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Designation of Mechanical Licensing Collective and Digital Licensee Coordinator	Docket No. 2018-11

MLC COMMENTS IN REPLY TO THE DESIGNATION PROPOSAL OF THE AMERICAN MUSIC LICENSING COLLECTIVE, INC.

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I. Introductory Statement

The nonprofit organization Mechanical Licensing Collective ("MLC") is proud to represent all copyright owners and songwriters in fulfilling the purpose for which it was created: realizing the objectives of the mechanical licensing collective (the "collective") created under the MMA. MLC board and committee members and advisors have been hard at work for months, since before the Register began this inquiry, building an entity that will not only faithfully discharge all of the mandated functions of the statute and meet the aggressive statutory timelines, but also unite the industry around collaboration and progress.

MLC opposes the designation proposal of the American Music Licensing Collective, Inc. ("AMLC"), but not because it opposes the voices of those associated with AMLC. MLC embraces the myriad constituencies in the industry, which is one of the reasons it is endorsed and supported by thousands of songwriters, composers, lyricists, small publishers, midsize publishers, large publishers, and stakeholders throughout the industry. The job of the collective is an objective and logistical one—identify owners, match works, pay royalties, enforce licenses. Every one of the collective's objectives is furthered by active input from all stakeholders.

MLC opposes the AMLC proposal rather because AMLC is plainly neither qualified nor prepared to be the collective. This is apparent as to each of the three areas of information the Register has sought:

Indicia of Endorsement: At the most fundamental level, AMLC does not demonstrate endorsement or support by musical work copyright owners that own the rights to license Section 115 covered activities, let alone by 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," as called for by the MMA. 17 U.S.C. § 115(d)(3)(A)(ii).

More troubling still is that AMLC has misrepresented facts to the Register about endorsement. The statement that AMLC's alleged endorsers "represent hundreds of thousands of separate and unique music publishers whose music is distributed on digital streaming services in the United States" is simply not true. (Proposal from AMLC – Initial Comments, ID No. COLC-2018-0011-0015 ("AMLC Prop.") at 47.)

As explained below, AMLC's claimed endorsers demonstrate no copyright ownership themselves, do not "represent" copyright owners in any relevant way, and show no authority to endorse a proposal on behalf of any unidentified third-party copyright owners. Indeed, when AMLC's largest alleged endorser, CIAM, was informed of what AMLC had misrepresented to the Register, CIAM took the extraordinary step of issuing a public disavowal of any alleged AMLC endorsement. (See attached Reply Exhibit 1.) Another of AMLC's purported endorsers, the Australasian CMO APRA, has gone even further and written a letter directly to the Register to explain that APRA "has not endorsed AMLC," and that the letter that AMLC attached to its proposal, "does not represent the commitment or support of our organization," and that "[t]o the extent the Copyright Office views this letter as an endorsement of the AMLC by APRA AMCOS again we reiterate that this is simply not the case." (See attached Reply Exhibit 2.)

AMLC's misrepresentations to the Office regarding endorsement are especially troubling given the immense responsibility entrusted to the collective by the MMA. The endorsement criterion of Section 115(d)(3)(A)(ii) is a mandate and signifies that the trust of the industry is vital; AMLC's failure to even remotely meet the criterion should alone disqualify it from consideration. (*See* Part II, *infra*.)

Governance: AMLC's governance also does not meet the basic requirements of the MMA, which is another independent reason for disqualification. The AMLC board includes individuals

that are manifestly ineligible to serve as board members under the statute. It is deeply concerning that AMLC could not find (or did not want) ten representatives of qualifying music publishers to sit on its board, resulting in an entity that will be governed by individuals unreflective of the copyright owner community. This is even more alarming because AMLC is a non-member corporation, leaving the 14 handpicked voting board members with absolute power to reelect themselves indefinitely with no term limits (and to pay themselves stipends just for being on the board), completely isolating AMLC from the input of those it is meant to serve, namely the actual music publishing and songwriting industries.

AMLC makes no effort to provide any transparency into how its governance was selected, despite a specific Register request to do so. Rather, AMLC's proposal is unsigned and written in the voice of the unidentified persons who handpicked its board. And AMLC's submission makes no disclosure of conflicts, although it unwittingly reveals significant conflicts and other issues that are immediately apparent. Rather than represent the songwriter and copyright owner communities as a whole, AMLC's board includes individuals associated with its founders and related to the primary vendor that AMLC would use the collective's funds to hire (DataClef), a conflict that AMLC does not disclose in its proposal. (*See* Part III, *infra*.)[1]

Administrative and Technological Capabilities: Beyond AMLC's failure to meet the requisite endorsement and governance criteria, the AMLC proposal reveals a near total lack of preparation, planning, or experience, to the point of misreading the guiding statute on fundamental points. Among many significant problems is that the AMLC technology plan hinges on hiring DataClef, a vendor not only affiliated with the AMLC founders, but one that has only recently

[1] MLC's proposal and governance, on the other hand, make clear that MLC does and will continue to represent all segments of the relevant copyright owner industry—an objective that is furthered by its fulfillment of the clear mandates of the MMA with respect to board composition.

launched and does not appear to have any U.S. clients. Instead of running RFI and RFP processes to identify and secure information from a broad spectrum of potential technology vendors, AMLC appears already committed to hiring its board-connected vendor "partner." AMLC has no organizational plan, no timeline, no groundwork, and no detail on the technological requirements the collective must develop. Its proposed budget is unconnected to the realities of the required operations and reveals that AMLC has no conception of the size and complexity of collective functions mandated by the statute. The lack of preparation evident in the AMLC proposal is encapsulated in its plan to fund startup operations using interest on unclaimed accrued royalties, which is not only improper but fails to grasp that unclaimed accrued royalties will not even be transferred to the collective until after the startup phase is completed. (*See* Part IV, *infra*.)

In sum, AMLC does not have the endorsement of the copyright owner community; has made misrepresentations, claiming endorsements which it does not have; has numerous ineligible individuals on its board and committees; is riddled with conflicts, exemplified by its apparent control by founders who are affiliated with the primary vendor that it seeks to hire; has laid no groundwork for meeting statutory deadlines; and has no plan, timeline, or practical budget. AMLC is not a serious candidate to be the collective, and shows no capability of fulfilling the responsibilities of running a nationwide collective on behalf of all songwriters and copyright owners, responsible for billions of dollars in royalties. These are precisely the shortfalls the MMA designation criteria were meant to protect against.

There will be many places where the legitimate voices of those associated with AMLC can work with MLC. Publicity and assistance with the claiming portal, educating on best practices for registering works and uses, and fostering productive relationships between copyright owners, DSPs, and the collective, are just some examples of how those proper constituents who have

associated themselves with AMLC can work for the good of the collective and the industry. But there can be no mistake, AMLC does not meet the statutory requirements to be designated as the collective, and is unqualified and unprepared to fulfill the duties and requirements of the collective. Its proposal is one of a chartless and uninformed wandering towards a failure that would have a very real and very harmful effect on songwriters and copyright owners across the nation and world.

II. Indicia Of Endorsement: MLC Is The Only Entity That Satisfies The Endorsement Criterion, Regardless Of Metric

For the reasons discussed at length in the MLC Proposal (Proposal from MLC – Initial Comments, ID No. COLC-2018-0011-0012 ("MLC Prop.") § E.3.a., at 107-113), AMLC's interpretation of the endorsement criterion is incorrect. Regardless, AMLC has not provided evidence that it is endorsed by any copyright owners that have licensed musical works for Section 115 covered activities. Thus, under any interpretation of the statutory language, including its own unsupported interpretations, AMLC does not meet the endorsement criterion.

A. The Endorsement Criterion Relates To Percentage Of Royalties Due From Uses Of Musical Works In Covered Activities

The MMA requires that the collective be "endorsed by, and enjoy[] 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." 17 U.S.C. § 115(d)(3)(A)(ii). As discussed at length in the MLC Proposal, the only reasonable reading of this language is the plain English reading: that the Register designates the entity among those seeking designation that has the endorsement and support of copyright owners whose works earned the greatest aggregate percentage of total mechanical royalties due from covered activities over the period. (MLC Prop. § E.3.a., at 107-113.) There is no basis in text, legislative history, or logic to torture the provision towards an inscrutable metric such as number

of copyright owners, number of licenses, or any metric other than share of royalties from usage in covered activities. (*Id.*)[2]

AMLC argues that the statutory criterion "cannot refer to market share" because it does not use the words "market" and "share" together in that exact sequence (even though it expressly refers to a "percentage" of the "market for uses," and "share" and "percentage" are synonyms). (AMLC Prop. at 44-45.) AMLC's strained argument appears to be that, because a separate provision of the MMA (Section 115(d)(3)(J), which sets forth methodology for distribution of unclaimed accrued royalties) uses the phrase "market share," then the purported absence of the precise words "market share" from Section 115(d)(3)(A)(ii) indicates an intent to not base the endorsement criterion calculation on a share of the market (again, despite explicitly calling for a "percentage" of the "market for uses").

