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Admitted in California and Texas

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By Regulations.gov

Regan A. Smith
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
101 Independence Avenue S.E.
Washington D.C. 20559

Re: Unclaimed Royalties Study: Notice of Inquiry Docket No. 2019–6

Dear General Counsel Smith:

Thank you for the opportunity to comment on the Copyright Office Unclaimed Royalties Study for the Office’s supervision of the operations of the Mechanical Licensing Collective and the Digital Licensee Coordinator.

I am a music lawyer in Austin, Texas and do not write this comment on behalf of any client. I appreciate the opportunity to comment on the unclaimed royalties issues. Songwriters are the seed corn of the music business. We must get this right.

A. Other Issues

At the outset, it is well to have a clear understanding of why there is an unmatched or unclaimed pool (which are two very different things and which I will address separately.) As the mathematician Cathy O’Neil observed in her excellent book, *Weapons of Math Destruction*,¹ “Models are opinions embedded in mathematics.” This is as true of the statutory matching issue as it is of insurance company redlining.

¹ Cathy O’Neil, *Weapons of Math Destruction* (2016) (hereafter “Weapons”).

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It’s just possible that the reason every prior effort to create a “global rights database” has failed is that the enterprise itself is unworkable, not because we lacked the Great Data Savior to rescue us from the unfortunate circumstances that the DLC member companies created and for which some of them have been sued. The result is an opaque fortification against the very people the transparency was designed to protect.

The fundamental step that Title I of the Music Modernization Act² excuses is basic and would solve much of the unmatched problem if Title I did not exist: Don’t use a work unless you have the rights. It is a fundamental aspect of copyright licensing and it is not metaphysical.

It’s not that this issue was ignored by the drafters of Title I. The failure to properly license songs is a human failure, not the failure of machines. It will not be fixed by machines that have to be populated by humans. Neither will it be fixed by a safe harbor.

But the Great Data Savior archetype ignores this step. Like the child who is both arsonist and firefighter who runs to Mommy or Daddy wanting praise for putting out the fire she herself started, the Safe Harbor Services come with a great rending of garments and exclaims that if the songwriters just had a database, if they only had this thing that has never existed, the problem would solve itself.³

This human failure was recognized and *excused both retroactively and prospectively in Title I*. Indeed, the entire foundation of Title I is based on this premise. It was very much discussed during the run up to Title I and we were repeatedly and emphatically told that the services would never agree to license in advance. And if their failures were not excused there would be no bill. Having no bill was proclaimed to be the one outcome the lobbyists couldn’t live with—unsurprisingly. You can tell this was important marketing to them by the extended period of self-congratulations that followed the passing of the MMA.

² Public Law 115–264, 132 Stat. 3676 (2018) (hereafter “MMA” and “Title I”)

³ This grand deflection was also heard from various parties including the MIC Coalition at the recent Justice Department consent decree workshop on the performance royalty side. Loosely translated, the canard says if you just had this thing that doesn’t exist anywhere, this unicorn database, then we would be happy to respect your rights.

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Yet behind every accolade was the creeping reality seeping like water through a failing dam that this was all going to collapse because of what Jack Burden called the “awful responsibility of Time.”⁴

And now that responsibility is about to catch up to them. Water always wins, and so does time.

So let us all be clear about what this question of the unmatched is really about. It’s not that the user cannot know the ownership information. It’s not that the user lacks the resources to obtain the ownership information. It’s not that the user lacks the means to pay royalties when due. It’s also not that the user is unwilling to obtain the information and properly license *before using the sound recording*. Users⁵ seem to have no problem licensing and matching owners of the sound recording and even paying them to one degree or another.

The issue is that the Safe Harbor Services want to be able to exploit the sound recording and *let someone else figure out who owns the song* and how the songwriter should get paid. The Safe Harbor Services wish to do this with so little liability accruing to them that we can say there is no liability. The Safe Harbor Services have somehow managed to convince songwriters that it is a good thing to throw them a money pie and let them fight over it in a kind of digital decimation.

So let’s be clear that there is one reason why it’s a problem and it’s always the same reason whether the mechanical royalty is paid for a stream or a cylindrical disc—somebody didn’t do their job before the fact. After Title I, the law is that they get away with it. And in the words of Austin songwriter and U.S. Supreme Court amici Guy Forsyth, nothing says freedom like getting away with it.⁶

The Office has set about serious business. The Copyright Act has shifted the burden for licensing and collection onto the owner of the song copyright—and why stop with songs?⁷ Songwriters will be very

⁴ Robert Penn Warren, *All the King’s Men*, 661 (1946).

⁵ Hereafter “Safe Harbor Services.”

⁶ Guy Forsyth, *Long Long Time* (2005).

⁷ See, e.g., Castle, *A New Dark Age: Blanket Licenses for Everything Based on MMA*, Hypebot (June 5, 2020) available at <https://www.hypebot.com/hypebot/2020/06/a-new->

lucky if the black box digital decimation commanded by Title I only results in the removal of a tenth. Decimation was a punishment. Songwriters dragged into the black box have done nothing wrong. And yet here we are.

As noted above, this inquiry seems to be upside down and backwards. My personal preference would have been for The MLC to tell the world's songwriters how they intend to answer the serious questions presented by the Copyright Office and have the world comment on those methods rather than the other way around. I would have thought that this would have been a condition of the Copyright Office designating The MLC as the MLC, but apparently not.

It is appropriate for The MLC to demonstrate to the world's songwriters how they intend to do their very well-compensated jobs. Unlike The MLC's competitors, The MLC does not need to raise a penny, takes on no debt because they can "borrow" what they need from the black box on an interest-free and non-recourse basis,⁸ has no meaningful performance metrics and is not accountable to anyone in any meaningful way aside from the quinquennial redesignation review.⁹

[dark-age-blanket-licenses-for-everything-based-on-mma-chris-castle.html](#) ("What he apparently wants to do is set up a massive revenue share statutory blanket license for sound recordings along the lines of the Title I blanket except with what will be virtually unauditible accounting based on popularity as a proxy for usage. In other words, the exact same kind of problem that exists today with the revenue share model—users paying for music they don't listen to.")

