Subcommittee on Courts, Intellectual Property, and the Internet
of the Committee on the Judiciary
U.S. House of Representatives

"Five Years Later – The Music Modernization Act"
Field Hearing, Belmont University, Nashville, TN
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Responses to Questions for the Record
by Kris Ahrend
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August 11, 2023

Questions Submitted by Representative Darrell Issa, Chair of the Subcommittee

Question 1. With respect to the "black box" royalties the MLC has accumulated to date, please provide the following information:

- **The total amount of such royalties currently in the custody of the MLC, the total amount of such royalties that has been distributed based on specific songwriter matches, and the total amount of such royalties that has been distributed based on relative market shares.**

- **The total amount of those royalties that has been successfully matched with one or more specific songwriters, and the total amount of those successfully matched royalties that have been claimed.**

- **The total amount of those royalties that are being held due to the Phonorecords III case.**

RESPONSE:

It is important to first clarify that, while there are still unmatched royalties, "black box" royalties no longer exist under the U.S. compulsory mechanical license – The MLC fulfilled the MMA's directive that the black box be illuminated. "Black box" is a term to describe unpaid royalties connected to *undisclosed* uses of works. "Black box" captured the intensely frustrating situation that rightsholders faced prior to The MLC, when there was no transparency about uses connected to royalties. Prior to The MLC, if a streaming service did not pay royalties on a particular song, there was often no way for rightsholders to know if the lack of royalties was because no royalties were due or because the streaming service had failed to identify the proper song or rightsholder. Streaming services further did not provide information on the amount of royalties at issue or even the general size of the unpaid "black box" royalty pools. Estimates varied wildly throughout the industry: in 2019, the industry publication *Billboard* estimated the size of

the "black box" was $250 million,[1] while a figure of $4 - 5 billion was raised in this Subcommittee's hearing on Oversight of the U.S. Copyright Office.[2] In February 2021, The MLC reported the exact size of the unmatched royalty pools that each digital music provider turned over to The MLC pursuant to the MMA, and the total was approximately $425 million (with approximately $2 million in additional royalties coming in after that date, bringing the total to approximately $427 million).

Pursuant to the MMA, The MLC then went to work making available to the public the data about what recordings and songs were connected to these royalties, and we have completed that process. The MLC is proud to have closed the chapter on "black boxes" in this corner of the music industry. Not only does The MLC identify and publicly disclose exactly how much in royalties remains unmatched in the aggregate, but even more importantly, The MLC also identifies the unmatched recordings and unclaimed shares of songs in a searchable database that is free to the public, together with easy-to-use tools that rightsholders can use to register their song ownership and identify any of the listed uses that they believe match to their songs.

To be clear, this is not to say that The MLC leaves it to rightsholders to do the work of matching. On the contrary, the vast majority of matching is done by The MLC based on its extensive and growing works database. As discussed at the hearing, The MLC devotes substantial resources to matching, and has been a leader both in expanding and developing its database of songs, and in matching those songs to the ever-increasing number of recordings in the market. Rather, the end of the "black box" represents the fruition of a value that appears throughout the MMA, namely that rightsholders are essential to making the process the best that it can be, and so they must be given access to the data so that they can play their part.

Turning now to the specific data points requested, there are two very distinct pools of royalties that The MLC is managing now: (1) the approximately $427 million in historical unmatched from uses before the blanket license; and (2) the blanket royalties that The MLC collects and processes and distributes on a monthly cadence. I will address each of these pools in turn. I will aim to provide below all of the details requested for each pool, but also want to stress that this information and much more about our matching and distribution activities is available in our detailed 2022 Annual Report and its 42-page Appendix.[3]

Also, before turning to the two pools, I will offer some general statements on the data requests:

- The answer to the request for "**the total amount of… royalties that has been distributed based on relative market shares"** is zero. There has been no market share distribution of any royalties, nor does The MLC have any such distribution planned in the coming year. The MLC is focused on matching uses and distributing royalties to the

[1] Ed Christman, *Just How Much Money Is There in Unclaimed Black Box Royalties?*, Billboard (June 26, 2019), https://www.billboard.com/articles/business/8517639/unclaimed-black-box-royalties-how-much-money.

[2] Oversight of the U.S. Copyright Office: Hearing Before the H. Comm. on the Judiciary, 116th Cong. (2019).

[3] Available at https://www.themlc.com/hubfs/The%20MLC%202022%20Annual%20Report.pdf.

identified rightsholders, and it has not yet turned to the evaluation of what remaining royalties might be appropriate for a market share distribution, let alone begun the process to effectuate such a distribution, which will occur with significant public notice and transparency as Congress intended.

- The requests for "**the total amount of… royalties that has been distributed based on specific songwriter matches**" and "**the total amount of those successfully matched royalties that have been claimed**" appear to address the same data. Generally, when a share of a matched musical work has been claimed, the associated payable royalties are distributed to rightsholders. There are discrete exceptions to this process. First, if the work or share is subject to a legal or dispute hold, then royalties are not distributed. These types of holds involve less than 1% of the royalties that we process. Second, sometimes The MLC does not have sufficient information to pay a rightsholder, i.e., The MLC does not have requisite tax forms, banking information, or other related issues.

- The numbers below reflect the *principal* of the royalties collected and maintained. The MMA also requires The MLC to accrue interest for unmatched royalties at the federal short-term rate and pay out that interest together with the principal when payable. As discussed below, The MLC has a program for maintaining cash royalty balances so as to accrue the interest mandated by the MMA, which is then calculated and paid with the principal when payable.

Historical Unmatched Royalties (2007-2020)

As of the end of June 2023:

- The MLC has received **$426,879,731** in total royalties at then-operative statutory rates, covering periods from 2007 through 2020.

