Submitted electronically via www.regulations.gov

April 11, 2025

U.S. Copyright Office
Library of Congress
101 Independence Avenue SE
Washington, DC 20559-6000

Re: Comments of the National Apartment Association and the National Multifamily Housing Council (the "Associations") on Issues Related to Performance Rights Organizations and the Copyright Act's Performance Rights for Musical Works; Docket No. USCO 2025-1

Dear Acting General Counsel Emily Chapuis:

On behalf of the National Apartment Association ("NAA"), the National Multifamily Housing Council, ("NMHC"), and the Real Estate Technology and Transformation Center ("RETTC," and collectively with NAA and NMHC, the "Associations"), we submit these comments in response to the Copyright Office's Notice of Inquiry and Request for Comments on issues related to performance rights organizations ("PROs") and the Copyright Act's public performance right for musical works. Docket No. USCO 2025-1, 90 FR 9253, Feb. 10, 2025 ("Notice of Inquiry" or "NOI").

INTRODUCTION

NAA, NMHC, and RETTC partner on behalf of America's rental housing providers and technology suppliers that are driving innovation and helping assist in addressing our long-term housing challenges. Drawing on the knowledge and policy expertise of staff in Washington, D.C., as well as the advocacy power of over 141 NAA state and local affiliated associations, NAA, NMHC, and RETTC provide a single voice for rental housing developers, owners and operators and the technology suppliers that are driving innovation and helping assist in addressing our long-term housing challenges. One-third of all Americans call a rental property home and more than 20 million U.S. households live in apartment homes—where, increasingly, technology solutions are being leveraged to modernize property operations, improve housing affordability, and enhance the resident experience. Given this background, we are uniquely qualified to comment on these issues.

During the past decade, multifamily housing providers have seen increasing activity by PROs to collect licensing fees. The fundamental concerns our members have expressed to us are that the fees they have been forced to pay to play music on their properties are not correlated to the value derived from those performances, and particularly with the rise of new PROs, the fees are unpredictable. We appreciate this opportunity to share our perspective on music uses in multifamily rental housing settings on (1) the private nature of certain uses which should not be treated as "public performances" under the Copyright Act, (2) the unique financial and administrative costs and burdens faced by apartment communities to comply with copyright law and PROs' licensing requirements, and (3) our recommendations on how to improve clarity and certainty for apartment communities.

1. Playing Music in Certain Common Areas That Are Extensions of Residents' Private Units Should Not Be Consider Public Performances Under the Copyright Act, 17 U.S.C. § 101

The Copyright Act defines public performances as performances of copyright protected material that occurs "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." 17 U.S.C. §101. Limited case law makes clear that the public versus private nature of the performance must be evaluated according to the nature or purpose of the establishment where the performance occurs. *See, e.g., Columbia Pictures Industries, Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 280-81 (9th Cir. 1989) (although a hotel is open to the public, the rooms where the alleged infringement occurred enjoyed a substantial degree of privacy); *Broad. Music Inc. v. Rockingham Venture, Inc.*, 909 F. Supp. 38, 41 (D. N.H. 1995) (the determination of whether a performance is public must considered whether it occurs in a place where the public is openly invited).

Many areas in apartment communities that are restricted to residents and their invited guests constitute substantially private areas within apartment communities that are extensions of residents' leased units. For example, amenities in these properties may include lounges, TV rooms, grill areas, pools, roof decks, fitness centers, and other social spaces. However, unlike many businesses, apartment communities are unique because often the social, common spaces where music may be played are accessible only to residents and their invited guests. These spaces are extensions of residents' leased units and provide residents with access to substantially private space beyond the walls of their apartment units. Just as a leased unit is a private space for residents and their invited guests, restricted common areas are limited to the residents and their guests. These areas are not open to any member of the public.

Notwithstanding this, the PROs take the position that music and music in television shows and movies in these spaces are public performances requiring a public performance license – regardless of whether the use is organized by the property or resident initiated.

As a result of this position – accompanied with a threat of litigation and statutory damages, multifamily housing providers are forced to choose between obtaining up to six public performance licenses for residents to watch TV in an apartment community lounge open only to residents and their guests, removing popular amenities like this, or challenging the PROs position in litigation. What is more, additional and different companies than the music PROs exist that license and distribute movie and television content, including: the Motion Picture Licensing Corporation ("MPLC"), Swank Motion Pictures ("Swank"), and Criterion Pictures USA, Inc. ("Criterion", and collectively with MPLC and Swank, the "Movie and TV Licensing Entities"). We are not aware that a license from any of the Movie and TV Licensing Entities includes a public performance license for the music licensed by the PROs. Yet, the PROs take the position that music played [on a television/in a television show or movie] requires a license from them.