AMLC states that if Congress wanted to base the endorsement criterion calculation on market share, it would have used in Section 115(d)(3)(A)(ii) the precise words "relative market share" and the same methodology to calculate such "relevant market share" as set forth in Section 115(d)(3)(J).[3] (*Id.*) This argument is misguided, and the use of the words "market share" in Section 115(d)(3)(J) supports, rather than refutes, the fact that the endorsement criterion looks to

[2] AMLC's conclusory and unsubstantiated argument that "an inherent conflict of interest would be created" if the collective were "primarily endorsed" by the largest and/or "major" publishers (AMLC Prop. at 45) is truly misguided, as the statute directly calls for endorsement by large publishers, being those publishers whose works in aggregate represent the greatest percentage of the royalties from covered activities that the collective will have the authority to license.

[3] Moreover, the apparent argument by AMLC that Congress should have employed the methodology used to calculate market share in Section 115(d)(3)(J) and the "corresponding confidentiality language" in that Section (AMLC Prop. at 44-45) is nonsensical. The Section 115(d)(3)(J) calculation cannot be done before 2023, as it is to be made based on usage reports provided to the collective after the 2021 license availability date.

royalty market share, as both are examples of the MMA's use of such market share to guide processes under the statute.[4]

AMLC argues that the endorsement criterion should instead "be interpreted so that the relevant 'licensor market' from which the 'greatest percentage' is taken is **the endorsing group of copyright owners who, via the greatest number of licenses, have made musical works available for covered activities** as measured over the preceding 3 full calendar years." (AMLC Prop. at 43 (emphasis in original).) AMLC then seems to waffle between arguing that the relevant metric is this "greatest number of licenses" (*id.*) and that it is instead the greatest "number of relevant copyright owners." (*Id.* at 46.) Putting aside that neither metric is viable or supportable under the statute (*see* MLC Prop. § E.3.a., at 107-113), MLC is the designated entity under even AMLC's own proffered metrics.

B. AMLC Cannot Satisfy Its Own Proffered Endorsement Measurements

AMLC states, without any citation or support, that "the greatest number of copyright owners are, taken together, songwriters," and, "[i]t is therefore the songwriters who are the greatest number of copyright owners relevant to and able to endorse [a collective] as long as each maintains ownership of a 'share' of a musical work." (AMLC Prop. at 46-47.)

Putting aside the lack of evidence for this statement, and the fact that the endorsement criterion is not a headcount of copyright owners, AMLC does not demonstrate that it is actually endorsed by songwriters (other than perhaps those on its board and committees, and even then that

[4] *See also* Section 115(d)(3)(D)(i)(III) (use of market share to establish qualification of the nonvoting publisher trade director); Section 115(d)(3)(D)(i)(IV) (use of market share to establish qualification of the nonvoting licensee representative trade director); 115(d)(7)(D)(v) (requiring CRJs to approve a negotiated administrative assessment where agreed to by DLC or by "interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works in covered activities"); *see also* 115(d)(5) (parallel provision to 115(d)(3)(A)(ii) requiring that DLC is endorsed by licensees that "together represent the greatest percentage of the licensee market for uses of musical works in covered activities").

is only assumed, as the proposal is unsigned and includes no actual letters of endorsement from songwriters), or that any such songwriters are copyright owners. In contrast, MLC has submitted a sworn declaration attaching a list of over 2,400 songwriters (over 1,400 of whom report that they are self-published, *i.e.*, they manage their own rights) expressing their endorsement and support for MLC, as well as several other signed declarations of endorsement and support from professional songwriters.[5] (MLC Prop. Exs. 5, 5-A, 6, 7, 8, 9, 10.)

AMLC sets up a similarly failed endorsement argument in stating that independent music publishers "vastly outnumber the number of 'major' or large independent publishers." (AMLC Prop. at 47.) AMLC fails to demonstrate material endorsement and support from this segment of the industry. In contrast, MLC provides exhibits showing endorsement and support by over 125 independent music publishers with catalogs of all sizes and genres[6], as well as endorsement and support from the Association of Independent Music Publishers. (MLC Prop. § D at 97-100 & Exs. 11-A – 11-W.)[7]

[5] AMLC's hollow reference to "600+ endorsements via AMLC website" is notable only because AMLC provides no names or details for any such purported endorsers. (AMLC Prop. at. 47.)

[6] MLC also refers the Register to the numerous additional letters of endorsements and support of MLC by copyright owners, songwriters and other stakeholders, that have been submitted as Reply Comments in this inquiry.

[7] As an aside, the AMLC proposal states incorrectly that "major music publishers or large independent music publishers will most likely not be licensed and collected via the MLC due to the publishing administrators having direct license agreements with the DSPs." (AMLC Prop. at 39.) Many such publishers do not currently have direct license agreements with even major DSPs, because many DSPs prefer to go compulsory, and it is likely that many more DSPs will shift to compulsory licensing given the ease of doing so under the collective. Moreover, publishers represented by MLC board members and MLC-endorsing publishers have stated in writing that they expect to license musical works that they own and administer through MLC. (MLC Prop. at 115; see also Exs. 11-B-W.) Finally, whether or not a publisher has a direct deal with a DSP has nothing to do with unclaimed accrued royalties, as unclaimed revenue accrues under both direct deals and compulsory licenses, and the same matching and distribution issues are present in both scenarios (which necessitates the use of the MLC by all interested parties to some degree, irrespective of how the respective DSP was licensed).

C. AMLC's Purported Endorsements Are Not From Relevant Copyright Owners

The necessary endorsement and support must come from parties with a relevant ownership interest in the copyright to musical works (including shares of such works). (Notice at 65753; MLC Prop. § E.3.c, at 114; AMLC Prop. at 46.) For the reasons discussed in MLC's Proposal, this includes entities granted exclusive licenses of mechanical rights for covered activities, as an exclusive licensee of an exclusive right is the owner of that copyright right. 17 U.S.C. § 101.

AMLC's claimed endorsements (at pages 47-48 of its submission and in the letters annexed as Schedule D) are from the following organizations:

1. International Council of Music Creators (CIAM). AMLC claims to be endorsed by CIAM. CIAM is not a relevant copyright owner (*i.e.*, an owner of musical works copyrights licensed for covered activities over the preceding three full calendar years), but is an advocacy and debate group. CIAM serves as "the umbrella organisation for a network of continental alliances that are involved in local debates on copyright and developments,"[8] including the "Continental Alliances" identified on page 47 of AMLC's submission and discussed further below. CIAM's members are thus also not relevant copyright owners, but are other policy and debate groups. CIAM focuses "on the key issues directly concerning the moral rights of composers and creators of music and serve[s] as a forum for cooperation and networking."[9]

CIAM's vice president, Joerg Evers, a member of AMLC's board of directors, executed AMLC's form endorsement letter, and AMLC misrepresented to the Register that this was an endorsement by CIAM. (AMLC Prop. at 47, Sch. D.) However, when CIAM and CISAC were informed of this misrepresentation, they took the remarkable step of *publicly disavowing any such*

[8] https://www.cisac.org/What-We-Do/Creators-Relations/CIAM (last visited April 18, 2019).

[9] http://www.ciamcreators.org/our-work/ (last visited April 18, 2019).

endorsement, affirming that they *do not endorse AMLC* (obliquely referring to AMLC's statements in its proposal to the contrary as "rumours circulating.").[10] (*See* attached Reply Exhibit 1.)

Even before this stunning rebuke, AMLC's claims of endorsement were troublingly misleading. Beneath Mr. Evers' signature is the handwritten statement: "CIAM is representing approximately 3,5 million musical creators of CISAC's music CMOs members worldwide,"[11] which AMLC extrapolated to claim support from 4 million creators. (AMLC Prop. at 47.) But plainly CIAM does not "represent" music creators in any relevant way, as to ownership or administration of their works. And Mr. Evers would have no authority to endorse on behalf of millions of unidentified musical creators who happen to be members of one of CIAM's alliance organizations, even if his supposed endorsement had not been publicly disavowed by CIAM and CISAC.

2. CIAM's Ex-U.S. "Continental Alliances." AMLC also claims endorsement by the following additional non-copyright owning advocacy or debate organizations operating outside of the U.S., all of which are under CIAM's umbrella: Pan-African Composers' and Songwriters' Alliance (PASCA), Asia-Pacific Music Creators' Alliance (APMA), Alianza Latinoamericana de Compositores y Autores de Musica (ALCAM), and European Composer and Songwriter Alliance (ESCA). To begin with, the supposed letters of endorsement, versions of an AMLC form letter, are on their face *not* endorsements by these organizations. Each is an endorsement of a single individual, stating only that "I hereby voice my support to [AMLC]," with nothing purporting to speak on behalf of the organization whose letterhead is employed. (AMLC Prop. Sch. D.)

