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

LIBRARY OF CONGRESS U.S. Copyright Office 37 CFR Part 210
[Docket No. 2020–6]

Re: Notice of Proposed Rulemaking and Inquiry Issued by the United States Copyright Office Concerning the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018 Titled "Reporting and Distribution of Royalties to Copyright Owners by the Mechanical Licensing Collective"

I. Introduction and Statement of Interest

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

SGA's organizational membership stands at approximately 4500 members, and through its affiliations with both Music Creators North America, Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA 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 & Lyricisits ("SCL"), the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre), and a co-member of MCNA along with SGA, joins in submitting these Comments on behalf of its more than 1700 members.

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

All statements herein attributed to SGA shall include SCL, and shall be considered made with the full endorsement of MCNA.

II. The Organization of These Comments and the Affirmation of Authority by the USCO

SGA greatly appreciates the effort that was devoted by the United States Copyright Office ("USCO") in properly organizing the issues about which it seeks comments today in its Notice of Proposed Rulemaking and Inquiry ("Notice").[1] These Comments, therefore, will adhere as closely as possible to the USCO's suggested framework, as follows:

> Subjects of Inquiry:
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> 1. Should the regulations require distribution and reporting of royalties to occur within a specified time period?
> 2. Should the rule establish electronic delivery of statements by default, with the option to request paper statements?
> 3. Is ''known to the MLC'' an appropriate standard for triggering an obligation to report information that the MLC is not expected to have for all musical works, sound recordings, and/or copyright owners?
> 4. Is there any additional content that should be reported to copyright owners, or, conversely, is there any content proposed to be reported that is unnecessary to require by regulation?
> 5. Are the minimum payment thresholds ($2 for direct deposit, $100 for paper checks, and $250 for wire transfer) for distribution of royalties appropriate?
> 6. Should the mechanical licensing collective be required to send annual statements in addition to monthly royalty statements?

Prior to addressing the specific inquiries above, SGA would first like to express its full concurrence with the following statement by the USCO regarding its authority to promulgate the rules that are the subject of the Notice:

[1] See https://www.govinfo.gov/content/pkg/FR-2020-04-22/pdf/2020-08375.pdf

"It is the Office's judgment that it is consistent with the larger goals of the MMA to prescribe specific royalty reporting and distribution requirements through regulation, that the Register of Copyrights has the authority to promulgate these rules under the general rulemaking authority in the MMA, and it can take into consideration how well the MLC carried out those obligations when reviewing the designation. Regulations establish a baseline for transparency and accountability, and the rulemaking process allows all stakeholders— particularly musical work copyright owners and songwriters—to communicate the specific transparency and accountability obligations they expect of the MLC."[2]

III. Comments

A. The Specific Inquiries Posed by the USCO

1. Should the regulations require distribution and reporting of royalties to occur within a specified time period?

The USCO defined its position on this issue within the Notice as follows:

> Given the unprecedented project of the blanket license and associated transactional challenges, the Office declines at this time to impose a further timing requirement for distribution of royalties, and credits MLC's description of the material differences between its project and pre-blanket processing of matched royalties. The MLC faces both known and unknown challenges when it begins administering the blanket license, and a strict timing requirement for reporting and distributing royalties may compound those challenges.
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> The proposed rule takes the same approach for reporting of cumulative royalties. The Office notes that, beginning on the license availability date, the MLC will receive cumulative usage reports of unmatched accrued royalties from DMPs covering as much as two years of usage at the same time it must begin processing royalties in the ordinary course. As with the regularly matched portion of monthly royalty statements, it is expected that the MLC will make timely payments of accrued royalties for newly matched musical works, but the proposed rule does not otherwise include a timing requirement with respect to reporting and paying cumulative royalties after they have been identified.
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> For both revenue streams, significant nonregulatory incentives are also in place to ensure timely distribution of royalties. For one, the MLC represented in its designation proposal that it 'intends to provide *prompt, complete, and accurate payments to all copyright owners*.' In addition, because the MLC is governed by the very copyright owners that it will be serving, and because it must maintain the

[2] Federal Register/Vol. 85, No. 78/Wednesday, April 22, 2020/Proposed Rules at page 22551.

