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COPYRIGHT LAW ALERT

DOMA DECISION IMPACTS STATUTORY SUCCESSION RIGHTS TO LITERARY AND ARTISTIC WORKS

The Supreme Court decision requiring the Federal government to give married same sex couples the same rights as enjoyed by heterosexual married couples under Federal law, so long as the laws of their state legally recognize the marriage, will have an immediate and direct effect on ownership of artistic and literary property protected by copyright. Copyright protects the property rights of writers, artists, photographers, graphic designers, songwriters, choreographers, architects and certain performers and filmmakers in their creative works. The protection continues for an additional seventy years following the death of the creator, for works created since 1978, or for 95 years after the copyright was secured for works created after 1923 and before 1978.

Recapture of rights protected by copyright:

Because the true value of a literary or artistic property may not have been realized by the original creator, the law allows for recapture of rights protected by copyright after specified periods. The statute, also, specifies who may exercise these rights, if the original creator has died. By law, the rights pass to the surviving "widow or widower" and children or grandchildren of any deceased child, at the time the rights vest, without regard to bequests made by the deceased artist or writer. The right to terminate a grant does not pass to the executor under a will, or to heirs, unless there is no surviving widow, widower or children. Indeed, statutory termination rights have been exercised by disinherited children or grandchildren to oust other beneficiaries of literary and artistic estates and trusts.

The result of the June 26, 2013 Supreme Court decision:

As a result of the Supreme Court's decision, same sex spouses now share copyright termination rights, which previously belonged solely to the children of a prior heterosexual marriage or other heirs, in the absence of children. The change in law applies automatically to same sex widows and widowers, whose spouses die or died in the thirteen states where same sex marriage is currently recognized, including New York and California. No further action by Congress or the Court is required. The decision only required the Federal government to recognize the definition of marriage under state law. Another section of the Defense of Marriage Act permits states to refuse to recognize same sex marriages celebrated in other states or countries. Unless or until this provision is also invalidated, surviving same sex spouses who are not considered "widows or widowers" under their states' laws will not be "widows or widowers" for purposes of copyright succession rights.

What should creators of literary and artistic works and beneficiaries of such estates and trusts do?

The time to exercise the right to terminate or recapture rights under copyright are complex and vary depending on when the work first secured copyright protection or the grant was made. The right, however, may be lost, if not timely exercised. For example, a grant of rights made by the author of a work after January 1, 1978 can be

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terminated between 35 to 40 years thereafter, provided that a notice is served by the widow or widower, if there are no children, or the widow or widower and at least one child, if there are children, within 25 and 38 years after the date of the grant. Other provisions provide for termination of agreements relating to works for which copyright protection was secured prior to 1978 at 28, 56 or 75 years following the date copyright was first secured. If the right is not exercised at the proper time, it is lost.

Since the ability to recapture rights under copyright are complex and require timely action, owners of property protected by copyright, same sex spouses, children and beneficiaries of trusts and estates holding economic interests in artistic and literary property should seek legal counsel for guidance on how the rules may affect their interests.

We are available to provide counsel concerning the issues related to the subject matter expressed in this Alert, as well as other copyright, intellectual property and trusts and estates law succession-planning issues. For additional information, please contact one of the attorneys named below or the attorney with whom you have a primary relationship.

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