- **$402,862,507** is "**the total amount of such royalties currently in the custody of the MLC.**"

- **$373,585,703** of this amount relates to 2018-2020, years that fall under the Copyright Royalty Board's (CRB) *Phonorecords III* rates which have recently been retroactively changed. This is the amount that answers the request for "**the total amount of those royalties that are being held due to the Phonorecords III case.**" However, please note that this precise total royalty amount is expected to change due to retroactive adjustments under the new CRB rates. As this amount is on hold due to the extended CRB process, it is not included in the numbers below related to matched, claimed, and distributed royalties.

- **$24,017,224** of the total royalties received has already been distributed and is thus "**the total amount of such royalties that has been distributed based on specific songwriter matches."** This amount relates to periods before the *Phonorecords III* period which has been on hold.

- It is currently not possible to identify precisely how much of the pre-*Phonorecords III* royalties transmitted to The MLC have been matched with songs (beyond the $24,017,224 noted above, which has been matched, claimed, and already distributed). The reason for this inability is a Copyright Office regulation that allowed digital music providers to report historical unmatched usage to The MLC but not transmit the associated royalties to The MLC, where the digital music provider claimed to have settlements with copyright owners that it believed would ultimately be due those royalties. *See* 37 C.F.R. 210.10(c)(5). Spotify in particular did not transmit **$30,027,057** in royalties for unmatched usage based on this regulatory provision. Thus, The MLC is matching against $30 million more in Spotify usage than we received royalties for, and even after The MLC matches some of that usage to a song, until the shares of the song are claimed, The MLC does not know if the match relates to royalties that it has in its custody or if the match relates to a settlement for which The MLC does not have royalties. **$55,395,843** of the pre-Phonorecords III *usage* reported to The MLC has been "**successfully matched with one or more specific songwriters**," but this amount might include matches that relate to settlements for which The MLC does not have royalties.

Blanket Royalties (2021-present)

From the inception of The MLC's blanket license administration on January 1, 2021 through June 2023:

- The MLC has processed usage for **$1,663,068,954** in total royalties at then-operative[4] statutory rates.
- Of that amount, The MLC matched usage related to **$152,831,444** in royalties as covered by voluntary licenses between digital music providers and rightsholders. The MMA requires The MLC to carve out and not collect those royalties, so that they can be paid directly pursuant to the voluntary license terms.
- After that carve out, the MLC has collected **$1,510,237,510** in blanket license royalties.
- Of that amount the collected amount of $1,510,237,510, The MLC has matched **$1,332,927,689** (resulting in unmatched of $177,309,822) of these collected royalties to a work, which is thus "**the total amount of those royalties [that have been in the custody of The MLC] that has been successfully matched with one or more specific songwriters**." Of that, The MLC has already distributed to rightsholders **$1,179,255,058**, which is the amount that answers the request for "**the total amount of such royalties [that have been in the custody of The MLC] that has been distributed based on specific songwriter matches.**"

[4] After a long delay in finalizing the Copyright Royalty Board rates for the 2018-2022 period, new and higher retroactive rates have just been published and we expect to collect significant additional royalties for 2021 and 2022 in the coming year.

Please note that while the question asks specifically for matching as a subset of collected royalties, a more accurate understanding of The MLC's matching activity should factor in the amounts that are matched and then carved out for voluntary licenses, which can only occur after The MLC matches the royalties to a specific work. Factoring in voluntary licenses, The MLC has matched more than **$1,485,759132** of the **$1,663,068,954** in total usage processed, an average **match rate of 89%** of royalties.

- The MLC has also identified an additional **$9,180,638** in royalties that had been associated with works ineligible for the blanket license (primarily non-musical works) and these will be paid out across all works *pari passu* as a true-up to their original royalties in subsequent rounds of adjustments.

- That leaves **$144,491,992**, of which **$132,314,670** are royalties for songs that have been matched, but for shares that have not been claimed by any rightsholder. The remaining **$12,177,322** are royalties implicated in legal or dispute holds.

- The unmatched, unclaimed, and royalties on hold total $321,801,814, and with pending adjustments, total **$330,982,452**, which is "**the total amount of such royalties currently in the custody of the MLC**."[5] The MLC provides this detail in our monthly newsletter sent to all Members and published on the MLC website;[6] in our annual summary provided in our Annual Royalty Recap published in the February newsletter; and as noted above, in our Annual Report.

Question 2. With regard to the MLC's investment policy:

- **Have any funds actually been invested yet by the MLC pursuant to its investment policy? If so, how much and what was the source of those funds (e.g., unmatched and unclaimed royalties, matched but unclaimed royalties, matched and claimed royalties that have not yet been distributed, assessment funds, etc.)?**

- **Did the MLC Board of Directors vote on the investment policy, and if so, what was the result of the vote?**

- **You testified that advisors recommended that certain aspects of the MLC's investment program be kept confidential. What specific aspects did the advisors recommend be kept confidential, and what aspects were not recommended to be confidential?**

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[5] These numbers are through the June distribution, and do not take into account the status of routine monthly payments for the *July* distribution, some of which would have been received from digital music providers and so technically in the custody of The MLC at the end of June. In addition, The MLC receives prepayments from digital music providers which are maintained as funds on account and which may be applied to future royalty obligations.

[6] See https://www.themlc.com/newsletters

- **How has the MLC informed its Board, its members, and the public about the non-confidential aspects of the investment policy?**

- **If the MLC invested royalty funds under its investment policy, and those investments resulted in net losses, how would the MLC address the resulting shortfall in royalty funds according to its investment policy?**

RESPONSE:

It is important to note first that the MMA effectively requires The MLC to have an investment program. The MLC does not engage in any sort of speculative or risky investing, but rather its program maintains the lowest risk investments available that can meet the MMA mandate to accrue interest at the federal short-term rate. What may not be apparent to many is that it is not possible to take hundreds of millions of dollars in cash to any bank – or even a variety of banks – and have a secured and insured deposit account with a guarantee of receiving interest at the federal short-term rate. The only way for The MLC to fulfill this particular statutory requirement was to create an investment program designed to meet the MMA's directive. The MLC's low-risk investment activities are a necessity, not a preference. There is no deposit account where The MLC can maintain royalty funds and earn interest at the federal short-term rate, without risk to the principal or interest. Since no such account was created by the MMA or made available by the government, and standard, insured bank accounts will not maintain The MLC's cash flow with an interest guarantee that meets the MMA's directive, The MLC developed an investment program intended to earn the necessary interest rate while keeping risk at a minimum, working with an outside financial advisory firm that has extensive experience in the field and is "fee-based," which means the firm is paid fixed fees instead of commissions and thus has no financial interest in the ultimate investment decisions.

