HELP! FIXING THE PROBLEM OF COPYRIGHT TERMINATION INCONSISTENCIES THROUGH PUBLIC AND PRIVATE INTERNATIONAL LAW

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ABSTRACT

Copyright law has transitioned from a primarily domestic area of law to an international matter over the past century. Today, the transfer or sale of a single copyrighted song can implicate several states' domestic laws and be subject to competing terms of protection and interpretation. This Paper explores one specific aspect of international copyright law: an author's right to termination. Several states give authors of copyrighted material the ability to withdraw or terminate prior transfers of their copyrighted material in order to secure moral or economic interests in their own work. However, not all states recognize a right to termination or withdrawal.

Under today's fragmented global copyright regime, the problem of termination inconsistencies arises when parties to a contract for the transfer of copyrighted material choose a law to govern their contract that does not recognize an artist's right to terminate or withdraw the transfer, but the contract has a close connection to a state whose law does recognize termination or withdrawal rights. This Paper argues that countries that protect termination rights should amend their domestic copyright laws in order to trigger key exceptions to party autonomy under choice of law conventions, and that the Berne Convention for the Protection of Literary and Artistic Work should be amended to incorporate termination rights.

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I. INTRODUCTION: THE PROBLEM OF TERMINATION INCONSISTENCIES

The Beatles' 1965 song "Help!" tells the story of a young John Lennon seeking help in adjusting to the pressures of "Beatlemania."[1] Lennon would have been well-served if the help he found was in the form of a lawyer who could counsel him and his bandmates on the various copyright transfers that the Beatles would make early in their career. George Harrison, reflecting on those early contracts, stated, "[i]f we'd known in 1962/3 what we know now, or even what we knew back in 1967, it would have made a real difference . . . if only we had known what was happening . . . ."[2]

1. *See 500 Greatest Songs of All Time*, ROLLING STONE (Apr. 7, 2011), http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/the-beatles-help-20110525 ("'Subconsciously, I was crying out for help. I didn't realize it at the time . . . .' Overwhelmed by Beatlemania, Lennon was . . . already expressing nostalgia for his lost youth.").

2. THE BEATLES, ANTHOLOGY 98 (Genesis Publications eds., 2000).

Young artists like the Beatles often sign away rights to their copyrighted songs without knowing exactly to what they are agreeing.[3] The Beatles were so eager to sign their first major record deal, after years of playing in small Liverpool night clubs, that they would agree to any contract that promised fortune and fame.[4] Many of the Beatles' early contracts are still in force today.[5]

Some states' domestic copyright laws address the problems and inequities that occur as a result of up-and-coming artists' copyright contracts (like the Beatles') by giving artists a right to terminate or withdraw prior transfers of their work. The U.S. Copyright Act of 1976,[6] for example, gives authors of copyrighted work the right to terminate prior assignments after a set period of time passes from the initial transfer.[7] Paul McCartney recently invoked this U.S. termination right in a dispute over dozens of Beatles songs currently owned by Sony/ATV Music Publishing.[8] However, only a handful of countries, including France, Germany, Italy, Spain, and the United States, recognize a right to terminate or withdraw copyright transfers.[9]

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3. *See* Eli Attie, *Did the Beatles Get Screwed?*, SLATE MAG. (Mar. 4, 2013, 2:25 PM), https://slate.com/culture/2013/03/the-beatles-start-northern-songs-was-it-really-a-slave-contract.html ("[I]t's believed that Lennon and McCartney didn't even read [the first major Beatles publishing agreement].").

4. *See* THE BEATLES, ANTHOLOGY, *supra* note 2, at 98 ("[The Beatles] were desperate to get a deal. It's like any young novelist who just wants to be published . . . they wouldn't care what the deal was, so long as they could say to their friends, 'Oh, my new book's coming out' . . . .").

5. Sir Paul McCartney recently settled a claim with music publisher Sony/ATV over the contractual rights to more than 260 Beatles songs. *See* Jonathan Stempel, *Paul McCartney Settles with Sony/ATV Over Beatles Music Rights*, REUTERS (June 30, 2017, 12:34 PM), https://www.reuters.com/article/us-people-paulmccartney/paul-mccartney-settles-with-sony-atv-over-beatles-music-rights-idUSKBN19L2ET.

6. Copyright Act of 1976, 17 U.S.C. § 101 (2012).

7. *See id.* at § 203(a) ("In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright . . . is subject to termination . . . .").

8. McCartney recently brought action against Sony/ATV, the current owners of early Beatles copyrights, after Sony/ATV failed to recognize McCartney's right to terminate the initial transfer of Beatles copyrights under U.S. copyright law. McCartney and Sony/ATV reached a confidential settlement. *See* Stempel, *supra* note 5.

9. *See* PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT 367 (3d ed. 2013) ("Only a small number of countries, including France, Germany, Italy, and Spain . . . grant authors an explicit moral right to withdraw their work from circulation . . . . The U.S. Copyright Act's termination of transfer provisions roughly approximate the civil law right of [withdrawal] . . . .").

Copyright law has transitioned from a primarily domestic issue to an international matter throughout the twentieth century.[10] Accordingly, a sale or transfer of rights to a single song can implicate laws in several countries under this globalized scheme.[11] Copyright sales and transfers are accordingly subject to potentially competing domestic laws.

This Paper explores one particular issue that arises in global copyright law: termination inconsistencies. Termination inconsistencies exist when parties to a contract for the transfer of copyrighted material choose a law to govern their contract that does not recognize an artist's right to terminate or withdraw the transfer, but the contract has a close connection to a state whose law does recognize termination or withdrawal rights.

A recent case in the High Court of Justice in England (English High Court), *Gloucester Place Music Limited v. Le Bon*,[12] highlights the problem of termination inconsistencies. *Gloucester Place* centered around copyright transfers made between members of the band Duran Duran and the band's music publisher, Gloucester Place Music Ltd. (Gloucester Music). The transfers were made through contracts that contained English choice-of-law clauses and included some of the band's U.S. copyrights.[13] A termination inconsistency arose when the band attempted to terminate the transfer of the U.S. copyrights under U.S. copyright law,[14] which, unlike English law,[15] recognizes termination rights.[16] The Court held that Duran Duran was barred from using U.S. termination rights because of the contract's English choice of law provision.[17] *Gloucester Place* has already

10. *See* Dave Lang, *Copyright and the International Music Industry, in* MUSIC AND COPYRIGHT 31-32 (Simon Frith ed., 1993) (stating that the success of the Beatles may have contributed to the globalization of music copyright law: "[t]he success of the Beatles and other performers in the 1960s significantly increased the share of world record sales taken by Anglo-American performers and songwriters . . . . Coinciding with this cultural change, US-owned recording companies took on an international role in the 1960s and 1970s.").

