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October 17, 2022

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 Ex Parte Call with the Copyright Office on October 4, 2022

Dear Ms. Wilson,

This letter summarizes the October 4, 2022 call ("October 4 Call") 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 October 4 Call for The MLC were Kris Ahrend (Chief Executive Officer), Kristen Johns (Chief Legal Officer), Rick Marshall (Assistant General Counsel), Ellen Truley (Chief Marketing Officer), and outside counsel Benjamin Semel and Mona Simonian.

On behalf of the Office, Suzanne Wilson, Jason Sloan, John Riley and Shireen Nasir participated in the call.

The following summarizes the discussion, and an updated copy of slides shared during the call is attached hereto.

Clarification Concerning DSP Audit Verification Period

There was a discussion concerning clarification of the scope of the term "verification period" as used in 17 U.S.C. 115(d)(4)(D)(i)(I) in connection with The MLC's verification of

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royalty payments by digital music providers (“DSPs”) through audits by The MLC. This statutory provision states:

The mechanical licensing collective may commence an audit of a digital music provider not more frequently than once in any 3-calendar-year period to cover a verification period of not more than the 3 full calendar years preceding the date of commencement of the audit, and such audit may not audit records for any such 3-year verification period more than once.

The MLC explained its belief that the natural and reasonable interpretation of this provision is that audits pursuant to this provision cover *payments received by The MLC* during the audit’s verification period.

It was then discussed that, pursuant to the Office’s implementing regulations, DSPs are able to retroactively adjust their royalty accountings for a given calendar year after the year has ended. *See* 37 C.F.R. 210.27(k). For example, in connection with annual statements for the previous year retroactive adjustments are regularly provided several months after the end of each calendar year. Retroactive adjustments are also permitted further in the future in certain situations, including “exceptional circumstances.” *Id.*

The result of these adjustment regulations is that DSPs will routinely make multiple royalty payments (including adjustment payments) that relate to a single month of usage. *These multiple payments will routinely span two different audit periods.* For example, an audit begun in 2024 will cover royalty payments received through December 31, 2023. This period will include initial royalty payments received by The MLC for a DSP’s 2023 usage through September 2023 (as payments for October 2023 usage will not be due until January 2024). However, *adjusted* royalty payments permitted under 37 C.F.R. § 210.27(k)(6) relating to 2023 usage through September 2023 may be received by The MLC in 2024 or after, and those payments will fall outside the scope of the audit commenced in 2024. Those adjustment payments would be part of a subsequent audit, and that subsequent audit will thus involve examination of books and records related to usage periods that were also the subject of a prior audit.

The MLC expressed its belief that it is uncontroversial that The MLC must have the right to audit all royalty payments once, and thus that the statutory language providing that an audit “may not audit records for any such 3-year verification period more than once” must not be read to prevent The MLC from auditing adjustment payments even if the original payment for the usage was covered by a prior audit. The MLC suggested that a clarification on this point could

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be made via an amendment to 37 CFR 210.27(m)(1)(vii), adding the following underlined language in red:

Any other records or documents that may be appropriately examined pursuant to an audit under 17 U.S.C. 115(d)(4)(D). **The records covered by an audit shall include the books, records, and data related to payments received by the mechanical licensing collective during a verification period. An audit of a payment made during a verification period shall not be considered a second audit if the records related to the payment were previously audited in connection with a different payment during a different verification period.**

The MLC believes that including this language will ensure that no payments received by the MLC will be unduly excepted from audit. For example, when a future audit covers adjustment payments for usage from a prior audit period, this language will ensure that an auditor would not be precluded from examining books and records necessary to verify the accuracy of the adjustment payment -- even if those books and records had been examined in connection with the original payment in a prior audit and even if the auditor/audit firm is different from the first or prior audit. The MLC expressed its belief that this understanding is implicit in the statute, and thus the regulation would be clarifying for the avoidance of doubt. The MLC also expressed its openness to another process for the Office to convey this clarification.

Interim Regulation Concerning Royalty Adjustment Reporting and Response Files

There was a discussion concerning DSP adjustment reporting and the provision of response files to DSPs in connection therewith, a subject that was also implicated in the Office's supplemental interim rule published at 87 Fed. Reg. 31422 (May 24, 2022) (the "Supp. Interim Rule").

