

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**JACKSON S. BRUMLEY, ALBERT E.
BRUMLEY, JR., ROLENE BRUMLEY,
BETTY BRUMLEY POCKRUS,
W. J. BRUMLEY, KRISTI BRUMLEY
LAXTON, MARK BRUMLEY, AND
KERI BRUMLEY PILCHER,**

Plaintiffs,

v.

**ALBERT E. BRUMLEY & SONS, INC.,
INTEGRATED COPYRIGHT GROUP, INC.,
AND ROBERT B. BRUMLEY,**

Defendants.

Case No.: 3:08-CV-1193

Judge Trauger

MEMORANDUM AND ORDER

On November 16, 2010 through November 18, 2010, the court conducted a jury trial in this case on the sole issue of whether Albert E. Brumley, Sr. (“Brumley”) was the “statutory author” of the famous gospel song, *I’ll Fly Away* (the “Song”). (See Docket No. 115.) The jury concluded that Brumley indeed was the statutory author, that is, not only did Brumley write the Song, but the Song was not a “work for hire” as that term is defined under the Copyright Act. (*Id.*) As discussed below, remaining for the court’s consideration following the jury trial are the defendants’ legal challenges to the termination notice. The parties elected not to conduct a bench trial on these challenges, but, rather, agreed to submit proposed findings of fact and

conclusions of law on April 22, 2011. (Docket No. 137 at 371; Docket Nos. 139 and 140.)

Having reviewed those submissions, for the reasons set out below, the court finds that the defendants' legal challenges to the termination notice are without merit.

FINDINGS OF FACT¹

In 1928 or 1929, Brumley began writing and composing the Song in the cotton fields of Oklahoma. The process of writing the Song took a few years, and he eventually sent the completed work to the Hartford Music Company (HMC) in the hopes of getting the Song published. On September 15, 1932, the HMC published the Song in a compilation titled "The Wonderful Message," ("the Songbook"), and the Song has since gone on to enjoy significant commercial success. Through a series of transactions over the next several decades, Brumley obtained a renewal copyright registration for the Song and Songbook (in 1959 and 1960), and, as he entered into his twilight years in the mid-1970s, he continued to hold full rights in the Song through his music publishing company Albert E. Brumley & Sons ("AEB").

On December 18, 1975, Brumley sold AEB to William and Robert Brumley, who are two of Brumley's six children, for \$100,000. On December 31, 1975, Brumley and his wife, Goldie, also executed a Bill of Sale, which purported to sell personal property and an "attached list of copyright songs," to William and Robert, although no such list appears in the record.

(Defendants' Tr. Ex. 1.) It is undisputed that, through these materials, Brumley, among other things, conveyed the publishing and exploitation rights to the Song to William and Robert.

¹ As can be seen herein, there is little remaining debate about the facts of this case or the relevant law, and, unless otherwise noted, the findings of fact are drawn from the parties' submissions. (Docket Nos. 139 and 140.) Also, for the purposes of focusing on the narrow issue remaining, the court presents a somewhat truncated account of the factual background.

(Docket No. 139 at 3; Docket No. 140 at 4.) On November 15, 1977, Brumley died, survived by Goldie and their six children.

On May 17, 1979, Goldie executed another Bill of Sale and Assignment. (Defendants' Tr. Ex. 2.) In this document, Goldie maintains that, as Brumley's widow, she is the "sole and rightful owner" of all of Brumley's songs. (*Id.*) Additionally, through the Bill of Sale, she purports to "grant, sell, assign, and transfer" to AEB Goldie's rights in Brumley's songs, along with various rights with respect to renewal copyrights in Brumley's songs. (*Id.*) There is no mention of Goldie's "termination rights" in the 1979 Bill of Sale and Assignment. (*Id.*)

In 1986, Robert bought out William's share of AEB for \$240,000 plus interest, leaving Robert as the sole owner of AEB. On July 10, 1988, Goldie died. On or about April 14, 2006, four of Brumley's children (Jackson, Albert, Betty, and Thomas) delivered a Notice of Termination of Transfers and Licenses ("the Termination Notice") to AEB, intending to terminate the 1975 transfer of rights in the Song from Brumley to William and Robert, effective April 14, 2008. (Plaintiffs' Tr. Ex. 4.) The Termination Notice was recorded by the U.S. Copyright Office on July 13, 2006.² (*Id.*) AEB's efforts to resist the Termination Notice have formed the basis of this lawsuit, which the plaintiffs filed on December 16, 2008. (Docket No. 1.) In this lawsuit, Thomas (now deceased) is represented by his surviving spouse, Rolene

