

7-20-2000

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### Recommended Citation

Francis M. Nevins, *Little Copyright Dispute on the Prairie: Unbumping the Will of Laura Ingalls Wilder*, 44 St. Louis U. L.J. (2000).

Available at: <https://scholarship.law.slu.edu/lj/vol44/iss3/16>

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## LITTLE COPYRIGHT DISPUTE ON THE PRAIRIE: UNBUMPING THE WILL OF LAURA INGALLS WILDER

FRANCIS M. NEVINS\*

### I. AUTHOR, BOOKS, BACKGROUND<sup>1</sup>

The name of Laura Ingalls Wilder (1867-1957) is as well known around the world as that of any American author who ever lived. At an age when most people are in or near retirement she began writing the famous *Little House on the Prairie* books that still sell millions of copies and generate millions of dollars in income annually as the third millennium begins. Laura had been a widow for many years and her marriage had produced only one child. Rose Wilder Lane, Laura's only daughter, was single, childless, and sixty-five years old in February of 1952, when her eighty-four-year-old mother executed her will. In that will Laura Ingalls Wilder left all her copyrights to Rose for the balance of Rose's life, and upon Rose's death to the Laura Ingalls Library in Mansfield, Missouri, which is a branch of the Wright County Library. Rose died in 1968. Since her death, who owns the fabulously lucrative rights to the *Little House* books and the other literary works of Laura Ingalls Wilder?

Every lawyer without expertise in copyright law, and every nonlawyer whose views of what the law should be are shaped by common sense, would hardly hesitate before replying: "Why, the library does, of course! What kind of silly question is that?" But lawyers versed in copyright law and particularly in its power to thwart authors' wills would decline to reply before they were given more facts; and upon learning those facts they might conclude that the library has no rights in Wilder's works at all. A recently filed lawsuit will perhaps bring some sanity into the matter.<sup>2</sup>

Understanding the bizarre concept I have dubbed "will-bumping" requires exposure to some elementary copyright law.<sup>3</sup> The Constitution empowers Congress: "To Promote the Progress of Science and useful Arts, by securing

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1. See generally JOHN E. MILLER, *BECOMING LAURA INGALLS WILDER* (1998).

2. *Wright County Library Bd. v. Harper Collins Publishers, Inc.*, No. 99-3368-CV-S-3-ECF (W.D. Mo. 1999). The case presents other issues, such as laches and the statute of limitations, which are beyond the scope of this article.

3. For a more thorough discussion, see Francis M. Nevins, *The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide*, 35 J. COPYRIGHT SOC'Y 77 (1988).

for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>4</sup> Pursuant to this grant of power, Congress passed the first federal copyright act soon after ratification of the Constitution itself.<sup>5</sup> From 1790 until the end of 1977, the term of copyright protection for a work began upon the publication of the work in compliance with various statutory formalities and lasted for a period of years thereafter.<sup>6</sup> That period was divided into two copyright terms.<sup>7</sup> During the first decades of our existence as an independent nation, an author alone had the right to renew a copyright; if he died during a work’s first term, at the end of that term the work fell into the public domain.<sup>8</sup> In 1831 the Copyright Act was amended so that any work in whose first term the author died could be renewed by a class of statutory successors consisting of the author’s surviving spouse and children.<sup>9</sup> Subsequent revisions of the statute extended the length of the terms but kept this structure intact. Under the 1909 Act, which was in effect throughout Laura Ingalls Wilder’s creative life, the initial term ran for twenty-eight years from a work’s publication.<sup>10</sup> If the author or (where the author was dead) a statutory successor filed for renewal during the twenty-eighth year of the work’s copyright life, the work was protected for a second term of twenty-eight years.<sup>11</sup> Our present Copyright Act did not alter the two-term structure applicable to works published before January 1, 1978, but merely extended the duration of the second term to forty-seven years, so that if the copyright were timely renewed, any work protected under the prior act would enjoy a total of seventy-five years protection from the date of its first publication.<sup>12</sup> In addition, the Sonny Bono Copyright Term Extension Act, signed by President Clinton in 1998, gave such works yet another twenty years of protection.<sup>13</sup>

The current statute that governs renewal of pre-1978 copyrights is 17 U.S.C. § 304(a). Subsection (1)(B), which comes verbatim from § 24 of the 1909 Act, provides that in the case of four particular types of work the renewal copyright vests not in the author, as is normally the case, but rather in the copyright proprietor as of the time the renewal vests.<sup>14</sup> The only one of these four exceptions that concerns us here is “any posthumous work,” a phrase that we shall parse in due course. All types of work except these four are governed

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4. U.S. CONST. art. I, § 8, cl. 8.

