at date of renewal
- Lots of case law: Winnie the Pooh, Lassie Come Home, Grapes of Wrath, Rear Window, Captain America



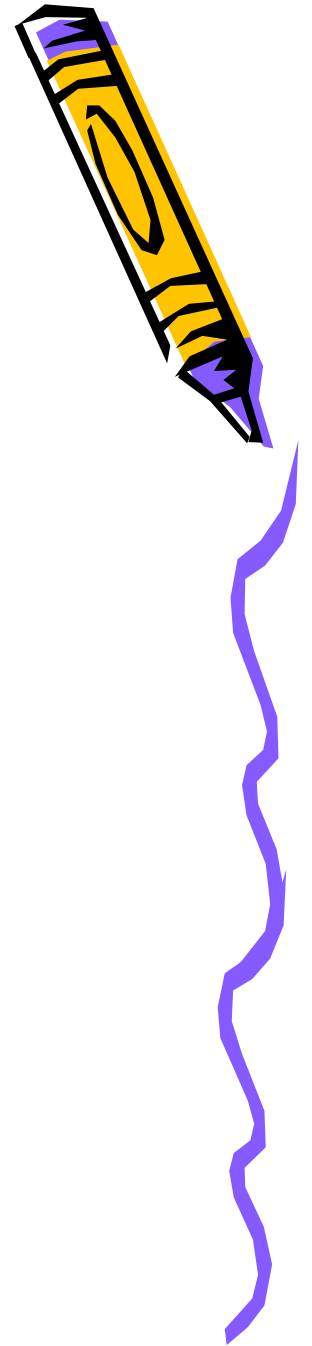
Copyright Act of 1976 as amended

- Eliminated copyright renewal concept for works created on or after Jan. 1, 1978
- Duration of copyright
 - Life of creator plus 70 years
 - For pre 1978 copyrights, added 39 years to term
- Provided termination rights for both pre and post 1978 copyrights
- No cases yet under 1976 Act



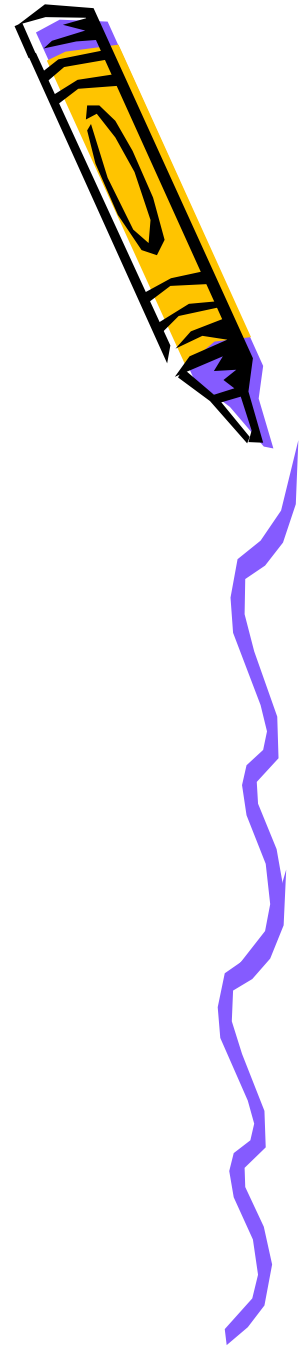
Termination Rights Under the Copyright Act of 1976

- Section 304:
 - Works created prior to 1978
- Section 203
 - Works created after 1977



Who May Terminate a Copyright?

- Author if living
- Statutory heirs
 - Spouse 50%, Issue per stirpes 50%
- Example: At Dudley's death,
 - Doris has a 50% vote,
 - Stuffy, Swingy and Davinia have a 16.66% vote each
- Majority vote rules



