MUSIC CREATORS
MCNA
NORTH AMERICA

SGA
SONGWRITERS GUILD OF AMERICA

5120 Virginia Way, Suite C22
Brentwood, TN 37027
(615) 742 9945

SCL
THE SOCIETY OF COMPOSERS & LYRICISTS

December 1, 2022

Comments of the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, and Music Creators North America

LIBRARY OF CONGRESS U.S. Copyright Office 37 CFR Part 210 [Docket No. 2022–5]

Re: Notice of Proposed Rulemaking and Inquiry Issued by the United States Copyright Office Concerning "Termination Rights and the Music Modernization Act's Blanket License"

I. Summary of Comments

Further to our prior comments on this matter submitted to the United States Copyright Office (USCO) in an ex parte letter from SGA outside counsel Charles J. Sanders dated June 26, 2020 (Ex Parte Letter of June 26, 2020), The Songwriters Guild of America (SGA), the Society of Composers & Lyricists (SCL), and the Music Creators North America (MCNA) coalition (together herein referred to as the Independent Music Creators), respectfully submit these Comments (as summarized immediately below) regarding the USCO's Notice of Proposed Rulemaking dated October 25, 2022[1] (Proposed Rulemaking):

A. The Independent Music Creators are fully in accord with the determination of the USCO set forth in its Proposed Rulemaking that "based on the …analysis of the statute, Congress's intent, and [other cited] authorities, the Office concludes that the

[1] Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64405. See, https://www.govinfo.gov/content/pkg/FR-2022-10-25/pdf/2022-23204.pdf

[Mechanical Licensing Collective] (MLC's) termination dispute policy is inconsistent with the law." We further agree with the USCO's assessment that because the MLC's termination dispute policy is contrary to current jurisprudence, the Proposed Rulemaking must "require the MLC to immediately repeal its policy in full."

B. The Independent Music Creators fully support the USCO's determination in its Proposed Rulemaking that "the copyright owner of a musical work (or share thereof) as of the last day of a monthly reporting period in which such musical work is used pursuant to a blanket license, is entitled to all royalty payments and other distributable amounts (*e.g.,* accrued interest), including any subsequent adjustments, for the uses of that musical work occurring during that monthly reporting period." This full support by the Independent Music Creators extends to the accurate USCO determination that "the derivative works exception contained in 17 U.S.C. 203(b)(1) and 304(c)(6)(A) does not apply to any blanket license and no individual or entity may be construed as the copyright owner of a musical work (or share thereof) used pursuant to a blanket license based on such exception."

C. The Independent Music Creators, however, disagree with the establishment by the USCO of an exception to the above rules that permits the Mechanical Licensing Collective (MLC) to honor a *general* letter of direction by the reclaiming copyright owner directing the MLC to continue paying the prior copyright owner or to hold such royalties pending the resolution of a "dispute." Rather, at minimum, we request that the USCO require that each such letter of direction or agreement between the parties: (i) be executed *after* the effective date of termination; (ii) set forth in plain language the fact that the signing party or parties acknowledge that the action being requested is contrary to the usual rules governing the distribution of such royalties by the MLC, and; (iii) include a clear statement stipulating to the MLC that the document has been executed without prejudice to the rights of either party, including but not limited to claims of copyright and/or royalty ownership under law.

D. The Independent Music Creators agree with the USCO that it has the full right and authority under law to mandate in rules the foregoing determinations (including the proposed amendment set forth above in (C)).

E. Moreover and of equal importance, we further ask the USCO to take note that the MLC's "misinterpretation" of the current law governing the termination rights of authors is exactly the type of potentially willful bias that the Independent Music Creators have been warning of since the creation of the MLC as an entity whose

board of directors is comprised of ten music publishers and only four music creators. We respectfully urge the USCO take steps to specifically address the pernicious effect on legal and administrative decision-making within the MLC that is resulting from the board's uneven distribution of power between creators and corporate music publishing entities, and consider joining the Independent Music Creator community in making recommendations to the US Congress that it act expeditiously to establish a balanced MLC governing board comprised of an equal number of songwriters and composers on the one hand and of music publishing entities on the other.

