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On behalf of the undersigned

Suzanne V. Wilson
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101 Independence Ave, S.E.
Washington, D.C. 20559-6000

Submitted through Regulations.gov

December 1, 2022

Re: Termination Rights and the Music Modernization Act's Blanket License, Notice of Proposed Rulemaking, Docket No. 2022-5

Dear Associate Register Wilson:

We write to voice our support for the U.S. Copyright Office's notice of proposed rulemaking regarding termination rights under the Music Modernization Act's ("MMA") blanket license under 17 U.S.C. § 115(d). Our primary interest in this rulemaking is to ensure that authors' termination rights under Sections 203 and 304 of the Copyright Act are not eroded. The Office's proposed rulemaking works to preserve these rights rather than erode them, and so we strongly support it.

Termination rights have been an important policy feature of U.S. copyright law since its inception. The Statute of Anne provided that after a copyright's initial term, "the sole right... shall return to the authors" and every version of U.S. copyright law since 1790 has included some version of termination or reversion of rights to authors.[1] Particularly as copyright terms were extended far beyond their original length, Congress recognized that "there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share" in those extended rights.[2] The stated Congressional policy rationale for termination is to "safeguard authors against unremunerative transfers" which derive from an "unequal bargaining position."

[1] See, Lionel Bently & Jane Ginsburg, *"The sole right...Shall return to the authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright,* 25 BERKELY TECH. L.J. 1475 (2010),
[2] H. Rep. 94–1476.

Unfortunately, that bargaining position is only modestly improved given current law and practice. As the Office is well aware, termination rights are not easy for authors to exercise. The system is incredibly complex, with numerous exceptions and technical requirements, such that creators can't reasonably navigate it without significant time, expense, and usually a team of lawyers. Numerous scholars have observed how current law fails to give effect to Congress's intent to benefit authors and the need for change.[3] Unfortunately, this legal complexity is not the only barrier authors face when seeking to exercise their termination rights. It is exceedingly common for authors to face additional barriers stemming from questionable business practices, administrative burdens, and litigation threats from corporate intermediaries that exploit ambiguity in the law to keep authors from exercising their termination rights.[4]

Recent empirical evidence highlights how the termination right is failing to achieve its purpose. A recent study examining works created from 1977 to 2020 shows that a vanishingly small percentage of authors ever exercise their termination rights, despite their significant value.[5] That research reports that the *total* terminations amounted to only 31,430 works under § 203 and 58,399 under § 304. Those numbers pale in comparison to the number of potentially eligible works. Certain categories of works lag significantly behind—for example, authors of nondramatic literary works, which recorded 1,323,608 registrations in the relevant 1978-1987 time period, recorded termination notices for only 840 titles under § 203. Notably, the one area where termination might be thought even *modestly* effective is in music, with creators in the performing arts notching the largest number of terminations as a group—20,745 works under § 203 and 54,096 works under § 304—most of which were musical works.

The Mechanical Licensing Collective's ("MLC") efforts to redefine the law and assert a default rule of interpretation that would effectively prevent creators from benefiting from their termination rights represents precisely the kind of industry intervention that undermines Congressional intent and limits authors' rights. In most instances, industry intervention (e.g., spurious work-for-hire assertions) leave creators with little recourse, absent legislation. In this case, the Office has a unique opportunity to address such overreach, and a responsibility to do so given its oversight role of the MLC. We applaud the Office's proposed rule, as it aligns with Congressional intent both of the specific terms of the MMA and the termination statute—for reasons stated in the Office's notice

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[3] See, e.g., Molly Van Houweling, *Authors versus Owners*, 54 HOUSTON L. REV. 371 (2016); Ann Bartow, *Using the Lessons of Copyright's Excess to Analyze the Political Economy of Section 203 Termination Rights*, 6 TEXAS A&M J. INTELL. PROP. L. 23 (2020).

[4] See DYLAN GILBERT, MEREDITH ROSE & ALISA VALENTIN, MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS ARTISTS AND HOW TO FIX IT (PUBLIC KNOWLEDGE 2019), https://publicknowledge.org/wp-content/uploads/2021/11/Making-Sense-of-the-Termination-Right-1.pdf.

[5] Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham & Genevieve Grant, U.*S. Copyright Termination Notices 1977–2020: Introducing New Datasets,* 19 J. EMPIRICAL LEGAL STUDIES 250 (2022), https://doi.org/10.1111/jels.12310.

of proposed rulemaking, with which we agree with fully—and because it comports with the more general policy objectives of copyright's termination system.

Sincerely,

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Authors Alliance

Jonathan Band on behalf of
American Library Association
Association of College & Research Libraries
Association of Research Libraries

Meredith Rose on behalf of
Public Knowledge

Corynne McSherry on behalf of
Electronic Frontier Foundation

Jennie Rose Halperin on behalf of
Library Futures

Lia Holland on behalf of
Fight for the Future