

GAY RIGHT TO TERMINATE UNDER THE 1976 COPYRIGHT ACT[♦]

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INTRODUCTION

On June 24, 2011, New York’s Governor, Andrew Cuomo, signed the Marriage Equality Act into law. This Act states, “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”¹

Fifteen years earlier, on September 21, 1996, President William Clinton signed the Defense of Marriage Act (“DOMA”), which provides that “[i]n determining the meaning of any Act of Congress . . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”²

Query: in what way do these two statutes, arising from different acts of state and federal legislation but both dealing with gay rights, impact the United States Copyright Act?

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¹ N.Y. DOM. REL. LAW § 10-A (2011).

² 1 U.S.C. § 7 (2006).

I. A SECOND BITE OF THE APPLE

Analysis of the underlying issue began in 1943 when the U.S. Supreme Court was first called upon to determine whether an author's assignment of his or her copyright during the first term (twenty-eight years) was binding on the author if he or she survived into the second term (twenty-eight to fifty-sixth year), also known as the renewal term.³

In a 5–3 decision (with one justice abstaining), Justice Felix Frankfurter held that because the 1909 Copyright Act (representing the first major copyright revision undertaken by Congress) allowed an author to freely assign his copyright provided the assignor survived into the renewal term, the author was bound by the provisions of his contract.

Given Justice Frankfurter's standing as a strict constructionist and one who vouchsafed the integrity of a freely negotiated contract, the result was not surprising. On the other hand, it was surprising that the majority of *Fisher's* progeny cite this decision for the proposition that the creation of the renewal term of copyright was intended to give imprudent authors a second bite of the apple (in being able to recapture their original copyright and secure for themselves the financial rewards during the then second twenty-eight year term), notwithstanding that *Fisher* chose to make apple pie out of the author's supposed fruit.

A series of cases sought to quarantine the Court's decision⁴ by assuring authors that all was not lost. They could secure the intended benefits of the renewal term if they died before the fifty-sixth year, thus ensuring their statutory successors a second bite of the apple.⁵

Justice Frankfurter's decision emphasized that it was not within the scope of the Court's power to determine whether authors acted imprudently in assigning their renewal copyrights. Nor should authors become objects of the Court's benevolence in protecting them from their own naiveté in assigning away their potential second term largesse from the exploitation of their creativity during its first term. It was not for the courts or the legislature to protect authors who failed to protect themselves by entering into a fiscally unremunerative publishing agreement.

It is not within the purview of this article to challenge the late jurist or point out that his decision mocked the second bite of the apple

³ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

⁴ *See, e.g., Stewart v. Abend*, 495 U.S. 207 (1990); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

⁵ *See, e.g., id.* at 218 (1990) ("Congress also intended to secure to the author's family the opportunity to exploit the work if the author died before he could register for the renewal term."); *see also De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956) ("The evident purpose of [the renewal provision] is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, [it] takes the form of a compulsory bequest of the copyright to the designated persons.").

theory. That discussion is unnecessary as the 1909 legislation itself flew in the face of Justice Frankfurter's holding by legislating the class of successors to the author's renewal term whose demise precedes the commencement of the renewal term. Section 304(a)(1)(C) of the 1976 Copyright Act restates the relevant provisions of the 1909 Act and provides, in pertinent part, that where an author dies before the renewal term,⁶ the right of renewal and its benefits belong first to the widow or children.⁷ Where there is no widow or children, renewal rights belong to the executor named in the author's will. As a final alternative, if the author dies intestate, renewal rights go to the author's next of kin as determined by state intestacy statutes.

What rationale persuaded Congress in 1909 that it, rather than the author, should decide who was entitled to the benefits of the renewal term that occurred after the author's death? Clearly the author—had he survived into the renewal term—was legally entitled (subject to states' inheritance laws) to leave the balance of the copyright renewal term to whomever he chose. So why did not the same freedom of contract apply to the author who had the bad break of dying too soon? And, if the author died without a spouse or children, the executor is free to secure the benefits of the renewal term for the author's designated beneficiaries without being bound by any prior contract entered into by the author, even where the preexisting contract states that it is binding on his "heirs or executors." The foregoing is also true for the next of kin of an intestate author.⁸

With the enactment of the 1976 Copyright Act (which had an effective date of January 1, 1978), the last copyright that required renewal was in 2006.⁹ Further, the 1976 Copyright Act preserved the renewal term for all copyrights that existed prior to January 1, 1978 but changed the term of copyright for post-1977 works of authorship to

⁶ See *Capano Music v. Myers Music Inc.*, 605 F. Supp. 692, 695 (1985) (citing *Miller Music Corp.*, 362 U.S. 377) (holding that "[i]f the assignor is not living when the renewal rights vest, then those who succeed to the author's interest under § 304(a) take free of any assignment made by the deceased assignor, and the assignee takes nothing.").

⁷ The U.S. Supreme Court has never determined whether the renewal interest should be split fifty/fifty, so that the widow gets fifty percent, and the children split fifty percent amongst themselves, or per capita, so that the widow and each child get the same interest; i.e., where there is a widow and three children, each would take twenty-five percent. Indeed, when presented with the opportunity, the U.S. Supreme Court expressly declined to decide the issue under the 1909 Act in *De Sylva*, 351 U.S. at 582. There, the language of the renewal successor clause was determined adversely to widows. The Court held that notwithstanding the language of the Act ("widow *or* children"), Congress intended both the widow *and* children to jointly own the renewal interest of the deceased author. Courts since forced to address the issue, however, have provided the widow with fifty percent. See, e.g., *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762 (6th Cir. 2005), *cert. denied*, 546 U.S. 871 (2005); *Venegas-Hernandez v. Asociación de Compositores y Editores de Música Latinoamericana*, 424 F.3d 50 (1st Cir. 2005).

⁸ *Miller Music Corp.*, 362 U.S. 373.

⁹ Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. 105-298 (1998).

conform to the term accepted by the members of the Berne Convention.¹⁰ Commencing in 1978, works of authorship would enjoy protection for the life of the author plus fifty years post-death.¹¹ Additionally, formalities under the 1909 Act (i.e., copyright notice, registration, and renewal) were abandoned.¹²

But, what of the copyrights in existence prior to January 1, 1978, that were still protected under the 1909 law as carried forward into the 1976 Copyright Act? Would their protection end at the fifty-sixth year when, under the 1909 law, they would have entered the public domain?

