

NOTES

Copyright Law—Definition of “Posthumous Work” Under Section 24 of the Copyright Act of 1909—*Bartok v. Boosey & Hawkes, Inc.*¹—In 1943, Bela Bartok assigned his rights² in his recently completed musical composition, *Concerto for Orchestra*, to Boosey & Hawkes, Inc., a music publisher.³ The agreement provided that Boosey would complete the printing and copyright the composition within six months. Wartime conditions, however, delayed the printing process and thus the copyrighting by almost two years.⁴ During this period, the *Concerto* was performed six times and broadcast over the radio,⁵ receiving great acclaim.⁶ The printing was finally completed in June, 1945 and Boosey copyrighted the work in March, 1946, six months after Bartok's death in September of 1945.⁷

The first statutory copyright term expired in March, 1974. Both Boosey and Peter Bartok, a son of the composer, filed timely renewal applications with the United States Register of Copyrights⁸ pursuant to section 24 of the Copyright Act.⁹ The Register accepted both applications, expressly declining to adjudicate between them.¹⁰ Peter Bartok thereafter brought an action in federal district court¹¹ claiming that as one of the “children of the author,” he was entitled to the renewal copyright on *Concerto for Orchestra*¹² under section 24 of the Copyright Act.¹³ Boosey filed a counterclaim and cross-claim asserting

¹ 523 F.2d 941 (2d Cir. 1975).

² The assignment was subject to the payment of royalties. *Id.* at 954 n.8 (dissenting opinion).

³ 523 F.2d at 943. Bela Bartok was impoverished at this time, *Bartok v. Boosey & Hawkes, Inc.*, 382 F. Supp. 880, 881 (S.D.N.Y. 1974), and suffering from leukemia which caused his death in 1945. 523 F.2d at 943.

⁴ 523 F.2d at 943.

⁵ *Id.*

⁶ See *Bartok*, 382 F. Supp. at 882. The *Concerto* has since become a repertory staple of orchestras throughout the world. *Id.*

⁷ 523 F.2d at 943. There was no suggestion that the publisher purposefully delayed publication until after Bartok's death: “[P]ublication here probably would have occurred in Bartok's lifetime had London not been extensively bombed and mail delivery extensively delayed.” *Id.* at 947 n.10.

⁸ *Id.* at 943. The renewal period is the twenty-eighth year of the original copyright term. During this time, anyone who is entitled to the renewal must file an application for renewal with the Copyright Office. In the absence of a valid application for renewal, the work falls into the public domain. 17 U.S.C. § 24 (1970). See Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460, 466, 470 (1943).

⁹ 17 U.S.C. § 24 (1970).

¹⁰ 523 F.2d at 943.

¹¹ *Bartok v. Boosey & Hawkes, Inc.*, 382 F. Supp. 880 (S.D.N.Y. 1974).

¹² *Id.* at 882.

¹³ 17 U.S.C. § 24 (1970). Section 24 provides in pertinent part:

That in the case of any posthumous work . . . upon which the copyright was originally secured by the proprietor thereof . . . the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years . . .

its renewal rights as the proprietor¹⁴ of a "posthumous work" under an exception in section 24.¹⁵ Suchoff, the trustee of Bela Bartok's estate, also counterclaimed and cross-claimed for judgment declaring that the estate was entitled to the renewal royalties since the *Concerto* was a "posthumous work" and since Boosey had previously agreed to pay royalties to the estate during the renewal term.¹⁶

On cross-motions for summary judgment, the district court defined a "posthumous work" as one that was published and copyrighted after the author's death.¹⁷ Therefore, the court held, the *Concerto* is a "posthumous work" and the publisher Boosey is entitled to renew the copyright for the second twenty-eight year period.¹⁸ Recognizing that the Copyright Act does not define "posthumous work," the district court based its decision on the definitions used by the Register of Copyrights, the dictionary, and the publishers of Chopin's works.¹⁹

The United States Court of Appeals for the Second Circuit, rejecting the authorities relied on by the district court, reversed and in a split decision HELD: A "posthumous work" under section 24 of the Copyright Act is a work on which the right to copyright has passed by will or intestacy due to the absence of an effective assignment by the author during his lifetime.²⁰ Applying this definition, the court reasoned that the *Concerto* is not a "posthumous work" since Bartok had executed an assignment to Boosey of the right to copyright during his lifetime. Therefore, the court concluded that the renewal rights in the *Concerto* reverted back to Bartok's widow and children under the general scheme of section 24 of the Act.²¹ In defining "posthumous work," the court focused on the legislative purpose behind the renewal provision, as evidenced by the House Committee Report,²² and concluded that the general renewal scheme reveals a Congressional intent to give the author or, if the author died prior to

And provided further, that in the case of any other copyrighted work . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, . . . shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years . . ."

¹⁴ Under the present Copyright Act, the term "proprietor" is synonymous with the term "assigns." *Public Ledger v. New York Times*, 275 F. 562, 564 (S.D.N.Y. 1921) (Hand, J.). A proprietor or assignee succeeds to the author's rights under common law or statutory copyright. 1 M. NIMMER, *THE LAW OF COPYRIGHT* §§ 61, 61.3 (1975).

¹⁵ 382 F. Supp. at 822. See note 13 *supra*.

¹⁶ 523 F.2d at 942. Under a 1949 agreement between Peter Bartok, Mrs. Bartok and Boosey, the publisher consented to pay royalties during the renewal term to the estate which, pursuant to the provisions of Bartok's will, pays the proceeds to Mrs. Bartok for life, with a remainder to her sons. *Id.* at 942 n.2. See text at notes 134-38 *infra*.

¹⁷ 382 F. Supp. at 884.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 523 F.2d at 944-45, 947.

²¹ *Id.* at 944, 946.

²² H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909).

the renewal period, his family, the right to renew the work.²³ The court therefore assumed that Congress included the "posthumous work" exception to withhold unnecessary protection for the author's family because in dealing with a "posthumous work," the family can negotiate the primary contract for the sale of the copyright themselves since the author had not done so during his lifetime.²⁴ The significance of the *Bartok* case lies in the fact that the court's explication of the "posthumous work" exception was the first attempted by a circuit court in the history of American copyright law.²⁵

This note will analyze and evaluate the *Bartok* decision, discussing first the history of federal copyright legislation and the provisions for copyright renewal. Emphasis will be placed on the legislative purpose behind the enactment of the renewal provision in the Copyright Act of 1909. An analysis of the majority and dissenting opinions in *Bartok* will be presented which, in turn, will be followed by an evaluation of the competing views expressed in the case. In conclusion, it will be submitted that the majority's interpretation of "posthumous work" in *Bartok* is the most appropriate definition since it emphasizes the nature of the execution of a contract, the assignment of legal rights, and the process of publication, rather than focusing simply on the actual date of publication as did the district court.

