

**Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.**

In the Matter of:

**Termination Rights, Royalty
Distributions, Ownership Transfers,
Disputes, and the Music Modernization Act**

Docket No. 2022-5

DIGITAL LICENSEE COORDINATOR’S REPLY COMMENTS

IN RESPONSE TO SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

Digital Licensee Coordinator, Inc. (“DLC”) respectfully submits these reply comments, in further response to the Copyright Office’s Supplemental Notice of Proposed Rulemaking (“SNPRM”) on “Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act.”¹

As previously stated, the DLC does not express a policy-based interest on who the correct payee should be in copyright termination-related circumstances.² The DLC does, however, have a particular interest in the efficient and effective functioning of the MLC. And, based on the concerns expressed by the overwhelming majority of commenters to the SNPRM, the DLC fears that the impacts of the Office’s proposed rule could severely hinder the operations of the MLC (as well as the mechanical licensing system more broadly).³ Accordingly, the DLC submits these reply comments to highlight certain of these concerns, with the hope that the Office will not engage in rulemaking that would undo much of the structural progress made since the enactment of the MMA and create unnecessary disruption, cost, delay and inefficiency for the MLC and other stakeholders, including digital music providers (“DMPs”).

In addition, several parties’ initial comments highlight issues that are critical for the Office to keep in mind when considering the broader question of how the MLC administers credits and debits, both within and outside of the termination context.

¹ 88 Fed. Reg. 65908 (Sept. 26, 2023).

² See DLC Initial Comments at 1 n2

³ See, e.g., MLC Initial Comments at 14-15 (“The implementation of the Historical Payee Rule at this point would require The MLC to: (i) redesign and build a new system to process royalties using temporal histories of ownership (after rightsholders deliver such histories using a new data format); (ii) reprocess all of the monthly usage data reported thus far, (iii) reprocess historical matched royalties distributed thus far, and (iv) revise regular monthly reporting.”).

I. The Office Should Not Enact Payment Rules that Increase the MLC’s Operational Costs.

Amidst the complex and often contentious set of challenges facing the music industry today, it is rare to find an issue on which all, or even most, stakeholders can agree. But the proposed rule outlined in the SNPRM has elicited nearly unified reactions of concern, at least with respect to the operational burden that the proposed rule would impose on all stakeholders. Indeed, the overwhelming sentiment expressed by the music publishing community – including by publishers,⁴ songwriters⁵ and the MLC⁶ alike – is that requiring the MLC to pay royalties to the party that administered the copyright at the time of usage, rather than at the time of payment, would result in potentially disastrous consequences for the operations of the MLC and the broader music publishing industry.⁷

Specifically, the MLC and others who are most familiar with the expected practical demands of implementing the proposed rule have identified a number of operational obstacles, including: requiring “adoption of a new data exchange format across the industry, as well as significant modifications to The MLC’s existing royalty and distribution processing systems”⁸; requiring “assembling ownership records for the more than 33 million works in The MLC’s Musical Works Database using standards, and possibly records, that do not exist currently”⁹; and

⁴ See, e.g., the Initial Comments submitted by each of National Music Publishers’ Association (“NMPA”), Association of Independent Music Publishers (“AIMP”), Big Machine Music, Combustion Music, Concord Music, Endurance Music, Jody Williams Songs, Joe Fisher, Jonas Group Publishing, Kobalt Music, Liz Rose Music, Me Gusta Music, SMACKSongs, Sony Music Publishing, Spirit Music, and Reservoir Media Management, respectively.

⁵ See, e.g., the Initial Comments submitted by each of Nashville Songwriters Association International (“NSAI”), Bob DiPiero, Dennis Matkosky, Farris, Self & Moore LLC, J.T. Harding, Jamie Moore, Jason Turner, and Wiatr & Associates.

⁶ MLC Initial Comments at 1-3, 13-16.

⁷ See NMPA Initial Comments, at 3 (“Everyone with whom NMPA has spoken [including music publisher members, songwriters and songwriter organizations, digital services representatives, and others] has expressed concern over the impact of the [proposed rule] and the harm it may cause to industry participants, including by significantly increasing costs, upending established data standards, and decreasing efficiency and the likelihood that the correct party – and the songwriters – will be timely paid or even paid at all.”).

⁸ MLC Initial Comments at 2; see also Reservoir Initial Comments at 1 (“The MLC would need to develop a brand-new system to house this information and correctly allocate royalties among changing owners across historical periods.”); NMPA Initial Comments at 6 (“Common Works Registration (“CWR”) is the data format and protocol most widely used by publishers . . . to register rights in musical works. CWR does not support the maintenance of data concerning copyright owners for prior periods.”).

⁹ MLC Initial Comments at 2; see also AIMP Initial Comments at 2 (“The current [MLC] system does not have the historical information to process to the prior owners/administrators/publishers.”); NMPA Initial Comments at 6 (“Accordingly, publishers and administrators would have to provide whatever historical

“add[ing] unprecedented delays to The MLC’s administration and distribution of mechanical royalties.”¹⁰

A key theme that emerges from the MLC and publisher comments is that the proposed rule would significantly change how things have been done in the industry for a long time, disturbing settled expectations and adding significant burdens, costs, and complexities. This reversal of longstanding industry practice is a compelling concern that should carry a lot of weight. Indeed, it is a concern that the DLC itself has expressed on multiple occasions—most recently in the context of the proceedings concerning late fees.¹¹

Moreover, the proposed rule may result in a massively increased (and potentially untenable) workload for the MLC that does not actually address the expressed needs or wishes of any key set of industry stakeholders.¹²