II. Statements of Interest

The Songwriters Guild of America, Inc. ("SGA") (https://songwritersguild.com/) is 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 over 91 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 is part of a global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA is also a founding member 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/) is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre). It has a membership of over 2800 professional composers and lyricists, and is a founding co-member --along with SGA and other independent music creator groups-- of the MCNA coalition.

Music Creators North America ("MCNA") (https://www.musiccreatorsna.org/) is the only united, internationally-recognized voice of North American songwriters and composers. Each MCNA member organizations is run exclusively by songwriters and composers.

SGA, SCL and MCNA have been deeply involved in the legislative process concerning the Hatch-Goodlatte Music Modernization Act ("MMA") from its beginnings, and have filed extensive comments regarding its enactment and implementation with the USCO and other US Governmental departments and agencies.

III. Discussion

A. Background

SGA was an acknowledged leader among those author advocacy organizations which in the 1960s and 70s fought long, hard and successfully to ensure that the US Copyright Act of 1976 included fair and effective termination rights for authors and their heirs. Since that time, the preservation of those rights under US law has been a key focus of concern for members of the Independent Music Creator community. SGA, for example, has played important roles in supporting creator-initiated terminations, and litigations concerning interpretation of the so-called "derivative rights exception" to termination rights under the US Copyright Act including the seminal cases *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *Woods v. Bourne*, 60 F. 3d 978 (2d Cir. 1995), and; *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.,* 958 F. Supp. 170 (S.D.N.Y. 1997).

Moreover, the Independent Music Creator community has actively championed the preservation of termination rights in relation to the concept of blanket mechanical licensing starting from the first, pre-introduction discussions of the MMA more than five years ago. In our Ex Parte Letter of June 26, 2020, concerning termination rights issues as they relate to the MMA, we requested that the USCO specifically include in any rulemaking a clear statement that:

> In the event that the MLC takes any operational action that affects the rights or interests of interested parties as they relate to termination rights, post-termination rights in derivative works, and all matters pertaining thereto, such MLC action shall not serve to prejudice in any way the rights of interested parties to dispute such action, and shall not be construed to indicate an intention on the part of the US Copyright Office to approve or disapprove of such MLC action or to indicate that such MLC action should be given weight in the eventual legal determination of such dispute.

We later applauded the fact that in its September, 2020 rulemaking, the USCO (in its own words):

> cautioned the MLC that it was not convinced of the need for a default process for handling termination matters. Rather, the Office agreed with other commenters that ''it seems reasonable for the MLC to act in accordance with letters of direction received from the relevant parties, or else hold applicable royalties pending direction or resolution of any dispute by the parties.'' The Office explained that having a default method of administration for terminated works in the normal course ''might stray the MLC from its acknowledged province into establishing what would essentially be a new industry standard based on an approach that others argue is legally erroneous and harmful to songwriters.'' Additionally, as requested by several commenters representing songwriter interests, the Office adopted express limiting language in the regulations to make clear that nothing in the related DMP reporting requirements should be interpreted or construed

> as affecting termination rights in any way or as determinative of the date of the relevant license grant.[2]

Notwithstanding the foregoing admonition, in 2021 the MLC (again in the words of the USCO):

> adopted a dispute policy concerning termination that does not follow the Office's rulemaking guidance. Instead, its policy established a default method for determining the recipient of post-termination royalties in the ordinary course where there is no resolution via litigation or voluntary agreement. Declining to heed the Office's warning, the MLC's policy assumes that the [Derivative Works] Exception applies to the blanket license and uses various proxy dates to determine who to pay under the blanket license."[3]

B. The MLC Dispute Resolution Policy, the USCO Proposed Rulemaking, and the MLC Board

The Independent Music Creators share the USCO's concern expressed above that the dispute policy adopted by the MLC is in direct conflict with prior judicial, Congressional and USCO determinations and instructions, which were intended to ensure that the statutory termination rights of creators would not be prejudiced or impinged upon by either the blanket license and/or other provisions set forth in the MMA, or by MLC distribution guidelines purportedly adopted pursuant to the MMA. We thank the USCO for its proposed rejection and repeal order regarding the MLC's policy, and fully support the substitute guidelines set forth in the USCO's Proposed Rulemaking (as modified by our Comments regarding letters of direction set forth below).