11. *See id.*

12. Gloucester Place Music Ltd. v. Le Bon [2016] EWHC (Ch) 3091 (Eng.).

13. *Id.* ¶ 1.

14. *See id.*

15. English copyright law recognizes several moral rights including the right to be identified as author or director, the right to object to derogatory treatment of work, the right to false attribution of work, and the right to privacy of certain photographs and films, but not the right to withdrawal or termination. *See* Copyright, Designs and Patents Act 1988, 1988 c. 48, §§ 77-89, (UK) [hereinafter U.K. Copyright Act].

16. *See* 17 U.S.C. § 203.

17. *Gloucester Place*, [2016] EWHC (Ch) at ¶¶ 44-45 ("I conclude that the Defendants have acted in breach of the Agreements by serving the Notices [of termination].").

influenced copyright litigation[18] and presents a novel issue of international law that may become a major legal problem in the coming years.[19]

Global termination rights are impacted by public international law instruments, including the Berne Convention for the Protection of Literary and Artistic Work,[20] and private international law instruments, including the Regulation of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).[21] The Court in *Gloucester Place* recognized the impact of public and private international law on termination rights but ultimately found that neither protected Duran Duran's right to terminate the band's U.S. transfers.

This Paper argues that current public and private international law mechanisms can be supplemented to solve the problem of termination inconsistencies. First, states can take proactive steps to articulate that their domestic termination provisions trigger exceptions to party autonomy in choice of law conventions. Second, the Berne Convention can be amended to reflect the private international law outcome by codifying a right to termination.

Part II provides an overview of termination rights in the United States and France to show that domestic termination rights should be protected in all international copyright contracts. Part III offers an overview of public international law regimes that govern copyright and details why copyright conventions do not adequately solve the problem of termination inconsistencies. A similar overview of private

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18. *See Paul McCartney Sues Sony/ATV for Beatles Music Rights*, 23 No. 21 WESTLAW J. INTELL. PROP. 5, Feb. 1, 2017 at *1 (noting that Sony/ATV "attempted to stall talks" with McCartney over McCartney's attempt to use of U.S. termination rights to reclaim Beatles songs until after a ruling was held in *Gloucester Place*).

19. *See, e.g.*, Nicola Harley, *Duran Duran Lose High Court Battle Over US Song Rights in Copyright Test Case*, TELEGRAPH (Dec. 2, 2016, 10:52 AM), http://www.telegraph.co.uk/news/2016/12/02/duran-duran-lose-high-court-battle-us-song-rights-copyright ("The ruling is being seen as a test case as it could affect many other UK songwriters . . . ."); Anthony Joseph, *Duran Duran Stars are in a High Court Battle*, DAILY MAIL (Nov. 15, 2016, 6:47 PM), http://www.dailymail.co.uk/news/article-3937404/Duran-Duran-High-Court-battle-rights-songs.html ("[T]he case is of importance to all . . . songwriters subject to contracts similar to those Duran Duran members signed. . . . [I]mplications . . . [are] potentially far reaching.").

20. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 17 U.S.C.A. § 116 (West 1988) 331 U.N.T.S. 217 (amended Sept. 28, 1979) [hereinafter Berne Convention].

21. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2007 on the Law Applicable to Contractual Obligations, June 17, 2008, O.J. (L 177) art. 1 (entered into force June 24, 2008) ("This regulation shall apply, in situations involving a conflict of laws, to contractual obligations and civil and commercial matters." International copyright contracts do not fit within any exception in art. 1(2)) [hereinafter Rome I Convention].

international law agreements and their shortcomings in solving termination inconsistencies follows in Part IV. Part V offers a detailed explanation of *Gloucester Place* and highlights shortcomings in public and private international law. Finally, Part VI provides private and public international law proposals for solving termination inconsistencies and shows how private and public international law solutions may be applied through a hypothetical contractual dispute.

II. A Comparative Study of Copyright Termination

Copyright is a primarily domestic area of law and specific protections like termination rights differ from state to state.[22] This section explores copyright law in France and the United States to provide a brief overview of two ways that termination rights are protected throughout the world: through moral rights and through economic rights. Generally speaking, moral rights protect authors' personal interests in their work by ensuring that authors' public work reflects their non-economic interests, which exist because of the civil law notion of a "presumed intimate bond between authors and their work."[23] Economic rights, on the other hand, protect authors' financial interests in their original work.[24]

A. *Moral Right Withdrawal in France*

Several civil law European countries protect authors' moral rights through domestic copyright laws.[25] Moral rights typically include:

> [1] [T]he author's right to claim authorship (right of attribution), [2] the right to object to modifications of work (right of integrity), [3] the right to decide when and how the work in question will be published (right of disclosure), and

22. *See* Goldstein & Hugenholtz, *supra* note 9, at 4 (noting that copyright is generally dictated by national laws which vary from state to state).

23. *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 Harv. Int'l L.J. 353, 355-56 (2006) ("The orthodox theory of oral rights is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests . . . . The non-economic interests of authors are found worthy of protection because of the presumed intimate bond between authors and their works, which are almost universally understood to be a protection of the author's personhood.").

24. *See* Edward E. Weiman, Andrew W. DeFrancis, & Kenneth D. Kronstadt, *Copyright Termination for Noncopyright Majors: An Overview of Termination Rights and Procedures*, 24 Intell. Prop. & Tech. L.J. 3, 4 (2012) (noting that Congress sought to give young and first-time authors the opportunity to benefit economically from inequitable contracts made early in career through the U.S. Copyright Act of 1976).

25. *See* Rigamonti, *supra* note 23, at 353.

> [4] the right to withdraw work after publication (right of withdrawal).[26]

French copyright law, or *droit d'auteur*,[27] recognizes two types of rights for copyright owners: economic rights and moral rights.[28] Economic rights have been protected since the French Revolution and originated in response to monopolies in the printing industry.[29] Moral rights were only codified after a series of French judicial decisions and popular support throughout the early twentieth century.[30]

In 1957, the French Parliament passed copyright legislation[31] that codified moral rights.[32] Moral rights are generally premised on the idea that an author's work is not only an exploitable object; authors should be able to control aspects of their "personality" that are projected to the public.[33] Among other rights, the 1957 Act gave authors the right to, in good faith, withdraw or terminate copyright transfers or sales, even after public distribution.[34] The right to withdraw work is particularly difficult to enforce given the potentially large amount of work that a given artist may sell to the public.[35] French law requires authors to

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26. *Id.* at 356.