This cumbersome regime affects only those who live in multifamily properties. There is no question that these types of music uses in single-family homes do not constitute public performances. There is no basis in the Copyright Act for a distinction that would allow residents

of single-family homes to play music, television and movies for "a normal circle of a family" and their "social acquaintances," while PROs and additional Movie and TV Licensing Entities extract annual licensing fees for that same right in an apartment community. Under copyright law, playing music or video in a private area of an apartment community, restricted to residents and their guests, should be treated the same as playing music or video in one's home for a "normal circle of a family" and "social acquaintances."

2. Complying with the PROs Licensing Demands Creates Unique Financial and Administrative Costs for Apartment Communities

Setting aside the initial question of whether music played in these spaces constitutes a public performance under the Copyright Act, 17 U.S.C. § 101 or is a private performance beyond the scope of the Copyright Act, with the threat of statutory damages and protracted litigation costs for even innocent infringement, the PROs have disproportionate bargaining power to demand license fees.

The Associations encourage their members to follow the federal copyright laws, obtain appropriate licenses to play music in their communities, and consult with legal counsel as needed. The Associations have worked with copyright experts to provide educational resources to their members on federal copyright law and licensing issues. However, our members were often frustrated at the need to pay the three different historic PROs (BMI, ASCAP, and SESAC) for what they viewed as the same right to play music. Now, with the emergence of new PROs in the space and separate existence of additional Movie and TV Licensing Entities seeking additional license fees, that frustration is multiplied as multifamily housing providers are being asked to pay additional and higher licensing fees to what could become an unlimited number of additional companies. And with the demand for additional licenses comes additional administrative costs associated with managing additional licensing agreements.

Many of our members pay for a subscription music service that includes a charge for the public performance licenses passed back to the PROs for the music provided by the service. However, PROs still demand that apartment communities pay for additional licenses to cover TV uses that are not covered by the subscription music service. This license, the PROs assert, is needed for music that might appear on televisions or that might otherwise be played outside of the subscription service in common areas.

Further, the existence of Movie and TV Licensing Entities that do not include public performance licenses enforced by PROs only adds to confusion and frustration. There is no guarantee that obtaining a license from a Movie and TV Licensing Entity provides any assurances that a PRO will not also claim a right to a public performance license fee for the music in any of the content. In fact, the MPLC's license terms explicitly state that:

> Any separate fee which may be due to music publishers or to collection societies for music publishers for the right to publicly perform the music contained in any of the Works[, content produced or distributed by MPLC-affiliated rights holders,] are

solely the Licensee's responsibility and are not the responsibility of MPLC.[1]

The reverse is also true. Obtaining a license from one or all six of the PROs does not provide any guarantee that a Movie and TV Licensing Entity will not also claim a right to a license fee. This is an unworkable regime.

Apartment communities have little to no way to control what music plays on the television or what music a resident might play in a lounge. Thus, to avoid threat of statutory damages and litigation with any one of many licensing entities, apartment communities are faced with paying public performance licensing fees to each of the PROs directly as well as paying for a subscription music service that already includes a charge for the applicable PROs' public performance license and may also be threatened with legal action if they do not pay a Movie and TV Licensing Entity.

With the proliferation of new PROs, multifamily housing providers are not seeing a reduction in fees from the original PROs. Instead, the fees are compounding, and there are additional administrative and management costs associated with dealing with the new entities. One multifamily operator estimates that the cost of the licensing fees alone has tripled from 2021 to 2025. This is a huge financial burden to property owners.

As the number of PROs have increased, apartment communities face increasing licensing fees and have no viable way to avoid the risk of statutory damages and costs of litigation without making payments to all of the PROs as well as the Movie and TV Licensing Entities and also purchasing music subscription services. Under the current licensing structure, apartment communities must pay for a license for the entire repertory of music from the PRO rather than pay an amount the reflects the music actually performed at their properties. If a radio or TV station includes a single song from a PRO's repertory, each PRO takes the position that the apartment community must pay for that PRO's entire repertory. For reasons highlighted in the Copyright Office's NOI, it would be impossible from a compliance perspective to attempt to play music from only one or two PROs rather than the six that exist in today's market. Therefore, to bring the use of a single song into compliance, a multifamily housing provider may need to pay for overlapping licenses at an increased financial burden.

