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Written Statement of the President of the Songwriters Guild of America, Inc. (“SGA”), Rick Carnes, for the hearing record of the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, July 15, 2014 hearing on *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term.*

I. INTRODUCTION

A. SGA

SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions and their heirs, with approximately five thousand members nationwide and over eighty years of experience in advocating for music creator rights on the federal, state and local levels. SGA’s membership is comprised of songwriters, lyricists, composers and the estates of deceased members. SGA provides a variety of administrative services to its members, including contract analysis, copyright registration and renewal filings, termination rights notices, and royalty collection and auditing, to ensure that songwriters receive fair and accurate compensation for the use of their works. SGA takes great pride in its unique position as the sole, untainted representative of the interests of American and international music creators, uncompromised by the frequently conflicting views and “vertically integrated” interests of other copyright users and assignees.

B. General Views Concerning Moral Rights and the U.S. Copyright Laws

SGA has been asked to testify today about moral rights, among other issues. I am told that the term "moral rights" is a translation of the French term "droit moral," and refers to the ability of

authors to control the fate of their works. The concept of moral rights relies on the intrinsic connection between an author and his or her creation. Moral rights are not easy to define, but they are generally regarded as protecting the personal, reputational, and monetary value of a work to its creator.

Thus, throughout the world, an author is generally thought to have the "moral right" to control his or her work, a concept reflected not only in national laws, but in international treaties and as part of the Universal Declaration of Human Rights, a basic restatement of universal, natural laws to which the United States and most other countries of the world are signatories. Although not specifically referred to as "moral rights" in the United States, the U.S. Copyright Act and other intellectual property-related statutes frequently incorporate moral rights concepts into American law.¹

Now, I want to stress that I'm not French and I'm not a lawyer, so I am not here to define what the scope or definition of moral rights in domestic and international law is or should be. But what I am is a professional songwriter who has been lucky enough to have had some modest success over a period of years, including having my songs on records that have sold close to forty million copies. And one thing we songwriters know about, and frequently write about, is right and wrong; good and bad. So SGA would like to use this opportunity to talk about what is "moral" and what is "right" as Congress is reviewing the state of copyright in the U.S., and to remind everyone of the enormous benefits to both U.S. creators and consumers that robust recognition of the general precepts of moral rights provides.

¹ Moral Rights Basics, By Betsy Rosenblatt, Harvard Law School, Last Modified: March, 1998

First and foremost, I want to point out that the bedrock moral rights principles that a creator has the right to control the use of something he or she has created, and to receive attribution for such use, are rights that I have personally noted are widely embraced by the American public. SGA applauds this fact, but also notes its strong and longstanding support for the incorporation of various free speech concepts into the U.S. Copyright Act through the fair use doctrine. On that very important point, I simply want to stress the importance of balance. Just as we never want to inhibit the free exchange of ideas and opinions in our society, we should similarly never allow the fair use doctrine to threaten or overwhelm the control, attribution and economic rights of creators, whereby the exception swallows the rules of protection. Any discussion of fair use must be viewed in the context that an exception to copyright protection drawn too broadly will inevitably, to the severe detriment of society as a whole, actually serve to inhibit and diminish the marketplace of ideas by destroying the ability of professional creators to earn their living through the creation of works that richly contribute to public debate.

Moreover, SGA maintains that the current fair use guidelines set forth in Section 107 of the Copyright Act establish an excellent, flexible framework for courts to settle questions concerning the adequacy of a fair use defense in any copyright infringement action. Attempting to expand or contract the application of the fair use doctrine by anticipating the presence or absence of various, specific facts or conditions in infringement suits would not only constitute a fruitless exercise in clairvoyance, it would threaten the very delicate balance that has taken nearly two centuries to develop between the rights and interests of creators and the overall public good. The fair use doctrine, in other words, needs to be left alone.

Further in that same vein, it is axiomatic that in evaluating any proposals for expanding

compulsory licensing of musical works to include, say, the use of compositions and sound recordings in compilation works known as “mash-ups,” Congress must move equally carefully to avoid creating similar upset and unfairness in the marketplace. The current system combining the rights of control of creators with the rights under the fair use doctrine have been more than adequate in creating a licensing marketplace that addresses and satisfies the needs of copyright users (including the creators of derivative works and compilations). That system does not need to be and should not be disturbed.