⁸ 17 U.S.C. § 115 (d)(7)(C) (hereafter, the Hoffa Clause).

⁹ Congress contemplated an active oversight role for the Register that has yet to materialize, though we live in hope. "For the responsibilities described in subparagraphs (J) [distribution of unclaimed royalties] and (K) [dispute resolution] of paragraph (3), the collective is only liable to **a party** for its actions if **the collective** is grossly negligent in carrying out the policies and procedures adopted by the Board of Directors pursuant to §115(d)(11)(D). Since the Register has **broad regulatory authority** under paragraph (12) of subsection (d), **it is expected** [by Congress and therefore by the party making the claim] that such policies and procedures will be **thoroughly reviewed by the Register** to ensure the fair treatment of interested parties in such proceedings given the high bar in seeking redress." H. Rep. 115-651 (115th Cong. 2nd Sess. April 25, 2018) at 5 (hereafter "House Report"); S. Rep. 115-339 (115th Cong. 2nd Sess. Sept. 17, 2018) at 5 (together with identical language, hereafter "legislative history") at 5.

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Sure, the Copyright Office retains a statutory quinquennial review¹⁰ for The MLC’s redesignation, but it’s unclear exactly how short The MLC would have to fall in order for the Copyright Office to refuse redesignation and what happens in the meantime.

Respectfully, I suggest that the Office do everything possible to strengthen the role of The MLC’s three “Statutory Committees”, particularly the Unclaimed Royalties Oversight Committee and the Dispute Resolution Committee.¹¹ These committees are strangely staffed with volunteers.¹² While their commitment can be commended, volunteers need resources and staff to deal with the vast numbers of unmatched transactions so the fact that these volunteers are not compensated seems very shaky management to me.

Thus, it should come as no shock that there is a school of thought that it matters little what anyone says or tries to require of The MLC regarding the black box. If The MLC don’t like the law or regulation, they’ll just get the Copyright Office to move the goal posts and no one will say a word about it—they’ll just do what they want, when they want, the way they want and for how long they want and do it under color of law or even perhaps with actual legal authority. We are already seeing evidence of this mindset.¹³

¹⁰ See H. Rep. 115-651 (115th Cong. 2nd Sess. April 25, 2018) at 6 (hereafter “House Report”); S. Rep. 115-339 (115th Cong. 2nd Sess. Sept. 17, 2018) at 5 (“Although there is no guarantee of a continued designation by the collective, the Committee believes that continuity in the collective would be beneficial to copyright owners so long as the entity previously chosen to be the collective has regularly demonstrated its efficient and fair administration of the collective in a manner that respects varying interests and concerns. In contrast, evidence of fraud, waste, or abuse, including the failure to follow the relevant regulations adopted by the Copyright Office, over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective.”)

¹¹ The Operations Advisory Committee, Unclaimed Royalties Oversight Committee and the Dispute Resolution Committee.

¹² *Transcript*, United States Copyright Office Unclaimed Royalties Study Kickoff Symposium (Dec. 6, 2019) at 10 ln 21 and 11 ln 2.

¹³ 17 U.S.C. §710(a).

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For example, I believe that The MLC is encouraging songwriters to correct their song data in the HFA database and that no data from HFA has been transferred to The MLC as yet, and may never be. If The MLC is having data corrected and filled out in the HFA database, then the rules applicable to vendor access to the database may not apply because the Congress's musical works database is not actually being created at The MLC, it's being created at HFA. Time will tell if I am correct about this, but it does seem that if I am correct, then The MLC and HFA are working together to exploit an imagined loophole in Title I that violates Congressional intent and certainly the spirit of MMA. Respectfully, the Office should find out what is going on.

When the enterprise fails, the black box will be a significant factor. As Mike Campbell told Bill Gorton, it will happen "[g]radually and then suddenly."¹⁴ In the hope that the arc of the moral universe may one day bend toward justice one way or another, it is well to have a full record on these issues.

I hope that the Copyright Office finds this comment useful in that regard either now or at some point in the future. Possibly the far distant future. But as Cathy O'Neil tells us, "Justice cannot just be something that one part of society inflicts upon the other."¹⁵

Particularly not through the manipulation of data.

¹⁴ Ernest Hemingway, *The Sun Also Rises* (1926) at 109.

¹⁵ Weapons at 96.

B. Subjects of Inquiry

1. Please describe best practices that the MLC¹⁶ may employ in matching musical works to sound recordings and otherwise identifying and locating musical work copyright owners associated with works embodied in sound recordings pursuant to administering the blanket license. As applicable, please identify specific technological or manual approaches, as well as considerations relevant to the MLC’s prioritization of resources.

I commend the Copyright Office for commissioning Susan Butler to write a report about “Collective Rights Management Practices Around the World.”¹⁷ Ms. Butler’s report provides great polling detail about what organizations outside of the United States supposedly have told her they do to create the black box and distribute those funds. The CMO Report provides a wonderfully insightful repository of handy anecdotes that most practitioners and experts have picked up from years of working in the field.

Unfortunately, the CMO Report does not provide essential information regarding the identity of the applicable CMOs responding to Ms. Butler’s confidential survey.¹⁸ These responses are essentially comments that should have been made in response to a regulatory docket, but have secretly come in through the back door.¹⁹

¹⁶ I assume for purpose of this comment that when the Office refers to “the MLC” it is actually a reference to The MLC, Inc. My intention is to use the definite article when referring to The MLC, Inc. and the indefinite article (“the MLC”) when referring to any MLC that the Copyright Office might designate in the future. Because The MLC is currently attempting to claim a service mark for “The MLC” this may get a little confusing, but no more confusing than if someone attempted to trademark “The Capital Gains” or “The RICO.”

¹⁷ Susan P. Butler, *Collective Rights Management Practices Around the World, A survey of CMO practices to reduce the occurrence of unclaimed royalties in musical works* (April 2020) (hereafter “CMO Report”).