[10] Notably, CISAC board members include the U.S. PROs ASCAP and BMI, both of which exclusively endorse and support MLC. (MLC Prop. Ex. X.)

[11] CISAC is the International Confederation of Societies of Authors and Composers, another advocacy organization based in France. CISAC is an international network of Collective Management Organizations (CMOs), collecting societies, and Performing Rights Organizations (PROs).

Even beyond the fact that the purported endorsements by the signatories of these form letters are not in fact endorsements by the organizations, none of these organizations is a relevant copyright owner. PASCA, based in South Africa, "exists to lobby for the interests of composers and songwriters" in Africa.[12] APMA, based in Japan, is a lobbying group that focuses on promoting "the protection, enforcement and expansion of the rights and interests of music creators in the Asia-Pacific region."[13] ALCAM, based in Brazil, describes itself as a "communication and debate platform" that focuses on the issues of Latin American creators.[14] ECSA, based in Belgium, is an advocacy organization focusing primarily on European music authors.[15]

These organizations and the other trade and advocacy groups discussed below do not "represent" their members in any way that is relevant to the endorsement criterion. At most, they represent member interests through advocacy, as do trade groups like NSAI, SONA and NMPA. But while NSAI, SONA, and NMPA—along with dozens of other industry organizations, including the International Confederation of Music Publishers (ICMP)—endorse MLC, MLC would never claim that, simply by virtue of a trade group endorsement, each songwriter and publisher member of the trade group can be deemed to endorse and support MLC, as that would be misleading.[16] Instead, the MLC Proposal demonstrates direct endorsement and support from over 130 copyright owner entities and over 2,000 songwriters together representing the majority of the licensor market for uses of musical works in covered activities.

[12] http://www.pacsa.org/ (last visited April 18, 2019).

[13] https://apmaciam.wixsite.com/home/about-apma (last visited April 18, 2019).

[14] http://www.alcamusica.com/manifiesto/ (last visited April 18, 2019) (as translated by Google Translate).

[15] http://composeralliance.org/about-ecsa/mission/ (last visited April 18, 2019).

[16] AMLC of course goes much further down this improper extrapolation, mischaracterizing an endorsement by a single individual connected with an organization as not only endorsement by the organization, but by all of its members or constituents.

3. The Australasian Performing Rights Association (APRA). APRA is a copyright collective performing similar functions to U.S. PROs in representing Australian and New Zealander composers, lyrists and music publishers with respect to public performance rights (with AMCOS handling mechanical rights licensing). As with CIAM-CISAC, AMLC's claim that it is endorsed by APRA is untrue. While a single member of the APRA board signed AMLC's form endorsement letter, the letter is plainly an individual endorsement, not an organizational one (stating that, "I hereby voice my support to the [AMLC]. . . ."), and is not even on APRA letterhead. When informed that AMLC was claiming APRA endorsement based on that letter, APRA wrote a letter to the Register directly rejecting such claimed endorsement, stating that APRA "does not endorse [AMLC] as was misrepresented in the AMLC's submission to the U.S. Copyright Office." (*See* Reply Exhibit 2 hereto.) APRA continues that, "[w]e were surprised to learn… that the AMLC entity in its submission to the Copyright Office listed "APRA – (Australia)" among the 'endorsers of the AMLC'… APRA AMCOS… has not endorsed AMLC and should not have been included in this list." (*Id*.) AMLC's misrepresentations as to endorsement are especially concerning in light of the immense responsibility entrusted to the collective.

4. Music Creators North America (MCNA), Songwriters Guild of America (SGA) and Screen Composers Guild of Canada (SCGC). Again, the endorsement letters written on the letterheads of SGA and SCGS do not even purport to endorse on behalf of SGA and SCGS. Rather, the signatories to those letters explicitly speak only for themselves as individuals, stating "I hereby voice my support to the [AMLC]. . . ." (AMLC Prop. Sch. D.)[17] Moreover, none of these letters indicates that it is an endorsement by a relevant copyright owner. MCNA describes itself as "an

[17] Of note, SGA representatives were actively involved in the selection of MLC songwriter board and committee members. (MLC Prop. at 67, 69.)

alliance of independent songwriter and composer organizations who advocate for, and educate on behalf of North America's music creator community."[18] Two of the advocacy organizations in MCNA's alliance are SGA and SCGS. SGA states that it engages in "music advocacy on Capitol Hill and elsewhere throughout the world."[19] SCGS's stated mission is to "[p]romote the music, status and rights of film, television and media composers in Canada."[20]

5. Society of Authors and Composers of Columbia (SAYCO). SAYCO is a copyright collective that represents Colombian songwriters and publishers. SAYCO does not represent that it is a relevant copyright owner, and there is no indication that it owns relevant rights with respect to covered activities.[21] It is unclear whether SAYCO was informed of or authorized the form endorsement letter apparently signed by SAYCO's General Manager, but in any event SAYCO claims no relevant copyright ownership or authority to endorse a proposal on behalf of unidentified Colombian songwriters and publishers that it may represent.

6. American Composers Forum (ACF). ACF is an advocacy and education organization located in Minnesota.[22] It organizes showcases and educational programs. ACF is

[18] http://www.musiccreatorsna.org/ (last visited April 18, 2019).

[19] https://www.songwritersguild.com/site/index.php/home/about-us (last visited April 18, 2019). We understand that SGA does in some cases, at the request of a songwriter, administer rights in a songwriter's musical works (but songwriters do not grant copyright rights to SGA).

[20] https://screencomposers.ca/about/ (last visited April 18, 2019). Note that SCGC is funded by SOCAN, *see* https://screencomposers.ca/, which, as discussed in Section IV, *infra*, wholly owns both DataClef—AMLC's chosen primary vendor—and Audiam, Inc.—which has representatives (Jeff Price and David Willen) on AMLC's board and committees and is also the entity employed by AMLC to design and implement its technology solution. (*See* AMLC Prop. at 4, 7, 9, 26, 35, 36, 64.) Eddie Schwartz, the co-chair of MCNA and a member of CIAM's executive committee, previously served on SOCAN's board and is a paid consultant to SOCAN. *See* http://www.socan.com/eddie-schwartz/, http://www.musiccreatorsna.org/about/mcna-executive-eddie-schwartz/, and http://www.ciamcreators.org/partners/eddie-schwartz/ (each last visited April 18, 2019).

[21] SAYCO's letter confirms this, stating that, "in the American territory (USA), our interests will be managed and represented before the MLC, by the firm KJM DIGITAL CORP.," a separate corporation. (AMLC Prop. Sch. D.)

[22] https://composersforum.org/about/about-acf/ (last visited April 18, 2019).

not a relevant copyright owner. ACF does not identify any members that own copyrights in musical works used in covered activities, nor does it indicate any authority to provide endorsement of a proposal on behalf of any copyright owners.

7. Music Answers. AMLC says that it is endorsed by "Music Answers on behalf of over 3,500 supporters." Music Answers is not a relevant copyright owner. It describes itself as an advocacy organization, and holds a nonvoting seat on AMLC's board as an alleged trade group. Music Answers' claimed "supporters" include anyone who fills out a free web form with first name, last name, email address, and a choice between three options: "Music Fan," "Music Business Professional (Legal, Label, Management/Agency, Publishing, Other)," or "Music Creator (Songwriter, Composer, Performer, Producer)."[23] Neither AMLC nor Music Answers provides any evidence that Music Answers has authority to speak on behalf of its alleged supporters, let alone that its supporters are relevant copyright owners.

8. Unidentified "individual composers/writers" and endorsers. AMLC states that it is endorsed by "100+ various individual composers/writers/publishers/organizations who have signed an AMLC endorsement letter" and has "600+ endorsements via AMLC website" (AMLC Prop. at 48), but AMLC does not identify any of these endorsers by name or attach any of the letters that were purportedly signed. Nor does AMLC indicate that any of these unidentified persons is a relevant copyright owner nor does it provide any proof to that effect.

In sum, AMLC simply fails to demonstrate endorsement and support from relevant musical work copyright owners, let alone from those that together represent the greatest percentage of the licensor market for uses of musical works in covered activities, as the MMA requires.[24]

[23] http://www.musicanswers.org/join (last visited April 18, 2019).