5. Act of May 31, 1790, Ch. 15, 1 Stat. 124.

6. See 17 U.S.C. § 10 (1976) (1909 Act) (superseded).

7. See 17 U.S.C. § 24 (1976) (1909 Act) (superseded).

8. *Id.*

9. Act of Feb. 3, 1831, Ch. 16, § 2, 4 Stat. 436.

10. 17 U.S.C. § 24 (1976) (1909 Act) (superseded).

11. *Id.*

12. 17 U.S.C. § 304(a) – (b) (1994 & Supp. IV 1999).

13. Pub. L. No. 105-298, 112 Stat. 2827 (1998).

14. 17 U.S.C. § 304(a)(1)(B) (1994 & Supp. IV 1999).

by subsection (1)(C), which also repeats verbatim the language of the 1909 Act in establishing priorities vis-a-vis the right to renew.<sup>15</sup> The person with the highest priority is, of course, the author. If the author has not survived to the time for renewal, next in priority is “the widow, widower, or children of the author. . . .”<sup>16</sup> If the author left no spouse or children but died testate, priority to renew belongs to “the author’s executors,” not for their own benefit, of course, but as fiduciaries for the devisees of the copyrights under the author’s will.<sup>17</sup> If the author left no spouse or children but died intestate, the priority belongs to “his or her next of kin,” *i.e.*, to the successors under the relevant law of intestate succession.<sup>18</sup> Thanks to this renewal structure, American copyright law has been blessed or cursed with two bizarre features: contract-bumping, which, up to a point, the legislators intended, and will-bumping, which was never intended at all.

## II. CONTRACT BUMPING IN A NETSHELL

In the nineteenth century it was customary for publishers to demand that they be assigned all rights in whatever work they published, with the author in return receiving either a flat sum or royalties. The purpose behind the renewal structure of the Copyright Act was to give the author—or, after the 1831 revisions, the spouse and children of an author who died in a work’s first term—a second chance to profit even if the author, during the work’s first term, had conveyed all rights in the work to the publisher or anyone else. The courts would have served that purpose most faithfully had they held that during a work’s first term the author simply had no legal power to convey any renewal-term rights. However, in *Fred Fisher Music Publishing Co. v. M. Witmark & Sons*,<sup>19</sup> the Supreme Court nullified Congressional intent in the interest of contractual freedom and held that the author may convey renewal term rights during a work’s initial term and is bound by that contract during the renewal term if in fact he lives to renew.<sup>20</sup> On the other hand, if the author dies before renewal vesting, his statutory successors are not bound and the contract is “bumped” when renewal vests in them.<sup>21</sup>

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15. *Id.* § 304(a)(1)(C).

16. *Id.* § 304(c)(ii).

17. *Id.* § 304(c)(iii).

18. *Id.* § 304(c)(iv).

19. 318 U.S. 643 (1943).

20. *Id.* at 657-58.