2021 Adjustments In Light Of The Phono III Remand

The MLC first remarked on the situation with respect to adjustments of 2021 usage reporting. In particular, The MLC noted that the pending Copyright Royalty Board determination in the *Phonorecords III* remand (the "Phono III Remand") will require all DSPs to retroactively adjust streaming royalties for 2021, thereby rendering moot all adjustments previously submitted. It would thus make no sense for The MLC to process any 2021 adjustments prior to the adjustments implementing the Phono III Remand determination. Such adjustments are not due until six months after the determination becomes effective. While The MLC does not know when the determination will become effective, it is already clear that the DSPs' deadline to implement

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adjustments will be well after the February 24, 2023 date set forth in the Supp. Interim Rule for The MLC to begin providing invoices and response files for adjustments. The MLC thus noted that the process for 2021 adjustments should be revised to allow The MLC to wait for DSPs to submit adjustments implementing the Phono III Remand and process those adjustments (made pursuant to 37 CFR §210.27(k)(6)(v)), rather than process previous adjustments (made pursuant to, *e.g.*, 37 CFR 201.27(k)(6)(iv)).

Such a process will reduce wasteful and burdensome data processing and support faster distribution of adjusted royalties. The timing of this process will depend upon the timing of the Copyright Royalty Board in finalizing its determination, but given that even an initial determination has not yet issued, adjustments likely will not be due until the middle of 2023 or later, and thus processing should be expected to begin no earlier than the second half of 2023.

Processing Adjustments made pursuant to 37 C.F.R. § 210.27(k)(6)(v)

The MLC next discussed reasonable timing for processing industrywide adjustments going forward. The MLC explained that processing adjustments of 12 monthly reporting periods per offering per DSP for more than forty DSPs and hundreds of offerings is an extensive and detailed endeavor. For example, one large monthly usage file can take up to a week of system processing time and that is before analysis and manual checks are performed. A single large DSP annual adjustment has proven to be a months-long process. Industry-wide adjustments will require several months of attention per calendar year. These adjustments must also be executed so as not to obstruct The MLC's critical path work of regular monthly processing and royalty distributions for the entire industry, as well as reprocessing prior months of both blanket and historical usage for over a decade in order to match and distribute previously unmatched royalties.

The MLC explained that its efficient and effective blanket license administration will be hindered if adjustments are required to be processed as they are received. In short, two different processes – *i.e.*, processing adjustments and reprocessing usage to match and distribute previously unmatched (or unclaimed) royalties – cannot occur on the same data at the same time. Reprocessing of usage is a critical path process which identifies previously unmatched, or held, usage for which royalties may be distributed. Reprocessing also includes identifying previously held or unmatched shares that may now be payable. Adjustment processing, on the other hand, requires, among other things, re-computing the royalty pool, applying new royalty rates to every usage, computing the variance between the previously paid royalties and the adjusted royalties, and preparing statements reflecting variations for all usage.

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Adjustment processing cannot occur while the data set is in flux due to reprocessing. To execute adjustments, the data on which the adjustment computations and statements are based must be fixed – and not dynamic – from the beginning to the end of the adjustment process. The MLC’s suggested revision to 37 C.F.R. § 210.27(k)(8) provides a solution to adjustment processing that integrates with The MLC’s current usage processing – and reprocessing – workflow.

As a result, a requirement to process adjustments whenever submitted, in order to create response files for DSPs, would necessarily preempt The MLC’s ability to reprocess unmatched uses because reprocessing would have to be put on hold for each adjustment. Moreover, DSPs may submit multiple adjustments in the period leading up to each annual report of usage, and having to cease reprocessing and address each adjustment separately will be tremendously burdensome. Indeed, the Office recognized this very concern in issuing its rule on The MLC’s reporting to copyright owners. There, the Office declined to require The MLC to process and report adjustments immediately on a monthly basis, but instead allowed The MLC to hold adjustments and process them on an annual cadence in its discretion, recognizing The MLC’s uncontested explanation of the inefficiency and burden. *See* 85 Fed. Reg. at 58162 (September 17, 2020) and 37 C.F.R. 210.29(b)(ii)(2). The MLC’s concerns that were referenced and acknowledged by the Office continue to apply.

Operational Processing Cadence

The MLC explained that it intends to begin work on the Phono III Remand adjustments for 2021 and 2022 immediately when they are submitted and estimates that the work will last up to a year. By 2024, The MLC envisions a cadence in which it receives annual adjustments from DSPs for each calendar year by or in the month of June of the following year, and then processes those adjustments over the second half of that year. DSPs that submit their adjustments late may see their processing moved to the next calendar year to maintain an orderly annual process.

