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Hon. Suzanne V. Wilson
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
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Re: Termination Rights and the Music Modernization Act's Blanket License, Notice of Proposed Rulemaking. (37 CFR Part 201) [Docket No. 2022-5]

Dear Associate Register Wilson:

I appreciate the opportunity to provide comments in response to the Notice of Proposed Rulemaking noted above.

I currently own an independent copyright administration company, ClearBox Rights, LLC, in Nashville (Brentwood), Tennessee, which represents hundreds of individual song catalogs, owned by hundreds of clients, representing over 100,000 songs. While ClearBox Rights has been in existence since 2010, my history includes working with administration of copyrights since 1985, including a prior company, Integrated Copyright Group, Inc. (ICG). I have also participated in numerous Copyright Office roundtables over the last decade, which included being a spokesperson for an organized group of copyright parties primarily in Nashville, Tennessee using the name IPAC (Interested Parties Advancing Copyright).

As part of our current catalogs, ClearBox Rights currently represents over 4,000 songs recaptured through either Section 203 or Section 304 terminations, including many living and deceased Hall of Fame songwriters or their heirs, as well as numerous well-known, "classic" songs. We are on the front line of executing Notices of Terminations to publishers, filing notices in the Copyright Office, as well as then notifying the appropriate parties and sources for royalty re-direction after the effective date of termination. Through all of that, we have also experienced the challenges of notifications, changing direction of royalties with sources and performing rights organizations, and trying to convince sources to make these changes in the absence of acknowledgment of the terminations from the prior publishers.

All this to say, we are very experienced and familiar with the many nuances and challenges that exist in the termination process.

OVERVIEW

First, I want to make clear that I want the MLC to be successful. Our industry needs this entity to be efficient and effective in its operations, and I believe song owners and writers should greatly benefit from its efficient operations.

Second, the purpose of this comment period and eventual ruling to "revisit the termination issue more directly and to squarely resolve the unsettled question of how termination law intersects with the blanket license", (as the Copyright Office has stated), is of extreme interest and importance to ClearBox Rights and our hundreds of clients. However, I agree with the statement the Recording Academy voiced when it stated, in relation to the MLC's proposal, that it "would diminish termination rights."

Last, I agree with the Copyright Office that it is properly within its authority under the MMA section 702 to resolve this unsettled question of law.

INTENT OF TERMINATION PROVISIONS

I would guess that many of those instrumental in revising the 1909 Copyright Act to the current 1976 Act, if alive today, would be exacerbated asking the question, "Are we really dealing with this issue again?"

The Register of Copyright's 1961 Report to Congress regarding the plans on the General Revision of the U.S. Copyright Law stated "Although the primary purpose of the copyright law is to foster the creation and dissemination of intellectual works for the public welfare, it also has an important secondary purpose: *To give authors the reward due them for their contribution to society*." (italics added).

As the Copyright Office clearly explained in (IV) Legal Background, (A) The Copyright Act's Termination Provisions (of 37 CFR Part 210), the current termination provisions were adopted in the 1976 Copyright Act because the similar provisions in the 1909 Copyright Act for authors and heirs to "reclaim" their copyrights after the initial 28 year period of copyright through Section 304 terminations had "largely failed to accomplish its primary purpose". The 1961 Report of the Register of Copyrights to Congress further explained that it had "…become a common practice for publishers and others to take advance assignments of future renewal rights. Thus the reversionary purpose of the renewal provision has been thwarted to a considerable extent". *[Sixty-Fourth Annual Report of the Register of Copyrights (June 30, 1961) report, pg 58 (A)]* Basically, the publishers found a way around the intent of the 1909 Copyright Act to compensate writers and heirs after the initial 28 year copyright term.