27. Andrew Paster, *Rethinking Copyright Termination in A Global Market: How A Limitation in U.S. Copyright Law Could Be Resolved by France's Droit D'auteur*, 23 SW. J. INT'L L. 375, 380 (2017).

28. *See* Christine L. Chinni, *Droit D'auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145, 149 (1992).

29. *See id.* at 149-50 (the French Sovereign granted printing presses exclusive licenses to print materials in order to censor adverse opinions).

30. *See id.* at 151-52 (stating that moral rights emerged following debates into whether copyright reflected a personal or property right. Eventually the French Parliament embraced a notion that an author's moral rights are personal and separate from pecuniary interests).

31. Loi 57-298 du 11 Mars 1957 sur la propriété littéraire et artistique [France Law No. 57-298 of Mar. 11, 1957 on Literary and Artistic Property], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Mar. 11, 1957, p. 2723.

French copyright law has since been incorporated into the French Intellectual Property Code, Law No. 92-597 of July 1, 1992, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], July 3, 1992, p. 8801. The Intellectual Property Code preserves moral rights provisions. *See* Rigamonti, *supra* note 23, at 359 n.33.

32. Chinni, *supra* note 28, at 152-55 (stating that moral rights include the right to release or modify work, to be recognized as the author of a work, to have work attributed to another, to have his or her name used in connection with a work, to prevent wrongful attribution, and to withdraw work from the public).

33. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

34. *See* Chinni, *supra* note 28, at 152-54 (noting the procedural requirements of withdrawal and citing *L'Affaire Rouault* where a French artist was able to withdraw 800 of his paintings that were already sold to an art dealer so long as the dealer was justly compensated).

35. *Id.*

compensate transferees for copyright withdrawals, and if authors seek to reintroduce the copyrighted work to the public, they must give the first right of refusal to the original transferees.[36]

Moral rights alter the notion of "ownership" in typical economic copyrights, because they let authors retain interest in their original work. In addition to the right to withdraw work, French law allows authors to enjoin others from using their work in ways in which the artist does not approve.[37] Accordingly, moral rights, unlike economic rights, protect an author's "honor and reputation as a creator."[38]

B. *Economic Termination in the United States*

All U.S. copyright laws stem from the U.S. Constitution, which gives Congress the power "[t]o promote the progress of science and useful arts, by securing for a limited time to authors and investors the exclusive right to their respective writings and discoveries."[39] Early copyright laws, like the Copyright Act of 1909,[40] dictated specific terms and protections for copyrighted work, including exclusive protection over authors' work for initial and renewal periods.[41] These early copyright laws reflected Congress's apparent preference for free market and economic rights over authors' interests. In *White-Smith Music Publishing Co. v. Goff*,[42] the U.S. Court of Appeals for the First Circuit rejected an author's copyright claims that were based in part on "sentimental reasons for believing that Congress may have intended that the author, who according to tradition seeks but little for his work . . . should later in life be brought to his kingdom."[43]

By the middle of the twentieth century, Congress shifted its attention towards protecting author rights over the economic considerations of publishers and distributors. The U.S. Copyright Act of 1976, over protest from publishers,[44] included extensive protections for authors,

36. *See id.* at 154.

37. *Id.* at 155.

38. Roeder, *supra* note 33, at 557.

39. U.S. CONST. art. I § 8, cl. 8.

40. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

41. *See id.* at § 23.

42. White-Smith Music Publ'g Co. v. Goff, 187 F. 247, 251 (1st Cir. 1911) (holding publisher could not claim ownership over copyright after extension of protection not properly effected).

43. *See id.*

44. Lionel Bently & Jane C. Ginsburg, *The Sole Right Shall Return to the Authors: Anglo-American Authors Reversion Rights from the Statute of Ann to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1566-68 (2010) ("Despite the publishers' bid to eliminate reversion rights, subsequent bills continued to include . . . the [reversion and termination] right[s] . . . .").

including the right to terminate prior transfers of copyrights.[45] Section 203 of the Act governs termination generally and gives authors the ability to terminate transfers made following 1978 after thirty-five years from the date that the copyright was initially transferred.[46] Section 304 gives authors the ability to terminate transfers made prior to 1978 after fifty-six years from the date the copyright was initially secured.[47] Termination rights do not vest automatically and require the author or the author's descendants to give notice of an intent to terminate.[48] Further, termination rights are inalienable and cannot be contracted away.[49]

U.S. courts have affirmed that termination provisions under the U.S. Copyright Act of 1976 create individual rights for musicians. In 1999, members of the band "Butthole Surfers" attempted to terminate copyright transfers made through an oral agreement despite not reaching the thirty-five-year threshold from section 203 of the U.S. Copyright Act of 1976.[50] Though the court ultimately found that termination was proper because of a state law that allowed for the termination of oral contracts, in doing so, it held that the U.S. Copyright Act of 1976 was one way for authors to legally terminate copyright sales and transfers.[51]

1. The Music Modernization Act

On April 25, 2018, the U.S. House of Representatives passed H.R. 5447 (the Music Modernization Act).[52] The Bill aims to "update how music rates are set and how songwriters and artists are paid"[53] by

45. The U.S. Copyright Act of 1976 defines "transfer" as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." 17 U.S.C. § 101.

46. *Id.* § 203(a)(3).

47. *Id.* § 304(c).

48. *See id.* § 203(a)(4).

49. *See id.* § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or make any future grant.").

50. *See* Walthal v. Rusk, 172 F.3d 481, 483-85 (7th Cir. 1999) (noting that the U.S. Copyright Act of 1976 was one of several ways to terminate copyright transfer and holding that termination was proper at any time when the band transferred rights through informal oral contract).

51. *See id.* at 483-84 (noting that the U.S. Copyright Act of 1976 is one way for authors or authors' descendants to terminate contracts where the author was in an unequal bargaining position at the time of contracting).