Congress rose to the occasion with section 304 of the 1976 Act, which provided that, as of its effective date, all such existing copyrights would receive an automatic extension of nineteen years. But what if an alert publisher, sensing that changes in copyright law were on the horizon, altered its contracts in the 1960s and 1970s to secure a term for the original, renewal, and “all extended and enlarged periods” of copyright? Would these words *ipso facto* vest in the publisher the exclusive benefit of the nineteen years added to the pre 1976 copyright term of fifty-six years?¹³

II. WHO’S SORRY NOW?

For the purposes of this article, the key provisions of the 1976 Act are sections 203 and 304. These provisions marked a compromise between “users” of copyright (who did not wish to lose copyright control by reason of the enlarged copyright term from fifty-six to seventy-five years)¹⁴ and the creators who, whether or not adversely affected by *Fisher*, were now about to realize not only a nineteen year extension of copyright life but, equally important, a real opportunity to recapture their copyrights during the extended nineteen year copyright term.

The compromise embodied in the statutory provisions provided

¹⁰ Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as codified by the United States, Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §2, 102 Stat. 2853 (codified as amended at 17 U.S.C. § 101 *et seq.*).

¹¹ But note that the CTEA added twenty additional years, thereby extending the term of protection in the U.S. to life plus seventy years.

¹² The registration formality, however, continues to be strongly encouraged by the requirement that a copyright be registered before an action for infringement can be maintained. 17 U.S.C. § 411(a) (2006).

¹³ See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172 (1985) (appearing to answer in the negative and discussing heirs’ right to terminate renewals previously granted to others by the author, the Court found that “[t]he principal purpose of the amendments in § 304 was to provide added benefits to *authors*.” (emphasis added)); see also H.R. REP. NO. 94-1476, at 140 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5756 (“The arguments for granting rights of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.”).

¹⁴ Sonny Bono Copyright Term Extension Act (“CTEA”), Pub. L. No. 105-298 (1998).

that the author, if living, and otherwise the author's statutory successors, could terminate his original contract with the grantee and recapture the copyright by giving timely notice to a prior grantee (e.g., a publisher) before the fifty-sixth year.

The one exception to the author's right of recapture is embodied in sections 203(b)(1) and 304(c)(6)(A), which state:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.¹⁵

The *raison d'être* for this provision was to protect creators/owners of derivative works whose financial (and possibly creative) contribution to the original often outdistanced the primary copyright (i.e., an author who wrote a work which received gala encomiums was in a position to license his work for audio-visual adaptation), the financing of which far exceeded that of his original manuscript and the production-editorial costs of the publisher.

But what if the author died before the commencement of the statutory period in which the Notice of Termination ("N/T") could be sent? Mirroring the structure of statutory succession to deceased authors that controlled the renewal copyright term under the 1909 law, Congress provided that if the author predeceased the statutory time period for sending the N/T, such right would descend upon the widow and children, an executor under the author's last will and testament, or in the absence of a will, to the next of kin.

What is crucial for our purposes is that the widow and children share the benefits of the N/T. To be effective, those holding at least fifty-one percent of the interest must execute the N/T.¹⁶ Therefore, with the widow owning fifty percent and each child an equal share of the remaining half, some type of agreement must be struck between widow and child. Once the N/T is properly sent, the benefits flow fifty percent to the widow, and the children share equally in the balance, with the deceased author's grandchildren sharing as a unit if their parent fails to survive.

In *Mills Music Inc. v. Snyder*,¹⁷ the U.S. Supreme Court decided an interpleader action brought to determine who was entitled to receive the royalties from pre-termination recordings on the classic "Who's Sorry Now"—either Snyder's heirs or Mills, the original music publisher that

¹⁵ 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (2006).

¹⁶ "[T]he notice shall be signed by all of those entitled to terminate the grant . . ." 17 U.S.C. § 304(c)(4).

¹⁷ 469 U.S. 153.

licensed the recording to companies to manufacture and sell phonorecordings during the initial fifty-six years. In a 5–4 decision, the U.S. Supreme Court held that the recording companies, as creators of derivative works (phonorecordings), were free to continue to issue their preexisting recordings in accordance with the terms of the mechanical license issued by Mills. And, because the mechanical license issued by Mills fifty-six years ago was the only contract governing payment of royalties, and which directed the recording companies to pay royalties to Mills (as the then copyright proprietor of the composition), that license survived the termination.

Déjà vue Fisher. Again, the U.S. Supreme Court chose to ignore the explicit language of the 1976 Copyright Act, the version of which was drafted to overcome the results in *Fisher*. Once again, therefore, the contract took precedence over the statute.¹⁸ In both *Fisher* and *Mills*, the Court, when confronted by federal legislation that implicated contractual rights governed by state contract law, chose to enhance the status of the latter. Thus, in each case, the Court chose to deprive the creator of the benefits of federal legislation whose purpose was to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings. . . .”¹⁹

Mills was particularly heinous in its disregard of the purpose behind ensuring creators the ability to own and control their copyrights on the date the N/T became effective. And while the effect of *Mills* has been greatly eviscerated by subsequent cases,²⁰ new clouds have

¹⁸ A reading of the U.S. Supreme Court decision in *Mills* represents a third major misinterpretation of congressional will to favor authors by interpreting an irrelevant “mechanical license” as the *raison d’être* in reversing the Second Circuit’s decision in *Mills*. This view is evidenced by the four justice dissent, which forcefully demonstrates the U.S. Supreme Court’s narrow viewpoint:

To carry out this purpose of protecting derivative users, it is unnecessary to protect middlemen as well, and there is no indication whatsoever that Congress intended to do so. The majority, however, unaccountably rejects the position that the Exception should be construed only so broadly as is necessary to effectuate this undisputed legislative intent. It also ignores the accepted principle of statutory construction that an ambiguous statute should be construed in light of the statutory purpose. As the majority acknowledges, the principal purpose of the extension of the term of copyright and the concomitant termination provisions—to which the derivative-works clause forms an exception—was to benefit authors. Under the 1909 Copyright Act, copyright subsisted in two 28-year terms, with renewal available to the author at the end of the first term. The right of renewal was intended to allow an author who had underestimated the value of his creation at the outset to reap some of the rewards of its eventual success. That purpose, however, was substantially thwarted by this Court’s decision in *Fred Fisher Music Co. v. M. Witmark & Sons*. . . . As a result of that decision, an author might assign, not only the initial term of the copyright in his work, but also the renewal term. Thus, assignees were able to demand the assignment of both terms at the time when the value of the copyrighted work was most uncertain.

