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To: The U.S. Copyright Office

From: Lisa A. Alter, Esq.

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Re: Possible Gap in Termination Provisions

Our firm represents composers and songwriters, statutory heirs of composers and songwriters, and music publishers. Our clients include some of this country's greatest musical catalogues, including the legendary Ira Gershwin, Hoagy Carmichael, Vernon Duke, Billy Strayhorn and Arthur Schwartz, as well as prominent current songwriters. Our work on behalf of these and other clients includes a wide range of transactional work as well as copyright analysis focusing on a myriad of ownership and rights issues. We have frequently advised these clients with respect to their respective termination and recapture rights under Sections 304(c), 304(d) and 203 of the Copyright Act, prepared and served notices of termination, and negotiated with music publishers respecting such termination rights. Our work on behalf of our music publishing clients includes in-depth copyright analysis of both existing catalogues and potential music copyright acquisitions and dispositions. We are frequently consulted to review notices of termination served on our music publisher clients by songwriters or the statutory heirs of songwriters, to determine the validity of said notices and negotiate with the parties seeking to recapture rights.

On several occasions over the past several years we have addressed the issue of determining the applicable termination provision where an author was signatory to a term songwriter agreement that began pre-1978 and continued beyond January 1, 1978. In these instances it is clear to us that no termination right would exist under Section 304(c) or 304(d) of the Copyright Act because there is no registration or publication prior to

1978. Rather, we have taken the position that where a work is created on or after January 1, 1978, the grant should be deemed to have occurred on the date of creation, and the Section 203 termination right should apply. The termination window would begin on the earlier of 35 years following publication of the composition, or 40 years from the date of the grant (in this case, substituting the date of creation for the date of the contract). This position is supported by common sense: if a composition is not created, it cannot be the subject of a grant. Once the composition is created, the author "delivers" the composition to the music publisher, and the terms of the contract are applied as of the creation date. Further, this interpretation is supported by the legislative history of the termination provisions: if the intent of Congress is to protect the author from being locked into a perpetual agreement negotiated from an unequal bargaining position, the intent of Congress will not be served by allowing certain grants to fall within the "termination gap" between Sections 304(c) and 203.

In light of the foregoing we respectfully recommend that the Copyright Act be clarified to provide that, in the case of a work created on or after January 1, 1978, where the rights to the work are assigned pursuant to a grant executed by the author prior to 1978, the author or his/her statutory heirs may terminate the grant on the earlier of 35 years after the date of publication of the work under the grant or 40 years after the date of creation.

In the future, we suggest that the Copyright Office consider the following additional issues:

1. Where a composition that is the subject of a pre-1978 grant to a music publisher is released on a sound recording before January 1, 1978 but is not otherwise published or registered for copyright, is the grant subject to statutory termination? Section 304(c) of the Copyright Act applies to works subsisting as of January 1, 1978. Grants of rights in such works are subject to termination during the window beginning 56 years after the earlier of registration or publication of the work. Since releasing a song on a sound recording prior to January 1, 1978 does not constitute publication of the song, and in this case the song was not registered for copyright, Section 304(c) of the Copyright Act would appear not to apply. Section 203 of the Copyright Act would also not be applicable because in this case the grant was executed and the work was created prior to 1978. However, under Section 303(a) of the Copyright Act, "copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyright, subsists from January 1, 1978, and endures for the term provided by section 302" of the Copyright Act. That is, copyright will be deemed secured and the work will be protected for the life of the author plus 70 years (in the case of a work written by more than one author, life of the last author to die plus 70 years). In effect, the work is treated by the statute as if it were created on or after January 1, 1978. Since, as of January 1, 1978 the distribution of a phonorecord embodying a work constitutes publication of said work, the date of publication of the composition should similarly be deemed to be January 1, 1978.

We believe that there needs to be an equitable resolution in this instance that deems a date of transfer of copyright that coincides with the date of copyright and publication – January 1, 1978. Assuming the author is alive as of this date, the author or his/her statutory heirs should be entitled to serve notice of termination of the grant under Section 203 of the Copyright Act, effective during the 5 year window beginning January 1, 2013 (35 years after publication and the deemed date of the grant).

2. Where a work is created and assigned to a third party prior to January 1, 1978 but is neither registered, published, nor released on a sound recording prior to that date, is the grant subject to statutory termination? Under current law, neither the Section 304(c), 304(d) nor 203 termination provisions would appear to apply. However, as discussed above, the work will be protected by copyright for the life of the author plus 70 years in accordance with Section 303(a). We believe that there needs to be an equitable resolution in this instance that deems a date of transfer of copyright that coincides with the date of copyright – January 1, 1978. Assuming the author is living as of January 1, 1978 the grant would be subject to termination under Section 203 of the Copyright Act, effective during the 5 year window beginning January 1, 2013. If the grant includes the right to publish the work and the work is ultimately published on or after January 1, 1978, assuming the author is living as of January 1, 1978, the author or his/her statutory heirs should be entitled to serve notice of termination of the grant under Section 203 of the Copyright Act, effective during the 5 year window beginning on the earlier of the date 35 years after publication under the grant or January 1, 2017 (40 years after the effective date of the grant).
3. Where a composition was created and published prior to 1978, but is subsequently assigned to a music publisher on or after January 1, 1978 (whether because the work was previously published by a third party or self-published by the author) when does the Section 203 termination window begin? We can imagine 3 possibilities: (i) The termination window opens 35 years after the initial publication of the work. This would be problematic because in some situations the initial publication might have occurred more than 35 years prior to the date of the instant grant, which would in effect mean the grant was terminable before it began; (ii) The termination window opens on the earlier of 35 years after publication by the new publisher or 40 years after the date of the grant. This would actually allow the publisher to extend the term by up to 5 years by simply delaying publication of the work, and would create an inequitable result; (iii) In the case of a grant of rights executed by the author on or after January 1, 1978 with respect to a previously published work, the termination window opens 35 years after the date of the grant. This creates the most equitable result. We believe that this result can be effected by revising Section 203(a)(3) to read:

“(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of *initial* publication

of the work, the period begins at the end of thirty-five years from the date of *initial* publication of the work under the grant or the end of forty years from the date of execution of the grant, whichever term ends earlier.”