Before the Copyright Office
Library of Congress

In the Matter of	)	
	)	
Gap in Termination Provisions	)	**FR Doc. 2010-6936**
	)	

Reply Comments of The Authors Guild and The Songwriters Guild of America

The Songwriters Guild of America ("SGA") and The Authors Guild ("Authors Guild") submit these reply comments in response to submissions of other interested parties in the above-captioned Notice of Public Inquiry and Request for Comments regarding the application of Title 17 to the termination of certain grants of transfers or licenses of copyright, specifically those for which execution of the grant occurred prior to January 1, 1978 and creation of the work occurred on or after January 1, 1978.

Summary of Reply Comments.

We agree with the comments of Jane C. Ginsburg that no termination gap should exist when the Copyright Act is properly read. Nonetheless, the debate about the existence of a gap is likely to lead to litigation, and the intended beneficiaries of the termination right – authors, songwriters, and other creators – are typically the weaker party economically and therefore at a significant disadvantage if litigation ensues. To avoid the frustration of the purpose of the termination statute, the Copyright Office should support a prompt revision of the statute to eliminate any ambiguities and to avoid adverse litigation results to authors and creators.

Reply Comments.

1. Termination Gap Unlikely As A Matter Of Law.

We noted in our initial comments that a termination gap "might exist" as a matter of law. We subsequently reviewed the comments of Jane C. Ginsburg of Columbia University Law School with interest, and we agree with her legal analysis. When the two termination provisions are reviewed in their proper context -- including 17 U.S.C. 102(a), which ties subsistence of copyright to the fixation and creation of a work -- it becomes apparent that the termination "gap" does not actually exist. If tested in court, we believe the arguments that certain works fall into a "gap" and therefore cannot be terminated would ultimately fail.

We further agree conceptually with Ms. Ginsburg that the "termination time clock thus runs from the creation of each work covered by the agreement." As a practical matter, however, the date of publication is much easier to assess if the work is published, and given the many formalities of the termination requirements, ease of documentation is an important principle. We therefore wish to amend our prior statement to clarify that the clock should run from the date of a work's publication, unless the work is unpublished, in which case the termination provisions should be measured from the date of the work's creation. This revised approach will address the situation raised by the comments of E. Randol Schoenberg, where certain unpublished works nonetheless take on significant value and should be available for termination as well.

2. A Clear Litigation Risk Nonetheless Exists.

Unfortunately, being "right on the law" is frequently cold comfort for authors and creators if economically powerful interests take a contrary legal position. We noted in our initial comments that the mere cost of litigation of this issue would be sufficient to defeat the termination interests of some authors and songwriters who do not have the legal or financial resources to take on a well-financed publisher advancing a contrary view. Any legal ambiguity – which the Copyright Office has identified here – is likely to be exploited by parties whose economic interests are threatened by the termination right.

The prospect of litigation is not merely speculative, as the comments of Karyn Soroka confirm. Some publishers are already rejecting termination notices filed with respect to works written after January 1, 1978 where the agreement in question was executed prior to such date. If this behavior is occurring already, it is likely to become a significant problem after 2011, when notices of termination for most post-1978 works first enter their termination "window." This risk of significant litigation is unmistakable, and it is important to remember that authors, songwriters and other creators are usually the "losers" when litigation ensues. This result would directly violate the intent of Section 304(c) and Section 203, which were intended to benefit authors, songwriters and other creators.

3. Congressional Action Is In the Best Interests of Authors and Creators.

In order to ensure that the termination right provisions are effectuated as Congress intended, and to eliminate the advantage held by large copyright owners if an author's termination filing is litigable, The Songwriters Guild of America and The Authors Guild strongly encourage the Copyright Office to support clarification of the law. Time is of the essence in this project, as the termination window for a large number of works created on and after January 1, 1978 opens in approximately six months.

In that process, we recommend that the termination clock begin running from the date of the work's publication, unless the work is unpublished, in which case the clock should begin running from the date of the work's creation.

Respectfully submitted,

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