21. In *Stewart v. Abend*, 495 U.S. 207 (1990), dealing with the contracts licensing Alfred Hitchcock to adapt a short story by author Cornell Woolrich into Hitchcock’s 1954 film *Rear Window*, the Court held that the same rules apply to contracts that authorize the making of a derivative work, such as a movie based on the author’s source work. *Id.* at 220-21. If the author dies before the commencement of the renewal term, as Woolrich did, the movie suffers what I have dubbed “copyright death” and (unless the court fashions an *ad hoc* compulsory license

If you are entering into a contract with an author, what can you do to keep the contract from being bumped? The only feasible strategy is to require the author's spouse and children at the time of the deal to execute contingent assignments of the relevant rights in the work during that work's renewal term. If the author lives to renew, he is bound by his contract under *Fred Fisher* and there can be no bumping. If he doesn't live to renew and those who signed the contingent assignments make up the entire statutory successor class, they too are bound under *Fred Fisher* and there can be no bumping. But if the successor class turns out to include someone who didn't execute a contingent assignment—for example, if the author remarried or had one or more new children after the movie deal was completed—at the beginning of the renewal term the contract is pro tanto bumped. In other words, the threat of contract bumping can be reduced but never completely eliminated.<sup>22</sup>

### III. WILL BUMPING IN ANOTHER NETSHELL

Reasonable minds can differ as to how extensive a contract-bumping function Congress intended the bifurcated structure of copyright law to perform, but it seems there was clearly an intent to “bump” at least some contracts that authors had executed in a work's first term. What no legislators seemed to have understood is that the two-term structure would give birth to a bizarre interface between copyright law and the law of wills; but courts throughout the twentieth century have consistently held that it did,<sup>23</sup> and that it operates in much the same manner as the interface between copyright and contracts. If the author lives to renew a particular work and dies in the work's renewal term, his will governs rights during the rest of the work's copyright life. However, if he dies during the work's first term, his will governs only for the balance of the first term. By renewing the copyright for themselves, the members of the statutory successor class, who enjoy a higher priority to renew than a mere testamentary devisee, succeed in their own right to ownership of the copyright. This is the phenomenon I have dubbed will-bumping. How are the works of Laura Ingalls Wilder affected by this phenomenon?

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without basis in the Copyright Act, as the Ninth Circuit did for *Rear Window*) becomes unavailable to the American public until and unless the movie owner negotiates a new deal with the statutory successors or their assignees. Section 304(a)(4)(A), enacted after *Stewart v. Abend*, prevents the copyright death of a derivative work unless a formal renewal claim is filed in the final year of the source work's first term but bars the making of any *new* derivative works by the derivative work owner during the source work's renewal term even if no renewal claim is filed.

22. Because the 1976 Act creates a unitary copyright term governing all works created on or after January 1, 1978, *see* 17 U.S.C. § 302(a) (1994 & Supp. IV 1999), contract bumping is impossible as to any such work. However, the right of termination constitutes something of a functional equivalent as to such works. *See id.* § 203.

23. *See, e.g.,* Nevins, *supra* note 3, at 96-102.

During Wilder's lifetime she published eight books in the so-called *Little House* series: *Little House in the Big Woods* (1932), *Farmer Boy* (1933), *Little House on the Prairie* (1935), *On the Banks of Plum Creek* (1937), *By the Shores of Silver Lake* (1939), *The Long Winter* (1940), *Little Town on the Prairie* (1941), and *These Happy Golden Years* (1943). She died on February 10, 1957, *i.e.*, while each of these works was still in its first term. Her will left all her copyrights to her daughter Rose Wilder Lane for the rest of Rose's life, and upon her death to the Laura Ingalls Library of Mansfield, Missouri. Rose, the only member of the statutory successor class, arranged for the publication of a ninth *Little House* book, *On the Way Home* (1962), the manuscript of which she found in her mother's papers. As each of the first six books in the series entered its twenty-eighth year of copyright life, Rose in her own name filed an application for the renewal of copyright in that title. She died on October 30, 1968, which as chance would have it was the last day of year twenty-eight in the copyright life of *Little Town on the Prairie* and therefore, the last day before the renewal term of that work would begin. Rose had no spouse or children and her own will left all the copyrights she owned to a "friend" named Roger Lea MacBride, who reaped all the profits from the hugely successful TV series (1974-83). The will of MacBride, who died in 1995, in turn left all the copyrights he owned to his daughter. Where do these events leave the little library in rural Missouri which Laura Ingalls Wilder clearly intended to own her copyrights after Rose's death? I am serving as consultant to the attorneys who represent the library and therefore cannot claim objectivity, but I believe I can accurately set forth the contending claims.

