Electronically Filed
Docket: 19-CRB-0009 AA
Filing Date: 09/09/2019 01:54:41 PM EDT

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective

Docket No. 19-CRB-0009–AA

ATTACHMENT TO THE SONGWRITERS GUILD OF AMERICA'S RESPONSE IN OPPOSITION TO THE MOTION OF THE MLC TO DISMISS SGA'S PETITION TO PARTICIPATE

The Songwriters Guild of America, Inc. ("SGA") has taken note that the electronic filing of its original Petition to Participate ("Petition") in the above-captioned Administrative Assessment Proceeding does not appear to have permitted the inclusion of its intended Attachment. Such Attachment was also referenced in SGA's "Response in Opposition to the Motion of the MLC to Dismiss SGA's Petition to Participate" filed on September 6, 2019 (denoted therein as "SGA Copyright Office Submission re MMA" but formally titled "Comments of the Songwriters Guild of America, Inc. Re: Notice of Inquiry Issued by the United States Copyright Office Concerning the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018 (Pub. L. 115-264) -- Designation of Mechanical Collective").

That referenced Attachment dated April 22, 2019 is now appended hereto.

SGA apologizes for this oversight, and respectfully requests that the Judges accept the present filing as an Attachment to both its September 6, 2019 Response filing and its original Petition. A Proof of Delivery document concerning both the initial Response and this Attachment are attached.

Dated: September 9, 2019

Respectfully submitted,

/s/ Charles J. Sanders, Attorney at Law PC, Counsel for SGA

29 Kings Grant Way, Briarcliff Manor, NY 10510 – (914) 588 7231
cjs@csanderslaw.com // csanderslaw@aol.com

Proof of Delivery

I hereby certify that on Monday, September 9, 2019, I provided a true and correct copy via electronic transmission of **THE SONGWRITERS GUILD OF AMERICA'S RESPONSE IN OPPOSITION TO THE MOTION OF THE MLC TO DISMISS SGA'S PETITION TO PARTICIPATE** and the **ATTACHMENT TO THE SONGWRITERS GUILD OF AMERICA'S RESPONSE IN OPPOSITION TO THE MOTION OF THE MLC TO DISMISS SGA'S PETITION TO PARTICIPATE** to the following:

Digital Licensee Coordinator, Inc., represented by Allison Stillman, served via Electronic Service at astillman@mayerbrown.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Mechanical Licensing Collective, represented by Benjamin K. Semel and Frank P. Scibilia, at fscibilia@pryorcashman.com and bsemel@pryorcashman.com

Signed: /s/ Charles J. Sanders, Counsel to Songwriters Guild of America, Inc.

Contact:
Songwriters Guild of America, Inc.
210 Jamestown Park Road Suite 100
Brentwood, Tennessee 37027-750
615-742-9945

April 22, 2019

Comments of the Songwriters Guild of America, Inc.
Re: Notice of Inquiry Issued by the United States Copyright Office Concerning the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018 (Pub. L. 115-264) Titled "Designation of Mechanical Collective"

I. Introduction and Summary

These comments are respectfully submitted by the Songwriters Guild of America, Inc., the longest established and largest music creator advocacy and administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Established in 1931, SGA has for 88 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 ranges between 3500 and 5000 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.

SGA acted independently, but also often together with many of its MCNA, CIAM and Fair Trade Music colleagues, in advocating for the passage of the Musical Works Modernization Act of 2018 (MMA) throughout the entire legislative process. During that time, however, SGA also worked for the inclusion of amendments to make the Act more equitable for the music creators who, under the US Constitution, are the intended beneficiaries of the legislation.[1] Some of those

[1] https://www.tennessean.com/story/money/2018/01/05/landmark-songwriting-bill-gains-momentum-songwriters-guild-association-raises-concerns/1007240001/

efforts, such as singularly gaining greater representation for songwriters and composers on the board of the Mechanical Collective to be established under the Act (from two songwriters to four), and arguing for clarification in the Act's Legislative History that music creators are due the full benefit of their publishing agreement splits in the distribution by music publishers of so-called "unmatched royalties," were successful.

Other efforts, such as our vigorous attempt to gain *equal* board representation for songwriters and composers on the Mechanical Collective board, were neither joined nor fully realized. In that regard, SGA wishes to note for the record that unfortunately, like many other independent creative and music publishing community organizations, it was generally excluded from taking part in the closed-door legislative negotiation process organized by the National Music Publishers Association, Inc. (NMPA), which gave deference only to its own, affiliated and/or controlled music creator groups. SGA took the alternative route of organizing visits to members of Congress on its own, but was principally and consistently rebuffed regarding its requests to regularly participate in meetings and discussions concerning the legislative negotiation and drafting process, with the principle exceptions being a short industry meeting in New York, and brief legislative discussions with NMPA that were organized by the US Copyright Office itself, for whose efforts in that regard SGA is extremely grateful.

