National
Music Publishers'
Association

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Via email

Suzanne Wilson, General Counsel and Associate Register of Copyrights
John R. Riley, Assistant General Counsel
Jason Sloan, Assistant General Counsel
Jalyce Mangum, Attorney-Advisor
United States Copyright Office
Library of Congress
101 Independence Ave, SE
Washington, DC 20559-6000

Re: Summary of *ex parte* meeting regarding NPRM concerning termination rights and the MMA blanket license

Dear Mses. Wilson and Mangum and Messrs. Riley and Sloan,

This letter summarizes the January 19, 2023 meeting ("January 19 Meeting") that occurred via Zoom videoconference between the National Music Publishers' Association ("NMPA") and representatives of the Copyright Office. NMPA thanks the Copyright Office for its time and attention in meeting with NMPA.

The persons participating in the January 19 Meeting on behalf of NMPA were Danielle Aguirre, EVP and General Counsel, Kerry Mustico, SVP of Business and Legal Affairs, and Shannon Sorensen, SVP of Business and Legal Affairs, along with outside counsel for the NMPA, Phil Hill. On behalf of the Copyright Office, Suzanne Wilson, John Riley, Jason Sloan, and Jalyce Mangum attended the meeting.

The following summarizes the discussion:

- The parties discussed the subjects raised in the NMPA's public comment in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") regarding Termination Rights and the Music Modernization Act's ("MMA") Blanket License [Docket No. 2022-5] dated October 25, 2022.

- NMPA reiterated that it fully supports the outcome of the intended rule to ensure that post-termination copyright owners are paid post-termination mechanical royalties from the MLC. To that end, NMPA had negotiated draft legislation with several songwriter organizations that would have amended 17 U.S.C. §115 to require post-termination copyright owners to be paid royalties under the blanket license. That legislation was carefully negotiated and drafted to provide clarity and certainty and to avoid future conflict. NMPA's concerns arise from the breadth of the NPRM's legal analysis and aspects of the Proposed Rule that go beyond the application of the derivative works exception under Section 115(d) and its application to the MMA blanket license. NMPA conveyed that a narrowly tailored rule and legal analysis will achieve the ultimate goal of allowing songwriters to receive post-termination blanket royalties from the MLC, while avoiding unnecessary and unintended conflicts and lawsuits.

- NMPA expressed its position that the Proposed Rule should not be retroactive. Retroactive application of the Proposed Rule would cause administrative and accounting issues on the part of publishers, many of whom have likely already distributed royalties received from the MLC to their songwriters. Moreover, as the NPRM acknowledges, the applicability of the derivative works exception to termination rights under the Section 115(d) blanket license was an "ambiguous" and "unsettled" issue. In the absence of any indication to the contrary from Congress, the courts, or the Copyright Office, the interpretation by some that the derivative works exception is applicable to the Section 115(d) compulsory license was reasonable. It also reflected a continuation of similar policies by other vendors prior to the MMA. Parties that paid royalties to pre-termination copyright owners of musical works for uses of those works in pre-termination sound recordings were operating under what was a reasonable interpretation of the law at the time. Thus, NMPA does not believe the Proposed Rule is correcting a policy that was a clear departure from settled law. Rather, it is a new interpretation or clarification of ambiguous law, and so retroactive application of the Proposed Rule would not be appropriate.

- The parties discussed the interpretation of *Mills Music v. Snyder* followed by some copyright owners prior to the NPRM.[1] As noted in the NPRM, the Supreme Court in *Mills Music* held that the music publisher in that case was entitled to continue to be paid for post-termination uses of derivative works made under the authority of licenses granted by the publisher prior to termination of the grant from the author to the publisher. While legal interpretations of this holding and views as to the applicability of the derivative works exception to the Section 115(d) statutory license may differ, it is NMPA's understanding that many in the industry had understood this holding to permit pre-termination copyright owners to continue to receive post-termination royalties for uses of derivative sound recordings created and utilized pursuant to licenses granted pre-termination, including licenses to interactive streaming services, provided that the licenses were issued pre-termination and were permitted under the original, terminated grant, and the recordings were prepared pre-termination.

[1] *Mills Music*, 469 U.S. 153 (1985).

The NPRM points to the dissent in *Mills Music* to distinguish the Section 115(d) compulsory license from other, terminable grants. The NPRM reasons that to be subject to termination under Sections 203 and 304, a grant must be executed by the author or the author's heirs, and because the blanket license "is not executed by the author or the author's heirs," it "cannot be terminated," and because it "cannot be terminated," it cannot be subject to an exception to termination."[2] However, as NMPA noted in its Initial Comments, the phrase "terminated grant" in the statutory text appears to refer to the original grant from the author to the publisher that is being terminated, and not to subsequent grants made by the publisher under the authority of that original grant. Subsequent grants of the right to prepare and use derivative works made by the publisher are not the terminated grant under Sections 203 and 304 and are instead part of the "panoply" of licenses preserved by the derivative works exception.[3] Therefore, it was the understanding of some in the music industry that post-termination uses of derivative sound recordings (such as by digital service providers) prepared and licensed pre-termination under the authority of the original terminated grant from songwriter to publisher were subject to the derivative work exception to statutory termination. In the absence of caselaw differentiating between licenses to *prepare and utilize* derivative works and licenses to *utilize but not prepare* derivative works, it was reasonable to believe that the license granted by publisher to a subsequent licensee would survive termination.