#### IV. SIX BOOKS IN THE MAELSTROM

With regard to the first six titles in the *Little House* series, the MacBride interests contend that the case is a simple application of the will-bumping principles summarized above. Laura Ingalls Wilder happened to die in the first term of each of those six books and Rose Wilder Lane happened to live through the balance of each book's first term. Therefore, for the balance of each book's first term, Rose owned its copyright because her mother's will left it to her for life. By filing renewals for each of those six books in her own name—not in her capacity as legatee under her mother's will, but rather as the sole member of the statutory successor class—Rose converted the life estate the will left her into fee simple title. Anyone who considers this an outrage to common sense and against the clear testamentary intent of Laura Ingalls Wilder, the author of the *Little House* books, should be referred to the words of Justice Douglas in a landmark contract-bumping case: the result is required by

the “symmetry and logic in the design of [the statute]. Whether it works at times an injustice is a matter for the Congress, not for us.”<sup>24</sup>

It cannot be denied that the courts may wind up agreeing with that view.<sup>25</sup> The argument for the Library, that will-bumping should not apply, is premised on the view that the facts in this case are unique. Laura Ingalls Wilder’s statutory successor class consisted at all times of one and only one person, her daughter, and pursuant to Laura’s will, that person enjoyed the ownership of all her mother’s copyright interests from the day Laura died till the day of her own death. If the purpose of will-bumping is to make the disposition of an author’s copyright interests into a sort of *legitime* for his or her spouse and children, that purpose was fulfilled by the terms of Laura’s will. There can be no policy justification for going further and demanding that upon the death of the sole statutory class member the devolution of those interests should be governed by the statutory successor’s will rather than by the author’s. No reported case has ever carried will-bumping so far.

At least one case, however, seems to take it for granted that will-bumping should be carried so far and perhaps even farther. *Bartok v. Boosey & Hawkes, Inc.*<sup>26</sup> dealt with the will of Bela Bartok (1881-1945).<sup>27</sup> The great composer and his first wife had had one child, Bela Jr. (1910-).<sup>28</sup> After that marriage ended in divorce, Bartok married the former Ditta Pasztory (1903-1982), by whom he had a son named Peter (1924-).<sup>29</sup> Bartok’s will left all his copyright interests to Ditta during the balance of her life and to his sons in equal shares upon her death.<sup>30</sup> Under a 1949 agreement with Ditta and the sons, Bartok’s publisher, Boosey & Hawkes, paid all royalties on the composer’s works into his estate, which in turn distributed them pursuant to the will—*i.e.*, exclusively to Ditta as long as she remained alive. She was still alive at the time of the landmark Second Circuit decision concerning her husband’s will.<sup>31</sup>

In a formal sense, the court decided only a narrow issue concerning the composer’s last great work. Bartok, while still alive, had assigned to Boosey & Hawkes the copyright in his Concerto for Orchestra, which had been performed a number of times in his last years but was not actually published

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24. *Miller Music Co. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 378 (1960).

25. *See generally* Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss and Order Instructing All Parties to Attend Mediation, Wright County Library Bd. v. Harper Collins Publishers, No. 99-3368 Civ. S3ECF (W.D. Mo. Feb. 10, 2000). In the order the district court granted the defendants’ motion to dismiss as to the first six Wilder titles, although without any sustained analysis or serious consideration of the opposing arguments.

26. 523 F.2d 941 (2d Cir. 1975).

27. *Id.* at 942.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See Bartok*, 523 F.2d at 942 n.2.