52. Music Modernization Act, H.R. 5447, 115th Cong. (2018).

53. Paula Parisi, *Music Modernization Act Unanimously Passes House of Representatives*, VARIETY (Apr. 25, 2018, 1:57 PM), https://variety.com/2018/biz/news/music-modernization-act-nanimously-passes-house-of-representatives-1202787045/. *See also* Ted Johnson & Paula Parisi,

modernizing the ways that royalties and licensing fees are calculated, gathered, and assessed.[54] The Bill also updates the tracking and publication of copyright ownership information[55] and improves the means for copyright owners to redress royalty and ownership disputes.[56] The Bill, for the first time,[57] gives artists of pre-1972 works significant rights to royalty payments for the transmission of their works.[58] The U.S. Senate is currently debating companion legislation.[59]

The Music Modernization Act would not directly alter artists' termination rights. However, the Bill signals a willingness among politicians and the music industry[60] to help artists reap the benefits of their work. The Bill also shows that comprehensive frameworks and structures can be created and updated to deal with the nuances of modern copyright law.

C. *Intentions in Protecting Copyright Termination*

Reasons for protecting copyright termination vary between moral and economic copyright regimes. Moral termination typically promotes authors' right to have their public work reflect their own personal beliefs and has a strong connection to personality rights.[61] Economic rights, like the U.S. Copyright Act of 1976, are more concerned with balancing the economic inequities that occur in some copyright

Music Modernization Act Gains Momentum in Senate, VARIETY (May 15, 2018, 8:45 AM), https://variety.com/2018/politics/news/smokey-robinson-senate-1202811064/.

54. *See* H.R. 5447 Title I ("Music Licensing Modernization").

55. *See* H.R. 5447 § 102(d)(3)(E) ("The mechanical licensing collective shall establish and maintain a database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works . . . and the sound recordings in which the musical works are embodied.").

56. *See* H.R. 5447 § 102(d)(3)(K) ("The dispute resolution committee . . . shall address and resolve in a timely and equitable manner disputes among copyright owners relating to ownership interests in musical works . . . and allocation and distribution of royalties . . . according to a process approved by the board of directors of the mechanical licensing collective.").

57. *See* Johnson & Parisi, *supra* note 53 ("In the early 1970s, Congress extended copyright protection to sound recordings, but it was effective as of Feb. 15, 1972.").

58. *See* H.R. 5447 Title II ("Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society").

59. A Senate version of the bill S.2823 was introduced on May 10, 2018. *See* Music Modernization Act, S. 2823, 115th Cong. (2018).

60. *See* Parisi, *supra* note 53 ("The bill is overwhelmingly supported by the music industry").

61. *See* Rigamonti, *supra* note 23, at 355-56 ("The orthodox theory of moral rights is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests . . . . The non-economic interests of authors are found worthy of protection because of the presumed intimate bond between authors and their works, which are almost universally understood to be a protection of the author's personhood.").

contracts: "[The U.S.] Congress hope[d] to provide authors an opportunity to terminate prior grants that created profits for the copyright holder[s] that dwarfed the compensation that the authors themselves received [through the U.S. Copyright Act of 1976]."[62]

The context around the codification of both moral and economic termination rights shows that termination rights are intended to be applied to all international copyright contracts. When the U.S. Copyright Act of 1976 was passed, music copyright was inherently international, thanks in large part to the success of the Beatles just a decade prior.[63] While French music was not necessarily as globally successful as British or American music, the porous borders and trade within Europe likely led to a similar determination by the French Parliament: that copyright contracts concerning France implicated other countries as well. Copyright law concerning transfers and sales likely would have taken this global nature of copyright into account, and states would have been aware that their own copyright laws would implicate international disputes.

III. Copyright Protection in Public International Law

Public international law conventions govern the treatment, protection, and trading of copyrighted material.[64] However, no public international law convention adequately solves the problem of termination inconsistencies. This section explores the Berne Convention and other international copyright agreements to highlight the shortcomings in public international law's protection of termination rights. Subsequent sections show that public international conventions may be well-positioned to protect copyright termination in the future.

62. Weiman et al., *supra* note 23, at 4.

63. *See* Lang, *supra* note 10, at 31-32 (stating that the success of the Beatles may have contributed to the globalization of music copyright law: "[t]he success of the Beatles and other performers in the 1960s significantly increased the share of world record sales taken by Anglo-American performers and songwriters . . . . Coinciding with this cultural change, US-owned recording companies took on an international role in the 1960s and 1970s.").

64. *See* Goldstein & Hugenholtz, *supra* note 9, at 29 ("The evolution of substantive international copyright norms has generally been in the direction of increased minimum standards . . . The norms of copyright and neighboring rights today are embodied in an interlocking network formed by [international conventions] . . . . The principles of territoriality, national treatment, and choice of law have long provided the mechanisms for determining jurisdiction and applicable law under the treaties . . . the TRIPS Agreement has put a spotlight on the relationship between copyright and trade").

A. *Copyright Protection under the Berne Convention*

In 1886, the Berne Convention was adopted in Berne, Switzerland, in order to govern the global treatment of copyrighted work.[65] The Berne Convention initially adopted basic rights that included national treatment, registration of works, rights to translation, and rights to public performance.[66] The Convention also created a "union" for the protection of copyright that "was structured to exist separate and apart from any particular act of the treaty, which means that the treaty could be revised over time to meet changing conditions . . ."[67]

The Berne Convention seemingly favors the rights of authors of copyrighted material over owners, as the text of the Convention deals solely with authorship issues and does not acknowledge the interests of other contributors to the creative process.[68] Moreover, the Berne Convention does not explicitly discuss issues related to transfers of copyrights. This silence may have been intended to allow authors and transferees freedom in transacting copyrighted work in light of a changing global market.[69]

Additionally, the Berne Convention does not include any explicit right to termination or withdrawal. Article 6*bis*, which was amended in 1971,[70] provides authors with two basic moral rights: the right to claim ownership and the right to object to distortion, mutilation, or other modification of work.[71] Of note, the United States was not a party to the Berne Convention when these moral rights were incorporated.[72]

The Berne Convention's choice of law provision in Article 5 provides that the means of redress afforded to an author to protect their work shall be governed exclusively by the laws of the country where protection is claimed (*lex loci protectionis*).[73] Article 5 may be helpful in determining precisely which law to apply in international copyright disputes, but it does not explicitly cover all issues, including termination inconsistencies, that may arise as a result of copyright transfer or assignment.

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65. *See id.* at 34.

66. *See id.* at 35.