The 1976 Copyright Act was another attempt to provide for authors and heirs to reclaim and participate in ownership and royalties for their works through Section 203 termination of grants, normally after a period of 35 to 40 years (as well as continuing Section 304 terminations with additional windows). The MLC's "Notice and Dispute Policy: Statutory Terminations" (September 2021, revised August 2022), appears to direct the majority of royalties processed by the MLC for terminated copyrights to the original publishers, and can be interpreted to be

another attempt to "thwart to a considerable extent" the aim of the revisions made by the 1976 Copyright Act "to protect authors against unremunerative transfers and to get rid of the complexity, awkwardness, and unfairness of the renewal provision." *[U.S. Copyright Office, General Guide to the Copyright Act of 1976, ch. 6:1 (1977)]*

While the termination provisions in the 1976 Copyright Act can be applied to all types of usages of copyrights, the MLC's proposed policy is limited to uses under 17 U.S.C. Section 115 by Digital Music Providers ("DMP") only. However, reports have shown that the U.S. recorded music revenues in 2021 were 83% from digital streaming, while only 11% was from physical recordings (digital downloads and synch made up the last 6%) (RIAA – Year-End 2021 RIAA Revenue Statistics). While not all of the 83% of digital streaming revenues qualify under the Section 115 license, it should be safe to assume the majority would. More worth noting is the decreasing amount of physical recordings at 11% and falling each year.

This is relevant because, prior to the digital streaming marketplace over the last 10 plus years, the practice of the record industry was to re-use existing recordings inserted into new collections, "best-of" recordings, and other packaging combinations, which would require a new license from the musical work owners for each product, catalog and/or ISRC number. If a musical work had been "reclaimed" through Section 203 or 304 termination provisions, any such release after the "effective termination date" of the musical work (in an already existing recording), would need to be licensed by the terminating claimants, which is normally the authors or heirs. That is, a famous recording from decades earlier could be re-released in another format, which would need a new license, and the writers or heirs would benefit from those royalties, rather than the original publisher. This became a significant portion of the compensation for writers and heirs after the initial period of the copyright term.

In today's digital streaming marketplace, there is rarely a need for a traditional re-release of a recording into a collection, best-of, or other packaging combination, since most streaming services offer single song selections, with the ability to create a custom "play list" to suit the consumer's taste. The basic result is, once a song is recorded, licensed and utilized on a DMP, there is little need for new licenses for that recording/song combination with the DMP provider. The significant portion of compensation writers and heirs had experienced through new licenses of that recording/song in the mechanical world has been reduced to almost nothing.

What had been an accepted practice of Terminating Claimants participating in licensing and receiving royalties for older recordings with new licenses was thwarted to a considerable extent through the unintended consequences of this modern-day digital distribution method.

The combination of the negative impact through the MLC's Notice and Dispute Policy, along with the consequences of the digital marketplace replacing recorded re-packaging, makes this issue of the Copyright Office ruling even more critical for writers and heirs.

So here we are, dealing with this again.

PRACTICAL RESULTS AND ISSUES

MLC Scenarios Examination

The MLC's "Notice and Dispute Policy: Statutory Terminations" (September 2021, revised August 2022 v 1.2), lists six different scenarios on the Exhibit A (page 11-12) of how the MLC would distribute royalties for Statutory Terminations. Below is an abbreviated interpretation of those scenarios, along with a few pertinent definitions. Following that are some facts of the marketplace along with some real-life examples and where they would fall into these scenarios.

Definitions:

- **Active License Date** - either a pre-2021 NOI compulsory license, a voluntary license, or the Blanket License (from MLC)
- **First Utilization Date** – the date the sound recording was first reproduced or released on a Digital Music Provider ("DMP"), or if that date is not known, an estimate date of the first distribution by the DMP, or based on usage data provided by the DMP.
- **EDT** - Effective Date of Termination of the song
- **Existing Claimant** – the original or pre-termination publisher owner
- **Terminating Claimant** – the author or heirs who own the song after termination

MLC Scenarios (with party to whom MLC would pay royalties listed after):

1. Active License Date and First Utilization Date are both before the EDT – **Party: Existing Claimant**

2. Active License Date is before EDT, no notice from DSP of First Utilization Date, and MLC determines the First Utilization Date was prior to the EDT – **Party: Existing Claimant**

3. Same as above except MLC determines the First utilization Date is same month as EDT – royalties **HELD for all parties until parties resolve**

4. Active License Date is before the EDT, no First Utilization Date received by DMP, and MLC determines First Utilization Date falls after month of EDT – **Party: Terminating Claimant**

5. Active License Date is before EDT, but First Utilization Date is after EDT – **Party: Terminating Claimant**

6. Active License Date is after EDT – **Party: Terminating Claimant**

As you will note from above, the only royalties that would be paid to the Terminating Claimants are in scenarios 4, 5 and 6. (and possibly 3, if the parties agree).