Response File Timing

With respect to the provision of response files to DSPs, The MLC can provide response files to a requesting DSP at or near the time of The MLC’s distribution of the respective royalties to copyright owners, and The MLC proposes a deadline of 15 days from the date of distribution. The MLC believes that this requirement ensures that response files to DSPs will be provided within a reasonable period. As the Office has stated, “because the MLC is governed by the very copyright owners that it will be serving, and because it must maintain the support of copyright owners, it shares their interest in prompt reporting and distribution.” 85 Fed. Reg. at 22554 (April

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22, 2020). This understanding was reflected in the Office’s rulemaking concerning reporting to copyright owners, where the Office acknowledged The MLC’s statements that “it has an inherent interest in timely payments to copyright owners, given that it is governed by and accountable to those copyright owners,” and provided flexibility to The MLC on timing so as not to “overlook the potential impact of dependencies outside the MLC’s control.” 85 Fed. Reg. 58162 (September 17, 2020).¹ The MLC has consistently met or exceeded goals for timely processing and distributing of royalties. Thus, requiring that DSPs receive a response file within days after copyright owners receive royalties will adequately protect DSPs from unreasonable delay while also providing The MLC with the necessary discretion to manage its extensive critical path operations to ensure that it fulfills its broad statutory mandate.

The MLC further stated that it has discussed with the DLC its proposed cadence for processing adjustments and providing response files, and is not aware of any continued DSP opposition to this cadence.²

Payments in connection with Adjustments made pursuant to 37 C.F.R. § 210.27(k)(6)(v)

There was also a discussion concerning the timing for payment of any additional royalties due in connection with adjustments. The MLC reiterated that it sees no need or reason to delay the obligation of DSPs to remedy any underpayments captured in adjustment reporting, regardless

¹ The same dependencies impact the MLC’s data processing. The MLC stresses that no other entity has processed musical works royalties for the entire U.S. streaming industry, and its timing estimates depend on numerous variables concerning the extent and integrity of industrywide adjustment reporting, as well as the demands of critical path items, which are themselves subject to numerous variables. For example, the MLC also noted that many DSPs still have not filed their 2021 annual reports of usage, although these were due in June 2022. This situation adds even more unknown variables to the task of assessing the scope of adjustment reporting, and further highlights the importance of providing for flexibility in how the MLC prioritizes and administers processing in these initial years of the blanket license.

² The MLC also reiterates here a point concerning the nature of the prior DSP request for special response file timing to assist with administration of voluntary agreements. 17 U.S.C. 115(d)(3)(C)(iii) requires that The MLC “charge reasonable fees” for services to administer voluntary agreements. As discussed herein and in The MLC’s April 4, 2022 ex parte letter, there would be substantial cost and burden associated with forcing The MLC to process adjustments outside of its planned cadence to assist a DSP’s voluntary license administration. These costs would ultimately be borne through a higher administrative assessment, which would amount to forcing all DSPs to subsidize the voluntary license administration costs of perhaps only one or two DSPs (if indeed there are any DSPs to which this remains an issue), an outcome that Section 115(d)(3)(C)(iii) seems intended to prevent.

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of when The MLC processes that reporting. The Office referenced a DSP argument that where a DSP has voluntary agreements and is adjusting underlying usage details (as opposed to royalty pool details), the DSP may need a response file from The MLC before being able to determine the precise division of royalties owed under the blanket license versus its voluntary agreements. The MLC explained its understanding that, despite such a possibility, DSPs are neither practically prevented nor legally absolved from making a concurrent payment in connection with the adjustment reporting.

As a practical matter, The MLC noted that if a DSP was in doubt as to what portion of a royalty underpayment was due under the blanket license, it could either estimate it or could simply pay the adjustment amount for the full pool to The MLC with its adjustment reporting. If The MLC then determined that some portion of the full usage fell under voluntary agreements, it would refund or credit the respective royalties back to the DSP along with the response file, at which time the DSP could use those funds to make any payments due under its voluntary agreements. The MLC also noted that it is not aware of significant continued concern about these issues from blanket licensees.³

For purposes of clarity, The MLC sees no reason to delay the DSPs' obligation to concurrently pay royalties owed pursuant to adjustment reporting.

To address these issues, The MLC proposes the following modifications to the regulatory language set forth in the Supp. Interim Rule:

§ 210.27 Reports of usage and payment for blanket licensees.

