Comments on the Copyright Law
Submitted by the Council of Music Creators
May 23, 2014

On behalf of the nearly one thousand music creators across America who have attended our meetings and expressed support for our principles and mission, the Council of Music Creators respectfully submits the following comments on the Copyright Law of the United States, its relevance to creativity and commerce, and its ability to fully protect the rights of Authors as set forth in Section 8 of the U. S. Constitution.

The Council of Music Creators (CMC) is a new organization dedicated to preserving, protecting, and strengthening the rights of songwriters and composers through education, outreach, and advocacy. CMC seeks to be a unified, pure voice representing the widest possible spectrum of creators in records, film, television, advertising, games, theater, and live performance, communicating with the music-making community and music lovers and users.

Our primary mission is to promote and strengthen the right of music creators to control the use of our work and to share fairly in its exploitation. We recognize that changes in the music business are inevitable, and we embrace those that help us reach wider audiences, increase respect for our art, and improve transparency within our business.

However, we vigorously oppose changes that enable illegal or unauthorized use of our work, allow others to unfairly benefit, whether directly or indirectly, from its use, decrease transparency in our business transactions, or diminish our right to license our works through the entities we choose.

We begin our Comments with a simple premise: without the music creator, there is not only no musical work, there is no music industry, and no need for music copyrights. There are no iPods, no streaming services, no downloads, no CDs, no concerts. There are no publishers, agents, record companies, producers, recording artists, engineers, recording studios, or equipment manufacturers. There are no film or television scores. Hotel lobbies, restaurants, and elevators are quiet. Indeed, without the music creator who places *that* note with *that* word and *that* chord, the world becomes an entirely different—and far less inspired and inspiring—place.

The essential purpose of copyright is to provide an economic incentive for individuals with creative talent to spend their time creating, on the theory that society is the ultimate beneficiary of that creativity. Copyright promises a creator the chance of a return on his/her investment of time, training, talent, and money required to learn and perfect a highly-skilled craft, and society benefits from that investment by maintaining the protection of copyright.

For more than a century, the system of music rights and collective licensing has worked well for music creators, consumers, and the businesses that bring them together. Radio and television broadcasters, cable systems and networks, background music services, hotels and restaurants, airlines, skating rinks and the myriad of other establishments that use music to enhance their businesses have reached agreements with music licensing organizations that grant access to millions of musical compositions and the necessary rights to use them. Consumers have enjoyed a vast and ever-expanding musical repertoire over the radio waves, via television, and through the purchase of physical products such as records and compact discs. Under this system, the creators of music have generally received just compensation for their investment.

And then along came the digital music file, and everything changed.

The easy exchange of music (not to mention the ease with which it can be stolen) made possible by the development of the digital music file has turned the music industry on its head and threatened the very livelihood of the creator. While songwriters and composers and their partners in the music industry struggle to find business models that use this new technology to expand the reach of music and still protect their rights, it has become clear that many provisions of the copyright law are no longer useful to either protect music creators or enable digital music services to thrive.

As the Copyright Office considers making changes to the law and contemplates the suggestions of the many interested parties who are requesting changes, we urge that you place the music creator at the very center of your deliberations and the resulting revisions. Indeed, we believe that those whose work is the foundation of the music business should be at its core, for it is for the protection of the "author" that the copyright law exists.

The Vulnerability of Music Creators

Most music creators currently have two sources of income under the provisions of the copyright law: royalties from mechanical and synchronization licenses, which usually flow through third-party music publishers, and royalties from performing rights licenses, which are paid directly to the creator through performing rights organizations (PROs) they designate, such as ASCAP, BMI and SESAC. (We note that composers of music for film and TV do not generally receive any royalties from mechanical or synchronization licenses).

For more than one hundred years, music creators have trusted PROs to license their public performance rights, and to pay the resulting royalties to them according to published formulas that, while complex, are generally understood to be applied in the same way for all music creators. In other words, music creators have been able

to depend on a system of collective licensing administered by the PROs to distribute royalties to them fairly and equitably.

On the other hand, royalties from music publishers, and the different processes by which they are calculated and collected, are more opaque. By tradition, royalties from music publishers are often "advanced" to music creators, and then recouped from future earnings. Every agreement between a music creator and a publisher is a negotiated document that contains variables and special conditions; no two are the same. Therefore, the royalties paid by music publishers to music creators vary according to contractual terms, and other than by conducting expensive audits, music creators can never be certain that music publishers are accurately paying them.

Many relationships between music publishers and music creators are satisfactory, and some are highly successful. But the lore of the music world is filled with stories of publisher audits that turn up long-overdue royalties and "lost" licenses, of large advances paid to publishers that are never shared with music creators, and of special incentives and "side deals" provided to publishers that are hidden from songwriters and composers. One publishing executive is well-known for saying about music creators, "*If they want their money, let them come get it.*"

The reality is that music is a highly competitive business in which a lot of money is at stake and in which songwriters and composers are often the easy victims of economic abuse. They need and deserve a copyright law that recognizes and compensates for both, and collective licensing of performance rights is key to the protection that is one of its primary goals. Any change in the copyright law that weakens it places them in jeopardy.