I. RENEWAL RIGHTS UNDER THE COPYRIGHT ACT OF 1909

The first copyright legislation in the United States was enacted by Congress in 1790,²⁶ pursuant to Article 1, section 8 of the Constitution.²⁷ Based on the English Statute of Anne,²⁸ the Act of 1790 created a two-term copyright scheme—a fourteen year original term that could be followed by a fourteen year renewal term if the applicant complied with the statutory renewal formalities.²⁹ If the author died before the end of the original term, the Act provided for renewal by the author's assignee or, in the absence of such an *inter vivos* transfer, by the author's estate.³⁰ The Act of 1831³¹ was the first general revision of the 1790 copyright law. This Act extended the original copyright term to twenty-eight years and amended the renewal section to provide that the right to renewal would pass to the

²³ 523 F.2d at 944.

²⁴ *Id.*

²⁵ *Id.* at 943 & n.3.

²⁶ Act of May 31, 1790, 1 Stat. 124.

²⁷ Congress is authorized "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8.

²⁸ 8 Anne, c. 19 (1710).

²⁹ Act of May 31, 1790, § 1, 1 Stat. 124.

³⁰ *Id.*

³¹ Act of Feb. 3, 1831, 4 Stat. 436.

author's widow and children if the author did not survive the original term.³²

The next revision of the copyright law was in the Copyright Act of 1909, which is still in effect today.³³ The major issue presented in the hearings on this bill concerning renewal rights was whether a single copyright term, lasting for the life of the author plus fifty years, was preferable to the existing two-term scheme.³⁴ Significant reasons could be advanced in favor of the single term proposal. The prevailing practice throughout the world both then and now was to afford copyright protection for a single term only;³⁵ generally, for the life of the author plus fifty years.³⁶ The benefit of this system is that the author is in a better bargaining position regarding sale of the copyright since the purchaser is assured of receiving the entire interest in the work, rather than having his interest defeated if the author dies prior to the renewal period.³⁷ The disadvantage of this system, however, is that sale of the copyright by the author terminates his entire interest in the work, thus allowing a proprietor to pay little for the copyright and reap large profits later if the work should prove popular.³⁸ Furthermore, extensions of the original copyright term prohibit works which are not sufficiently remunerative from falling into the public domain at the earliest possible date.³⁹ Congress was persuaded by the latter rationale in enacting the 1909 Copyright Act and continued the two-term scheme.⁴⁰ In doing so, Congress main-

³² *Id.* § 2. This Act created the renewal system which "in its basic form, has been continued even to the present statute." See *De Sylva v. Ballentine*, 351 U.S. 570, 574-75 (1956).

³³ Act of March 4, 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075. Except for the addition of the family's right to renew if the author died prior to the renewal period and the extension of the renewal term, the law and theory on renewal rights have remained consistent throughout the history of the copyright law. Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460, 461 (1943).

³⁴ See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 652 (1943).

³⁵ S. REP. NO. 473, 94th Cong., 1st Sess. 119 (1975). The United States and the Philippines are the only exceptions to this practice. *Id.*

³⁶ *Id.* Adherence to the Berne Copyright Convention requires adoption of this term. *Id.*

³⁷ Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 46 (1955). Bricker further observed that although the author is in a poor bargaining position in negotiating for the renewal term — which destroys the legislative purpose of benefiting the author and family — it is undesirable to prevent assignment of the renewal expectancy. Since a twenty-eight year term may be too short to assure a fair return on the purchaser's investment, nonrecognition of renewal assignments could deter publishers from handling any works of unknown authors. He therefore advocates the creation of a one term system. *Id.*

³⁸ See text at notes 54-58 *infra*.

³⁹ See Note, 44 COLUM. L. REV. 712, 735 (1944), rejecting extension of the original term and elimination of the renewal term. *Id.*

⁴⁰ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909). However, the two-term system is rejected in the copyright revision bill that is currently before Congress. See S. REP. NO. 473, 94th Cong., 1st Sess. 117 (1975). The bill provides that "copyright in a work created on or after January 1, 1977, subsists from its creation and . . . endures for

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tained the original term of twenty-eight years, extended the renewal period from fourteen to twenty-eight years, and simplified the formalities of renewal.⁴¹

The general renewal scheme in section 24 provides for a reversion of the renewal rights to the author or, if the author has died, to his surviving spouse, children or other designated beneficiaries at the end of the original twenty-eight year term:

The author . . . , if still living, or the widow, widower, or children of the author, if the author be not living, . . . or if such [persons] be not living, then the author's executor, or . . . his next of kin shall be entitled to a renewal and extension of the copyright . . . for a further term of twenty-eight years⁴²

Section 24 includes four exceptions to this general renewal scheme, however. In those cases, the proprietor of the original copyright retains the copyright interest and no reversion to the author or his family occurs:

[I]n the case of any posthumous work or . . . composite work . . . or . . . work copyrighted by a corporate body . . . or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years⁴³

In asserting its right to the renewal copyright in the *Bartok* case, Boosey sought to avoid the general reversion scheme of section 24 by contending that the *Concerto* fell within the "posthumous work" exception to the provision.⁴⁴

The interpretation of "posthumous work" is not an easy task. Section 24 does not define the term. Moreover, analysis of the provision is especially difficult since there is a scarcity of judicial opinions dealing with it, probably because only within the past twenty-five years, have many works maintained any value past the original

a term consisting of the life of the author and fifty years after his death." S. 22, 94th Cong., 1st Sess. § 302(a) (1975). The bill includes a safeguard against unremunerative transfer by providing for divisibility of copyright. The copyright comprises five exclusive rights, each of which may be separately assigned. *See id.* §§ 106, 201(d). In addition, an "exclusive or nonexclusive grant of aser or license of copyright or of any right under a copyright, executed by the author . . . is subject to termination" under specified conditions. *See id.* § 203(a). The Senate has passed the bill, thus adopting a single copyright term for the life of the author plus fifty years. S. 22, 94th Cong., 1st Sess. § 302(a) (1975). Enactment of this bill will thus extend the original term and eliminate the renewal term, bringing United States copyright law in line with that of other countries, except the Phillipines.

⁴¹ Act of March 4, 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075 (codified at 17 U.S.C. § 24 (1970)).

⁴² 17 U.S.C. § 24 (1970).

⁴³ *Id.*

⁴⁴ 523 F.2d at 942.

twenty-eight year term.⁴⁵ Nor has the legislature given much attention to the Copyright Act⁴⁶ even though commentators and judges have continually criticized the 1909 Act as being "poorly drafted"⁴⁷ and "hardly unambiguous."⁴⁸ Therefore, interpretation of the "posthumous work" exception must begin with an understanding of both the mechanics of section 24 and the legislative purpose behind enactment of this provision in 1909.

The 1909 House Judiciary Committee Report⁴⁹ on the Act explains that the primary purpose of the renewal term is to afford to the author, or to the successive classes enumerated by statute if the author died prior to the expiration of the original term,⁵⁰ a second chance to benefit economically from the work.⁵¹ Accordingly, the renewal term is not a mere extension or renewal of the property interest represented by the original copyright.⁵² Rather, it is a separate estate, "clear of all rights, interests or licenses granted under the original copyright."⁵³ There are conflicting views as to the legislative rationale for providing a reversion of the copyright interest. One view is that, unlike other forms of personal property, the nature of copyright precludes an "accurate monetary evaluation prior to its

⁴⁵ Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23 (1955). The advent of radio broadcasting, television and motion pictures revived interest in old works that could be adapted to the new medium of expression. See *Silverman v. Sunrise Pictures Corp.*, 273 F. 909, 912 (2d Cir. 1921), cert. denied, 262 U.S. 758-59 (1923); Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460, 466 (1943). Despite this interest in older works, only 9.5% of all original copyrights obtained in 1927 were renewed in 1954. J. GUINAN, JR., *DURATION OF COPYRIGHT* 24 (1957).

