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By email

John R. Riley, Assistant General Counsel
Jason Sloan, Assistant General Counsel
Jalyce Mangum, Attorney-Advisor
United States Copyright Office Library of Congress
101 Independence Ave, SE
Washington, DC 20559-6000

Re: Summary of *ex parte* meeting regarding Notice of Proposed Rulemaking, *Termination Rights and the Music Modernization Act's Blanket License*, Docket 2022-5 [87 FR 64405]

Dear Ms. Mangum and Messrs. Riley and Sloan:

This letter summarizes the March 10, 2023 Zoom videoconference meeting among the three of you attending as representatives of the Copyright Office, Erin McAnally, Abby North and me in my capacity as counsel to Abby North and North Music Group in this matter. Ms. McAnally, Ms. North and I thank the Copyright Office for its time and attention in meeting with us. Unless mentioned by name, Ms. Mangum and Messrs. Riley and Sloan are referred to as the "Copyright Office" or "you," and Ms. McAnally, Ms. North and I are referred to individually or as "we" or "us."

The following summarizes the discussion:

1. MLC Unilateral Business Rules

We discussed with the Copyright Office The MLC, Inc.'s ("***The MLC***") unilateral adoption of its business rules relating to payment or nonpayment of an unknown amount of post-termination royalties The MLC has collected from "covered

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activities" under the Music Modernization Act.[1] These unknown sums could include post-termination royalties that may be part of the $424 million in historical "unmatched" or "black box" royalties paid to The MLC by the services in 2021,[2] and any accrued interest.[3]

We emphasized that The MLC created a business rule for its administration of terminations that is inconsistent with our understanding of how terminations have been treated in the industry regarding payments of mechanical royalties under Section 115. This business rule appears to be inconsistent with the law, Copyright Office guidance and industry standard practice.

The MLC created its business rule for terminations and there is little or nothing that members of The MLC such as Ms. McAnally and Ms. North can do to challenge that rule (or any other unilateral business rule[4]) in the moment.[5] We were relieved that the Copyright Office is challenging The MLC's termination rule through the current NPRM. The parties discussed the oversight role of the

[1] The Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Public Law 115–264, 132 Stat. 3676 (2018); 17 USC § 115(e)(7).

[2] *The Mechanical Licensing Collective Receives $424 million in Historical Unmatched Royalties from Digital Service Providers*, The MLC (Feb. 16, 2021) available at https://blog.themlc.com/press/mechanical-licensing-collective-receives-424-million-historical-unmatched-royalties-digital.

[3] 17 U.S.C. § 115(d)(3)(G)(i)(III) and (H)(2)(I). The current "applicable" Federal short term monthly interest rate is 4.41%. See Internal Revenue Service Revenue Rule 2023-5 Table 1.

[4] I gave several examples of such business rules in my comment in the current docket, including The MLC's cryptic explanation of its "Investment Policy" for trading with unmatched funds. See, *@musictechpolicy's Comment to Copyright Office on Termination, the Black Box and Lawlessness at the MLC*, Music Tech Policy (Jan 14, 2023) available at https://musictechpolicy.com/2023/01/14/musictechpolicy-comment-to-copyright-office-on-termination-the-black-box-and-lawlessness-at-mlc/.

[5] For example, The MLC's *Guidelines for Adjustments* (Jan. 2022) (available at https://f.hubspotusercontent40.net/hubfs/8718396/files/2022-02/MLC%20Guidelines%20for%20Adjustments.pdf) is replete with subjective standards spoken in the passive voice that essentially authorizes arbitrary decisions at the discretion of The MLC. Examples would be Section 2.1 thereof: "When The MLC **discovers or learns** of **anomalies** with a matched Work or Share, it **may elect** to place Royalties in Suspense while it **researches and analyzes the issue**. If, **after review, The MLC determines** that the match was not **proper** and, as a result, Royalties for the Work/Shares concerned were **incorrectly paid** to a Member, **The MLC may seek** to apply an Adjustment."

Copyright Office and The MLC being addressed on a case-by-case basis in the appropriate forum.