Following the enactment of the legislation, NMPA and its affiliated music creator groups began assembling various music industry committees to consider implementation issues, leading to the establishment of the non-profit organization now generally referred to as the NMPA Music Licensing Collective (NMPA/MLC). Despite being invited to participate on the NMPA/MLC music creator advisory committee (although several SGA candidates were rejected for service on the committee without explanation or reason), SGA continued to be rebuffed in its efforts to ensure inclusion, transparency, diversity, and non-conflicted consideration of music creator issues and protections even as its representatives participated in committee meetings.

SGA's request to establish a conflict of interest committee policy, for example, was rejected outright, even after SGA's offer to the committee to draft such a policy and accompanying pledge for its consideration. The NMPA/MLC music creator advisory committee chose instead to implement a non-disclosure requirement concerning its activities and deliberations, to which SGA objected as being antithetical to the spirit of transparency and accountability mandated under the Act.

By its comments in this regard, SGA does not wish to denigrate the positive work in which NMPA and its affiliated music creator groups may or may not be otherwise engaged in alignment with SGA. As to issues concerning the MMA, however, cooperation by the NMPA/MLC has been less than what SGA had hoped for and anticipated.

SGA does wish to note that so far as concerns the group known as the American Music Licensing Collective (AMLC), SGA's consultations on similar issues of inclusion, transparency, diversity and non-conflict have been welcomed. Prior to consulting with AMLC on such matters, it should be noted that SGA discussed the matter with the US Copyright Office, and received assurances that it would not constitute a conflict of interest for SGA to work with both the NMPA/MLC and the AMLC in attempting to ensure that each group would build an

organization wholly responsive to the need of music creators to have their rights and interests protected without bias or conflict under the MMA.

The AMLC thereafter responded, in fact, by inviting SGA President Rick Carnes to serve as a music creator representative on its board, along with other songwriter and composer members affiliated with MCNA and the international music creators' group CIAM. This latter point appears to be an especially important reflection of AMLC's global view concerning its outreach obligations, in light of the fact it has been widely reported that a very large percentage of the unmatched royalties the designated Mechanical Collective will be charged with identifying and distributing likely belong to composers and songwriters residing outside of the United States.

Similarly, AMLC has signed a pledge to conduct itself, if designated as the Mechanical Collective, in ways consistent with Fair Trade Music principles in all cases not in conflict with its statutory obligations. The NMPA/MLC has neither supported the inclusion of international music creators on its board (and in fact rejected at least one eminently qualified international candidate), nor signed similar pledges to abide by Fair Trade Music principles.

Nevertheless, as will be discussed below, SGA is far more concerned with ensuring that music creator rights are fully protected against conflicts of interest and impingements upon the rights and interests of songwriters and composers under all circumstances, than in supporting one or the other candidate vying to be selected as the Mechanical Collective. Others in the music creator community are choosing to voice opinions in this regard, including a founding member of one of NMPA's affiliated songwriter groups, and SGA urges the Copyright Office to consider all such opinions based upon the facts.[2] SGA's comments, however, will deal principally with issues of fairness and equitable administration, payment, and oversight, rather than with statements of support for or opposition to one or the other of AMLC or NMPA/MLC. SGA trusts in the Copyright Office to make the correct decision as to which group is best suited to protect the artistic creators whom the Act is primarily intended to serve, and seeks only to assist the Copyright Office in coming to the most informed and equitable decision in that regard.

Further, as part of that process herein, SGA will also endeavor to point out instances in which the Copyright Office is well-positioned to address and institute various checks and balances permissible within the statute, to ensure as thoroughly as possible that *the rights and interests of creators are protected.* That principle is, has always been, and should always be, the central mandate of both SGA and the United States Copyright Office. It is also the reason why Congress has entrusted the US Register of Copyrights and the Librarian of Congress to perform the crucial threshold tasks before them, investing in them the broad authority and latitude to ensure, through independent investigation and analysis, that the entity eventually designated to serve as the Mechanical Collective is led only by those dedicated to and capable of carrying out that protective mandate for songwriters and composers.