The MLC has managed all of its funds through its investment program, and royalty funds and operational funds (as collected through the administrative assessment) are addressed separately and maintained separately. The program has investments in a handful of mutual funds managed by significant and experienced institutional investment firms that our financial advisors have thoroughly vetted. Over time, we have also held a small amount of funds in deposit accounts at a handful of commercial banks willing to offer very competitive interest rates. Funds are never placed in investments that would be classified as having heightened or high risk. The MLC's operational funds are kept entirely separate from royalty funds and are maintained in standard business cash management accounts, which are FDIC insured, and diversified, high-grade money market funds.

The MLC presented its investment program to the MLC board of directors for approval in January 2021, and after consideration and discussion with our financial advisory firm, the board approved the program.

Our financial advisors have advised that we not make public any details about specific investment solutions. Their reasons include security concerns and concerns that such information could be used alongside our public royalty distribution timelines to engage in market timing to the detriment of The MLC. Public knowledge about large-scale trades can be used to exploit the market for an investment to the detriment of the known trader. Other statements in the investment

policy are not confidential, including statements about the need to minimize risk, the need to act in accordance with the MMA, the intention to limit costs, and the concerns with holding funds at issue in bank accounts where funds would substantially exceed FDIC insurance.

The MLC has informed the public about some non-confidential aspects of its investment policy in its Annual Report, including that the policy covers the investment of royalty and assessment funds, respectively, sets forth The MLC's goals and objectives in establishing policies to implement The MLC's investment strategy, and contains an anti-comingling policy (as called for by the MMA).

The MLC has put great effort into crafting a cash management and investment program that minimizes risk while still meeting the MMA's high demands. It is our intention and expectation that there will never be a shortfall. With respect to the question, **"if the MLC invested royalty funds under its investment policy, and those investments resulted in net losses, how would the MLC address the resulting shortfall in royalty funds according to its investment policy?**" – in the event that the situation in the hypothetical came to pass, The MLC would have to address the matter based upon the specific details at hand, but we do not project any shortfalls.

Question 3. Some have reported that the MLC's database includes errors. What is the MLC doing to detect errors or discrepancies in its database, and what has the MLC discovered in terms of the extent of erroneous data in its database?

- **What measures is the MLC taking to remedy reported discrepancies in its database?**
- **How does the MLC plan to improve its database and ensure that it contains accurate records?**
- **What percentage of matches found using the MLC's database has included erroneous data, to the best of the MLC's knowledge?**
- **What data vendors has the MLC used thus far to create its database, and what percentage of its data came from each vendor? How were those vendors chosen, and what other options were rejected?**

RESPONSE:

As with any large-scale database covering an active and changing marketplace, there will always be records in The MLC database that need to be updated, supplemented, and/or corrected, as well as new data that needs to be added. The MLC database includes dozens of data fields related to ownership and over 32 million[7] song records, and we have been receiving more than

[7] For reference, in a recent letter submitted to the Subcommittee on this hearing, ASCAP and BMI discuss their impressive joint venture to create a shared database, entitled SONGVIEW, which "provides easily searchable, transparent, and authoritative performing rights data on songwriters, composers, music publishers, and copyright ownership shares for nearly 28 million works, amounting to over 90% of U.S. music." *Music Modernization Act Five*

500,000 new registrations each month in recent months. Moreover, ownership of existing songs in the database is constantly changing, so even the existing song records are never "final." The MLC database also includes data relating to hundreds of millions of monthly sound recording uses across the fifty blanket licensees. As I noted in my written testimony, it is reported that now over 120,000 new music tracks are uploaded to streaming services each *day*, more than 3.5 million each month.[8] Records relating to usage of those new sound recordings are reported to The MLC monthly. Moreover, each digital music provider reports a new sound recording separately, with its own unique track ID, among numerous fields of other metadata provided to The MLC. While some metadata fields that should allow the different uses to be connected (such as the International Sound Recording Code (ISRC)), this is not always the case, so The MLC must also manage multiple iterations among new monthly tracks. Matches between those sound recordings and their underlying songs are reflected in the database, as is data related to unmatched sound recordings. In short, The MLC manages an extraordinary flow of data that is constantly changing from month-to-month.

To manage this data successfully, we have internal teams devoted to monitoring the data we receive from both MLC members and the digital services, including member claims and attempts to make new matches between sound recording products and the works our members have registered. We have also designed numerous tools to assist rightsholders in updating their data. Together, these efforts enable us both to add more data to our database while also improving the quality of the data in our database.

The question asks, "**what has the MLC discovered in terms of the extent of erroneous data in its database?**" The MLC has discovered that, while there is, and always will be, more work to do to update and improve the quality of the data in our database, the quality of our data is already high enough that the industry actively employs it, taking advantage of both the comprehensiveness of the data and the transparency that we provide. As I noted in my written testimony, at least 170 entities have signed up for access to weekly, updated bulk copies of the database, and nearly 90 have signed up to use our API to send musical works ownership search queries directly from their internal systems to The MLC's database.