⁴⁶ The few bills that have been introduced on copyright revision neglected to deal with the "posthumous work" exception despite a consistent call from commentators for an explanation of the term. See, e.g., 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 114.1 (1975). Thus, the bills included the same provision for proprietor renewal of the copyright on a "posthumous work." See *Bartok*, 382 F. Supp. at 884. For discussion of the pending bill, see note 40 *supra*.

⁴⁷ Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23 (1955).

⁴⁸ *De Syl v. Ballentine*, 351 U.S. 570, 573 (1956).

⁴⁹ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909).

⁵⁰ See text at note 42 *supra*. Section 24 thus provides that if the author is dead, the renewal rights do not pass under the usual rules of testamentary or intestate succession. Instead, they pass to certain enumerated classes of beneficiaries. 17 U.S.C. § 24 (1970).

⁵¹ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909).

⁵² "[T]he proprietor of an existing copyright as such has no right to a renewal." *Silverman v. Sunrise Pictures Corp.*, 273 F. 909, 911 (2d Cir. 1921), cert. denied, 262 U.S. 758-59 (1923).

⁵³ *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir.), cert. denied, 342 U.S. 849 (1951). See *White-Smith Music Publishing Co. v. Goff*, 187 F. 247, 249 (1st Cir. 1911); *Fitch v. Shubert*, 20 F. Supp. 314, 315 (S.D.N.Y. 1937); *Southern Music Publishing Co. v. Bibb-Lang*, 10 F. Supp. 975 (S.D.N.Y. 1935). The Fifth Circuit has described the renewal term as a "second recognition" extended by the law to the author of work that has proven permanently meritorious by giving directly to him, if alive, or, if not, to his widow, children, or next of kin or executor . . . a supplementary copyright upon the terms stated in the statute. *Harris v. Coca-Cola Co.*, 73 F.2d 370, 371 (5th Cir. 1934).

exploitation."⁵⁴ Since the inability to predict the future success of the work puts the author in a poor bargaining position in negotiating a contract for exploitation during the original copyright term, reservation of the renewal term for the author or his family provides a "second chance" to negotiate an advantageous contract for a successful work.⁵⁵ The second view is that the reversion of the renewal term is part of the legislative scheme to protect widows and children from the improvidence of authors⁵⁶ who, due to their lack of business acumen,⁵⁷ often sell their rights outright for a small sum to publishers who later reap large profits from the work.⁵⁸

Whether the first or second view is accepted, reversion of the renewal rights is not automatic since an assignment of the renewal rights made prior to the renewal period will be binding if the author is alive at the commencement of the renewal period.⁵⁹ The rationale of this rule is that an author should have the same freedom to dispose of his property as other persons.⁶⁰ Since the assignment is of an expectancy, however, it is not valid if the author dies prior to the renewal period since he would not be entitled to renew the copyright.⁶¹ In that case, renewal rights vest in those classes succeeding under the statute, regardless of any assignment made by the author.

⁵⁴ 2 M. NIMMER, THE LAW OF COPYRIGHT § 113 (1975). See *Bartok*, 523 F.2d at 944-45.

⁵⁵ 2 M. NIMMER, THE LAW OF COPYRIGHT § 113 (1975).

⁵⁶ *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 700 (2d Cir. 1941).

⁵⁷ *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 955 (2d Cir. 1942) (Frank, J., dissenting), *aff'd*, 318 U.S. 643 (1943); Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 27 (1955).

⁵⁸ *White-Smith Music Publishing Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911).

⁵⁹ *Miller Music Corp. v. Chas. N. Daniels, Inc.*, 362 U.S. 373, 375 (1960); see *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943). However, a purported assignment of renewal rights may be invalid even though the author survived to the renewal period. For example, the court will not view an assignment of a copyright in *general* terms as including a conveyance of the *renewal* interest. 318 U.S. at 653. Nor will circumstances justifying a finding that the original copyright has been transferred be viewed as sufficient for validating an alleged transfer of the renewal rights. *Rossiter v. Vogel*, 134 F.2d 908, 911 (2d Cir. 1943). Moreover, the court will assess the adequacy of the consideration paid for the renewal right in determining whether to enforce the assignment. See *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 954 (2d Cir. 1942), *aff'd*, 318 U.S. 643 (1943).

⁶⁰ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943). Commentators argue that this rule undermines the basic rationale of the renewal provision by legally recognizing an assignment made by an author at a time when accurate assessment of the value of the renewal copyright may be impossible. See, e.g., 2 M. NIMMER, THE LAW OF COPYRIGHT § 117.21 (1975). One commentator supports the author's right to assign the renewal rights by stating that the committee report on the 1909 Act, H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14-15 (1909), sought only to prevent an outright sale of the copyright from carrying the renewal rights rather than to prevent the author from specifically assigning the renewal term. Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460, 468 (1943).

⁶¹ *Miller Music Corp. v. Chas. N. Daniels, Inc.*, 362 U.S. 373, 375 (1960).

II. AN ANALYSIS AND EVALUATION OF THE *BARTOK* DECISION

In holding that a "posthumous work" is one in which no effective assignment has been made by the author during his lifetime, the court in *Bartok* advanced four reasons in support of its decision. First, the court relied on the reversion of the copyright interest to the author or statutory beneficiaries under the general renewal scheme in section 24, reasoning that fulfillment of the legislative purpose behind the "posthumous work" provision required application of that exception only where the author did not execute a contract for copyright during his life.⁶² Since under the general scheme, the renewal rights pass to the family if the author dies prior to the start of the renewal period, Congress must have concluded that protection of the family's renewal interest would be unnecessary in the limited case of a "posthumous work" since the family could make its own contract for the sale of the original copyright and thus guard its interests.⁶³ This is true, the court reasoned, because if the author has not executed a contract during his lifetime, then no publisher has any interest in the work unless granted such by the deceased author's family.⁶⁴

It is submitted, however, that the family is in no better position to evaluate the future success of the work than was the author. Thus, the same considerations that led Congress to provide in the renewal scheme for reversion of the renewal rights to the author or his family⁶⁵ and led the courts to invalidate an author's assignment of the renewal rights if he died prior to the renewal period⁶⁶ apply as strongly when the family itself negotiates the original contract for copyright. Yet Congress did not so provide. When dealing with a "posthumous work," the exception in section 24 requires that the family assess the value of the renewal term when it negotiates the original contract, since the renewal rights will automatically vest in the proprietor of the copyright. Nor is it likely that the proprietor will agree to a large sum in consideration for the renewal term since he generally cannot evaluate its worth either. If the renewal rights in a "posthumous work" vested in the author's children or next succeeding class

⁶² 523 F.2d at 944.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909). See text at notes 49-58 *supra*.