For songs first published or registered after January 1, 1978, the earliest effective date for Terminations (203) was 2013. Spotify launched in the U.S. in July 2011 reportedly offering approximately 15 million songs, with major labels Universal, Sony, EMI and Warner Music having licensed their recordings. Apple Music launched June 30, 2015, and Amazon Music

launched 2014. These three services alone represent approximately 65% of the streamed music in the U.S.

How the MLC would pay for songs in certain groups:

Well-Known Songs on existing Recordings with EDTs between 2013 through 2020:

It is extremely likely that most well-known songs written after 1/1/1978 were available on Spotify prior to 2013, so in essence, most of the songs eligible for 203 Terminations had already been licensed through an NOI and utilized on a DMP prior to the earliest possible Effective Date of Termination. If that is true for all or most post-1978 well known songs, then, according to the Six scenarios above, those songs would not qualify to have royalties sent by the MLC to the Terminating Claimants. Only new recordings of these songs (after the EDT) would qualify to have payments sent to the Terminating Claimants.

Well-Known Songs on existing Recordings with EDTs between 2021 through today:

Since the Blanket License Date (01/01/2021) is considered the Active License Date unless an NOI or voluntary license was established earlier, then royalties would continue to be paid to the Existing Claimant (original publisher) as above.

Well-Known Songs on existing Recordings with EDTs beginning tomorrow:

Since the Blanket License Date (01/01/2021) is considered the Active License Date unless an NOI or voluntary license was established earlier, then royalties would continue to be paid to the Existing Claimant (original publisher) as above.

Some real-life examples I have personally dealt with are below:

1. A Pre-1978 copyright that is a well-known recording by Elvis, which has an EDT of 2016 (through Section 304 Termination). The Elvis recording was utilized on Spotify prior to 2016, so all MLC royalties would continue to go to the Existing Claimant (original publisher) per the MLC's Scenarios.
2. A George Strait #1 song released in 1988, with an EDT of 2019. The George Strait recording was on Spotify prior to 2019, so all MLC royalties would continue to go to the Existing Claimant (original publisher) per the MLC's Scenarios.
3. A well-known song recorded by 4 major artists beginning in 1988 through 1999, all reaching high chart positions world-wide, with a future EDT in 2023. All recordings are currently on DMPs, so all MLC royalties would continue to go to the Existing Claimant (original publisher) per the MLC's Scenarios.

Bottom line, it is extremely rare that royalties for a well-known song already existing on a recording prior to the EDT would ever get paid to the Terminating Claimant. In the Copyright Office's Proposed Rules (37 CFR Part 210, II Procedural Background), it states that, "In meetings with the Office, the MLC described its policy as a middle ground and explained that the policy was intended….to avoid circumstances where parties' disputes could

cause…payments to be held pending resolution…to the disadvantage of both songwriters and publishers." I'm not sure how defining scenarios where the majority of songs after their respective EDT would continue to be paid to the Existing Claimants (original publishers) is "middle ground" when royalties that congress apparently intended to see paid to the terminating authors and heirs is being snatched from their hands. As the Copyright Office stated in their (V.) Analysis (3), "Applying the Exception to the blanket license would lead to an extreme result."

Different Types of Licenses

Another point is if the MLC bases its actions on which type of license was used in order to provide the utilization of the song on a particular DMP, we could find ourselves with one portion of a song eligible for the Terminating Claimant to receive royalties after the Effective Termination Date, while another portion of the song does not get paid to the Terminating Claimants after the ETD due to a different type of license from that portion's original publisher. To further complicate that point, perhaps a publisher licensed a particular song with one DMP via an NOI, to another DMP by a voluntary license, and yet another DMP with no valid license at all. Perhaps the Copyright Office can make clear that all such licenses are treated equal, in that the type of license should not be held to different sets of rules for termination. The rights of the terminating claimant should not be negatively affected due to the actions of the original publishers, prior to the effective date of termination, by which type of license the original publisher chose or allowed to take place, and which was completely out of the control of the Terminating Claimant at the time of the license.