Id. at 184 (emphasis omitted).

¹⁹ U.S. CONST. art. I, § 8, cl. 8

²⁰ *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17 (2d Cir. 1998); Larry

appeared on the horizon, wherein the courts were called upon to interpret the meaning of sections 203(a)(5) and 304(c)(5) of the Act, which state that “[t]ermination of the grant may be effected *notwithstanding any agreement to the contrary*, including an agreement to make a will or to make any future grant.”²¹ It would seem apparent that this language was enacted specifically to overcome the problem confronting authors in *Fisher*, but the courts have refused to recognize such.

Two cases dealing with the copyright claimants of a deceased author’s N/T best summarize the issues: the first key decision, involving the interpretation of the statutory provision, “notwithstanding any agreement to the contrary”, was *Penguin Group (USA) Inc. v. Steinbeck*.²² There, author John Steinbeck died prior to the date on which the N/T for a number of his principal works could be sent. In his will, Steinbeck left his wife Elaine all of his copyrights; he also left each of his two sons from a prior marriage \$50,000 in trust.²³

In 1938, Penguin Group had acquired the exclusive publishing rights to Steinbeck’s principal works for the initial and renewal terms. Then, in 1994, Steinbeck’s widow, on the cusp of the date when a N/T could have been sent to Penguin, entered into a new agreement with Penguin terminating her late husband’s original 1938 publishing agreement and entering into a contract entitling her to increased royalties and other benefits.²⁴

The widow died in 2003, and she was survived by children and grandchildren of a prior marriage. Under her will, they (like their mother on the death of the author) inherited one hundred percent of the late author’s copyrights. By that time Congress had enacted the Sonny Bono amendment, which both enlarged the duration of pre-1978 copyrights to ninety-five years and, equally important, gave those entitled to send a N/T a new opportunity to do so provided “the author or owner of the termination right has not previously exercised such termination right.”²⁵

Steinbeck’s sons elected to send a N/T of their late father’s 1938

Spier Inc. v. Bourne Co., 953 F.2d 774 (2d Cir. 1992); *Bourne Co. v. MPL Comme’ns, Inc.*, 751 F. Supp. 55 (S.D.N.Y. 1990).

²¹ 17 U.S.C. §§ 203(a)(5), 304(c)(5) (emphasis added).

²² 537 F.3d 193 (2d Cir. 2008) (citing 17 U.S.C. § 304(c)(5)).

²³ Given that he died in 1968, \$50,000 in trust would, at the then current conservatively paid interest rate, equal \$3250.00, per year, per son. Given the value of any Steinbeck work, the reader can make his own judgment of the testator’s parental largesse when he executed his will.

²⁴ While the widow could have achieved these, or possibly greater rights from Penguin had she elected to send a N/T, she could only have done so if at least one of Steinbeck’s sons joined in the sending of the N/T. Such termination action would not only have reduced her share in the enlarged bouquet of royalties by fifty percent; but also it would have reduced the value of her bequest to her own children.

²⁵ 17 U.S.C. § 304(d).

publishing contract with the Penguin Group and a series of film and stage production contracts that constituted derivative works. The defendant argued that the 1938 agreement had been specifically canceled and superseded by the 1994 amendment entered into with Steinbeck's widow.²⁶ The district court found that since the 1994 agreement acknowledged the possibility of the widow exercising her right of termination, and that the agreement effectively stripped Steinbeck's natural sons of their termination rights, it was "an agreement to the contrary" and void.²⁷ The Second Circuit, however, reversed, and held that the 1994 Agreement between Elaine and Penguin terminated the 1938 agreement.²⁸ The court then perambulated through NY State law, which indicated that parties are free to terminate prior agreements.²⁹ The Second Circuit not only focused on authorized parties' rights to mutually terminate a prior agreement, but also on the inability of any of Steinbeck's statutory successors to exercise the termination right after the fifty-sixth year because the widow refused to share the benefits of termination with her stepsons.³⁰

To quote from the court's final admonition:

It should be noted that under our view, authors or their statutory heirs holding termination rights are still left with an opportunity to threaten (or to make good on a threat) to exercise termination rights and extract more favorable terms from early grants of an author's copyright. But nothing in the statute suggests that an author or an author's statutory heirs are entitled to more than one opportunity, between them, to use termination rights to enhance their bargaining power or to exercise them. See 17 U.S.C §304(d) (permitting exercise of termination right only "where the author or owner of the termination right has not previously exercised such termination right"). In this case, Elaine Steinbeck had the opportunity in 1994 to renegotiate the terms of the 1938 Agreement to her benefit, for at least some of the works covered by the agreement were eligible, or about to be eligible, for termination. By taking advantage of this opportunity, she exhausted the single opportunity provided by statute to Steinbeck's statutory heirs to revisit the terms of her late husband's original grants of licenses to his copyrights.³¹

As is clearly seen from his testamentary dispositions (and with due

²⁶ *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 200 (2d Cir. 2008).

²⁷ *Id.* at 203.

²⁸ *Id.* at 202.

²⁹ *Id.* at 200.

³⁰ *Id.* at 201.

³¹ *Id.* at 204 (citation omitted). The court "slips over" or purposely avoids the fact that Steinbeck's widow could not have unilaterally exercised her termination right, which required one of her two stepsons (the only lineal descendants of the deceased author) to join in the sending of the N/T.

respect to the late author's right of statutory succession), Steinbeck's relationship with his sons was less than benevolent. And, as in many similar situations, his widow appears to have emulated the pattern of her husband's last will, judging by the fact that at her death she bequeathed "her copyright interests in the Steinbeck works . . . to various testamentary heirs . . . but she specifically excluded [Steinbeck's sons] and their heirs."³²

In a fact pattern not too dissimilar from *Steinbeck*, the heirs of A. A. Milne—late author of the beloved *Winnie the Pooh* children's books—considered termination of a 1930 publishing contract entered into by their late father but instead, revoked his 1930 contract and entered into a new agreement with his publisher.³³ The 1930 agreement granted Stephen Slesinger, Inc. ("SSI") exclusive merchandising and other rights in the Pooh works for both terms of copyright. In turn, SSI entered into a 1964 agreement with Walt Disney Productions covering movie and merchandising rights.³⁴ The author's last will left his copyrights in trust for his wife during her lifetime, and on her death, to other beneficiaries including their son and granddaughter, the latter being the plaintiff and sole surviving heir.