Similarly, suggestions that the United States should break with the rest of the world to reduce the current term of copyright protection (designed specifically to allow creators to address the economic welfare of their families for a time period limited basically to the lives of their grandchildren) in order to stimulate “faster growth of the public domain” should be rejected outright. The U.S. Copyright Office, Congress and the United States Supreme Court have considered this issue on numerous occasions and determined that the current term of copyright protection established under Article I Section 8 of the U.S. Constitution is not only proper, but serves the dual purpose of supporting the marketplace of ideas by encouraging professional creativity *and* bolstering the U.S. economy and balance of trade as well. To reconsider this issue yet again would be an unfortunate waste of valuable, legislative time far better spent on other issues critical to improving the U.S. copyright system.

Having commented on the “moral rights” related areas about which SGA asks Congress not to act, I would now like to turn to those issues of enormous importance to the U.S. music creator community on which positive action by Congress would be enormously helpful and productive to music creators.

II. SGA's Five Principles

SGA has identified five principles that are necessary for a “moral” copyright system that treats songwriters with dignity and respect. These are the indispensable needs for:

- (A) The establishment of a small claims venue so songwriters have a real and workable remedy when our works are stolen;
- (B) Fair market value compensation for the authorized use of musical works, including the right to terminate transfers of works after a term of years;
- (C) Complete transparency throughout the licensing, use and payment process, including the right of a music creator to affiliate and remain with the performing rights society of his or her choice;
- (D) Full and equal representation of music creator interests in the management of any organization(s) created as so-called “centralized licensing” agents; and
- (E) The establishment of a stable and secure digital marketplace in which the theft of musical works is diminished to a level at which commercial interests no longer have to compete against free, stolen goods.

A. The Establishment of a Small Claims Venue so Songwriters have a Real and Workable Remedy when our Work is Stolen

An essential element of moral rights, and the ability of a creator to have any true hope of control over the fate of his or her work, is the ability to have a remedy when we are wronged. A right without a remedy, after all, is no real right at all. Under present U.S. law, however, creators are faced with the conundrum that in order to enforce rights against infringers, they must literally make a “federal case” of it, at an average cost of nearly a quarter million dollars in legal fees and costs. Our music publisher assignees won’t enforce the rights of individual writers in cases that

mean substantial amounts to the writer but don't rise to the magnitude of a "dot.com". As a result, creators are left on our own to suffer the unauthorized use of our works on the Internet with no reasonable means to protect ourselves against the "death by a million cuts" that results from such an unenforceable right of remuneration. Thus, SGA urges Congress as one of its highest priorities in the copyright reform process to establish a small claims venue so songwriters actually have a real and workable remedy when our works are stolen.

SGA would like to emphasize its support of the work of the U.S. Copyright Office regarding the potential development of a small claims court system to address the needs of individual music creators for an affordable means of rights enforcement. Our organization looks forward to working with the Subcommittee and the Copyright Office to further the discussion of the small claims issue as an important component of curbing the rampant problem of online infringement of musical works that has devastated the music creator community, and made it nearly impossible for songwriters to earn a living.

B. Fair, Market Value Compensation for the Use of Musical Works

SGA is in accord with the views of the Performing Rights Organizations ("PROs") and others expressing the idea that all music creators deserve fair market value for their use of their works on all platforms. Fair pay for one's labor is a basic tenant of a just society. SGA is also in agreement with the PROs and others that the governmentally imposed consent decrees to which the PROs remain subject are severely outdated, crippling the ability of the PROs to establish fair, market value rates for the performance of musical compositions in digital environments on behalf of music creators.

SGA is pleased about the U.S. Department of Justice, Antitrust Division's recent announcement that it is opening up a review of the ASCAP and BMI consent decrees. SGA strongly believes the consent decrees need to be overhauled in ways that make it possible for American and international music creators to realize fair market compensation for the use of their works, free from the artificial devaluation of royalty rates that result from strict judicial interpretation of decades-old decrees formulated for the pre-Internet and digital distribution era.

By way of example, the untenable results of recent rate-setting decisions concerning the digital music streaming company Pandora, the entire business model of which is built upon the exploitation and distribution of musical compositions at rates far below market value, stand as a stark example of the need to address the market inequities that flow from the consent decrees before further, irreparable harm is caused to the American music creator community and to American culture.

Moreover, SGA also stands side by side with its music community colleagues in support of the *Songwriter Equity Act* currently pending in before both houses of Congress (S. 2321, H.R. 4079). This Act would direct the Copyright Royalty Board to utilize the “willing buyer – willing seller” (“WBWS”) standard in setting future royalty rates pursuant to its oversight mandate under the Copyright Act. SGA believes that the WBWS formula would likely lead to far more equitable results in rate setting for the use of musical compositions, including a long overdue increase in the current statutory mechanical royalty rate. That rate has for a decade stagnated at the level of 9.1 cents per physical or digital copy made and distributed even as inflation and other devaluing factors have advanced at alarming rates.