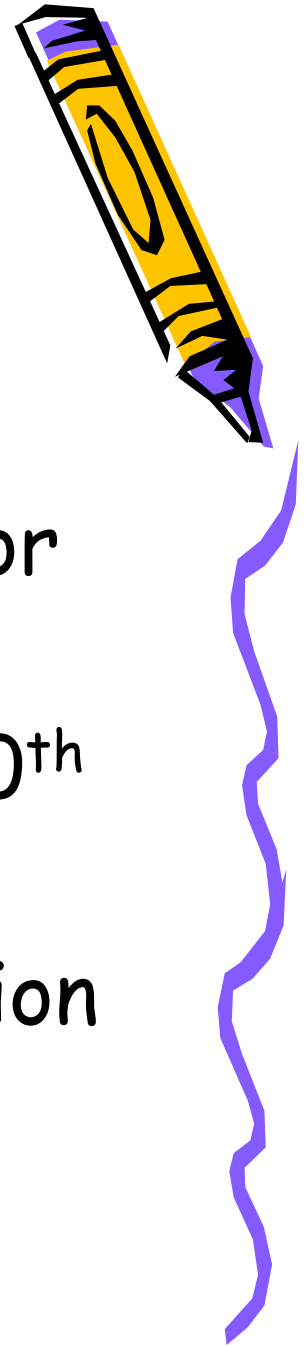
Upon Termination, Copyright Reverts to Statutory Heirs

- Doris 50%, children 16.66% each
- If Doris dies, each child has 33.33% vote and interest
- If Stuffy dies, his children divide his vote and interest into 2 shares (16.66%)
- If Dudley is not survived by statutory heirs, his Executor or Administrator can exercise his rights



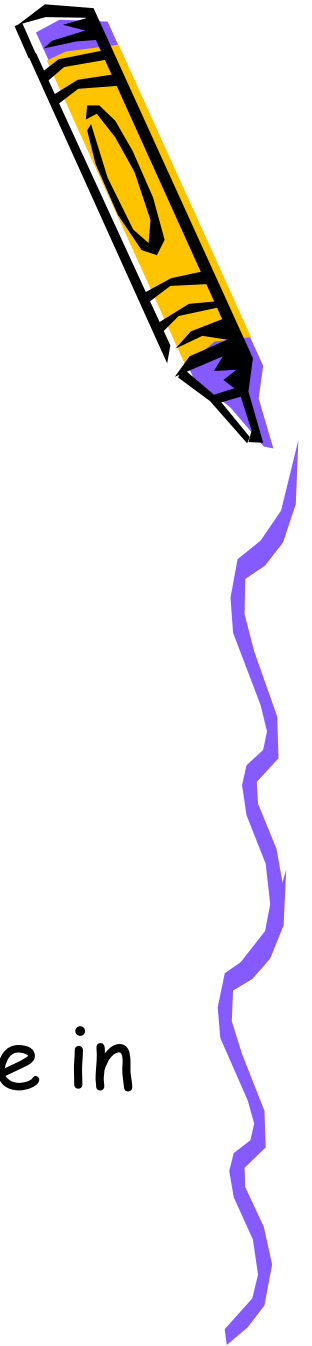
Pre-1978 Copyrights

- Creator and then statutory heirs have the right to terminate gifts or assignments of copyright
- Only in period 56 years through 60th year after original copyright date
- If not exercised, second termination right 76 through 80th year



Example : Bludger Mystery
Published and Assigned to
Publisher October 1, 1958,

- $1958 + 56 \text{ years} = 2014$ (earliest termination date)
- Notice must be served
 - Earliest: Oct. 1, 2004
 - Latest: Oct. 1, 2012
- Very specific requirements
- Must be filed with copyright office in Washington, D.C.



Termination Rights for Copyrights Created on or after Jan. 1, 1978

- 36th through 40th years after date of publication
- Written notice must be given at least 2 years and not more than 10 before effective date of termination
- Earliest case would arise in 2014 (1978 + 36), earliest notice 2004



Example 1: Lifetime Gift to Davinia



- "In the Library" published Feb. 1, 1980
- Copyright given to Davinia May 1, 1980
- Dudley dies July 1, 2008

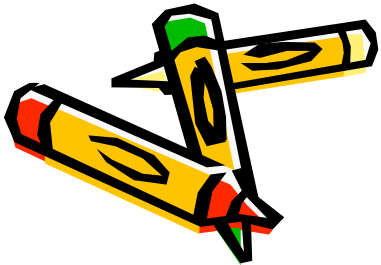


Exercise of Termination Rights

- Termination rights may be exercised by Doris and either Stuffy or Swingy from May 1, 2016 - May 1, 2020
- Notice must be given no earlier than May 1, 2006, no later than May 1, 2014
- Davinia forfeits her copyright on
May 1, 2016



Is Dudley Happy About This?



What If Doris Predeceases Dudley?