[24] Section 115(d)(3)(A)(ii) requires that the entity designated be not only "endorsed by" but also "enjoy[] substantial support from" musical work copyright owners that represent the greatest percentage of the

D. Only MLC Satisfies The Endorsement Criterion, However Measured

MLC's proof of endorsement and support stands in stark contrast to AMLC's. MLC has demonstrated that the copyright owners that endorse and support MLC represent the vast majority of the licensor market for all uses of musical works during the relevant three-year period, and have together received the substantial majority of total mechanical royalties for use of musical works in covered activities in the U.S. during the Covered Period. (MLC Prop. at 99-100 & Ex. 11 (Israelite Decl.) ¶¶ 13-19.) Thus, based on market share of uses of musical works in covered activities during the relevant period, MLC is the only entity that meets the statutory endorsement criterion.

Nevertheless, even if the Office were to use one of AMLC's non-statutory and counterintuitive metrics—number of copyrights or number of licenses—MLC would still be the entity qualified under those metrics. MLC has established that it is exclusively endorsed and supported by over 130 music publishers that own the relevant exclusive copyright rights to over 7.3 million musical works. (MLC Prop. at 98 & Ex. 11 (Israelite Decl.) ¶ 20.) AMLC's endorsers demonstrate no ownership of relevant rights. Moreover, while "number of licenses" is a very ambiguous term (*see* MLC Prop. at 109-110), these publisher endorsers have affirmed that issuance of licenses for millions of works during the relevant three-year period indicated in Section 115(d)(3)(A)(ii). (*Id.* Exs.11-A-11-W.) In contrast, AMLC has not demonstrated that its alleged endorsers have issued any licenses in the U.S. for covered activities. Finally, while AMLC has not identified songwriters that endorse it (other than assuming support from the nine songwriters listed on the board and committees), the MLC Proposal identifies in a sworn declaration over 2,400

relevant market. Endorsement and support are two different requirements (if they were the same, the statute would have had no need to use both terms). MLC's endorsers all state that they have provided or pledge to provide support to MLC. AMLC completely ignores the separate and independent support requirement of the statutory provision in identifying its purported endorsers. (Compare AMLC Prop. Sch. D with MLC Prop. Exs. 11-A – 11-W.)

individual songwriters endorsing MLC, over 1,400 of which reported that they are self-published (*i.e.*, they manage their own rights). (*See* MLC Prop. at 98-99 and Ex. 5-A.)

In sum, however measured, whether by the plain English metric set forth in the statute or by the metrics advanced by AMLC, MLC is the only 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 three full calendar years," which calls for MLC's designation as the collective.

III. Governance: The AMLC Board And Committees Fail To Meet Basic Statutory Requirements Or Represent The Community

MLC's board is a diverse group of songwriters and representatives of music publishers of all sizes and representing all musical genres, who have affirmed that they meet the requirements of Section 115(d)(3)(D)(i) and will faithfully serve the entirety of the songwriting and music publishing industries. In contrast, AMLC's board fails to meet even the most basic statutory requirements set forth in the MMA. Its board includes multiple individuals that are ineligible under the plain language of the statute, and was handpicked to include primarily associates of AMLC founders or persons otherwise connected to SOCAN, the Canadian parent company of AMLC's intended vendor partner DataClef. A handful of others appear to have been added at the last minute to fill out vacant spots in time for the Register's proposal deadline.

These failures make even more noticeable the fact that AMLC has not explained how its board or committees were selected, despite a specific Register request to do so. (Notice at 65752.)

A. The AMLC Governance Selection Procedure Is Not Explained Or Transparent

The discussion in AMLC's proposal of how AMLC's governance was selected invites question. (AMLC Prop. at 37-38.) It repeatedly references an unidentified "we" that "chose board

and committee members," despite purporting to be a submission by AMLC itself. (*Id*.) Moreover, this unidentified "we" is in the first-person plural, indicating that the same persons who made these choices are also the submitters of the AMLC proposal.[25] The AMLC proposal is not signed by anyone, but the submission website indicates that it was submitted by John Barker, whose company's address is also the address of record for AMLC, which seems to support that founders Jeff Price and John Barker personally handpicked the board and committees, adopted the bylaws, and submitted the designation proposal.[26]

In this context, the strange statement in the AMLC proposal that "[i]n the event a major publisher would like a voting board seat, we would absolutely accommodate it and replace one of the current publisher board members," only highlights this lack of transparency and the arbitrary procedure apparently exercised by those in control of AMLC. (*Id.* at 35.) It is unexplained just who would be replaced on the board, and how the founders can "absolutely" modify the board at will.[27] The statement lets slip that the AMLC founders appear to control the board and committees,

[25] Contrast this with MLC's submission, which describes the open and competitive process MLC used to select its board and committee members, including the identity of the independent songwriter and publisher panels that made those selections. (MLC Prop. at 66-73; 76.)

[26] This is even more troubling given Barker's and Price's direct financial involvement with SOCAN, the parent company of the vendor that AMLC declares its intent to partner with (despite having not even undertaken an RFI or vendor-bidding process). (*See* Part IV, *infra*.) It is also perplexing given the claim that these founders "made it a criterion to avoid perceived and actual conflicts of interest that could be realized in the form of self-enrichment." (AMLC Prop. at 37; *see also id.* at 38 (noting that each of AMLC's board and committee members "had to be unimpeachable in regards to any perceived or actual conflict of interest and not significantly benefit or enrich themselves").) It is also concerning that the AMLC board members granted themselves the right to pay themselves "reasonable stipends" just for being on the collective's board. (AMLC Prop. Sch. C, Bylaws, § 4.12.)

[27] MLC is currently in the process of establishing written rules and policies for the organization's operations, including bylaws, committee charters, handbooks, and policies on conflicts, confidentiality, document retention, and whistleblowing, among others. The statute provides for bylaws to be passed within a year of designation. MLC will be far ahead of that deadline with its policies. But proper policies for an organization as unique and responsible as the collective take time and thought, input from board members, and iterations. Rushing out bylaws within one day of incorporation, as AMLC did, is a bug, not a feature. MLC is happy to discuss with the Register its current status on governance documents and policies and answer any questions related thereto.

which are largely comprised of associates and which can reelect themselves at will with no term limits (and no input or oversight from the music publishing or songwriting community).

B. AMLC's Alleged Publisher Board Members Do Not Individually Or Together Reflect The Music Publishing Community

MLC's music publisher board members "individually and together faithfully reflect the entire music publishing community." (Notice at 65752.) They were selected by a panel of well-respected individuals in the independent music publishing community and represent publishers of all sizes and genres. (MLC Prop. at 69-73.)

AMLC's board does not even resemble the music publishing community, let alone reflect it faithfully. As discussed further below (at Points III.C & IV.C., *infra*), it includes a group of individuals affiliated with SOCAN, the parent company of DataClef, AMLC's proposed vendor; representatives of entities that do not own the exclusive right to license musical works for covered activities; representatives of publishers with largely or exclusively non-U.S. repertoire; and a class-action law firm attorney with no demonstrated ownership of exclusive rights of reproduction and distribution of musical works (other than a passing reference to his being an "independent publisher"). To the extent that there are actual music publishers represented on AMLC's board, they have not even affirmed that they meet the requirements of Section 115(d)(3)(D)(i)(I)(aa), nor is this fundamental requirement evident from AMLC's submission.

AMLC's board also does not include a single representative of a large or midsized music publisher, which is a serious problem. The presence of publishers of all sizes and genres on MLC's board is precisely what makes it "faithfully reflect the entire music publishing community." (Notice at 65752.) AMLC not only has no large or midsized publishers on its board, but it also reveals in its submission, as well as in public comments, a decided bias against large music publishers, repeatedly disparaging them, although their works represent the majority of the

royalties that the collective would be charged with processing.[28] AMLC has no basis for making these disparaging assertions, other than its own self-interest, and AMLC's demonstrated prejudice against music publishers shows that its governance does not "faithfully reflect the entire music publishing community."

C. AMLC's Board Includes Numerous Statutorily-Ineligible Members

The statute requires the collective to have ten voting board members who are representatives of music publishers to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities, and four voting board members who are professional songwriters who have retained exclusive rights of reproduction and distribution of musical works with respect to covered activities with respect to musical works that they have authored. 17 U.S.C. § 115(d)(3)(D)(i). For the reasons noted in MLC's Proposal, a "representative" of a qualifying music publisher must mean an actual employee, officer, or board member of such publisher, and may not be merely the outside counsel or a third-party agent of such publisher. (MLC Prop. at 105-06.) AMLC has several directors who are not shown to meet basic statutory criteria, and AMLC fails entirely to explain how its governance is compliant with Section 115(d)(3)(D):

i. Henry Gradstein is a litigation attorney at King, Holmes, Paterno & Soriano. (AMLC Prop. at 57.) AMLC installs Gradstein in a publisher director seat, listing him as an "Independent Publisher" without further explanation or identification. (*Id.* at 35.) Neither Gradstein's CV attached to AMLC's submission (*id.* at 57-58), nor his law firm web page biography make any mention of him being a publisher or employed by a publisher.[29]

[28] AMLC's negative views do not reflect or represent the views of the industry as a whole, as demonstrated by the fact that over 125 diverse independent music publishers exclusively endorse and support MLC and its board as constituted. (MLC Prop. Exs. 11-A – 11-W.)