²In a footnote, the defendants now attempt to challenge this time line, arguing that there is no evidence that AEB received the Termination Notice in April 2006. (Docket No. 139 at 6.) Prior to trial, the defendants stipulated to receiving the notice "on or about April 14, 2006." (Docket No. 82 at 3.) Further, the submission to the Copyright Office contains a statement attesting that the Notice of Termination was sent to AEB on April 14, 2006. (Plaintiffs' Tr. Ex. 4.)

Brumley. In addition to Jackson, Albert, Rolene, and Betty, the other plaintiffs are the four surviving children of William, who died in 1995. (Docket No. 139 at 2.)

CONCLUSIONS OF LAW

Pursuant to the 1976 Amendment to the Copyright Act, an author of a copyrighted work may terminate a *pre-1978* transfer of that author's copyright. 17 U.S.C. § 304(c). When the author dies survived by a spouse and all of his children, the author's termination interest passes to those heirs, with the spouse receiving 50 percent of the termination interest and the children receiving 50 percent, allocated on a *per stirpes* basis. 17 U.S.C. § 304(c)(2)(A)-(C). If there is no surviving widow, the entire termination interest is held by the author's children on a *per stirpes* basis. *Id.* In order to terminate a pre-1978 transfer, the author's heirs must cobble together "more than one-half of that author's termination interest." 17 U.S.C. § 304(c)(1).

Exercise of the termination right is limited by the 1976 Amendment to a five-year time window. The window begins at the end of 56 years from the date that the copyright was "originally secured" or January 1, 1978, whichever is later. 17 U.S.C. § 304(c)(3). To exercise the termination right, the heir(s) must give notice of termination to the rights holder not less than two and no more than ten years prior to the specified termination date. 17 U.S.C. § 304(c)(4)(A). Notice of the termination also must be recorded with the U.S. Copyright Office prior to termination. *Id.* Here, the transfer at issue is the 1975 grant of rights in the Song, which was first published in 1932. Therefore, in order to terminate the 1975 transfer of interest in the Song in this first time window, the heirs needed to have acted between 1978 (ten years prior to 56 years) and 1991 (two years before the close of the five-year time window). *See id.*

The 1998 Amendment (also known as the “Sonny Bono” Amendment) to the Copyright Act, provided a second opportunity for authors or heirs to terminate *pre-1978* transfers. 17 U.S.C. § 304(d). This second time window begins 75 years from the date that the copyright was “originally secured,” and the same time guidelines for issuing the notice of termination apply. 17 U.S.C. § 304(d). Therefore, under this second window, Brumley’s heirs must have acted between 1997 (ten years prior to 75 years) and 2010 (two years before the close of the five-year time window). Heirs can only use the second time window if the termination right has not been “previously exercised.” *Id.*

Here, the plaintiffs claim that, with Goldie’s death in 1988, Brumley’s six children each held one-sixth of the termination interest. (Docket No. 140 at 7; 17 U.S.C. § 304(c)(2)(A)-(C)). And, in 2006, well within the “second window” provided by the Sonny Bono Amendment, four-sixths of the termination interest (four of Brumley’s children) properly served a written notice of termination on AEB, permissibly setting a termination date two years from the date of the notice. (*Id.*) Given that this was the first time a termination notice had been issued for the 1975 transfer of interest in the Song, they argue, there is nothing improper about the Termination Notice, and there is no basis to set it aside. (*Id.*)

The defendants claim, however, that Goldie, in essence, exercised her termination rights in the first time window by executing the 1979 Bill of Sale, which had the effect of transferring her termination rights to AEB and rendering it impossible for Brumley’s children to later cobble together enough remaining termination rights to actually terminate AEB’s interest in the Song. (Docket No. 139 at 12.) In support of this interpretation of the Copyright Act, the defendants rely on two cases, *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005) and *Penguin*

Group, Inc. v. Steinbeck, 537 F.3d 193 (2nd Cir. 2008) and attempt to distinguish one case, *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008). The defendants argue that the lesson from these cases is that, when an heir has the option to terminate (as Goldie did in 1979) but instead re-assigns or re-grants rights to the original grantee, that operates as an exercise or divestment of that heir's portion of the termination right. (Docket No. 139 at 15.)

