

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

In the Matter of:

**Request for Information: Designation of
Mechanical Licensing
Collective and Digital Licensee
Coordinator**

Docket No. 2018-11

April 22, 2019

Comments of the Recording Academy

INTRODUCTION

The Recording Academy appreciates the opportunity to submit these comments to the U.S. Copyright Office in response to its Request for Information regarding the designation of the Mechanical Licensing Collective (“Collective”) and Digital Licensee Coordinator (“DLC”). The Recording Academy (“Academy”), best known for celebrating artistic excellence through the annual GRAMMY Awards, represents thousands of songwriters, performers, producers, and engineers. The Academy is the only music trade association that represents all music professionals. It represents only individuals and has no company or corporate members; included in its membership are thousands of working songwriters and composers, many of whom are independent, self-published, or unaffiliated songwriters.

BACKGROUND

Title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) (Public Law No: 115-264), also known as the “Musical Works Modernization Act,” reformed the Section 115 mechanical license for reproduction and distribution of musical works in phonorecords by establishing a new blanket license for digital music providers. The new blanket license allows the digital music providers to engage in specific covered activities, such as streaming, digital downloads and limited downloads. Under Section 115(d)(3), the Register of Copyrights must designate an entity—the Mechanical Licensing Collective (“Collective”)—which will administer the new license and distribute royalties to songwriters and music publishers.

Reform of mechanical licensing under Section 115 has long been a priority of the Academy, which advocated extensively for the passage and enactment of the MMA. As a leading creator organization, the top priority of the Academy has always been to ensure that music creators—including all songwriters—are paid fairly for their work. For several years, Academy songwriter members walked the halls of Congress, lead spirited grassroots initiatives, and testified in front of the House and Senate Judiciary Committees in support of the comprehensive music licensing reforms contained within the MMA.¹

Prior to the passage of the MMA, the system of compensating songwriters was fundamentally broken; if operated as intended, the Collective will serve as a much needed solution. The Academy's comments reflect the critical importance of the proper establishment of the Collective, and are intended to assist the Office in its designation process. The Register of Copyrights is empowered and equipped to designate a Collective that will improve the lives of every songwriter—major or independent—for the foreseeable future, while building a better and more transparent royalty framework that can serve as the global model for generations.

Please note that the Academy's comments will not weigh in on the designation of the DLC.

GENERAL COMMENTS

The Academy values the leadership the Copyright Office has demonstrated in establishing a process to designate the Collective. The Request for Information (RFI) raised important threshold questions that speak both to the statutory requirements prescribed by the MMA as well as operational matters. The Recording Academy recommends that the Office exercises continued due diligence prior to designating a Collective, including requesting supplemental information and amendments from potential Collective submissions to address any outstanding concerns or points of clarification.

The Academy also appreciates the leadership demonstrated by the boards of the American Music Licensing Collective ("AMLC") and the Mechanical Licensing Collective ("MLC") in their respective submissions to serve as the Collective. While many organizations offered exclusive endorsements prior to the April 22 reply comment deadline, the Academy chose not to exclusively endorse either entity until fully reviewing each submission to consider their respective merits and capabilities. Upon review, the Office is fortunate to weigh two entities that have demonstrated substantial expertise, resources, strategy and financial commitment to establish a fully operational

¹ *Music Policy Issues: A Perspective from Those Who Make It: Hearing Before the H. Comm. On the Judiciary*, 115th Cong. (2018) (statement of Booker T. Jones, Recording Artist, Songwriter, Producer; statement of Mike Clink, Producer); *Protecting and Promoting Music Creation for the 21st Century: Hearing Before the S. Comm. On the Judiciary*, 115th Congress (2018) (statement of Justin Roberts, Singer/Songwriter)

Collective. Both have also demonstrated a clear commitment to the rights of songwriters.

The AMLC, in particular, should be credited for opening up dialogue on many areas of concerns previously raised by the Academy such as operational transparency and board representation. Additionally, the Academy values the AMLC's commitment to mitigating against unclaimed royalties, and appreciates its dedicated approach to matching unclaimed works. At its core the Collective should fundamentally be focused on paying songwriters what they are owed—and the AMLC showed throughout its submission a commitment to this goal.

However, upon careful consideration of both submissions, the Academy believes that the MLC submission is best equipped to satisfy the statutory requirements of the MMA. The MLC submission embodies a thoughtful, meticulous, and comprehensive approach. It demonstrates the administrative and technological capabilities necessary to perform the required functions of the Collective. The Academy has confidence in the MLC's ability to create and operate the Collective in accordance with the statute.