II. Discussion

A. The Fundamental Basis of All US Copyright Legislation

[2] https://www.digitalmusicnews.com/2019/04/18/sona-mlc-amlc-statement/

For centuries, it has remained an immutable legal principle that it is protections for the rights of *creators* that are recognized in the United States and throughout the world as the basis for the encouragement and advancement of art, culture and civic life. Virtually every modern law and treaty enacted in the sphere of artistic and intellectual property rights focuses on this same principle: *in order to serve the greatest interests of both individuals and societies, it is the rights of the creators of intellectual property that must be legally, commercially, and ethically protected.* Those laws and treaties include The United Nations Universal Declaration of Human Rights to which the United States is an original signatory, the Berne Copyright Convention of which the United States is a signatory, and most importantly for the purposes of this legislation and these comments, the United States Constitution (including Article I, Section 8, which establishes the right of Congress to enact intellectual property laws for the principle purpose of "promoting the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

With that principle in mind, Congress cited Article I, Section 8 as the basis of its authority to enact the MMA, principally for the benefit of music *creators,* and invested in the US Register of Copyrights and the Librarian of Congress broad responsibility and authority to oversee the MMA implementation process. SGA, as the result of its detailed discussions with the Copyright Office throughout the legislative process, is confident that the Librarian and the Register grasp the weight of this responsibility, and will take into full account the need to act independently and wisely in the investigation and analysis of the candidates competing for selection as the Mechanical Collective (and their board and committee members) with the best interests of creators as its primary focus.

B. The Role of the US Register of Copyrights and the Librarian of Congress Under the MMA

In line with the foregoing, Section 102(d)(3)(A) of the MMA sets forth the specific but expansive criteria to be utilized by the US Register of Copyrights in designating which competing, non-profit entity is to serve as the US Mechanical Collective with the approval of the Librarian of Congress.

Among the three most important of these criteria are those which provide that the entity seeking designation must:

(i) "[have been] created by copyright owners to carry out responsibilities under this subsection," which prominently include "ensur[ing] that the policies and practices of the collective are transparent and accountable." See, Section 102(d)(3)(D)(ix)(I)(aa);

(ii) "[be] endorsed by, and enjo[y] substantial support from, musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years"; and,

(iii) "[be] able to demonstrate to the Register of Copyrights that the entity has, or will have prior to the license availability date, the administrative and technological capabilities to perform the required functions of the mechanical licensing collective."

Moreover, in further clarifying its intention that the US Copyright Office, the Register and the Librarian are fully authorized and encouraged to engage in independent investigation and analysis in determining which candidate is to be designated as the Mechanical Collective under the foregoing general criteria, Congress also provided in Section 102(d)(3)(B)(bb) that the Register is to publish the "*reasons* for the designation" (emphasis added), in order to permit public and industry review of the determination, and to allow for appeal if appropriate. The House and Senate Reports concerning the legislation fully support this principle, as will be discussed below.

C. Transparency and Accountability—Especially Regarding Unmatched Royalties

As to the first criterion set forth in the prior section above, *transparency and accountability*, Congress had reasons for serious concern that certain inherent conflicts created by the MMA would require particularly intensive scrutiny of the Mechanical Collective at both the threshold of its designation, and over the later performance of its duties. The most obvious of these conflicts concerns the role of the Mechanical Collective in seeking to identify the rightful owners of hundreds of millions of dollars in unmatched royalties that will shortly be turned over to the Collective for identification and distribution. SGA has endeavored over a period of many months to ascertain from various, knowledgeable sources (including the US Copyright Office) the exact amount of unmatched royalties that are currently being held by digital music distributors, but has not yet secured a demonstrably accurate answer. Estimates, however, have ranged from several hundred million dollars to a high of $1.6 billion, and far more unmatched royalties will be arriving at the Mechanical Collective over future years.

Regardless of the actual amounts being held, following its designation by the Register and the Librarian, it will be up to the Mechanical Collective to engage in various outreach and analytic activities in an attempt to identify the rightful owners of this huge cache of "black box" royalties, in an effort to pay *all* of those monies to the proper recipients. In the event such rightful owners cannot be definitively determined and located by the Collective, however, the royalties belonging to those as yet unidentified parties (most of whom are likely to be independent songwriters) *will then be distributed on a market share, title by title basis under the Act to music publishers, the largest among whom will receive the major portions of monies that knowingly do not otherwise belong to them.*[3]

[3] It is worth noting further that those music publisher recipients of unmatched royalties will then be on their honor to notify their affiliated music creators that such royalties have been received, and obligated under the law to pay the creators according to their contracts as if such monies had been reported on a title by title basis in the normal course (or at a minimum rate of fifty percent, whichever amount is higher). How this downstream payment process will work effectively remains to be seen, a subject that will be addressed in greater detail later in these comments.

Under such circumstances, the board of the Mechanical Collective is likely to be placed under enormous pressure from major music publishers to limit its search for the rightful of owners of these hundreds of millions of dollars in black box royalties. With the knowledge that "permanently" unmatched royalties will eventually be distributed on a market share basis to *them*, those largest music publishers will almost certainly do all they can to influence, hamstring and obscure the search process.[4] At the same time, those large publishers will ironically also likely decline to utilize the Mechanical Collective for their mechanical licensing services, choosing instead to negotiate direct deals and payments with digital music distributors.