[29] https://www.khpslaw.com/Our-Lawyers/Henry-D-Gradstein.shtml (last visited April 18, 2019).

ii. John Barker is listed as a publisher representative of ClearBox, which does not appear to own any copyright rights, either by virtue of assignment or exclusive license. ClearBox does not describe itself as a music publisher, but rather as an entity that provides solely administrative services, such as collecting, accounting, and distributing royalties to the rights owners. (*See, e.g.*, AMLC Prop. at 53 (describing ClearBox as "an independent IP rights management company" whose "mission is to transform the management of intellectual property for owners and creators through transparent and efficient administrative services").)[30] Entities that do not have a relevant ownership interest in the copyright to musical works (either by virtue of assignment or exclusive license) do not meet the statutory criteria. (*See* MLC Prop. at 96-97, 114.)

iii. Joerg Evers is listed as a publisher representative of "Eversongs" for the purposes of his board seat. (AMLC Prop. at 35.) Eversongs does not appear to have any public presence, and no information is provided to indicate that it is a music publisher or holds rights other than to works written by Evers. Evers appears, therefore, to be a songwriter and not a publisher that meets the requirements of Section 115(d)(3)(D)(i)(I).

iv. Wally Badarou similarly is listed as a publisher representative but appears to be a songwriter and not a publisher under Section 115(d)(3)(D)(i)(I). (*See* AMLC Prop. at 50-51.)[31] While AMLC lists Badarou's affiliation as "ISHE sarl Music," there appears to be no public presence for such a publisher and no information is provided to indicate that it is a music publisher or holds rights other than to works written by Badarou.[32]

[30] *See also* http://www.clearboxrights.com/about.php (last visited April 18, 2019) (same); http://blog.audiam.com/2018/07/so-what-is-music-publishing.html (last visited April 18, 2019) (audio interview of AMLC board member John Barker (of ClearBox) by AMLC board member Jeff Price (of Audiam) where Barker repeatedly describes ClearBox as an administrator and distinguishes administrators from copyright owners).

[31] http://www.ciamcreators.org/partners/wally-badarou/ (last visited April 18, 2019). AMLC's board already includes four songwriters other than Messrs. Evers and Badarou. (*Id.* at 35).

[32] Further, Lisa Klein Moberly is listed as a publisher representative of Optic Noise (which is a d/b/a for herself). While Moberly may have been granted exclusive mechanical rights to some musical works, Optic Noise does not identify itself as a publisher involved in covered activities. Rather, Optic Noise's website states that "Optic Noise represents music masters and compositions of independent artists, labels and publishers for film, television and commercial placement." http://optic-noise.com/ (last visited April 18, 2019). This does not describe covered activities under Section 115, but rather synchronization licensing, which is also what the content on the Optic Noise website concerns. Ricardo Ordonez is listed as a publisher representative of Union Music Group. Neither Mr. Ordonez's bio (AMLC Prop. at 63-64) nor the Union Music Group website, www.unionmusicgroup.com (last visited April 18, 2019), indicates that Union Music Group is a music publisher owning rights to musical works for use in covered activities. Rather, his bio discusses his work as giving him "the opportunity to consult, support and develop strategies for many music companies including PRO's, digital distributors and major music publishers." (AMLC Prop. at 63.)

IV. Administrative & Technological Capabilities: The AMLC Proposal Indicates That It Is Not Prepared To Develop The Necessary Capabilities, And Has Serious Undisclosed Conflict Issues

As laid out in the MLC Proposal, achieving steady-state operations for a nationwide end-to-end mechanical license administration, enforcement, and royalty processing platform for the world's largest market by January 1, 2021 is a massive task, let alone including a robust, well-publicized and widely-used ownership claiming portal and rights database.

The copyright owners that created MLC began the process for developing operational capabilities even before the MMA became law and issued a formal written RFI before the Register initiated this inquiry in December 2018. MLC has been at work on this issue every day for months, with a large and focused team that includes publisher and songwriter representatives and full-time technology consultants. For that reason, MLC begins by emphasizing that songwriters and musical works copyright owners (including any associated with AMLC) will be represented. MLC is an experienced, diverse, and professional organization working on their behalf that is capable, will meet the deadlines, and will enforce their rights and pay out their royalties.

In contrast, AMLC offers a casual, uninformed, and conflicted approach to building collective operations. Among the most troubling issues are: AMLC's apparent failure to lay any groundwork to date for meeting statutory deadlines; its nonchalant lack of workable planning or budgeting for sustaining development or operations; its failure to even consider numerous important functions of the collective; and its lack of transparency and vendor affiliation (which was concealed in its proposal to the Register). These are addressed in turn, although they are interrelated problems that run through the proposal.

A. AMLC Shows No Groundwork Towards Developing The Necessary Capabilities

As discussed in detail below, AMLC's plan turns on hiring DataClef, a vendor affiliated with AMLC's founders (who are also directors and committee members).[33] Two other related points indicate that: (1) AMLC appears to acknowledge that DataClef is itself not capable of providing the necessary vendor support, as AMLC states that it hopes to also use the vendor Music Reports, Inc. ("Music Reports," which AMLC defines as "MRI"), which provides the same systems that DataClef offers; and (2) AMLC has not even begun the process of reviewing the landscape of vendors to understand capacities, interoperability, availability, timelines, or commercial terms, let alone any due diligence.

As discussed in the MLC Proposal, MLC began an RFI process in November 2018. Sixteen vendors participated in that RFI, which covered and went beyond the landscape of potentially suitable vendors. DataClef was one of the vendors that submitted a response, describing itself as a "newly-formed initiative," as it launched on October 22, 2018.[34] DataClef failed to identify a single client in the United States, or indicate how it had requisite capabilities or experience, a particularly glaring problem given that it had just launched weeks earlier.

AMLC fails to address DataClef's qualifications or capabilities with reference to the scope of operational demands or market competition in its casual disclosure that it will hire DataClef to build a nationwide end-to-end royalty processing platform to service the world's largest

[33] *See e.g.*, AMLC Prop. at 9 (stating that AMLC "intends to leverage DataClef's services to allow for a public 'claiming portal' website"); *id.* at 12-13 (stating intention to engage DataClef to provide matching services and data); *id.* at 18 (stating intention to hire DataClef to provide payment and accounting services).

[34] *See* https://www.socanmagazine.ca/news/socan-launches-dataclef-services-to-address-music-rights-needs-of-international-clients/ (last visited April 18, 2019). Of note, the company first mentioned by SOCAN in its DataClef launch press release is not DataClef, but its affiliate Audiam, founded by AMLC founder Jeff Price.

mechanical rights market. AMLC also misrepresents DataClef's capabilities, for example claiming that DataClef will provide access to the CIS-NET Works Information Database (WID) to the collective, ostensibly because DataClef is owned by SOCAN. Access to the CIS-NET WID is a benefit for CISAC member societies, but a CISAC member like SOCAN would not have authority to sublicense the WID to anyone else it wants, be it DataClef or the collective. AMLC's claim that through a vendor relationship with DataClef, it will have legal access to the WID is simply not accurate.[35]

The lip service that AMLC pays towards diligence cannot cure the problems with its proposal. For example, in the midst of numerous statements confirming that AMLC intends to hire DataClef, it drops a conflicting comment that it "will be conducting a robust RFP and review process for any vendor that is interested in providing services… between now and July 2019," and will "thereby" be prepared to develop the necessary technology. But, notably, nowhere does AMLC indicate: (a) why it states repeatedly that it "intends" to hire DataClef to be its "partner" if it has not even begun an RFP process; (b) that it might ultimately *not* engage its admitted intended partner DataClef;[36] or (c) who outside of its DataClef-affiliated founders and their associates would be involved in deciding which vendors to engage. These issues are of course critical to assessing the objectivity and impartiality of AMLC's vendor choices and any RFP process. Furthermore, AMLC does not give any indication as to when or how exactly the hypothetical RFP

[35] The proper approach for the collective to gain access to CIS-NET and the WID is for the collective to join or license directly with CISAC. The MLC Proposal indicated its intention to collaborate directly with industry organizations globally, which of course includes CISAC.

[36] AMLC describes "initial vendors working with the AMLC" (AMLC Prop. at 11), implying that it has already entered into an agreement with DataClef.

process will happen.[37] However, about a third of the time between the AMLC Proposal and July has expired, and there is no indication that any RFP process has even begun, nor what information AMLC is requesting, nor what vendor roles AMLC is seeking to source in such a process.