In the alternative, some apartment communities have chosen (or may choose) to remove televisions and other media devices from common areas. However, this is not an attractive option in markets where amenities and the ability to create community through common areas attracts new residents and contributes to resident retention and satisfaction. The rental housing industry, which is predominantly made up of small mom-and-pop owners, operates on narrow profit margins. Increased and unpredictable operating costs can jeopardize the ability of rental housing providers to cover their expenses, which can lead to a reduction in housing quality and quantity. There is a common misconception that rental housing providers enjoy large profit margins. In reality, only 7 cents of every dollar of rent are returned as profits to owners.[2] This slim margin underscores the challenging financial pressures that the rental housing industry faces.

[1] *See* MPLC Blanket License Terms and Conditions, available at https://us.mplc.com/mplc-blanket-license-terms-and-conditions/ (last accessed April 8, 2025).
[2] *See* Breaking Down One Dollar of Rent: 2023, available at www.naahq.org/breaking-down-one-dollar-rent-2023 (last accessed April 7, 2025).

3. Recommendations to Improve Clarity and Certainty for Apartment Communities

NAA, NMHC, and RETTC support music licensing and copyright reforms that aim to improve efficiency, transparency, and reduce burdens for apartment communities to comply with federal copyright law. The question we hear most often from our members is why do they have to pay three, four, five, six, or more different companies for what they perceive to be the same right—the right to play music. It is a cumbersome and frustrating process and compliance will only become more expensive and unpredictable with increasing numbers of PROs in the market.

While a free market with reduced regulation is sometimes optimal, that is simply not the reality for public performance licensing because the PROs have a monopoly. As the Associations set forth in connection to the requests from the Antitrust Division of the U.S. Department of Justice for public input on the consent decrees governing ASCAP and BMI, a PRO representing even a single artist can demand outsized license fees from American businesses as soon as that one artist is played on a radio or television broadcast.[3] The copyright monopoly being licensed by the PROs creates a somewhat-unique situation where more government regulation is needed to ensure a fully functional and cost-effective music rights marketplace where prices are in line with the value of what is being licensed.

The consent decrees governing ASCAP and BMI were intended to ensure fair and efficient licensing of musical works. However, with the more recent emergence of additional PROs, it has become more complicated to license music. Not only is there not a "one-stop shop" to pay royalties, now there is no longer a "three-stop shop." With nothing to stop the number of PROs from continuing to grow, artists, songwriters and publishers will increasingly be able to switch PROs and end users have no certainty that the money they are paying to the PROs will get them all of the rights they want or need.

Congress recognized the importance of having efficient processes surrounding music licensing issues in passing the Music Modernization Act ("MMA"), which created a new, single collective to collect and distribute certain royalty payments from digital streaming services. As important as it was to simplify the process for the limited number of streaming music services, it is even more so for the countless apartment communities and the enjoyment of their residents. We encourage Congress and the Copyright Office to look to the MMA and related regulations for guidance to simplifying the public performance licensing processes.

The Associations also encourage Congress and the Copyright Office to examine what constitutes a public performance under the Copyright Act and whether, as an initial matter, playing music in an apartment community area accessible only to residents and their guests is a "public" performance. Only if these areas are "public" under the Copyright Act, can PROs demand licensing fees. Clarification from Congress or the Copyright Office about the extent or definition of public performance under the Copyright Act would be welcome by the multifamily housing community.

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[3] *See* NAA and NMHC Submit Comments Regarding Music Licensing, August 29, 2019, available at https://naahq.org/naa-and-nmhc-submit-comments-regarding-music-licensing (last accessed April 7, 2025).

CONCLUSION

The Associations appreciate the opportunity to respond to the Copyright Office's NOI. Rule. We remain committed to working with federal regulators and policymakers in Congress to address our shared goal of long-term housing affordability nationwide.

Thank you for considering the Associations' comments. If you have any questions regarding these comments or if we can be of any assistance, please do not hesitate to contact the undersigned Associations with respect to this comment letter through Nicole Upano, NAA's Assistant Vice President, Housing Policy & Regulatory Affairs at nupano@naahq.org.

Sincerely,

Robert Pinnegar
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