But prior to designation, the MLC should answer several key questions it failed to adequately address in its submission. Many of these key questions were identified by the Office in the RFI and reflect concerns that have been raised by the Academy. Most notably, the concerns fall under two broad categories:

- Unclaimed royalty distribution
- Education and outreach

As such, the Academy encourages the Office to exercise its authority and request supplemental information and additional public comment that will allow the submitters to offer further analysis, details and input to assist the Office in its final designation. The Academy believes that this is the most effective way to ensure that the Collective can reflect the diverse needs, and meet the challenges, of the entire songwriter community.

UNCLAIMED ROYALTIES

Section 115(d)(3)(J) contains standards to which the Collective must adhere in order to properly manage unclaimed royalties for songwriters. With significant unclaimed royalties expected to be available upon commencement, the designated Collective's success is predicated on its ability to effectively manage this sum in a manner that reflects the best interests of the songwriter community. Ultimately, it should be the primary goal of the Collective to reduce the total unclaimed royalties, and establish effective procedures that ensure songwriters are properly compensated.

During the drafting of the MMA, the Academy made unclaimed royalties a top priority, noting concerns expressed by many of its songwriter members who feared that the Collective's management of unclaimed royalties could be fraught with impediments that could delay or deny rightful payment. Similar concerns were also raised by

lawmakers, and the MMA’s legislative history reflects steps taken to mitigate against these concerns. The Academy applauds the Office for taking these concerns into consideration in the crafting of the RFI, and appreciates that both the MLC and AMLC attempted to address these concerns in their submissions.

The MLC submission repeatedly acknowledges that under the statute, MLC is granted the discretion to delay the initial distribution of unclaimed royalties beyond January 2023, the earliest date when such a distribution could occur. With regard to this discretion, MLC declares that it “is committed to ensuring diligent and extensive efforts to match uses and works, even if that means holding unclaimed accrued royalties beyond eligibility for distribution in order to obtain more matched and distribute more royalties (plus interest) to rightful owners.”²

MLC further explains its intentions by explaining that it will “implement policies allowing use of that discretion to retain unclaimed accrued royalties and continue matching efforts in situations *where there is reasonable evidence that this will result in material increases in matching success*” (emphasis added)³. MLC later says that it will deploy its matching system “robustly and relentlessly” and utilize its “discretion to delay distribution of unclaimed accrued royalties *where appropriate* to allow encouraging matching results to run their course” (emphasis added).⁴

The MLC thus asserts a strong commitment to matching unclaimed royalties and accepts that the statute gives it the flexibility to do so. But this expression of commitment comes attached with qualifiers. MLC says it will retain unclaimed royalties where there is “reasonable evidence” that royalties can successfully be matched and that it will delay distribution of such royalties “where appropriate.” The use of these qualifiers raises the question of whether MLC will truly work “robustly and relentlessly” to match unclaimed royalties or whether it will only do so “where appropriate” and when it believes there is “reasonable evidence” to justify the effort. These terms are not explained in the submission. What constitutes reasonable evidence to justify continued efforts to match unclaimed royalties? At what point is it no longer appropriate to continue to delay payment of accrued royalties?

In contrast, AMLC states that “[e]nsuring the correct rights holder(s) receive payments is the primary mission of the AMLC.”⁵ It includes among its guiding principles that “the proper use of technology can provide correct payments to all song owners for what they have earned rather than paying the wrong rights holders by using estimates and black box distribution.”⁶ In this regard, AMLC establishes a high standard for itself in matching unclaimed royalties. It asserts that it would start from a 70 percent match rate prior to launch, and achieve a 94 percent match rate by the end of 2025.

² See Proposal from MLC - Initial Comments at 43

³ *Id.* at 53

⁴ *Id.* at 54

⁵ See Proposal from AMLC - Initial Comments at 19

⁶ *Id.* at 2

The treatment of unclaimed royalties was of paramount concern to the lawmakers and stakeholders who worked so hard to craft the MMA. Based on the number of questions related to unclaimed royalties included in the Request for Information, the issue is clearly of great concern to the Office as well. Before making a final designation, the Office should ask MLC to make a more explicit commitment to delay the distribution of unclaimed royalties if such a delay is necessary to ensure that royalties are matched to the appropriate copyright owners to the greatest extent possible, in accordance with the discretion provided under the statute.