Disney, fearing termination by Milne's surviving son, renegotiated a new agreement with the surviving son in 1983, wherein the latter agreed not to exercise his termination rights. The Court estimated that under the new agreement, the trust's revenue increased by hundreds of millions of dollars.³⁵

In 2002, taking advantage of the CTEA, the surviving statutory successor—Clare, the grandchild of the author—served a N/T and simultaneously assigned whatever rights she would reacquire to Disney³⁶ in order to eliminate SSI's interests and leave Disney with all rights of exploitation.

In opposition to Clare's declaratory action, SSI made the same arguments as to the ineffectiveness of the N/T as were propounded in *Steinbeck*; namely, that the 1983 contract with Disney was "an agreement to the contrary."³⁷

As in *Steinbeck*, the *Milne* court chose to honor the contract signed by the owners of the copyrights and perhaps viewed the party-plaintiffs as interlopers in a financially rewarding outcome to the creators or their immediate heirs. Whatever the rationale, the court's dismissal of "notwithstanding any agreement to the contrary" sets a bad precedent

³² *Id.* at 197.

³³ *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2008).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

for future owners of the termination right when confronted by a less rewarding financial picture. Note the language of the *Milne* court:

After more than 50 years of advancement of the Pooh works in the marketplace, their value was sufficiently demonstrated, and the 1976 Copyright Act provided Christopher a window for termination. The Pooh Properties Trust recognized the perceived right to terminate as a valuable bargaining chip, and used it to obtain an advantageous agreement that doubled its royalty share relative to SSI's share. Thus, the 1983 agreement exemplifies the increased bargaining power that Congress intended to bestow on authors and their heirs by creating the termination right under the 1976 Copyright Act. As the 1983 agreement appears to be the type expressly contemplated and endorsed by Congress, we do not consider it to be a prohibited "agreement to the contrary" under *section 304(c)(5)*.³⁸

Recall that in *Fisher*, Justice Frankfurter emphasized that it was not the role of the courts to address the compassionate treatment to be afforded to an author's heirs whose parent was unable to handle his affairs so as to protect their interests after death. But apparently what is true for the courts does not equally apply to Congress, which in both the 1909 and 1976 Acts explicitly determined who would inherit the benefit of the renewal term and the N/T where the author died before the statutory period for compliance. That Congress, and not the author, should decide who inherits their most valuable rights—particularly in an area of decedents' rights, which are in all other respects governed by state law—is likely inherent in the Constitution, affording the federal system exclusive control over this arena.³⁹

III. GAY MARRIAGE FACES DOMA

It is now appropriate to return to the legislation quoted at the beginning of this article, and in so doing, take note of the New York State law (and that of nine other sovereign states and the District of Columbia) that has given legal recognition to state sanctioned marriage

³⁸ *Id.* (emphasis added).

³⁹ U.S. CONST. art. I, § 8. In a possibly bold move to enforce the Right of Termination, under 17 U.S.C. § 203(a)(3), the U.S. District Court for the Southern District of California, held that the Defendant-Composer's N/T was effective against Scorpio Music S.A. et al. notwithstanding that Defendant alone was the terminating party of a joint work in which his collaborator, who had signed a separate contract with plaintiff, failed or refused to join in the Notice of Termination. *See Scorpio Music S.A. v. Willis*, No. 11-CV-1157- BTM (RBB), 2012 WL 1598043 (S.D. Cal. May 7, 2012). The Court chose to interpret the statutory language "[in] the case of a grant executed by two or more authors," 17 U.S.C. § 203(a)(1), as requiring a majority to join in the N/T only where both are signatories to the same original grant (i.e. contract with their publisher). *Id.* at *2. The Court's rationale is one of the few times that authorial termination rights were given paramourcy over the grantee (possibly a belated atonement by a California district judge for the Ninth Circuit's decision in the ZZ Tops case, *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950(9th Cir. 1995), requiring an Act of Congress to overturn its catastrophic effect).

of same-sex couples.⁴⁰ While *Steinbeck* involved children of the late author's prior marriage, survived by a spouse of a third marriage (a potentially acrimonious fact pattern for any trusts and estates attorney), let us posit a fact pattern that, given the inevitable expansive nature of gay marriage legislation, will undoubtedly bear fruit.

Suppose an author (residing in New York State) of a series of successful novels, still in print, was married in 1980 and had two sons. He divorced his wife in 2000, and shortly thereafter, began a relationship with a male partner. The author died in 2005 before the date when a N/T could be sent to the publishers of his novels, leaving his two sons as the only legally recognized statutory successors to the termination right. The author's will left his copyrights and residuary estate to his male partner. While the partner will continue to enjoy the royalties flowing from the deceased author's copyrighted works, the partner has no legal right to send the N/T, which would vest in the surviving sons on the author's death. Accordingly, if the sons timely send the N/T on the effective date of termination of copyright on each work, they will acquire one hundred percent of the benefits from those copyrights, and thus, deprive the partner of all royalties.

Now, posit the same fact pattern except that the author dies in 2012 after he marries his partner in New York following the enactment of the Marriage Equality Act.⁴¹ If the married partner is recognized as the "widow," then he, along with the children, is empowered to send the N/T.⁴²

The 1976 U.S. Copyright Act defines "widow" as follows: "The author's 'widow' or 'widower' is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried."⁴³

Section 304(c)(1) requires that the widow and at least one son must join in sending the N/T failing which no one can terminate the preexisting grants of copyright.⁴⁴ The foregoing would similarly apply in the absence of a will to the next of kin of the deceased author who, given the same facts, would be the surviving "widow" and "next of kin."

If the posited events all occurred in New York State where the

⁴⁰ As of this writing, same sex marriage is legally recognized in Maine (2012), Maryland (2012), Massachusetts (2003) Washington (2012), New York (2011), The District of Columbia (2010), New Hampshire (2010), Iowa (2009), Vermont (2009), Connecticut (2008), and Massachusetts (2004). See *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states> (last visited December 27, 2012).