A core principle of The MLC is to compile *authoritative* data.[9] The MLC sources musical works ownership data solely from the owners of those works (or their authorized representatives),

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Years Later: Congress Holds Hearing to Examine its Impact, at https://www.bmi.com/news/entry/music-modernization-act-five-years-later-congress-holds-hearing-to-examine (July 20, 2023). ASCAP and BMI's collaboration on this project deserves praise. Similarly, The MLC is proud that its database provides easily searchable, transparent, and authoritative *mechanical* rights data on songwriters, composers, music publishers, and copyright ownership shares for over 32 million works.

[8] Stassen, M., *There are now 120,000 new tracks hitting music streaming services each day*, Music Business Worldwide. (May 25, 2023) (retrieved from https://www.musicbusinessworldwide.com/there-are-now-120000-new-tracks-hitting-music-streaming-services-each-day/).

[9] This question requests information concerning "errors or discrepancies" in The MLC's database. However, there is no consensus about what would be considered an error or discrepancy in the data, let alone what would be a material error or discrepancy, particularly where data is from an authoritative source. A sound recording titled "Sitting On The Dock Of The Bay" could be an embodiment of the song titled "(Sittin' On) The Dock Of The Bay." Is there a

and we source sound recording usage data solely from the services that engage in the usage. Federal regulations also provide that, for critical data fields, the data reported to The MLC by services will not alter the sound recording data received from sound recording licensors. 37 CFR 210.27(e)(2)(ii). These practices are designed to make The MLC database as authoritative as possible, with the relevant stakeholders ultimately responsible for the accuracy of the data related to their stake.

The question asks, "**how does the MLC plan to improve its database and ensure that it contains accurate records?**" The short answer is: in every way that we can. We utilize many different tools in this process. The one thing we do *not* intend to do is abandon the authoritativeness of sourcing ownership data solely from the respective owners or sources of that data. Rather, we are always conceiving, designing, and building new tools to further connect rightsholders to their data. As directed by the MMA, we engage deeply in industry outreach and member support, spreading the message and the tools to further connect our database with the shared knowledge of the creators we serve.

The question asks, "**what measures is the MLC taking to remedy reported discrepancies in its database?**" The primary way that concerns about discrepancies in ownership data arise is in connection with overlapping claims to ownership. Pursuant to the MMA, we administer an Ownership Dispute Policy to allow copyright owners to challenge claims of ownership, and while The MLC does not decide competing claims, our policy includes a mechanism to hold disputed funds pending resolution of the dispute. https://www.themlc.com/dispute-policy; 17 U.S.C. § 115(d)(3)(K).

With respect to other reports of discrepancies, including with respect to matches or song royalty eligibility (such as in connection with registration of public domain works or non-musical works), we devote significant resources to reviewing and investigating concerns. If we find an error, we take the appropriate steps to have it corrected. If one of our members informs us of a discrepancy, we investigate that discrepancy and, if we corroborate their view, take the appropriate steps to have it corrected.

The question also asks, "**What data vendors has the MLC used thus far to create its database**." Notwithstanding the core principle of sourcing ownership data only from the owner, at its inception The MLC was required to retain a vendor with a substantial existing database because the MMA required The MLC to have a fully operational system in 18 months. During the designation proceeding before the Copyright Office, The MLC described it this way:

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discrepancy in the data? If one looks at the precise characters in the text metadata then it looks like an error, but not if one looks at the title as a whole. If the title is the one chosen by the recording artist, then the track title data is not an error, as it reflects the actual track title, which does not have to be identical to the underlying song. In this situation, the sound recording data may be correct, but The MLC may have to do some additional work to make sure that the sound recording is matched to the correct song. Indeed, a cover of the song that is intentionally titled simply "The Bay" may have entirely "correct" data yet be very difficult to match, while a different cover titled "SittinOnThe DockOfTheBay" may have errors (in the missing spaces and special characters in the title) and yet be easy to match. The endeavor to define and judge what counts as a database "error" is thus a different, and less relevant, activity from The MLC's core activity of matching and paying royalties to the proper rightsholders.

> Even with MLC's depth of experience, broad coalition support, and demonstrable capability, a fully scaled, end-to-end system for processing usage data through royalty payments built from scratch could not be ensured to be 100% reliably operational by the statutory license availability date of January 1, 2021. It is therefore much more prudent to leverage existing platforms by the most experienced and capable vendors at the start, and build the collective's own capabilities on a viable schedule.
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> MLC's RFI/RFP process as fully explained in Section B.2.d, *infra,* has identified the foremost vendors in the world with demonstrated capability to provide a comprehensive interoperable database for matching. Practically, this would be accomplished by vendors in one of two paths. The first would be by quality incumbent domestic vendors, who should already have data and integrations. A quality matching platform requires live, ongoing connections with rightsholders. Quality domestic vendors will already have a wide network of contacts with rightsholders throughout the market, and processes for keeping their database current, as this is a requirement for their existing operations just as it is a requirement for the collective. Due diligence would confirm the comprehensiveness and quality of this database.
>
> The second path would be taken by vendors without substantial domestic operations, who would have to undertake a significant initial aggregation of data. Notably, foreign vendors at the necessary scale to be considered should already have contacts and processes with the bulk of the U.S. publishing market, which, in a global music business, has ex-U.S. operations as well. Nonetheless, this aggregation is a substantial task, and demonstrating that capability is a big part of the due diligence in MLC's RFP process. (MLC Designation Proposal[10] at 33-4)

The question then asks, "**How were [data] vendors chosen, and what other options were rejected**." As noted in the above quote, The MLC's designation proposal to the Copyright Office contained significant information on the RFI/RFP process. As it stated:

> The RFI process was publicly announced in November 2018 and open to the public. All leading vendors were contacted directly for participation, and opportunity to join was promoted to the public on MLC's website. [A copy of the RFI that was distributed to those who joined the process was attached as Exhibit 3 to the MLC Designation Proposal]. Participants to date in the RFI process included:
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> · ASCAP
> · AxisPoint
> · BackOffice
> · BMI
> · BMAT
> · Crunch Digital

[10] See Designation Proposal of Mechanical Licensing Collective ("MLC Designation Proposal"), U.S. Copyright Office Dkt. No. 2018-11 (March 22, 2019) (available at https://www.regulations.gov/comment/COLC-2018-0011-0012).