¹⁸ It also appears that Ms. Butler’s report was a single source consulting contract from a party who could be trusted. I am not aware that the Copyright Office ever requested proposals from anyone to prepare the largely unusable report. Single source contracts are what they use to pave the road to hell when they run out of good intentions.

¹⁹ The plan evidently was that no one, including either the Copyright Office or the taxpayer, would ever see the underlying data. For example, Ms. Butler tells us that

Further, the confidential survey is essentially a general solicitation of facts or opinions from the public in a manner that is materially inconsistent with the record keeping that is the beating heart of transparent policy making²⁰ involving polling of this nature. A major reason the CMO Report is fairly useless for policy making is that it is a secret review²¹ that is not statistically generalizable and cannot be peer reviewed due to the secrecy of both sources and responses. Yet the Office is holding out the report as though it is a signpost for policy making, which puts great pressure on Ms. Butler²² who no doubt would resist disclosing her “sources” if she were required to do so relying on a journalist’s shield rule in the policy making context. That’s fine for her newsletter, but not for policy making.

“[A] condition [of cooperation by responding CMOs] was that **the author would refrain from sharing with anyone** the specific responses from each CMO since some of the information may not be publicly available **or for other reasons**. To meet this condition, the author agreed with the CMOs to gather information from each CMO **in a journalistic manner (i.e., protecting the identities of the specific sources)**, compile all responses into summaries per category of questions (i.e., combining similar responses into one summary), and then prepare the report based on those summaries. **The completed report would then be delivered to the U.S. Copyright Office.**” CMO Report at 3.

²⁰ While issued to Executive Branch agencies, Administrator Sunstein’s 2010 memo regarding policy making using social media is instructive guidance. Cass R. Sunstein, *Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies*, Executive Office of the President (April 7, 2010) https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf

²¹ The sources of the underlying data and survey responses used by Ms. Butler are known only to her, and the public is unable to review them for accuracy or cross-reference. While this may meet what passes for “journalistic standards” in current practice, it is useless for policy making and accountability. It compares apples to oranges to discover a pomegranate.

²² As Ms. Butler tells us, “The author [i.e., Ms. Butler] represents and believes, based on 30 years of experience working in the international music industry, that the number and locations of the participating CMOs and the detail provided in written and oral responses, which make up this report, represent significant and substantive information on the specific issues.” It is comforting to know how long Ms. Butler has been working in the music business and that she thinks her work is important, but that’s not the issue. The issue is whether the public has any idea of who said what to whom about what and when, and can the information be peer reviewed or simply meet the standards of the other commenters in the current docket.

The CMO Report also provides considerable support for the wisdom of the proponents of The MLC in requiring the services to pay the costs of operating The MLC. There are a number of references in the CMO Report to CMOs conducting a cost-benefit analysis²³ over whether and when to account for particular royalty streams or even attempt to match.²⁴

Thankfully, due to the cost-shifting combinations of direct licensing, modified compulsory and service-supported blanket (and significant non-blanket) licensing, **cost will never be a factor for The MLC, so the only consideration should be the benefit from getting it right.**

As the House Judiciary Committee stated, Congress passed the MMA to end the poor treatment of artists derived from cost/benefit analysis and the black box:

Testimony provided by Jim Griffin at the June 10, 2014 Committee hearing highlighted the need for more robust metadata to accompany the payment and distribution of music royalties....In an era in which Americans can buy millions of products via an app on their phone based upon the UPC code on the product, the failure of the music industry to develop and maintain a master database has led to significant litigation and underpaid royalties for decades. The Committee believes that ***this must end*** so that ***all*** artists are paid for their creations and that so-called “black box” revenue is not a drain on the success of the entire industry.²⁵

²³ CMO Report at 10 (“Usage Reports...A CMO may choose not to process a usage report even though music has been identified, when: The cost of processing the data would exceed the amount received from the licensee.”)

²⁴ *Id.* at 11 (“Matching... The participating CMOs point to a number of reasons why they may not be able to link a recording title reported by a DSP in a digital sales or usage report to a specific work or to specific rights holders and be able to distribute money to those specific rights holders.... The data in the usage reports cannot be automatically matched and requires manual research that either has not yet been performed ***or would be too costly to perform....***”)

²⁵ House Report at 8.

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The MLC's administrative assessment²⁶ is a radical departure from the way that CMOs²⁷ cover their budgets. The assessment is unique to The MLC²⁸ and was used as a major selling point in rallying support for both passing the MMA and the designation of The MLC itself. Again, this detail about cost-benefit analysis may be interesting, but it is largely irrelevant—unless The MLC is planning on doing the same and sweeping other people's money into the black box because they want to skimp on the allocation of the assessment. If that's the intention, then I would respectfully suggest that the Office needs more to support its position than what is essentially a long newspaper article.

On the one hand, the really great news is that the Copyright Office has found the perfect time to call the current docket. The CMO Report now gives a background to measure the steps already taken by The MLC to address the unmatched and unclaimed. As The MLC's Richard Thompson has told us, The MLC has been hard at work with HFA and ConsenSys since July 2018 on standing up the company, which presumably will include addressing The MLC's various immediate statutory mandates regarding unclaimed and unmatched royalties.

The CMO report also highlights by omission another major difference between The MLC and the CMOs—The MLC is a creature of statute

²⁶ *In re Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective* (U.S. Copyright Royalty Judges Docket No. 19-CRB-0009-AA (Aug. 26, 2019)).

²⁷ *Id.* at 13 (“[P]ublishers may be provided more information than songwriters to assist in matching large numbers of works. For example, ***the works accessible to publishers may be categorized into specific value ranges (high, medium or low value) to assist publishers in prioritizing matching processes (to be cost effective)***, while songwriters would not be provided with values/royalty amounts.... Most commonly, posting such lists with a reasonable amount of non-private information on the CMO's website. Some CMOs only list on a website those works that generated more than a certain value (amount of royalties), such as \$100 or more (U.S. dollars used for this example), ***with works generating smaller amounts not available for specific claiming due to the cost of processing such claims (that money becoming part of a pool to be shared as unclaimed works)***.”). Of course, \$100 is a long way from the \$5 limitation in 37 C.F.R. §201.16(g)(6).