- The impact of the NPRM on licenses other than the Section 115(d) license administered by the MLC was also discussed. NMPA expressed concern that the NPRM's assertion that licenses that are not "executed by the author or the author's heirs" are necessarily ineligible for termination or an exception thereto could be interpreted to extend broadly to licenses other than the Section 115(d) statutory license, which may lead to additional conflict within the music industry, and may also conflict with *Woods v. Bourne* and other cases. Furthermore, because this conclusion is not limited to the Section 115(d) license, it may exceed the USCO's regulatory authority under the MMA.

- NMPA raised the issue that the Proposed Rule may impact royalties paid by the MLC following ownership changes that are not termination-related, like catalog purchases. NMPA understands that, under current industry practice, once an ownership transfer occurs, the party receiving subsequent adjustment payments for usage of a musical work that occurred prior to the transfer is typically handled pursuant to the agreement between the previous owner and the new owner of the work. The NPRM would require that the copyright owner at the time of the usage be paid for subsequent adjustments, regardless of whether the change in ownership was due to termination or another type of transfer. NMPA conveyed that it believes the rule does not need to be so broad in its effect.

[2] 87 Fed. Reg. at 64410.

[3] *See Mills Music*, 469 U.S. at 167 (the exception's phrase "continue to be utilized under the terms of the grant" refers to both "the terminated grant "and "the entire set of documents that created and defined each licensee's right to prepare and distribute derivative works"); *Woods v. Bourne*, 60 F.3d 978, 987 (2d Cir. 1995) ("*Mills Music* appears to require that where multiple levels of licenses govern use of a derivative work, the 'terms of the grant' encompass the original grant from author to publisher and each subsequent grant necessary to enable the particular use at issue.")

NMPA believes that it is important to either modify the Proposed Rule to allow parties to agree by contract to a different payment arrangement and provide letters of direction to the MLC pursuant to those agreements or, more appropriately, to limit the scope of the rule to termination.

- The Copyright Office asked whether NMPA's concerns about historic unmatched royalties are related to its concerns about the Proposed Rule's retroactive application. To clarify, there are two separate considerations regarding the Proposed Rule's impact on historic unmatched royalties: 1) how the Proposed Rule would impact the matching and payment of historic unmatched royalties matched subsequent to the Proposed Rule, and 2) whether and how the Proposed Rule would impact market share-based distributions of historic unmatched royalties that remain unmatched.

  As to the impact of the Proposed Rule on historic unmatched royalties that are subsequently matched, NMPA raised the concern that while the Proposed Rule appears to require the MLC to pay the copyright owner at the time of the applicable use, that may not be possible where historical ownership information is not available. It is not clear whether, in that scenario, the MLC would continue to place the royalties on hold. From a practical standpoint, if that is the Copyright Office's intention, NMPA is concerned that this may result in lower match rates and lower payouts of historic unmatched royalties, even where the current copyright owner is known, because the MLC may have possibly incomplete or unreliable historical ownership data.

  As to the impact of the Proposed Rule on historic unmatched royalties that remain unmatched, it is unclear whether the Proposed Rule's determination as to copyright ownership is intended to impact calculations of market shares for purposes of distributing unmatched royalties for pre-MMA usage periods. Such royalties are to be distributed based on the market shares of copyright owners during each particular reporting period in question. A determination that the pre-termination copyright owner of a particular work is not the owner of that work for such pre-MMA period because the derivative works exception to Section 115 does not apply would have an impact on the calculation of such copyright owner's market share during such period. To the extent that the Proposed Rule has the effect of retroactively modifying copyright owner market shares for usage periods prior to the MMA, NMPA respectfully believes it is beyond the authority of the Copyright Office to do so.

- NMPA also clarified a point from its Initial Public Comments which said that songwriters recapturing their copyrights could not receive the benefit of the current industry practice of paying the new owner of a work for subsequent adjustments to past payment periods. This language was included in our comment in error; NMPA's draft legislation would have required the copyright owner at the time of the usage to be paid for subsequent adjustments.

- The Copyright Office raised several other questions during the conversation that NMPA believes are beyond the scope of the NPRM:

  The Copyright Office asked for NMPA's position on whether, in the context of ownership changes outside of the context of statutory termination and the blanket license, the new owner would be required to credit a licensee in the event the licensee had overpaid the prior owner. NMPA believes that this would be addressed either in agreements between the licensee and the new and the prior copyright owners, or in the transfer or purchase agreement between the new and the prior owners (e.g., such as through a collection period or related provision). NMPA believes that this is the appropriate solution, as parties should where possible always be permitted to handle such matters through voluntary agreements.

  Also in the context of ownership changes outside of the context of statutory termination, the Copyright Office asked for NMPA's position on who has the right to sue for infringement for activity occurring prior to the ownership change. NMPA understands that this would also be addressed by private contract.

  The Copyright Office also asked what NMPA believes should happen in the event that the MLC pays the wrong person or makes a payment in an incorrect amount. NMPA understands that errors may occur in the course of administering and distributing large amounts of royalty payments, and takes no position at this time as to how the MLC should correct errors of this type.

NMPA appreciates the Copyright Office's consideration and attention to this important matter.

Sincerely yours,

Danielle M. Aguirre
EVP & General Counsel
National Music Publishers' Assoc.