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February 21, 2024

Via email

Suzanne Wilson
General Counsel and Associate Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Ave. SE
Washington, DC 20559-6000

Re: Summary of The MLC's February 13, 2024 Ex Parte Meeting with the Copyright Office Concerning Docket No. 2022-5, *Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act*

Dear Ms. Wilson,

This letter summarizes the February 13, 2024 videoconference ("February 13 Meeting") between the Mechanical Licensing Collective ("The MLC") and representatives of the Copyright Office (the "Office"). The MLC thanks the Office for its time and attention in meeting with The MLC.

The persons participating in the February 13 Meeting for The MLC were Rick Marshall (Assistant General Counsel) and outside counsel Benjamin Semel. On behalf of the Office, Jason Sloan, John Riley and Jalyce Mangum participated in the meeting.

The following summarizes the discussion:

There was a discussion concerning establishing a default payee for royalty distributions, and The MLC reiterated its support for a provision clarifying that The MLC can distribute royalties for a musical work to the current payee registered in its database. As discussed in its

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SNPRM Comments¹, The MLC believes that this is the rule laid out in the MMA. Even where the terms of a private agreement might grant a right to royalties to someone other than the entity registered with The MLC, those situations can be managed by the contracting parties according to their agreement. It can be clarified that distribution by The MLC does not alter the legal or contractual rights of the parties to a private transfer as between each other, but the authority to distribute to the entity registered with The MLC per the MMA should be maintained.

There was a discussion concerning how aspects of the SNPRM may affect The MLC's implementation of voluntary licenses ("VLs"). Generally speaking, The MMA requires The MLC to carve out royalties related to works subject to a VL from the monthly royalty total that DSP must pay to The MLC. The MLC explained that, in the context of a given monthly royalty distribution for a streaming offering, the VL carve-out process occurs after The MLC's standard matching process takes place. In other words, The MLC first processes the monthly usage reported by the DSP, matches that usage to works included in The MLC's musical works database, and further identifies the person or entity that is entitled to receive royalties for each registered share of such works. The MLC then attempts to identify any streaming usage reported by a DSP that is not royalty bearing, such as non-musical works or public domain material, and remove those streams from the total stream count. When this process is completed, The MLC divides the total royalty pool by the total stream count to determine the royalty per play for that offering that month, which is allocated across every work that was streamed in proportion to its stream count. It is only at this point that The MLC addresses VL activity, by matching the works identified by the DSP as being subject to VLs with the works matched to streams, and carving out the royalties associated with those streams. Under the MMA, The MLC does not collect royalty amounts identified as covered by VLs, as they are left for direct payment by the DSP under the VL terms.²

¹ See The MLC SNPRM Initial Comments (November 9, 2023), available at <https://www.regulations.gov/comment/COLC-2022-0004-0082>; The MLC SNPRM Reply Comments (December 6, 2023), available at <https://www.regulations.gov/comment/COLC-2022-0004-0094>.

² Where royalties are on hold because of an ownership dispute such that The MLC does not know whether the uses will ultimately be subject to a VL when the dispute is resolved, then associated royalties would not be carved out from collection.

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As this process reflects, the VL carve out process necessarily occurs after matching, which is the critical stage where the default payee rule comes into play. In this sense, the presence or absence of VLs does not change the impact of the default payee rule.

With respect to the substantive question of the application of the Exception to VLs, The MLC reiterated that it takes no position on the substantive law of terminations. With respect to the interplay between a default payee rule and VLs, The MLC strongly supports a rule confirming that it is authorized to use the payee information registered in its database to determine whether a work is subject to VL carve out. The MLC sees this as an application of the same MMA directive to distribute royalties in accordance with the ownership and other information contained in The MLC's records.

There was a hypothetical discussion about whether conflict could occur between ownership information in The MLC database and ownership asserted by parties under a VL, leading to conflict over whether royalties should be paid under the blanket license or a VL. The MLC noted that it is not aware of substantial conflicts of this type in practice, and explained how a default rule that confirms that The MLC is to rely on the ownership information in its database when implementing VLs provides parties to VLs with helpful clarity that would be of use if such conflicts arose.

There was a discussion about retroactive adjustments. The MLC reiterated that it takes no position on the substantive law concerning retroactive adjustments or the Office's authority to implement same. The MLC's interest relates to the timing for implementing any retroactive adjustments, and particularly to ensure that such a process does not interfere with critical path processing of royalty distributions that are expected to be a *thousand* times the size of the royalties at issue in any retroactive adjustments. The MLC stresses that it takes very seriously all distributions, and appreciates that even relatively small pools of royalties may involve critical royalty streams for certain individual songwriters. Indeed, it is precisely this sensitivity that motivates The MLC on this question. Over the next year, The MLC's regular monthly royalty distributions, together with special rounds of distributions,³ are expected to exceed \$1 billion.