²⁸ While the CMO Report identifies a number of “anomalies” that distinguishes the MLC from ex-US CMOs, the payment of the MLC's administrative costs by the Safe Harbor Services is not mentioned. CMO Report Section 3 “*Background: Notable Distinctions*” at 5-7.

and is subject to regulation by the Congress, the Librarian and the Register in a very direct way. It would have been interesting to have a CMO-by-CMO analysis of their respective interactions with their national governments, particularly in light of the MMA Presidential Signing Statement.²⁹

On the other hand, we have no idea what steps The MLC is taking to address the unmatched (or steps taken by the Safe Harbor Services enjoying the MMA’s dubious retroactive safe harbor, for that matter). Again, it seems that the current docket is out of sequence and unripe. The Copyright Office could ask whether it would be more useful to require The MLC to disclose the systems it is currently building to accomplish its statutory mandate since there has been no public release. Surely there are systems to review by this time.

For example, The MLC also has a statutory mandate that is expressly stated requiring a “public notice of unclaimed royalties” on The MLC’s public facing website listing all unmatched songs (or shares of songs) it is holding at any moment in time.³⁰

All these systems should have been in some state of construction or at least planning well before this writing. Recall that The MLC’s executive Richard Thompson said at the Copyright Office panel on unclaimed royalties last December, “[A] lot of the time since July has been spent working very closely with the staff at HFA and ConsenSys, really starting to nail down how all of this is going to work at the, you know, lowest operational level, all of the things that we need to work out. (Referencing the July 8, 2019 designation of The MLC as the MLC.)”³¹

²⁹ *Statement on Signing the Orrin G. Hatch–Bob Goodlatte Music Modernization Act*, 2018 Daily Comp. Pres. Doc. 692 (Oct. 11, 2018) (“Because the directors are inferior officers under the Appointments Clause of the Constitution, the Librarian must approve each subsequent selection of a new director. I expect that the Register of Copyrights will work with the collective, once it has been designated, to ensure that the Librarian retains the ultimate authority, as required by the Constitution, to appoint and remove all directors.”).

³⁰ 17 U.S.C. § 115 (d)(3)(J)(iii).

³¹ *Transcript*, United States Copyright Office Unclaimed Royalties Study Kickoff Symposium (Dec. 6, 2019) at 28 ln 15.

Of course, The MLC didn't announce the selection of HFA and ConsenSys until November 26, 2019³² and was evidently still interviewing vendors up to that date. Even so, The MLC says it has been hard at work on developing their platform, and I take them at their word. This hard work presumably includes fulfilling its statutory obligations regarding the unmatched and unclaimed. Fortunately, The MLC has confirmed that they are "on track" and the COVID-19 crisis did not have much effect on their launch.³³

Thus, a more beneficial time to have called this docket might have been after The MLC demonstrates its functionality but before the License Availability Date assuming the License Availability Date and the public disclosure of unmatched royalty deadlines are not goal posts to be moved under the Register's new emergency powers. That would allow the public to comment on the actual product that will control the distribution of revenue as opposed to a report about what other countries do that does not take a critical look at The MLC or provide tangible sourcing.³⁴

³² Tatania Cirisano, *Mechanical Licensing Collective Selects Leadership, Partners for Copyright Database*, BILLBOARD (November 26, 2019).

³³ Emmanuel Legrand, *Kris Ahrend (The MLC): "We Will Be Ready to Deliver on January 1, 2021"* LEGRAND NETWORK (May 17, 2020) ("We are still on track and we are 100% committed to hitting it. The pandemic has created some interesting issues, and you can appreciate how challenging it can be for big establishments having to deal with the logistical challenges of people working from home. But we are very much a start-up with some 19 people today, up from two, in January so it was not too difficult to manage the transition.").

³⁴ Medianet and its executives were sued in 2012 by publishers on similar grounds to the Spotify class actions and gave relevant sworn deposition testimony regarding HFA's match rate. Granted this testimony was from 2012, but based on the litigation that gave rise to Title I as well as the *Eight Mile Style v. Spotify* lawsuit, it's pretty safe to assume that not much has changed, and may have actually gotten worse.

"Q: Do you know what percentage match rate--percentage **Harry Fox** was getting?"

A: **At the beginning the representations they gave us, they showed us figures that [showed]an overall match rate below 55 percent. But a match rate by value of over 90 percent in terms of value of royalties earned of a dollar or more over an 18-month period per track. At the end of that period, they had improved that match rate to 77-1/2 percent."**

As Senator Feinstein made abundantly clear in the Senate Judiciary Committee hearing on MMA, and as Representatives Sheila Jackson Lee, Ted Deutch and several others made crystal clear as recently as the Summer 2019 Congressional hearings on Copyright Office oversight,³⁵ the black box is a big deal to Congress.

It seems that the next logical step in this docket is to hear directly from The MLC in a formal setting exactly what The MLC has done up to today on developing its own matching efforts and a plan for dealing with the unclaimed. After reading Ms. Butler's excellent report, I hankered after the same level of detail regarding what has been done in the United States since that is the actual task at hand however intellectually interesting Ms. Butler's representations about what happens overseas may be.

My initial thought was that it would be quite useful for Ms. Butler to write a similar report on what The MLC is actually doing. On reflection, I realized that such a report was unnecessary because the Copyright Office or the Congress could simply ask The MLC to testify as to what it has been doing and plans to do in order to meet its statutory obligations. That transcript would offer a tremendous resource for the world to know how their money is to be treated so a report would be unnecessary. Why delay?