until March 1946, six months after his death. In 1974, the year the work had to be renewed, competing renewal applications were filed by Boosey & Hawkes and by Bartok's younger son, Peter, who obviously was not on good terms with his mother. The only issue before the court was whether on these facts the Concerto should be deemed a "posthumous work." If so, then it would come within one of the four exceptions to the general rule, and, pursuant to what is now §304(a)(1)(B)(i), the renewal by Boosey & Hawkes as "the proprietor of [the] copyright" would be the only valid one, with the result that royalties from the Concerto during its renewal term would continue to be paid by the publisher to the estate and by the estate to Ditta alone for the balance of her life.<sup>32</sup> If, however, the court ruled that the Concerto did not count as a "posthumous work," then it would come within the general rule itself, and, pursuant to what is now §304(a)(1)(C)(ii), the renewal by Peter on behalf of the entire statutory successor class (himself, his half-brother, and his mother) would be the only valid one, with the result that Bartok's will would be pro tanto bumped and the children would share in the royalties from the Concerto even during the balance of Ditta's life. The court held that a work economically exploited during the author's life but published only after his death did not count as a "posthumous work."<sup>33</sup> The Concerto was thereby thrown out of the ambit of Bartok's will and the Boosey & Hawkes contract and into the ambit of the will-bumping feature of the Copyright Act.

From the perspective of the MacBride interests, what is relevant to the Laura Ingalls Wilder case is not the *Bartok* court's narrow holding but its apparent assumption that the iron logic of will-bumping brooks no exceptions. But from the Library's perspective, there is a crucial distinction between the cases. What precluded Bartok from leaving the rights in the Concerto to Ditta alone for the rest of her life was the fact that he had children, who shared the same statutory renewal priority as his widow. The case would seemingly be on point with the Wilder situation only if Bartok had not had children and if, his will had left the rights in the Concerto to Ditta for the rest of her life and then, let's say, to a home for old composers. The fact that Laura Ingalls Wilder, unlike Bartok, had one and only one statutory successor would seem to be a crucial distinction that turns *Bartok* into a decision of very limited relevance.

#### V. THE RIDDLE OF THE SIXTH BOOK

Even if the court rejects the Library's position vis-a-vis the first six *Little House* titles as a group, there is a further issue surrounding the sixth book in the series. According to § 24 of the 1909 Copyright Act, which was in force throughout Laura Ingalls Wilder's creative life, the initial term of any copyright "shall endure for twenty-eight years from the date of first

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32. *Id.*

33. *Id.* at 944-46.

publication.”<sup>34</sup> Although the 1909 statute was notorious for lack of definitions, the term “date of publication” is defined in § 26:

In the interpretation and construction of this title ‘the date of publication’ shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed. . . .<sup>35</sup>

According to Copyright Office records, the date of publication for *The Long Winter* coincides with the date of its registration, October 30, 1940.<sup>36</sup> Laura Ingalls Wilder died in this work’s first term and Rose Wilder Lane filed for renewal of the copyright in her own name during the twenty-eighth year of the work’s copyright life. But she happened to die on October 30, 1968—scant hours before the beginning of the first day of the work’s renewal term.<sup>37</sup> Therefore a sound argument can be made that as to this title there *was* no statutory successor class, so that pursuant to Laura’s will the Library has owned *The Long Winter* since Rose’s death.

Resolution of this issue will require a judicial decision on an issue that has vexed and divided courts for generations. It is undisputed that a renewal claim can be filed only during the twenty-eighth year of a work’s copyright life. But when within that year does the renewal right vest in the renewal claimant? There are three possibilities. Vesting could be held to occur at (1) the beginning of the last calendar year of the first term (Year Twenty-eight), (2) at the date a renewal claim is actually filed, or (3) at the beginning of Year Twenty-nine when the renewal term itself begins. In *Frederick Music Co. v. Sickler*,<sup>38</sup> the District Court for the Southern District of New York held that renewal vests on the effective date of filing of a valid renewal claim.<sup>39</sup> If the court deciding the Wilder suit were to agree, the result would be that Rose’s renewal of *The Long Winter* took precedence over Laura’s will. Melville and David Nimmer, in their classic treatise on copyright, opt for the third possibility, arguing that renewal does not vest unless the claimant—whether the author or, as here, the statutory successor—survives into the beginning of

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34. 17 U.S.C. § 24 (1976) (1909 Act) (superseded).

