

**BEFORE THE  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS**

**Periodic Review of the Designations of the  
Mechanical Licensing Collective and Digital  
Licensee Coordinator**

Docket No. 2024-1

**COMMENTS OF THE ARTIST RIGHTS INSTITUTE**

The Artist Rights Institute thanks the Copyright Office for the opportunity to submit the following comments responding to the Office’s request for public comments on the Office’s first Periodic Review of the Designations of the Mechanical Licensing Collective and the Digital Licensee Coordinator. The Institute is concerned only with the investment policy of The MLC, Inc. (“MLC”) and will address only that issue.

**I. STATEMENT OF INTERESTS.**

By way of background, the Artist Rights Institute is a 501(c)(3) organization founded by David Lowery and Chris Castle based in Austin, Texas concerned with educating the public, creators, policymakers and academics on issues relating to artist rights that the Institute finds compelling.

## II. UNMATCHED ROYALTIES

In a nutshell, the Music Modernization Act<sup>1</sup> (“MMA”) requires the MLC to match royalties to publishers and to account and pay such royalties when matched plus interest as determined under the MMA. To the extent there are unmatched royalties, the MMA requires:

Interest-bearing account.—Accrued royalties for unmatched works (and shares thereof) shall be maintained **by the mechanical licensing collective** in an interest-bearing **account that earns monthly interest—**

(I) at the Federal, short-term rate; and

(II) that accrues for the benefit of copyright owners entitled to payment of such accrued royalties.<sup>2</sup>

We note that the statute does not require that there be a single co-mingled account for all unmatched royalties. Rather, the statute refers to a singular account that is for the benefit of the copyright owners entitled to that payment. This implies that the account is more of a journal account on the books of the MLC, not necessarily a bank account. In fact, the word "bank" does not appear in the MMA. The MMA requires *the MLC* to calculate monthly interest, i.e., interest compounded monthly. Aggregating all unmatched funds in a single co-mingled account with

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<sup>1</sup> The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Public Law 115–264, 132 Stat. 3676 (2018).

<sup>2</sup> 17 USC §115(d)(3)(H)(ii)

compound interest at changing rates over time that must be allocated when matched does not seem to be what is contemplated.

Again, the statute seems susceptible to some interpretation of its plain language. However, it is clear that the MLC is to maintain “an account” and that it is the MLC that is to pay the interest. Otherwise, it seems that Congress would have taken more care to specify which bank, what kind of bank, what happens to shortfalls or windfalls, and so on.

Likewise, Congress specifies the interest rate that the MLC is to pay, but it does not say that the MLC is to find an interest-bearing account at a bank such that a third party pays that interest. Rather, it seems to the Institute that the intention was to treat the interest penalty as just that—an incentive for the MLC to match publishers to revenue more quickly or pay the penalty for failing to do so similarly to the royalty late fee. It does not seem that Congress intended to create an investment opportunity for trading in the open market. Presumably this penalty would be paid from the Administrative Assessment as a matching cost<sup>3</sup> or from funds raised by the MLC.

However, MLC CEO Kris Ahrend takes a different position in his responses to Chairman Issa’s Questions for the Record<sup>4</sup> following the House Judiciary

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<sup>3</sup> 17 USC § 115(e)(6), definition of “collective total cost”.

<sup>4</sup> Available at <https://musictechpolicy.com/wp-content/uploads/2023/12/questions-for-the-record-ahrend-responses-hrg-118-ju03-20230627-sd013.pdf>

Subcommittee on Courts, Intellectual Property, and the Internet field hearing on June 27, 2023<sup>5</sup>:

**It is important to note first that the MMA effectively requires The MLC to have an investment program....**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**.

Indeed, the MLC has announced that its Board of Directors has mandated an investment program<sup>6</sup> for the unmatched funds which involves investing those funds in the open market. According to Part X, Line 11 of the MLC’s 2022 IRS Form 990, the MLC held \$804,555,579 in stocks as of the end of 2022.<sup>7</sup> Presumably some large part of this sum is the black box including the historical unmatched.<sup>8</sup>

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<sup>5</sup> *Five Years Later – The Music Modernization Act*, THE HOUSE JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET, FIELD HEARING (June 27, 2023) available at <https://judiciary.house.gov/committee-activity/hearings/five-years-later-music-modernization-act>.

