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November 25, 2020

**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. 2020–12]**

Re: Notice of Supplemental Proposed Rulemaking and Inquiry Issued by the United States Copyright Office (“USCO”) Concerning the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018: Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective

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 roughly 6,500 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 1,700 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

A. A Review of Known Facts

In order to make its positions as clear and concise as possible on the complex matters under consideration in this Supplemental Proposed Rulemaking, SGA, SCL and MCNA wish to begin by expressing the following “known facts” as they pertain to the very important issues of accrued unmatched royalties and private and confidential negotiated agreements:

1. The Digital Licensee Coordinator (DLC) confirmed during a November 13, 2020 ex parte teleconference among interested parties organized by the USCO (the November 13 Meeting) that Digital Music Providers (DMPs) have accrued an aggregate amount of unmatched royalties valued in the *hundreds of millions of dollars*, dating back to the inception of each of the individual DMP services.
2. The DLC and various music publishers have confirmed that prior to the date of enactment of the Music Modernization Act (MMA), private and confidential negotiated agreements were entered into by certain DMPs and music publishers purporting to address the distribution of portions of such accrued, unmatched royalties being held by those DMPs. The DLC has confirmed that the aggregate amount of accrued unmatched royalties distributed by DMPs to music publishers under such private and confidential negotiated agreements is valued in the *tens of millions of dollars*.
3. No details of such private and confidential negotiated agreements are known to any parties other than the individual music publishers and DMPs that entered into each respective agreement, including the considerations given and received under such agreements, and the specific provisions pertaining thereto. It is reasonable to conclude, based upon the stated positions of such parties, that most if not all such agreements include strict confidentiality and non-disclosure provisions.
4. As SGA President Rick Carnes and SCL President Ashley Irwin noted at the November 13 Meeting, based upon the known dates and circumstances of the private and confidential negotiated agreements, the following points remain uncontroverted:

- a. That the parties to such agreements almost certainly knew at the time of execution that no reasonable efforts had been undertaken by the DMPs to identify the accrued unmatched royalties that were allegedly the subject of the agreements;
 - b. That the parties to such agreements almost certainly knew at the time of execution that any such payment of accrued unmatched royalties to the music publishers would constitute the disposition of property belonging to yet-to-be identified, third-party persons or entities with likely no relationship to either of the signing parties,¹ and;
 - c. That the parties to such agreements were well aware that new legislation being discussed or about to be introduced in Congress would likely (i) require the DSPs to exercise considerable efforts to properly identify and/or provide extensive data concerning the accrued, unmatched royalties prior to distribution; and, (ii) require music publishers to share any permanently unmatched accrued royalties with their affiliated music creators under legislative provisions mandating that creators receive royalties in accordance with the splits set forth in their publishing contracts, with a minimum statutory floor of fifty percent.²
5. Several music publishers who entered into such private and confidential negotiated agreements claim to have distributed portions of the accrued unmatched royalties they received from the DMPs to their affiliated songwriters and composers. However, not one single music publisher, to our knowledge, has revealed the methodology and details of such sharing, including but not limited to whether attempts were made to determine the proper owners of such royalties, or whether the principles and guarantees eventually set forth in the MMA as enacted were applied to any lump sum payment of unmatched royalties to the publisher.³

1 The vast bulk of unmatched royalties accrued since the inception of services by the DMPs likely do not belong to the major music publishers. The record keeping of such majors and their ability to police the use of their works makes far more probable that such unmatched royalties belong to independent creators and small music publishers.

2 See, e.g., Summary of Ex Parte Meeting submitted to the USCO by MediaNet dated October 28, 2020: "In 2013, MediaNet recognized that it had accrued significant royalties on its books related to unmatched usage, and in December of that year approached Universal Music Publishing Group ("UPMG") to pay out their portion of the balance of those royalties. UPMG directed MediaNet to work with NMPA to establish a mechanism for paying out unmatched royalties. MediaNet worked with NMPA to develop this program, including by sharing internal data. NMPA provided a preliminary framework for the settlement agreement in November 2015, and followed up in July 2016 with an initial draft agreement. Negotiations over that agreement ensued, and in December 2017, as NMPA was negotiating the legislation that would become the Music Modernization Act, pressed MediaNet to finalize the agreement. On December 20, 2017, MediaNet entered into an umbrella Pending and Unmatched Usage Agreement ("P&U Agreement") with the NMPA. <https://www.copyright.gov/rulemaking/nma-implementation/ex-parte/medianet.pdf>