> support of copyright owners, it shares their interest in prompt reporting and distribution. The Office reserves the right to revisit a potential timing obligation in the future, and solicits comment on this aspect of the proposed rule.[3]

While SGA can agree with some of the logic contained in the foregoing paragraphs, it respectfully cannot endorse a rule that omits *any* statutory-based limitations on the amount of time the MLC has to distribute and report on "matched" royalties received. It is true that a reasonable amount of time may be necessary for the MLC to engage accurately and effectively in following its established administrative processes A completely open-ended royalty and statement delivery process, however, is --on the other hand-- nearly always an invitation to the tolerance of inefficiencies and delays.

Further in this regard, we ask the USCO to keep in mind that as to the vast majority of songwriters and composers who will by choice or agreement likely *not* register as "copyright owners" under the MMA, such music creators will face further delays in the receipt of their statements and royalties at the music publisher level. Although some agreements with music publishers provide for monthly or quarterly distributions of royalties and statements to creators, many if not most require only semi-annual or even singular annual accountings.

Thus, the damage caused to music creators by the failure of the MLC to operate efficiently and in a timely manner in the forwarding of royalties and statements may be compounded by similar delays further down the royalty and statement distribution chain, resulting in intolerable slow-downs in creator payments, especially in regard to cumulative royalties. Delays at MLC of six months could easily turn into a payment postponement of a year or longer for songwriters and composers. Moreover, the principle nearly always holds true that the longer the delays between the times royalties are earned and such royalties are paid (in this case potentially years), the more likely it is that errors, omissions and inconsistencies will go overlooked and/or unaddressed.

SGA therefore urges that the USCO set at least some reasonable and firm payment and reporting deadlines, such as the mandatory payment and forwarding by the MLC of royalties and statements pertaining to matched works within three months following receipt. This deadline could be made more flexible by placing an obligation on the MLC to justify the specific, extraordinary reasons for delays beyond the three-month mandate, through a timely application for extension to the USCO. Such application should request a reasonable, specified time for extension regarding specifically identified, anticipated delayed reporting and payments, which the USCO could in its discretion either grant, deny or modify in advance.

2. Should the rule establish electronic delivery of statements by default, with the option to request paper statements?

[3] Federal Register/Vol. 85, No. 78/Wednesday, April 22, 2020/Proposed Rules at Page 22554.

SGA endorses this efficient and environmentally appropriate rule as proposed by the USCO without further comment.

3. Is ''known to the MLC'' an appropriate standard for triggering an obligation to report information that the MLC is not expected to have for all musical works, sound recordings, and/or copyright owners?

SGA's answer to that question is a respectful but emphatic "no."

Before proceeding to a discussion of proper standards of care and investigation regarding the collection of music creator information by the MLC, however, SGA would first like to thank the USCO for recognizing in its proposed rules the extreme importance of including songwriter/composer information as part of the Royalty Statement reporting process.[4] In its November 8, 2019 comments submitted to the USCO, SGA detailed its position in regard to the crucial significance of including music creator information in the formulation of the MLC database, and repeats those important assertions today.[5]

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[4] (c) *Content*—

(1) *General content of royalty statements.* Accompanying the distribution of royalties to a copyright owner, the mechanical licensing collective shall provide to the copyright owner a statement that includes, at a minimum, the following information:

(i) The period (month and year) covered by the statement. (ii) The name and address of the mechanical licensing collective. (iii) The name and mechanical licensing collective identification number of the copyright owner. (iv) ISNI and IPI name and identification number of the copyright owner, to the extent it has been provided to the mechanical licensing collective by a copyright owner. (v) The name and mechanical licensing collective identification number of the copyright owner's administrator (if applicable), to the extent one has been provided to the mechanical licensing collective by a copyright owner. (vi) ISNI and IPI of the copyright owner's administrator, to the extent one has been provided to the mechanical licensing collective by a copyright owner, songwriter, or administrator. (vii) Payment information, such as check number, ACH identification, or wire transfer number. (viii) The total royalty payable to the relevant copyright owner for the month covered by the royalty statement.