AMLC's other tribute to unpreparedness is just as troubling. AMLC makes numerous references to also hiring Music Reports to assist with its development, although it does not appear to have engaged Music Reports on scope, timelines, or commercial terms. Music Reports, along with other vendors, has been a participant in the MLC RFI/RFP process for months, which has to date involved numerous interactions, live presentations and demos, and examination of 72 Detailed Functional Requirements. AMLC seems content to just baldly state that it will hire Music Reports, with no evaluation or comparison or actual information about what that would entail. If this was sufficient to demonstrate likelihood to develop capability to build and maintain the largest global market's end-to-end mechanical license administration and royalty processing platform in less than two years, it of course means that anyone willing to make unsupported pronouncements could demonstrate such capability.

AMLC's perfunctory statement that it will hire a board-affiliated vendor and a vendor with which it has had no material interaction underscores its failure to run a proper RFI or RFP process or lay any groundwork for developing the administrative and technological capabilities necessary to carrying out the collective's mandate.[38] AMLC's cavalier disregard for the complexity of this process and the diligence it demands is alarming.

[37] Referencing MLC's early RFI process, AMLC posted a web page about having an RFI process itself (https://www.songrights.net/request-rfi), but the existence of an actual RFI process by AMLC is not evident or mentioned once in its proposal.

[38] The further empty statement on page 26 that "[t]he AMLC has held discussions with four primary vendors that are discussed in detail in the Technology budget section," provides nothing, as there is no Technology budget section in the AMLC Proposal, and thus no such discussion or detail. (*See* Discussion in Part IV, B *infra*).

B. AMLC Reveals No Workable Plan, Timeline, or Budget

The AMLC proposal does not demonstrate a thoughtful or diligent approach to the statutory responsibilities of the collective. The proposal lacks a plan or timeline for developing the myriad capabilities required of the collective, and AMLC's proposed budget is untethered to the reality of executing on the massive scope and broad functions that include nationwide license administration, rights database population and maintenance, automated and manual works matching systems, royalty processing, and much more.

The AMLC budget would result in a grossly underfunded collective that could not diligently protect the rights and royalties of songwriters and copyright owners. The Congressional Budget Office estimated operating costs of the collective to be $30 million annually, based on its extensive industry survey. This is in line with what the MLC has found in its extensive budget development process, except that the CBO estimate may be low since it may not capture the additional burdens of the statutory mandate to handle all licensing administration and enforcement, and all copyright ownership claiming, no matter how small or complex. The AMLC proposal lacks a clear explanation of how it plans to perform the necessary ownership clearinghouse and license administration work for a cut-rate price that is barely a quarter of the CBO estimates. [39]

Moreover, the vagueness of the proposed budget is not supplemented by any detail elsewhere in the proposal. The proposal cites to a "Technology budget section" (AMLC Prop. at 26) that would provide vendor engagement details, but such a section does not actually exist in its proposal. The "five year budget" proposal provides neither clarity on these subjects nor insight into AMLC's plan for fulfilling the collective's functions, and it is unclear as to what timeframes

[39] Nor should the decision to present budget items as *to the dollar* in a five-year $43 million plan with only six budget line items (AMLC Prop. at 28), distract from the groundlessness of the numbers.

the budget columns apply.[40] The failure to budget on clear timeframes underscores the lack of any development timeline in the AMLC Proposal.

AMLC's proposal also seems oblivious to critical functions of the collective. For example, although handling nationwide blanket license enforcement is a specified function of the collective, AMLC does not even mention this topic once in its proposal or appear to budget for this vital activity. Additionally, despite the critical function of matching works to uses, AMLC seems to have no personnel planning or budget allocation for the labor-intensive manual matching efforts required to reduce unclaimed royalty pools. AMLC states that in addition to vendors, it "will also sufficiently staff the database population process with internal resources to help (in conjunction with the data source partners) to identify, match works to recordings, normalize, and correct discrepancies in the data." (AMLC Prop. at 11.) However, it does not provide for these employees in any planning or budgeting.

AMLC offers no real staffing assessment, planning, or budgeting. It states it will have 11 employees, identifying four officers, and "approximately five full time customer care representatives." (AMLC Prop. at 26, 32.) There is no discussion of whether those customer care representatives are to be the same ones doing manual matching, not to mention which employees would handle the many other critical functions of the collective. Worse yet, it has only allotted $1.6 million in total annual personnel costs (which presumably includes benefits, since those are not evident in any other cost line item).[41]

[40] The AMLC five-year budget (AMLC Prop. at 28) has six columns of costs (in addition to the summary column). None of the columns are labelled with any time frame, and there is no explanation of why the first column has $7 million in costs unassociated with any personnel budget (technology development and infrastructure are budget line items).

[41] The inadequacy of $1.6 million to cover staffing for an enterprise of this size and complexity—even if it were to include only four executives and seven additional employees—is manifest. For comparison, AMLC founder Jeff Price, in his failed lawsuit against his former company Tunecore after being fired for an alleged "lack of confidence," stated that in 2007 Tunecore executives were paid, "what they should have been:

The MLC Proposal lays out in detail more than 50 fulltime roles estimated to discharge the functions of the collective, along with a planning structure.[42] AMLC plans for four executive officers and five customer care representatives, and fails to address how any of the collective functions will actually be executed, including:

- Manual efforts to match uses to works, including large archives of existing unmatched uses and the constant stream of new unmatched uses;
- Oversight, calibration, troubleshooting and reporting of automated matching systems;
- Royalty payment issues, including credits, debits and accountings for newly claimed works;
- Blanket license administration;
- Voluntary license administration;
- Coordination of significant nonblanket licensees and administrative assessments;
- Managing the back end of the claiming portal, including the integration and serving of data on ownership and the constant stream of unclaimed uses with each royalty period;
- Managing the front end of the claiming portal and help desk for the tens of thousands of stakeholders using the portal;
- Managing the back end of the rights database, including the reception and merging of data in numerous formats, and handling the requests for copies of the database that the public is entitled to obtain;
- Managing the front end of the rights database and help desk for members and stakeholders, including corrections and updating of the billions of moving data points therein;
- Managing the processing of ownership disputes for millions of works;
- Nationwide blanket license enforcement, including investigation, analysis, verification, and pursuit of licensee defaults in usage reporting, pool calculation, and royalty accounting;

$250,000, plus a bonus, plus stock options plus other executive perks." Reply Affidavit of Jeffrey Price, *Price v. Tunecore, Inc.*, Ind. No. 653194-2013, ECF No. 125 (New York Supreme Court, New York County, August 29, 2017). It is now 2019, and the collective of course cannot provide stock options. The idea that the collective can find adequate executive and managerial talent and operate on 11 employees with total personnel related expenses, including benefits, of less than $150,000 per person is simply unrealistic, even more so given AMLC's intention to be based in New York City (AMLC Prop. Sch. C, Bylaws, Art. II).

[42] The MLC Proposal further explains that some roles may be adjusted or filled either by outside vendors or in house, and thus one cannot say precisely what the employee headcount would be at this stage. Indeed, the concept that AMLC knows that it will have precisely eleven employees—not ten and not twelve—when it does not even know the roles those employees will play or what its vendor contracts will be, is the sort of hollow declaration that permeates the AMLC proposal, and which is not a proper substitute for actual diligent groundwork, analysis, and planning.

- Extensive public outreach and continuing global dissemination of information about ownership, unclaimed royalties, and the claiming portal;
- Responses to the regular stream of subpoenas and participation in proceedings before the Copyright Royalty Board and Copyright Office as the statute mandates;
- Coordinating regular audits, both of the collective and by the collective; or
- Financial statements and disclosures and requests for information by stakeholders.

These core functions do not even include necessary administrative jobs like human resources within the collective, office management, or just answering the phones and emails. The AMLC budget shows a serious lack of consideration for the duties and responsibilities that the collective owes to the songwriters and copyright owners whose livelihoods are in the hands of the collective, and demonstrates that AMLC is fundamentally unprepared to build the necessary administrative and technological capabilities.