SONGWRITER EDUCATION AND OUTREACH

As codified in Section 115(d)(3)(J), the Collective must engage in diligent, good-faith efforts to publicize the Collective and its practices throughout the music industry. In practice, this will require songwriters to both know of and to register with the Collective. Reaching and registering songwriters will prove to be a primary tool to reduce the total universe of unmatched songs and mitigate against unclaimed royalties. As such the Collective will need to conduct extensive outreach to the creative community to educate songwriters. Without an effective outreach program, the Collective will not succeed.

Considering that an estimated 24,000 songs are uploaded to digital music providers per day, there is a large, and continuously increasing, volume of songwriters who need to be reached and registered.⁷ The degree of difficulty is compounded when one considers that many songwriters are considered self-published, independent and/or unaffiliated, and do not have a management team, publisher, and/or PRO in place to provide them with critical information. It is imperative that the Collective outlines a clear and executable plan that reaches all of these songwriters, and that the Collective can demonstrate the expertise inherent in reaching all of these songwriters. Additionally, the Collective should establish clear benchmarks that measure its outreach effectiveness so that it can modify and adapt its strategies and tactics to best serve the entire songwriter community.

To that end the Academy recommends that the Office requests additional information to address the following questions:

- Will the entity commit to disclosing a comprehensive public outreach strategy prior to designation?
- How does the entity plan to educate self-published, independent and/or unaffiliated songwriters?
- Does the entity demonstrate the requisite resources to execute a public outreach campaign?
- Will the entity adopt goals and metrics that measure awareness?

⁷ Bruce Houghton, *24,000 Tracks Uploaded To Music Streamers Every 24 Hours*, Hypebot (June 11, 2018), <https://www.hypebot.com/hypebot/2018/06/24000-tracks-uploaded-to-music-streamers-every-24-hours.html?>

- Will the entity commit to reporting to the Office on its outreach effectiveness?

To their credit, both the AMLC and the MLC did contain information regarding public outreach. The AMLC proposal contains a robust public outreach strategy complete with concrete communication tactics, staffing details, and information on videos, advertising and website development.⁸ However, it fails to detail how the AMLC will measure the effectiveness of its outreach or specify what steps it will take to target self-published, independent and/or unaffiliated songwriters. Additionally, the AMLC proposal does not detail any existing industry relationships which will prove pivotal to augment initial outreach with publishers, PROs and songwriter organizations who collectively represent, or work with, hundreds of thousands of songwriters.

The MLC proposal is even more limited in details. While the submission does reference utilizing various means of communication tools and working with existing trade groups affiliated with copyright owners to raise the Collective's awareness, it does not specify strategies, tactics, costs or staffing needs.⁹ Undoubtedly, through its extensive industry connections, the MLC will be able to reach many songwriters, but the submission is less clear on how the MLC will reach nearly all songwriters.

The Academy encourages the MLC to more explicitly demonstrate it has the capabilities and willingness to conduct a multi-pronged and continuous education campaign. Outlining a clear public outreach plan—complete with details on strategies, tactics, timeline, budget, and measurement—will assuage concerns and prove the MLC's commitment to fully educate all songwriters, including independent writers.

The Academy acknowledges that public outreach will be challenging, and that many songwriters—major and independent, affiliated and unaffiliated—will prove difficult to reach and register with the Collective. To that end, the Academy pledges to work with the chosen entity, the Office and other industry groups to educate the greater songwriter and music creator community.

CONCLUSION

Title I of the Music Modernization Act is critically important to the thousands of songwriter members of the Recording Academy. For too long, these hard-working songwriters have suffered from a complex rights regime that have left them underpaid or worse unpaid. The establishment of the Collective will greatly transform the industry to the benefit of the greater songwriter community and embark on a new royalty regime that can be the model for the world.

As the Register of Copyrights considers the candidacies of the American Music Licensing Collective and the Mechanical Licensing Collective, the Academy encourages the Register to employ proper due diligence and leadership to ensure the right entity is chosen to operate this exciting, and greatly needed, Collective. Prior to any

⁸ See Proposal from AMLC - Initial Comments at 30-33

⁹ See Proposal from MLC - Initial Comments at 62-63

designation, the Copyright Office should seek additional information and input that address certain songwriters' concerns and provide greater clarity on operational processes.

Thank you again for the opportunity to provide input into the Office's designation process. The Recording Academy stands ready to participate further or provide any additional information.

Respectfully Submitted,

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