* * * * *

(k) * * *

(4) In the case of an underpayment of royalties, the blanket licensee shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the report of adjustment ~~or promptly after receiving an invoice from the mechanical licensing collective that sets forth the royalties payable by the blanket licensee under the blanket license with respect to the adjustment,~~ which shall be broken down by each applicable activity or offering including as

³ With respect to the current status of voluntary agreements, there are four DSPs that are currently reporting to The MLC voluntary agreements that cover streaming offerings.

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may be defined in part 385 of this title. A blanket licensee who has entered into voluntary licenses for covered activities for a usage period may utilize estimates of royalties due to the mechanical licensing collective for such usage period pending receipt of an invoice from the mechanical licensing collective. Nothing herein shall change a blanket licensee's liability for late fees, where applicable. Where the blanket licensee will receive a response file under paragraph (k)(8) of this section, the mechanical licensing collective shall deliver the invoice to the blanket licensee contemporaneously with such response file. The mechanical licensing collective shall otherwise deliver the invoice to the blanket licensee in a reasonably timely manner. A report of adjustment and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the report of adjustment to the payment.

(8) If requested by the blanket licensee, the mechanical licensing collective shall deliver a response file to the blanket licensee that contains the information required by paragraph (g)(2)(v) of this section to the extent applicable to the adjustment. The response file shall be delivered within 15 days of the distribution to copyright owners of royalties associated with the blanket licensee's respective usage reporting~~no later than 45 calendar days after receiving the relevant report of adjustment, unless the report of adjustment is combined with an annual report of usage, in which case the response file shall be delivered no later than 60 calendar days after receiving the relevant annual report of usage.~~

(9) The mechanical licensing collective may abstain from processing a DSP's adjustments to royalty reporting for calendar years 2021 or 2022 until it has received that DSP's adjustment implementing the final determination after remand by the Copyright Royalty Board setting forth rates for these years~~may make use of a transition period ending February 24, 2023, during which the mechanical licensing collective shall not be required to deliver invoices or response files within the timeframes specified in paragraphs (k)(4) and (8) of this section.~~

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The MLC appreciates the Office's time, effort, and thoughtful inquiries, and is available to provide further information on request.

Sincerely yours,



Benjamin K. Semel

USCO Ex Parte Meeting

October 4, 2022

Audit Verification Period Clarification

DSP Audits: Clarification of “Verification Period” Definition

Request to Copyright Office

The MMA gave The MLC the unambiguous right to audit every royalty payment it receives to verify the accuracy of those payments. The MLC is going to ask the Copyright Office to revise 37 CFR 210.27(m)(1)(vii) to add the highlighted language below, clarifying this right:

(m) Documentation and records of use.

(1) Each blanket licensee shall, for a period of at least seven years from the date of delivery of a report of usage to the mechanical licensing collective, keep and retain in its possession all records and documents necessary and appropriate to support fully the information set forth in such report of usage (except that such records and documents that relate to an estimated input permitted under paragraph (d)(2) of this section must be kept and retained for a period of at least seven years from the date of delivery of the report of usage containing the final adjustment of such input), including but not limited to the following:

* * *

(vii) Any other records or documents that may be appropriately examined pursuant to an audit under 17 U.S.C. 115(d)(4)(D). **The records covered by an audit shall include the books, records, and data related to payments received by the mechanical licensing collective during a verification period. An audit of a payment made during a verification period shall not be considered a second audit if the records related to the payment were previously audited in connection with a different payment during a different verification period.**