3 At least one publisher has indicated an alleged willingness to share details of such payments with any writer who makes inquiry as to his or her own works, but that remains an unlikely scenario considering that a huge percentage of writers have no knowledge of the private negotiated agreements in the first place, and --to the knowledge of the IMCOs based on informal canvassing-- have not been directly informed about them by their publishers. See, e.g., Ex Parte letter from Sony/ATV dated October 28, 2020: "It has been SATV's practice to explain to our writers who inquire how these royalties are distributed and reflected on their statements."

6. Moreover, as SGA, SCL and MCNA reported at the November 13 Meeting, an informal and ongoing process of canvassing creators currently being conducted by each MCNA member organization has yet to identify a single instance in which a songwriter or composer received a royalty statement indicating that distributions of such accrued, unmatched royalties were included (though they may have been), and on what basis.⁴ No other music creator group or representative present at the November 13 Meeting sought to contradict these findings or to present additional or alternative information.

7. It is the position of the DSPs that the provisions of the MMA allow them to deduct the amount of unmatched royalties allegedly paid to music publishers under the private and confidential negotiated agreements from the amount of unmatched royalties accrued from inception that they are otherwise bound by the statute to turn over to the Mechanical Licensing Collective (MLC). The DMP's justification for such deductions is that they comport with "Generally Accepted Accounting Principles" (GAAP) (as referenced in passing but not explained under one subsection of Title I of the MMA), although no one, including the DMPs, have yet to satisfactorily explain either (i) the principles of acceptable accounting to which they refer, or (ii) the basis upon which they have the right to do so under the private and confidential negotiated agreements.⁵ Nevertheless, SGA, SCL and MCNA remain confident in their position that settling debts by confidentially misdirecting other people's money to one's creditor is not, in so far as we know, a recognized GAAP standard anywhere in the world.

8. In summary of the above,

a. The DMPs will not reveal the content of the confidential agreements they signed with music publishers. They nevertheless seek to rely on such agreements to deduct unmatched royalties --which they made no effort to identify but simply paid over to music publishers in exchange for unrevealed consideration-- from the amounts that the statute explicitly requires them to pay over to the MLC as accrued from the date of inception of their services.

b. The music publishers will not reveal the content of the confidential agreements with DSPs they signed. They nevertheless seek to rely on such agreements to justify their acceptance from DSPs of unmatched royalties that likely did not belong to them, which they claim (although royalty statements appear silent on the issue) were shared with their affiliated music creators on terms that they likewise will not reveal.

c. The music publishers further seek to rely on the provisions of the MMA to ensure that the DSPs be compelled to render to the MLC *all* accrued, unmatched royalties from the inception of their services stretching back well prior to the enactment or effective dates of the statute, but balk at the application of the MMA's safeguards for songwriters and composers

regarding the unmatched royalties paid to them by DMPs prior to the enactment or effective dates of the statute.

⁴ *Were such unmatched royalties paid to songwriters and composers by music publishers on terms resembling the MMA rules concerning music creator protections (as either drafted or eventually enacted), it seems counter-intuitive that that no line item would appear anywhere in accounting statements indicating the source of such payments, not only as a matter of sound accounting practice, but of earned good will.*

⁵ *No public accountants with whom we or our associates have spoken are aware of GAAP rules for what could easily be labeled “secret deals.” From our perspective, the purpose of GAAP, like the Sarbanes-Oxley regime, is to provide consistent standards for public financial reporting, not to weaponize the accounting rules.*

E. The Conundrum for Independent Music Creators

With the opaque nature of these highly complex issues in mind, the independent songwriter and composer community is nevertheless today being asked to comment on Supplemental Proposed Rules that would purportedly govern the disposition of these matters. Attempting to do so with such woefully limited information on which to base our recommendations places us, and the entire music creator community, at a severe disadvantage in attempting to protect our rights.