Deposition of Stephen Barraclough, *Appalseed Productions, Inc. et al v. Medianet Digital, Inc. et al* (Case. No. 1:11-cv-05922 U.S.D.C. S. Dist. NY, March 13, 2012). Excerpt of deposition available at <https://musictechpolicy.files.wordpress.com/2010/09/deposition-of-stephen-barraclough-re-hfa.pdf> (hereafter "Barraclough Deposition"). It should be noted that the match rate applied to approximately 20 million songs, so the best unmatched rate missed approximately 4,500,000 songs. It is not clear in the testimony whether this rate applied to whole songs or partial song shares.

³⁵ Subcommittee on Intellectual Property, Committee on the Judiciary, United States Senate (July 30, 2019); House Committee on the Judiciary (June 26, 2019)

2. Please identify any special issues with respect to the MLC's matching and distribution policies for musical works with identified, but unlocated copyright owners, or works for which only a partial amount of ownership information is available.

There is a simple answer to this question: If works are identified in whole or in part, then The MLC should redouble its efforts to find the missing information. Likewise, if in its supervisory role the Copyright Office determines that The MLC's musical works database is objectively unreliable, then The MLC must take immediate action to clean up their act.

In such events, The MLC should not be allowed to distribute the funds in its black box allocation nor should it be allowed to borrow against these sums under the Hoffa Clause. The sums should simply be frozen in a true escrow account held in an unrelated financial institution with no connection to The MLC, its board members or vendors.

This question anticipates the need to strengthen the volunteer Statutory Committees and cries out for an ombudsman role for songwriters seeking to comply with the formalities imposed by Title I.

3. If you believe that practices of similar CMOs, here or abroad, are relevant or helpful, please identify those practices.

Ex-US CMOs will no doubt have much to say about The MLC proposes to deal with the unmatched. As noted above, I don't understand how to make policy based on what is essentially an unverifiable news article which should be disregarded in the Office's final work product in favor of on-the-record comments at the source rather than a journalist's analysis of secret communications that not only are withheld from the report but also appear to be withheld from the Copyright Office itself. That may seem a bit harsh, but it really isn't. I'm sorry the taxpayer had to be charged for what appears to be a single source contract, but the thing speaks for itself.

4. If you believe that past practices of individual digital music providers or vendors facilitating voluntary or statutory licensing are relevant or helpful, including any under the prior song-by-song licensing system, please identify those practices.

The litigation that was the run up to Title I has made abundantly clear that even the most well-heeled of the digital services essentially have no matching processes that inconvenience them in any way. This is also true in the Eight Mile Style case against Spotify and the Harry Fox Agency.

Crucially, there has been an ear-splitting silence from the Safe Harbor Services regarding the matching efforts that they are required by Title I to undertake as a condition of their continued enjoyment of the safe harbor quid of the pro quo on the blanket license.

The Copyright Office is in the perfect position to require through regulation of the Safe Harbor Services that they fully disclose all unmatched funds they are currently holding and all available identifying information regarding those titles. It is likely that they at least have the song titles and artist names.

As I determined from a search of the “address unknown” database at SX Works, it is clear that Spotify has trouble finding songwriters for hit songs even when giving them an award. For example, Latin superstars Nicky Jam and ChocQuibTown performed at a Spotify awards show in Cancun. Yet Spotify claimed to the Copyright Office that they were unable to find the songwriters for these artists including artist-written songs.³⁶

5. Are past efforts to build music ownership databases, such as the Global Repertoire Database, International Music Rights Registry, and International Music Joint Venture, helpful to consider in identifying best practices for the MLC? If so, how?

Respectfully, a better question would be how the efforts of the Safe Harbor Services such as Spotify have fared (sued in two different class actions and at least six individual lawsuits that we know of), or Google’s Content ID (currently the subject of a class action).

³⁶ Chris Castle, *Spotify Can’t Find Songwriters Performing at Spotify High Roller Party in Cancun*, MUSICTECHPOLICY (Jan. 25, 2019).

The burning question that has dogged The MLC all the way through the MMA legislative process is who thought it was a good idea to start over again from scratch rather than build upon the millions of man-hours that publishers and songwriters have—at their own expense—poured into Content ID, Spotify’s publisher accounting systems, iTunes metadata and the other siloed transaction systems, particular because the transaction data is going to be coming from these same services in large part at a scale that has never been seen before under one roof?

6. How can the MLC facilitate claiming of accrued royalties through its public database? If there are specific fields, search capabilities, or tools that would be beneficial, or not, to the MLC’s core project, please identify them.

Other commenters will have more technical appraisals of this question, but I would make one suggestion: Do not allow The MLC to perpetuate the mistakes of the past.

Since The MLC has selected the Harry Fox Agency to provide its data, the only songs that HFA should be permitted to hand off to The MLC should be those for which HFA can identify 100% of the owners of each contributory share and none for which there are partial records or any that are “Copyright Control”. If the Office fails to do this—and remember this advice because it will come back—it is only a matter of time until the entire process collapses under the weight of complexity and customer service expense.

That may still happen, but it is a lot more likely to happen sooner if the basic tools of The MLC’s core project simply perpetuate the things that drive people crazy about HFA, which is already being sued. All of which, strangely enough, are guaranteed to increase the black box and provide the funds for the Hoffa Clause.

7. Please identify particular data formats or file types that would be helpful for the MLC to use in connection with encouraging copyright owners to have their works identified in the MLC’s database.

This question misidentifies the problem. The MLC should not be able to dictate file types or data formats for songwriters to present data to The MLC unless The MLC is going to pay for the cost of converting the publisher’s data into the required format or file type, if necessary.

But The MLC has made it pretty clear that they have no intention of underwriting this cost. That means that all these songwriters and publishers around the world who are told to “Play Your Part” will have to come out of pocket for the sole purpose of fulfilling The MLC’s statutory mandate.

Remember, the law doesn’t require rightsholders to submit their data in any particular format to The MLC, at least not yet. The law essentially says if you don’t do as your told by The MLC, then The MLC can take—there’s that word again—your money after the law compels you to license and participate in a statutory scheme and comply with formalities—there’s that word again, too—you may want nothing to do with.