Adjustments Processing Timing

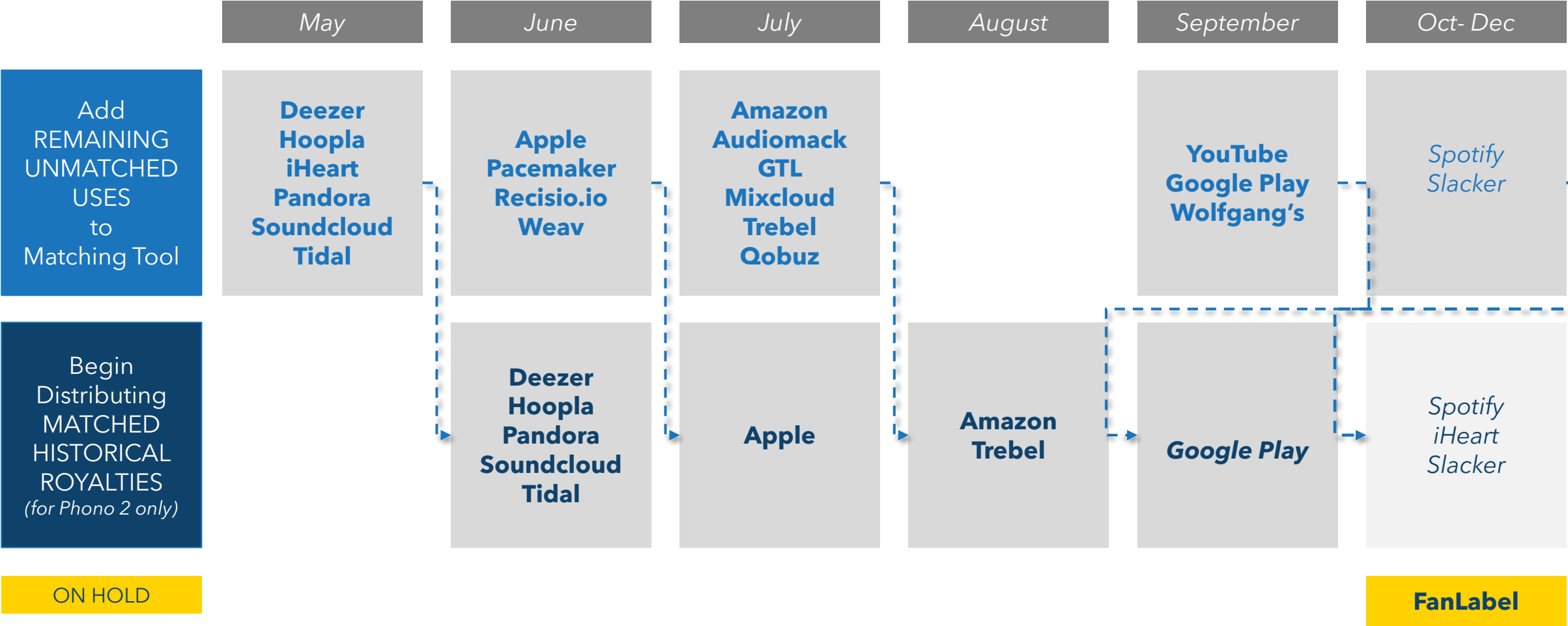
Historical Unmatched: Breakdown by Rate Period

	Wave 1	Wave 2	Wave 3	Wave 4	Wave 5-1	Wave 5-2	5-3**
Usage for Phono 3 & earlier	Deezer Hoopla iHeart* Pandora Soundcloud Tidal	Apple	Amazon Trebel	Google Play	Spotify (part 1)	Spotify (part 2) Slacker	
Only Phono 3 Usage		Pacemaker Recisio Weav	Audiomack GTL Mixcloud Qobuz	YouTube Wolfgang's			

* We have not yet processed any matched historical royalties from iHeart due to an issue with the data they delivered to The MLC