Similarly, the USCO is being placed at a terrible disadvantage in being asked by others to fashion fair and effective solutions without being in the possession of the full range of information reasonably required to do so. That dearth of data includes something so basic as copies of the private and confidential negotiated agreements that are the subject of the controversies they are seeking to resolve pursuant to their duties under the MMA.

At the same time, the corporate entities representing the DSP and music publishing industries appear content to turn a landmark legislative initiative that promised a new era of transparency, into one about which we remain concerned will be marked by a level of obfuscation that practically invites unfairness, deception, and the possibility of cloaked duplicity and wrongdoing despite the best efforts of music creators and many MLC administrators.

Just as troubling, the DSPs and publishers seem further intent on creating a situation that virtually guarantees a forced resort to litigation in order for individual songwriters and composers to protect their rights and incomes, a situation that the creative community neither wants, nor should be compelled to undertake. SGA, SCL and MCNA have long warned of this developing situation and our desire to avoid it. In our 2020-12 Comments to the USCO dated August 17, 2020, we wrote:

[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... would not be subject to the accrual 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. This situation is of the exact nature that the MMA was intended to address in a fair and equitable manner for the benefit of US and international music creators, again pursuant to the mandates of Article I, Section 8 of the US Constitution.

The Chairman of the Senate Judiciary Committee has recently expressed similar concerns. In a letter dated September 30, 2020, he wrote to the Register of Copyrights that:

Since the intent of the MMA was to provide legal certainty for past, present, and future usage, it is critical that this issue be resolved in a manner that protects copyright owner interests while ensuring that songwriters are paid their splits and services are not burdened with double payments.... If the parties are unable to

address this current dispute on their own in the immediate future, I urge the Copyright Office to bring them together in order to prevent a return to the inefficient litigation that featured prominently in the prior licensing regime.

At the risk of redundancy, it bears repeating that SGA, SCL, MCNA, and their internationally affiliated organizations, songwriters and composers numbering in the hundreds of thousands around the globe, share the Senator's concerns. As we have tried to make clear in our many past submissions and comments to the USCO, our organizations strongly believe that litigation is an inefficient, burdensome and expensive methodology for solving the problems that the MMA was supposedly enacted to address. However, it is our duty to assist our members in ensuring that they have the ability, if they so individually choose, to protect their rights by whatever legal means they deem necessary and appropriate.

Therefore, we have made the decision not to speak directly in these Comments regarding the USCO's proposed Supplemental USCO Rules that --in our analysis admittedly limited by a lack of fact disclosure-- neither resolve nor even address the core issues of transparency and fairness. Rather, they instead threaten to drag out resolution of these issues beyond the statutes of limitations that may govern the exercise of the legal rights of music creators.

We believe that a more constructive course, and one which we will follow, is to present the following, urgent suggestions in the hope that they will be incorporated into any short and long-term strategies adopted by the USCO in fashioning options and solutions. Our goal is to frame potential courses of action that address the needs and concerns of all music creators in ways agreeable to other interested parties, with an eye toward avoiding the necessity for legal action by any of our members or constituents in the defense of his or her rights.

C. Suggested Action

(i) Regulatory Authority to Ensure Transparency and Fairness for Music Creators

The USCO has itself defined what it perceives as its oversight role under the provisions of the MMA, as follows (copied and pasted within this Comment to ensure the inclusion of footnote links and they appear in the original⁶):

The MMA enumerates several regulations that the Copyright Office is specifically directed to promulgate to govern the new blanket licensing regime....

Additionally, Congress invested the Copyright Office with “broad regulatory authority”^[18] to “conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license].”^[19]

The legislative history contemplates that the Office will “thoroughly review” policies and procedures established by the MLC and its three committees, and promulgate regulations that “balance the need to protect the public's interest with the need to let the new collective operate without over-regulation.”^[20] It further states that “[t]he Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation.”^[21]

Together, the statute and legislative history make clear that Congress intended for the Office to oversee and regulate the MLC as necessary and appropriate,^[22] as well as periodically review that designation.^[23] Indeed, Congress acknowledged that “[a]lthough the legislation provides specific criteria for the collective to operate, it is to be expected that situations will arise that were not contemplated by the legislation,” and that “[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations.”^[24] Emphasis Added.