· DDEX
· Gracenote
· ICE
· Music Reports, Inc.
· Open Music Initiative (OMI)
· Sacem/IBM
· SESAC/HFA
· SOCAN/DataClef
· SourceAudio
· SXWorks

Thorough review of responses to the initial RFI was undertaken beginning in December 2018. RFI participants were broadly vetted by numerous members of the copyright owner community, including the publisher members of the Operations Advisory Committee who as a group have significant experience with each of the vendor's services and capabilities (*see* Section C.3 for information on committee members). Additional input was provided on request by major digital services, including Amazon, Apple, Google, Spotify and Pandora, each of who also have significant experience with vendors in this space. Review was on rigorous standards and in accordance with established criteria.

In February 2019, a smaller group of participants determined to be most likely to meet the high demands of MLC were prioritized for movement into an RFP process, including:

· ASCAP
· BackOffice
· ICE
· Music Reports, Inc.
· SESAC/HFA
· SXWorks
· Sacem/IBM

[A copy of the RFP, along with the its Detailed Functional Requirements Appendix, was attached as Exhibit 4 to the MLC Designation Proposal.] Responses to the advance RFP were received on March 11, 2019. [*Footnote*: Three of the initial RFP participants—ASCAP, BackOffice and ICE—determined that the aggressive demands of the statutory timeline for the collective conflicted with other business goals and have removed themselves from the process.] As is apparent, the RFP is a detailed document collecting comprehensive information about each vendor's capabilities to assist MLC in establishing full operations on the statutory timeline. The 72-point appendix of Detailed Functional Requirements and associated Commentary lays out the many components that the vendor(s) must be able to fulfill, as well as the statutory timeframe.

A self-assessment spreadsheet was also sent to vendors to identify with particularity as to each of the 72 Detailed Functional Requirements whether the vendor provides full support, partial support or no support. Preliminary self-assessment indicates

> that between the RFP participants, each of the 72 functional requirement is supported, with nearly all of the requirements fully supported. In the aggregate, the participants remaining in MLC's RFP process have processed nearly 20 trillion lines of sound recording usage and more than $4.2 billion in royalties for the U.S. territory over the past 3 calendar years, and have more than 20 million unique works in rights databases and existing connectivity with approximately 50,000 publishers.
>
> MLC is currently undertaking a full and detailed evaluation of the RFP response information, which will include extensive in person meetings and discussion with vendors concerning their capacities and planning. MLC will then proceed to due diligence on selected vendors, examining and testing systems, investigating statements and business history, obtaining additional documentation and other steps to confirm the bona fides of the vendors. (MLC Designation Proposal at 55-56)

After designation, The MLC completed the RFP process in the manner described above, which included substantial due diligence as to database content and quality and retained the Harry Fox Agency (HFA) as a vendor. HFA is one of the oldest song license administrators in the country and had a substantial database of song ownership. As part of the vendor agreement, HFA effectively gave up its proprietary song ownership database by agreeing to share its data with The MLC, since The MLC's ownership data is publicly searchable at no cost and publicly accessible in bulk for a nominal access fee, as required by the MMA.[11]

However, The MLC did not simply utilize a vendor database. Before launching licensing operations, The MLC began an industry-wide Data Quality Initiative (DQI), in which every rightsholder in the industry was able to compare in bulk its ownership data with the data that The MLC sourced from HFA to validate or make any corrections. Data for millions of songs in the database were reviewed by rightsholders through the DQI, which allowed them to validate or update their ownership records that had been sourced from HFA.

The question asks what "**what percentage of its data came from each vendor**" used by The MLC. Because database ownership records have many data fields, and records can be modified regularly and incrementally, there is no way to identify the precise percentage of data that should or could be attributed to a vendor. The only vendor that The MLC sourced any musical works ownership data from was HFA, and a significant portion of that data was also then re-reviewed by rightsholders as part of the DQI, allowing validation or updating of records. Thus, even for the portion of The MLC database that was initially sourced from HFA, a significant portion of that ownership data would appropriately be considered to come from rightsholders.

Since then, The MLC's database has grown significantly. When The MLC launched in January 2021, the database contained data for approximately 17.4 million songs. Today, it contains data for more than 32 million songs. In 2022 alone, The MLC registered 8,230,200 new musical works and the data for these additional songs came directly from rightsholders.

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[11] The current cost of Bulk Access Subscription program is $100 for a setup fee, which includes first month of access, and costs $25 per month thereafter.

Question 4. The MMA mandates that the MLC Board of Directors consist of ten publisher representatives and four songwriters as voting members. In what ways has the composition of the Board presented challenges to the MLC's mandate to remain a neutral administrator?

- **How were MLC Board members chosen, and were there any candidates from publishers that are not also represented on the Board of the NMPA?**

- **Are there any differences between voting and non-voting members of the MLC Board of Directors with respect to access to information, and if so, does the MLC have plans to mitigate that information gap?**

RESPONSE:

I do not believe that the composition of The MLC board presents any challenge to The MLC's statutory mandate. On the contrary, as described below, the board reflects a broad diversity of stakeholders who bring experience and commitment to fulfill The MLC's mission and the MMA's vision, and who deserve considerable credit for the success of The MLC to date.

