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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 January 22, 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 January 22, 2024 videoconference ("January 22 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 January 22 Meeting for The MLC were Kris Ahrend (Chief Executive Officer), Kristen Johns (Chief Legal Officer), 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:

The MLC summarized its comments to the Supplemental Notice of Proposed Rulemaking ("SNPRM") in Docket 2022-5 published on September 26, 2023, and the proposed regulatory

language attached to its reply comments.[1] The MLC explained that its goal was to assist with the expeditious resolution of the rulemaking as to statutory terminations by presenting regulations related solely to the mechanics of processing termination claims in an aggregated, straightforward way. The MLC also reiterated that it was not taking a position on the proper answer to substantive law questions relating to the application of the Exception (as defined in the SNPRM) or the legality of retroactive application of the Office's resolution.

The parties discussed in detail The MLC's proposed regulatory language. The MLC indicated that it sought to largely retain the Office's proposals as to procedure for processing termination claims, with the limited modifications generally explained by the operational necessities that come from The MLC's statutory functions to administer an immense volume of royalty collections and distributions on a monthly basis. The Office expressed general agreement with the procedures captured by The MLC's proposed regulatory language, while noting that the precise language that the Office would adopt for a rule has not been determined at this time.

The MLC discussed the broad industry consensus reflected in the comments to the SNPRM that, at least outside of the terminations context, payments for all periods should be distributed by default to the current payee in The MLC's records. There was a discussion on the original suggestion in the SNPRM concerning adopting a general rule that would establish as a default that distributions should be made to the owner at the time of use and not the current payee in the absence of an agreement otherwise. The MLC expressed its understanding that such a general rule is not called for by the MMA or copyright law or longstanding industry practice, but pointed out (as discussed in The MLC's SNPRM Initial Comments (Section I.A)) that the MMA does include language directing The MLC to distribute royalties only to those copyright owners reflected in The MLC's current records.

There was a discussion of a 2014 Office rule cited in the SNPRM.[2] In that 2014 rulemaking, the Office noted that it "questions the assertion that where there has been… a change in ownership, any reconciliation must be made with the current copyright owner," and then

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[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] *See* Final Rule, *Mechanical and Digital Phonorecord Delivery Compulsory License*, Docket 2012-7, 79 Fed. Reg. 56190, 56193 (September 18, 2014) (available at https://www.copyright.gov/fedreg/2014/79fr56190.pdf).

offered that "absent… an arrangement" to the contrary royalties "may" be properly due to the owner at the time of usage. (*Id*.) Despite the speculation in these passages from the 2014 rule, the final rule implemented did *not* define a default payee as the owner at the time of usage. Rather, it stated only that royalty distributions "shall be served on the copyright owner." Moreover, the rule provided that where royalties for past periods had accumulated pending the location of a copyright owner, upon receiving information with the copyright owner's location, current royalties *and* "all royalty fees covering the intervening period" should be served on that *current* copyright owner.[3] For these reasons, The MLC believes that this 2014 rule does not support the conclusion that statutory royalty distributions should be made to the owner at the time of use, but rather supports the conclusion that such royalties should be made to the current copyright owner.

There was a discussion concerning the contractual nature of ownership transfers outside of the terminations context, and The MLC's belief that because such transfers are by private agreement, issuing a default payment rule for these transfers based on what would occur in the *absence* of a private agreement is unnecessary. There was then a discussion concerning the existence of other types of non-contractual transfers of ownership. The MLC notes that these other types of non-contractual transfers further weigh against a Historical Payee Rule (as defined in The MLC's SNPRM Initial Comments). Distributions for prior usage periods that take place after other non-contractual transfers—such as transfers to heirs through wills or intestate succession, or in other contexts like bankruptcy proceedings—would generally be made to the *current* payee, not the owner at the time of prior usage (namely, the decedent or the bankruptcy debtor).

In sum, The MLC continues to believe that the best path is to avoid a Historical Payee Rule. Rather, The MLC fully supports provisions that help implement the industry consensus position, also dictated by the MMA, that distributions should go to the current payee in The MLC's records. To that end, The MLC believes that the inclusion of a provision confirming that

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[3] *Id*. at 56214. The 2014 rule further implemented another procedure whereby royalty adjustments for prior periods would be made to the *current* owner. *Id*. at 56208, §210.14. Under the "negative reserve balance" provisions implemented by the Office, a DSP with excess returns of physical product could establish a negative reserve balance, which could be credited against future sales at any time. *Id*. at §210.14(d). This effectively provides for adjustments concerning royalties for physical product to be made to the *current* owner.