In *Milne*, there was also a pre-1978 (1930) grant of rights involving the *Winnie-the-Pooh* children's books, which were written by A.A. Milne. 430 F.3d at 1037. The evidence in that case clearly showed that, in 1983, during the first time window, Milne's heirs "considered terminating the 1930 grant outright, but instead entered into a new agreement that revoked the original grant and re-issued rights in the works" to the licensee, and, in so doing, secured much more favorable licensing terms for the heirs going forward. *Id.* at 1037-38, 1040. It was abundantly clear from the record in *Milne* that the heirs had "agreed not to seek termination of the existing agreements in return for executing the new agreement." *Id.* at 1040. The Ninth Circuit determined that the 1983 grant of rights terminated the 1930 grant of rights, leaving no pre-1978 grant of rights. *Id.* at 1043. Without a subsisting pre-1978 grant of rights, the Copyright Act provided no termination right for the heirs. *Id.* citing 17 U.S.C. 304(d).

In *Steinbeck*, there was also a pre-1978 (1938) grant of rights to the publisher in the works of author John Steinbeck. 537 F.3d at 196. In 1994, Steinbeck's widow entered into a new, explicitly superseding agreement with the publisher's successor-in-interest, which added additional works to be covered by the agreement and otherwise "changed the economic terms of the 1938 Agreement," mostly to the widow's benefit. *Id.* The widow died, and, when Steinbeck's children attempted to exercise their termination rights in the second time window,

the court concluded that the parties to the 1994 Agreement had intended to terminate the 1938 grant of rights, and, therefore, no pre-1978 grant of rights remained, and there was no right of termination. *Id.* at 201-202.

In *Mewborn*, the Ninth Circuit considered whether the Copyright Act's "termination of transfer right . . . can be extinguished by a post-1978 re-grant of the very rights previously assigned before 1978." 532 F.3d at 979. At issue in *Mewborn* was a 1976 grant of rights by Mewborn to a media distributor in the *Lassie Come Home* series. *Id.* at 980. In 1978, Mewborn executed another grant of rights, which "contained the identical transfer of motion picture, television and radio rights as the 1976 Assignment, but added language assigning ancillary rights" to the distributor. *Id.* at 980-81. In 1996, within the five-year time window, Mewborn attempted to terminate the distributor's rights and, as the Ninth Circuit artfully put it, "this began the Lassie Works' difficult journey home," which included the district court's determination that *Milne* dictated that the 1978 re-grant eliminated Mewborn's termination rights. *Id.* at 981.

In reversing the district court, the *Mewborn* court noted "the omission of any language transferring termination rights in the 1978 Assignment or even a mention of the right of termination." 532 F.3d at 982. The court found that the 1978 Assignment did not disturb or revoke the 1976 grant of rights, but left the core 1976 agreement "intact," while adding a few additional licensing vistas. *Id.* at 986. The court also noted that, because the 56-year term for the *Lassie* works would not commence until 1994, Mewborn had no termination right to bargain with at the time of the 1978 assignment. *Id.* at 987. In the court's view, this clearly distinguished *Mewborn* from *Milne*, where the heir "had the present right to serve an advance notice of termination, and could exercise it at any moment. Thus when the *Milne* heir chose to

use the leverage” of termination to enter into a better deal, it was “tantamount” to a formal exercise of termination rights followed by a fresh grant of rights. *Id.* In *Mewborn*, however, with no termination right to bargain with and no explicit mention of termination, there was no evidence of any intent by Mewborn “to waive or relinquish” her termination rights going forward. *Id.* at 989.

Relying on these three cases (and in the absence of any clear guidance from the Sixth Circuit), the defendants argue that Goldie divested her termination rights by entering into the 1979 Bill of Sale.³ (Docket No. 139 at 14.) The defendants maintain that *Mewborn* is clearly distinguishable because, unlike Goldie, Mewborn did not have a termination right at the time of the re-grant, and, therefore, had nothing with which to bargain. (*Id.* at 18.)