It will take highly experienced, non-conflicted and strongly independent-minded board members of the Mechanical Collective to resist this pressure, and to act in ways that fulfill their duties up to the mandated standards of fairness, transparency and accountability set forth in the Act. The necessity for those characteristics in board members is amplified by the fact that the Mechanical Collective board may even override the recommendations of its own, statutorily established Unclaimed Royalties Oversight Committee if it sees fit to do so. It thus falls to the Register of Copyrights to serve as investigator, analyst and arbiter concerning this crucial, threshold issue of appropriate board and committee member selection as part of its evaluation of the competing candidates for designation as Mechanical Collective.

In honing in on its concerns regarding that specialized duty of the Register, members of Congress took the opportunity in both the Senate and House Reports to elaborate on their expectations regarding the qualifications of board and committee members proposed for service by any Mechanical Collective candidate, and the obligation of the Copyright Office under the direction of the Register to use its own, appropriate judgement in independently evaluating and verifying the credentials of those directors and committee members proposed. That Congressional posture was undoubtedly taken to ensure that all board and committee members of the Mechanical Collective possess the proper background and abilities to execute their duties to protect the rights of creators and other interested parties without conflict, pursuant to the terms of the Act.

Specifically, the applicable section of the Senate Report reads:

> "The Board of Directors of the new collective is required to be composed of individuals matching specific criteria. The detailed requirements concerning the overall framework of the Board of Directors of the collective and its three committees, the criteria used to select individuals to serve on them, and the advance publication of their names and affiliations all highlight the importance of selecting the appropriate individuals. Service on the Board or its committees is not a reward for past actions, but is instead a serious responsibility that must not be underestimated. With the advance notification requirement, the Register is expected to allow the public to submit comments on whether the individuals and their affiliations meet the criteria specified in the legislation; make some effort of its own as it deems appropriate to verify that the individuals and their affiliations actually meet the criteria specified in the legislation; and allow the public to submit comments on whether they support such individuals being appointed for these positions. It has been agreed to by all parties

[4] The same temptation, in fact, may also be attributed to those smaller publishers that had major hits during the accounting periods in question. The potential influence of those independent parties, however, will be far more limited than that of the major, multi-national music publishing conglomerates that today more than ever before seem willing to exert market pressure to achieve economic benefits to which they may not be entitled.

> that songwriters should be responsible for identifying and choosing representatives that faithfully reflect the entire songwriting community on the Board." (emphasis added) S. Rept. 115-339 at 4-5. [5]

The otherwise identical section of the House Report concludes on the following note:

> During the entire discussion of the legislation, it has been agreed to by all parties that songwriters should be responsible for identifying and choosing the songwriter representatives on the Board. The Committee strongly agrees with such an approach. (emphasis added) H. Rept 115-651 at 5. [6]

Further, it seems of particular importance that the Executive Branch also regards the careful, post-designation oversight of the Mechanical Collective board and committee members by the Librarian of Congress and the Register as a crucial prerequisite to ensuring that conflicts of interest and bias among such members not poison the ability of the Collective to fulfill its statutory obligations for fairness, transparency and accountability. The Presidential Signing Statement, in fact, asserts unequivocally that "I expect that the Register of Copyrights will work with the collective, once it has been designated, to ensure that the Librarian retains the ultimate authority, as required by the Constitution, to appoint and remove all directors."[7]

SGA regards it as a significant red flag that the NMPA-MLC submission to the Copyright Office devotes the equivalent of ten full pages of text principally in attempting to refute this governmental oversight authority, and regards the expression of such a position by NMPA/MLC as arguably indicative of an organization more inclined towards opaque, insider management control than one devoted to fairness, transparency and accountability.[8] AMLC's submission appears to be silent on this point.

Specific SGA Recommendations Concerning the Issues of Fairness, Transparency and Accountability

With all of the foregoing in mind, including the emphasis placed by Congress on the importance of bona fide, independent music creator participation in the selection of the representatives of its own community on the Mechanical Collective board and committees, SGA poses the following suggestions:

a. That in the process of independently vetting candidate organizations seeking to be designated as the Mechanical Collective, the US Copyright Office carefully consider the diversity of its proposed board and committee members in regard to the following categories:

    (i) The inclusion of representatives of foreign music creators, who are expected to be among the largest group of recipients of current and future unmatched royalties;
    (ii) The inclusion of representatives of independent music creators without *any* third party recording or music publishing deals, who are also expected to be among the largest group of recipients of currently unmatched royalties;

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[5] S. Rept. 115-339 see, https://congress.gov/115/crpt/srpt339/CRPT-115srpt339.pdf
[6] H. Rept. 115-651 see, https://www.congress.gov/115/crpt/hrpt651/CRPT-115hrpt651.pdf
[7] Presidential Signing Statement 2018-013 available at http://www.coherentbabble.com/2018-013.htm
[8] NMPA-MLC Initial Comment Submission at 115-125.