⁴¹ McKinney's DRL § 10-a, 2011 Sess. Law News of N.Y. Ch. 95 (A. 8354) (McKinney's).

⁴² 17 U.S.C. § 304(c)(2)(A) (2006).

⁴³ 17 U.S.C. § 101.

⁴⁴ *Steinbeck v. McIntosh*, 433 F. Supp. 2d 395, 400 (S.D.N.Y. 2006) ("to exercise a termination right requires a simple majority of the possessors . . . no termination right [can] be exercised [where] neither side ha[s] 51%.") (overruled on other grounds).

author, widow, sons, and publisher resided and did business, then under both New York law and the Copyright Act's definition of widow, the sons along with the widow would be empowered to exercise the termination right. If no son agreed to join in the sending of the N/T, then the contract with the original publisher would remain in effect for the balance of its contractual term. This means that if the sons were excluded from the author's will, or, like the Steinbeck children, received a diminished interest, the widow would succeed to his late partner's interest under the late author's will and take one hundred percent of the royalties. In such case, it would be in the widow's interest not to join in the sending of the N/T except that: (1) the publisher would have no incentive to improve the terms of the original publishing agreement;⁴⁵ (2) the publisher would be under no compulsion to pay a signing bonus to secure a new contract; and (3) the widow would receive no benefits beyond those in the late author's original publishing contract other than all of the royalties—to the sons' exclusion.

If the N/T were timely sent, while the sons would reap fifty percent of the continuing revenue flow, the publisher would undoubtedly sweeten the royalty rate, possibly pay a signing bonus, and possibly cede rights previously controlled by it to the terminating parties.⁴⁶

But what are the rights and interests of the parties if under the same fact pattern, the surviving widow, along with the deceased author, resided in New York, and the surviving children and the publisher (e.g., a Pennsylvania publishing house) were residents or were incorporated or did business in a state that refused to recognize same-sex marriage? The sons would argue that since that state did not recognize gay marriage, in that it was antithetical to the principles of that sovereignty, the sons alone are the statutory successors entitled to send the N/T and succeed to the royalties, and that the publisher was obliged to pay them as the statutory successors. The surviving widow's argument would be that since the Copyright Act defines an author's widow as the surviving spouse under the law of the deceased author's domicile, neither son could terminate prior grants without the agreement of the widow.⁴⁷

Generally, each state gives full faith and credit to the laws of its sister states. For example, in *Debra H. v. Janice R.*, Judge Read set forth the standard of "comity," expressing the views of New York's highest

⁴⁵ See generally *Steinbeck v. McIntosh*, 433 F. Supp. 2d 395 (S.D.N.Y. 2006); see also *Milne ex rel Coyne v. Stephen Slesinger Inc.*, 430 F.3d 1036 (9th Cir. 2008).

⁴⁶ As an example: in denying John Steinbeck's son and grandson the right to terminate a prior (1938) grant—see *supra* notes 22-31 and accompanying text—the Second Circuit cited the benefits flowing to Steinbeck's widow under the 1994 agreement to wit: an increased annual advances guarantee and increased royalties. See *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 196 (2d Cir. 2008).

⁴⁷ See 17 U.S.C. § 101.

court, whose broad sweep this author believes is the essence of the concept of “full faith and credit.”⁴⁸ As the court explained,

The doctrine of comity “does not of its own force compel a particular course of action. Rather, it is an expression of one state’s entirely voluntary decision to defer to the policy of another’s. Such a decision may be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of co-operative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical.

New York’s “determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict.” . . . Even in the case of a conflict, however, New York’s public policy may yield “in the face of a strong assertion of interest by the other jurisdiction.”⁴⁹

To further compound the issue, does DOMA, which precludes any federal law from recognizing gay marriage, supersede the Copyright Act’s definition of widow, which is governed by the law of the decedent’s domicile? This same issue will arise if an author dies intestate.

Stieg Larsson, a Swedish resident whose *Millennium Series* sold over sixty-five million copies by 2011, was born in 1954 and died at age fifty. His last will was discovered in May 2008, but since it was not witnessed, his father and son inherited all of his royalties under intestacy. His long-term partner, Eva Gabrielsson, inherited nothing. According to Gabrielsson, the deceased had little contact with his father. Such a fact pattern demonstrates the harsh results that can arise where, for reasons best known to the author, he fails to take advantage of benefits flowing from laws that authors are often unaware of without education by counsel.

We do not cite these facts to draw comparisons to the effect of the N/T under state laws that do not recognize gay marriage, but rather to revisit the language of Justice Frankfurter in *Fisher* that it is not the duty of either the courts or legislatures to protect authors who lack either business or common sense to sufficiently protect those who are closest to them.

DOMA includes two key provisions, both of which undercut the validity of same-sex marriage. First, DOMA provides that no state can be forced to recognize a same-sex marriage that is otherwise valid in another state. At first blush, it appears as though this could raise a classic conflicts-of-law problem. For example, which law should apply

⁴⁸ 14 N.Y.3d 576, 600.

⁴⁹ *Id.* (citing *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980)).

in a dispute over termination rights between a Pennsylvania publisher, whose state refuses to recognize same-sex marriage, and a same-sex widow from New York? The answer is New York law, but not because of any choice-of-law analysis, but rather because federal law preempts state law, and the Act explicitly states that the law of the decedent author's domicile applies. Accordingly, DOMA's first provision does not impact the Act.

DOMA's second provision, however, arguably affects the Act directly by providing that the definition of marriage, wherever it is implicated in federal law, is between only one man and one woman. DOMA states that,

[i]n determining the meaning of *any Act of Congress*, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and *the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.*⁵⁰

Since DOMA defines "spouse" as only a person of the opposite sex and the Copyright Act defines widow as a decedent's surviving "spouse," there is a strong argument to be made that DOMA implicates, and directly collides with, the language of the Copyright Act, at least in situations where the state law permits individuals of the same sex to become each other's spouse.

When possible, federal statutes will be interpreted to exist harmoniously unless there is a clearly expressed congressional intention that one repeals the other.⁵¹ Yet, it is difficult to argue that DOMA does not repeal the Act's definition of widow. The Copyright Act is indeed an "Act of Congress." Moreover, as stated earlier, in situations where a decedent author was a party to a same-sex marriage and was domiciled in a state that recognizes such marriage at his or her death, DOMA and the Act appear to be in irreconcilable conflict.

