

# FINAL DRAFT COPY

May 14, 2010

Marybeth Peters  
Register of Copyright  
US Copyright Office  
101 Independence Ave S.E.  
Washington DC 20059

Re: Notice of Public Inquiry; Reply Comments: 75 Fed Reg 15390 (3/29/10)

## **A. Experience**

Future of Music Coalition (FMC) is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. Our work often concerns copyright issues and creators' ability to exploit their intellectual property in an open marketplace.

## **B. Interpretation**

FMC files these reply comments in response to the Notice of Inquiry and Request for Comments regarding the application of Title 17 to termination of certain grants of transfers. According to the provisions in the 1976 Copyright Act, works that were written on or after January 1, 1978 are eligible for termination of transfer after 35 years. We are particularly concerned with songwriters who entered exclusive publishing agreements in which they agreed to assign songs not yet composed, and for whom it is unclear when their copyrights will revert. For example, country legend Charlie Daniels wrote the song "Devil Went Down to Georgia" under a publishing agreement that began in 1976, although that song wasn't actually published until 1979. Is his copyright held to the 56-year termination provisions of the 1906 Copyright Act or the 35-year terms of its 1976 successor?

Such a "gap" in the copyright termination provisions could have significant consequences for a number of songwriters. FMC agrees with a number of commenters who have said that Congress did not intend for there to be such exceptions to the termination provisions. Therefore, we urge the Copyright Office take the necessary steps to resolve these

discrepancies and provide the full range of eligible artists an opportunity to own their copyrights.

Beyond this particular issue, there is concern about whether musicians are aware of the processes by which they can re-obtain their copyrights. Those well-intentioned provisions in the 1976 Act do little good if the creators themselves aren't aware about their rights or how they may be executed. As more copyrights become eligible for termination of transfer, it is imperative that efforts be made to inform recording artists and songwriters about the specific requirements for re-obtaining their works.

Clearly, the realities of today's marketplace differ significantly from those of 1976. Back then, musicians and songwriters had little chance of reaching listeners without entering into contractual agreements that were all too often exploitative. The termination of transfer provisions of the 1976 Act are meant to give artists the chance to regain their intellectual property, a welcome opportunity for many recording artists and songwriters. This "second bite at the apple" is even more important in an environment where product and broadcast spectrum scarcity has far less bearing on whether a musical work finds an audience. As more copyrights become eligible to revert back to creators, we may find that the artists themselves exploit their works in novel ways that could be beneficial to the overall health of the music marketplace. Therefore, it is crucial that musicians understand how to apply for termination of transfer. This will require the good faith efforts of a number of stakeholders; FMC is committed to doing its part.

### **C. Recommendations**

FMC supports generally the position of commenters who make the argument that, until a work is authored and fixed, no copyright exists and, therefore, US copyright law does not apply. By statute, copyright law only concerns, "original works of authorship fixed in any tangible medium of expression."<sup>1</sup> In the Copyright Board's example,<sup>2</sup> and consistent with copyright law, the pre-1978 transfer was executed by a songwriter who had yet to author the work. Therefore, no federal copyright interest could have been granted.<sup>3</sup>

A key reason why §304(c) cannot apply to the example highlighted is because it only applies to a "copyright subsisting in either its first or renewal terms as of January 1, 1978." Copyright cannot subsist in a work that is yet to be created. Section 102 of the Copyright Acts says "Copyright protections subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression ...."<sup>4</sup> If work is not fixed, a copyright will not subsist.<sup>5</sup>

Finally, FMC believes the Copyright Office has the power, as a federal agency, to clarify whether "gap" works are eligible for termination under the Copyright Act. By addressing

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<sup>1</sup> 17 USC §102

<sup>2</sup> 75 Fed Reg 15390 (3/29/10)

<sup>3</sup> Bill Gable Comment in re Gap in Termination Provisions; Inquiry 75 Fed Reg 15390

<sup>4</sup> 17 USC §102

<sup>5</sup> Geoffrey Hull Comment in re Gap in Termination Provisions; Inquiry 75 Fed Reg 15390



discrepancies between current statute and prior songwriter-publisher agreements, the Copyright Office is in a unique position to assist songwriters in regaining control of their work. FMC supports looks forward to a timely resolution to these issues for the benefit of recording artists and songwriters.

#### **D. Other Issues**

As previously stated, Future of Music Coalition supports a robust music marketplace where creators can leverage their intellectual property and receive equitable compensation. Termination of transfer is a clear instance where recording artists and songwriters can benefit from copyright law, provided they understand the conditions by which termination may occur. We believe that education about this process is crucial to the ability of artists to exercise their rights. As the first round of 1976 Act applications for termination of transfer take affect during the next couple of years, there is a need to raise awareness about copyright transfer issues and the process by which eligible artists may re-obtain their copyrights.

As the music marketplace continues to evolve, there will be more opportunities for artists to reach potential audiences without necessarily having to assign their copyrights to intermediaries. For those artists whose work has already changed hands, the looming termination window presents an opportunity to use their work in new ways. The results of these historic circumstances are not entirely clear, but FMC believes strongly that it's a good thing when artists are able to use their work the way they see fit. We look forward to working with musicians and the Copyright Office as relevant issues emerge, and thank you for the opportunity to offer our perspective.