(2) *Musical work information.* For each matched musical work owned by the copyright owner for which accompanying royalties are being distributed to that copyright owner, the mechanical licensing collective shall report the following information: (i) The musical work name, including primary and any alternative and parenthetical titles for the musical work known to the mechanical licensing collective. (ii) ISWC for the musical work, to the extent it is known to the mechanical licensing collective. (iii) The mechanical licensing collective identification number of the musical work. (iv) The administrator's unique identifier for the musical work, to the extent one has been provided to the mechanical licensing collective by a copyright owner or its administrator. *(v) The name(s) of the songwriter(s), to the extent they are known to the mechanical licensing collective. (vi) ISNI(s) and IPI(s) of each songwriter, to the extent either is known to the mechanical licensing collective.* (vii) The percentage share of [a] musical work owned or controlled by the copyright owner. (viii) For each sound recording embodying the musical work, the identifying information enumerated in paragraph (c)(3) of this section and the royalty information enumerated in paragraph (c)(4) of this section. (emphasis added). Federal Register/Vol. 85, No. 78/Wednesday, April 22, 2020/Proposed Rules at page 22558.

[5] 'The establishment of a complete and accurate musical works database by the MLC has been recognized as the *sine qua non* for the success of the new blanket licensing system mandated under the Music Modernization Act. As the MMA Senate Report makes clear, "the failure of the music industry to develop and maintain a master database has led to significant litigation and underpaid royalties for decades. This situation must end so that all artists are paid for their creations and that so-called 'black box' revenue is not a drain on the success of the entire industry." Senate Report 115-339 at 8.

Section 102(3)(E) of the MMA therefore sets forth in detail the methodology to be utilized in setting up the music works database, the process of populating the database with complete and accurate information, the accessibility of the database to various interested parties and the public, and other essential elements necessary to maximize its usefulness as the key tool in ensuring the proper payment of royalties due on individual musical compositions to music creators and their administrators or agents.

Consistent with its prior November 8, 2019 submission, however, SGA asks the USCO to reconsider the language pertaining to this issue as it appears in section 210.29 (c)(2) of the proposed rules, in favor of the following revisions set forth below, underlined in italics:

> (2) Musical work information. For each matched musical work owned by the copyright owner for which accompanying royalties are being distributed to that copyright owner, the mechanical licensing collective shall report the following information:
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> ….(v) The name(s) of the songwriter(s), to the extent they are known to the mechanical licensing collective *following its undertaking of best efforts to locate and assist in procuring such information.*
>
> (vi) ISNI(s) and IPI(s) of each songwriter, to the extent either is known to the mechanical licensing collective *following its undertaking of best efforts to locate and assist in procuring such information.*
>
> .
>
> (vii) The percentage share of [a] musical work owned or controlled by the copyright owner*, but subject to confidentiality requirements [to be delineated] that prohibit disclosure of such information to the public.*

Almost inexplicably, however, while including a long list of elements to be included in the new database, the MMA omits specific mention of perhaps the most immutable and essential information (other than the title) to the identification of works and their owners: the name(s) of the music creators. Those two bedrock elements of identification and attribution --title and creator(s)-- must be present in any information system designed to effectively function as the music industry's "master database" of musical works.

While the names of copyright owners and administrators associated with a musical work may change on a constant basis, and other variables and data points are subject to frequent adjustment, the title and the names of the creators never vary from the date of a work's creation forward. It is no exaggeration to say, therefore, that the failure to mandate the inclusion of the name(s) of a musical work's creator(s) in the database would infuse within it a flaw so significant as to almost guarantee a shortfall in any results the MMA is seeking to achieve in creating an improved licensing environment.