Since its enactment, courts have held that DOMA very clearly applies to all federal acts. In *Gill v. OPM*, the District Court of Massachusetts held that despite the fact that the Federal Employee Health Benefits ("FEHB") statute clearly provided benefits to spouses, DOMA was equally clear, and "[i]n the face of such strikingly unambiguous statutory language . . . this court cannot plausibly interpret the FEHB statute to . . . provide health benefits to same-sex couples . . ." ⁵² *Gill* also describes how other acts, such as those governing the Flexible Spending Arrangement Program for federal

⁵⁰ 1 U.S.C. § 7 (emphasis added).

⁵¹ See *Branch v. Smith*, 538 U.S. 254, 273 (2003).

⁵² *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 385–86 (D. Mass. 2010).

employees, Social Security, and the Internal Revenue Code are affected by DOMA.⁵³

Finally, in January 1997, the General Accounting Office issued a report clarifying the scope of DOMA's effect⁵⁴ stating that over one thousand federal laws were affected by DOMA and specifically mentioned sections 101, 203, and 304 of the U.S. Copyright Act.

It is worth noting that in all of the published opinions challenging DOMA, the United States sought to deny a federal benefit to a same-sex spouse. To like effect, see *Windsor v. United States*⁵⁵, in which the Second Circuit held that the plaintiff, the surviving spouse of a same-sex couple married in Canada in 2007, was entitled to the benefits of spousal deduction for estate taxes under 26 U.S.C. §2056-(A), notwithstanding Section 3 of DOMA. The Court of Appeals, finding that states have the absolute right to prescribe conditions for marriage, found that none of the rationales underlying DOMA are sufficient to overcome court "intermediate scrutiny" at a level required to ban entitlement under state law, failure of which becomes an "unprecedented intrusion 'into . . . state regulation.'"⁵⁶ The Copyright Act, however, is a statute meant to govern purely private affairs, not the dispensation of federal benefits.

What purported interests for enacting DOMA could be found to pass any level of equal protection scrutiny in the copyright context? Many authors are unaware that they have termination or renewal rights in the first instance. For those who know about such rights, the notion that they would have avoided entering into a same-sex marriage if they had known further that those rights would not descend to their same-sex spouse, is highly unrealistic. Moreover, the government's interest in preserving scarce resources, which arose in some cases,⁵⁷ is not implicated in the copyright context because the government is not a party to the action and would suffer no economic burden of enforcement of the Copyright Act's definition of widow.

It is not the goal of this Article to weigh whether DOMA relates to the Fifth Amendment's Due Process Clause, which applies the Equal Protection Clause to the federal government. Suffice it to say, every court called upon to pass judgment on this law found it inconsistent

⁵³ *Id.* at 380–83. See also *Mass. v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (describing how DOMA affected the eligibility of same-sex spouses' burial in a military cemetery); *In re Balas*, 449 B.R. 567 (C.D. Cal. 2011) (where the United States argued DOMA's application to the federal bankruptcy statute).

⁵⁴ *Gill*, 699 F. Supp. 2d at 379.

⁵⁵ 699 F.3d 169 (2d Cir. 2012).

⁵⁶ *Id.* at 186.

⁵⁷ The issues that arise under Title 17 of the United States Code and which are the subject of this article all deal with the parties entitled to share in royalties following the Author's demise. Hence the U.S. government has no monetary gain or loss as a result of "Gay Marriage" Acts.

with the principles of Equal Protection.⁵⁸ And on February 23, 2011, Eric Holder, Attorney General of the United States, advised Congress that the Obama Administration viewed DOMA's definition of marriage unconstitutional and that it would not seek to enforce DOMA in the courts,⁵⁹ but, of course, the U.S. Supreme Court will ultimately have the final say on the matter.⁶⁰

Assuming that DOMA did not exist, or was held unconstitutional, does the Full Faith and Credit clause impact one state's refusal to recognize a marriage in another state that has enacted recognition legislation?

Marriage is not the sort of decree that states are constitutionally required to give full faith and credit. Article IV, Section 1 of the U.S. Constitution states that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other State."⁶¹ The law governing the validity of a marriage contract is generally the law of the state where the marriage took place.⁶² A reviewing court need not apply the law of that state, because more than one state may have a strong interest in the marriage.⁶³ Indeed, "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."⁶⁴ Thus, states have never been constitutionally required to recognize a marriage that is legally binding in a sister state. If, for example, a state required the age limit for marriage to be seventeen, that state need not recognize a marriage between two fourteen-year-old domiciliaries despite its validity in the state where it was performed. Similarly, there is no constitutional requirement that states recognize same sex-marriages performed in other states.

The policy of full faith and credit requires only that the denying state provide a valid reason for its choice. In *Hughes v. Fetter*,⁶⁵ the U.S. Supreme Court held that the Wisconsin state legislature could not prohibit its courts from hearing a wrongful death claim simply because the death occurred in Illinois without stating a reason why—certainly

⁵⁸ See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dept. of Health & Humane Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *In re Balas*, 449 B.R. 567 (C.D. Cal. 2011); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

⁵⁹ Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* 2011 WL 641582 *3–4. See also Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 13, 2011), <http://www.nytimes.com/2011/02/24/us/24marriage.html>.

⁶⁰ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted* 133 S. Ct. 786 (2012); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

⁶¹ U.S. CONST. art. IV, § 1.

⁶² See, e.g., *In re Estate of May*, 305 N.Y. 486, 490 (1953).