⁶⁶ In *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), a case dealing with whether the author's right to the renewal term is assignable at all prior to the renewal period, the Court observed that the statute placed no limitations on the assignability of the renewal interest. *Id.* at 647. However, in a subsequent case, dealing with an author's assignment of the renewal rights followed by the author's death prior to the renewal period, the Court held that the assignment was invalid when the author died before the end of the first term. The total renewal rights then passed to the author's family or the next succeeding classes enumerated in the statute. *Miller Music Corp. v. Chas. N. Daniels, Inc.*, 362 U.S. 373, 375 (1960).

instead of in the proprietor of the original copyright, *they* would then be given the "second chance," provided to the family dealing with a *non*posthumous work and to the surviving author absent a valid assignment, to benefit from a "work that has proven permanently meritorious."⁶⁷ Nevertheless, the statute provides an exception to the general renewal scheme for any "posthumous work" and the court is required to recognize it.

The majority in *Bartok* next reasoned that its own definition of "posthumous work" was the most appropriate because it avoids the creation of an illogical distinction between the family of an author who executed a contract for copyright prior to his death and the family of an author who had not made such a contract.⁶⁸ The majority emphasized that under the district court's definition of "posthumous"—which focused on whether publication occurred before death—the family of an author who had already assigned his rights in the work would be denied all protection since it could not negotiate for royalties during either the original copyright term or the renewal term.⁶⁹ Furthermore, if publication after the author's death always defeated the family's right of renewal, a publisher could intentionally delay the printing of the work in hopes that the author would die prior to publication.⁷⁰ It appears that this reasoning is supported by logic and considerations of justice. Any other definition of "posthumous work" would create an unreasonable discrimination between families in equally defenseless positions and permit an unscrupulous publisher to benefit at the family's expense.

The court thirdly supported its definition of "posthumous work" by arguing that the rationale for its interpretation of the term is consistent with the imputed purpose behind inclusion of the other exceptions in section 24.⁷¹ The court explained that where the rights have passed by will or intestacy, delays in settling the estate may postpone sale of the copyright for several years. Thus, when the renewal period vests twenty-eight years later, there may be no surviving children of the author. The court therefore reasoned that the difficulty of locating all the author's heirs in the case of a "posthumous work" was similar to the inconvenience of locating all contributors in a "composite work" or the problem of identifying the creator of a "work made for hire."⁷² The court thus assumed that a recognition of this shared inconvenience motivated the legislature to create the statutory excep-

⁶⁷ *Harris V. Coca-Cola Co.*, 73 F.2d 370 (5th Cir. 1934).

⁶⁸ 523 F.2d at 944-45.

⁶⁹ *Id.*

⁷⁰ *Id.* at 946.

⁷¹ *Id.* at 947-48. Section 24 includes exceptions to the renewal scheme for "any posthumous work . . . composite work . . . work copyrighted by a corporate body . . . or by an employer for whom such work is made for hire." In these cases, "the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years." 17 U.S.C. § 24 (1970).

⁷² 523 F.2d at 948.

tions that allow the proprietor of the original copyright to renew the copyright for any posthumous work, composite work or work made for hire.

It is submitted that the court inappropriately imputed a common rationale to the exceptions in section 24 since these exceptions do not present analogous situations. Unlike the author of a "posthumous work," the contributor to a composite work does not lose the renewal rights. Rather, the contributor can renew his individual work and the proprietor presumably can renew the composite work.⁷³ Nor is the "employee for hire" exception analogous to the "posthumous work" exception. Unlike an "employee for hire," who receives a salary to produce the work, an author of a "posthumous work" does not generally receive any compensation from the proprietor of the copyright while he is creating the work. Nor does the proprietor of a "posthumous work" motivate the production, as does the employer in the case of a "work for hire."⁷⁴ Thus, the majority's attempted justification for the "posthumous work" exception fails to recognize the differences between renewals of those works and renewals of other works excepted under section 24.

Moreover, it is submitted that the majority's imposition of a trust upon proprietors' receipts from renewals of copyrights⁷⁵—for the benefit of the statutory recipients—demonstrates the unsoundness of its view that the difficulty of locating the author's heirs justifies the "posthumous work" exception in section 24.⁷⁶ Absent this trust scheme, invalidation of the proprietor's renewal would cast the work into the public domain due to the lack of an effective renewal application during the renewal period, and thus would deprive the beneficiaries of all proceeds from the renewal term.⁷⁷ This same evil could result *absent* the "posthumous work" exception. However, it too could be averted by application of the trust mechanism. Thus, if the heirs were entitled to the renewal rights, one heir could renew the work and hold the title in trust for the other heirs.⁷⁸ Then the other heirs could claim their rights against the one who renewed the work. Furthermore, as in *Bartok*, the time between the author's death and the copyrighting of the work may be so short that the same individu-

⁷³ See *id.*

⁷⁴ *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

⁷⁵ 523 F.2d at 948-49.

⁷⁶ See text at notes 71-72 *supra*.

⁷⁷ See 523 F.2d at 948-49. The dissent warned of this result, *id.* at 952-53, motivating the majority to impose the trust. *Id.* at 948.

⁷⁸ See *Silverman v. Sunrise Pictures Corp.*, 273 F. 909, 914 (2d Cir. 1921), *cert. denied*, 262 U.S. 758-59 (1923); *Nimmer, Copyright 1956: Recent Trends in the Law of Artistic Property*, 4 U.C.L.A. L. REV. 323, 334-35 (1957). Assignability of the renewal term would not be effected because once the renewal rights vested, the heir who exercised the rights could assign the renewal term to a third party and hold the proceeds in trust for the other heirs. *Cf. Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 646-47 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

als would be alive when the renewal rights vest, whether the author or the family negotiated the original assignment.

The majority finally reasoned that the term "publication" has "a variety of definitions in the Copyright Act depending upon the context,"⁷⁹ and that the district court inappropriately relied upon the definition of "publication" for statutory copyright purposes in interpreting section 24, the renewal provision.⁸⁰ The court suggested that even under the district court's definition of "posthumous work," the *Concerto* may have been "published" prior to Bartok's death, although this "publication" was not sufficient to deprive the work of common law copyright protection.⁸¹ Thus, without specifically so holding, the court created the possibility that public dissemination of a work through its performance during the author's lifetime will be sufficient to take the work out of the "posthumous work" category.⁸²

Although this description is consistent with the common usage of "publication"—the act(s) of making something known to the public⁸³—it nevertheless conflicts with previous judicial pronouncements that a live performance or radio broadcast does not constitute publication of the work.⁸⁴ However, in those cases, the courts based their definitions of publication on a desire to preserve the author's common law copyright: if the performances were "publication" of the work, the work would fall into the public domain since the author had not given notice of statutory copyright.⁸⁵ Thus, "performance" was

⁷⁹ 523 F.2d at 945. For example, the courts require more open dissemination of a work subject to common law copyright protection before holding that publication has occurred than where statutory copyright protects the work. *American Visuals Corp. v. Holland*, 239 F.2d 740, 743 (2d Cir. 1956).

⁸⁰ 523 F.2d at 945, 947.

