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March 4, 2024

Suzanne Wilson
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Ave. SE
Washington, DC 20559-6000

VIA EMAIL

Dear Ms. Wilson,

We write to summarize the February 26, 2024 *ex parte* meeting held between the Digital Licensee Coordinator ("DLC") and representatives of the Copyright Office (the "Office"). That meeting focused on the Office's pending proposed rulemaking relating to the applicability of the derivative works exception to termination rights to the statutory blanket mechanical license established under the Music Modernization Act (Docket No. 2022-5). In attendance at the meeting were Jason Sloan, John Riley, and Jalyce Mangum from the Copyright Office, and Kirsten Donaldson and Sy Damle on behalf of the DLC. This letter summarizes that discussion and follows up on questions raised by the Copyright Office during the meeting.

Under the proposed rule as set forth in the Office's September 26, 2023 supplemental notice of proposed rulemaking ("SNPRM"),[1] the Office addressed the circumstances in which the MLC should place royalties on hold.[2] Under the Office's proposed rule, when a termination has occurred, the default rule is for the post-termination owner to be paid. As the Office explained, a disagreement over the application of the derivative works exception is not a "dispute over ownership" that would otherwise require the MLC to hold royalties as required by the statute.[3] Thus, such a disagreement "would generally not constitute grounds for the MLC to hold related royalties," unless litigation was commenced over the issue, or if a pre-termination copyright owner initiates a dispute with the MLC over the application of the exception to a particular voluntary license.[4] In those circumstances, the proposed rule requires the MLC to "hold applicable accrued royalties and accrued interest pending resolution of the dispute."

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

[2] *Id.* at 65918-19.

[3] *Id.* at 65918-19 (citing 17 U.S.C. § 115(d)(3)(K)(i)).

[4] *Id.*

The situation where such a termination dispute has been initiated at the MLC involving voluntary licensors is what drew the DLC's concern. In its comments to the proposed rule, the DLC noted that, in two circumstances, there should be no money paid to the MLC by the digital service until the dispute is resolved: (1) where both the pre-termination copyright owner and the post-termination copyright owner are voluntary licensors of a service and (2) where the pre-termination copyright owner is a voluntary licensor, and the post-termination copyright owner is paid via the blanket license. In either scenario, there is no basis for a digital service to pay the MLC when it is possible that the pre-termination owner, as a voluntary licensor, is owed money from the service directly, not the MLC. DLC expressed that one of its concerns was the possibility of double payment if voluntary license partners demanded money during the pendency of the dispute.[5]

The Office asked whether a similar issue arises when there is no dispute initiated with the MLC. In that circumstance, and under the Office's default rule, the post-termination owner would be the entity owed royalties. The Office believed that there may be circumstances that a pre-termination owner which had a voluntary license agreement with a service might similarly demand payment, even if it does not raise a dispute with the MLC, resulting in a double payment.

As we explained in the meeting, the circumstances where a voluntary license partner has a right to demand royalties notwithstanding who the MLC's records show is entitled to payment is ultimately a matter of private contract between the parties, and there is no industry standard approach to that issue. Instead, we reiterated that the DLC's concern arises with respect to *the MLC's* ability to demand payment when there is a dispute related to termination that involves one or more voluntary licensors. DLC believes that, as a matter of the statutory license, that the MLC should not require payment of royalties related to a termination dispute in the two circumstances set forth above, unless and until resolution of the dispute shows that distribution of royalties via the MLC under the blanket license is proper.

The Office questioned whether the DLC's view was consistent with section 115. The Office highlighted two provisions during the conversation: (1) the requirement that the MLC hold royalties related to disputes before the dispute resolution committee, 17 U.S.C. § 115(d)(3)(K); (2) the requirement that the MLC hold royalties for "unmatched works," *id.* § 115(d)(3)(H). Neither provision applies to this scenario.

First, the Office itself recognized in the SNPRM, a termination dispute is not a dispute over ownership that would fall within the scope of the dispute resolution committee process.[6] Indeed, the statute provides that the MLC is to set up a "dispute resolution committee" (section 115(d)(3)(D)(vi)) and to establish policies and procedures "for copyright owners to address in a timely and equitable manner ***disputes relating to ownership interests in musical works*** licensed under this section and allocation and distribution of royalties by the mechanical licensing

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[5] *See also* Initial SNPRM Comments of the Amercian Association of Independent Music and Recording Industry Association of America, at 3-4.

[6] 88 Fed. Reg. at 65918-19.

collective." 17 U.S.C. § 115(d)(3)(K)(i). The MLC's dispute resolution function concerns disputes over copyright ownership of the works being licensed, and it is limited to disputes of that nature.

Second, the work in this scenario is not "unmatched." The statute defines an unmatched work as one where the "copyright owner of such work (or share thereof) has not been identified or located."[7] That does not describe the scenario here. The post-termination owner *is* the copyright owner in the case of a valid termination; the only question would be who would be entitled to the payment for certain uses of that work.

Indeed, the Office itself explained that a legal hold was not in fact required under either of these provisions where there is a dispute about the effect of a valid termination. It noted that the "the statute may not compel the MLC to implement legal holds in disputes unrelated to ownership," but concluded it was "prudent for the MLC to hold royalties whenever a litigation or other formal dispute procedure (e.g., arbitration) is initiated that implicates the disposition of royalties.

The Office also expressed concern that a copyright owner that is paid via the MLC may lose out on accrued interest that it is legally entitled to if the service holds royalties pending the resolution of a termination dispute.[8] But because the termination dispute is neither a dispute over ownership, nor involves "unmatched" works, there is no statutory requirement for the MLC to hold the money in an interest bearing account for the benefit of the copyright owners entitled to payment.[9] The interest provisions, if anything, reinforce that the MLC should not hold royalties in the case of termination disputes involving voluntary licensors, since any interest earned would not necessarily benefit copyright owners. Having said that, if the Office disagrees with the DLC and requires the MLC to collect and hold such royalties, it should provide guidance on how any interest accrued by the MLC during the pendency of a termination dispute is handled.[10]

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[7] 17 U.S.C. § 115(e)(35).

[8] Whether a voluntary licensor is entitled to such interest is of course a function of the private contract.

[9] 17 U.S.C. § 115(d)(3)(G)(i)(III) (requiring the MLC to "deposit into an interest-bearing account, as provided in subparagraph (H)(ii), royalties that cannot be distributed due to . . . an inability to identify or locate a copyright owner of a musical work (or share thereof); or . . . a pending dispute before the dispute resolution committee of the mechanical licensing collective"); *id.* § 115(d)(3)(H)(ii) (requiring accrued royalties be held in an account that earns monthly interest "that accrues for the benefit of copyright owners entitled to payment of such accrued royalties").

[10] In the case where resolution of the dispute results in a service paying the voluntary licensor, the interest should be paid back to the service (with any requirement to pay that interest onto the voluntary licensor dictated by the terms of the voluntary license). In the case where resolution of the dispute results in payment being made by the MLC to a blanket licensor, then any interest earned should be used to offset the MLC's administrative costs.

We thank you and the staff of the General Counsel's office for your time and attention to this matter, and are available to answer any follow up questions.