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December 21, 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 December 16, 2022 Ex Parte Call with the Copyright Office

Dear Ms. Wilson,

This letter summarizes the December 16, 2022 call ("December 16 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 December 16 Call for The MLC were Kris Ahrend (Chief Executive Officer), Kristen Johns (Chief Legal Officer), Rick Marshall (Assistant General Counsel), and outside counsel Benjamin Semel and Mona Simonian.

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

The following summarizes the discussion:

Payments in connection with adjustments made pursuant to 37 C.F.R. 210.27(k)

There was a discussion concerning the supplemental rule adopted by the Office governing reporting and payments of adjustments by digital music providers ("DSPs") to The MLC and issues raised in connection therewith by the Digital Licensee Coordinator (the "DLC") in its November 18, 2022 Ex Parte Letter to the U.S. Copyright Office (the "Nov. 18 DLC Ex Parte Letter").

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The MLC noted that the DLC supports The MLC’s proposed adjusted regulatory language concerning the timing for The MLC to provide response files and any invoices to DSPs.¹ The MLC appreciates this support. The MLC then discussed the proposal by the DLC to delay the timing for payment of any additional royalties by DSPs in connection with reporting adjustments. Specifically, The MLC reiterated its opposition to permitting a DSP to wait until it receives an invoice from The MLC to remit additional payment due with an adjustment. Full payment of royalties is due and owing from the original due date of each month’s royalties (namely, 45 days after the end of each month), and The MLC explained that no further delay should be sanctioned when an underpayment is later reported as part of an adjustment.

The MLC explained that allowing a further delay in paying amounts that are already due creates tangible risk of harm to rightsholders. First, additional royalties identified in connection with a DSP adjustment are already late and owing to The MLC, and should be placed in the custody of The MLC as soon as identified. The MLC noted that DSPs have faced bankruptcy or insolvency issues in the past, and allowing monies owed to The MLC to sit with DSPs increases the risk of unrecoverable loss of those monies. The MLC noted that the problem of historical unmatched royalties that the MMA sought to resolve was intertwined with the prior practice of DSPs holding royalties owed to copyright owners for extended periods. The MLC also pointed out that, in fact, certain DSPs appear to leverage statutory deadlines to increase the “float” of royalty funds that remain with them before being turned over to The MLC. In addition, certain DSPs have also already raised a lack of funds as a reason for not paying royalties owed to The MLC when due. The MLC expressed that these realities, together with the simple precept that moneys that are already late and owing to The MLC should not be held by DSPs, counsel that payment should not be delayed until royalty processing is finished and an invoice provided by The MLC.²

¹ “[T]he DLC supports giving the MLC relief from its deadlines to process reports of adjustment and provide invoices and response files, as provided in the MLC’s proposed amendments to 37 C.F.R. 210.27(k)(8).” Nov. 18 DLC Ex Parte Letter at 6.

² In response to a question from the Office concerning the current provision at 37 C.F.R. 210.27(k)(4), which provides that additional royalties shall be paid to The MLC together with delivery of the report of adjustment “or promptly after being notified by [The MLC] of the amount due,” The MLC noted that it did not support the additional quoted language during the 2020 rulemaking, and that the reasons discussed on the October 4, 2022 ex parte call concerning the likely extended process for processing adjustments further support payment concurrent with adjustment reporting. The additional language quoted above also was not included in the NPRM in the 2020 rulemaking, nor was it proposed by either the DLC or The

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The MLC also noted that, as discussed in its October 4, 2022 *ex parte* call with the Office, processing adjustments may take substantial time, particularly where multiple DSPs submit reporting and associated adjustments simultaneously. The MLC will process and distribute such adjustments on a rolling basis on as efficient a timeline as possible. However, payments keyed to an MLC invoice date, rather than the reporting date, would lead to situations where DSPs who report adjustments on the same date would have different payment dates based on the order in which The MLC processes the adjustments. Section 115 outlines clear and consistent due dates for royalty payments. It does not outline a scenario where different DSPs retain royalty funds owed to The MLC for varying additional periods based upon how their adjustments are ordered for processing and when The MLC is able to work through a quantity of adjustments submitted at the same time..

The Office referenced an argument made by the DLC that certain DSPs who are not operating under voluntary licenses may need an invoice for internal accounting controls. The MLC stated that it is, in fact, unaware of any true inability of a DSP to make payments without an advance invoice. The MLC noted that DSPs have historically made royalty payments regularly without an advance invoice. Prior to blanket license availability in 2021, all monthly royalty payments pursuant to the compulsory license had to be made by DSPs without invoices from copyright owners, and 21 DSPs paid \$425 million in historical unmatched royalties to The MLC in February 2021 without advance invoices. Furthermore, under the MMA, DSPs must make monthly royalty payments on a 45-day timeline, regardless of whether an invoice is received in advance.³ Of course, regular royalty payments under voluntary licenses are typically made without advance invoice from the copyright owner (who would not know the amount due). The MLC acknowledged that while an invoice might be helpful for some DSPs' records, the statutory system for the blanket license should not be bent to accommodate an apparently small number of

MLC in their comments to the NPRM or *ex parte* letters, and so was not substantively addressed in that proceeding. *See* 85 Fed. Reg. 22518, 22534 (April 22, 2020) (“[a]n underpayment will need to accompany delivery of the report of adjustment”); MLC Comments and DLC Comments (May 22, 2020).