⁸¹ *Id.* at 945-46. "Publication," when used for purposes of deciding if the work is eligible for statutory copyright protection, occurs "when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public . . ." 1 M. NIMMER, *THE LAW OF COPYRIGHT* § 49 (1975).

⁸² 523 F.2d at 945-46. This suggestion is not novel. Barbara Ringer, present Register of Copyrights, raised the issue of whether a work is posthumous if it was "publicly disseminated during the author's lifetime (by public performance, broadcast or recordings) but not published in visual copies until after his death . . ." B. Ringer, *Renewal of Copyright*, in *STUDIES ON COPYRIGHT* 503, 524 n.155 (1963). Professor Nimmer advocates including among posthumous works "only those which have received no public dissemination in any form during the author's life." 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 114.1 (1975).

⁸³ *Marx v. United States*, 96 F.2d 204, 206 (9th Cir. 1938).

⁸⁴ *Ferris v. Frohman*, 223 U.S. 424, 435 (1912); *Nutt v. National Institute for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 107 (S.D.N.Y. 1963); *McCarthy & Fisher, Inc. v. White*, 259 F. 364, 365 (S.D.N.Y. 1919).

⁸⁵ See cases cited at note 84 *supra*. Once "publication" occurs, the law imposes a forfeiture of common law copyright since a work cannot command both common law and statutory protection. 1 M. NIMMER, *THE LAW OF COPYRIGHT* § 46 (1975). Nevertheless, commentators have argued that performance should result in loss of common law copyright since performance may bring the most substantial economic returns to the

only related to "publication" in deciding whether a work would command statutory or common law copyright. It is submitted that application of the common usage of "publication" is nevertheless inappropriate since it has no necessary relation to statutory copyright law. Moreover, since the term "publication" is "clouded by semantic confusion,"⁸⁶ its adoption in the renewal scheme would only create additional uncertainty in the area.

The majority lastly announced that, with the exception of the present parties, the decision will be applicable to only future and pending renewals.⁸⁷ Judge Van Graafeiland began his dissenting argument by complaining of the injustice to Mrs. Bartok that results from the majority's decision to apply its holding to the parties in *Bartok*.⁸⁸ Instead of receiving the entire royalty proceeds during her lifetime, Mrs. Bartok now will receive only a one-third share.⁸⁹

Moreover, he argued, this injustice is unwarranted. Since numerous illustrations of the common usage of "posthumous" as "published after the author's death"⁹⁰ exist, it must be assumed that Congress gave "posthumous work" its common meaning.⁹¹ Consequently, an examination of the legislative history was unnecessary in light of elementary rules of statutory construction which afford to statutory language its ordinary meaning.⁹² Even if legislative history was considered, he asserted, it did not indicate that the legislature used "posthumous" in a manner different than its common usage.⁹³ He further contended that since the Copyright Office had adopted

author. *Id.* § 53.1; J. GUINAN, JR., *DURATION OF COPYRIGHT* 23 (1957).

Bartok does not raise this issue since no infringement occurred subsequent to the performance and prior to receipt of statutory copyright which would question whether the author forfeited his common law copyright protection before obtaining statutory protection. Nor did anyone contest the initial copyright that was taken out by Boosey. Furthermore, since both Peter Bartok and Boosey filed renewal applications, the work would not fall into the public domain after the termination of the initial twenty-eight year term because one of the applications was undoubtedly valid. Thus, the sole issue presented in *Bartok* was which renewal application was valid. The application filed by Peter Bartok (that was accepted by the court) affords protection for all the Bartok family members since members of a class who file for renewal become legal owners of the copyright which they hold as trustees for the benefit of all members of the class who are entitled to the renewal. Nimmer, *Copyright 1956: Recent Trends in the Law of Artistic Property*, 4 U.C.L.A. L. REV. 323, 334-35 (1957).

⁸⁶ *American Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956).

⁸⁷ 523 F.2d at 948.

⁸⁸ *Id.* at 953 n.6 (dissenting opinion).

⁸⁹ *Id.* at 942 n.2. See text at notes 105-11 *infra*.

⁹⁰ 523 F.2d at 950-51.

⁹¹ *Id.* at 952.

⁹² "It must be assumed 'that the legislative purpose is expressed by the ordinary meaning' of words used in the statute and where they have a basic and usual sense, they require no resort to legislative history." 523 F.2d at 951, quoting *United States v. Blasius*, 397 F.2d 203, 205-06 (2d Cir.), cert. dismissed, 393 U.S. 1008 (1968).

⁹³ 523 F.2d at 952.

the common meaning of "posthumous work,"⁹⁴ so should the court.⁹⁵ In conclusion, Judge Van Graafeiland advised that the appropriate course would be to apply the "common usage" definition of "posthumous work" and await congressional resolution of the issue through revision of the 1909 Copyright Act.⁹⁶

Perhaps the most influential difference between the majority and dissenting opinions was their differing views on the equities of the case. The majority, focusing on the legislative purpose behind enactment of section 24,⁹⁷ reasoned that there was no injustice in holding that the *Concerto* is not a "posthumous work" since the widow and family may now execute a contract with the publisher for the renewal term.⁹⁸ Moreover, the majority suggested that the terms of Bartok's original contract with Boosey mandated a reversion of the copyright interest irrespective of Bartok's death prior to the renewal period.⁹⁹ Since clear evidence of an intent to assign the renewal rights is required for an effective assignment of those rights,¹⁰⁰ the majority implied that even if Bartok was alive at the time for renewal, his original assignment to Boosey did not convey the renewal rights.¹⁰¹ The majority further pointed out that had wartime conditions not hindered the printing process, the *Concerto* would have been copyrighted during Bartok's lifetime and, since Bartok's death preceded the renewal

⁹⁴ The Office has defined "posthumous works" as "works published and copyrighted after the death of the author." United States Copyright Office, Circular No. 15 (1953).

⁹⁵ See 523 F.2d at 952 (dissenting opinion). The minority cited authorities holding that the court should give deference to the interpretation of a statute by the agency charged with its administration. *Id.* For example, the Supreme Court upheld the Copyright Office's determination that a statuette could be registered as a work of fine art in *Mazer v. Stein*, 347 U.S. 201, 213-14 (1954).

⁹⁶ 523 F.2d at 952, 954 (dissenting opinion). In support of his contention that the majority wrongfully performed a legislative function by defining "posthumous" as it did, the dissenter quoted Justice Frankfurter's statement that "[c]onstruction is not legislation and must avoid . . . retrospective expansion of meaning." *Id.* at 953, quoting *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944). However, Justice Frankfurter was referring to a statute—the Fair Labor Standards Act of 1938—in which the legislature described the exemptions in great detail. See 322 U.S. at 618.

⁹⁷ The court's reasoning suggests that since the legislature predicated the renewal section on the case of outright sale of the copyright by the author, the court should interpret the statute based on that situation. See 523 F.2d at 944 & n.4. Therefore, consideration of the effect of an assignment of copyright subject to the payment of royalties was unnecessary. See *id.* The dissent disagreed, however, and focused on the facts presented in the *Bartok* situation. 523 F.2d at 949, 953-54 (dissenting opinion).