Copyright Reform and the Rights of Creators

We begin with a recognition that the laws concerning Copyright enacted by Congress pursuant to Section 8 of the Constitution have generally awarded protection to the *owners* of copyright, rather than the authors and inventors whose creations are the subject of that copyright. While this may be convenient, enabling copyright owners to avail themselves of property laws to enforce their rights, in practice, it often subjugates the rights of creators to those of business interests, with mixed results.

The opportunity to revisit copyright law, then, might also present an opportunity to imbue the law with some needed protections for creators, such as recognition of the inalienable interest of the creator in his work throughout his lifetime and beyond and limitations or conditions on the transfer of rights from creator to another entity (for example, clarifying and strengthening the rights of creators under work-for-hire laws).

Beyond the over-arching consideration of the rights of authors, we will address more specific issues facing the Copyright office, below. Our recommendations for reform are based on the following general principles:

- Copyright serves society by encouraging artistic expression and driving commerce.
- Creators need and deserve protection of their work from illegal and unauthorized use
- Users need simple, quick and certain licensing solutions
- Copyright agents need to be monitored

A Right of Communication

Given the rapid development of new technologies for transmitting copyrighted works from one place to another, the language of the Copyright law must be broad and clear, not subject to technical interpretations that allow infringers to skirt the law by manipulating the technology. As a general rule, and with the crucial caveat that different types of performances on different platforms will necessarily be valued differently, when the experience of the consumer is essentially the same using two different methods of delivery, the laws that apply to the transmission of the work to the consumer should be consistent.
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We strongly recommend that the Copyright Office consider the establishment of a Right of Communication, to alleviate the uncertainty caused by, for instance, the technical difference between "downloading" (which implicates the right of mechanical reproduction) and "streaming" (which implicates the right of public performance). Whether a work is transmitted to the consumer in bits, in packets, in files, or by some new yet-to-be-discovered method, the result for the consumer is the same, and should be treated as such.

Consent Decrees

The Consent Decrees negotiated between the Department of Justice and ASCAP and BMI back in the 1940s were designed to curb the "market power" of these music licensing organizations. Today, ASCAP and BMI are, in many cases, dwarfed by their licensees, and the provisions of the Consent Decrees are constraining ASCAP and BMI from achieving fair market value for performances of the work they administer.

First, the Consent Decrees force ASCAP and BMI to grant a license to use the work of music creators to anyone who asks, even if it's not clear what the user is doing (or is going to do) with that work, or how much (or even if) they're going to pay for it. Whatever allegedly nefarious practices the Decrees were designed to curb, a forced

(and enforced) business model under which an owner is required to give away the product, first, and discuss the price, later, is, at best, a loser. But that's what the Consent Decrees make ASCAP and BMI do on behalf of music creators.

Secondly, the Consent Decrees mandate that a single judge, one, each, for ASCAP and BMI, has authority to essentially make deals for the music creator and his/her work. Not only do these judges, acting on their own, get to decide exactly how much a user must pay for the use of a creator's work, they may not factor in "outside" market forces.

In our view, the terms and administration of the Consent Decrees have produced unfair and unrealistically low payments for the use in the digital music world of the work of songwriters and composers. We believe that these key provisions, among others, must be revised. Without such revision, music creators will face not only their hope for just compensation, but the continued undermining of their right to give—or not—their permission for the use of their work.

A Grand Bargain?

We sympathize with entrepreneurs entering the world of digital music for the first time. The fact is that the music industry is a byzantine hodgepodge of rights, rights owners, and administrators, all working under a patchwork of laws, consent decrees, and court decisions that are confusing, conflicting, and confounding. The resulting uncertainty surrounding music rights is inhibiting the growth of digital music services, and that's not good for anyone involved in creating, recording, distributing, or licensing music.

A piecemeal approach to the reform of copyright law covering music is not likely to solve this problem or any of those all parties agree are significant; they demand a larger, comprehensive view, engaging all parties involved. Such an approach requires consideration of a wide range of ideas, some of which, like a form of a compulsory license for the use of music by digital music services and a "moral right" for music creators, have traditionally been anathema to parties on both sides. But if we acknowledge that digital music services are the music industry's future, providing a gateway to larger audiences and increased opportunities for commerce, than no idea that may play a role in a "grand bargain" should be rejected out-of-hand.

As open as we are to considering solutions that may involve significant changes in the current Copyright law and system of administering it, we must state in no uncertain terms that the right of music creators to grant permission—or not—for the use of their work must not only be preserved, it must be strengthened. Songwriters and composers cannot guarantee that their investment of time, training,

talent, and money will result in a reasonable—or, for that matter, *any*—return. But having taken the notable risks associated with creating the musical works that move the world, at minimum, their right to control how, when, and by whom they are used should and must be enshrined as inviolate.

Respectfully submitted,
The Council of Music Creators