35. 17 U.S.C. § 26 (1976) (1909 Act) (superseded)

36. Document on file with the author.

37. This position follows the ruling in *International Film Exchange, Ltd. v. Corinth Films, Inc.*, 621 F. Supp 631, 634-35 (S.D.N.Y. 1985), that the first term of copyright runs from the first day after the date of publication until the twenty-eighth anniversary of the publication date. Rule 6 of the Federal Rules of Civil Procedure likewise provides that in time computations under any applicable statute “the day of the act [or] event. . .from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included. . . .” *Id.*

38. 708 F. Supp. 587 (S.D.N.Y. 1989).

39. *Id.* at 592.

Year Twenty-nine.<sup>40</sup> In *Marascalco v. Fantasy, Inc.*,<sup>41</sup> the Ninth Circuit agreed with and adopted the Nimmer view. Accordingly, it will be one of the tasks of the attorneys for the Wright County Library to convince the Eighth Circuit to follow suit.

#### VI. SEVEN AND EIGHT, LAY THEM STRAIGHT

However problematic the above argument may be as it applies to *The Long Winter*, there can be scant doubt of its validity vis-a-vis *Little Town on the Prairie* (1941) and *These Happy Golden Years* (1943), the last two *Little House* books published in Laura Ingalls Wilder's lifetime. These works were due for renewal respectively in 1969 and 1971. Rose Wilder Lane died before the earliest day on which renewal applications for these works could have been filed. Since will-bumping does not take place unless at least one member of the statutory successor class is alive as of the vesting of renewal rights, it follows that after Rose Wilder Lane's death the true copyright owner of these two works has been the Wright County Library. One might describe this as a situation where it's the will of a statutory successor, rather than the author, which is bumped by the Copyright Act.

A case that comes close to being identical with the Wilder situation is *Capano Music v. Myers Music, Inc.*<sup>42</sup> Max Freedman died in the first term of the early rock-n-roll hit "Rock Around the Clock," which he had co-authored.<sup>43</sup> His statutory successor class consisted of one and only one person, his wife Ray, who in turn died before the earliest possible date of vesting of the renewal term in the song.<sup>44</sup> In these respects, *Capano* is identical to the situation regarding the seventh and eighth *Little House* books. The cases differ in that Freedman's will left his wife all the copyright interest he owned in the work, while Laura Ingalls Wilder's will left her daughter only a life estate.<sup>45</sup>

Following what he took to be the iron structure of the 1909 Copyright Act's renewal provision, re-enacted verbatim in §304(a) of the 1976 Act, Judge Carter in *Capano* held that

the renewal rights could not vest, first, in the author, Max Freedman, because he was not alive at the time of vesting. Second, the rights could not vest in Ray Freedman as Max Freedman's widow because she, too, was not alive when the vesting date arrived. Third, the rights could not vest in the executor . . . of Max Freedman's estate, because [that person] was Ray Freedman, and, as noted, she

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40. MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT, § 9.05[C] (1978 & Supp. 1999).

41. See 953 F.2d 469 (9th Cir. 1991).

42. 605 F. Supp. 692 (S.D.N.Y. 1985).

43. *Id.* at 693.

44. *Id.*

45. *Id.*

was not living at the time of vesting. . . . Consequently, the renewal rights passed, fourth, to whoever was Max Freedman's next of kin on vesting day.<sup>46</sup>

The first two links in this chain of reasoning are clearly correct, but at the third step Judge Carter just as clearly lost his way. Whether or not the executor of the author's estate is alive as of the date of renewal vesting is irrelevant, for in the absence of a spouse or child of the author who survived to that date, the renewal copyright passes to the executor not in his or her own right but for the benefit of whoever was left the work in the author's will. But since Max Freedman's will had left virtually his entire estate, including all his copyright interest in "Rock Around the Clock," to his wife, there was nothing in that document relevant to his intent in the event she should die before the vesting of renewal rights. This is why, despite flawed reasoning, the *Capano* court was correct in awarding the copyright interest to Freedman's intestate successors. But, as should be crystal clear by this point, the crucial distinction between *Capano* and the Wilder case is precisely that Laura Ingalls Wilder's will did contain a clear provision dealing with ownership of her works after Rose Wilder Lane's death. Therefore, it seems beyond dispute that that provision should govern ownership of the works Rose did not live to renew.

