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Reply Comments of the Songwriters Guild of America, Inc., Joined by the Society of Composers & Lyricists Endorsed by Music Creators North America, Inc.

LIBRARY OF CONGRESS
U.S. Copyright Office
[Docket No. 2019–6]

Re: Notice of Inquiry Issued by the United States Copyright Office Concerning the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018: Unclaimed Royalties Study

I. Introduction and Statement of Interest

These Joint Comments are respectfully submitted by the Songwriters Guild of America, Inc. (SGA), the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 89 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world.

SGA's organizational membership stands at approximately 4500 members, and through its affiliations with both Music Creators North America, Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA and The Society of Composers & Lyricists (SCL) are part of a global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA and SCL are also founding members of the international organization Fair Trade Music, which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

The Society of Composers & Lyricists (SCL) (https://thescl.com/), the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre), and a founding co-member of MCNA along with SGA, joins in submitting these Comments on behalf of its more than 1700 members.

Both SGA and SCL have been deeply involved in the legislative process concerning the Hatch-Goodlatte Music Modernization Act (MMA) from the beginning, and have filed numerous and extensive comments regarding its enactment and implementation with the United States Copyright Office and other US Governmental departments and agencies.

The member organizations of MCNA have endorsed these comments in full. Such organizations are listed at http://www.musiccreatorsna.org.

II. Comments

SGA and SCL very much appreciate the opportunity to submit these Reply Comments concerning the US Copyright Office's (USCO) Unclaimed Royalty Study (NOI 2019-6), and respectfully request that the USCO take into consideration the following points regarding the study prior to its finalization.

A. The Critical Issue of Prior Negotiated Agreements

As we pointed out in the joint comments filed by our organizations dated August 17, 2020 pertaining to its Notice of Proposed Rulemaking 2020-12 (NPR 2020-12),[1] it is an issue of existential concern to music creators of what the potential effects are of "Negotiated Agreements" --executed between Digital Music Providers (DMPs) and music publishers-- on the accrual and transfer of unclaimed/unmatched royalties by DMPs to the Mechanical Licensing Collective (MLC) under the Music Modernization Act (MMA). This issue is therefore directly pertinent to the USCO's Unclaimed Royalty Study, and we believe a proper and important subject of concern to be raised in these Reply Comments as a follow-up to our initial NOI 2019-6 comments dated August 3, 2020.[2]

In our NPR 2020-12 comments filed earlier this month, we focused on the recent revelations by the USCO concerning the above dilemma, published in its Notice of Proposed Rulemaking issued on July 17, 2020. Within that Notice, the USCO underscored that prior to or contemporaneous with the enactment of the MMA, numerous digital music distributors and music publishers apparently entered into Negotiated Agreements addressing the disposition of such royalties in ways that may have been intended to place them outside of the scope of the MMA's accrual and distribution provisions.[3]

[1] SGA & SCL Comments. https://beta.regulations.gov/document/COLC-2020-0011-0006

[2] Initial Comments from Songwriters Guild of America, https://www.regulations.gov/document?D=COLC-2020-0007-0010

[3] Federal Register / Vol. 85, No. 138 / Friday, July 17, 2020 / Proposed Rules at 43517, 43522-23

As we further noted, one of the primary objectives of the MMA is to resolve the matter of distributing "permanently" unclaimed/unmatched royalties in ways that are fair and protective to music creators.[4] With potentially hundreds of millions of dollars in songwriter and composer royalties at stake now and in the future, and in light of the profound lack of transparency surrounding these issues, we believe that the following questions should be openly addressed, answered and acted upon by the USCO as expeditiously as possible:

(i) What do these individual, Negotiated Agreements actually state?
(ii) What efforts (global and US) were undertaken by the DSPs and/or the music publishers to identify the true owners of the musical compositions that were the source of the unclaimed/unmatched royalties purportedly being dealt with in the Negotiated Agreements?
(iii) Were the sums received by music publishers under these Negotiated Agreements (whether purportedly associated with unclaimed/unmatched royalties or not) ever shared with music creators, and if so, how? Put another way, what efforts were made to determine how music creators should share in these revenues? and;
(iv) How do the provisions of the MMA (such as those that require mandatory accrual and turnover by the DMPs to the MLC of ALL unclaimed/unmatched royalties so that they may be researched for matching --and failing that effort-- distributed according to the statutory provisions that protect music creator rights) apply to these royalties and Negotiated Agreements.

To its credit, the MLC also filed NPR 2020-12 comments on August 17, 2020, supporting the USCO determination that it would *not* include in its proposed rules, a provision automatically exempting those unclaimed/unmatched royalties that were allegedly the subject of Negotiated Agreements from being counted as "accrued" royalties (thus required to be turned over to the MLC).[5] That welcome comment by the MLC, however, did not in any way address the other crucial, open questions raised in the prior paragraph above.