⁹⁸ 523 F.2d at 944. Since § 24 provides that the renewal rights in a nonposthumous work vest in the widow and children if the author dies prior to the renewal period, regardless of any previous assignment by the author of the renewal term, the congressional purpose behind the "posthumous work" exception is in accord with the sentiment that the widow and family are capable of protecting themselves by executing a contract for copyright when the author did not negotiate such an agreement. *Id.* at 949 n.12.

⁹⁹ *Id.*

¹⁰⁰ *Id.* See note 59 *supra*.

¹⁰¹ See *id.*

period, the renewal rights clearly would have vested in his widow and children.¹⁰²

Judge Van Graafeiland disagreed, viewing the case as one between a covetous son and his helpless mother¹⁰³ (the "distraught widow"), and strongly objected to the "injustice [done] to Mr. Bartok's widow."¹⁰⁴ He argued that Mr. Bartok's intent, as evidenced by provisions in his will, should control.¹⁰⁵ Under the terms of the will, upon which Mrs. Bartok, Peter Bartok and Boosey patterned their royalty agreement in 1949,¹⁰⁶ the payments negotiated by Bartok and Boosey¹⁰⁷ would be distributed in full to Mrs. Bartok during her lifetime with the remainder then going to her sons.¹⁰⁸ This is the result which would have obtained if the court had not retroactively applied its decision to the present case and if it then recognized the 1949 agreement.¹⁰⁹ Thus, the majority's plan of equal distribution of the royalty proceeds¹¹⁰ in effect deprived Mrs. Bartok of two-thirds of the royalties to which she would have otherwise been entitled.¹¹¹

An ultimate decision as to whether the majority's or the dissenting judge's definition of "posthumous work" is correct involves many considerations. Since the Copyright Act does not define "posthumous work" and since all of the court's attempts in *Bartok* to find legislative rationales to support the exception are subject to criticisms, the possibility exists of "legislative oversight in including it among the proprietor renewals."¹¹² Indeed, the majority in *Bartok* suggested this pos-

¹⁰² See *id.* at 947 n.10.

¹⁰³ "Bela Bartok, as a loving and thoughtful husband, executed a will in which he left the royalties from all copyrights and renewal copyrights in trust for his widow with the remainder, upon her death, to his son Peter, the appellant herein. Apparently, appellant is unwilling to wait for his remainder to accrue." 523 F.2d at 949 (dissenting opinion).

Aside from the majority opinion's validation of Peter Bartok's claim of legal right, it is possible to hypothesize situations suggestive of collusion between Peter and his mother in bringing the suit. For example: Mrs. Bartok, along with Peter, may have wanted a judicial declaration on whether the *Concerto* is a posthumous work for the purpose of determining the validity of the 1949 agreement. See text at notes 134-38 *infra*.

¹⁰⁴ 523 F.2d at 949 (dissenting opinion).

¹⁰⁵ *Id.*

¹⁰⁶ See text at notes 134-38 *infra*.

¹⁰⁷ While the royalty provisions negotiated by Bartok appear to be adequate, see 523 F.2d at 954 n.8, the dissent failed to recognize that an unscrupulous publisher might have taken advantage of Bartok since he was ill and impoverished.

¹⁰⁸ 523 F.2d at 949 (dissenting opinion).

¹⁰⁹ See note 138 *infra*.

¹¹⁰ See 523 F.2d at 942 n.2.

¹¹¹ *Id.* at 949, 953-54 (dissenting opinion). It appears that Judge Van Graafeiland misinterpreted the law, however, since section 24 lays out the scheme by which the renewal interest is transferred upon the author's death prior to the renewal period, regardless of any attempted assignment by the author. 17 U.S.C. § 24 (1970). Thus, rights in the renewal copyright will not pass to the author's widow or children according to the terms of any testamentary disposition. See note 50 *supra*.

¹¹² 2 M. NIMMER, THE LAW OF COPYRIGHT § 114.1 (1975). Barbara Ringer, present

sibility by indicating that the courts could not apply all of the exceptions in section 24 since the "corporate body" provision, for example, is "practically meaningless."¹¹³ Nevertheless, since section 24 does include the "posthumous work" exception, all means of ascertaining the legislative intent in including a "posthumous work" among the exceptions to the general renewal scheme must be considered.

Neither the courts nor the legal commentators have agreed upon a settled definition of "posthumous work." The only judicial statement on "posthumous work" prior to *Bartok* was Judge Learned Hand's dictum in *Shapiro, Bernstein & Co. v. Bryan*:¹¹⁴ "'posthumous' works, [are] . . . those on which the original copyright has been taken out by someone to whom the literary property passed before publication."¹¹⁵ The precise meaning of this definition depends on the interpretation of the word "passed." One view holds that "passed" refers to any type of transfer, including the author's conveyance by contract prior to his death.¹¹⁶ The other view rejects inclusion of the author's conveyance by contract, arguing that if "passed" means any type of transfer, then all assignments of common law copyrights involve a "posthumous work" since no reference is made by Judge Hand to the death of the author.¹¹⁷ To avoid the inference that Judge Hand intended to defeat the statutory renewal scheme's protection of the author and his family, the preferable interpretation is to include within his definition of "posthumous work" only those works on which the right to copyright passed by will or intestacy.¹¹⁸ In any event, however, this single statement by Judge Hand falls far short of establishing a judicial definition of "posthumous work."

Register of Copyrights, observed that the exception for posthumous works was "spliced onto the renewal provision as one of the works which the proprietor could renew in his own right, but without definition or regard for the consequences. As a result, both the meaning of the term 'posthumous work' and its consequences in the renewal section are obscure." B. Ringer, *Renewal of Copyright*, in *STUDIES ON COPYRIGHT* 503, 524 (1963). Professor Nimmer remarked that "[t]he preference of proprietor over author, or necessarily in this instance, his widow and children . . . seems least justified in the case of posthumous works. It is precisely in the publication of such works that the author's family may most rely for financial support." 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 114.1 (1975).

A bill is currently before Congress which would abolish the two-term system and thus eliminate the problems of the "posthumous works" exception. See note 40 *supra*.

¹¹³ 523 F.2d at 948. See Note, 17 B.C. IND. & COM. L. REV. 607 (1976).

¹¹⁴ 123 F.2d 697 (2d Cir. 1941). This case dealt with an employee for hire. *Id.* at 698.

¹¹⁵ *Id.* at 699.

¹¹⁶ *Bartok*, 523 F.2d at 952 (dissenting opinion); Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 38-39 (1955). While Bricker agrees with this interpretation, he nevertheless denies that an acceptable reason exists for the defeat of the statutory beneficiaries' rights in this case. *Id.* at 39. See also B. Ringer, *Renewal of Copyright*, in *STUDIES IN COPYRIGHT* 503, 524-25 (1963).

¹¹⁷ 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 114.1 (1975).

¹¹⁸ *Bartok*, 523 F.2d at 947; 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 114.1 (1975); Note, 44 COLUM. L. REV. 712, 715 (1944).

