

MUSIC CREATORS

MCNA

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April 10, 2023

**Fees for Late Royalty Payments under the
Music Modernization Act’s Blanket
Mechanical License**

Docket No. 2023–2

**LIBRARY OF CONGRESS U.S. Copyright Office
37 CFR Part 210 Docket No. 2023–2**

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

**Re: Notice of Inquiry Issued by the United States Copyright Office Concerning “Fees for
Late Royalty Payments under the Music Modernization Act’s Blanket Mechanical
License”**

I. Summary of Comments

Further to our support for the April 10, 2023 Submission of the Copyright Alliance (an organization of which our groups are members and a Submission that we fully endorse), The Songwriters Guild of America (SGA), the Society of Composers & Lyricists (SCL), and the Music Creators North America (MCNA) coalition (together herein referred to as the Independent Music Creators), respectfully submit these additional comments as summarized immediately below regarding the United States Copyright Office’s (USCO) Notice of Inquiry dated February 23, 2023¹ (NOI):

¹ Federal Register/Vol. 8, No. 36/Tuesday, February 23, 2023 /Proposed Rules at 11398. See, <https://www.govinfo.gov/content/pkg/FR-2023-02-23/pdf/2023-03738.pdf>

The Independent Music Creators are fully in accord with the principles set forth in the Copyright Alliance Submission referenced above. Our groups, however, wish to further amplify our disappointment over yet another attempt by several of the wealthiest, multi-national conglomerates in global history to force American music creators to expend precious time and resources on opposing specious claims that such corporations are due special considerations by Congress, the USCO, the Copyright Royalty Board (CRB) and other US Governmental agencies that would allow them to avoid late payments that are clearly due and owing to songwriters and composers.

The repeated attempts at non-payment of these digital music distributors --who not-so-incidentally are the most sophisticated technology companies in the world and whose business are built upon the backs of the very creators they seek to non-remuneratively exploit at every opportunity-- grow exceedingly tiresome. Not having been willing to construct a licensing and royalty payment system on their own that would have ensured proper payments to music creators during the two decades in which these tech and data specialists enriched themselves principally through the unauthorized distribution of our works, the USCO is now asked to excuse their payment of proper late fees stemming from their own failures to properly estimate and set aside reserves to cover the royalty payments they knew would eventually come due.

This request will likely be followed in the near future by claims --should the USCO approve such late fee avoidance in the current instance-- that these companies now have a permanent precedent for flexibility in the timing and disposition of royalties payable under the Music Modernization Act (MMA) without incurring late fee liability. That result would heap more insult and injury on top of two decades of intolerably unfair royalty avoidance practices that the MMA was supposedly designed to reform.

Every legal and equitable aspect of this situation demands that the request by these companies to be excused from certain late fees be denied. Moreover, we respectfully suggest that their request calls for additional admonitions from the USCO that the clear intent of Congress to utilize late fees as a prime motivator for reforming the haphazard way in which these companies conducted themselves in the past regarding obligations to creators *must and will be upheld*.

II. Discussion

Only a few months ago, the world's major digital music distributors again agreed on US late fee payment principles in a private settlement as part of the Phonorecords IV proceeding before the CRB. As was explained in the NOI:

The currently operative late fee provision was adopted by the [Copyright Royalty Judges] as part of an approved settlement in the *Phonorecords IV* proceeding, which covers the time period 2023 through 2027. The provision states that '[a] Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 17 U.S.C.

115(d)(4)(A)(i), as applicable and detailed in part 210 of this title.’ It further provides that ‘[l]ate fees shall accrue from the *due date* until the Copyright Owner receives payment.’² (emphasis added)

In adopting this settlement, the Copyright Royalty Judges found that the proposed late fee provision was “not unreasonable.” Once again, however, the multi-billion-dollar, global technology conglomerates are seeking just a few months later another bite at the late fees avoidance apple before the USCO. In short, they are pursuing this course despite having recently and voluntarily agreed in Phonorecords IV to the opposite result that “due date” means what it says: the date upon which royalties, as correctly calculated, would have been due to be paid in full to the creators who own the works utilized by those tech giants.³

The digital tech corporations argue that the weaknesses of their under-developed royalty systems and the “good faith” inaccuracies of their estimations of past and present royalties due should serve to shield them from late fee liability (apparently based on some form of “time off for good behavior” methodology), despite the fact that Congress clearly recognized the application of late fees as perhaps the only corrective recourse it thought would be sufficient to end the decades of opaque bookkeeping and inconsistent accounting practices among the music distribution giants. (It is further noteworthy that such Congressional resort to late fees as a motivator was necessary in light of the fact that the MMA limits the ability of music creators and copyright owners to utilize copyright infringement litigation as an alternative means to compel accurate and timely royalty compliance).

Many words and phrases come to mind to describe this payment avoidance strategy being attempted once again by the technology conglomerates, but we will settle for labeling it simply as “outrageously inconsistent” with its past pledges to reform. As such, we respectfully ask the USCO to adopt rules that will stringently apply late fees to all late payments --without exception-- rendered by the digital music distributors calculated from the *due date* of royalties *in full* to the date of payment *in actuality*, under the well-established legal principle regarding governmental oversight that *fair is fair* –especially when the party to be charged demonstrates it knows exactly what is and is not fair through both its own agreements and its egregious past actions and omissions.

We also respectfully request that the USCO emphasize that such late fees, once paid through the Music Licensing Collective (MLC) or otherwise, are to be shared by music publishers with their affiliated songwriters and composers as if such fees were part of the royalty payments due on a title-by-title basis.

² Federal Register/Vol. 8, No. 36/Tuesday, February 23, 2023 /Proposed Rules at 11398. See, <https://www.govinfo.gov/content/pkg/FR-2023-02-23/pdf/2023-03738.pdf> at 11398.

³ The Independent Music Creators reserve all rights to pursue other, unrelated changes to provisions of the Phonorecord IV decision(s) as adopted by the CRB.

III. Conclusion

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

A description of the submitting parties is set forth immediately below:

The Submitting Organizations

SGA is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated independently and solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for over 92 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 over 4500 members. SGA is represented by signatory Rick Carnes, who is signing as an individual music creator and copyright owner, and as an organizational officer.

SCL is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre). It has a membership of over 3000 professional composers and lyricists, and is a founding co-member --along with SGA and other independent music creator groups-- of MCNA. SCL is represented by signatory Ashley Irwin, who is signing as an individual music creator and copyright owner, and as an organizational officer.

MCNA is an alliance of independent songwriter and composer organizations that advocates and educates on behalf of North America's music creator community. As the only internationally recognized voice of American and Canadian songwriters and composers, MCNA, through its affiliation with the International Council of Music Creators (CIAM), is part of a coalition that represents the professional interests and aspirations of more than half a million creators across Africa, Asia, Austral-Oceania, North and South America, and Europe. MCNA is represented by signatories Rick Carnes and Ashley Irwin, who are signing as organizational officers.

Respectfully submitted,



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



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

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