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**Before the Copyright Office  
Library of Congress**

In the Matter of )  
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Gap in Termination Provisions ) Docket No. RM 2010-5  
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**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 comments on the above-captioned Request for Comments on Proposed Rulemaking and in support of Copyright Office’s *December 7, 2010 Analysis of Gap Grants* under the Termination Provisions of Title 17. SGA and the Authors Guild previously submitted comments in response to the Notice of Public Inquiry and Request for Comments, FR Doc. 2010-6936, 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.

*The Copyright Office’s December 7, 2010 Analysis of Gap Grants*

We strongly endorse the Copyright Office’s conclusion that the reasonable interpretation of Gap Grants is that they are terminable under section 203 as it is currently codified. We concur that statutory clarification is not legally necessary for termination, but would help to ensure the policy objectives of the provisions because of the potential confusion among stakeholders.

SGA and the Authors Guild take strong issue with the RIAA’s claim that the Takings Clause of the Fifth Amendment might prevent “retroactive application” of the termination provisions to Gap Grants. The Register has shown that the statute as enacted addresses works in the so-called “gap.” Thus, no retroactive application of the statute will occur, and the Takings Clause is not implicated whatsoever.

Finally, the Copyright Office is correct as a matter of statutory interpretation with regard to the RIAA’s question whether Congress in fact meant “signed” when it used the word “executed”—it is highly unlikely that Congress intended one phrase, “executed by the author,” to have two distinct meanings depending on whether the grant at issue was concluded orally or in writing.

## *Comments on Proposed Rulemaking*

We also strongly endorse the Copyright Office's statement in the summary of the Notice of Proposed Rulemaking and Request for Comments dated November 26, 2010 that, "The amendments are intended to clarify the recordation practices of the Copyright Office regarding the content of section 203 notices of termination and the timeliness of their service and recordation, *including a clarification that the Office will accept for recordation under section 203 a notice of termination of a grant agreed to before January 1, 1978 as long as the work that is the subject of the grant was not created before 1978.*" (Emphasis added).

The proposed rule at 37 C.F.R. § 201.10 can better reflect the Office's logical analysis and equitable conclusion in its *December 7, 2010 Analysis of Gap Grants* as well as in its own Notice of Proposed Rulemaking and Request for Comments of November 26, 2010 through affirmatively stating that Gap Grants are terminable under section 203 as currently codified and, as such, notices of termination will be accepted by the Copyright Office.

One possible manner of such a recommended affirmative statement would be as follows:

Add in the initial paragraph of section 210.10, the following italicized language:

### **201.10 Notices of termination of transfers and licenses.**

This section covers notices of termination of transfers and licenses under sections 203, 304(c), and 304(d) of title 17, of the United States Code. *Notices of termination for works created on or after January 1, 1978, the grants of transfers and licenses of copyrights for which were entered into before January 1, 1978, will be accepted under section 203.* A termination under section 304(d) is possible only if no termination was made under section 203(c), and federal copyright was originally secured on or between January 1, 1923, and October 26, 1939.

## *Conclusion*

SGA and the Authors Guild agree with the Copyright Office's conclusion that statutory clarification is not required for termination of Gap Grants under section 203, but that statutory clarification is warranted to reduce the threat of litigation, eliminate the lack of confidence in rights to copyright titles for authors or their grantees, and ensure that Congressional policy objectives are met. The Office's proposed rule would more accurately reflect the logical analysis and equitable conclusions of the Office articulated in both its *December 7, 2010 Analysis of Gap Grants* as well as in its own Notice of Proposed Rulemaking and Request for Comments of November 26, 2010 if it included an affirmative statement reflecting the Office's conclusion that Gap Grants are terminable under section 203.

Respectfully submitted,

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