Application of the canons of statutory construction is similarly inconclusive: One rule of statutory interpretation is that "it must be assumed that the legislative purpose is expressed by the ordinary meaning of words used in a statute."¹¹⁹ However, there is not one definitive "ordinary meaning" of "posthumous." Although the dissenting opinion in *Bartok* cited numerous examples defining "posthumous" as "published after the death of the author,"¹²⁰ the majority remarked that another common usage of "posthumous" refers to a child born after his father's death.¹²¹ Moreover, the Supreme Court in *De Sylva v. Ballentine*¹²² rejected the application of this rule of statutory construction to section 24 by explaining that "[t]he statute is hardly unambiguous, however, and presents problems of interpretation not solved by literal application of words as they are 'normally' used."¹²³

Another general principle of statutory interpretation is that a court should defer to the interpretation of an ambiguous statute made by the agency charged with its administration.¹²⁴ However, this rule of construction should not apply to the Copyright Office's interpretations (the Office defined a "posthumous work" as one "published and copyrighted after the death of the author"¹²⁵) since the Copyright Office is not an administrative agency and does not have the power to give legal opinions or advice.¹²⁶ It is primarily an office of record, similar to a register of deeds.¹²⁷ Thus, the Copyright Office customarily allows registration by conflicting claimants without making a determination of the validity of their claims,¹²⁸ and any conclusions of

¹¹⁹ *United States v. Blasius*, 397 F.2d 203, 205-06 (2d Cir. 1968), cert. dismissed, 393 U.S. 1008 (1969); accord, *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 465 (1967). However, judicial acceptance of this rule is not complete: "The notion that because the words of a statute are plain, its meaning is also plain, is merely a pernicious oversimplification." *Addison v. Holly Hill Fruit Prods. Co.*, 322 U.S. 607, 637 (1944) (dissenting opinion).

¹²⁰ 523 F.2d at 950-51 (dissenting opinion).

¹²¹ *Id.* at 945 n.6. As so defined, it obviously has no relation to the copyrighting of a work; Bartok's *Concerto* was not "born" after its father's death—it was "a creation conceived, born and very much made known to the world during its progenitor's lifetime." *Id.* See Brief for the Author's League of America, Inc., as Amicus Curiae at 7, *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975).

¹²² 351 U.S. 570 (1956).

¹²³ *Id.* at 573. In deciding whether the illegitimate child of an author is entitled to share in the renewal proceeds with the widow, the Court interpreted the phrase "widow, widower or children of the author" in § 24 to mean "widow, widower and children of the author" so that the surviving spouse and children (both legitimate and illegitimate) take the renewal rights as a class, rather than the widow or widower taking to the exclusion of the children. *Id.* at 580 (emphasis added).

¹²⁴ *Id.* at 577-78.

¹²⁵ *United States Copyright Office*, Circular No. 15 (1953).

¹²⁶ 37 C.F.R. § 201.2 (a)(1) (1975). See Register of Copyrights, Circular 1B.

¹²⁷ *United States ex rel. 20th Century-Fox Film Corp. v. Bouve*, 33 F. Supp. 462, 463 (D.D.C. 1940); Register of Copyrights, Circular 1B.

¹²⁸ *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1214-15 n.3 (2d Cir.), cert. denied, 409 U.S. 997 (1972). This was done in *Bartok*.

law it may draw are not binding on the court.¹²⁹ Consistent with this view, the Court in *De Sylva* also held that no weight could be given to the Copyright Office's interpretation of the phrase "widows, widowers or children" in section 24 since considerable ambiguity surrounded the meaning of these words.¹³⁰ This approach equally applies to the Copyright Office's definition of "posthumous work" which unquestionably is an attempt to resolve a legal issue of similar doubt.

Professor Nimmer suggests that the interpretation of an ambiguous statute such as the Copyright Act should not focus on the view held by an administrative agency or a legal commentator. Rather, he submits, emphasis should be placed on the manner in which those persons who are directly affected by the statute perceive it since they will conduct their affairs in accordance with that view.¹³¹ As a general rule, certainly neither the composer nor the publisher considers that he is dealing with a "posthumous work" when he drafts a contract for the original copyright term.¹³² Consequently, the living author does not demand compensation from the publisher for the latter's right to renew the work since the author anticipates that the renewal rights will vest in his family if he dies prior to the renewal period.¹³³

This scenario is especially evident in *Bartok*; it does not appear that either the family or the publisher regarded the *Concerto* as a "posthumous work." In 1949, Boosey, Mrs. Bartok and Peter Bartok made an agreement which provided that Boosey would pay royalties during the renewal period in the same amounts as required by Bartok's agreement with the publisher.¹³⁴ It appears that there would have been no reason for Boosey to agree to this payment if he viewed the *Concerto* as a "posthumous work" since, as the proprietor of a

¹²⁹ *United States ex rel. 20th Century-Fox Film Corp. v. Bouve*, 33 F. Supp. 462, 463 (D.D.C. 1940).

¹³⁰ 351 U.S. at 577-78.

¹³¹ Nimmer, *Copyright 1956: Recent Trends in the Law of Artistic Property*, 4 U.C.L.A. L. REV. 323, 332 (1957).

¹³² 523 F.2d at 945 n.6. In determining whether an assignment by the author includes the right to renew, "[t]he test is the intention of the parties as gleaned from the writing." *Selwyn & Co. v. Veiller*, 43 F. Supp. 491, 493 (S.D.N.Y. 1942). It cannot be conclusively argued that Bartok intended to convey the renewal rights to Boosey. Both Bartok and Boosey knew Bartok's death was imminent and he would not survive the twenty-eight years to the renewal period. Thus, as his death prior to the renewal period would defeat his contingent assignment of renewal rights, an attempt to convey the renewal rights cannot be imputed. See note 66 *supra*. Furthermore, even if Bartok was not near death, the court need not infer an intent to convey the renewal rights from his agreement with Boosey, even though he contracted for royalties on a percentage basis. 523 F.2d at 954 n.8 (dissenting opinion). A second chance to benefit from the work is still warranted in this situation since "the nature of the royalty formula . . . and the numerical amount of the percentage may well vary depending upon the author's bargaining position." 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 113 (1975).

¹³³ This reasoning is even more persuasive as applied to the facts in *Bartok* since the work would have been copyrighted during Bartok's life if wartime conditions had not delayed the printing process. 523 F.2d at 947.

¹³⁴ 523 F.2d at 942 n.2.

"posthumous work," he would be entitled to the renewal rights "clear of all rights, interests or licenses granted under the original copyright."¹³⁵ The parties arguably might have thought that the royalty provision in Bartok's original contract with the publisher required continuation of royalty payments through the renewal term even if the *Concerto* was a "posthumous work."¹³⁶ However, if such were the case, the 1949 agreement would still have been unnecessary since the royalty obligation would flow from Bartok's original agreement rather than from any subsequent agreement by the family. It is more likely that the publisher and family treated the work as nonposthumous. The 1949 agreement suggests that the parties did not expect the original contract for copyright to include the renewal rights.¹³⁷ Therefore, the 1949 agreement appears to be the family's assignment of the renewal rights.¹³⁸

¹³⁵ *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951). The court in *Bartok* did not decide whether the publisher receives the renewal on a "posthumous work" free of all obligations to the author's family or whether he receives it subject to royalty payments. The dissent did not address this issue either because he erroneously assumed that Bartok's original contract with the publisher governed the renewal rights. 523 F.2d at 953-54 (dissenting opinion). *See also id.* at 949 n.12.