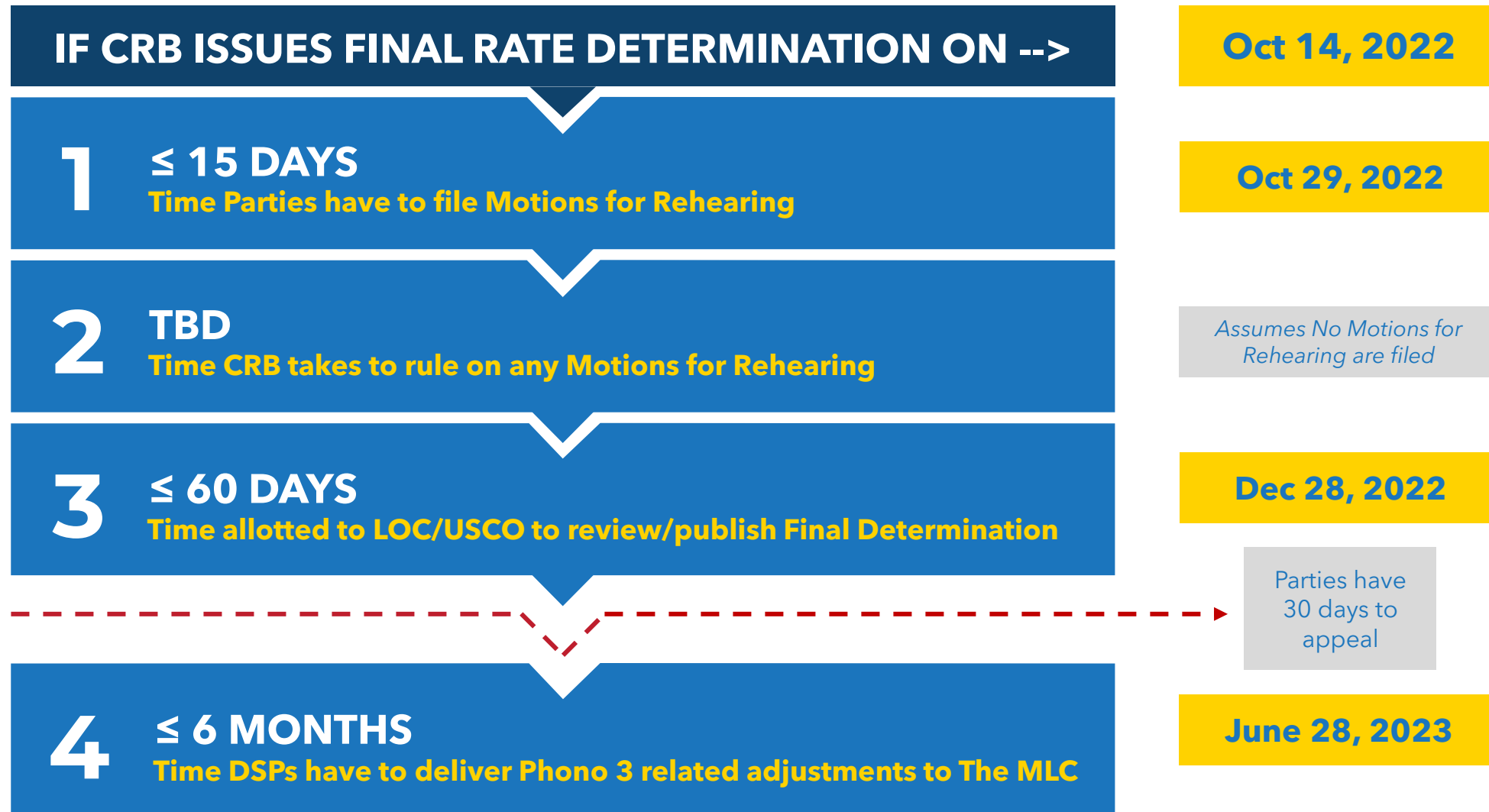
** We may need 3 months to process Spotify

Historical Unmatched: Initial Rollout



We intend to pro-rate Slacker's HU payments to date across all of the HU usage they've reported.

Phono 3 Final Rate Determination - Hypothetical Timeline



Historical Unmatched Processing Plan for 2023 [TENTATIVE]

Months below refer to Royalty Distributions



***Timing of: (a) when we can begin to pay out Blanket Royalties at Phono 4 rates, and (b) when we can begin to process Phono 3 Historical Uses depends on when CRB finalizes those rates.**

Plan for Processing Adjustments [TENTATIVE]

Months below refer to Royalty Distributions

2021 Adjustments	Wave 1	Wave 2	Wave 3	Wave 4	Wave 5	Wave 6
	July 2023	August 2023	Sept 2023	Oct 2023	Nov 2023	Dec 2023
2022 Adjustments	Wave 1	Wave 2	Wave 3	Wave 4	Wave 5	Wave 6
	Jan 2024	Feb 2024	March 2024	April 2024	May 2024	June 2024
2023 Adjustments	Wave 1	Wave 2	Wave 3	Wave 4	Wave 5	Wave 6
	July 2024	Aug 2024	Sept 2024	Oct 2024	Nov 2024	Dec 2024

Going forward, we will aim to process adjustments on an annual basis in the **second half** of the year following the year being adjusted (i.e., July through December).

Amounts Distributed To Date (Thru Sept. 2023 Distribution)

Phono 1 & 2	\$8.0M
Phono 3	--
TOTAL	\$8.0M

		June 2022
Phono 1 & 2	We began distributing our 1 st set of <u>matched</u> royalties in our June 2022 Distribution	\$2.1M
Phono 3	We are waiting until the CRB finalizes the Phono 3 rates (and we receive the revised data and payments from DSPs) to begin processing matched royalties for uses that took place in the Phono 3 rate period.	--
TOTAL		\$2.1M

	July 2022	August 2022	Sept 2022	Oct 2022	Nov 2022	Dec 2022
Phono 1 & 2	\$2.5M	\$1.8M	\$1.6M	--	--	--
				\$8.0M of \$52.7M (15.2%)		
Phono 3	--	--	--	--	--	--
				\$0 of \$373.2M (0%)		
TOTAL	\$2.5M	\$1.8M	\$1.6M	--	--	--
				\$8.0M of \$426.9M (1.87%)		