67. *Id.*

68. *See* J. GUNNAR ERICKSON ET AL., MUSICIAN'S GUIDE TO COPYRIGHT 26-27 (1983).

69. Paster, *supra* note 26, at 384 ("In Fact, Berne's silence on transfers of ownership may have been intended to grant individual nations . . . freedom to determine how they are to proceed in an ever-changing global market.").

70. GOLDSTEIN & HUGENHOLTZ, *supra* note 9, at 40-41.

71. *See* Berne Convention, *supra* note 20, at art. 6bis.

72. GOLDSTEIN & HUGENHOLTZ, *supra* note 9, at 38 (noting that the United States became a party to the Berne Convention on March 1, 1989).

73. Berne Convention, *supra* note 20, at art. 5(2).

B. *Copyright Protection in Other International Conventions*

No international copyright convention outside of the Berne Convention solves the issue of termination inconsistencies. The Agreement on Trade-Related Aspects of International Property Rights (TRIPS)[74] sets minimum standards for the treatment of copyrighted work and intellectual property from a market-based perspective, particularly focusing on dispute settlement and conditions for protection related to trade.[75] The World Intellectual Property Organization (WIPO) Performance and Phonograms Treaty[76] protects performers and requires most favored nation treatment for copyright owners.[77] Although TRIPS and WIPO provide certain standards that apply to copyrighted material across all signatory countries, neither explicitly or implicitly regulates termination rights.

IV. Termination Rights in Private International Law

Private international law favors party autonomy in choosing laws to govern contracts. Major international law conventions, including Rome I,[78] the Hague Principles on Choice of Law in International Commercial Contracts,[79] the Inter-American Convention on the Law Applicable to Contracts,[80] and the Restatement (Second) of Conflict of

74. Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1c to the Agreement Establishing the World Trade Organization, Marrakesh), Apr. 15, 1994, 33 I.L.M. 1 (1994).

75. *See, e.g.*, Goldstein & Hugenholtz, *supra* note 9, at 73-77.

76. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203 (entered into force May 20, 2002).

77. *See* Goldstein & Hugenholtz, *supra* note 9, at 46-48.

78. Rome I Convention, *supra* note 21, at art. 3 ("A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.").

79. Hague Conference on Private International Law, The Hague Principles on Choice of Law in the International Commercial Contracts, Mar. 15, 2015, art. 2 ("(1) A contract is governed by the law chosen by the parties. (2) The parties may choose – (a) the law applicable to the whole contract or to only part of it; and (b) different laws for different parts of the contract . . . (4) No connection is required between the law chosen and the parties or their transaction.") [hereinafter Hague Principles].

80. Inter-American Convention on the Law Applicable to Contracts art. 7, Mar. 14, 1994, O.A.S.T.S. No. 78 (entered into force Dec. 15, 1996) ("The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or

Laws (the Second Restatement),[81] codify this right to party autonomy.[82]

Private international law favors party autonomy for several reasons, including the "efficiency, certainty, predictability, and protection of the parties' expectations—the conflict of law values . . . ."[83] Party autonomy is not absolute and is subject to several exceptions, including mandatory overriding provisions and public policy.[84] Exceptions are mainly used to benefit parties that have weak bargaining power in a given contract.[85] This section provides a brief overview of the key exceptions to choice of law conventions. Subsequent sections will show how choice of law exceptions may be used in the future to fix the problem of termination inconsistencies.

A. *Overriding Mandatory Provision Exceptions to Party Autonomy*

The Hague Principles and Rome I include overriding mandatory provision exceptions to party autonomy in the choice of law, which hold that mandatory rules of the forum state may prevail over the contract parties' choice of law. The Hague Principles, for example, state:

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to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.").

81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) ("(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectation, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.").

82. Termination inconsistencies arise when parties use these rights to autonomy to choose a law to govern their contract that does not recognize an artist's right to terminate or withdraw the transfer, but the contract has a close connection to a state whose law does recognize termination or withdrawal rights. *See* Gloucester Place Music Ltd. v. Le Bon [2016] EWHC (Ch) 3091 ¶¶ 1-4 (Eng.) (parties to contract chose English law to govern, which does not recognize termination rights, but the contract had close connection to the United States, which does recognize termination rights).

83. Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 512 (2006).

84. *See id.* at 524 ("It is undisputed that party autonomy gives the parties the freedom to select governing law, but such freedom is not absolute.").

85. *See, e.g.*, Sarah Laval, *A Comparative Study of Party Autonomy and Its Limitations in International Contracts American and European Law, with Reference to the Hague Principles 2015*, 25 CARDOZO J. INT'L & COMP. L. 29, 69-71 (2016) ("For weak parties in commercial transactions . . . the protection of the weak party is mostly achieved through the application of overriding mandatory rules. . . . The method consists of applying the rules that protect the weak party instead of the chosen law, because these rules rely on fundamental policy. . . . In sum, mandatory rules may become overriding mandatory rules when the protection of a weak party is at stake.").

> These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties . . . . The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.[86]

Scholars typically agree that overriding mandatory provisions include only those provisions of law that cover important social or economic policy.[87] Particularly important for our consideration, the Hague Convention and Rome I protect mandatory rules from states outside of the forum that have a connection to the contract through third-party overriding mandatory provisions.[88]

B. *Public Policy Exceptions to Party Autonomy*

Several choice of law agreements also include public policy exceptions to party autonomy. Public policy exceptions generally involve setting aside a contract's chosen law when the chosen law violates fundamental principles or policies of the forum.[89] The Hague Principles' public policy exception states:

> A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum . . . . The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.[90]

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86. Hague Principles, *supra* note 79, art. 11(2)-(3).

87. Laval, *supra* note 85, at 42-43 ("In sum, the mechanism of overriding mandatory rules leads a judge to apply a national or European provision, which carries an important social or economic policy . . . instead of the law chosen by the parties in the multistate transaction.").

88. Rome I, for example, states: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application." Rome I Convention, *supra* note 21, art. 9(3).

89. *See, e.g.*, Monika Pauknerová, *Mandatory Rules and Public Policy in International Contract Law*, 11 ERA FORUM 29, 31 (2010).

90. Hague Principles, *supra* note 79, art. 11(2)-(3).

Like overriding mandatory provisions, courts generally limit the use of public policy to situations where the forum's laws on which the contracted law is encroaching are of "fundamental" importance to the forum's legal system.[91] Some countries, like the United Kingdom, consider any provision under a chosen law that would be illegal in the forum state to trigger the public policy exception to party autonomy.[92]

V. Termination Inconsistencies in Practice

Case law interpreting the problem of termination inconsistencies is limited, but the English High Court ruling in *Gloucester Place* illustrates that public and private international law alone do not solve the problem.

