Submitted by Susan Chertkof on behalf of Recording Industry Association of America, Inc.

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of: Study on the Moral Rights of Attribution and Integrity	Docket No. 2017-2

REPLY COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") is pleased to provide these reply comments in response to the Copyright Office's January 23, 2017, Notice of Inquiry ("NOI") and its March 2, 2017 extension of time in the above-captioned proceeding. *See* 82 Fed. Reg. 7870 (January 23, 2017) and 82 Fed. Reg. 12372 (March 2, 2017).

RIAA is the trade organization that supports and promotes the creative and financial vitality of the major recorded music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music legitimately produced and sold in the U.S.

We appreciate the opportunity to share our views on the issues raised by the NOI. Although the NOI asked about two distinct moral rights – the right of attribution and the right of integrity – most of the initial comments filed in this study, like the majority of comments made at the April 18, 2016 Copyright Office-sponsored symposium ''Authors, Attribution, and Integrity: Examining Moral Rights in the United States,'' acknowledge that a right of integrity is far too complicated to implement in the U.S. As such, we focus here solely on the right of attribution.

Before deciding whether to recommend any changes to U.S. law – whether large or small – we urge the Copyright Office to consider carefully the unintended consequences that legislated moral rights could have for the entire U.S. music community.[1]

Artist attribution is, and always has been, a *sine qua non* of the recorded music industry. Artists' names are their brands. An important goal of a record label is to help each of its artists become a household name and help artists amass the largest possible fan base. U.S. record labels invest billions of dollars each year discovering and developing new artists and marketing and promoting new and existing artists. It would be economically irrational for record labels to invest such large sums of money in artists without doing everything possible to generate name recognition. Without name recognition, artists would be unable to sustain a career and record labels would be unable to receive a return on their investment. Given this strong marketplace incentive for record labels to ensure that artists receive attribution everywhere possible, a government mandate is simply not needed.

Not surprisingly, given the critical importance of attribution to an artist's career, contracts between artists and record labels routinely include provisions that address attribution. Likewise, record labels' agreements with third-parties generally include attribution requirements. Such contractual provisions are preferable to government mandates that would presumably apply identical rules to all classes of creative works, rather than treating sound recordings (which typically involve numerous creative contributors) differently than photographs or novels or videogames (the first two of which typically involve a single creator). Individual contracts can and do take into account the type of creative work at issue, such as sound recordings, and the

[1] While we acknowledge that moral rights laws have long existed in various European countries, the United States is a far more litigious society, which makes new laws that are both broad and vague far more problematic here than they are overseas.

commercial context in which those works will be distributed, promoted and otherwise exploited. Contracts can also address any unique needs of a particular artist (which may be an individual or a multi-person band) or a particular single or album. More importantly, standard attribution provisions – developed through the back and forth of actual marketplace negotiations – can be adjusted over time to keep pace with changes in the manner that music is distributed and consumed.

A new statutory attribution right, in addition to being unnecessary, would likely have significant unintended consequences. Over the last two decades, the recording industry has weathered a series of fundamental shifts in the way music is consumed. These include a shift from physical to digital formats (which brought with it an explosion in online piracy) and, more recently, a shift from ownership models to access models. All of this upheaval has taken a heavy toll on revenues for record labels and for the artists whose livelihoods depend upon them. After fifteen years of declining revenues, the recorded music industry outlook is finally showing signs of improvement. This fragile recovery results largely from growing consumer adoption of new streaming models, made possible by the industry's substantial investment in the requisite systems and infrastructure supporting the efficient and widespread creation of business partnerships between digital music services and record labels that, in turn, has fostered the growth of existing streaming services and the launch of new ones. We urge the Office to avoid legislative proposals that could hamper this nascent recovery by injecting significant additional risk, uncertainty and complexity into the recorded music business.

In an access-based world, third-parties, such as digital music services, are increasingly responsible for distributing sound recordings to the public. This reality creates a number of

practical challenges for a broad statutory right of attribution, including, but not limited to, the following:

- Who would be required to comply with a statutory attribution requirement – record labels or digital music services?
- Would record labels be obligated to include broad new attribution provisions in agreements with third-parties (and, if so, how would this affect those negotiations)?
- Could record labels be held liable if a third-party failed to comply with a contractual attribution provision?
- Who would be responsible for enforcing attribution laws against third parties – record labels or the artists seeking attribution?