Representatives from major trade groups advocating for songwriters, music publishers, and digital music providers hold the three non-voting board member seats, and together represent The MLC's three core stakeholder groups. The MLC does not make distinctions with respect to access to information based on whether a board member is a voting or non-voting member.[12]

With respect to voting members of the board, the MMA does not include all stakeholders, but restricts membership exclusively to *licensors*. Pursuant to the MMA, The MLC administers the blanket license, but it does so on behalf of the actual licensors and rightsholders. Roles traditionally played by licensors—including receiving notices of license and collecting royalties directly from digital music providers and enforcing the rates and terms of the compulsory license—were reassigned by the MMA to The MLC.[13] In doing so, the MMA also explicitly provided that the voting members of The MLC board be composed exclusively of those licensors whose rights The MLC is now exercising.

The MMA states that ten members of the board shall be "representatives of music publishers… to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities." 17 U.S.C. 115(d)(3)(D)(i)(I). The MMA also provides for four songwriter members, but states that they must be four "professional songwriters who have retained and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored." 17 U.S.C. 115(d)(3)(D)(i)(II). In other words, the songwriters on the board must also be licensors.

The MLC governance structure defined in the MMA thus focuses on the role of licensors, which is the role that the MMA reassigned to The MLC. The MMA provides that the entity to be

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[12] Further, as the MMA directs, no board member has access to confidential information relating to other rightsholders. 17 U.S.C. 115(d)(12)(C); 37 C.F.R. 210.34.

[13] 17 U.S.C. 115(d)(3)(C).

designated as the mechanical licensing collective shall be the entity "that is endorsed by, and enjoys substantial support from, musical work copyright owners that together represent the greatest percentage of the *licensor* market for uses of such works in covered activities, as measured over the preceding 3 full calendar years." (emphasis added)

The bylaws[14] adopted by The MLC board further divide the ten music publisher seats into five seats for the largest five publishers and five seats for independent publishers. The MLC board thus represents the three main types of licensors who were displaced by The MLC: songwriters who self-administer, independent publishers, and the largest publishers. Pursuant to The MLC's bylaws, each of the voting members of the board of directors must be appointed by the Librarian of Congress, and each of the three licensor groups recommend to the Librarian of Congress their respective representatives on The MLC's board. The five largest publishers do not vote on the selection of independent publisher board members, and *vice versa*. In other words, the only votes in the elections for independent music publisher directors come from independent music publishers. Similarly, none of the music publishers has a vote in the election of songwriter directors, and the candidates for those songwriter seats are determined by a committee of songwriters, including ones selected by three major songwriter trade groups: Songwriters of North America, the Recording Academy, and Nashville Songwriters Association International.

The majority of the voting board – 9 out of 14 votes – is thus made up of songwriters and independent publishers who are selected for recommendation to the Librarian of Congress for appointment exclusively by other independent music publishers and songwriters, and who are qualified for the board by virtue of being licensors.

The question asks, "**how were MLC Board members chosen?**" I described above how the three types of voting members are chosen under the bylaws. Ten of the fourteen current voting members are also founding board members. In its designation proposal, The MLC laid out in detail how these founding board members were selected:

> MLC's songwriter Board members were selected by a panel of respected songwriters (consisting of two professional songwriters from each of NSAI, SONA, Songwriters Guild of America (SGA), ASCAP, and BMI) in an open, competitive process. The songwriter Board member selection panel interviewed and vetted all of the professional songwriter candidates to ensure that the songwriters serving on the Board: (a) have the requisite expertise and experience to govern MLC; (b) individually and together faithfully reflect the entire songwriter community; and (c) are motivated to serve on the Board and understand and do not underestimate the serious responsibilities entrusted to them. The result is a group of songwriter Board members whose knowledge and experience extends well beyond the creation of extraordinary songs; each also has significant experience with regard to, *inter alia,* the licensing of musical works and the collection, distribution, and accounting of royalties for the use of musical works…. The songwriter advisory panel that searched for, interviewed, vetted, and selected MLC's songwriter Board members

[14] A copy of our bylaws is available on our website at https://www.themlc.com/governance.

> consisted exclusively of songwriters. No members of the advisory panel were themselves candidates for the Board.
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> …
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> MLC's music publisher Board members were selected in an open, competitive process by a panel comprised entirely of individuals associated with independent music publishers, each of whom are well-respected throughout the music publishing community. The music publisher Board member selection panel carefully vetted candidates to ensure that the representatives selected to serve on the Board: (a) have the requisite expertise and experience to govern MLC; (b) individually and together faithfully reflect the entire music publisher community; and (c) are motivated to serve on the Board and understand and do not underestimate the serious responsibilities entrusted to them. The result is a diverse group of individuals, ranging from representatives of small, independent publishers like Pulse, a thirty-employee company established and run by creatives with a catalog of approximately 10,000 songs, to representatives of large, global publishers like Sony/ATV Music Publishing, with a catalog of more than three million songs. Each publisher Board member brings to MLC extensive experience, and together they deliver a tremendous diversity of individual insights. The publisher Board members include individuals who, in addition to their decades of music publishing experience, are songwriters, educators, writers, attorneys, business school graduates, board members of independent music publisher trade organizations, digital technology and operations experts, and individuals with deep business experience with record labels, collective management organizations, and technology companies… MLC's music publisher Board members were selected by an advisory panel consisting of music publishing luminaries from the independent music publishing community. This panel was comprised of individuals who are extremely well respected in the music publishing community, each of which is associated with an independent music publisher.

(MLC Designation Proposal at 66-75)[15]

The question also asks, "**were there any candidates from publishers that are not also represented on the Board of the NMPA?**" The MLC has no involvement in NMPA governance, and so my knowledge on this topic is limited, particularly as to NMPA's historical board composition. To my knowledge, there have been several board members and board candidates who represent publishers that were not on the board of the NMPA. At the time of The MLC's founding in early 2019, two of the founding board members, Mike Molinar of Big Machine Music and Scott Cutler of PULSE Music Group, represented publishers who were not on the board of the NMPA at the time, although Mike Molinar later joined the NMPA board and PULSE Music Group

[15] The proposal also names and describes each member of the songwriter advisory panel and music publisher advisory panel.

later affiliated with another entity that is currently on the NMPA Board.[16] Three of the candidates on the ballot in last year's election for independent music publisher board seats also represented publishers who are not on the board of the NMPA (although they were ultimately not chosen by the independent music publishers who voted in that election).