Article I Section 8 of the US Constitution grants to Congress the authority to fashion laws to grant rights to and protect authors and inventors, the human beings responsible for the acts of creation that so benefit society and culture. The concept that the rights and protections of creative works fundamentally accrue to creators was later adopted in whole under international treaties that include the Berne Copyright Convention and the Universal Declaration of Human Rights, both of which include the US as a key signatory. The creators' right of attribution, currently under review by the US Copyright Office in relation to the concept of moral and ethical rights within intellectual property regimes, may soon result in a formal and specific codification of such an attribution right under Title 17, the US Copyright Act. Under such facts and circumstances, what logical rationale can possibly be utilized to marginalize or eliminate the necessity for inclusion of creators' names in the musical works database? SGA can think of none.

Perhaps in anticipation of just such a situation, the MMA specifically grants to the Register of Copyrights in Section 102(3)(E) the authority to add mandatory data points as to both matched and unmatched works for inclusion in the database by providing with specificity that "the musical works database shall include…such other information relating to the identity and ownership of music works (and shares of such works) as the Register of Copyrights may prescribe by regulation." In light of the foregoing, SGA therefore respectfully urges the immediate addition of creators' names to the list of mandated data points necessary for inclusion in the musical works database at the threshold of its establishment, and at all times thereafter. To do otherwise would be a grave disservice to the entire, global community of music creators, but most especially to those American songwriters, lyricists and composers most heavily reliant on the Constitutionally-encouraged protection of their incomes and reputations in the United States through the proper identification and attribution of their works." SGA Comments to the United Staes Copyright Office, November 8, 2019

As the USCO itself recognized in its Notice, the issue of songwriter/composer identification is crucial to ensuring that music creators actually receive their royalties from the MLC through their publishers:

> [Ft nt 81] The regulations make clear that certain types of information—which are not required by the statute for copyright owners to receive royalties they are entitled to under the blanket license, such as IPI numbers or International Standard Name Identifiers (''ISNI'')—will be reported if provided by a copyright owner, but they are not a prerequisite to receiving royalties. Some commenters raised concerns about such standard identifiers, which independent or self-represented songwriters may not necessarily have, becoming de facto requirements for receiving royalties from the MLC. See, e.g., North Music Group Reply at 1…. [Ft nt 82] North Music Group Ex Parte Letter at 1 ('Major publisher deals often include language that allows the publisher to not pay the writer if the data within the royalty statement delivered to the publisher does not include the writer's name. The MLC must deliver the writer's name in statements in order to provide the writer the best chance of receiving his/her royalties from the publisher.'). Federal Register/Vol. 85, No. 78/Wednesday, April 22, 2020/Proposed Rules at page 22555.

SGA is in complete concurrence with the issue as described by North Music Group, based upon SGA's own eight decades of experience in advocating for music creator rights and protections in the United States. Under such circumstances, whereby the entire basis for the MMA (ensuring proper royalty payments to music creators and copyright owners) could be thwarted by a failure of the MLC to locate, procure and report such music creator data, SGA respectfully suggests that it must be the MLC's duty to undertake its *best efforts* to do so. Anything less would render fulfillment of clear Congressional intent --that the MMA's principle purpose is to protect and benefit songwriters and composers as specified in the US Constitution-- a complete failure.

Finally, in regard to the important reasons SGA believes that confidentiality concerning the royalty splits among music creators needs to be protected in order to best serve the creative process among collaborators and co-authors throughout the music community, SGA would be pleased to discuss that matter further with the USCO at any future time.

4. Is there any additional content that should be reported to copyright owners, or, conversely, is there any content proposed to be reported that is unnecessary to require by regulation?

SGA has no specific recommendations at this time, but may in the future wish to discuss with the USCO advances in data technology that make the reporting of information by MLC in different ways and formats to be more advantageous for music creators. SGA also wishes to note its agreement with the USCO suggestion that the MLC use royalty statements as part of its educational and outreach obligations under the statute.