<sup>6</sup> MLC, Inc. 2021 Annual Report, Appendix A at 4 available at <https://www.themlc.com/hubfs/Marketing/23856%20The%20MLC%20AR2021%206-30%20REFRESH%20COMBINED.pdf>

<sup>7</sup> See The MLC, Inc. IRS Form 990 available at [https://www.themlc.com/hubfs/2022\\_FORM990\\_TOC-FINAL.pdf](https://www.themlc.com/hubfs/2022_FORM990_TOC-FINAL.pdf)

<sup>8</sup> Chris Eggertsen, *The MLC Receives Over \$424 Million in Unmatched “Black Box” Streaming Royalties*, BILLBOARD (Feb. 16, 2021) available at <https://www.billboard.com/pro/mechanical-licensing-collective-receives-over-424-million-unmatched-royalties-streaming-services/#!>

The Investment Policy states:

**Investment Policy:** This policy covers the investment of royalty and assessment funds, respectively, and sets forth The MLC's goals and objectives in establishing policies to implement The MLC's investment strategy. The anti-comingling policy required by 17 U.S.C. §115(d)(3)(D)(ix)(I)(cc) is contained in The MLC's Investment Policy. The Investment Policy was by the Board in January 2021.

According to Mr. Ahrend, The MLC, Inc.'s investment program of "hundreds of millions of dollars" in unmatched funds is entirely based on its interpretation of the requirement to pay interest on funds it cannot match for as long as it cannot match the funds. Whatever Congress meant, it did not provide a broad discretionary authority to invest "hundreds of millions of dollars" of other peoples' money in the open market and then not disclose their holdings either in the statute or legislative history.

Despite being asked directly by Members of Congress to disclose how much money is in this single co-mingled account and what instruments it is held in, Mr. Ahrend provided only a general description in his oversight hearing:

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.... **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.

We have determined that there is a public filing of the Payton Limited Maturity Fund SI ([PYLSX](#)) that discloses The MLC, Inc.'s investment in this fund as sufficient to require disclosure by PYLSX of the MLC, Inc. as a "Control Person"<sup>9</sup> that owns 25% or more of PYLSX's \$1.9 billion net asset value. PYLSX is required to disclose the MLC as a Control Person in its registration materials to the

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<sup>9</sup> 17 CFR § 230.405

Securities and Exchange Commission.<sup>10</sup> Since the MLC's holdings are required to be disclosed under the securities laws for at least this significant PYLSX investment and possibly others, it does seem that there is no reason why the MLC could not disclose its investments of black box funds to the general public and certainly to songwriters whose money it is in the first place.

### III QUESTIONS FOR THE COPYRIGHT OFFICE

We think the public and copyright owners who are potentially subject to the black box would benefit from the Copyright Office answering the following questions or whatever else the Office thinks would be beneficial:

1. Is the MLC, Inc. authorized by statute to initiate and maintain an investment program for the gross amount of unmatched funds?
2. If Congress authorized this investment program, who bears the losses and who earns the profit on those investments?
3. If the Copyright Office does not re-designate the MLC, Inc. as the collective, what happens to these investment funds? In whose name are the securities held and would the holdings be transferred to the new collective operator in the case that The MLC, Inc. is not redesignated?
4. Have there been any distributions of trading profits from the investment corpus? If so, to whom were these distributions made?

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<sup>10</sup> *Payton Limited Maturity Fund SI, Form N1A Registration Statement*, SECURITIES AND EXCHANGE COMMISSION (Feb. 28, 2023) at 57 available at <https://www.sec.gov/Archives/edgar/data/885709/000119312523053597/d392463d485bpos.htm>

5. Does The MLC, Inc. hold any shares of its board members companies or any licensees? If so, how many share in which ones?

6. Has The MLC, Inc. made any investments in private companies or music publishing catalogs or catalog investment funds? If so, which ones?

7. Who controls the voting rights to any shares of securities held by The MLC, Inc.?

8. Since The MLC, Inc. had already started its investment program in 2021 can the Copyright Office require The MLC, Inc. to regularly disclose its portfolio?

Respectfully submitted.

ARTIST RIGHTS INSTITUTE

May 29, 2024