The MLC can distribute royalties for a musical work to the current payee registered in its database would be beneficial.

There was further discussion concerning specific procedural provisions surrounding terminations. The MLC explained that, in the event that a work is placed on hold in connection with a dispute over a termination claim, *neither* party would continue to receive royalty statements containing reporting data for the specific works at issue pending the resolution of that dispute. Royalty statements are generated at the payee level for all works claimed by a Member, and there is not a process for generating work level statements that only report royalties for a subset of the works claimed by a Member. The MLC explained that it would be burdensome and disruptive to manually pull and then provide royalty information for individual works on a monthly basis to the parties involved in each statutory terminations dispute, for the duration of those disputes. Such a manual reporting requirement could quickly result in the need to produce hundreds or thousands of separate manual reports each month. The provision of an aggregate amount of royalties on hold at the outset of a dispute should be adequate for the parties, and would be less burdensome on The MLC and less disruptive of The MLC's regular operations.

There was a discussion concerning procedures for retroactive adjustments, in the event that the Office chose to implement a rule with retroactive effect. The MLC did not take a substantive position on applying the proposed rule retroactively, but noted the substantial burden that doing so would impose upon The MLC by requiring The MLC to create and implement a new custom process to apply a new set of retroactive changes. Moreover, The MLC stressed the importance of providing a flexible timeline for The MLC to implement any such retroactive changes, including a significant initial period of time for The MLC to design and build the processes necessary, particularly given that The MLC is already preparing to process several hundred million dollars of royalties in excess of regular monthly processing as a result of the application of the final *Phonorecords III* rates to previous periods of blanket royalties (2021-22) and historical unmatched royalties (2018-20). The MLC feels strongly that any newly required retroactive adjustments related to statutory terminations should not be prioritized over the processing of other adjustments The MLC is already working on and that will result in substantially greater aggregate royalty distributions to rightsholders. Giving The MLC the discretion to prioritize and set up efficient timetables for making adjustments in light of all royalties being processed is the best way to maximize royalty distributions to all rightsholders.

The Office requested an update on the royalties and works on hold in connection with terminations claims. As of the January 2024 distribution, the total amount of royalties affected

by the hold, across all works and rightsholders, is just over $5 million for approximately 5,000 musical works.

There was a discussion of proposed provisions in the SNPRM concerning ownership disputes. As expressed in The MLC SNPRM Reply Comments, The MLC supported implementation of the Office's proposed approach to termination-related disputes with only minor changes. The MLC reiterated its position that additional regulations concerning ownership disputes *unrelated* to terminations are not necessary. The MLC's general ownership dispute policy was created pursuant to the MMA with input from a broad group of stakeholders. Some of the proposed SNPRM procedures are in line with the existing policy of The MLC, but others differ in ways that could interfere with the efficient and effective processing of disputes.

There was specific discussion of the provision proposed in the SNPRM for release of disputed funds related to an ownership dispute in the event that there is no active dispute resolution, in which case the disputed funds would be paid "to the party who would have received such funds if the funds were not placed on hold pursuant to a dispute." SNPRM at 65927 (proposed § 210.30(f)(3)). The MLC explained that this provision can work in the termination context (provided that there is a clear and administrable definition of "active dispute resolution"), because the Office plans to prescribe which party should receive royalties absent a hold in the terminations context. However, outside of terminations, there is generally no such "default" correct owner in the context of disputes. Where multiple parties claim the same share(s) of a work and provide adequate substantiating documentation for their claims, there is no clear and reasonable way for The MLC to determine who should receive the royalties absent the hold. The MLC noted that overlapping claims will often come in around the same time. Moreover, where one claim is made well before another, The MLC's current policy requires the later claimant to submit substantiating documentation before a hold is placed on the funds. But if that later claimant provides substantiating documentation, the burden then shifts to the earlier claimant to substantiate their claim. If both submit substantiating documentation, The MLC does not consider one or the other the "default" owner, and does not determine the substance of the ownership dispute. As a result, The MLC sees no way for it to reasonably administer a provision to pay disputed royalties to one of the parties to a non-termination-related dispute, even in the event that there is no active dispute resolution.

There was a discussion on the many potential complications around a different application of the Exception to voluntary licenses versus the blanket license. The MLC agrees that there are many potential difficulties that could arise with conflicts here. However, as expressed in its

comments, The MLC does not take a position on the substantive law of terminations, including the application of the Exception to voluntary licenses.

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

Sincerely yours,

Benjamin K. Semel