#### VII. THE PUZZLE OF THE POSTHUMOUS PUBLICATIONS

As we have seen, after her mother's death Rose Wilder Lane arranged for publication of one new *Little House* title, *On The Way Home* (1962). After Rose's death her testamentary devisee Roger Lea MacBride arranged for publication of two additional posthumous books by Laura Ingalls Wilder: *The First Four Years* (1971) and *West From Home* (1974). The crucial factors these works have in common are (1) that they remained unpublished in Laura's lifetime and (2) that Rose did not live into the renewal term for any of them. It seems clear to me that since Rose's death these works have been owned by the Wright County Library.<sup>47</sup>

This conclusion is supported to differing degrees by two arguments. The weaker of the pair is based on the premise that will-bumping does not take place unless the author's will bequeathed the rights in a work that obtained statutory copyright in the author's lifetime by virtue of its publication. With regard to these three works this simply is not the case. As of Laura Ingalls Wilder's death they were not covered by federal copyright at all but only by so-called common law copyright. *On the Way Home* was published in Rose Wilder Lane's lifetime and with her permission, whereas the other two works were published only after Lane's death. Before its publication each of these

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46. *Id.* at 695-96.

47. *See supra* note 25. The district court denied the defendants' motion to dismiss as to the posthumous Wilder works.

three works was protected only by common-law copyright, which upon publication was lost and replaced by statutory copyright.

What makes this argument relatively weak is that the only reported case with somewhat similar facts may have reached the opposite conclusion. As we have seen, the court in *Bartok* held that the Concerto for Orchestra, which was performed in Bartok's lifetime but not published until six months after his death, was not a "posthumous work" under the renewal scheme of the 1909 Copyright Act.<sup>48</sup> That decision took the Concerto out of the ambit of Bartok's will and within the ambit of the will-bumping phenomenon so that, despite the composer's clear intent to the contrary, his sons would share in the royalties from the Concerto while his widow was still alive. The court never considered whether the bequest of the Concerto might not be subject to bumping because as an unpublished work it was protected only by common-law copyright at Bartok's death, but de facto its holding would seem an implicit repudiation of this thesis. Nevertheless, if a court today could be persuaded either that the Second Circuit never ruled on this precise issue or that it did and was wrong, the Wright County Library might still prevail as to these three posthumous works of Laura Ingalls Wilder based on the theory that their publication after Laura's death (and, with regard to two of the three books, after Rose's death also) did not subject these works to the will-bumping phenomenon.

The Library seems more likely to prevail vis-a-vis the three posthumously published titles with a second argument, which is based on *Capano*<sup>49</sup> and was advanced in Section VI above vis-a-vis the two works published in Laura's lifetime that Rose didn't live to renew. Laura's will, unlike Max Freedman's, contained language clearly expressing her intent as to copyright ownership of her works after her statutory successor's death. The will-bumping phenomenon may deprive her of testamentary freedom over those of her works which Rose lived to renew but Laura's will should control over those works that were still in their initial copyright term when Rose died.

#### VIII. IT CAN'T HAPPEN TODAY—OR CAN IT?

By this point the reader must be wondering whether will-bumping threatens the estate plans of authors still alive today. The only accurate answer is typically lawyeresque: Yes and No.

First, the No side. The current Copyright Act made a large number of radical alterations to prior law. All works created on or after January 1, 1978 are protected not under a two-term scheme but for a single unitary term lasting for the life of the author plus fifty (recently amended to seventy) years.<sup>50</sup> No

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48. 523 F.2d at 944-46.

49. See *supra* Part VI.

50. See 17 U.S.C. § 302(a) (1994 & Supp. IV 1999); Pub. L. No. 105-298, 112 Stat. 2827 (1998).

work created on or after January 1, 1978 ever needs to be renewed.<sup>51</sup> And since no such work is subject to the bifurcated structure of prior law, no testamentary disposition of such a work is subject to being bumped.