As stated previously in the summary section of these Comments, the Independent Music Creators wholly support the USCO's determination, based upon the Office's sound analysis of applicable provisions of the Copyright Act and prior judicial determinations, that "the derivative works exception contained in 17 U.S.C. 203(b)(1) and 304(c)(6)(A) does not apply to any blanket license and no individual or entity may be construed as the copyright owner of a musical work (or share thereof) used pursuant to a blanket license based on such exception."[4]

We further endorse the USCO's determination, consistent with the above premise, that "the copyright owner of a musical work (or share thereof) as of the last day of a monthly reporting period in which such musical work is used pursuant to a blanket license, is entitled to all royalty payments and other distributable amounts (*e.g.,* accrued interest), including any subsequent adjustments, for the uses of that musical work occurring during that monthly reporting period."[5]

Moreover, the Independent Music Creators believe it is of utmost importance to restate once again their firm belief that the MLC dispute policy in question represents a prime example of the inevitable, unjust results produced by a quasi-governmental music licensing entity whose policies are determined by a board unequally balanced in favor of the interests of music publishing conglomerates-- over and above the rights of the authors and inventors that both

---

[2] Proposed Rulemaking at 64407.
[3] Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64407.
[4] Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64412.
[5] Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64412.

Article I Section 8 of the US Constitution and the US Copyright Act seek to protect. The bias exhibited by the MLC in the present instance, through its attempts to expand the rights of music publishers at the expense of songwriters, composers and their heirs, is as obviously contrary to the letter and spirit of US law as it is potentially damaging to creators.[6] As such, we urge the USCO to take action beyond merely overruling the MLC through the rulemaking process.

Rather, we respectfully request that the USCO take future steps to specifically address the pernicious effect on legal and administrative decision-making within the MLC that is resulting from the board's uneven distribution of power between creators and corporate music publishing conglomerates, and to consider joining the Independent Music Creator community in making recommendations to the US Congress that it act expeditiously to establish a balanced MLC governing board comprised of an equal number of songwriters and composers on the one hand, and corporate music publishing entities on the other, to direct fulfillment of all of the MLC's future statutory obligations.

C. Letters of Direction

As regards the newly Proposed Rulemaking, the Independent Music Creators respectfully have one additional suggestion. We believe it is imperative for the USCO to expand upon its directives to the MLC concerning the adequacy and implementation of "Letters of Direction" (LODs) regarding the disposition and distribution of royalties in the event of disputes regarding termination rights, in order to ensure full consistency with the provisions of the US Copyright Act.

The USCO has recommended in its Proposed Rulemaking the following language:

> The mechanical licensing collective shall not distribute royalties in a manner inconsistent with paragraph (b)(4)(i) of this section,[7] *unless directed to do so in writing by the copyright owner identified in paragraph (b)(4)(i) of this section or by the mutual written agreement of the parties to an ownership dispute*.[8] [emphasis added]

The Independent Music Creator Community believes that the provisions of sections 203 and 304 of the US Copyright Act require a more robust explanation of what conditions should be required to be fulfilled for an LOD or mutual written agreement to be permissibly accepted as valid by the MLC.

---

[6] Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64408-12.

[7] Proposed Rulemaking (b)(4)(i) states: "Subject to 17 U.S.C. 115(d)(3)(J), the copyright owner of a musical work (or share thereof) as of the last day of a monthly reporting period in which such musical work is used pursuant to a blanket license is entitled to all royalty payments and other distributable amounts (*e.g.,* accrued interest), including any subsequent adjustments, for the uses of that musical work occurring during that monthly reporting period…." See, Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64412.

[8] Federal Register/Vol. 87, No. 205/Tuesday, October 25, 2022/Proposed Rules at 64412.