(iii) Diversity as to race, gender, and creative musical genres among proposed board and committee members;
(iv) The individual integrity and absence of conflicts of interest in regard to all board and committee members, and a willingness of each to abide by general Fair Trade Music principles (unless in conflict with statutory requirements).

b. That in the process of independently vetting individual board and committee candidates, the US Copyright Office carefully consider the following criteria in addition to specific mandates under the Act:

(i) The candidate's potential conflicts of interest, whether in the case of a publishing representative who is employed by a major music publisher or connected to an independent music publisher beholden to a major music publisher by contract (such as though a foreign representation agreement), or, whether in the case of an independent music publisher or music creator who owns, controls or has created one or more musical works that enjoyed great recent popularity and who would be the recipient of substantial unmatched royalties if distributed on a market share basis;

(ii) The candidate's demonstrated knowledge of the music industry (both domestically and internationally), including a sophisticated understanding of existing accounting systems and databases, and of industry economics across various genres and categories of licensed uses;

(iii) The candidate's past experience in working on boards of directors, and his or her demonstrated ability to act independently and with resistance to undue influence from conflicted or biased sources in carrying out his or her duties;

(iv) The candidate's willingness to remain constantly engaged throughout his or her term of service in carrying out his or her duties, including maintaining a current knowledge and understanding of ongoing developments in the music industry; and,

(v) The candidate's commitment to upholding and championing the principles of fairness, transparency and accountability in all aspects of the Mechanical Collective's activities, without fear of professional reprisal or disadvantage.

D. Substantial Endorsement and Support

As to the second Mechanical Collective designation criterion, *whether the candidate possesses a sufficient level of endorsement and support,* it was reported that NMPA declared in February of 2019 that the NMPA/MLC should be considered the presumptive designee as the Mechanical Collective in what amounts to a "no-bid" process, due to its claimed majority status in what NMPA considered to be every category of representation of the music copyright owners and creators that constitute the "licensor market." NMPA further apparently believed that this

obviated the need for a full investigation and analysis by the Register and the Copyright Office of other Mechanical Collective candidates.[9]

AMLC publicly countered with the following argument shortly thereafter:

> The suggestion that only one entity gets to compete -- which, by default, is not a competition -- counters the MMA and the Copyright Office's intentions and requirements. In fact, to help encourage the needed competition, the Copyright Office publicly stated that "the Office does not read this clause as prohibiting a musical work copyright owner from endorsing multiple prospective MLCs." The intent of the law is to clearly allow copyright owners to recognize and endorse multiple groups.
>
> As the MLC will work for independent and major music publishers as well as all global music copyright owners, this ties into the MMA provision that clearly states, and logically requires, that the MLC have "substantial support" from "musical copyright owners" who together represent "the greatest percentage of the Licensor Market for uses."
>
> About 90 percent of the millions of global music copyright creators own and control their own copyrights. Each month alone in the U.S. there are over 500,000 new recordings of new songs from tens of thousands of DIY, self-owning copyright owners being delivered to U.S. music services and made available to stream. In just the last year, hundreds of thousands of DIY copyright owners have created and distributed at least 6 million works. In the past 10 years, estimates place that number closer to millions of copyright owners distributing over 20 million songs to streaming services. The majority of works being written, recorded, distributed and made available to stream overwhelmingly come from this constituency.
>
> It is this constituency of millions of hard-working individuals, with a rising market share, that represents the majority of musical works copyright owners. These global copyright owners, combined with the legacy industry, make up the entire Licensor Market eligible to be streamed in the U.S. Surely the intent of the law is not to make them irrelevant in the process of establishing the MLC, particularly when there is a further important distinction between the two market segments: some of the biggest publishers in the traditional music industry are expected to bypass and not use the MLC due to their direct licensing deals with the digital streaming services, as compared to the millions of global copyright owners whom will rely on the MLC for licensing and payments.[10]

In attempting to independently evaluate the accuracy of these competing assertions as to the issue of support, SGA has not been able to fully fact check the veracity of either set of claims. Nevertheless, it seems highly implausible to SGA that Congress intended that the "licensor market support" criterion be the primary, deciding factor as to whether a full investigation and analysis by the Register and the Copyright Office of each serious Mechanical Collective candidate is necessary. General principles of fairness, transparency and accountability again dictate that such a process is certainly a Congressionally mandated necessity.

That is especially so considering the fact that the vast number of copyright owners yet to be identified in the unmatched searching process are not likely represented by either the NMPA/MLC or the AMLC. Thus, it would be premature in any case for either candidate to declare it has gained the support of a majority of the "licensor market." The size and scope of

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[9] See, https://www.digitalmusicnews.com/2019/02/04/nmpa-mechanical-licensing-committee-mlc-mma/

[10] See, https://www.billboard.com/articles/business/8499237/american-music-licensing-collective-competition-needed-forming-mma-mlc

such market has clearly not yet been identified, nor have its preferences or support for neither, one, or both of the candidates fully been ascertained.