However, we would also add that we believe that sound recording owners, as well as the creators and owners of musical compositions, deserve fair market value for their works, and the pitting of sound recording owners versus creators and owners of musical compositions is based on a false presumption that allows the distributors of music to avoid paying fair market rates for both, with songwriters and composers suffering deeply unfair financial discrimination as a result.

SGA is a founding member of the Music Creators North America coalition ("MCNA"), and as such, is pleased to announce that MCNA's "Study Concerning Fair Compensation for Music Creators in the Digital Age" will be published soon. This study, in its final stages of review by author Pierre Lalonde, will shortly be available widely on the Internet and in printed form. SGA hereby respectfully requests permission from the Subcommittee to be able to submit a copy of this study upon its publication.

As a closing thought on the issue of fair remuneration, I want to take this opportunity reiterate my past statements in staunch support of the right of termination already enshrined in U.S. copyright law. SGA was the foremost proponent for incorporation of the termination right into the Copyright Act of 1976, and continues to believe that it is one of the most important reflections of moral rights that Congress has ever incorporated into American law. Congressional recognition that the value of copyrighted works cannot be adequately determined at the time of their creation, and that therefore fairness and morality dictate there must be a right of termination for creators to ensure that they have the opportunity to realize the true value of their

works, is a concept SGA believes is on the verge of global recognition. With that in mind, SGA would like to express its active support for the principle that the rights of recording artists to terminate grants of rights in sound recordings to recording corporations (which SGA believes are not the proper subject of work for hire agreements under the U.S. Copyright Act) must be recognized as sacrosanct under law.

C. Complete transparency throughout the licensing, use and payment process.

For close to two decades, American music creators have been assured again and again by leaders of the technology community, members of the marketplace of copyright licensees, and by its own music publisher partners, that the great benefit of the digital age for songwriters and composers is the promise of “transparency.” The brave new world of immutable ones and zeros, it has been pledged to creators, will at last put an end to decades of obfuscation and uncertainty concerning the accurate payment and distribution of royalties. Unfortunately, these promises of full disclosure and access for creators in the tracking of copyright uses and the concomitant payment of royalties have so far gone largely, if not completely, unfulfilled. The issue of mandatory transparency concerning intellectual property licensing and transactions, in fact, is one the Subcommittee should consider as part of its review of music licensing issues. Any new or modified licensing system without a requirement of complete transparency will still leave songwriters at an impossible disadvantage.

Since the Subcommittee recently held two hearings on music licensing, SGA wishes to point out two areas of music licensing activity in the digital marketplace that currently require especially intense scrutiny if promised levels of transparency are

ever to be realized.

The first category of activity concerns the so-called “pass through” mechanical license established under section 115 of the Copyright Act (through provisions of the Digital Millennium Copyright Act), whereby mechanical licensees of music (such as record companies), holding licenses permitting the manufacture and distribution of physical copies of sound recordings embodying musical compositions, may “pass through” such licenses to digital distributors of the sound recordings. This creates a situation in which the creators and owners of musical compositions have no privity of contract with online music distribution giants such as Apple iTunes. Therefore, they must rely on sometimes adversarial record company “intermediaries” for the monitoring and payment of royalties earned via online download usage. To the knowledge of SGA, not a single royalty audit of online distributors of music by the creators and owners of musical compositions has ever taken place due to this licensing anomaly. Under such circumstances, music creators simply do not have a mechanism under which they can verify that proper monitoring and payment of royalties by online music download distributors is taking place. This manifestly unfair and opaque system should be quickly and decisively rectified.

The second category regarding the lack of transparency is even more troubling to the music creator community, as it concerns a movement away from the important tradition of collective performing rights licensing through the PROs that has benefited and given protection to the community of American music creators for over one hundred years. The trend toward direct licensing to copyright users by music publishers of performing rights in musical compositions causes grave concern to the

music creator community because of the utter lack of transparency in the direct licensing process.

Since the establishment of ASCAP in 1914, music creators in the United States have been able to rely upon the PROs for licensing, collection and distribution services in the performing rights context pursuant to a one on one relationship between each creator and his or her chosen PRO. This system has not only provided music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO, but has also fostered the development of a robust partnership of advocacy for music creator rights between SGA and the PROs over the past eight decades.