The AMLC approach to startup funding is similarly inadequate. It claims that "interest income earned from unclaimed accrued royalties may be used to defer initial operating costs of the MLC during the startup phase." (AMLC Prop. at 29.) This plan reveals a severe misunderstanding of the MMA. The collective will not possess unclaimed accrued royalties (or interest thereon) prior to the license availability date**,** and so AMLC would not be able to dip into those funds to pay its founders' affiliated vendors for startup costs.[43]

Further, AMLC's notion that somehow it has a greater entitlement to dip into interest earned on unclaimed royalties has no grounding in fairness, and does not reflect the reality of what a withdrawal from unclaimed royalty accounts would be. The contemplated use by AMLC of

[43] Section 115(d)(10)(B)(iv)(III) lays out the procedure for DSPs to transfer their pools of historically unclaimed accrued royalties to avoid late fees. It requires that the DSP continue regular diligent matching efforts of all accrued royalties up to the license availability date, and then transfer such funds to the collective within 45 days of the license availability date. Thus, the collective will not have possession of any unclaimed royalty pools prior to January 1, 2021, by which time it must have a fully-operational nationwide end-to-end license administration and royalty processing system.

funds from unclaimed royalty pools would not attach to particular unmatched uses or interest for particular unmatched uses, but would be a withdrawal leaving the entire unclaimed royalty account lower, and thus would not only affect interest. Notably, the MMA only allows the collective to apply unclaimed accrued royalties "on an interim basis to defray [collective total costs], subject to future reimbursement of such royalties from future collections of the assessment." Section 115(d)(7)(C). This is the only use of the unclaimed royalties that is allowed, and it is explicitly subject to reimbursement via the assessment. And as noted, it is not available "to defer initial operating costs of the MLC during the initial startup phase," as AMLC is apparently planning, since no such funds will be transferred to the collective until after the startup phase is completed.[44]

The license availability date is January 1, 2021. That is approximately 20 months from now. More than six months have passed since the MMA became law, and AMLC has apparently done nothing to advance operational development—no RFI or RFP process has even begun. Casually sauntering forward is not an option for meeting the aggressive statutory deadlines. The AMLC budget shows a serious lack of consideration for the duties and responsibilities that the collective owes to the songwriters and copyright owners whose livelihoods are in the hands of the collective and demonstrates that AMLC is fundamentally unprepared to build the necessary administrative and technological capabilities the MMA demands. Thankfully, MLC began a broad RFI process in November 2018, has progressed into a further round of RFP evaluations, and has

[44] The AMLC proposal comments concerning intended collaboration with DSPs raise further questions. To begin with, despite numerous comments that seem aimed at insinuating that AMLC has done actual planning with DSPs, it is clear instead that AMLC has done no such planning. Rather, AMLC states that it intends to "meet with [DSPs] to collaborate" only "upon designation." (AMLC Prop. at 4.) It is also concerning that meeting with DSPs is AMLC's stated "first priority" after designation. (*Id.*) AMLC has virtually no endorsement, support, or trust from the broader songwriter and copyright owner community. While MLC had involved DSPs in its planning from the start, the first priority was always building the strongest bonds of collaboration and trust within the songwriter and copyright owner communities. This is the most critical component for success, and one AMLC barely acknowledges.

developed detailed operational timelines, organizational plans, and collaborations with many stakeholders, as demonstrated in the MLC Proposal.

C. AMLC Has Serious Undisclosed Conflicts And A Profound Lack of Transparency

AMLC has failed to disclose serious conflicts concerning its planned primary vendor partner, which is related to AMLC board and committee members. AMLC's intended vendor partner DataClef is owned by the Canadian Performing Rights Organization SOCAN. (AMLC Prop. at 7.) The founders of AMLC, Jeff Price and John Barker, are each financially connected to SOCAN. Price is the CEO of Audiam, Inc. ("Audiam"), which is also owned by SOCAN. (*Id.* at 64.) Audiam and DataClef are thus affiliated sister companies. Price has also been a paid consultant for SOCAN. (*Id.* at 64.) Barker is also a paid consultant to SOCAN, and ClearBox Rights, LLC and SOCAN have a joint venture called ClearBox Global.[45]

Numerous other AMLC board or committee members are business associates of these two founders or SOCAN directly, including:

i. Board member and litigation attorney Henry Gradstein has hired Jeff Price as a litigation consultant;[46]

ii. Board and Committee members Lisa Klein Moberly (of Optic Noise) and Brownlee Ferguson (of Bluewater Music) and Committee member Peter Roselli (also of Bluewater Music) run companies that are clients of Audiam, and after Price chose Gradstein, Moberly, and Ferguson to be AMLC board members in October 2018, both Gradstein and Price submitted declarations on behalf of Moberly and Ferguson's companies in a pending lawsuit in November 2018;[47]

[45] http://www.clearboxglobal.com/ (last visited April 18, 2019).

[46] Declaration of Henry Gradstein, ¶ 3, *Bluewater Music Svcs. Corp. v. Spotify USA Inc.*, Case 3:17-cv-01051 ECF No. 130-5 (M.D. Tenn. Nov. 14, 2018).

[47] *Id*; Declaration of Jeff Price, *Bluewater Music Svcs. Corp. v. Spotify USA Inc.*, Case 3:17-cv-01051 ECF No. 130-2 (M.D. Tenn. Nov. 14, 2018); *see* First Amended Complaint, *Robertson v. Spotify USA Inc.*, Case 3:17-cv-01616 ECF No. 35 (M.D. Tenn. March 26, 2018).

iii. Board members Joerg Evers and Wally Badarou serve on the Executive Committee of CIAM, whose president (Eddie Schwartz) is a paid consultant and representative of SOCAN.[48] SOCAN's CEO Eric Baptiste is also the Chairman of the Board of CIAM's parent organization CISAC;[49]

iv. Multiple committee member Gian Caterine (aka John Cate) has been in business with Price for over twenty years, and was the CFO of his former company Tunecore and a founder of Audiam;[50]

v. Committee member and AMLC technology consultant David Willen is the current CTO of Audiam.[51]

These are just the conflicts that surfaced in a brief review of available facts. In light of these significant conflicts, it is especially glaring that there is no check on the AMLC Board's authority. The corporation has no members and the bylaws give the board the power to be entirely self-perpetuating with no term limits—meaning that these fourteen individuals (or their handpicked successors), with no input from any industry stakeholders, have complete control over AMLC perpetually.

Given the conflicts described above, the lack of transparency over how AMLC came to be formed and to choose the SOCAN-owned and Audiam-affiliated DataClef—a vendor that just launched in October 2018—to be its partner cannot be overlooked.

AMLC was incorporated on March 20, 2019. The next day it filed its proposal for designation, which is not signed by anyone. A set of unsigned and undated bylaws are attached to its proposal, though the proposal does not state whether these bylaws were actually adopted in the

[48] http://www.socan.com/eddie-schwartz/ (last visited April 18, 2019).

[49] AMLC's bylaws provide that Messrs. Price, Barker, and Evers (along with two other board members, Messrs. Ordonez and Ferguson), will have the longest terms of office (5 years) before possible re-election in the manner described below, a concern that is exacerbated by the fact that the AMLC board is essentially self-perpetuating, with no stakeholders in AMLC other than the current board members, who will themselves reelect the board, with no term limits. *See* Section III.A, *supra*.

[50] AMLC Prop. at 54; https://www.linkedin.com/in/john-cate-895086a/ (last visited April 22, 2019); https://www.johncate.com/about (last visited April 22, 2019).

[51] AMLC Prop. at 26 & 70.

single day that the corporation was in existence, let alone who adopted them and by what procedure. As shown above, a brief search disclosed that at least seven of the fourteen board members have direct ties to Jeff Price and/or DataClef/Audiam's parent company SOCAN.

AMLC answered "None" to the Register's specific request for disclosure of any conflicts of interest between board members and actual or potential vendors (AMLC Prop. at 26). It is hard to see how AMLC governance could have considered this to be a truthful and accurate answer. The failure to provide any explanation of how AMLC wound up providing potential multimillion-dollar contracts to a company affiliated with its founders reveals, at best, profound lack of planning and appropriate oversight at AMLC.

To be clear, AMLC's failure to handle conflicts properly is not ambiguous or disputable. There is a direct violation of AMLC's own conflict of interest policy in the unsigned and undated bylaws attached to its proposal. Article XIV therein defines a conflict of interest to include "when an individual is an officer, director, owner… employee or agent of any company or business venture (or any affiliate thereof) which … might reasonably in the future enter [] into a relationship or a transaction with the AMLC." (emphasis added). At a minimum, Jeff Price has a conflict of interest. He is the CEO of Audiam, which is an affiliate of DataClef (both Audiam and DataClef are owned by SOCAN), which AMLC repeatedly describes as its intended vendor partner. It is unknown how many other directors and committee members have similar conflicts, or trigger the Related Party Transaction provisions in the bylaws.[52] These unaddressed conflicts are just some of the numerous red flags raised by AMLC's proposal.

[52] Committee member David Willen, CTO of Audiam, also has a conflict of interest. So too does Board member John Barker, whose company is in a joint venture with SOCAN.