Now, the Yes side. Every work that was protected by statutory copyright prior to January 1, 1978 remains subject to the renewal scheme of the earlier statute including its will-bumping feature.<sup>52</sup> Section 304(a)(3)(B), enacted in 1992, ended the requirement of formal renewal and made all renewals automatic but did nothing to alter the will-bumping phenomenon.<sup>53</sup> Keeping in mind (a) that the last possible publication date for a work coming under the old regime was December 31, 1977, (b) that the initial term of copyright protection under that regime lasted for twenty-eight years, and (c) that the statute of limitations extends for three years, it would seem that the last possible date on which a cause of action like the Wilder case could commence would be December 31, 2008. Of course, if the facts of a particular controversy, like those in the Wilder case, permit the argument that the statute should be tolled, a case of this nature might arise many years after the apparent cutoff date. If so, there may well be some employment opportunities and intellectual challenges decades in the future for attorneys who take the time to make themselves at home in the wonderful world of will-bumping.

On the assumption that readers of this essay may wish to join that select group, I close with an examination question. For the last thirty years Wally Wordsmith has written a series of hugely successful adventure novels. He comes to you in November 1999 as this essay is being written and asks you to prepare his estate plan. Being one of his millions of readers, you are aware that his works include *The Skull of the Stuttering Gunfighter* (1968), *Toads Die on Tuesday* (1971), *The Boy Who Blew the Bezuzu* (1974), *Fish Priest of the Galapagos* (1978) and a host of more recent novels. Wally has a wife and children but wants to provide for them generously with other property and leave his copyright interests to a charitable foundation. To what extent is he allowed to do this?

In skeletal form the answer is as follows. With regard to *Fish Priest of the Galapagos* and all his later titles Wally has full testamentary freedom because none of those works are subject to the bifurcated scheme with its will-bumping feature. With regard to *The Skull of the Stuttering Gunfighter*, which was automatically renewed in 1996, he also has full testamentary freedom because he has lived into its renewal term even if his jurisdiction were to follow *Marascalco* and hold that he must live at least until the first day of Year Twenty-nine in a work's copyright life. With regard to *Toads Die on Tuesday*, which was automatically renewed in 1999, and *The Boy Who Blew the Bezuzu*,

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51. 17 U.S.C. § 302 (1994 & Supp. IV 1999).

52. *Id.* § 304.

53. Pub. L. No. 102-307, 106 Stat. 264 (1992).

which will be automatically renewed in 2001, whether he has testamentary freedom depends on how long he lives and, if he should die during year twenty-eight in the copyright life of one of those works, on whether his jurisdiction accepts or rejects *Marascalco*.

An attorney today who is planning the estate of one of the countless still living authors in Wally Wordsmith's situation has only one strategy at his or her disposal to counter the threat of will-bumping: the same strategy that, as we saw in Section II above, is available to counter the threat of contract-bumping when someone is entering into an inter vivos agreement with an author. At the time the author's estate is being planned, his or her then spouse and children must be asked to execute contingent assignments of their renewal expectancies to the author. If the author lives beyond renewal vesting as to a particular work, there can be no will-bumping and the contingent assignments as to that work become irrelevant. If the author dies before renewal vesting and if the statutory successor class consists entirely of people who executed contingent assignments, they are bound by those assignments and there can be no will bumping. But if the author dies before renewal vesting and the successor class includes one or more people who didn't execute contingent assignments—for example, a later-acquired spouse or after-born child—the will is pro tanto bumped. As to works predating 1978 the threat can be reduced but never completely eliminated.

The days of copyright law's meddling with authors' testamentary freedom are drawing to a close. Each year until the end of 2005, authors run the risk that their testamentary bequest of pre-1978 works entering their renewal term that year will be bumped. But at the close of business on December 31, 2005, the last date on which any pre-1978 copyright can conceivably begin its renewal term, most, if not all, of the will-bumping phenomenon will have faded forever into history. Will-bumping was created inadvertently and grew haphazardly, its desirability was never subjected to any sort of policy debate, and it remains unknown even today to countless authors, whose freedom it irrationally curtails, and countless attorneys who are charged with the responsibility of planning authors' estates. Let us shed no tears for its coming demise as it lurches along the road to its inevitable end.