8. What lessons can be learned from prior music dispute settlements and claiming systems, including the *Ferrick v. Spotify*, *Football Association Premier League v. YouTube*, and *National Music Publishers’ Association/Spotify* settlements? What about the claiming portals or opt-in procedures for these agreements were beneficial or detrimental in encouraging copyright owners to claim accrued royalties?

I will leave others to comment on these portals other than to say that the Ferrick portal (songclaims.com) looks like it was created this century. The others do not. I personally was happy with DOS, but that is no longer the standard and I would say that both songclaims.com and the SoundExchange unclaimed royalty search portal (<https://www.soundexchange.com/artist-copyright-owner/does-soundexchange-have-royalties-for-you/>) are the gold standard.

However, the frame of the question again starts from the wrong premise. Much can be learned from the Canadian experience with orphan works. I asked a lawyer at Canada’s Copyright Royalty Board why so few people use the Canadian orphan works license. The reply was that “We find them. It’s amazing who you can find with the phone book.” So they weren’t orphans after all. It’s not that they couldn’t be found, it’s that they hadn’t been found yet. And of course, you can’t find what you don’t look for.

9. Please identify education and outreach practices that the MLC should consider adopting in encouraging copyright owners to claim royalties.

A sentence that starts with the words “Google can’t find...” is ridiculous and devoid of truth value. Therefore, I think the question is not framed correctly. Remember, the Safe Harbor Services have at least two common characteristics: They are all the source of the unmatched royalties and they are all supposed to have been searching like mad for the artists they owe money to.

I suggest that the Office start with making solving the unmatched a joint effort of the DLC and the MLC *together*. Otherwise, the Safe Harbor Services become like the child arsonist who disavows any knowledge of who started the fire that burned the house down. As the Canadian lawyer said, “We find them.” So find them.

The Office seems to misapprehend the problem as a burden of the songwriter. It’s not. It’s not even the burden of The MLC. It’s a burden of the Safe Harbor Services and a problem that they created. Let’s not forget whose zooming who here.

10. Please identify activities or policies that the MLC may take or adopt to encourage groups of musical work copyright owners who may be underrepresented in the MLC’s database to come forward and claim accrued royalties. Your response may consider, for example, the unique experiences of self-administered songwriters; genres expected to generate a more diffuse record of musical work ownership; non-English language works or genres; non-U.S. based musical work copyright owners, including the role of international collection societies; and particular challenges associated with classical music metadata.

Again, it is critical to understand the problem and the solution as addressing a *shared* burden but weighted substantially to The MLC. This was *their* idea, *they* are the ones who are getting paid millions, *they* are the ones who control access to the database. We are now at the 11th hour getting it up and running. Now The MLC tells the world’s songwriters to “Play Your Part.” I will leave you to decide whether that is an insulting message to those who have been sidelined by the Establishment and are never profiled in HITS Magazine or ever

appear on a Power Players list in Billboard—but who will find their royalties swept into the black box because they didn't "Play Your Part" sufficiently or quickly enough.

There is one thing I know from experience—if there is a way to stiff old blues artists, the Establishment will find it. If that makes anyone uncomfortable with their privilege, there's an easy fix: Prove me wrong. Nothing could make me happier than to be proven wrong.

First, the Office should make clear that at least in the early years, the burden is squarely on The MLC *to find* underserved songwriters and publishers, not to place the burden on the songwriters who are underserved. If those writers are not found, it should be clear that it is a failure of The MLC, not the songwriter.

This is not to absolve the songwriter of any responsibility for taking care of their own business, but realize that Title I has changed the law significantly mostly for the benefit of the Safe Harbor Services. What ought not to happen—one way or another—is that *any* songwriters in their 80s or 90s should have to somehow figure out the ins and outs of The MLC and Title I alone in order to "Play Your Part".

Given all the smart people who were involved with drafting and passing Title I, surely they have a plan. Surely they are not relying on the public to tell them what they should be doing through comments to the Copyright Office. Surely the plan is not "Play Your Part." I am still waiting to hear The MLC's plan. These are not obscure nuances.

The need for assistance is especially stark when it comes to older jazz and blues artists, or as some might call them our national treasures. Many have lost their documents for a host of reasons, not the least of which are natural disasters like Hurricane Katrina. They are not computer savvy and may not have access to the Internet even if they could figure out the sign-up process for The MLC. Many have been flim-flammed throughout their lives. The MLC is in a prime position to do right by these gifted human beings.

I strongly suggest that the Office reach out to Classical Archive, the longest running online classical music site which was founded by a technologist and classical music aficionado, Pierre Schwob. Pierre understands the intersection of classical and metadata better than

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anyone on the planet, is multilingual and a super-expert on classical music.

You didn't mention jazz, but as it turns out Mr. Schwob's colleague at Classical Archives is the Stanford musicologist Nolan Gasser who could be tremendously helpful in both classical and jazz. You can find them both at <https://www.classicalarchives.com/about.html#tv=folks>

Both are solid people and their knowledge vastly exceeds the expertise we have come to expect.

I fear that self-administered songwriters may not even know that The MLC exists or why, or ever find themselves inside the Title I bubble. There are obvious ways to reach these people and that would start with the Safe Harbor Services who have direct billing relationships with many artist/songwriter hyphenates on the sound recording side.

If the Office makes it clear to these services that they stand a chance of losing their safe harbor for everyone if they screw up on anyone, you may—may—get their attention. But the overwhelming experience is that the services really don't care about anyone but the majors (Daniel Ek's most recent artist relations debacle³⁷ should prove the point if that's even necessary).

11. Please identify issues for the MLC to consider in establishing policies related to its duty to distribute unclaimed accrued royalties after a prescribed holding period in a manner that incentivizes reduction in the overall incidence of unclaimed accrued royalties. In particular, identify considerations related to the timing of the initial distribution of unclaimed, accrued royalties, as well as the retention of a portion of accrued royalties in the hope that they may later be matched.

I'm glad to hear the Copyright Office describe The MLC's role in collecting and distributing unclaimed royalties as a "duty"³⁸ and I expect to see that legal obligation reflected in regulations. This is particularly relevant because the way Title I was drafted there is

³⁷ Chris DeVille, *Spotify's CEO to Musicians: "You Can't Record Music Every Three or Four Years and Think That's Going to Be Enough"* STEREOGUM (July 31, 2020).