For context, however, it is important to note that one should expect to see substantial overlap between these two governance bodies. As discussed above, at the core of the MMA is the idea that The MLC would be governed by the licensors whose activities were moved to The MLC by the MMA. My understanding is that NMPA has calculated that its members represent more than 98% of that licensor market. In designating The MLC to be the mechanical licensing collective, the Register of Copyrights cited to the endorsement of The MLC by NMPA and its members as support for the designation, stating that, "the Office finds that there is substantial evidence to demonstrate that [The MLC] is endorsed and supported by the required plurality of relevant endorsing copyright owners, based on applicable market share."[17] Where the MMA requires the mechanical licensing collective to be governed by licensors, it is to be expected that The MLC's governance will typically involve individuals employed by companies that are members of the trade organization that represents the bulk of that licensor market. This outcome is completely in line with the MMA's vision and requirements.

Question 5. What prompted the MLC to support a proposal providing that even after a songwriter exercises termination rights, payment of royalties could continue to go to the relevant publisher after its rights are terminated by the songwriter?

- **What process did the MLC use to reach its position? Was there a Board vote, and if so, what were the results of the vote?**

- **What has the MLC done now that the Copyright Office issued its proposed rule contradicting the MLC's proposal, and what are the MLC's plans with respect to getting involved with the Copyright Office's process for issuing a final rule?**

RESPONSE:

This question relates to processing blanket license royalties in connection with songs that have been the subject of an exercise of statutory termination rights pursuant to Section 203 or 304 of the Copyright Act. As the Copyright Office (the "Office") explained in the recent rulemaking:

> The MMA did not address or amend the Copyright Act's rules governing termination or derivative works. The Copyright Act permits authors or their heirs,

[16] While there is significant overlap between the licensors represented on the two boards, there is almost no overlap among the actual board members. My understanding is that Mike Molinar is currently the only member of The MLC board that also sits on the NMPA board.

[17] See Designation of Music Licensing Collective and Digital Licensee Coordinator, 84 Fed. Reg. 32,274, 32,285 (July 8, 2019);

> under certain circumstances and within certain windows of time, to terminate the exclusive or nonexclusive grant of a transfer or license of an author's copyright in a work or of any right under a copyright. The statute, however, contains an exception with respect to "derivative works." A derivative work is "a work based upon one or more preexisting works, such as a ... musical arrangement, ... sound recording, ... or any other form in which a work may be recast, transformed, or adapted." The derivative works exception (the "Exception") states that "[a] derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." The Second Circuit observed that:
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> > [The] Exception reflects Congress's judgment that the owner of a derivative work should be allowed to continue to use the derivative work after termination, both to encourage investment by derivative work proprietors and to assure that the public retains access to the derivative work. Without the Exception, the creator of a derivative work (and, indeed, the public at large) could be held hostage to the potentially exorbitant demands of the owner of the copyright in the underlying work.
>
> A question has arisen regarding the application of the Exception in the context of the blanket license when a songwriter exercises her right to terminate her agreement with a music publisher. Because the statute is silent on this issue and no court has addressed it, the Office is engaging in a rulemaking to ensure that there is a full airing of the issue and development of the relevant facts. The Office is undertaking this rulemaking to provide definitive guidance regarding the appropriate application of the Exception to the blanket license and to direct the MLC to distribute royalties consistent with the Office's guidance.

Termination Rights and the Music Modernization Act's Blanket License, Notice of Proposed Rulemaking (the "NPRM"), Docket No. 2022–5, U.S. Copyright Office, 87 Fed. Reg. at 64,406 (proposed Oct. 26, 2022) (internal citations omitted)

As the Office explains in the NPRM, "the statute is silent on this issue and no court has addressed it." The NPRM further explains that the law in this area is "unsettled," *Id*. at 64,407, and "the statute is ambiguous, as it does not directly speak to how the Exception operates in connection with the blanket license," and that in this ongoing proceeding, the Office is "undertaking… to provide definitive guidance" on the law. *Id*. at 64,411, 64,406.

The MLC welcomed this rulemaking explicitly, beginning its public comments to the notice stating:

> The MLC welcomes the NPRM concerning the derivative works exception (the "Exception") to the statutory termination rights provided in Sections 203 and 304 of the U.S. Copyright Act and its relation to the blanket license established by the MMA. As The MLC made clear during the 2020 rulemakings to implement the

> MMA, The MLC "takes no position on what the law of termination should be, but is seeking to follow the law, welcomes guidance from the Office on the interpretation of the law, and will follow judicial guidance on the law."[18] The NPRM references the express limiting language in the existing rule stating that nothing in that rule should be construed as affecting termination rights. The MLC highlights that it actively supported the inclusion of that provision, a fact that was previously acknowledged by the Office.

MLC Comments to the NPRM at 1 (December 1, 2022).

As The MLC noted in its public comments to the NPRM, it had sought authoritative guidance on this issue since the initial MMA implementation rulemakings in 2020, when The MLC was required to build and operationalize the blanket license royalty processing platform. The MLC did not have the luxury to wait for the law to be developed, but had to design a process and policies for distributing royalties imminently.