Specific SGA Recommendation Concerning the Issue of Presumptively Substantial Community Support

Sound jurisprudence generally dictates that in evaluating the request of one party for the issuance of "summary judgement" on a particular issue by the fact finder, the fact finder should construe each fact and plausible argument of the other party in the most favorable light. In this instance, SGA believes that the result of that test clearly mitigates in favor of the necessity for further investigation and analysis by the Register and the Copyright Office of each of the two candidates vying to be designated as the Mechanical Collective. SGA therefore recommends that an independent investigation and analysis of the true levels of support for each of the candidates by members of the full "licensor market" be undertaken by the Register and the Copyright Office as soon as possible.

E. Administrative and Technological Capabilities

As to the third criterion concerning *administrative and technical capabilities,* it is beyond the scope of these comments to compare and contrast the varying abilities of each of the candidates seeking designation as the Mechanical Collective in sufficient detail to be helpful. The determination of whether one or both will be able to meet the requisite demands set forth in the statute is a matter for independent investigation and expert analysis by the Register and the Copyright Office. Each candidate has already submitted extensive information to the Copyright Office on these specific matters, and will likely submit much more in response to the other's filings.

Nevertheless, SGA would like to suggest some specific questions for each of the candidates regarding the true scope of their abilities and intentions concerning administrative and technological issues.

Specific SGA Recommendations Concerning the Issue of Administrative and Technological Capabilities

SGA suggests that at minimum each of the candidates be requested to address the following issues and questions directly and in detail:

a. Describe the full scope of your capabilities, intentions and plans regarding the process of identifying and distributing presently-unmatched royalties to their rightful copyright owners (including costs associated therewith), and disclose the minimum length of time and level of effort you will expend on such processes prior to declaring any such royalties "permanently unidentifiable." Each candidate should then be requested commit to such plans in writing, pending good faith ratification by their respective boards of directors.

b. Describe the full scope of your capabilities, intentions and plans regarding the process of

establishing and maintaining the Musical Works Database (including costs associated therewith), and disclose the reasons for reliance or not on existing, freely available and/or licensable databases as either a starting point or a method for expedited data enhancement.

c. Explain the substantial discrepancies in expected start-up and maintenance costs and workforce size for the Mechanical Collective, as submitted by each of the candidates.

III. Other Issues of Importance to the Songwriter and Composer Community Under the MMA Further Illustrating the Importance of Integrity and Non-Conflict Regarding the Mechanical Collective's Board and Committee Members

A. Distribution by Music Publishers of Unmatched Royalties

As noted above, potentially one of the most complex and contentious areas of activity in which the Mechanical Collective will engage is the identification process regarding unmatched musical compositions and the distribution of royalties connected thereto, especially in cases in which the rightful creator and owner of a composition cannot be identified and located. In such instances, the Mechanical Collective will distribute such royalties to copyright owners on a market share basis under the provisions of the Act.

SGA has serious concerns that the Mechanical Collective lacks proper statutory direction as to the details of exactly how this process of unmatched distributions should work, due to the complexities and potential ambiguities within the statutory language itself. Under such circumstances, a Music Collective board consisting of ten music publishers and just four music creators may, without proper oversight, adopt rules and systems designed to obfuscate and compromise the rights of songwriters and composers to properly share in such royalties for the benefit of the board's largest and most influential music publisher members.

This conundrum illustrates once again the extreme importance of independent analysis and review by the Register and the Copyright Office of prospective Mechanical Collective board and committee members, who must be non-conflicted and independent-minded persons of integrity, knowledge and experience, that can be relied upon to act in ways that fulfill their duties up to the mandated standards of fairness, transparency and accountability set forth in the Act. This is especially true in light of the fact that the MMA specifically eliminated, under the Supremacy Clause of the US Constitution, the rights of states' attorneys general to enforce escheat laws against those holding "unidentified" music creator royalties. Under such circumstances, it will be up to the members of the Mechanical Collective Board to even more energetically ensure that the rights and interests of songwriters and composers --the very persons in whose interests the MMA was enacted-- are fully respected and protected.[11]

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[11] See, http://blog.audiam.com/2019/04/the-one-sentence-in-music-modernization.html

Specific SGA Recommendations Concerning the Issue of Unmatched Royalty Distibutions to Music Publisher Copyright Owners, and Subsequent Distributions to Their Affiated Music Creators

In order to avoid a substantial miscarriage of justice in the payment and/or non-payment of unmatched royalties on a market share basis to music publisher copyright owners, and in the subsequent payment and/or non-payment of such royalties by such publishers to their affiliated songwriters and composers, SGA respectfully requests that the Copyright Office convene as soon as possible a series of public discussions among all affected parties for the purposes of commenting on and addressing the following Mechanical Collective unmatched distributions issues (including the issue of selecting Board and Committee members able to fulfill their duties regarding this issue):