³⁸ See also NOI in this docket, text accompanying notes 22 and 23.

virtually no downside to The MLC (as opposed to its employees or board members) for failing to comply with the law or doing a sloppy job in good faith.³⁹ Yet the legislative history clearly contemplates a review by the Register of policies and procedures adopted by The MLC's board, which presumably means that those items would be made available to the public. I have yet to see them (or The MLC's by-laws for that matter.)

The question presented begins referring to “*unclaimed* accrued royalties” but concludes with “the retention of a portion of accrued royalties in the hope that they may later be *matched*.”

There is a difference between unmatched and unclaimed. If royalties for a song are unclaimed because they are unmatched, those royalties should never be distributed until significant efforts have been undertaken to find the songwriter, and perhaps not even then. The three-year holding period imposes a one-size-fits all Washington-style solution on a very complex process. It is simply not a fit.

Neither is it the case that matched but unclaimed royalties should be swept into the black box on an arbitrary date given the upheaval to business practices created by Title I. This is another reason why the initial holding period should be much, much longer than three years and could be eased back once songwriters had a chance to learn about the existence of the new blanket license, the safe harbor and The MLC.

The arbitrary three-year holding period actually creates the opposite incentive that Congress intended for the unmatched. As the Office notes in this NOI, Congress clearly stated that maintaining an accurate database is a duty and responsibility of the MLC because “[w]ith only the exception of the efficient and accurate collection and

³⁹ Congress contemplated an active oversight role for the Register. “For the responsibilities described in subparagraphs (J) [distribution of unclaimed royalties] and (K) [dispute resolution] of paragraph (3), the collective is only liable to **a party** for its actions if **the collective** is grossly negligent in carrying out the policies and procedures adopted by the Board of Directors pursuant to §115(d)(11)(D). Since the Register has **broad regulatory authority** under paragraph (12) of subsection (d), **it is expected** [by Congress and therefore by the party making the claim] that such policies and procedures will be **thoroughly reviewed by the Register** to ensure the fair treatment of interested parties in such proceedings given the high bar in seeking redress.”) Legislative history at 5.

distribution of royalties, [updating the database is] *the highest responsibility of the collective.*⁴⁰

If The MLC knows that all they have to do is look busy for three years and then the black box gets distributed with virtually no downside, then what effect does the three-year holding period actually have on “the highest responsibility of the collective”?

Frankly, I would bet that the big publishers actually don’t want to get a distribution this underhanded way, particularly when they consider the writer relations backlash that the smart people may have created.

The issue is not only how long The MLC can hold the unclaimed funds. The issue is how fast they can match and either account and pay royalties or make the money available to claim. If The MLC is matching at a rapid rate, I would say holding the monies for an initial period of ten years would be acceptable provided that songwriters are protected from the Hoffa Clause.⁴¹

As Cathy O’Neil wrote:

We’ve seen time and again that mathematical models can sift through data to locate people who are likely to face great challenges....**It’s up to society whether to use that intelligence to reject and punish them—or to reach out to them with the resources they need.** We can use the scale and efficiency that make [algorithms] so pernicious in order to help people. It all depends on the objective we choose.⁴²

The Office has the opportunity to set the objective—consistent with the intent of Congress—in the direction of holding unmatched funds longer to do what the Canadian lawyer told me their Copyright Board does: We find them.

It is worth noting that no one has raised a cost/benefit analysis for the application of the MMA safe harbor. All the more reason that it is

⁴⁰ H. Rep. 115-651 (115th Cong. 2nd Sess. April 25, 2018) at 9.

⁴¹ 17 U.S.C. § 115 (d)(7)(C).

⁴² Weapons at 118 (emphasis added).

deeply troubling that the CMO Report raises the pernicious cost/benefit analysis addressed above⁴³ for matching⁴⁴ which is exactly the kind of thing that Cathy O'Neil warned us against in *Weapons of Math Destruction*. The comparison is also inapt: The MLC is qualitatively different from the CMOs that we have to guess that Ms. Butler interviewed.

That's why it seems that any cost/benefit analysis in the CMO Report should be disregarded and rejected as irrelevant. The MLC's operating costs are covered outside of the royalty payments it administers and the Safe Harbor Services received a substantial quid for the pro quo. No other CMO has this conflict and to my knowledge, no other country has granted a safe harbor to music users the way Title I did. There should be no cost/benefit analysis involved for The MLC as it has no costs and the Safe Harbor Services get substantial benefits to which no cost/benefit analysis applies. Again, it's like comparing apples to oranges and spawning a pomegranate.

The unmatched/unclaimed royalty issues start upstream of The MLC. The Office should require the Safe Harbor Services to fully disclose the transaction route that their unclaimed royalties (and related transactions) took from the time a royalty was accrued as unmatched or unclaimed to the time it arrived at The MLC. This is no different than reconciling a bank statement. This reconciliation could be done today.

Services could be required to disclose the current balance of the unmatched and then update that initial disclosure on a monthly basis in addition to the requirements of 17 U.S.C. § 115 (d)(3)(J)(iii). The monthly calculation should show the month's starting balance of unmatched royalties, how much was paid out during the month due to matching efforts (and what those efforts entailed), how much was added during the month, and the remaining balance at the end of the month.

That disclosure would include any sums paid along the way to any third party, including, by way of example, publishers, trade associations or individuals. It is well known that some of the Safe

⁴³ See supra note 21.

⁴⁴ See Barraclough Deposition supra note 31.

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Harbor Services send publishers a list of unmatched songs and allow them to claim their songs. There already are products available to run automated queries to match catalogs. If these efforts have resulted in matches, it should be easy enough for the Safe Harbor Services to disclose those payments.