⁶³ *Id.*

⁶⁴ *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

⁶⁵ *Hughes v. Fetter*, 341 U.S. 609 (1951).

not where the court could still hear wrongful death claims and could still apply Illinois law in that and other contexts.⁶⁶ Accordingly, if a state's public policy prohibited its courts from recognizing a same-sex marriage and provided no reason for doing so, the statute would likely be unconstitutional under the reasoning of *Hughes*. If, however, the state provided a legitimate reason for not recognizing the marriage, it likely would pass constitutional muster under the reasoning in *Hughes*,⁶⁷ and the state need not recognize the marriage.⁶⁸

In light of the foregoing, the constitutional question that arises where a second state did not recognize the same-sex marriage of another state would be one of due process. The constitutional inquiry would be whether the state whose law was applied had a significant enough connection to the parties and occurrence or transaction so as to prevent arbitrariness or fundamental unfairness.⁶⁹

While states need not give full faith and credit to marriages performed in other states, they are bound to recognize *judgments* pertaining to those marriages. Judgments are expressly covered by the Full Faith and Credit clause of the Constitution. Moreover, even if a state is incorrect in its application of law, a final judgment must still be given full faith and credit.⁷⁰ The only way to attack the judgment of a court is through the appeals process. Judgments cannot be attacked collaterally by bringing the same suit in another state.⁷¹

In the landmark case of *Williams v. North Carolina*, the U.S. Supreme Court held that a marriage dissolution judgment must be given full faith and credit in other states.⁷² The Williamses were married and domiciled in North Carolina. Mr. Williams traveled to Nevada where he established domicile under Nevada law and sought a divorce from Mrs. Williams, who never left North Carolina. The Nevada court granted Mr. Williams the divorce and on appeal the U.S. Supreme Court held that while North Carolina policy might cut against recognition of the judgment, North Carolina was nevertheless bound to recognize it. The Court held similarly in *Estin v. Estin*, finding that a Nevada marriage dissolution between New York domiciliaries must be given

⁶⁶ *Id.* at 613.

⁶⁷ *See id.* at 618.

⁶⁸ The rationale underlying this belief rests on the language of New York's highest court in *Debra H. v. Janice R.*, 14 N.Y.3d 576, 600, which emphasizes that "comity," while not compelling a particular course of action, reflects an expression of hope for reciprocity in future cases, where a forum's interests are more critical. *Id.* The flexibility in this interpretation of "full faith and credit," gives leeway to courts that are called upon to rule on issues which, while differing from their own legislative policies, are not necessarily anathema thereto.

⁶⁹ *See generally* *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

⁷⁰ *See* *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

⁷¹ *Id.*

⁷² *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

full faith and credit in New York.⁷³

Whether divorces between same-sex couples must be recognized is less clear. It would *ab initio* appear that they would be recognized even if not constitutionally required. If a state does not recognize same-sex marriage, it would make little sense for it not to recognize a same-sex couple's divorce judgment. But, the second state might feel that recognition of the divorce grants implicit recognition to the marriage.⁷⁴ And because divorce decrees usually involve incidents such as awards for support, the second state might choose not to recognize either the divorce or the marriage and refuse to enforce the support award. In light of *Williams* and its progeny, however, failure to recognize the divorce judgment is probably unconstitutional even if failure to recognize the marriage is not.⁷⁵

Existing case law makes it appear as though judgments pertaining to same-sex marriages are entitled to full faith and credit by sister states. For example, it is possible that where a same-sex couple was married in a state that recognizes it, such as New York, the couple could seek a declaratory judgment pronouncing the validity of their marriage. If they did, it may very well be that the Constitution requires a second state to recognize that judgment and thus the marriage. This method, however, is yet to be tested.

Other judgments relating to same-sex marriage have been held to be entitled to full faith and credit despite a state's strong policy against the initial marriage. The best example available is the one between Janet and Lisa Miller-Jenkins, who entered into a civil union in Vermont and lived in Virginia for several years.⁷⁶ While in Virginia, Lisa gave birth to a child after being impregnated through artificial insemination. Janet was fully aware of this and later became an adoptive parent of the child. Shortly after the birth, both women and the child moved to Vermont. While in Vermont, the women decided to separate, and Lisa moved back to Virginia with the child. Thereafter, Lisa filed a petition to dissolve the civil union in a Vermont family court. The family court dissolved the civil union and issued a

⁷³ See *Estin v. Estin*, 334 U.S. 541, 549 (1948).

⁷⁴ This is slightly different than *recognizing* a divorce judgment; at least one court refused to *grant* a divorce to a same-sex couple for these very reasons. In *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), a same-sex couple, legally wed in Massachusetts and domiciled in Rhode Island, sought a divorce in Rhode Island, which did not recognize same-sex marriage. The court held that because it only had jurisdiction to grant divorces to married people and since it did not recognize same-sex couples as married, it could not grant the divorce.

⁷⁵ Note that even if the second state is required to recognize the marriage dissolution, it may not have to give full faith and credit to an attendant support award if it determines the award to be non-final. See *Worthley v. Worthley*, 44 Cal.2d 465, 283 P.2d 19 (1955) (holding that a modifiable decree can be adjusted by a second, interested state).

⁷⁶ While a "civil union" is not technically a "marriage," it is, for the intents and purposes of this article, the same thing.

temporary order on parental rights and responsibilities that granted a type of joint custody requiring that both parties be granted contact with the child.⁷⁷

After that judgment had been entered, Lisa disobeyed the order by denying Janet any parental contact and filed a petition in a Virginia court to establish the parentage of the child.⁷⁸ The Vermont court responded by reaffirming its jurisdiction over the case and made clear that the temporary order for parent-child contact be followed.⁷⁹ Despite discussions between the two courts, an “interstate parental-rights contest ensued.”⁸⁰ On September 2, 2004, the Vermont court found Lisa in contempt for willful refusal to comply with the temporary visitation order. On September 9, the Virginia court held that it had jurisdiction to determine the parentage and parental rights.⁸¹ The Virginia court further held that any parental rights that Janet had were based on rights created under Vermont’s civil union laws, which were not recognized in Virginia.⁸² Accordingly, on October 15, the Virginia trial court held that Janet had no parental rights with respect to the child and awarded sole custody to Lisa, which Janet timely appealed.⁸³

On November 17, 2004, the Vermont family court held that both Janet and Lisa had parental interests in the child and, on December 21, it issued a ruling refusing to give full faith and credit to the Virginia parentage decision.⁸⁴ Lisa appealed.

Upon Lisa’s appeal, the Vermont Supreme Court held that the civil union between Lisa and Janet was valid and that the family court had jurisdiction to dissolve it.⁸⁵ Further, it held that the family court had *exclusive* jurisdiction over the custody determination under the Parental Kidnapping Prevention Act (“PKPA”).⁸⁶ Moreover, “[i]n order for a [state] court to exercise jurisdiction consistent with the PKPA, it must have jurisdiction under [state] law”⁸⁷ Because Vermont had exclusive jurisdiction under the PKPA, the court held that Virginia violated the PKPA since it never had jurisdiction to make a parentage determination.⁸⁸ Therefore, the Vermont family court was under no

⁷⁷ *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956 (Vt. 2006).

