John Barker
ClearBox Rights, LLC

June 28, 2023

Via email

John R. Riley, Assistant General Counsel
Jason Sloan, Assistant General Counsel
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 Blanket License

Dear Messrs. Riley and Sloan:

This letter summarizes the June 20, 2023 in-person meeting with the two of you representing the Copyright Office, and John Barker of ClearBox Rights, LLC. First, I would like to thank you both for meeting with me and for your work with the MMA and specifically the NPRM concerning termination rights.

The following summarizes the discussion:

1. ClearBox's Current Role, Duties and Experience in Administering Termination Rights

I explained to the Copyright Office that ClearBox works with hundreds of various song owners, including over forty different Hall of Fame Songwriters, or their heirs, with recapturing Section 203 and Section 304 Termination Rights, as well as administering their recaptured U.S. rights through registrations, Letters of Direction, Licensing, collection and distribution of royalties for those rights.

Being on the front lines of numerous current issues and challenges related to the effective administration of terminated rights on behalf of the terminating parties allows us a unique perspective and insight into these matters that most of the parties participating in the NPRM comments may not hold.

2. <u>Whether Proposed Rule Should be Retroactive</u>

I discussed with the Copyright Office that I disagree with the initial comments of National Music Publishers Association's ("NMPA") and Church Music Publisher's Associate ("CMPA") individual comments that they believe the Proposed Rule should not be retroactive.

NMPA's initial comments to the Proposed Rulemaking stated:

"First, the Proposed Rule would expressly undo royalty payments already made under the Blanket License pursuant to the MLC's current policy. This would create a significant administrative and financial burden on the MLC, as well as on publishers or other recipients of these royalty payments who likely already distributed some portion of those amounts pursuant to their contractual obligations with their songwriters." - *National Music Publishers Association's Comments On The U.S. Copyright Office's Proposed Rule Concerning Termination Rights and The MMA Blanket License (page 5)* - https://www.regulations.gov/comment/COLC-2022-0004-0012

CMPA's initial comments to the Proposed Rulemaking stated:

"CMPA believes any USCO rule should have prospective effect only." - *Church Music Publishers Association Comments On The U.S. Copyright Office's Proposed Rule Concerning Termination Rights and The MMA Blanket License (page 1)* - https://www.regulations.gov/comment/COLC-2022-0004-0011

I explained my reasoning to my opposition of the above comments, which are unchanged from my opposition stated in my "ClearBox Rights Comments To The Initial Written Comments" of the NPRM, dated January 5, 2023 pages 3-4. https://www.regulations.gov/comment/COLC-2022-0004-0038

To highlight one statement, The Copyright Office observed in the Proposed Ruling that "the accurate distribution of royalties under the blanket license to the copyright owners is a core objective of the MLC." The calculations of identifying which parties were paid incorrectly (according to the Proposed Ruling), and to make adjustments for the correct parties to be paid from the start of the "License Availability Date" of the MLC, which was January 1, 2021, is simple math. The data is all there. There is no mystery. While it may take some effort to analyze and verify these amounts, it is reasonable to expect this to be done. Companies like ClearBox Rights, and many others, do these types of calculations all the time. The beauty of simple math is, it is all black and white, and it eventually leads to one truth.

To suggest that this process "would create a significant administrative…burden on the MLC" is laughable. The MLC was formed to create the best, most efficient and effective administration entity in the U.S., if not the world. Let us hope and believe that this has actually occurred, and not cut corners on the core objective of the accurate distribution of royalties to the copyright owners only after just over two years of operation.

Further, the music publishing sector seems to have no problem holding the Digital Service Providers accountable for their detailed, retroactive calculations and timely payments for the prior periods of incorrect payment calculations under the Phonorecords III rates which are (hopefully) soon to be confirmed. We should hold ourselves to the same, if not greater standards, than those we require from our industry associates.

3. Assessing and Correcting the Terminations Adjustments Issue

I suggested to the Copyright Office that it would be helpful to ask The MLC how many songs have had royalties put "on hold" by the MLC due to the NPRM. In order to best determine how much effort is needed and how complex a solution will be to correct improperly paid royalties, the initial assessment of how large the problem actually is would be extremely helpful.

Since the MLC has been operational since January 1, 2021, and it is reported the MLC put royalties on hold for various terminated songs due to the NPRM in October 2022, taking into account the MLC's payment schedule, we can estimate that no more than 20 months of royalties had been paid for those affected works. Since the MLC's own policy seems to impact only those terminating songs with effective termination dates of January 1, 2021 and later, that number of songs which were paid to the original publishers may be relatively small. Before we suggest the degree of difficulty in correcting payments, we should first determine the actual number of corrections that need to be made.

Each of the approximately 20 months of payments would have each had X number of songs with effective termination dates later than January 1, 2021. What is that number?

Second, we should verify that there were no payments made to original publishers for terminated works with effective dates prior to January 1, 2021. In theory, that should not have taken place. I believe it would be important to request that confirmation from the MLC. If payments with effective termination dates earlier than January 1, 2021 were indeed paid to the original owners, then those adjustments need to be a part of the correction as well since those royalties should have already been directed to the terminating owner even before the MLC License Availability Date.