Moreover, it is to our great disappointment that the comments filed by the Unclaimed Royalties Oversight Committee (UROC) of the MLC on August 4, 2020 regarding NOI 2019-6, did not contain one word or mention of this entire, critical issue of "Negotiated Licenses."[6] That alone would be understandable, had the UROC filed comments addressing this crucial issue in connection with NPR 2020-12, as our organizations did. But it did not, and to the best of our knowledge has declined to comment on the issue altogether.[7] Should it further decline to take the opportunity presented by this round of NOI 2019-6 Reply Comments to join our organizations and others in voicing concerns over the "Negotiated Agreements" issue as it pertains to unclaimed/unmatched royalties, the independent music creator community would have little choice but to regard such actions (or lack thereof) as enormous red flags.

As we explained in our NPR 2020-12 comments:

[4] SGA & SCL Comments, at 3-9. https://beta.regulations.gov/document/COLC-2020-0011-0006
[5] MLC Comments at 8-9. https://beta.regulations.gov/document/COLC-2020-0011-0009
[6] Initial Comments from Unclaimed Royalties Oversight Committee. https://www.regulations.gov/document?D=COLC-2020-0007-0013
[7] Insofar as we can determine after a diligent search, no such filings concerning this issue by UROC have to our knowledge been made.

> [T]he horrendous conundrum for songwriters and composers created by the current issues concerning pre-MMA negotiated agreements is that *both* the DMPs *and* the music publishers with whom the DMPs have executed such deals concerning unmatched royalties, very likely stand to benefit by having those agreements determined to be outside the scope of the MMA mandates. Such a result would mean that the payments made under such arrangements --possibly including distributions required long into the future-- would not be subject to the accrual [and international matching effort] rules of the MMA *or* the MMA requirements for music publishers to equitably share such payments with their affiliated songwriters and composers (as if they were matched to specific compositions and/or creators pursuant to Congressional stipulations).
>
> In other words, under such a scenario regarding prior negotiated agreements, music creators might receive absolutely nothing, while music publishers *make* millions of dollars and DMPs *save* millions of dollars. That would be an untenable and grossly unjust result, to say the very least.[8]

It was our expectation, as was promoted numerous times by the leading proponents of the MMA prior to its passage, that the presence on the UROC of an equal number of music creators and music publishers would ensure the fair airing and treatment of songwriter and composer issues related to the disposition of unclaimed/unmatched royalties. The omission by the MLC's *Unclaimed Royalties Oversight Committee* from its comments concerning the USCO's *Unclaimed Royalties Study*, however, of perhaps the most potent potential danger that songwriters and composers currently face in connection with the MMA --when viewed in combination with its failure to file comments at all in relation to NPR 2020-12-- would speak for itself in the event it additionally forgoes submission of NPR 2019-6 Reply Comments addressing the issue.

We genuinely hope that such a submission from the UROC will be forthcoming today. But if it is not, it will raise serious, factually-based questions as to how the UROC could ignore this vital issue, absent a potential scenario that its ability to address it was pre-empted through pressure (however subtle or not) applied by interested parties who stand to benefit enormously by its silence.

We also note again with concern, as was stated in our NPR 2020-12 comments, that after years of demanding answers to the elementary question "what is the *approximate aggregate value of unclaimed/unmatched royalties currently being held by the DMPs?*," not a single reliable answer has been provided by any party with actual knowledge.[9] The added failure so far of the UROC to address this additional, most basic issue of transparency is another reason for great apprehension among members of the independent music creator community as to the fairness, honesty and reliability of this entire process.[10]

To avoid any doubt, we wish to stress that the foregoing comments are not intended as criticism of the UROC or of its members, but rather as our attempt to protect its authority, ability and

[8] SGA & SCL Comments, at 8. https://beta.regulations.gov/document/COLC-2020-0011-0006

[9] *Id*, at 3-4.

[10] The MLC has assured us it is still working on this issue, but we have our doubts as to whether either the DMPs or the music publishers regard this as an imperative, and the UROC's participation in helping to carry the inquiry forward is essential. See, *id*, at 3-4.

integrity to perform the statutory functions with which it is charged in a manner that fairly protects the rights of music creators on whose behalf the legislation was specifically enacted pursuant to Article 1, Section 8 of the US Constitution. We also wish to voice concern over the possibility that the members of the UROC are hamstrung in their ability to voice criticism of the internal processes to which they are being subject by mandatory non-disclosure agreements they may have been required to sign, contrary to the principles of transparency that are consistently touted as being among the hallmark aims of the MMA.