The MLC also made clear that it did not believe that an appropriate path was to put all royalties "on hold" related to this unsettled area of the law, since that would harm songwriters and deprive some of them of an important flow of income. It is critical to understand in the context of terminations that, regardless of the application of the derivative works exception, in most cases, most royalties flow to the songwriters. This is not to say that the application of the exception does not matter, as it does and can materially affect the share of royalties due to some music publishers. Still, in most situations, most royalties will flow to the songwriters regardless of the outcome of a terminations dispute, thus songwriters would bear the bulk of the burden when royalties are put on hold. The MLC is acutely aware of this because we prioritize connecting with our stakeholders to understand their concerns, and we work hard to minimize royalties that are on hold.[19]

Thus, The MLC detailed its understanding of the *status quo* industry approach to distributing royalties subject to terminations extensively in public filings in 2020.[20] After detailing that understanding, The MLC invited the Office to provide further guidance. The Office declined, "stress[ing]" that "it is not making any substantive judgment about the proper interpretation of the Copyright Act's termination provisions, the derivative works exception, or their application to section 115. Nor is the Office opining as to how the derivative works exception, if applicable, may operate in this particular context." 85 Fed. Reg. at 58132.

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[18] *See* MLC *Ex Parte* Letter (June 26, 2020) (available at https://www.copyright.gov/rulemaking/mma-implementation/copyright-office-letters/ex-parte/mlc-2.pdf).

[19] As discussed above in detail, royalties on hold are less than 1 percent of our royalties processed to date, and these holds are generally beyond our control, since when there are lawsuits or disputes over ownership, The MLC cannot resolve those for the parties, but must wait for a resolution from a court or a settlement.

[20] *See, e.g.,* MLC Comments, U.S. Copyright Office Dkt. No. 2020-5 (May 22, 2020) (available at https://www.regulations.gov/comment/COLC-2020-0005-0014); MLC Ex Parte Letter (April 3, 2020) (available at https://www.copyright.gov/rulemaking/mma-implementation/ex-parte/mechanical-licensing-collective-4.pdf); MLC Ex Parte Letter (June 26, 2020) (available at https://www.copyright.gov/rulemaking/mma-implementation/copyright-office-letters/ex-parte/mlc-2.pdf).

Rather than offer its own guidance or interpretation of the law, the Office made clear in 2020 that it understood the approach laid out by The MLC, about which The MLC was fully transparent, and the Office noted that The MLC's approach was "colorable" under the law, and that "the Office's intent was to neither endorse nor reject the MLC's position." *Id*. The Office further stated that it "understands and appreciates the MLC's general need to operationalize its various functions and desire to have a default method of administration for terminated works in the normal course." 85 Fed. Reg. at 58132.

The MLC subsequently published a policy that followed this *status quo* industry approach that had been outlined in the public rulemaking process, and which the Office had declared was colorable and otherwise did not take an opinion on, in a *Notice and Dispute Policy: Statutory Terminations* in December 2021.[21] The question asks, "**what process did the MLC use to reach its position? Was there a Board vote, and if so, what were the results of the vote?**" The policy was developed and approved in accordance with the MMA. The process included review by The MLC's Dispute Resolution Committee, which is comprised of equal numbers of songwriters and independent music publishers. The policy was voted on by The MLC's board and the board approved the policy. The policy followed industry practice that The MLC had clearly explained in virtual hearings before the Office during the 2020 rulemaking that were attended by dozens of stakeholders representing both songwriters and publishers. As The MLC explained, this approach provided a structure for royalties to continue to flow to songwriters while key questions regarding the interpretation of the law remained unanswered. In the year that the policy was operative, The MLC received only a single complaint concerning the policy.[22]

The question also asks, "**what has the MLC done now that the Copyright Office issued its proposed rule contradicting the MLC's proposal, and what are the MLC's plans with respect to getting involved with the Copyright Office's process for issuing a final rule?"**

As soon as The MLC learned that the Office was planning to offer "definitive guidance" on the law of terminations, that this guidance could lead in some situations to a different result than The MLC's default approach, and that the Office was considering calling for The MLC policy to be repealed, The MLC immediately suspended its policy. The MLC suspended the policy before any comments were received or any directive from the Office to do so. As a result, beginning with the royalty distribution for October 2022 usage, royalties related to works implicated in disputed claims involving statutory terminations are currently on hold pending the outcome of this rulemaking and further guidance from the Office, the courts, or Congress.

I also want to stress that the Office's proposed rule does not "contradict" The MLC's policy, in that The MLC policy was explicitly *not* guidance on the law. The MLC's policy was simply a default practice based on the *status quo* industry approach to address an issue where, as the Office acknowledged, the law was "unsettled," and the Office had declined to offer legal guidance. The

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[21] A copy of the suspended policy is available on The MLC website at https://www.themlc.com/dispute-policy.

[22] The MLC receives many more queries and complaints from members about royalties that have been placed on hold than the single complaint it received about its termination dispute policy in the nearly one year that it was in effect.

MLC's policy clearly stated that it did not affect the law or any legal rights, and deferred to the parties with respect to any agreed distribution approach:

> This Policy and the processes described herein, and the MLC's exercise of discretion in administering such, shall not limit or diminish any legal or equitable rights or remedies available to any relevant rightsowner concerning, inter alia, ownership of any Work/Share or entitlement to royalties for any uses of any Work/Share. In addition, this Policy and the processes described herein shall not supersede any applicable laws currently existing or hereinafter enacted. A voluntary agreement among the respective Terminating Claimant and Existing Claimant will be implemented in the place of the processes in this Policy.

The MLC has since provided comments in response to the NPRM, primarily to offer questions and guidance on issues that should be expected to arise around implementation of the Office's proposed approach. The MLC will continue to cooperate with the Office, and we look forward to receiving the definitive guidance that we have sought since 2020, whether from the Office, the courts, or Congress. We will of course follow that legal guidance, as we do all of the statutes and rules that govern our operations.

In closing, I want to thank the Subcommittee for its attention to the issues in this hearing and the important work of The MLC. It has been an honor to speak with the Members and to represent the whole team at The MLC, including our dedicated staff, governance and advisory bodies, who have met the ambitious demands of the MMA through hard work and commitment, and created an organization of integrity and quality that I believe should make Congress proud.