³ The MLC acknowledged that, as part of the 2020 rulemakings, it agreed to a very specific negotiated cadence alongside regular monthly reporting that would allow for invoices to be provided to DSPs in advance of the statutory deadline for monthly payment, but highlighted that this is a narrow and specified process that only applies to a single month's reporting that is provided in a specific format as part of a specific, regular workflow. In contrast, adjustments can involve 12 months or more of new reporting, can be based on a variety of different reporting changes, and can be reported at any time.

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internal voluntary DSP policies, particularly when DSPs have operated without the need for invoices prior to 2021 and in these other situations.

Late fees in connection with adjustments pursuant to 37 C.F.R. 210.27(k)

The MLC also raised a concern that the DLC’s letter implicitly seeks to raise its previously denied request to improperly toll the date from which late fees are calculated until after an annual report of usage or adjustment is submitted. The MLC reiterated its vehement disagreement with such an interpretation. It was first discussed how annual reports of usage are distinct obligations from adjustments. There is no obligation to submit an adjustment concurrent with an annual report of usage. The MLC explained that, in fact, over half of the blanket licensees submitted annual reports of usage for 2021 *without* any concurrent adjustment.

The MLC also discussed how, as part of the 2020 rulemakings, the ability of DSPs to report any adjustments immediately, rather than wait until an annual report, was important because late fees accrue for any unpaid portion of royalty liability due after the 45-day monthly grace period. DSPs thus needed the ability to report an adjustment and make any additional payment immediately in order to stop the accrual of late fees, and the current regulations allow for that. The MLC also noted that nearly all adjustments made in connection with 37 C.F.R. 210.27(k) to date have involved corrections to estimated inputs used to calculate royalty pools. Adjustments for this reason may also be made after the submission of the annual report of usage. 37 C.F.R. 210.27(k)(6)(ii). Thus, adjustments are reported before and after annual reports of usage, as well as concurrent with them. There is nothing about annual reports of usage or adjustments that could permit them to toll the statutory due date for payment.

As Section 115 provides, DSPs must pay monthly royalties to The MLC which “shall be due on the date that is 45 calendar days... after the monthly reporting period,” and that this payment “shall include *all* royalties for the month next preceding.” 17 U.S.C. § 115 at (d)(4)(A)(i) and (c)(2)(I) (emphasis added). The late fee provision provides DSPs “shall pay a late fee...for *any* payment owed... and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 17 U.S.C. 115(d)(4)(A)(i)”—a due date that the preceding sentence shows is 45 calendar days after the end of each month—and that such late fees “shall accrue from the due date.” 37 C.F.R. 385.3. The MLC expressed its position that there is no reasonable reading of these provisions that could allow a DSP to underreport and underpay royalties and then pay no late fees despite not correcting the underpayment for up to 18 months or more.

The MLC also addressed the argument that a DSP’s correction of its own incorrect estimate could be excused from the late fee obligation. The MLC stressed that DSPs are in control

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of both the payment terms that they agree to with other licensors and the methodology by which they estimate any inputs to their royalty pool calculations.⁴ DSPs are thus in control of the level of risk that they have of incurring late fees by choosing whether to estimate in a low range or a high range. The MLC noted that certain DSPs regularly use estimates that avoid late fee obligations, while others regularly underestimate royalties due. The MLC also stressed that, even if there was a good faith underestimation of royalties due by a DSP, that choice by the DSP still led to an underpayment of royalties to songwriters and copyright owners and a loss of income for the period prior to adjustment. The proposal that songwriters and copyright owners should shoulder the loss resulting from a DSP's choice to underestimate and underpay royalties is inconsistent with the law as well as the general purpose of late fees. Late fees are meant to deter late payments and make whole the rightsholders who were unfairly deprived of their full royalties when they were due. The risk of incurring late fees is the only disincentive for DSPs to intentionally underestimate amounts due, and thereby delay payment and obtain the financial benefit of the "float" of additional funds in their possession that are due and owing to copyright owners.

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

⁴ In the 2020 rulemakings, the Office acknowledged the need to disincentivize estimates that result in underpayments, although also accepted a concern about not "unfairly penalizing DMPs who make good faith estimates from incurring late fees due to subsequent finalization of those inputs outside the DMPs' control." 85 Fed. Reg. 58137 (September 17, 2020). In addition to the other reasons outlined here why the statutory due date cannot be changed, The MLC submits that none of the inputs to a DSP's royalty pool are outside the DSPs' control. The inputs that typically may be estimated—public performance royalties and TCC—are calculated under the terms of voluntary agreements that DSPs agree to with PROs and record companies. DSPs thus exercise substantial control over the terms that underlie those calculations and the process for estimating those calculations using the actual usage data.