A. *Background to Gloucester Place*

As discussed earlier, *Gloucester Place* centered around a contractual dispute between the band Duran Duran and the band's music publisher, Gloucester Music. Between 1980 and 1993, each of the five members of Duran Duran entered into copyright transfer and sales agreements with Gloucester Music. The contracts between members of Duran Duran and Gloucester Music specifically included English choice of law clauses.[93] Unlike U.S. law, English law does not recognize authors' termination rights.[94] In March and June of 2014, members of the band served Gloucester Music with notice to terminate the band's assignment of thirty-seven U.S. copyrighted songs under section 203 of the U.S. Copyright Act of 1976.[95]

After Gloucester Music received notice from Duran Duran, it initiated suit against the band, seeking a declaration that the band "acted in breach of [its contracts] . . . by serving a series of notices . . . terminating assignments to the Claimant of the US Copyrights in 37 Duran Duran songs . . . ."[96] Gloucester Music claimed that the U.S. termination rights were waived by the English choice of law clauses in the copyright contracts, and U.S. termination rights, accordingly, were not applicable to the assignment of the band's songs "for the full period of copyright and

91. *See* Commentary, Hague Conference on Private International Law, the Hague Principles on Choice of Law in International Commercial Contracts, Mar. 15, 2015, 72 [hereinafter Commentary to Hague Principles].

92. *See* Gloucester Place Music Ltd. v. Le Bon [2016] EWHC (Ch) 3091 ¶ 25 (Eng).

93. *Id.* ¶¶ 1-4.

94. *See* U.K. Copyright Act, *supra* note 15.

95. *See Gloucester Place*, [2016] EWHC (Ch) at ¶¶ 1-4.

96. *Id.* ¶ 1.

all renewals and extensions thereof whether now or hereafter possible."[97]

Important for our study, the only statement about U.S. copyright law that Duran Duran made during trial was that of a non-expert witness, who stated, "[a]s a consequence of Section 203 [of the U.S. Copyright Act of 1976], a U.S. court would not allow a claim for damages for breach of contractual agreement because the statutory termination right supersedes any contractual rights. This applies whether that contract was governed under English or U.S. law."[98] The court held this statement to be inadmissible at trial.[99]

B. *Termination Rights in Gloucester Place*

The English High Court only briefly mentioned the Berne Convention, stating that section 5(2) of the agreement bound the parties to apply the law of the state in respect to which protection was claimed.[100] The Berne Convention led to the same outcome as the choice of law clause from the contract, as both pointed towards English law.[101] The Court did not explore public international law outside of this limited application of the Berne Convention.

The Court analyzed the contract under the 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention),[102] rather than Rome I, which was not in effect at the time of the contract.[103]

After noting that Article 3 of the Rome Convention made the parties' choice of English law proper, the Court found that the United Kingdom was not party to the optional overriding mandatory provision of the Rome Convention.[104] Accordingly, Duran Duran could not claim that its U.S. termination rights were overriding mandatory provisions that invalidated party autonomy.

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97. *Id.* ¶ 11(b).

98. Gloucester Place Music Ltd. v. Le Bon [2016] EWHC (Ch) 3091 ¶ 20 (Eng).

99. *Id.* ¶¶ 18-23. Among other reasons, the court did not give consideration to the witness's statement because the witness was not an expert, did not give a basis for his statement, shared no compelling case law, and provided no explanation of what law was in force at the time the that the contracts were signed.

100. *See id.* ¶ 16.

101. *See id.*

102. Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 80/934/EEC, 1980 O.J. (L 266) (entered into force Apr. 1, 1991).

103. Rome I did not enter into force until June 24, 2008. *See* Rome I Convention, *supra* note 21.

104. *Id.*

The Court did not explicitly consider a public policy exception under the Rome Convention or any other choice of law agreement. Instead, the Court found that English public policy would not recognize the U.S. termination right. The Court defined English public policy, stating, "English courts will enforce a contract which is valid and enforceable under English law even if the contract would be unenforceable as contrary to public policy in another country with which the contract has a connection."[105] Had the Court explored public policy under the Hague Principles, for example, it would have queried whether the English choice of law was against the public policy of the *lex fori*.[106] If the Court considered the United States to be the *lex fori* (a possibility considering the copyrights that the band sought to terminate were in the United States), the Court could have held that the English choice of law was invalid, because it did not recognize the band's inalienable termination right. If, on the other hand, the United Kingdom was the *lex fori* (a possibility considering the signing of the contract occurred in the United Kingdom and the nationality of the contract parties), the Court likely could not have held that the English choice of law was invalid, because there is no English public policy interest in copyright termination. The Court also cited the proposition that "English courts will not enforce a contract, the performance of which would be unlawful in its place of performance."[107] However, Duran Duran did not invoke this privilege, so the Court did not consider it at length.[108]

The Court ruled for Gloucester Music after finding no exceptions to party autonomy in the contractual choice of English law.[109] Accordingly, the Court held that Duran Duran contracted away its termination rights through the contract's choice of law clause, and the attempt to invoke termination rights constituted a breach of contract.[110]

VI. Proposed Solutions to Termination Inconsistencies

Gloucester Place shows that neither public nor private international law guarantees that a musician's termination rights will be inalienable and protected in all contracts. Nevertheless, the fact that the Court in *Gloucester Place* actually explored mechanisms of public and private

105. *Gloucester Place*, [2016] EWHC at ¶ 25.
106. *See* Hague Principles, *supra* note 79, at art. 11(2)-(3).
107. *Gloucester Place*, [2016] EWHC at ¶ 25.
108. *Id.*
109. *See* Gloucester Place Music Ltd. v. Le Bon [2016] EWHC (Ch) 3091 ¶¶ 32-45 (Eng).
110. *See id.*

international law highlights that such mechanisms may be valuable in protecting copyright termination in the future. This section argues that domestic copyright laws in states that currently protect termination rights should be amended to trigger exceptions to party autonomy in choice of law and that the Berne Convention should be amended to incorporate termination rights. First, however, artists should argue that termination rights are already overriding mandatory provisions.

