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January 24, 2011

Maria Pallante, Esq.
Acting Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, DC 20559

Re: Comment in Response to Notice of Proposed Rulemaking at Federal Register/Vol. 75, No. 227 (November 26, 2010)

Dear Ms. Pallante:

This comment is offered in response to the proposed rule change with respect to so-called "gap works," as outlined in the referenced Notice.

First, however, I would like to commend the Copyright Office and the former Register, Ms. Marybeth Peters, for its most thoughtful and comprehensive "Analysis of Gap Grants Under The Termination Provisions of Title 17," United States Copyright Office, December 7, 2010 (the "Analysis"). The Analysis clearly takes into consideration the many scholarly comments and replies that the Copyright Office received in response to its initial Notice of Inquiry in this matter. The Analysis offers sound guidance, grounded in both the Copyright Act and the historical and philosophical underpinnings behind the Termination Provisions of Title 17.

With respect to the proposed rule change, it is an important step in addressing and attempting to correct what is clearly an oversight on the part of Congress with respect to so-called "gap works." However, the use of the date of creation in the proposed rule change, while doctrinally sound, may in reality be problematic. Further, the suggestion that the notice state that the grant was executed "on a specified date on or after January 1, 1978," may further unduly complicate the matter.

Prior to my career as an attorney, I worked for several music publishers in New York for nearly ten years, where I was heavily involved in the creative process with artists/songwriters, often editing and recommending revisions with respect to their musical compositions. It is my

experience that songs often evolve in the creative process, sometimes not being finalized until the song is ultimately recorded, and often bearing little resemblance to the song that was initially presented. It is my understanding that the late, great composer and lyricist, Johnny Mercer, often had three alternate words for each word of his lyrics. Thus, the "date the work was created" may not always be susceptible to a date certain.

Additionally, songwriters are not always the best record keepers. Coupled with the fact that songs often evolve over time, again, the date of creation may not be so easy to determine. Finally, in the case of a deceased author, it may be virtually impossible for the statutorily designated heirs to determine the date of creation.

Similarly and closely related to the preceding, I am concerned with respect to the reference in the notice of the proposed rule change suggesting that the notice of termination include that the grant was executed "on a specified date that is on or after January 1, 1978." If this means furnishing a specific date, month and year in which the work was created, for all of the foregoing reasons mentioned above this may be difficult, if not impossible to furnish. On the other hand, if this simply means furnishing the year of creation, which would be wholly consistent with the requirement for the initial registration of the copyright, this would not be a problem. I see no reason why the termination of a copyright should include the unduly burdensome task of furnishing the exact date, month and year of creation in circumstances where the date will not necessarily be used to determine the effective date of termination; the Termination Provisions of Title 17 are already burdensome enough.

Taking all of the foregoing into consideration, I would submit that in the case of published "gap works," where the date of creation is unknown or unascertainable, the proposed rule change should include alternative language with respect to the date of execution, such as "where the date of creation is unknown, the date of publication, may be used." Inasmuch as the date of publication is easily ascertainable, and given the fact that most termination notices utilize the date of publication, this would be a reasonable compromise, consistent with the legislative objectives behind the Termination Provisions of Title 17: to give authors and their heirs a second bite of the apple.

Respectfully submitted,

F. Casey Del Casino

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