Mewborn is clearly the closest factual corollary. The 1975 transfer materials in the record here indicate that Brumley (joined by Goldie) transferred “all . . . title and interest” and “all [] rights of any nature” in the Song to William and Robert. (Defendant Tr. Exs. 1, 7.) The 1979 Bill of Sale from Goldie to AEB likewise transfers “all [] right, title, and interest” in the Song (which Goldie claimed that she owned), and it explicitly states that AEB is obtaining the right to obtain copyright renewals in the Song. (Defendants’ Tr. Ex. 2.) Therefore, as in *Mewborn*, there are two grants of rights, one coming prior to 1978 and one coming shortly after, both of which purport to convey the same interest and make no mention of superseding the previous agreement or conveying termination rights. *Milne* and *Steinbeck* are less instructive

³The plaintiffs also relied on *Mewborn* and, for Sixth Circuit authority, the plaintiffs cite *BMI v. Roger Miller Music*, 396 F. 3d 762, 769 (6th Cir. 2005). (Docket No. 140 at 9.) *Roger Miller Music* discussed the exercise of termination rights generally, but the issue of whether termination rights could be bargained away as discussed in *Milne*, *Steinbeck*, and *Mewborn* was not before the court in *Roger Miller Music*.

because, unlike here, they made clear that the licensor was creating a new agreement, and, the record suggested, bargaining with the threat of termination to achieve a better licensing arrangement.

In *Mewborn*, the court determined that there was no basis to conclude that the licensor had intended to bargain away the termination right, and such a conclusion is equally appropriate here. Clearly, the 1979 Bill of Sale operates as a re-grant or confirmation by Goldie that she wished that the exploitation rights in the Song be conveyed to AEB. As far as the court can tell, there is no evidence in the record as to the rationale for this re-grant or what Goldie's purpose was in drafting this document. However, while it is true that, at the time of the 1979 Bill of Sale, Goldie had a termination right with which to bargain, there is no suggestion that, as in *Milne* or *Steinbeck*, she knew that she had that termination right or that she used that termination right as leverage to achieve a better licensing deal. Indeed, there is no mention of "termination rights" at all, and the context (in which she is granting rights to her son's company) strongly suggests that Goldie was not bargaining or attempting to leverage any rights to obtain a better deal. Consistent with *Mewborn*, in the absence of any evidence suggesting that Goldie was knowingly bargaining with her termination right, her mere re-grant of her rights in the Song is not sufficient evidence that she divested or relinquished her termination right to AEB.

The defendants' challenges to the Termination Notice are thus without merit.⁴ The court finds that, on or about April 14, 2006, four-sixths of the rights holders in the relevant termination

⁴The defendants also claimed that William's 1986 sale of his interest in AEB to Robert operated as a waiver or divestment of William's termination right. (Docket No. 139 at 19.) It is not necessary to reach this issue because William did not join in the Termination Notice, which was issued by more than 50 percent of the interest holders.

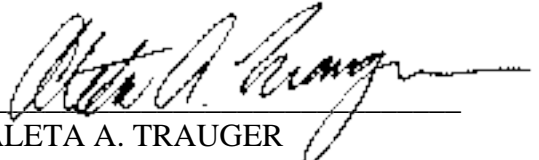
interest properly and for the first time exercised that interest by submitting to AEB and timely recording with the U.S. Copyright Office a valid termination notice that stated the work subject to termination, the author, the original date of copyright, the percentage of interest to be terminated, and the date of termination, all in accordance with the Copyright Act. See Plaintiffs' Tr. Ex. 4; 17 U.S.C. § 304(c)(4); 17 U.S.C. § 304(c)(1). The court concludes that AEB's copyright interest in the Song, as granted under the 1975 transfer, was properly terminated on April 14, 2008, and, from that date forward, Brumley's four surviving children each own one-sixth of the interest, Rolene Brumley owns one-sixth as surviving spouse of Thomas Brumley, and William's four children share a one-sixth interest. 17 U.S.C. § 304(c)(6).

Through their submissions here, the plaintiffs seek attorneys' fees, pre-judgment interest and a hearing on damages, based on their claim that they have been denied income from the copyright to the Song from April 15, 2008 forward. (Docket No. 140 at 15-16.) The plaintiffs recognize that these issues have not been fully briefed. (*Id.*) To the court, the next reasonable step is to consider the sum owed to the plaintiffs for exploitations of the Song that have occurred from April 15, 2008 to the present.

Therefore, the court will conduct a telephonic status conference with counsel for the parties on Wednesday, June 1, 2011 at 12:00 noon CDT to determine how best to proceed.

It is so Ordered.

Entered this 18th day of May 2011.



ALETA A. TRAUGER
United States District Judge