There is no reason for this information to receive confidential treatment. Indeed, the information cannot be confidential as there is a statutory requirement for a “public notice of unclaimed royalties” on The MLC’s public facing website listing all unmatched songs (or shares of songs).⁴⁵ Neither can there be confidential treatment for the song titles (and other related identifying metadata) for the corresponding songs claimed to be unmatched.

12. Please identify preferred methods for the MLC to publicize the existence of unclaimed accrued royalties before they are distributed, in light of the minimum 90-day period required by the statute.

The MLC should not bear the entire burden of publicizing unclaimed accrued royalties. (See discussion of “unclaimed” vs. “unmatched” above.) The Safe Harbor Services may well be in a position to push out information about the unclaimed list as part of the well-publicized creator programs that each touts (such as Spotify for Artists).

The unclaimed list would actually be useful information to the artists who distribute on their platforms as opposed to a heat map of streams in Poughkeepsie, Yellowknife, Singapore and Seattle that is supposed to help them route a tour that cannot exist due to COVID.

If the Safe Harbor Services were willing to lift a finger for a mouse click to fulfill their obligations under the Title I safe harbor, they might actually have a low-cost solution to contacting millions of songwriting artists. As this hasn’t happened once in the last 15 years, I don’t expect it to happen now, but I would point out that the Safe Harbor Services should be required to do at least a little singing for their safe harbor.

⁴⁵ 17 U.S.C. § 115 (d)(3)(J)(iii).

13. Please describe how success in lowering the incidence of unclaimed royalties may best be measured.

Please see above my answer to question 11 regarding reconciling unmatched/unclaimed funds. Given that the Safe Harbor Services are supposed to make efforts to reduce the unmatched, a public reconciliation process would be one way to measure how well the Safe Harbor Services are doing their jobs. In theory, one would expect to see the unmatched decline.

The same could be said of a similar process for The MLC. The problem for songwriters is that they often have no earthly idea what is going on behind these Safe Harbor Services walls and no one is doing much to inform them despite the MMA hoorah.

When it comes to MLC audits of Safe Harbor Services, special care should be taken. First, all communications regarding audits or settlements of audits or settlements of potential audit claims should be made public immediately. If an audit is noticed, it must actually be undertaken.

For example, if The MLC plans to audit one of the Safe Harbor Services that pays its salaries, The MLC should be prohibited from settling the audit claims before the audit is noticed unless the entire chain of correspondence and settlements are made public. Remember—it's not their money.

If The MLC notices an audit but does not conduct the audit because it settles, then both the audit notice and the settlement should be made public.

I'm going back and forth on whether The MLC should be able to hire an auditor on a contingent fee basis. Whatever the terms of the auditor's engagement are, it would be customary for those terms to be both approved by The MLC board in a written board vote and made public shortly after the auditor is engaged and before the audit commences or is settled. It should be clear from the engagement that the fiduciary duty of the auditor flows to all the songwriters subject to the audit.

To reduce what we in Texas call the “bubba effect”, the auditor should not be conflicted or have any conflict waived. It’s a big job—they should be in or out.

All third-party payments from the audit settlement should be disclosed publicly, including payments to auditors, attorneys, experts, trade associations, executives and consultants.

14. What actions can others, including those engaged in digital platform, sound recording, music publishing, and music creation activities, voluntarily take to contribute to a more accurate musical work data supply chain?

One of the biggest problems with metadata in the supply chain is that some services take it upon themselves to change the metadata as it suits them. This is crazy.

As should have been obvious to the Copyright Office during the “address unknown NOI” debacle, services were certifying they had confirmed that copyright owners could not be found in the public records of the Copyright Office. This was clearly false in many cases, yet nothing was done about it. Accordingly, I would include the Copyright Office itself in that supply chain.

I would recommend the Office consider an appropriate punishment for anyone changing metadata to suit their consumer experience (or for any other reason). Until there is some downside for intentionally (or negligently) degrading metadata, it’s hard to take any of this seriously.

15. What actions can better ensure the accurate assignment of unique identifiers like the International Standard Recording Code (“ISRC”) and International Standard Musical Work Code (“ISWC”) identifiers early in the digital supply chain?

SoundExchange maintains the definitive ISRC database. What you don’t want is for anyone to be able to access the SoundExchange ISRC data and then change it without the copyright owners and SoundExchange approving. Sometimes there are mismatches (such as an incorrect ISRC claimed for a soundtrack album), but these should be manageable corrections.

Digital audio workstations are capable of attaching credits and identifiers to original recordings and songs recorded. However, it is still necessary to protect these data from being changed. Companies like Jaxsta and Auddly should be consulted regarding their efforts.

16. Please identify education and outreach practices that digital music providers and others may consider adopting in encouraging copyright owners to claim royalties.

The iTunes Style Guide is an extremely thoughtful and detailed approach to metadata. Apple has done a great job of training their employees and we have always had good experiences with them. Plus, you'll note they have not been sued by songwriters.

The question again is framed in the light of copyright owners claiming royalties. I say again the better approach is to get the Safe Harbor Services to play their part in getting it right the first time as required by the Copyright Act. I think it would be a big mistake to say that Title I has now shifted the burden of proper licensing to the songwriters and away from the richest companies in commercial history.

17. Please recommend existing guides or other resources regarding music data that can be used by copyright owners and songwriters, and/or information to be included in such educational materials.

Copyright owners and songwriters very often know how to register with their PRO and with SoundExchange. The question again is framed as though it was the responsibility of the songwriter to do the Safe Harbor Services job for them. If that's how it's going to be, then it would be helpful for the Copyright Office to notify songwriters that the traditional burdens have been shifted from music users to them in the unfunded mandate of Title I.

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18. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study, including any further legislative changes that you believe are needed to reduce the instance of unclaimed royalties.

I have already noted a number of changes that I think are arguably necessary to Title I. I would point out that composers and film production libraries have some special needs regarding the black box and I have yet to see these contributors to the creative community included in the plans for the unclaimed and unmatched.

Thank you again for the opportunity to comment.

Very truly yours,

A handwritten signature in blue ink that reads "Ch. Castle". The signature is written in a cursive, flowing style.

Christian L. Castle

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