- Majority rules among Stuffy, Swingy and Davinia
- Stuffy needs Swingy's vote
- If Swingy can be found, good to go
- If Swingy is missing and been declared dead or is dead, Stuffy and Davinia each have a 50% vote

Davinia with veto power would block



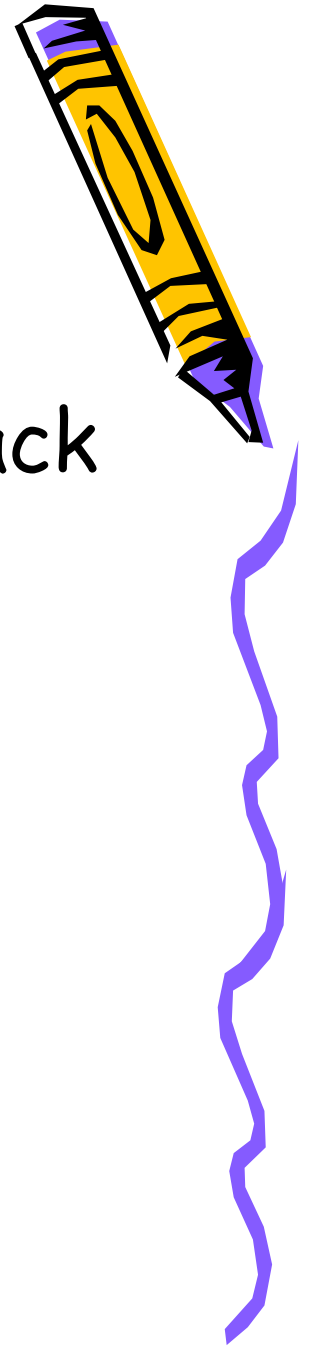
Can They Do It?
Will They Do It?
Who is "They"?

- "They" is a majority in interest among the statutory heirs
- Doris and either Stuffy or Swingy
- Yes, they can (as someone once said...)
- Yes, they will because Doris and Stuffy don't like Davinia and could use the money



Example 2:
1995 Copyright Assigned to
Publisher for Life of Work

- Dudley wasn't a household name back then
- The Bludger series has been made into a cartoon series on TV
- Doris and Stuffy would like to renegotiate the deal



Can They Renegotiate the Deal?

- Yes, but only if they are alive when notice can be given and when exercised
- Right of termination can be exercised in years 2016 through 2020
 $1980 + 36 - 40 = 2016 - 2020$
- Notice must be given no earlier than 2014 and no later than 2018



Is Dudley Happy About This?



What If Doris and Stuffy Give Notice, Then Doris Dies Before Exercise?

- Not clear, no cases yet under 1976 Act, not until 2013
- Based on "Rear Window" case under 1909 Act, death terminates notice
- Stuffy would have to get Swingy or Davinia to agree and start again



Problems with Statutory Heirs Named as "Spouse and Issue"

- Gay marriages
 - Definition of "statutory heirs" under the Federal Defense of Marriage Act" would exclude same sex spouses
- Unmarried couples
- Second (or third, etc.) marriages
 - Children from more than one marriage
- Divorce and/or prenuptial agreements



Other Problems Caused by Termination Rights

- If copyrights subject to termination rights pass to charity, what is the value of the charitable deduction?
- Similarly, with copyrights passing to marital deduction trust, what is the value of the marital deduction?
- Who pays the tax?
- From what funds?



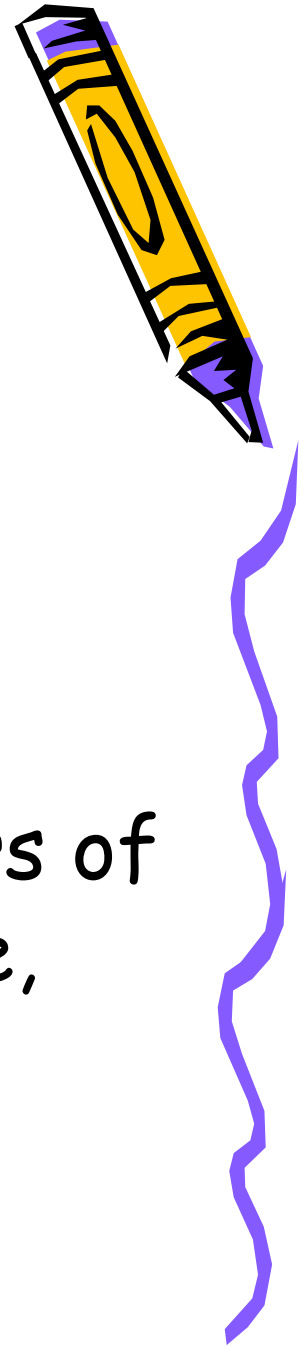
What's a Copyright Owner To Do?