Performance and Mechanical Royalties Split

Another result of the MLC's Policy in dealing with Terminations is that royalties for the same portion of a song, used on the same DMP, could ultimately get paid both to the Existing Claimant and the Terminating Claimant. For instance, royalties for a particular song being streamed on Spotify will likely earn approximately 50% for mechanical use, and 50% for the performance use. (The actual percentages vary greatly per DMP per month's reporting and calculations, but usually settle in over time to be roughly 50/50). Spotify would pay the performance portion to a particular Performing Rights Organization ("PRO") like ASCAP, while the mechanical portion would be paid to the MLC. The PRO's practice has been to pay these performance royalties to the appropriate Terminating Claimant for performances occurring after the EDT. The MLC's current policy would likely direct the mechanical royalties to be paid to the Existing Claimant. The result would be royalties split between the prior and the current owners of the song from the exact same streams from various DMPs. The publishing industry payments are already fragmented more than they reasonably should be. Surely, we don't want to see them fragmented even more.

LEGAL ARGUMENTS

In short, I appreciate the Copyright Office's explanation of B. Application of the Exception by the Courts (in the Notice of Proposed Rulemaking 37 CFR Part 210), and agree with the Office's assessment, including distinguishing the difference in statutory mechanical licenses and voluntary mechanical licenses, as well as the application of the (derivative) Exception.

Further, in V. Analysis, I agree with the point in (1) that, "If a blanket license cannot be terminated, then it cannot be subject to an exception to termination…", as well as in (2) that no derivative work is generally prepared under a blanket license, and also that, "If no derivative work is prepared "under the authority of the grant," then the Exception cannot apply."

And finally, that "even if the Exception applies to a blanket license, a Terminated Publisher is not entitled to Post-termination blanket license royalties."

MLC License Availability Date Significance

In the 37 CFR Part 210 Notice of Proposed rulemaking, the Copyright Office stated it was "…concerned that it (The MLC's policy) conflicts with the MMA, which requires that the MLC's dispute policies "shall not affect any legal or equitable rights or remedies available to any copyright owner or songwriter concerning ownership of, and entitlement to royalties for, a musical work." Further, the Office stated it was concerned that the MLC resolution might cause the MLC "…into establishing what would essentially be a new industry standard based on an approach that others argue is legally erroneous and harmful to songwriters."

However, the MLC's inclusion of the "License Availability Date" of January 1, 2021 (the Blanket License) under the "Active License Date" definition, which would then serve as a trigger date for the six "Possible Scenarios for Royalty Disposition" listed in Exhibit A of the Notice and Dispute Policy (see examples below), seems to establish the date of January 1, 2021 as a significant date in copyright law, sharing the same prominence as January 1, 1978 (Copyright Act of 1976), and October 27, 1998 (Sonny Bono Copyright Term Extension Act).

Derivative Exception

Lastly, the term "Exception" has been used throughout this and other reports related to termination rights. The Cambridge Dictionary defines "exception" as "someone or something that is not included in a rule, group, or list or that does not behave in the expected way." Clearly, an exception, in this definition, means something that is more "rare" than "normal". Unfortunately, according to the proposed MLC Policy regarding terminations, royalties for "terminated" songs would rarely be paid to the Terminating Claimants (authors and heirs), but rather the majority of royalties would continue to be paid to the Terminated Parties, or original publishers. While the intent of the termination provisions in the 1976 Copyright Act was to provide for authors and heirs to reclaim and participate in ownership and royalties for their works, the reversionary purpose of the renewal provision may once again be thwarted to a considerable extent. The carve out of "exceptions" which may qualify to ***not*** be paid to Terminating Claimants could now be the norm, and where Terminating Claimants are actually eligible to receive royalties after the terminations be the exception. That seems a bit backward.

PROPOSED RULE

I agree with the Copyright Office's conclusions under VI. Proposed Rule, specifically the statement, "the statute entitles the current copyright owner to the royalties under the blanket license, whether pre- or post-termination."

Regarding the first part of the proposed rule, I support the rule that the owner(s) of the musical work at the end of the monthly reporting period should be the parties entitled to the royalties, including market-share-based royalties distributions. Attempting to identify, calculate and pay royalties by a specific day of the month in which the musical work was streamed based on the actual termination date would be administratively cumbersome and ripe for disputes. I believe the practice of the performing rights organizations in determining which party to pay for terminated rights is even more imprecise since their payment schedules are quarterly.