⁷⁸ *Id.* at 956.

⁷⁹ *Id.* at 956–57.

⁸⁰ *Id.* at 957.

⁸¹ *Id.* at 957.

⁸² *Id.*

⁸³ Indeed Janet’s appeal of the Virginia determination was crucial. If she had not appealed, the Vermont Supreme Court would likely have been constitutionally required to give full faith and credit to the judgment even if it was wrong. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

⁸⁴ *Miller-Jenkins*, 912 A.2d at 957.

⁸⁵ *Id.* at 956.

⁸⁶ *Id.*

⁸⁷ *Id.* at 958 (citing 28 U.S.C. § 1738A(c)(1) (2000)).

⁸⁸ *Id.* at 958.

obligation to give full faith and credit to the Virginia parentage decision.⁸⁹

Lisa argued that because a civil union is essentially a marriage, and because the family court's determination was based on rights obtained under that marriage, Virginia did not need to give full faith and credit to the Vermont decision despite the PKPA. She also argued that DOMA, which explicitly allows states to disregard same-sex marriages valid in other states, superseded the PKPA.⁹⁰ The court dismissed that argument, finding that the sole purpose of DOMA is to "provide an authorization *not* to give full faith and credit in the circumstances covered by the statute," as opposed to the PKPA, which requires a state to give full faith and credit to the decision of another state's court.⁹¹ Inasmuch as DOMA did not positively require that full faith and credit be given to the Virginia judgment—since this case was not about recognition of the marriage, but rather about a custody determination—the PKPA alone controlled.

After the Vermont Supreme Court's decision, the Virginia Court of Appeals heard Janet's appeal of the trial court decision and found that "the trial court erred in failing to recognize that the PKPA barred its exercise of jurisdiction . . . [a]nd remand[ed] [the] case with instruction to grant full faith and credit to the . . . orders of the Vermont court."⁹² The court further held that "it is well settled that the PKPA preempts any conflicting state law."⁹³

Lisa again argued that DOMA enabled the Virginia trial court to ignore the Vermont family court judgment. In disagreeing, the Virginia court held that whether Virginia recognized the civil union was irrelevant; the only question was whether Virginia could deny full faith and credit to the Vermont custody order in light of the PKPA. It held that by placing herself before the Vermont family court in her initial filing, Lisa's choice of forum and the PKPA "precluded the courts of [Virginia] from entertaining countervailing assertions and prayers."⁹⁴ Accordingly, because the PKPA determines which state has exclusive jurisdiction, whether another state would otherwise recognize the initial marriage out of which the controversy is borne, is inapposite.

Miller-Jenkins is particularly relevant for our purposes, especially when we analyze the situation as if DOMA did not exist. In both cases we have a federal act: either the Copyright Act or the PKPA. And both Acts, in some part, defer to state law. The PKPA states that exclusive

⁸⁹ *Id.* at 959.

⁹⁰ *Id.* at 961.

⁹¹ *Id.* at 962.

⁹² *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006).

⁹³ *Id.* at 334.

⁹⁴ *Id.* at 337.

jurisdiction is decided by the law of the state; and the Copyright Act states that who qualifies as a widow is defined by the law of the state where the author was domiciled at death. In both cases, the applicable state law is chosen by the Act. The federal government essentially conducts the choice-of-law analysis for the reviewing court.

In *Miller-Jenkins*, it did not matter that Virginia would not otherwise recognize a same-sex marriage because the judgment in question was not about the marriage but about the custody determination. The PKPA preempted any contrary state rules that Virginia might apply to the case. The PKPA provides that once Vermont determines it has jurisdiction over the custody determination, it does so at the exclusion of all other states and that those other states must give full faith and credit to Vermont's judgment as a matter of federal law.

Suppose a judgment were rendered in New York, finding a same-sex spouse to be a deceased author's widow entitled to a portion of the author's termination right under the language of the Copyright Act, to the detriment of the author's only surviving son, a resident of Virginia who would otherwise be entitled to one hundred percent of the author's termination right. The son appeals in New York and concurrently seeks a declaratory judgment in Virginia, which does not recognize same-sex marriage. Would the Virginia court be allowed to ignore the New York judgment? The answer appears to be no for two reasons. First, judgments are entitled to full faith and credit under the Constitution. Second, as the PKPA preempted in *Miller-Jenkins*, the Copyright Act itself seems to preempt any conflicting state law. The Copyright Act clearly states that who enjoys widow status is determined by the law of the state where the author was domiciled at death.

Further, widow status is arguably no more based on marriage than parentage was in *Miller-Jenkins*. One could argue that the parentage inquiry is entirely different than the widow status inquiry. One need not ever be formally married to become a parent. But, in states that recognize common-law marriage, the same can be said for establishing widow status. Moreover, the inquiry into whether two people are married is entirely different than the inquiry into whether a surviving spouse is a widow, in no small part because one of the spouses must be dead. Surely, the death of one party to a prospective marriage would prevent it from taking place. To be sure, there are obvious differences between parentage and widow status—namely some form of legally recognizable marriage is a fundamental prerequisite to establishing widow status. Still, without DOMA, the Constitution appears to plainly require any *judgments* granting a same-sex widow the termination right

to be given full faith and credit in sister states.⁹⁵

CONCLUSION

While it is accepted law that the Copyright Act is territorial in its scope, nevertheless the Act's definition of widow is the "spouse under the law of the author's domicile." Hence any gay author, married as of his death, who had been published in the United States but domiciled abroad in a country that recognizes same-sex marriage would find that his widow would be entitled to exercise rights of termination as described above

This article seeks to recognize a new class of previously disenfranchised widows who, having entered into a same-sex marriage, will (in the states that recognize it) be able to secure the benefits of the termination right heretofore unavailable. However, just as the federal courts in interpreting provisions of the Copyright Act affecting renewal rights and termination rights have often chosen to rely on contract law, those tribunals may now turn to the topic at hand in so interpreting full faith and credit as to diminish, if not eradicate, a right which was born in 2004 in Massachusetts.

⁹⁵ Provided, of course, that the rendering court had jurisdiction in the first place.