- Sign a Will bequeathing copyrights which have not been assigned or transferred to intended beneficiaries
 - Copyrights passing by Will are not subject to termination rights
- Exercise termination rights at earliest opportunity on works that have been assigned



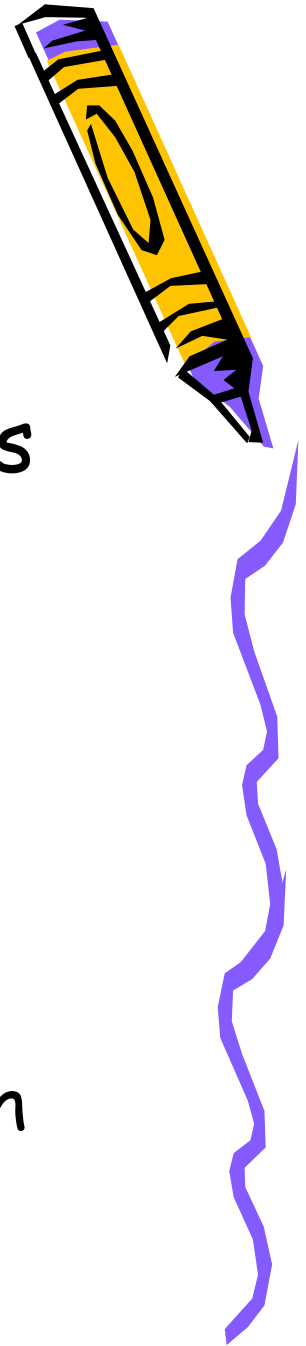
To Do, continued...

- Review all gifts and contracts for assignments, sales or licenses of copyrighted works
- Coordinate Will with trusts, powers of attorney and, if applicable, divorce, prenuptial agreements



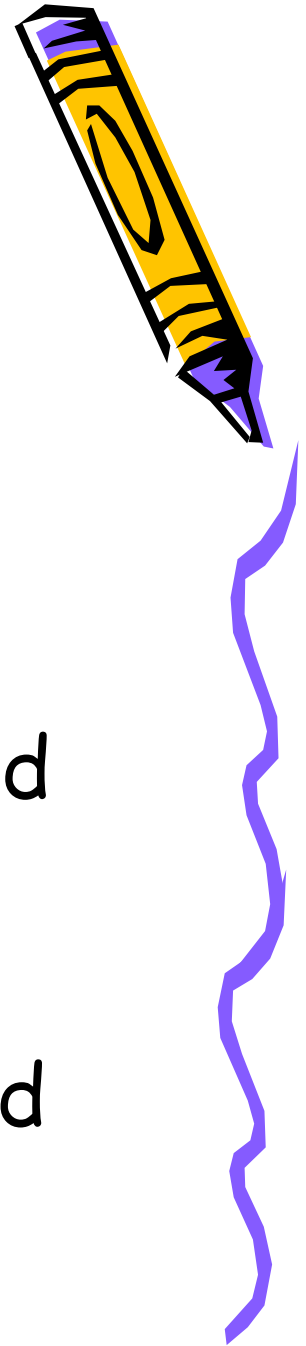
Problems with Passing Copyrights By Will

- Copyrights must be held in author's name alone at time of death
- Not
 - A trust, revocable or irrevocable
 - A partnership or LLC
 - Joint ownership
 - Assigned or given away prior to death



Problems with Wills, continued....

- Assets passing by Will go through Probate (publicity and expense)
- Divorce and/or prenuptial agreements may not be coordinated with the Will
- Special needs trusts for disabled beneficiaries not always considered



Suggestions

- Keep accurate list of all your copyrighted works, contracts and ownership or license arrangements
- Create an estate plan designed to avoid the pitfalls of termination rights
- Keep current. This issue will create litigation and, therefore, clarification



Suggestions, continued...

- If your copyrights have significant value or are intended for specific beneficiaries,
 - Consider appointing a Literary Executor or Trustee to manage your literary or artistic property
 - Consider contacting a knowledgeable attorney to help you prepare a plan that ensures that your wishes are carried out.