Congress clearly intended for the UROC to play an instrumental role in helping to accomplish full success in the receipt, attempted identification, and eventual distribution by the MLC of unclaimed/unmatched royalties pursuant to the terms of the statute, including those provisions intended to protect music creator rights and interests. We have no doubt about the UROC's innate ability to accomplish that goal, *but only if it is permitted to do so.*

Finally, we re-emphasize that in past comments, SGA and SCL have endorsed serious consideration by the USCO of the proposal that a neutral, full-time Ombudsperson be appointed to independently oversee and ensure that MMA-related disputes, problems and "anomalies" (including the application of undue pressure and coercion due to conflicts of interest within the MLC) are handled fairly and expeditiously under the statute. We hereby respectfully repeat that recommendation with an increased and justified sense of urgency.[11]

B. Database Ownership

The MLC included in its initial NOI-2019-6 comments a description of the efforts currently being undertaken to achieve the laudable goal of maximizing the accuracy of the database it will be relying on to fulfill its statutory obligations:

> Current activities impacting the reduction of unclaimed royalties also go beyond regulatory matters. Obtaining the best possible usage data set from DMPs must be met on the other side with a complete, accurate and authoritative data set on musical works ownership. This will require the participation of those who provide the authoritative data on ownership: musical works copyright owners and administrators. *While the MLC has begun with a very large data set from its vendor, the MLC is focused on working with its stakeholders to supplement and correct that data set to create a comprehensive public database.* To that end, the MLC has already initiated and commenced working with copyright owners on its Data Quality Initiative (DQI). The DQI provides a simple and streamlined way for copyright owners and administrators to compare full or partial catalogs against the MLC's data, to allow them to correct discrepancies. Copyright owners send files with the works they want to check, and the MLC returns a comparison report highlighting any errors and inconsistencies in the data. The DQI is accessible, efficient, flexible and repeatable. Copyright owners can check whatever portions of their catalogs they want as frequently as they want. The DQI is an excellent topic for the Study's discussion on best practices, but the MLC also stresses that the DQI is active and available now, and copyright owners can

[11] SGA & SCL Comments at 8-9. https://beta.regulations.gov/document/COLC-2020-0011-0006

> take meaningful steps to reduce unclaimed royalties that would be due to them by using the DQI to ensure that the MLC has authoritative data on their works.
>
> This resource for copyright owners to view, compare and correct existing ownership records is a potent tool for reducing unclaimed royalties. The MLC is also developing its Portal and building the functionality that will allow copyright owners to search unclaimed uses, identify works, and register ownership claims, as well as to access the catalog and royalty data that the MLC has for them. When it becomes available soon, registering with the MLC Portal and adding or verifying data are valuable steps copyright owners can take to reduce unclaimed royalties, and the extent to which copyright owners update their works data through the MLC Portal will directly shape the reduction in unclaimed royalties. This is particularly true for copyright owners who feel that their ownership data has not been reflected accurately in the records of vendors to date. The MLC represents a new era and a long-awaited opportunity to fix incorrect records of the past. In parallel with these valuable discussions of best practices, copyright owners can being (sic) to play their part in ensuring The MLC's success by updating their data. Authoritative ownership data means data from owners—and no copyright owner should want to leave the determination of what they own to someone else.[12]

To that analysis, however, was added by well-known music industry attorney Christian Castle, the following admonition concerning the contractual rights and obligations of the presumed "vendor" referenced in the MLC's comments, The Harry Fox Agency (HFA):

> I believe that The MLC is encouraging songwriters to correct their song data in the HFA database and that no data from HFA has been transferred to The MLC as yet, and may never be. If The MLC is having data corrected and filled out in the HFA database, then the rules applicable to vendor access to the database may not apply because the Congress's musical works database is not actually being created at The MLC, it's being created at HFA. Time will tell if I am correct about this, but it does seem that if I am correct, then The MLC and HFA are working together to exploit an imagined loophole in Title I that violates Congressional intent and certainly the spirit of MMA. Respectfully, the Office should find out what is going on.[13]

SGA and SCL believe that these are important questions of fact that require answers to ensure that data ownership issues are as clearly defined as possible in advance of any conflicts that may arise.

The contractual role and authority of HFA (or any other vendor) should be subject to transparent scrutiny by all interested parties, including the music creators whose works are the very subject of all information that resides in the database. That includes examination of the contractual rights of the vendor in regard to the data flowing through its own systems and/or those of the MLC, the ancillary vendor use rights of such data during both the pendency and post-expiration/termination periods of such contract(s), and the clarity of rights ownership of data by the MLC and successor iterations of the MLC (including as regards the Musical Works Database). We respectfully call

[12] Comments of the MLC at 5-6. https://www.regulations.gov/document?D=COLC-2020-0007-0011

[13] Comments of Christian Castle at 6. https://www.regulations.gov/document?D=COLC-2020-0007-0014

on the USCO to address these important issues of transparency and data ownership in an expeditious manner.

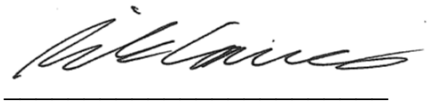
C. Termination Rights in regard to Work-for-Hire Compositions and Unmatched Royalties

SGA and SCL wish to clarify that each supports the principle that the work-for-hire provisions of the US Copyright Act should accommodate a right of employees-for-hire to assert termination rights at a certain point in the life of a copyright (subject to the derivative works exception rights of the employer). Moreover, such rights of termination by authors should include the right to share automatically in the distribution of permanently unclaimed/unmatched royalties under the MMA during the post-termination period.

III. Conclusion

SGA and SCL thank the US Copyright Office and the Librarian of Congress for their careful concern regarding protection of the rights and interests of songwriters and composers under the MMA, and for the opportunity to submit these Comments.

Respectfully submitted,



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