The two termination provisions of the 1976 US Copyright Act contain identical clauses stating as follows: "Termination of the grant may be effected *notwithstanding any agreement to the contrary*, including an agreement to make a will or to make any future grant."[9] [emphasis added] The Senate Report provides additional insight into Congressional intent, noting "although affirmative action is needed to effectuate termination, the right to take this action cannot be waived in advance or contracted away."[10] The House Report is even more specific, noting that the Act "seeks to avoid the situation that has arisen under the present renewal provision [of the 1909 US Copyright Act], in which third parties have bought up future contingent interests as a form of speculation. Section 203(b)(4) [makes] a further grant of rights that revert under a terminated grant valid only if it is made after the effective date of the termination."[11]

"A provision of this sort is needed," states the 1976 Senate Report referring generally to termination rights, "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."[12] It should be noted, however, that the specific inclusion of the "notwithstanding any agreement to the contrary" provision by Congress in the 1976 US Copyright Act was in clear reaction to the reality that the prior attempt in the 1909 Act to protect authors from such predatory publishing practices had failed.

Congress was well aware in 1976 that music and book publishers had almost immediately instituted the practice after passage of the 1909 Act of demanding assignment of both the initial and renewal terms of copyright by an author, even though the term of copyright under the 1909 Act had been bifurcated by Congress in large part to allow for recapture of rights by the author or her heirs after the expiration of the initial 28-year term as a matter of fairness. A judicial doctrine was fashioned through litigation over subsequent decades that only if the author died during the initial copyright term could the statutory heirs terminate the grant, a condition decidedly inconsistent with the Congressional intent underlying the 1909 Act.[13] That is the reason for the inclusion of the "notwithstanding" language in the 1976 Act: to avoid another catastrophe for creators and their families, who were correctly viewed by Congress as having played constantly on a playing field tilted sharply against them under the prior Act.

Using history as our guide, we are naturally concerned that by permitting a general LOD to serve as a valid, dispositive instruction to the MLC regarding the disposition and distribution of royalties in a dispute over termination rights, the Proposed Rulemaking will inadvertently open the door to similar acts of contractual overreaching by publishers at the thresholds of publishing agreements with authors (or at any time thereafter). The execution of "anticipatory LODs" as part of publishing agreements has become common practice. We posit that the coerced signing by an author of such an LOD concerning the disposition by the MLC of post-termination

[9] See, US Copyright Act, 17 USC Sections 203(a)(5) and 304(c)(5).
[10] Copyright Revision Act of 1976, CCH (1976) at 216 (Senate Report).
[11] Copyright Revision Act of 1976, CCH (1976) at 219 (House Report).
[12] Copyright Revision Act of 1976, CCH (1976) at 216 (Senate Report).
[13] *See, e.g.,* Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 377 (1960).* Generally, if rights vested in the author (still living) upon commencement of the renewal term, her original assignment of rights to the publisher for the renewal term was deemed effective and non-terminable.

royalties --as a pre-condition set by the publisher for execution of the underlying publishing agreement with such author-- is easily within the future scope of imaginable, attempted publisher overreach should the Proposed Rulemaking be adopted without amendment.

Though some may argue that our wariness is misplaced based upon a broad reading of the current Proposed Rulemaking, we nevertheless urge that all ambiguity be removed by requiring at minimum that each such Letter of Direction or mutual written agreement: (i) be executed *after* the effective date of termination; (ii) set forth in plain language the fact that the signing party or parties acknowledge that the action being requested is contrary to the usual rules governing the distribution of such royalties by the MLC, and; (iii) include a clear statement stipulating that the document has been executed without prejudice to the rights of either party, including but not limited to claims of copyright and/or royalty ownership under law.

IV. **Conclusion**

SGA, SCL and MCNA 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,

Rick Carnes
President, Songwriters Guild of America, Inc.
Officer, Music Creators North America

Ashley Irwin
President, Society of Composers & Lyricists
Co-Chair, Music Creators North America

cc: Charles J. Sanders, Outside Counsel, SGA
Members of the SGA, SCL and Boards of Directors
Members of the US House and Senate Judiciary Committees