¹³⁶ *See* 523 F.2d at 953-54 (dissenting opinion).

¹³⁷ *See* *Rossiter v. Vogel*, 134 F.2d 908 (2d Cir. 1943). In *Rossiter*, the court reasoned that since the parties executed a subsequent agreement on renewal rights, the parties could not have intended the original agreement to cover the renewal term. *Id.* at 911.

¹³⁸ Two problems are evident in enforcing this agreement. First, the agreement provides that the publisher will pay royalties during the renewal period to the estate which, pursuant to the provisions of Bela Bartok's will, will distribute all the proceeds to Mrs. Bartok during her lifetime and then to her sons after her death. *Bartok*, 523 F.2d at 942 n.2. (There is much disagreement on the terms in this provision of the will. In conflict with the majority's description of this provision in the will, the dissenter explained that the remainder was left solely to the son Peter, 523 F.2d at 949 (dissenting opinion), while the district court stated that Mrs. Bartok was the sole beneficiary under the will. 382 F. Supp. at 883 n.5.) This agreement may contravene the Court's interpretation of section 24 as requiring that the proceeds from the renewal of a nonposthumous work be divided between the widow, widower and children. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). Secondly, since one son, who was a statutory owner of the renewal rights, did not sign the 1949 agreement, 523 F.2d at 942 n.2, it is questionable whether the renewal assignment could be binding on him. The Court in *De Sylva* suggested that the assignment would not be binding on one who is entitled to share in the renewal and did not join in on the assignment. *See* 351 U.S. at 582. However, dicta in *Easton v. Universal Pictures, Co.*, 158 U.S.P.Q. 301 (N.Y. Sup. Ct. 1968), indicates that a renewal assignment by the widow alone would be binding on the children if it was executed prior to the *De Sylva* decision.

The court in *Bartok* did not directly pass on the validity of the 1949 agreement. Nor did the Court in *De Sylva* decide whether all members of the class must join in for an effective assignment of the renewal rights or if, like the situation of joint authorship, each member of the class could convey a nonexclusive right. The court in *Bartok* seemed to adopt the former view by suggesting that the mother and two sons receive equal shares of the renewal proceeds. 523 F.2d at 942 n.2. The court thus denied that the assignment by Peter and his mother conveyed their interest in the work to Boosey resulting in common ownership of the renewal copyright between Boosey and the sec-

NOTES

It is submitted, however, that neither the definition of Judge Hand, the definition suggested by the rules of statutory construction, nor the definition of Professor Nimmer are ultimately adequate. Since there is no reliable indication of legislative intent for the inclusion of the "posthumous work" exception, and since there is not a definition provided by judicial interpretations or the canons of statutory construction, it seems appropriate that in defining a "posthumous work," the critical consideration should be, as held by the majority in *Bartok*, whether the author executed a binding contract for copyright prior to his death rather than whether publication or performance occurred prior to his death.¹³⁹ Consistent application of the statute is fostered by focusing on a legally defined event—the making of a contract—instead of relying on terms which do "not have the same legal meaning[s] in all contexts."¹⁴⁰ Moreover, this definition effectuates the underlying policy of the Act in protecting the families of deceased authors. If the author has made a contract, the work is non-posthumous and, by statute, the family has the opportunity to negotiate for the renewal term. In the absence of a contract by the author, the family can execute a contract for the original copyright term of the "posthumous work." In both situations then, the interests of the family are protected by their participation in execution of a contract, original or renewal. This interpretation thus avoids the creation of an illogical discrimination between families in equally defenseless positions and prevents an unscrupulous publisher from benefiting at the family's expense.

ond son. This result was not required by *De Sylva* since the Court did not discuss the allocation of interest between the widow and children.

It appears that nonrecognition of the 1949 agreement does not result in a frustration of Bartok's intentions as expressed in his will. The renewal rights in other works which Bartok exercised during his lifetime presumably became assets of his estate upon his death and were distributed according to the provisions of his will, as were the proceeds from the original term of the *Concerto*. Therefore, it seems that Suchoff, the trustee of Bartok's estate, acted inappropriately when he joined with Boosey in seeking to have the court declare that the *Concerto* is a posthumous work.

¹³⁹ The Author's League of America, Inc. explained the illogical results which would occur from acceptance of the dissenter's definition of "posthumous works" as those for which publication (*i.e.* first sale and distribution of copies) occurs after the author's death:

Three generations after an author's death, the unpublished, unknown score of one of his concertos is found in a trunk. The legatee of his literary property, a university, grants rights to a publisher. Copyright is secured by registration under Sec. 12; the work is widely performed and broadcast; but copies are not sold or distributed. Consequently, under the District Court's definition [that was adopted by the dissenter in the court of appeals], the work is not "posthumous" although it had been completely dormant and unknown during the author's life and for three generations after his death. His executor or next of kin—three generations removed—would secure the renewal copyright.

Brief for The Author's League of America, Inc., as Amicus Curiae at 11-12, *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975).

¹⁴⁰ *American Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956).

If the court had defined a "posthumous work" as one published after the death of the author, as did the district court, a method would still have been available to protect the family's interest in the work. The court could have held that any executory contract signed by the author is void if the work has not been published prior to the author's death. The author's family or the next succeeding statutory class could then make a contract for the rights to copyright, with consideration given to the proprietor's rights to the renewal term. The legislative purpose of "protecting authors and their families"¹⁴¹ would be fulfilled by considering this a "posthumous work" since "the logical basis for excepting the widow and children from statutory protection is that, as original proprietors, they would have no need for it."¹⁴² Nevertheless, it is submitted that the majority's definition of "posthumous work" as a work for which "a contract for copyright was never executed by the author during his life"¹⁴³ is preferable. This interpretation accords the family greater protection by permitting them to negotiate for the renewal term during the renewal period—a time when the value of the renewal copyright is better apt to be known—rather than negotiating for the renewal term twenty-eight years earlier when its value is purely speculative.

CONCLUSION

It appears that the majority in *Bartok* adopted the most equitable interpretation of "posthumous work" by defining it as a work on which the right to copyright has passed by will or intestacy.¹⁴⁴ Since the focus is on whether the author executed a contract for copyright, this definition entitles the statutory beneficiaries to negotiate either the original contract for a "posthumous work" or the renewal contract for a nonposthumous work. The problem with the *Bartok* decision, however, is that the court's reasoning is unpersuasive; the imputed legislative rationale for inclusion of the "posthumous work" exception is simply not supported. A copyright revision bill is currently pending before Congress;¹⁴⁵ it appears that ultimately only congressional reappraisal of this provision will solve the problems which have arisen in interpreting the "posthumous work" exception.

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¹⁴¹ 523 F.2d at 944.

¹⁴² *Id.* Of course, this creates the same difficulties in assessment of the value of the renewal term as exists with the majority's definition of "posthumous work." See text at notes 65-67 *supra*.

¹⁴³ 523 F.2d at 944.

¹⁴⁴ *Id.* at 947.

¹⁴⁵ See note 40 *supra*.