2. Necessary Retroactivity of Proposed Rule

In the NMPA's summary[6] of its January 19, 2023 ex parte meeting with representatives of the Office, the NMPA states:

> NMPA expressed its position that the Proposed Rule should not be retroactive. Retroactive application of the Proposed Rule would cause administrative and accounting issues on the part of publishers, many of whom have likely already distributed royalties received from The MLC to their songwriters.[7]

We categorically disagree.[8] We discussed with the Copyright Office that it is of the essence of the role of publishers large and small, including collectives like The MLC, to be able to make allocation corrections involving adjusting debits and credits. These adjustments necessarily require retroactive payments. Adjustments in accounting by The MLC and by publishers to songwriters arise for a host of reasons at both levels and will continue to do so. It must be said that at The MLC level, resolution of retroactive payments requires allocation of sums already invoiced and collected, so should have no affect at the service level upstream of The MLC, rates and terms, territories, or the like. This likely explains The MLC's Retroactivity Policy that seems at odds with an adjustment required by a termination, but in any event raises a question deserving of an answer and perhaps oversight by the Office.

We discussed with the Copyright Office the time and resources that publishers invest in learning to account and maintaining the data necessary to render accurate accountings. Any suggestion that publishers cannot render retroactive

[6] National Music Publishers Association ex parte letter (Feb. 6, 2023) available at https://www.copyright.gov/rulemaking/mma-implementation/ex-parte/nmpa-5.pdf

[7] Id at 2.

[8] Indeed, Section 3.4 of The MLC's *Guidelines* expressly contemplate retroactive payments as a matter of course: "Adjustments may be made by The MLC retroactively to January 1, 2021 (i.e., the License Availability Date)" (hereafter, Retroactivity Policy).

payments or that doing so would be so difficult the process should require a change in the law is inconsistent with our lived experience.

The same skills are present at The MLC with millions of dollars of resources and a Congressional mandate to operate as a world-class collective management organization responsible for a single revenue source. We emphasized that other collectives routinely correct for contractual reversions, overpayments, underpayments, changes in rates, changes in ownership, changes in administrators of the same owners, changes in splits, the whole panoply of rights payments issues that arise daily as a matter of course.

Different organizations handle corrections differently, but it comes down to recasting statements for a particular work for a particular set of accounting periods. This can either be accomplished with manual statements for the work and period concerned or on an automated basis depending on the sophistication of the accounting system. We emphasized that making corrections in a variety of levels is such a routine part of publishing administration that a state-of-the-art accounting system should be built with these capabilities.

Not only are these bread-and-butter adjustments a matter of routine practice, but The MLC is also facing a significant retroactive adjustment as the result of the Phonorecords III remand. We expressed the concern that The MLC should operate on the same basis as other CMOs around the world and changing the well-established industry-wide system of adjustments through debits and credits would certainly be a departure. Further, if The MLC's brand-new accounting systems truly cannot accommodate retroactive payments and adjustments that are a relatively trivial exercise for other CMOs and for publishers, then how will they ever handle the remand rates? There may be significant operational issues that the Office should investigate.

As we pointed out to the Copyright Office, there are relatively few terminations compared to the numbers of songs in publisher catalogs generally, these terminations are U.S. only, and songwriters often renegotiate administration terms as part of a termination, perhaps with a new advance or minimum guarantee. This is particularly likely when the publisher maintains worldwide publishing and administration rights ex-US for the terminated song.

Retroactive payment is potentially a material deal point to be negotiated by the terminating songwriter (or their heirs), albeit paying the songwriter with what ought to be their own money. We emphasized that the retroactive payment of royalties under the proposed rule is essential to protect terminating songwriters.

Even so, there are almost always other songs by the same songwriters administered by the terminated publisher and any incorrect retroactive payment that escaped would be treated like any other overpayment. Overpayments are typically offset against other earnings.

We discussed that this ability to offset overpayments would be particularly true at The MLC level where The MLC administers a publisher's entire catalog, albeit for the US only. It must also be noted that rolled-over terminations under a renegotiated administration agreement with the pre-termination owner may address the allocation of post termination earnings. Failing all else in an unlikely case of a songwriter with one song exploited in the US only with recoupment of advances limited to the US, any overpayments due to retroactive payment could likely be recovered on various legal theories depending on the underlying assignment's applicable terms.[9]

These issues highlighted to the Copyright Office our concern that removing retroactive payments (including at The MLC) puts the government's thumb on the scale in any renegotiation and further illuminates our support for the Office's position in the MPM.