...Taking seriously Congress's instructions to exercise its regulatory authority “to ensure the fair treatment of interested parties” by the MLC,^[27] in designating the MLC and DLC, the Office stated that it “intends to conduct its oversight role in a fair and impartial manner; songwriters are encouraged to participate in these future rulemakings.”^[28]

⁶ <https://www.federalregister.gov/documents/2019/09/24/2019-20318/music-modernization-act-implementing-regulations-for-the-blanket-license-for-digital-uses-and#citation-26-p49968>

Further to the above positions as articulated by the USCO, the MMA specifically confers upon the USCO responsibility and authority to adopt regulations applicable to the matters addressed in these comments. Section 102(a)(4)(A)(iv) (“ADOPTION OF REGULATIONS”)— specifically provides that:

The Register of Copyrights shall adopt regulations— (I) setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license; and (II) regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.

Moreover, in 1984, the US Supreme Court held in the landmark *Chevron* case⁷ that deference should be accorded to a governmental agency in evaluating an administrative action, or its right to take such action, so long as the action was not unreasonable under the statute and Congress has not spoken to the precise issue at question.

Those MMA provisions and that judicial decision lend further credence to our contention that the USCO has sufficient authority to compel disclosure of the details of the private and confidential agreements between DSPs and music publishers (perhaps subject to redactions to accommodate legitimate privacy and antitrust concerns) as a condition under rules concerning, for example, the MLC’s handling of Reports of Usage. Only under such conditions of transparency can the Supplementary Proposed Rules be rationally evaluated, and eventually promulgated with the requisite specificity to protect the rights and interests of all parties concerned, including songwriters and composers.

The taking of a strong role by the USCO in acting to ensure such transparency and fairness in regard to the disposition of these tens of millions of dollars in royalties that are the subject of these Comments is especially critical to music creators, who stand in a subordinate position on issues concerning the MLC. That is due in significant part to the fact that the MLC board of directors is so heavily weighted in favor of its music publisher members, forcing creators to rely --as we believe Congress planned-- on the USCO for balance, transparency and protection. The suggestion, for example, that letters of direction from music publishers should be automatically honored by the MLC concerning credits or refunds to the DSPs, is absurd considering the potential conflicts of interest enabled by secrecy and non-disclosure. But to whom are songwriters and composers to appeal under such circumstances if not the USCO? To the MLC board, comprised of ten publishers and just four music creators?

Respectfully, SGA, SCL and MCNA request that if the USCO deems its statutory and legal authority insufficient to perform those protective functions, including compelling the disclosure of details concerning the private agreements the purpose or effect of which may have been the misappropriation or misdirection of tens of millions of dollars in

⁴See, [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.](#), 468 U.S. 837 (1984) at 837-838, 859-866.

unmatched royalties, we ask that at the very least it notify Congress that changes to the law are necessary to (i) take appropriate corrective actions, (ii) expand the regulatory authority granted to the USCO, especially as concerns the promulgation of rules addressing conflicts of interest, and (iii) balance the MLC board by adding six songwriter representatives for equal representation. We consider these to be urgent imperatives should the USCO determine its authority is too limited in scope to address the transparency, fairness and related issues raised herein.

F. Accrued Unmatched Royalties, the DSPs, and Music Publisher Payments to Songwriters and Composers

As noted above and in our prior USCO comments, SGA, SCL and MCNA believe that the MMA is crystal clear in requiring DSPs to render to the MLC *all* accrued, unmatched royalties from inception. The inclusion in the statute of a passing, unexplained reference to “GAAP” standards cannot under any reasonable interpretation stand as evidence of Congressional intent to include an exception for the act of likely misappropriation of other people’s royalties to settle a DSP’s debts or liabilities owed to a third-party music publisher.

Moreover, the MLC is bound to use its best efforts under terms specified by the MMA, to properly identify one hundred percent of accrued unmatched royalties. Those efforts are thwarted at the threshold if only a portion of accrued unmatched royalties are rendered to the MLC by the DMPs, who clearly used no effective efforts to identify the proper owners of such royalties prior to paying them to music publishers pursuant to private and confidential negotiated agreements.