While it is likely that some of the royalties received by the (incorrect) original publishers for these terminated works have likely already been paid to various third party recipients, including songwriters or heirs, the number of accounting periods that these payments were made are likely 1 to 3 times from the various publishers, and they should all be easily accounted for and traceable. Many, if not a majority of publishers continue to account to songwriters on a semi-annual basis, which is normally broken into the first and then second six-month period of each calendar year. It is also standard for many of these publishers to make that semi-annual payment 90 days after the end of the accounting period. If the MLC makes payments to the publishers within approximately 75 days after the date in which it receives royalty payments from the DSPs, then the writers may not receive their royalties from the publishers as long as 9 months later. Which means certain writers under these agreements could receive their royalties from interactive streaming as much as a year after the date of the actual streams. Since the first payments from the MLC occurred in the first half of 2021, writers on this schedule would have received no more than three total payments from their semi-annual reporting publishers before the MLC put certain terminated songs on hold in October 2022. Each publisher having received royalties for these certain terminated songs from the MLC during that time period should be able to easily produce such payment history to the various third parties.

In my opinion, if publisher A received $100 from the MLC for these terminated songs, and passed on $25 to two of the writers, that publisher should be able to easily prove to the MLC that such payments

have been made. If those two writers, or any third party payees for that matter, are the same parties who would be eligible to receive the proposed correction adjustment of $100 from the MLC under the NPRM decision, rather than the MLC clawing back or recouping the entire amount paid to the original publisher, the MLC could take into consideration such third party payments already made to the exact same parties who would receive the adjustment correction payment and give credit to the original publisher for those completed payments.

The MLC should be responsible to recoup all payments known to have been incorrectly made to original publishers for effectively terminated works, and should not wait until recoupment of the sums incorrectly paid before paying the correct royalties to the terminated owners. This is standard operating procedure for many if not most of the publishers in the industry when incorrect payments are made. I believe the MLC should be able to "borrow" from the unallocated, unidentified funds pool which would likely be ultimately paid out to the various publishers via a market-share calculation. Such borrowed funds would be replaced by the monies recouped by the MLC from the incorrectly paid original publishers.

In order to completely correct any and all incorrect termination related payments, I believe it is fair that any party that was ultimately overpaid in error, including publishers, writers, and other third party recipients, should be eligible to have their overpaid royalties recouped from future funds in order to correct the issue. In fact, many of the standard songwriter agreements allow the publishers to recoup any overpayment made by the publishers to the writers, with some agreements even including stronger language that require the writers to "pay back" such overpayments upon demand by the publisher rather than wait until recoupment. I have never personally seen this clause enacted by a publisher, and I disagree that such a clause should be used, but these clauses do still exist in certain songwriter agreements.

4. Clarifying the Appropriate Payee Under the Blanket License

We discussed the issues of determining which parties would be eligible to receive the royalties if works were effectively terminated in the middle of a reporting month. I agree, in part, with the Copyright Office's proposed rule that the copyright owner of the work as of the end of the monthly reporting period is the one who is entitled to the royalties or other related amounts. However, the small change I would suggest is that the language not state the end of the monthly reporting period, but rather simply "the reporting period". Since the DSPs are, under the blanket license, to make at least monthly payments, the schedule should never be less twelve times a year. However, as the industry changes in the future, perhaps entities will have the ability and practice to provide reports more often than monthly. With that in mind, if a provider begins paying semi-monthly, it seems fair to suggest the copyright owner of the work at the end of the "reporting period" , however often that period is, should be entitled to the royalties.

Also, I believe the same rules should apply for songs which have ownership transferred in methods other than through terminations. That is, if a song is sold from one person to another, the person who owns the work at the end of the reporting period should be entitled to the royalties.

Last, to further clarify this issue, I believe the trigger should be the end of the reporting period of the digital provider's actual activity, and not the end of the MLC's reporting period in which the MLC received and/or distributed the royalties.

5. Need For Further Clarification on Various Related Issues

I brought up with the Copyright Office a number of issues which I believe need further clarification and procedures determined for more transparent and effective practices through the MLC.

Some of those issues are:

a. If a termination notice providing the effective date of termination was sent to both the MLC and The Harry Fox Agency ("HFA"), (as we have been told sending to one will automatically be registered with the other), but The MLC does not change its records in a timely manner and continues to pay incorrectly to the original publisher, should it be the MLC's responsibility to pay the correct publisher for it's error prior to recouping the incorrectly paid royalties?
b. What verification does the MLC require from the original publisher in order to begin paying the royalties to the terminating owner after the effective date of termination?
c. What if the original publisher refuses to acknowledge the termination to the MLC, is slow to respond to such requests, or is silent on the issue? Does the MLC give the original publisher x number of days to reply, to provide documentation stating a dispute, or if silent, begin paying the original publisher after x period of days?
d. What is the minimum and maximum number of days before an effective date of termination that the MLC should receive such notice of termination from the terminating owners?
e. How will market share be determined for terminated songs which may not have been aligned with any organization that tracks market share, such as NMPA or HFA, in order to be used for possible future market share payments?

I thank the Copyright Office again for your time and interest in meeting with me.

Sincerely,

John Barker
President/CEO
ClearBox Rights, LLC