A. *Artists Should Argue that Termination Rights are Already Overriding Mandatory Provisions*

Termination rights should already trigger the overriding mandatory provision exception to choice of law conventions, because termination rights do not carry issues of ambiguity or uncertainty. Courts hesitate to apply overriding mandatory provisions because of the difficulty in ascertaining when provisions of law are actually mandatory.[111] In 2001, the *Revue de Droit Commercial* in Belgium refused to apply a Tunisian overriding mandatory provision to a contract that included a Belgian choice of law clause, because the Tunisian provision was essentially "isolated" to Tunisia and not used elsewhere.[112] Concerns over uncertainty of application should not prevent courts from holding that termination rights are mandatory overriding provisions, because they are unambiguously inalienable[113] and should, accordingly, be respected in all contracts.

B. *Countries Should Amend Domestic Laws to Make Termination Rights Mandatory Provisions that are Applicable to International Contracts*

Arguing that termination rights are already overriding mandatory provisions does not give artists a guarantee that they will actually be treated as such.[114] States that protect termination rights should amend

111. *See* Pauknerová, *supra* note 89, at 32-35 (highlighting that courts faced with similar scenarios have come to different determinations as to the applicability of overriding mandatory provisions).

112. *See* Delphine Nougayrède, *TNK-BP, Party Autonomy, and Third-Country Mandatory Rules*, 35 NW. J. INT'L L. & BUS. AMBASSADOR 1A, 11A-12A (citing Tribunal de Commerce [Comm.] [Commerce Tribunal] Nov. 2, 2000, REVUE DE DROIT COMMERCIAL BELGE [RDC] 2001, 617-21) (Belg.).

113. *See, e.g.*, 17 U.S.C. § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or make any future grant.").

114. In *Gloucester Place*, for example, termination rights were not treated as overriding mandatory provisions despite testimony by a U.S.-law witness. *See Gloucester Place*, [2016] EWHC at ¶¶ 32-45.

their domestic copyright laws so that the laws will necessarily trigger choice of law exceptions in international contracts. The U.S. Congress's recent passage of the Music Modernization Act[115] demonstrates a willingness in the United States to update copyright laws in order to address changes in the global copyright landscape. In the United States, a bill or joint resolution that contains explicit language making termination rights mandatory provisions of law should be introduced.[116] Other termination states, like Italy and France, can do the same under their own domestic laws. The proposed U.S. bill should state:

> The following language shall be added as 17 U.S.C. §203(a)(6) to clarify existing law: "(a)(6) Termination under (a)(5) of this section shall be deemed an overriding mandatory provision of the United States in international contracts falling under this section's scope, the denial of which in any contract shall be deemed unlawful."

1. The Amendment Will Trigger The Overriding Mandatory Provision Exception

Precedent shows that states can compel international recognition of their own domestic mandatory provisions through clear, unambiguous legislation. The EU made rules on the protection of posted workers in the EU overriding mandatory provisions by implying in the preamble of a directive that protection should be treated as an overriding mandatory provision.[117] The proposed termination amendment should similarly make termination rights mandatory overriding provisions by clearly and unambiguously stating that they should be treated as such.

The proposed amendment also avoids any uncertainty in the international application of termination rights. In 2001, the French court *Cour de Cassation* refused to apply a domestic provision of French law to a contract governed by the laws of New York, because the French

115. *See* Music Modernization Act, H.R. 5447, 115th Cong. (2018).

116. *See* Richard S. Beth, *How Bills Amend Statutes*, CRS REPORT FOR CONGRESS, at 1(2003) (A bill or joint resolution can be used to supplement an existing provision, like the U.S. Copyright Act of 1976.).

117. *See* Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, Dec. 16, 1996 O.J. (L 18) (EU) (entered into force Feb. 10, 1997) (explicitly citing and explaining Rome Convention and mandatory overriding provisions in preamble).

provision (related to exclusive representation agreements) was merely an *internal* mandatory rule.[118] The proposed amendment could not be construed as simply a domestic mandatory law that would not apply internationally, because the amendment would explicitly make termination rights binding in international contracts.

The proposed amendment would effectively turn termination provisions into overriding mandatory provisions according to the Commentary to the Hague Principles.[119] While noting that "[i]t is not necessary that an overriding mandatory provision . . . be expressly stated," the Commentary states, "[n]evertheless, the exceptional nature of Article 11 qualifications to party autonomy should caution against the conclusion that a particular provision is an overriding mandatory provision in the absence of words or other indications to that effect."[120] Courts determine whether a domestic provision is overriding and mandatory by asking if it "is one from which the parties are not free to derogate but also that the provision must be applied notwithstanding that the parties have chosen [a law that does not recognize the provision] to govern their relationship."[121] The proposed amendment would remove courts' burden in answering this question by affirmatively stating that termination rights are mandatory overriding provisions.

Moreover, deference to domestic articulations of overriding mandatory provisions makes sense from a theoretical perspective. Overriding mandatory provisions are meant to protect the fundamental interests of states that would either be the forum in the absence of a choice of law clause or have a close connection to the contractual dispute.[122] This intention implies that deference should be given to a state's determination that it considers termination rights to be fundamental and an overriding mandatory provision of law.

2. The Amendment Will Trigger The Public Policy Exception In Limited Situations

The proposed amendment would also protect authors' termination rights in certain situations through the public policy exception to party autonomy. Unlike *Gloucester Place*, if a contract's *lex fori*, in the absence of a choice of law clause, would have recognized termination rights,

118. *See* Pauknerová, *supra* note 89, at 34 (citing Arrêt no 2037 du 28.11.2000, Cour de Cassation—Chambre Commerciale, Clunet 128, 511 (2001)).

119. Commentary to Hague Principles, *supra* note 91, at 74.

120. *Id.*

121. *Id.* at 75.

122. *See id.* at 74.

public policy holds that a choice of law that does not recognize termination should be overcome. *Roberts v. Energy Development Corp.*[123] illustrates how the public policy exception would be used in practice. *Roberts* utilized the public policy exception to set aside a Texas choice of law provision that appeared in an employment contract between parties from Louisiana after an employee was killed at work while cleaning an oil tank.[124] The employee's estate brought a suit against the corporation that turned on the interpretation of an indemnity clause in the employment contract.[125] The court established that Louisiana law would have been the applicable law without the Texas choice of law clause. Accordingly, the court set aside the clause, claiming that indemnity clauses were void under Louisiana's public policy. Therefore, the Texas choice of law could not overcome Louisiana's public policy.[126]

The public policy exception should similarly protect termination rights when the parties' chosen law does not protect termination but the *lex fori* does. Under the proposed amendment, termination rights are fundamental and a part of U.S. public policy (and would be part of the public policy of any state that passes similar amendments). The public policy exception would be triggered if a chosen law did not protect termination but the law of the forum did. However, the public policy exception would not protect termination rights in contracts in which choice of law *and lex fori* both fail to protect termination rights.