³ In particular, since receiving adjustment reporting from DSPs for the Phonorecords III rate period by the recent deadline of February 9, 2024, The MLC is preparing to process and then distribute: (1) additional royalties due pursuant to the final CRB rates established retroactively for 2021 and 2022, and (2) royalties that The MLC has matched from the historical unmatched pools turned over the The MLC pursuant to the MMA.

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Under standard industry practices, the majority of these royalties would be paid or credited to songwriters.

In contrast, the total amount of royalties that would be subject to retroactive adjustment under the Office's contemplated policy on this issue (*i.e.*, amounts paid to pre-termination publishers for post-termination periods under The MLC's prior statutory termination policy) are less than \$2 million.⁴ Moreover, under standard industry practices, the majority of those distributions would likely have already been paid through to the songwriter by the pre-termination publisher. Thus, the total amounts that would likely change hands as part of a retroactive adjustment – across all works for all periods – would be less than \$1 million.

There was discussion about the problems that could arise for songwriters from a retroactive adjustment process, particularly where such process requires a songwriter to pay back royalties to the pre-termination publisher, so that the pre-termination publisher could remit those funds to The MLC, so that The MLC could redistribute them to the post-termination publisher, who would then distribute the funds back to the songwriter. Given the time lags on these steps, the process could lead to songwriters having to use funds to temporarily pay back royalties paid to them years ago, and then wait several months or more to get those funds back.

The MLC discussed a possible alternative approach, if the Office pursued retroactive adjustment, whereby on request of either party, The MLC would provide notice to both the pre-termination and post-termination publisher of the amounts at issue that The MLC had distributed to the pre-termination publisher for post-termination periods. After this notice was provided, the parties could work together to identify and carve out the portion of those royalties that were already paid to the songwriter, thereby avoiding having to claw back any royalties from the songwriter. The parties could then arrange for the direct transfer of remaining royalties, as appropriate, to the post-termination publisher. These are all steps that The MLC is not in a position to administer because The MLC cannot know the terms of the private contracts between the parties or how much was paid to the songwriter out of the total initial distribution. The MLC noted that this process would be more efficient, and would avoid the problems associated with clawing back royalties from songwriters. The MLC submitted that, to the extent that concerns

⁴ Under The MLC's former statutory terminations policy, which it voluntarily suspended in 2022 at the beginning of this rulemaking proceeding, The MLC distributed over \$4 million in royalties. The majority of these royalties (more than \$2 million) were distributed to the post-termination copyright owners, and the remaining amount to the pre-termination copyright owners.

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remained about the willingness of parties to comply with this approach, further provisions could incentivize compliance, such as resorting to the claw-back and redistribution approach if a significant period elapsed without resolution by the parties.

There was a discussion concerning disclosure of amounts on hold to interested parties. The MLC notes first that it makes regular disclosures of total amounts on hold, which are less than 1% of royalties processed to date. The MLC also further explained that it operates on a fixed budget and generating work-level royalty statements is a manual process that takes resources away from other tasks that benefit all rightsholders. The MLC reiterated, under the current volume of works implicated, it could provide a summary to the pre-termination and post-termination copyright owners at the outset of a termination dispute that identifies the royalties at issue for the most recent month. With respect to updates to this disclosure, any regular cadence to a burdensome manual process like this could be problematic, particularly as the number of works subject to termination is growing. The MLC is very responsive to its members, and submits that giving it the discretion to prioritize its many member services requests, including disclosures of information about works and associated royalties on hold, would best implement the MMA's vision of effective and efficient royalty administration by The MLC.

The MLC also expressed strong objection to any proposal to require disclosure to any third parties concerning amounts on hold for reasons other than termination. The MLC administers upwards of \$100 million in royalties a month on very aggressive statutory timeframes, and has substantial review processes in place to prevent fraudulent or improper claiming and diversion of royalties, which often result in royalty holds. To begin with, there is no reliable way to define who would have a right to receive royalty information in many of these review situations. The reason the royalties are on hold is because The MLC is trying to determine who, if anyone, has a right to blanket license royalties in connection with the work. Until The MLC determines who, if anyone, has a right to royalties, it would be inappropriate to disclose uncertain royalty amount information. It would also be burdensome to require a manual royalty process when The MLC undertakes critical review processes and puts royalties on hold to safeguard royalty pools. The MLC has not received significant complaints about its disclosures around works on hold outside of terminations, and strongly believes that it would be imprudent to require disclosure of royalty amounts on hold due to suspected improper activity, including fraud, to the parties being investigated for that improper activity.

The MLC appreciates the Office's time, effort, and thoughtful inquiries, and is available to provide further information on request. The MLC also believes that more discussion of these

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issues may be useful to the expeditious resolution of this proceeding, and therefore requests another ex parte meeting to continue discussion of any remaining open questions.

Sincerely yours,



Benjamin K. Semel