



# Future of Music Coalition

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Maria Pallante  
Register of Copyright  
US Copyright Office  
101 Independence Ave S.E.  
Washington DC 20059

**Re: Gap in Termination Provisions Notice of Proposed Rule Making;  
Request for Comments: 75 Fed Reg 72771 (11/26/10)**

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.

First off, FMC would like to commend the Copyright Office on its Analysis of Gap Grants under the Termination Provision of Title 17 (Gap Grant Analysis).<sup>1</sup> We believe the Office did a thorough analysis of the comments and reply comments from the Gap in Termination Notice of Inquiry and produced an appropriate compromise to facilitate the notice of termination filing requirements for Gap Grants.

FMC works with diverse array of artists and songwriters, some of whom may potentially be implicated by the termination process in general and the gap specifically. It is our belief that most artists would welcome the opportunity for a "second bite at the apple" with regard to ownership of their creative works, which makes the recent efforts of the Copyright Office especially significant.

Though the gap only applies to works created during a limited period, there are many artists whose works created after Jan 1, 1978 were subject to licensing agreements entered into prior to that date. FMC supports the Office's determination that it was the intent of Congress to prevent the author of a work from being locked into a long term agreement entered into from an unequal bargaining position and that the gap must have been unintentional. Given that sections 203 and 304(c) do not on their face allow for

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<sup>1</sup> US Copyright Office, Analysis of Gap Grants Under termination Provisions of Title 17 (2010)

termination of works created in the Gap, this Notice of Proposed Rulemaking proposes a reasonable amendment to the regulations governing the notice for termination of the gap grants.

We believe that the proposed section 210.10 (f)(4) will provide necessary guidance for authors seeking to begin the notice of termination process<sup>2</sup>. Allowing the author to establish January 1, 1978 or later as the date of “execution,” should be enough for the Copyright Office to record a document in order to effect termination. We support the Office in its determination not to effect broader efforts to define execution but rather clarify that the author can merely use the date of creation to begin the termination process. We are aware that once notice is filed, grantees will have the ability to either dispute the actual date of creation or challenge that the “date of execution” means the date the agreement was signed and not the date of creation with respect to the pre-1978 transfers.

As the Gap Grant Analysis makes clear, this rulemaking is not a substitute for statutory clarification,<sup>3</sup> to which we agree. In our previous Reply Comments<sup>4</sup> with the Copyright Office, we likewise agreed with some of the other filers that supported the belief that for the purpose of allowing gap authors to file a notice to terminate, the broader reading of the Copyright Act<sup>5</sup> favors termination under Section 203. The issues with furthering such determination beyond the limited scope of filing termination notices for gap grants is twofold. First, as addressed in the analysis of gap grants for many older works, there may be a question of establishing the actual date of creation of a work. Second, by codifying 203 to read the date of creation as the date of execution, the termination provisions would be made less friendly to authors, especially when individual contracts apply to works created piecemeal or involve the transfer of multiple future works. FMC is concerned that if the notion that the date of execution becomes synonymous with the date of creation within the termination sections of the Copyright Act, authors and creators will face tremendous litigation challenges when trying to terminate their works.

Future of Music Coalition appreciates the opportunity to present our perspectives on the process of determining the most appropriate means of facilitating the termination of transferred copyrights in a way that benefits the artists whose creativity so greatly informs our cultural and commercial traditions.

Respectfully Submitted,

Future of Music Coalition

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<sup>2</sup> US Copyright Office, Gap in Termination Provisions, Notice of Proposed Rule Making; request for comments. 75 Fed. Reg. 72772 (Nov 26, 2010)

<sup>3</sup> Gap Grant Analysis, p iii.

<sup>4</sup> Reply Comments of the Future of Music Coalition to the Copyright Office (May 21, 2010).

<sup>5</sup> Copyright under Title 17 requires a work of authorship fixed in a tangible medium of expression. Until such a work is created, there is no copyright interest, no transfer of that interest, and no author for whom exclusive rights (not to mention termination rights) can vest. 17 U.S.C. §§ 101, 102(a), 106 and 203.