I have concerns with how disputes between the pre-termination copyright owner and the new (or existing) termination copyright owner will be handled by the MLC. Through our business practice of notifying various sources, including the MLC, of effective dates of terminations and therefore re-direction of certain royalties, we are many times held hostage in seeing those changes occur while the notified party is waiting for a verification or acknowledgement from the pre-termination owner. There is very little incentive for the pre-termination owner to send an acknowledgement, and even if they don't have an issue with doing so, administratively it could take them weeks, months, or in some cases, years. Our company has frustratingly experienced all of these lag times, with very little we can do to try and effectuate the change.

I believe the Copyright Office's proposal of allowing blanket license royalties to continue to be paid to an existing claimant during a dispute if both parties jointly submit a letter to do so is appropriate. However, I believe there also should be some rules for the MLC to follow in the event a pre-termination owner simply does not respond with a verification or acknowledgment of the effective termination of the musical work in a timely manner, or simply refuses to communicate regarding the change of ownership. Terminating Claimants should not be held hostage from receiving royalties they are entitled to due to a prior owner's lack of response.

CONCLUSION AND CONCERNS

In conclusion, I appreciate the Copyright Office's recognition of this issue as a priority to be addressed, its comprehensive research and explanation of the history, background and analysis related to the issue, and its final conclusions and proposed rules in the report. Further, I am grateful the Office is seeking comments from interested parties which allows individuals like me, and companies like ours, who are on the front lines dealing with these very issues on behalf of our clients, an opportunity to be heard.

I do have a concern related to the current matter at hand, which translates to a long-term uneasiness which I believe is appropriate to bring up as part of these comments. That concern is, how did the MLC's proposed policies stated in the Notice and Dispute Policy: Statutory Terminations (September 2021, revised August 2022) come in to being in the first place? The Copyright Office makes clear in its statements in the Proposed Rules publication that "…the

MLC adopted a dispute policy concerning termination that does not follow the Office's rulemaking guidance.", and that the policy "…decline(d) to heed the Office's warning…". Given that the Office observed that "[t]he accurate distribution of royalties under the blanket license to copyright owners is a core objective of the MLC", it is a bit alarming that the MLC's proposed policies got published in the first place. I am personally only able to come up with two reasons why this occurred. Either the MLC board did not fully understand the impact on termination owners and the future administration of those royalties, or the MLC board DID realize the importance, and were intentional with their guidelines, despite the Copyright Office's warnings.

Both conclusions are disturbing, and I believe need to be addressed.

In recent questions submitted to the Register of Copyrights by Senator Patrick Leahy, Chair of the Senate Judiciary Committee, Subcommittee on Intellectual Property Oversight Hearing on the U.S. Copyright Office (September 7, 2022), question 4 (b.) asks, "You are scheduled to review the MLC in January 2023. In that process, will you address whether you view the MLC's current statutorily imposed makeup, which has ten publishers and four songwriters, as fair?" Register of Copyrights Shira Perlmutter's response included the statement, "We are aware of concerns that some groups have raised regarding composition of the MLC's board." However, she also states "…the board's composition is set by statue and any changes would require an act of Congress."

Perhaps this termination issue highlights the need to focus on the MLC's board makeup which may eventually lead to an act of Congress. While I've heard public statements many times defending the current makeup of the MLC board since the 10 publishers include both major and independent publishers, the reality is, they are all publishers. For issues where publishers and songwriters may have distinctly different interests and concerns, such as this termination issue, the 4 songwriter board members across the table from 10 publisher board members seems a bit unbalanced.

In closing regarding the termination issue at hand, I have a hard time believing a government body (Congress) would intentionally allow a government controlled entity (The MLC) use a government license (blanket/statutory license) to reverse the intent that same Congress established through the 1976 Copyright Act and not allow authors and heirs to receive the royalties they are entitled to for a substantial portion of the current music business.

Thank you again for this opportunity to comment on such an important matter.

Sincerely,

John Barker
President/CEO
ClearBox Rights, LLC