We further suggest that the USCO consider the following possible solutions to the problem of accounts balancing:

In the event that a DSP is able to prove that it has previously paid unmatched royalties to a music publisher --under a formula that reasonably approximated such music publisher’s actual share of the accrued, unmatched royalties that were being held by the DSP for the particular accounting period(s) in question *had they been matched to such music publisher (and not simply been allocated by market share alone)*-- one potential resolution would be for the MLC to (i) refund to the DSP an amount equal to the amount previously paid to the music publisher (memorialized by a public filing on the MLC website), (ii) secure a stipulation under oath from the music publisher (memorialized by conspicuous publication on the MLC website) that it has or will within a specified period pay its affiliated music creators their share of such unmatched royalties as if the royalties had been paid pursuant to the MMA through the MLC, and (iii) eliminate that settling music publisher (and its affiliated songwriters and composers) from participating in the pool of recipients that receive *adjusted* market share distributions of permanently unmatched, accrued royalties distributed by the MLC for the applicable period.

6 Protections for Songwriters and Composers Not Party to the Private and Confidential Negotiated Agreements (including extension of Statutes of Limitations)

Whether or not the potential course of action posed above (or an alternative that similarly addresses and resolves the issues of transparency and fairness) is instituted, there must be safeguards put into place that protect the rights of those hundreds of thousands of music creators and copyright owners throughout the US and around the world who were not parties to the private and confidential negotiated agreements executed between the DMPs and the music publishers.

The vast bulk of unmatched royalties accrued since the inception of services by the DMPs likely do *not* belong to the major music publishers under their voluntary agreements, lump sum unmatched settlements, or otherwise. The record keeping of such majors and their ability to police the use of their works makes far more probable that such unmatched royalties belong to independent creators and small music publishers. It would be grossly unfair, to put it in the mildest possible terms, if the DMPs and music publishers who were principals in the private and confidential negotiated agreements that are the subject of these Comments, were permitted to illicitly convert to their own use and ownership tens of millions of dollars in unmatched royalties that rightfully belong to others, with the imprimatur of the MLC and potentially the USCO.

Moreover, as SGA, SCL and MCNA have noted in the past but were not able to discuss at the November 13 Meeting in significant enough detail, there remains a statute of limitations issue that also demands the attention of the USCO and Congress as it regards the rights and interests of music creators.

The urgency of this issue has in fact been heightened by the apparent assertions of one or more DMPs that they may choose to forego the limited safe harbor provisions provided by the MMA by not turning over to the MLC the full amount of accrued, unmatched royalties dating back to inception of use, probably under the assumption that the potential running of applicable statutes of limitations will provide the same protections as the safe harbor without payment of the royalties due. As the DLC noted in prior comments, "...a DMP could make the rational choice to forego the payment of accrued royalties entirely, and save that money to use in defending itself against any infringement suits."⁸

As we noted in our Ex Parte Summary concerning the November 13 Meeting, we raised this statute of limitations issue and were gratified that the DLC felt it remains a matter worthy of further discussion, hopefully with the important input of the USCO. Unfortunately, this week's filing deadline did not permit definitive discussions prior to this submission. The issue remains very much in the forefront of our minds, however, especially as to how it may affect the ability of our members and constituents to enforce

⁸ See, Comments Of Digital Licensee Coordinator, Inc. In Response To Notice Of Proposed Rulemaking , Docket 2020-12, Document COLC 2020-0011-0008 (Aug. 17, 2020) at 4.

their rights, and we intend to follow up with the DLC and the USCO in the immediate future.

III. Conclusion

SGA, SCL and MCNA thank the USCO for the opportunity to respectfully submit these Comments. We further look forward to full participation in the amicable resolution of all aspects of the important set of issues discussed herein, remain available to confer with you on this or any other matters of import at any time, and implore the USCO to act on the suggestions set forth herein for the good of all music creators as matters of fairness, equity and law. We also once again, however, are constrained to add that we reserve without prejudice all the rights and interests of our members and constituents.

Respectfully submitted,



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