1. Solicitation from Mechanical Collective candidates of more detailed explanations as to how such unmatched royalties will be divided (after a sufficiently diligent search for rightful owners proves unsuccessful) among recipients on a market share basis by the Mechanical Collective, including a full description of the methods and details of calculation and reporting on a title by title basis that will be employed;

2. Solicitation from Mechanical Collective candidates of more detailed explanations as to how the Mechanical Collective, in conjunction with the Copyright Office, will as a matter of transparency, accountability and fairness, arrange to place the music creator community on notice that the Collective will be making a distribution of unmatched royalties on each specific date such distributions occur, so that songwriters and composers can be sure they receive their proper shares of such royalties from their affiliated music publishers; and,

3. Very importantly, solicitation from Mechanical Collective candidates of more detailed explanations as to how the Mechanical Collective, in conjunction with the Copyright Office, will as a matter of transparency, accountability and fairness, educate music publishers as to the fact that affiliated songwriters and composers are to be paid their share of such unmatched royalties pursuant to the percentages set forth in the applicable publishing agreements with such affiliated creators, as if such royalties had been received on a title by title basis under such agreements. In this regard, members of Congress were especially diligent (at the urging of SGA and with the assistance of the Copyright Office) in including in the Senate and House Reports for the legislation the following crucial direction:

   > It is the intent of Congress to ensure that songwriters receive their fair share of monies distributed to copyright owners under subsection (d)(3)(J), while at the same time respecting contractual relationships. To that end, payments and credits to songwriters shall be allocated in proportion to the reported usage of *individual musical works* by digital music providers during the relevant periods. The 50% payment or credit to a songwriter referenced in subsection (d)(3)(J)(iv)(II) *is intended to be treated as a floor, not a ceiling,* and is not meant to override any applicable contractual arrangement providing for a higher payment or credit of such monies to a songwriter. (Emphasis added). S. Rept. 115-339 at 14.[12] H. Rept. 115-651 at 13. [13]

[12] See, https://congress.gov/115/crpt/srpt339/CRPT-115srpt339.pdf
[13] See, https://www.congress.gov/115/crpt/hrpt651/CRPT-115hrpt651.pdf

A failure by the Mechanical Collective to educate music publishers of their obligations in this regard could result in the music creator community as a whole being subject to losses of tens of millions of dollars per year, and perhaps hundreds of millions of dollars in the initial distributions of currently unmatched and held royalties. That is certainly not the result Congress intended, as evidenced by its expressed concerns regarding this very important matter. SGA therefore urges the Copyright Office to take the lead in publicly highlighting this issue.

B. Safe Harbor for Past Infringers and the 5th Amendment Takings Clause

In part as a result of the recent decision by the digital music distribution companies Google, Spotify, Amazon and Pandora to file judicial appeals of the US Copyright Royalty Board's recent mechanical rate setting decisions,[14] there has been renewed discussion over the Constitutionality of Section 102(d)(10)(A) of the MMA. That section purports to bestow upon those and other digital distribution companies an exemption from certain liabilities and damages for past infringing activity (including statutory damages) in suits filed on or after the date January 1, 2018.

Specifically, the question of whether Section 102(d)(10)(A) is violative of the so-called "takings clause" of the Fifth Amendment to the US Constitution has been put forward by several leading copyright scholars, including attorney Richard Busch, who represents several members of SGA in their private, individual, ongoing lawsuits against Spotify filed prior to the January 1, 2018 deadline set forth in the Act. The potentially applicable clause of the Fifth Amendment to the US Constitution reads: "private property [shall not] be taken for public use, without just compensation."

According to Mr. Busch, in a public statement he made in 2018, "it is well established that a copyright infringement cause of action is a property right that vests at the time of the infringement — whether a lawsuit has been filed or not. Limiting damages retroactively if a lawsuit has not yet been filed may very well be unconstitutional."[15]

This issue is of particular importance to those independent music creators who were not given an opportunity to be present or represented in the negotiations that took place regarding the drafting of the bill. In a recent Twitter comment, one of the NMPA-affiliated music creator representatives who apparently may have been present and/or participated in such meetings at the invitation of NMPA (and who is now nominated for an NMPA/MLC committee position), made the following revelation:

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[14] See, https://www.billboard.com/articles/business/8502707/why-spotify-appeal-crb-rate-decision-huge-deal-songwriters-publishers

[15] See, https://www.digitalmusicnews.com/2018/01/19/spotify-music-modernization-act/