3. Windfalls and Clawbacks

One concern of NMPA apparently is the "clawback," i.e., how retroactive payments might affect publishers who had already paid out post termination royalties to songwriters. We discussed that this is not an MLC issue since The MLC only deals with publishers so the "clawback" issue probably would not happen at the songwriter level. We made the point that terminations are relatively few for any one publisher and that terminations do not happen in a vacuum. Publishers have notice and are able to take precautions to prevent themselves being in a clawback situation pending the resolution of the termination.

We also discussed the possibility of a double royalty payment at the songwriter level following a termination if The MLC had accounted to a publisher who had in turn accounted to a songwriter who then terminated their US rights resulting in a windfall to the songwriter. However, the royalty accounting clock and the termination clock run on different timelines.

[9] Note that unrecouped advances or overpayments are carried in historical dollars in the music business, unlike other industries where a money factor may be applied in the form of interest or overhead charges (or both) on unrecouped sums that produces the Zeno's Paradox effect.

For the songwriter to have received the first of the double payments on covered activities, The MLC would first have to have rendered an accounting statement to the publisher. Generally, this occurs monthly with a 75-day lag from the date The MLC receives payment. The publisher typically pays royalties 45 days or more after the close of a calendar quarter for royalties received in that quarter. So, there is a substantial lag of many months between the time the song earned royalties and the time the songwriter receives payment.

Termination notices operate independently of accounting cycles. Given the long lag at The MLC level and the publisher level, it is a challenge to imagine a situation where the songwriter would have received a double payment as the result of a termination notice if The MLC or the publisher were diligent in monitoring terminations. At The MLC level, we understand that HFA flags terminations which should put The MLC on notice. Presumably HFA knows to flag the song either because their publisher-principal has already notified HFA or because the termination has already occurred and HFA is operating on a new letter of direction for that song.

We discussed HFA's current practice for resolving terminations. HFA already has an accepted procedure for transferring ownership due to terminations which involves the terminating owner notifying HFA and HFA assigning a new song code to that new owner. The two parties agree on a "perfection date" with the new owner being paid prospectively. If the current owner objects to the termination, this presumably would be a dispute resolved like any other dispute. We suggested that adding the requirement of an ISWC to be embedded in The MLC records at this point would be essential to a minimum viable data standard.[10]

4. Black Box Market Share Calculation and Interest Payment for Terminated Works

Due to the methodology for market share calculation spelled out in the Music Modernization Act,[11] the ownership change in a terminated song could have a meaningful impact in some cases on the ultimate distribution of black box and the corresponding interest payment. We suggested that if a terminated work is included in the black box that is claimed post termination, the terminating party

[10] See infra note 12 discussion of minimum viable data standard.

[11] 17 U.S.C. § 115(d)(3)(J)(i)(II)

should be incentivized to claim the work by being allowed to retain any pre-termination unmatched revenue they are able to match.

Given that the current historical black box at The MLC has been held for many years on average by the services when received by The MLC in 2021 and will be held several years longer by The MLC, the pre-termination owner has had a chance to claim the accrued unmatched and will have had time to claim the black box and any pipeline royalties while adjusting for a termination.

We have not seen a policy from MLC regarding allocation of historical unmatched and may have additional comments on the policy in the context of terminations (and otherwise) if it is released to the public. We would say that the treatment of historical unmatched is yet another example of The MLC creating a business rule that essentially has the force of law outside public scrutiny. Accordingly, we are hopeful that the Office will retain oversight for that policy and require suitable public comments and rulemaking particularly considering The MLC's investment policy.

5. Timing of Payments for Post-Termination Adjustments

You raised the question of how post-termination adjustments should be treated if the adjustment relates to pre-termination earnings for matched works. It is important to bear in mind that such adjustments could result in an increase or a decrease in payments by MLC. Remembering that MLC is just one revenue source, an adjustment in MLC payments does not mean that any other source is affected. (PR III remand, for example, would be cabined to MLC.)

If the termination is purely statutory and no contract rights are at issue, then it seems that the new owner would bear the burden of any downward adjustment and get the benefit of any upward adjustment. This would be equally true of the PR III remand retroactive payment. To our knowledge, this issue was not addressed by the CRJs or by the DC Circuit.