A broad statutory right of attribution would raise a myriad of concerns for record labels and their partners. The shift to access-based models is changing the manner in which consumers listen to music. More and more consumers now listen to music on small mobile devices, in-dash receivers (whether satellite or otherwise), or web pages where room for attribution is limited. Streaming services have already invested in user interfaces that generally provide on-screen attribution for the featured artist (along with the title of the song and the title of the album). In fact, Section 114 of the Copyright Act requires all services operating under the statutory license to display these three pieces of information. If a statutory attribution right suddenly required these services to provide attribution to others involved in the creative process, that would presumably require costly changes to their user interfaces (and their associated metadata feeds) and push them up against the size limitations of their display screens. To continue growing, streaming services must provide a compelling product to consumers. Providing a long list of on-

screen attributions would not make for an engaging or useful experience for consumers. In addition, if services were forced to undertake significant financial investments to comply with a new attribution right, that could result in less money being placed into the music ecosystem. As a result, there could be less money available for the very artists who are intended to benefit from a statutory attribution right.

These are far from the only practical concerns that a statutory right of attribution would raise. Other practical issues that we hope the Office will consider include the following:

- A statutory attribution right would pose difficult line-drawing problems regarding how far the attribution mandate would extend: Just to featured artists? To non-featured artists? To session musicians? To producers? To each writer, performer and musician on each sample included in a single recording? What about movie soundtrack albums or Broadway cast albums? Would attribution extend to producers, directors and other creative personnel associated with the movie or show?
- How would re-uses of catalog recordings be handled (e.g. a re-release of an old jazz recording)? What if all the relevant contributors to a recording are not known? What if a statutory waiver were required but the creator or his/her heir(s) could not be located?
- How would attribution be handled in the case of public domain works? Fair uses?
- How would a streaming service collect all of the necessary attribution information for the millions of recordings already in its repertoire?
- Would streaming services have to provide a complete attribution list alongside the name of each playlist? Would they need to provide separate attribution for every contributor to every sample in every recording in its catalog?

- Would broadcasters be required to back-announce each song that they play? Would back-announcements be required to include attribution for samples included in the recordings they broadcast?
- How would services that offer user generated content ("UGC") that includes music provide attribution? Would users be required to supply the attribution information or would the services have to do the research and add the attribution information? If users supplied the information, would the service be liable if that information was wrong?
- Until authoritative data is available (an issue the industry is actively working on), how would a record label or service know which data to use? What if a service used the wrong data? Might it face claims both from the creators whose names were mistakenly omitted *and* from the creators whose names were mistakenly used?
- Where would attribution be given when music is used in television shows and commercials – which generally do not include motion picture-style credit rolls that identify the music used? Would liability be waived in those circumstances or would television shows and commercials have to put government-mandated attribution requirements ahead of the aesthetic and other considerations that underlie the choice to omit credits from such works? What about motion pictures and videogames, which generally include music credits, would an attribution requirement extend beyond the artist and songwriters?
- If there were a statutory right, what would the appropriate remedies be? Would the remedies be different for physical product than for digital product? And how would a

new cause of action impact an already overburdened court system? Would a new right apply retroactively or would it be prospective only?

There is one other issue we wish to raise. A number of the comments suggest expanding the Visual Artists Rights Act ("VARA") to include audiovisual works. In evaluating this proposal, we encourage the Copyright Office to keep two points in mind. First, when VARA was enacted in 1990, it was intentionally kept narrow. Second, unlike works of visual art, which typically have a single creator, audiovisual works such as music videos and theatrical films typically have scores of creative people involved in making them, including everyone from songwriters to performers to musicians to directors, producers, cinematographers, choreographers and more. Figuring out who would be included in a VARA-style attribution requirement would raise even more difficult questions at the very least and could well have a chilling effect on the creation of covered audiovisual works.

We hope this practical perspective is helpful to the Office. If we can provide any additional information about the unintended consequences that statutory moral rights would create for the recorded music industry, we would be happy to do so.

Dated: May 15, 2017

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Respectfully submitted,

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