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June 26, 2020

Via email
Regan Smith, General Counsel and Associate Register of Copyrights
Anna Chauvet, Associate General Counsel
Jason Sloan, Assistant General Counsel
United States Copyright Office
Library of Congress
101 Independence Ave. SE Washington, DC 20559-6000

Re: Docket No. 2020-5
Summary prepared on behalf of the Songwriters Guild of America, Inc. of the US Copyright Office ex parte conference call of June 22, 2020, generally regarding data reporting regulations and uses, and their potential effect on the exercise of termination rights under sections 203 and 304 of title 17.

Dear Counsels:

This letter summarizes the June 22, 2020 call ("June 22 Call") among representatives of the US Copyright Office ("USCO") and those interested parties delineated on the attached list of attendees, including the Songwriters Guild of America ("SGA") on whose behalf this letter is sent. SGA, which was represented on the June 22 Call by President Rick Carnes and the undersigned as outside counsel, thanks the Copyright Office for its time and attention in meeting with the interested parties concerning the above-referenced rulemaking proceeding.

In summary, as it specifically indicated on the June 22 Call, SGA is in full agreement with the conclusion of the USCO that a consensus seems to have been reached among the participants as follows: "[I]f the rule requires DMPs to report or make available records pertaining to certain dates for purposes of helping the MLC operationalize aspects of its administration of recaptured rights, the regulatory language [should] also specify that this provision is not intended as a substantive interpretation by the Copyright Office with respect to the proper relationship between the termination provisions of sections 203 and 304 and the section 115 blanket license." See, Letter of Assistant General Counsel Jason Sloan dated June 22, 2020 ("Sloan Letter").

In further response to the USCO's invitation set forth in the Sloan Letter "to propose suggested regulatory language that achieves this end," SGA would like to endorse the prior submission by MAC and SONA cited in the Sloan Letter, with the following, underlined clarification as was posted by SGA as part of the "chat" feature during the June 22 Call:

> The records required to be collected and maintained under paragraph (m)(2) shall not be construed to alter, limit, or diminish the ability of an author, an author's heirs, or the representatives of an author's estate to exercise rights of termination, nor shall the collection and maintenance of such records be construed to affect in any way the scope or

effectiveness of the exercise of termination rights pertaining to derivative works, as provided in sections 203 and 304(c) of title 17.

By way of further emphasizing the principle that the rulemaking by the USCO, and the operational decisions of the MLC stemming therefrom, are not in any way intended to alter the status quo in regard to the laws and judicial decisions governing termination rights and their application to derivative works, SGA also suggests that the following language be added in an appropriate place in the final regulations:

> In the event that the MLC takes any operational action that affects the rights or interests of interested parties as they relate to termination rights, post-termination rights in derivative works, and all matters pertaining thereto, such MLC action shall not serve to prejudice in any way the rights of interested parties to dispute such action, and shall not be construed to indicate an intention on the part of the US Copyright Office to approve or disapprove of such MLC action or to indicate that such MLC action should be given weight in the eventual legal determination of such dispute.

Finally, as regards the further discussion that took place concerning the scope of information that a Digital Music Provider ("DMP") should be mandated to provide to the MLC pursuant to the regulations under consideration, SGA stands by the principles it articulated on the June 22 Call: "the general goal of the regulations should be to produce maximum transparency, accuracy and breadth in data reporting." The approach of placing greater emphasis on the value of robust information collection, delivery and preservation, rather than on creating short cuts in pursuit of economic efficiencies for DMPs at the risk of data loss, was clearly the intent of Congress when it enacted the Music Modernization Act ("MMA").[1]

Thus, in order to best ensure the availability of all data that may be pertinent and necessary to the determination of future legal issues such as identifying those parties entitled to receipt of post-termination royalty streams, the following data at minimum should be ascertained and/or collected by the DMPs (or other parties as the USCO may properly designate), and reported to and maintained by the MLC:

1. The date of creation and first fixation of the sound recording in question by the artist;
2. The date of first release/street date of the sound recording in the United States;
3. The date of first server fixation of the sound recording by the individual DMP;
4. The date that the server fixation of the sound recording was first made available to the public by the individual DMP;
5. The date upon which the server fixation of the underlying musical composition embodied in the sound recording first became properly licensed for such use to the individual DMP (not including the effect of retroactive licensing pursuant to the MMA);
6. The date of actual first access by a member of the public to the server fixation copy of the sound recording made available by each individual DMP;
7. The date that the musical composition embodied in each server fixation copy of the sound recording first appeared in a DMP's monthly report of usage.

1 The hallmark principles of the MMA are intended to be "transparency and accountability." *See*, e.g., Section 102(d)(3)(D)(ix)(I)(aa). Moreover, SGA wishes to note as it did on the June 22 Call that Congress granted to DMPs legislative concessions in the MMA that included limitations on liability for past infringements, even willful ones, in exchange for (among other things) accurate and timely licensing, royalty payments and robust data provision to enable fairness in the operation of the MLC and in the marketplace. SGA urges that such consideration should not be ignored in the crafting of the regulations by the USCO.

Such information should be collected, verified, and reported to the MLC for permanent preservation, and made available to all appropriate parties and to the public in the most transparent and efficient manners possible.

SGA once again thanks the USCO for the opportunity to present these comments, and remains available to address any additional questions the Office may have.

Sincerely,

//Charles J. Sanders//

Charles J. Sanders
Outside Counsel
Songwriters Guild of America, Inc.

CJS:hm
Encl.
cc: Rick Carnes, SGA President
SGA Board of Directors

Attendees List for 6/22/2020 Ex Parte Call

U.S. Copyright Office
Regan Smith
Anna Chauvet
Jason Sloan

MLC
Kris Ahrend
Richard Thompson
Ellen Truley
Alisa Coleman
Bart Herbison
Danielle Aguirre
Cassandra Sciortino
Ben Semel
Frank Scibilia
Abel Sayago
Maurice Russel

DLC
Garrett Levin
Sy Damle
Sarah Rosenbaum

Music Artists Coalition
Susan Genco
Ned Waters

Peermusic
Timothy A. Cohan

Recording Academy
Todd Dupler

Songwriters Guild of America
Rick Carnes
Charlie Sanders

Songwriters of North America
Lauren Hancock
Jacqueline Charlesworth
Dina LaPolt
Michele Lewis
John Riley
Terry Hart
Jack Kugell
Adam Gorgoni
Cameron Berkowitz