Copyright Office Seeks to Close Apparent Loophole in Music Modernization Act

By: Mario Marini

Welcome back to part three of this ongoing series discussing select aspects of music streaming. If you missed part one, a brief look into the importance of the new mechanical royalty rate agreement, Phonorecords IV, you could catch up here, or for part two, a discussion on the future of streaming rate models, see here. Today, we survey an upcoming rule from the Copyright Office seeking to overturn a policy created by the Mechanical Licensing Collective. The Music Modernization Act[1] was codified in 2018. The Mechanical Licensing Collective (MCL) was established therein as a non-profit entity to issue mechanical licenses to music streaming services and other digital service providers and then collect and distribute royalties stemming from said license. The MLC interprets its own policies but is subject to the oversight of the Copyright Office. Recently, the Copyright Office has issued a proposed rule[2] that would alter an existing MLC policy and align the MLC more with the spirit of the Music Modernization Act.[3]

In 2020, the MLC adopted a policy that attempted to reach a middle ground and stave off drawn-out disputes by effectively eliminating termination rights, provided for within the Copyright Act, for musicians on streaming services.[4] Termination rights are the ability of the original author to reclaim one's rights after having previously sold or licensed them to a publisher. The idea was to aid artists who often have to sell their rights long before they know whether a song will be popular or lucrative. Termination allows the artist to get their rights back from the publisher after a number of years, between thirty-five and fifty-six years later. However, and logically, any derivative works created or licenses issued by the publisher remain in force. Essentially, the MLC determined that when a publisher issued a license to a streaming service, that created a derivative work. Therefore, any artist who engaged in termination would essentially never receive any royalties from the streamer so long as the streamer licensed the work with the publisher prior to termination.[5]

The Copyright Office has sought to close this loophole with a proposed rule that would stop what it has called an "erroneous understanding and application of current law."[6] The rule has received broad support in comments from publishers and artists alike. Publishers remain concerned

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[1] Orrin G Hatch—Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (codified as amended in scattered sections of 17 U.S.C.).
[2] Termination Rights and the Music Modernization Act's Blanket License, 87 Fed. Reg. 64405 (proposed Oct. 25, 2022) (to be codified at 37 C.F.R. pt. 210).
[3] Bill Donahue, *Obscure Copyright Rule Change Might Be Big Win for Songwriters*, BILLBOARD (Nov. 2, 2022), https://www.billboard.com/pro/copyright-termination-rights-rule-change-songwriters/.
[4] *Id.*
[5] *Id.*
[6] *Id.*

that the rule has been drafted too broadly and may lead to further uncertainty and litigation.[7] A collective of over 350 artists, including many popular names, has signaled their overwhelming support for the proposed rule, going so far as to call anyone opposing the rule a "vote against songwriters."[8]

The proposed rule would close the loophole created by the MLC and ensure that any royalty payments are received by whoever holds the copyright at the end of the monthly reporting period. Whether the rule will undergo further revision remains to be seen, but with fundamental support from all sides, it seems only a matter of time until the Copyright Office issues a Final Rule.

[7] Nat'l Music Publisher's Ass'n, Comments on the U.S. Copyright Office's Proposed Rule Concerning Termination Rights and the MMA Blanket License 2 (Dec. 1, 2022).
[8] SONA, MAC, and BMAC, Reply Comments Unified and Overwhelming Industry Support for the U.S. Copyright Office's Proposed Rule (Jan. 5, 2023).