> "With the #MusicModernizationAct, songwriters agreed not to sue @spotify out of existence in exchange for some basic fairness in their business practices. Their current behavior shows they negotiated in bad faith, which is not generally great for business. We'll see, I suppose."[16]

SGA would like certain clarifications of the facts underlying this tweet, including whether the author is implying that NMPA-affiliated songwriters (most if not all of whom SGA believes had already settled copyright infringement claims they may have had against Spotify and other distributors through a variety of private industry settlements negotiated by the music publishing community), formally negotiated away the rights of other music creators who had not yet brought or settled their claims against Spotify and the others. Was this concession formally negotiated in exchange for promises that Spotify (and potentially the other distributors) would engage in "basic fairness in their (sic) business practices?" Was such agreement memorialized in a written document or exchange of correspondence with Spotify and other of the digital distributors, and if not, why not? Further, why weren't those music creators whose rights were being bargained away consulted on this matter, instead of being shut out from the closed-door negotiations?

In light of the foregoing, SGA finds it especially ironic that the songwriter group of which the above author is a founding member, purports to have recently sent the following statement to the US Copyright Office which among other claims, criticizes the efforts of some in the music creator community to sound alarms about rushing to judgement in the designation of the Mechanical Collective:

> Their default position is to spread fear by playing upon an old and tired trope about cigar-smoking, greedy major publishers - ready to obfuscate and pounce on a writer's hard-earned money at every turn. We, however, have worked closely with the publishing community throughout the MMA process and know that is simply not the reality.[17]

In so far as SGA can determine, the public debate on the many issues raised by concerned music creators with legitimate questions and concerns about the MMA has been factual, and not in any way based on innuendo or fear-mongering. To suggest otherwise in formal comments seems to be a fairly good example of employing the "pounding on the table" strategy, when the facts, the law, and history don't seem to support the point of view one is trying to promote.

The independent songwriter and composer community has a right to know the answers to the questions raised above and throughout these comments, and hopes to rely upon the Register to ascertain this information as part of the comments, investigation and verification process currently being undertaken. Further, any music creator or music publisher-affiliated person who participated directly in legislative negotiations and is now seeking to be authorized to serve on a board or committee of a Mechanical Collective candidate should be interviewed by the Register and the Copyright Office regarding such prior activity to ensure that

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[16] See, https://twitter.com/kayhanley/status/1117174896587464704?s=21 (excerpt attached at the end of these comments as SGA ATTACHMENT A)

[17] https://www.billboard.com/articles/business/8508007/songwriters-north-america-mlc-copyright-office-comment-letter

principles of non-conflict were properly observed by such person and by the candidate seeking to be designated as the Mechanical Collective in general.

Specific SGA Recommendations Concerning the Issue of Constitutionality of Section of the MMA Under the Takings Clause of the Fifth Amendment

In addition to the questions posed immediately above, SGA believes that the question of the Constitutionality of Section 102(d)(10)(A) of the MMA is of such a crucial nature to the protection of the rights of American music creators that it would be more than appropriate for the US Copyright Office to convene a panel of experts on all sides of the issue to engage in a public discussion of the matter. SGA therefore urges the Register to consider doing so as soon as possible, and will be pleased to participate in such a public discussion if so requested.

IV. Conclusions

SGA extends its sincerest thanks to the Register of Copyrights, the Librarian of Congress, and the US Copyright Office for the opportunity to submit these comments on issues of extraordinary importance to every music creator in the United States and throughout the world. Please do not hesitate to call on us for further information or input. We welcome the opportunity to continue our participation in every aspect of this legislative implementation process, and invite you to keep us apprised of all further developments in this regard.

Respectfully submitted,

//Charles F. Carnes//

Charles F. Carnes
President
Songwriters Guild of America, Inc.

April 22, 2019

cc: Charles J. Sanders, Esq., Outside Counsel
Members of The SGA Board of Directors

CFC:sga
Encl.

SGA ATTACHMENT A

Kay HanleyVerified account @kayhanley

FollowFollow @kayhanley

Replying to @imanmazhar18 @Spotify @wearesonaLA

With the #MusicModernizationAct, songwriters agreed not to sue @spotify out of existence in exchange for some basic fairness in their business practices. Their current behavior shows they negotiated in bad faith, which is not generally great for business. We'll see, I suppose.

2:17 PM - 13 Apr 2019 from Los Angeles, CA

Proof of Delivery

I hereby certify that on Monday, September 09, 2019, I provided a true and correct copy of the Attachment to the Songwriters Guild of America's Response in Opposition to the Motion of the MLC to Dismiss SGA's Petition to Participate to the following:

Digital Licensee Coordinator, Inc., represented by Allison Stillman, served via Electronic Service at astillman@mayerbrown.com

Mechanical Licensing Collective, represented by Benjamin K Semel, served via Electronic Service at Bsemel@pryorcashman.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Signed: /s/ Charles J Sanders