The DLC has serious concerns that the operational burdens identified in connection with the Office’s proposed rule could lead to significantly increased costs to operate the MLC—costs that would not necessarily result in any increased benefit to rightsholders, but that the MLC would nevertheless then try to pass along to the DMPs. Indeed, one commenter expressly anticipated as much: “The costs associated with requiring the MLC to change the way its database and operations practices have worked for the past three years would be significant. In addition to the monetary costs to implement such a change including costs to build the technical infrastructure to comply, there would be additional labor costs to hire people to research and input historical information. This could not be accomplished under the current budget and a revised administrative assessment from the digital service providers would be necessary, so an additional assessment would have to be set by the Copyright Royalty Board to even begin the project.”¹³

Without opining on what the MLC could or could not accomplish under its current budget funded by the administrative assessment,¹⁴ the DLC’s firm view is that any additional

ownership information they are able to put together to the MLC . . . even though those parties have already provided ownership data for their musical works to the MLC, at significant time and expense.”).

¹⁰ MLC Initial Comments at 2; *see also* Spirit Music Initial Comments at 2 (“From a pragmatic point of view, we are also concerned the proposed changes will require significant changes in the MLC’s infrastructure, which will result in substantial delays in payment of future royalties during the building phase.”); NMPA Initial Comments at 6 (“Payment to songwriters and others entitled to royalties would be significantly delayed . . .”).

¹¹ *See* DLC Initial Comments, Dkt. No. 2023-2, at 7-9; DLC Reply Comments, Dkt. No. 2023-2, at 2-5.

¹² *See* Concord Music Initial Comments at 3 (“[T]he Proposed Rule is an answer to a question that no one in the industry is asking.”).

¹³ NSAI Initial Comments at 4.

¹⁴ The DLC has twice settled with the MLC regarding the administrative assessment, agreeing to fund the MLC’s proposed budget in its entirety, reflecting the DLC’s continued commitment to ensuring that the MLC has the resources it actually needs to effectively and efficiently administer the blanket license and

costs associated with a proposed rule that upends the practices of the entire industry, without actually facilitating the payment of royalties to songwriters or music publishers, *as a matter of law* would not be “reasonable collective total costs” that could be imposed on the DMPs, through the administrative assessment or otherwise.¹⁵

The DLC urges the Office to refrain from engaging in rulemaking that would materially disrupt and hinder the functioning and efficiency of the MLC and that would increase the MLC’s operational costs.

II. It is Critical that the Office Establish a Clear and Equitable System for Royalty Adjustments that Addresses the Concerns of all MLC Stakeholders.

As noted in the DLC’s Initial Comments to the SNPRM, the SNPRM raises important issues regarding the need for the MLC to have a fair, efficient and transparent methodology for administering corrections and adjustments to payments.¹⁶ These are issues that apply within the termination context, but also more broadly to any form of payment adjustment that may be necessary (such as, for example, to correct for a DMP’s overpayment of royalties).

While some other commenters echoed similar concerns,¹⁷ the MLC suggests that error corrections, adjustments, disputes and payee changes outside of the specific and purportedly unique termination context “do not represent a controversial topic that would require regulation of operational details” and merely constitute part of “the normal course of business, which The MLC can administer without additional regulation.”¹⁸ But the DLC members’ experiences in waiting for corrections and adjustments from the MLC where the issue has arisen so far indicate otherwise, and that is before the MLC has had to operationalize the anticipated regular practice of DMPs’ over-estimating monthly royalties that will be subsequently adjusted downward, in

get royalties paid out to rightsholders. *See* 19-CRB-0009-AA (Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective) (“Initial AA”); 23-CRB-0007-AA (Determination of Adjustment to Administrative Assessment to Fund Mechanical Licensing Collective) (“2023 AA”). The record that has emerged in this rulemaking proceeding demonstrates that the increased operational costs that would result from this proposed rule would amount to waste – either because the new system imposed by the rule is not correct or necessary, or because the operational systems set up by the MLC in the first instance were incorrect as a matter of law, making any need to now rebuild to correct the MLC’s past errors inherently unreasonable costs to be shouldered by the DMPs.

¹⁵ *See* 17 U.S.C. § 115(d)(7)(D)(ii)(II) (directing the Copyright Royalty Judges to determine the amount of the administrative assessment necessary to fund the MLC as “an amount that is calculated to defray the *reasonable* collective total costs” (emphasis added)).

¹⁶ *See* DLC Initial Comments at 2-3.

¹⁷ *See, e.g.*, Spirit Music Initial Comments at 2 (“We strongly recommend that the USCO establish an equitable solution to compensate under payments.”); *see also, e.g.*, Promopub B.V. Initial Comments at 2-3; Reservoir Initial Comments at 1.

¹⁸ MLC Initial Comments at 18, 19-20.

order to avoid late fees.¹⁹ The same principles underlying any regulatory approach to ensuring the prompt and transparent correction of erroneous payments to one rightsholder vs another as a result of copyright termination apply equally to require the prompt and transparent correction of overpayments made by DMPs – including, but not limited to, in scenarios where the DMP has overestimated monthly royalties and is entitled to a credit or refund upon adjustment.

We thank the Office for its careful attention to these issues and would welcome the opportunity to provide any additional information the Office would find useful.

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Respectfully submitted,



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¹⁹ See DLC Reply Comments, Dkt. No. 2023-2, at 8-9, submitted in connection with the Office’s recent interpretive rule concerning late payments and discussing the possibility (or even the likelihood) that DMPs will be forced to overpay the MLC in order to avoid being charged late fees; *see also* DLC Initial Comments at 2 n4.