5. Are the minimum payment thresholds ($2 for direct deposit, $100 for paper checks, and $250 for wire transfer) for distribution of royalties appropriate?

SGA believes that the amounts set forth in the proposed rules are appropriate, although the USCO may wish to give additional consideration to lowering the threshold for the issuance of paper checks to $50, in light of the difficult economic times many music creators are facing or are about to confront due to the COVID-19 pandemic and its aftermath.

6. Should the mechanical licensing collective be required to send annual statements in addition to monthly royalty statements?

SGA would first like to applaud the USCO's proposed rules regarding the mandate for Certifications by the MLC of Royalty Statements, exactly as such rules have been written. As the USCO clearly recognizes, the inclusion of all of the following information and obligations represent necessary safeguards for the protection of music creators forced to rely on the MLC for both accuracy and integrity:

> (i) The name of the person who is signing and certifying the statement. (ii) A signature of a duly authorized officer of the mechanical licensing collective. (iii) The date of signature and certification. (iv) The title or official position held by the person who is signing and certifying the statement. (v) One of the following statements:
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> (A) Statement one: I certify that (1) I am duly authorized to sign this royalty statement on behalf of the mechanical licensing collective; (2) I have examined this royalty statement; and (3) All statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith; or
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> (B) Statement two: This statement was prepared by the Mechanical Licensing Collective and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed Certified Public Accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly statements that accurately reflect, in all material respects, the blanket licensee's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.[6]

[6] **Federal Register**/Vol. 85, No. 78/Wednesday, April 22, 2020/Proposed Rules at page 22558.

As regards the USCO's decision not to propose a rule requiring the provision by the MLC to copyright owners of Annual Royalty Statements,[7] however, SGA respectfully disagrees. Annual Statements serve an important purpose for small businesses (including independent creators acting as their own music publishing entities), which generally lack extensive accounting resources and need as many available resources as possible in conducting their own annualized, internal bookkeeping audits. It would seem at most a minor imposition to mandate that the MLC electronically provide or make available to copyright owners what amounts to little more than a simple, yearly data compilation. SGA urges the USCO to amend its proposed regulations to add such a rule, the benefits of which to music creators and copyright owners would far outweigh the costs of compliance to the MLC.

IV. Conclusion

SGA thanks 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 respectfully submit these Comments. SGA further looks forward to providing more of its insights and suggestions in its future submissions, and will gladly respond to any further questions regarding MMA implementation and proceedings.

Respectfully submitted,

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Officer, Music Creators North America

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Co-Chair, Music Creators North America

[7] "At this time, the Office is not proposing including a requirement for annual royalty statements. Although section 115 requires non-blanket licensees to provide an annual statement of account to copyright owners, there is a key difference in how adjustments to royalties distributed in prior reporting periods are proposed to be reported under the blanket license. Under the non-blanket license, licensees are required to serve an amended annual statement of account when royalties are adjusted. Under the blanket license, to facilitate timely payment of royalties to copyright owners, the proposed rule would provide for adjustments to be reported to copyright owners with their regular monthly statements, as the MLC receives and processes reports of adjustments from the DMPs. Thus, the proposed rule ensures copyright owners continue to receive the same information under the blanket license they expect under the non-blanket license, just in a different type of statement. In fact, since the Office is proposing that adjustments be reported by DMPs to the MLC and subsequently, from the MLC to copyright owners, in a more frequent manner than once a year, the Office hopes that adjustments will be made and any additional royalties paid out more quickly under the blanket license than under the non-blanket license. As with the type of information this rule requires the MLC to report to copyright owners, this rule establishes only minimum reporting obligations. The MLC may choose to provide copyright owners with annual statements if it sees a value in doing so. The rule is silent on the requirement to preserve maximum flexibility to the MLC for providing statements beyond what the Office has identified as required to ensure transparency and accountability. The Office seeks comment on this proposal." Federal Register/Vol. 85, No. 78/Wednesday, April 22, 2020/Proposed Rules at page 22551

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