Music publishers, however, citing the unfairly stifling effects of the consent decrees on the ability of PROs to negotiate fair market royalty rates for the performance of musical works in the digital era, have recently begun in earnest to consider following through on their announced intentions to withdraw their catalogs from the PROs and to license performing rights directly. While, as noted above, SGA fully supports efforts to revamp the consent decrees in ways that will solve the fair market royalty rate-setting problem, it cannot and does not support a solution that will allow music publishers to partially or fully withdraw their catalogs, including the rights of both American and foreign music creators from the PROs, without formal commitment to complete transparency as well as to music creators being granted the full value of their rights.

This complex issue was recently the subject of important correspondence between

SGA and its international partners in the MCNA and the European Composers and Songwriters Alliance ("ECSA") on the one hand, and the two largest PROs - ASCAP and BMI - on the other. It is SGA's firm belief that the views expressed in those written exchanges are extremely relevant and important to the Subcommittee's examination of music licensing issues. SGA has already submitted copies of this correspondence to the Subcommittee for inclusion in the hearing record in its written submission to the Subcommittee on June 10th. The content of this correspondence is self-explanatory as to the problems and issues that have arisen as a result of the accelerated movement by music publishers toward the direct licensing of performing rights.

Moreover, it should also be noted that despite announcements by some major music publishers that they may continue to utilize the services of the PROs to distribute royalties to music creators directly, even following the withdrawal of their catalogs from the PROs, not a single such publisher has announced that it intends to share with those PROs full and complete data concerning the terms of its licensing arrangements, including fees, advances and related contractual benefits. This lack of transparency will inevitably result in music creators being denied the full value for their rights. This is an issue where we may part ways with our PRO friends, in that we do not consider the "partial withdrawal" of publisher catalogs as in the best interests of songwriters, especially given the very significant problem of lack of upstream transparency.

Finally, in this regard, SGA would like to express that one of the most important moral rights of any music creator is the right to affiliate and remain with the performing

rights society of his or her choice. No transferee of copyright (whose rights are generally subject to termination by law or to other stipulations by contract) should have the unilateral right to disassociate a music creator from his or her performing rights society without specific authority of such creator, a subject about which SGA will have more to say in the immediate future.

D. Equal representation of music creator interests in the management of “centralized licensing” organizations

SGA looks forward to the opportunity to consider and comment upon any proposals that may be forthcoming from Congress and/or the music and recording communities for the establishment of a more streamlined, centralized and potentially combined music and sound recording licensing system. SGA can state with certainty that in considering the merits of any such proposals, it shall be guided by many of the same essential principles that it expressed in 2006 regarding the consideration of the “SIRA” legislation. These include the *sine qua non* for music creator community support, namely the need for equal creator representation on the governing boards and any dispute resolution bodies of any designated licensing agent or agents. In addition, SGA will insist that prohibitions against the surrender of rights of creators through "letters of direction" will be included in any proposals. This will ensure that the rights granted to creators are not easily vitiated by the imposition of marketplace pressures by copyright administrators in inevitably superior bargaining positions. There are other essential components of any licensing systems, including a bar against unchecked spending authority by any designated agent or agents; transparency in providing data (at no or minimal cost) to

songwriters about collections and disbursements; timely distribution of royalties; and fair distribution to creators of unclaimed funds. SGA would welcome the opportunity to comment on these issues in the future.

E. Establishment of a stable and secure digital marketplace where the theft of musical works is diminished to a level at which commercial interests no longer have to compete against “free”

The looting of musical works on the Internet has continued nearly unabated over almost two decades, during which time the income of the music and recording industries (and especially of individual music creators and recording artists) have been diminished by as much as two-thirds. A basic sense of justice, as well as the moral rights that connect a creator to his or her work, require addressing the drastic need to curtail online digital theft of musical works.

Moreover, accepting the notion that licensed music distributors and services must be permitted to artificially depress royalty payments because they must compete against black market free goods stands the principles of moral rights, fairness and the sanctity of property ownership on their heads. In considering the viability of any potential licensing solutions considered by the Subcommittee, there must be recognition that unless additional systems and laws are put in place to control or eliminate theft, no licensing scheme can possibly address the royalty needs of the music creator community.

V. CONCLUSION

SGA applauds the Subcommittee's efforts to examine moral rights and to consider the individual creators innate connection to his or her work. We look forward to working with the Subcommittee in helping to shape a “moral” future in which the rights and incomes of music creators are fairly and equitably protected.

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