The Commentary to the Hague Principles provides a three-part test to determine whether a provision of law should trigger the public policy exception:

> [1] [T]here must be a policy of the forum state of sufficient importance to justify its application to the case in question . . . [2] the chosen law must be inconsistent with that policy . . . [3] the manifest incompatibility must arise in the application of the chosen law to the dispute before the court.[127]

The amendment would trigger the public policy exception under this three-part test. Termination rights are of "sufficient importance" to trigger the public policy exception, because the amendment would make ignoring termination rights, even in international contracts,

123. Roberts v. Energy Dev. Corp., 235 F.3d 935 (5th Cir. 2000).

124. *Id.* at 936.

125. *See id.* at 936-39.

126. *See id.* at 94-144.

127. Commentary to Hague Principles, *supra* note 91, at 77.

illegal. A chosen law that did not protect termination would necessarily be inconsistent with legally-binding termination rights. The chosen law would thus be voided in disputes over the application of termination rights.

C. *The Berne Convention Should be Amended to Incorporate Termination Rights*

The Berne Convention presents an opportunity to simplify these private international law outcomes. The Convention has been amended several times since 1886 through additional protocols and texts (including the 1928 Rome Text, 1948 Brussels Text, and 1971 Paris Text).[128] The 1971 Paris Text, which codified authors' moral rights but not the right to termination or withdrawal, was enacted prior to the United States' entrance into the treaty.[129] There is likely more support for the inclusion of termination rights in 2017 than there was in 1971 because of the addition of the United States, which protects termination rights,[130] as a signatory.[131]

In the Berne Convention's next iteration (i.e., in future texts like the Paris Text), termination provisions should be enacted to better reflect their prominence in copyright law. The following language should be added to Article 6*bis*, making it Article 6*tre* (as the third iteration):

> (3) An authors' right to withdraw or terminate prior transfers, assignments, or sales of original copyrighted material shall be protected in all contracts whose obligations arise in states that protect an authors' right to withdraw or terminate, according to those states' domestic laws. This section applies notwithstanding any contractual choice of law that does not protect such rights.

The added language is fairly neutral and for the most part would lead to the same results as private international law (supplemented with the proposed domestic amendments). The proposed Berne amendment would not create any new rights for authors, but rather would announce that existing termination rights will be enforced. This amendment would simplify the use of termination rights and remove

128. *See* GOLDSTEIN & HUGENHOLTZ, *supra* note 9, at 36-39.

129. *See id.*

130. *See* 17 U.S.C. § 203(a).

131. The United States became a party to the Berne Convention in 1989. GOLDSTEIN & HUGENHOLTZ, *supra* note 9, at 38.

the burden of conducting a choice of law analysis in every international copyright contract.

VII. The Future of Termination Inconsistencies: A Hypothetical Gloucester Place

The effectiveness of the proposed amendments to domestic law and the Berne Convention in protecting termination rights can be illustrated through a hypothetical situation with facts similar to those of *Gloucester Place*. Under the hypothetical, an up-and-coming band transfers its U.S. copyrights to a British publisher. The contract includes an English choice of law clause, and the United Kingdom is a party to both Rome I and the Berne Convention.

The English choice of law provision would be overcome by the United States' amendment to the U.S. Copyright Act of 1976, because termination rights would be clearly articulated as overriding mandatory provisions. Rome I's third-party mandatory overriding provision exception would, accordingly, nullify the choice of English law, which does not allow for termination. If the United States is the *lex fori* of the contract because of the close connection between the United States (a possibility because the copyrights in question are in the United States), then the public policy exception would nullify the English choice of law, because the failure to allow for termination would be unlawful in the United States. Finally, under the proposed amendment to the Berne Convention (which essentially codifies these choice of law exceptions in termination), termination would be proper, because the domestic termination rights of the United States would be protected through Article 6*tre*. The supplemented private and public international mechanisms thus solve the problem of termination inconsistencies under a new, hypothetical *Gloucester Place*.

VIII. Conclusion: The Importance of Termination Protection

Fixing the problem of termination inconsistencies is essential to ensure that copyright is treated in a uniform, consistent, and predictable way around the world. Efficiency in copyright law not only benefits musicians in protecting artists' economic and non-economic interests in their work, but it also benefits consumers who rely on a well-functioning international copyright regime to which artists feel comfortable ascribing. This Paper proposes to fix the problem of termination inconsistencies and guarantee the efficient treatment of copyrighted material by supplementing private international law with domestic amendments that trigger choice of law exceptions and amending the Berne Convention to codify termination rights.

The solutions for fixing termination inconsistencies articulated in this Paper favor artists' rights. Producers and distributors are not likely to protest this outcome, because the proposals do not establish a radically new copyright regime. And, as the Music Modernization Act shows, lawmakers in the United States are willing to update copyright law to address global copyright trends.[132] The solutions simply ensure that the correct outcomes, under typical conflict of law regulations (i.e., choice of law conventions), occur.

While this Paper explores termination provisions from a music standpoint, the solutions provided would also protect the termination rights of authors of other types of copyrighted materials (i.e., books, paintings, films, etc.). Additionally, these solutions would be useful for any international contract that contemplates rights, like termination provisions, that domestic law considers important and inalienable.

Supplementing private and public international mechanisms in order to protect termination rights ensures that the key conflict of law values—"efficiency, certainty, predictability, and the protection of the parties' expectations"[133]—are respected in all copyright contracts. A fragmented global copyright regime, under which artists and publishers alike are left with uncertainty as to where termination rights apply, prevents efficiency, certainty, and predictability from being realized. However, if countries listen to the Beatles and choose to "get by with a little help from [their] friends"[134] by respecting termination rights, conflicts of law values will be guaranteed.

132. *See* Music Modernization Act, H.R. 5447, 115th Cong. (2018).

133. Zhang, *supra* note 83, at 512.

134. The Beatles, *With a Little Help from My Friends*, *on* Sgt. Pepper's Lonely Hearts Club Band (Capitol Records 1990) (1967).