D. AMLC Claims Of Conflicts Are Misleading, As Pro Rata Distribution Rules Ensure That All Copyright Owners And Songwriters, Including Those Associated With AMLC, Will Receive Distributions Of Like Significance

It bears discussing in this context the claims of conflict that AMLC makes. AMLC states that, "we believe there is a serious conflict of interest that exists when a MLC board member is eligible to receive a significant portion of the accrued but unpaid royalties." (AMLC Prop. at 19.) MLC cannot stress enough that its goal is to eliminate unclaimed accrued royalties, and that it has developed a realistic plan to pursue this goal. Nonetheless, if unclaimed accrued royalties were distributed, the statute directs that they would go: (a) pro rata by respective market share, and (b) at least 50 percent to songwriters. This means that every single copyright owner whose works were materially used would receive distributions, as well as every associated songwriter.

Thus, every copyright owner and songwriter on the board of any entity designated as the collective would receive a distribution of unclaimed accrued royalties—including any AMLC board members who are copyright owners or songwriters (as all of the voting board members must be). MLC is keenly focused on building the best matching systems available to minimize such unclaimed accrued royalty pools. AMLC's posturing with the argument that its board members would not receive a "significant portion" of any accrued royalties distribution is misguided. "Significant" is a relative term, and the fact that each of AMLC's board members might receive fewer absolute dollars from an unclaimed royalty distribution than a music publisher that represents thousands of songwriters (and would pass on at least 50% of any distribution to those songwriters) does not mean AMLC board members would receive something less significant to them.

AMLC's attempt to distract from the fact that its copyright owner and songwriter board members would benefit personally and significantly from any unclaimed accrued royalty distributions should not succeed. Notably, AMLC's intended procedures would not enhance

matching efforts or minimize unclaimed accrued royalty pools. AMLC expresses that it would have only "an initial one-year period to claim [the collective]'s existing unclaimed blackbox royalties." (AMLC Prop. at 31). This would be an improperly short period of time for claiming existing unclaimed royalty pools, and would mean that AMLC would be distributing unclaimed accrued royalties too quickly. MLC explained in its proposal that it interprets Section 115(d)(3)(J)(i)(I) to preclude distribution of unclaimed accrued royalty pools prior to 2023, and that it intends to implement policies to allow exercise of discretion to retain such pools for even longer periods, and that matching and claiming would continue throughout. (MLC Prop. at 52-53)

A diverse collective that represents the entire industry, understands the MMA's mandates, and operates with transparency and professionalism is what will ensure both fairness and operational effectiveness that minimizes distribution of royalties to anyone other than rightful owners. This is what MLC faithfully provides.

V. Conclusion

For all of the foregoing reasons, and for the reasons in the MLC Proposal, MLC is the only entity that meets the statutory requirements for designation and it should be designated as the collective under 17 U.S.C. 115(d)(3)(B). MLC remains available to respond to any additional legal questions or requests for further information.

Respectfully submitted,

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Attorneys for Mechanical Licensing Collective, a Delaware nonprofit corporation

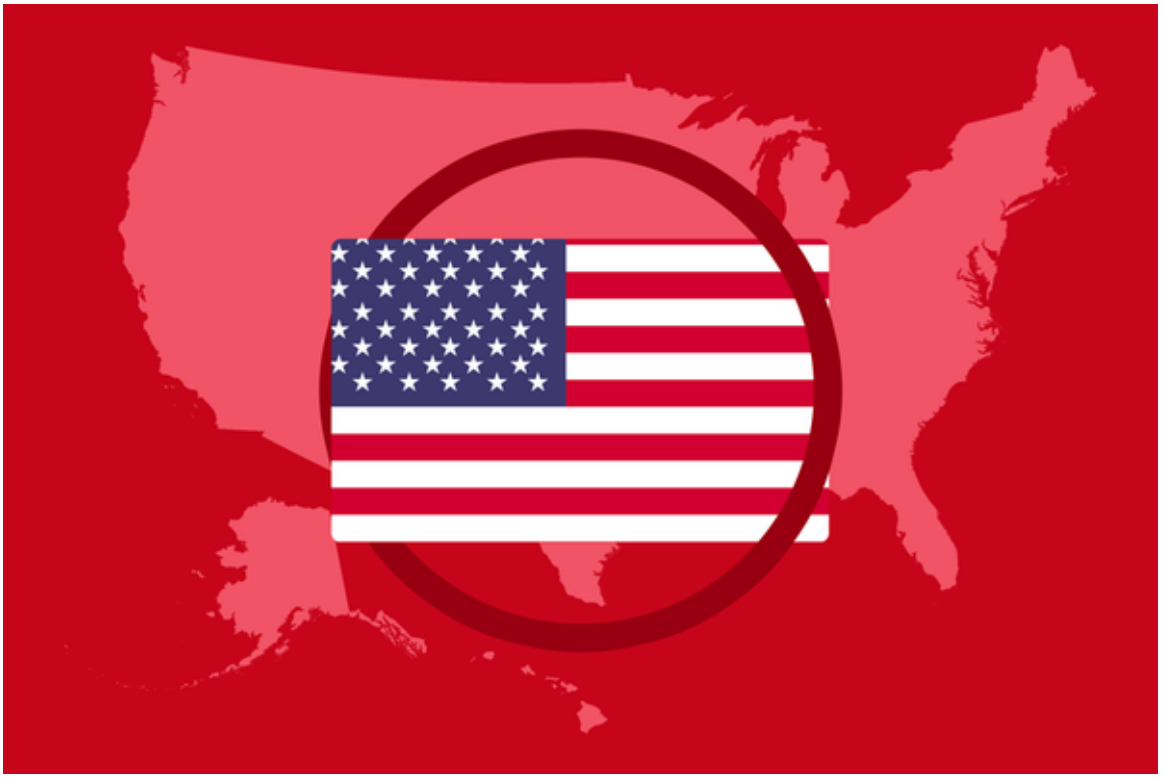
REPLY EXHIBIT 1

INTERNATIONAL CONFEDERATION OF
SOCIETIES OF AUTHORS AND COMPOSERS

ARTICLES

05 APRIL 2019

Statement from CISAC and CIAM on the U.S. Music Licensing Collective



The International Confederation of Societies of Authors and Composers (CISAC) and the International Council for Music Creators (CIAM), to clarify and reduce any confusion, have issued the following statement in regard to the U.S. Music Licensing Collective (MLC).

> *"For the avoidance of doubt and in view of the different rumours circulating, CIAM and CISAC wish to clarify that the organisations have not endorsed either of the competing companies for the U.S. MLC, nor has CIAM or CISAC taken any position with respect to the suitability of any candidate over the other for the role of the future MLC."*

RELATED CONTENT

REPLY EXHIBIT 2

APRA AMCOS

18 April 2019

Register of Copyrights
U.S. Copyright Office
101 Independence Ave SE
Washington, DC 20540

Dear Register,

I write as the Chief Executive of the Australasian Performing Rights Association and Australasian Mechanical Copyright Owners Society (APRA AMCOS) to clarify that APRA AMCOS *does not* endorse the American Mechanical Licensing Collective ("AMLC") as was misrepresented in the AMLC's submission to the US Copyright Office on March 21, 2019.

APRA AMCOS is a music rights organisation representing over 100,000 Australian and New Zealand members who are songwriters, composers and music publishers. We license organisations to play, perform, copy, record or make available our members' music, and we distribute the royalties to our members.

We are affiliated with similar collecting societies around the world to ensure that when Australian and New Zealand songs and compositions are performed overseas, Australian and New Zealand writers get paid. We also help music customers in Australia and New Zealand access music from the rest of the world. We also advocate on behalf of music creators' rights and the Australasian music industry locally, nationally and internationally. As such, we are well-familiar with the challenges of musical composition rights licensing in the global digital marketplace.

We understand that, pursuant to the Music Modernization Act, the U.S. Copyright Office called for proposals for entities to fulfill the role of the mechanical licensing collective as required by the statute for the offering of blanket mechanical licenses for covered digital streaming activities. We were surprised to learn, however, that the AMLC entity in its submission to the Copyright Office listed "APRA – (Australia)" among the "endorsers of the AMLC" in its effort to speak for "hundreds of thousands of separate and unique music publishers." AMLC, Initial Comments, March 21, 2019, p. 47. APRA AMCOS however has not endorsed AMLC and should not have been included in this list.

AMLC also notes a "supporting letter" from APRA apparently referencing the letter on page 96 of the AMLC submission. To be perfectly clear the letter in question *does not* attempt to (nor can it) constitute an endorsement by APRA AMCOS of the AMLC's proposal. The letter is signed by a single writer director of the APRA board and does not represent the commitment or support of our organization, nor does the letter state anywhere that APRA itself has offered any such institutional endorsement. To the extent the Copyright Office views this letter as an endorsement of the AMLC by APRA AMCOS again we reiterate that this is simply not the case.

Please contact me if you have any questions in relation to the above.

Sincerely,

Dean Ormston
Chief Executive Officer
APRA AMCOS

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