One reason the issue has not bubbled up to the top of the list may be because terminating songwriters and heirs enter new administration agreements or settlements with their publishers. Those agreements would likely cover adjustments. In that case the contract rights should prevail and any new rulemaking or statute should take care to not interfere in private voluntary agreements.

6. The MLC Should Adopt the ISWC as the Primary Identifier

The pre- and post-termination payments, retroactive payments and other adjustments are examples of why The MLC should use the industry standard ISWC as the primary public-facing identifier for songs. While The MLC may collect ISWCs if available from registrants, to our knowledge The MLC does not require an ISWC but does use both the HFA song code and The MLC's own song code.

Because The MLC uses the HFA database, the HFA database links songs to the HFA song code. However, outside of the HFA database and especially outside of the US, the industry standard is the ISWC which is becoming more robust and readily available. Therefore, international matching is made more difficult because The MLC either does not have ISWCs or does not display the ISWC in the registry. In any event, if The MLC does not already have ISWCs prior to the time of a "data dump", The MLC makes no additional effort to obtain the ISWC as part of that data dump or a commitment to a minimum viable data standard.

Perhaps more significantly, The MLC identifier is not a bridge to the parties or their IPIs. The ISWC is that bridge. Because the ISWC links to the IPI, post termination ownership can be adjusted through the IPI with the ISWC remaining constant. This is also true of adding partial ownership interests to the IPI as splits become known, or settled, after commercial release of the song concerned and encourages a "first to file" practice to encourage transparency and increase matching that would protect songwriter sustainability as well as valuations.[12]

Changing the HFA or MLC song codes increases the number of identifiers but only functions in the US and at that just within The MLC and HFA. This seems at odds with The MLC's Congressional mandate to develop the authoritative global musical works database and certainly makes the termination right unnecessarily complex to administer.

It is then unclear what the benefit is of how The MLC uses multiple song codes in the context of pre- and post- termination revenues. There is a clear benefit of using the ISWC as the primary identifier for The MLC consistent with global industry standard best practices.

[12] Note that this subject came up in the discussion of a minimum viable data standard by Merck Mercuriadis (https://musictechpolicy.files.wordpress.com/2023/03/merck-main-presentation-v-1.pdf), Dr. David Lowery, Helienne Lindvall, Ms. McAnally and Ms. North on panels at the University of Georgia Artist Rights Symposium III, Nov. 15, 2022.

7. Implementation of Office's Corrective Adjustment in NPRM

Often, the original grant is to a larger publisher but the terminating party is much smaller, therefore it is more likely that any retroactive payment could easily be debited to the original publisher without a shortfall or creating a negative balance. Affording the parties 90 days to implement the NPRM adds even more time to prepare for the transfer and any adjusting payments beyond the 75 days to render The MLC statement plus the typical quarter plus 45 to 90 days at the publisher level. It is very unlikely that a songwriter will be paid incorrectly with this substantial lead time.

However, we emphasize the importance of communication at The MLC level of any pending changes. HFA has a practice of email communication that allows the terminating publisher to tender the termination documents to HFA, confirmation of the terminated publisher and designation of a perfection date. The MLC could adopt a similar practice at the portal or could implement the ability for members to directly communicate within the portal. Members should be able to upload termination documents and letters of direction within their portal access. Indeed, it seems that The MLC has already contemplated such documentation in its *Guidelines*.[13]

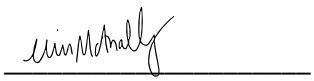
[13] See, e.g, *Guidelines* Sections 4 and 5.

We discussed with the Copyright Office a concern about non-responsive terminated publishers. The Office may wish to consider requiring a standard for terminating publishers to document their compliance with the statutory termination requirements. Once the terminating publisher has met that standard, The MLC would be required to pay royalties to the terminating publisher subject to any rights that the terminated publisher may have to challenge the termination.

Again, we thank the Copyright Office for its time and attention in meeting with us.

Very truly yours,

Christian L. Castle



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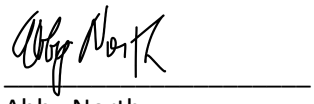

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