Songwriters Guild of America

SGA Comments to House Judiciary Chairman Goodlatte and Ranking Member Conyers on the Copyright Office Reform Proposal

January 26, 2017

Dear Chairman Goodlatte and Ranking Member Conyers,

The Songwriters Guild of America, Inc. ("SGA") submits these comments in response to the December 6, 2016 policy proposal regarding Copyright Office Reform. SGA's recommendations will focus positively on the crucially important proposal that the Copyright Office host a small claims system consistent with the September 2013 report on the issue released by the US Copyright Office. This small claims system should handle lower monetary value infringement cases, as well as bad faith Section 512 notices. Moreover, the Register should be given the authority to promulgate regulations to ensure that the system works efficiently.

As you know, SGA is the nation's oldest and largest organization run exclusively by and for songwriters, with over 5,000 members throughout the United States. As a voluntary association comprised of composers and the estates of deceased members, SGA provides contract advice, royalty collection, audit services, copyright renewal, termination filings, and numerous other benefits, including advocacy on behalf of creators in Congress, before the courts, and in administrative proceedings.

SGA welcomes your Copyright Office Reform proposal, and strongly endorses the concept of establishing a mutual opt-in forum in which individual copyright owners may pursue infringement claims of relatively small economic value. Such small claims and random infringements may seem unimportant to the public, and often-times to unlicensed copyright users, but taken in the aggregate they have had a highly destructive effect on the livelihoods of individual creators akin to the infamous torture "death by a thousand cuts."

It is an all-too-common complaint among individual songwriters that they have no effective remedy for infringement under the current system. That is not to say that a remedy does not exist; it is simply a recognition of the fact that the challenges and expenses of bringing a copyright infringement action in federal district court (with legal fees and costs now ranging upward of $350,000 per action and statutory damages for such infringements currently capped under the US Copyright Act at less than half that amount per title) put the remedy out of reach for most songwriters, particularly when a small claim is

involved.

SGA offers the particular thoughts below in the spirit of helping the House Judiciary Committee to craft a legislative small claims solution. You will note that these thoughts remain consistent with the SGA and the Nashville Songwriters Association International comments jointly submitted to the Copyright Office in January, 2012. The issue remains one of the American music creator community's highest priorities, as it has since the proposal was originally floated a decade ago.

- **Possible alternatives for small copyright claims.** We believe it is crucial that any small claims tribunal have expertise in copyright law, not only to keep costs down, but also to prevent inconsistent and legally unsupportable judgments. Because of that, we agree with your proposal that a small claims court affiliated with the Copyright Office would be the best alternative. While we would certainly be willing to consider proposals utilizing the CRB, creating a streamlined procedure in federal court, or creating a staff of experienced administrative law judges, we are concerned that those options would likely prove too formal and expensive for individual, opt-in litigants.

- **Logistical issues involved in creating a small claims court.** SGA is concerned that, if a small claims tribunal were to sit in only one location, it might discourage individual litigants who would be faced with travel and associated costs, along with time away from work. Therefore, we believe that, to the maximum extent possible, a small claims court should utilize electronic means, mail and telephone communication for filings, conferences, and arguments, rather than requiring appearances. Moreover, a mechanism whereby a copyright owner plaintiff is able to name multiple defendant infringers within the same action is critical to the fairness and accessibility of the system to creators, ensuring that it is an effective means of deterring the type of mass piracy that currently plagues the creative community.

- **Threshold legal questions.** It is apparent to SGA that there are a number of legal questions that would have to be resolved in the creation of a small copyright claims court. First, what would constitute a "small claim?" SGA would await comments from other stakeholders on this point; we have no definite dollar amount in mind, beyond believing that it should be high enough to encourage individual creators to use the new system and not so high that defendants might be prejudiced by the more informal procedures. Second, what showing must a copyright owner make before a defendant is required to appear? Two possible options would be for the copyright owner to make a prima facie showing of infringement or, alternatively, to require the plaintiff to certify the veracity of the claim, as in Federal Rule of Civil Procedure 11. SGA believes the latter option is more consistent with the small claims concept and would be far easier for an individual copyright owner appearing pro se to understand.

- **Secondary legal questions.** SGA believes there are a number of other legal questions that must be considered if a small claims court is to be established. First, how would claims of "fair use" be handled? Because these claims are in most cases fact-specific, litigating them in small claims court could prove problematic. We believe that if such a defense is raised, and it is credible and substantial, the case should be dismissed without prejudice and designated as removable to federal court. There are also issues relating to the Digital Millennium Copyright Act ("DMCA"): (First, how would claims involving

DMCA takedown notices, and any counterclaims, be handled? Second, should individual copyright holders in small claims court be allowed to bypass the takedown notice requirement so as to make the process easier and more attractive? SGA believes that the more burdens imposed on individual creators before they can utilize any small claims process, the less likely it will be that the court would serve as a meaningful alternative to the current system. Finally, we note the question of whether appeals from decisions by a small claims tribunal should be permitted? We are concerned that the benefits of establishing a small claims court could be eliminated if appeals to federal court are allowed. The savings in money and time would simply vanish if a small claimant were then forced to hire counsel and litigate his or her case again in the appellate court. The expense would just be moved up a notch to a higher court. Consequently, we believe that any appellate option should, like the small claims court, be simple, informal, and inexpensive.

- **Remedies.** Of great concern to SGA would be the effect that establishment of a small claims court might have on statutory damages. If the small claims court could not offer statutory damages as a remedy, we feel strongly that there must be some assurance that the level of those damages in federal court would not be effectively undercut. SGA also believes that, at least in some instances, a small claims court should be authorized to order injunctive relief. In particular, injunctions would seem appropriate in cases in which there are repeated infringements with no colorable defense, and the defendant has limited resources against which to collect a monetary judgment. In such circumstances, the copyright owner's only recourse might be to stop the infringement.

- **Estoppel.** SGA believes that one issue the House Judiciary Committee should consider in its deliberations is whether the small claims process would act to estop subsequent related claims in a larger infringement action in federal district court. For example, what would happen in a situation in which a copyright owner sued one website for infringement in small claims court, obtained redress, and subsequently it became apparent that this website was in fact part of a much larger pattern of willful infringement? If the website was thereafter named as a defendant in federal district court, we believe the website should not be able to argue that its liability is limited to the relief obtained in the earlier small claims proceeding.

- **Legal fees**. SGA believes a provision to award legal fees in a small claims setting would be fatally counterproductive. A small claims statute that included a "loser pays" provision, for example, would discourage--if not eliminate--the likelihood of an individual songwriter or other creator utilizing the new system. The risk of having to pay the legal fees of a well-heeled defendant, particularly a corporation that hired an attorney or attorneys to litigate the case, would be all out of proportion to the possible benefit of prevailing on the "small claim." Individuals would simply not take the risk and would effectively remain without a remedy for infringement.

SGA appreciates the opportunity to submit these comments to the House Judiciary Committee, and looks forward to playing an active and constructive role in this important congressional endeavor of creating a small claims venue.

Respectfully submitted,

Rick Carnes
President
The Songwriters Guild of America, Inc.