

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard petty officer, warrant or commissioned officer on board a Coast Guard vessel or on board a federal, state, or local law enforcement vessel assisting the Captain of the Port (COTP), Delaware Bay in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter or remain in the zone, contact the COTP or the COTP's representative via VHF-FM channel 16 or 215-271-4807. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(3) This section applies to all vessels except those engaged in law enforcement, aids to navigation servicing, and emergency response operations.

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This zone will be enforced from approximately (but no earlier than) 5 p.m. to approximately (but not later than) 9 p.m. on July 14, 2019.

Dated: June 28, 2019.

Scott E. Anderson,

Captain, U.S. Coast Guard, Captain of the Port Delaware Bay.

[FR Doc. 2019-14420 Filed 7-5-19; 8:45 am]

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LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 210

[Docket No. 2018-11]

Designation of Music Licensing Collective and Digital Licensee Coordinator

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: Pursuant to title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, and following a solicitation of proposals and public comment on those proposals, the Register is designating the entities who will perform certain functions relating

to the compulsory license for digital music providers to make and distribute digital phonorecord deliveries. For the reasons published in this document, the Register designates Mechanical Licensing Collective, Inc. as the mechanical licensing collective and Digital Licensee Coordinator, Inc. as the digital licensee coordinator, including their individual proposed board members.

DATES: Effective July 8, 2019.

FOR FURTHER INFORMATION CONTACT:

Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov, Steve Ruwe Assistant General Counsel, by email at sruwe@copyright.gov, or Jason E. Sloan, Assistant General Counsel, by email at jslo@copyright.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the "MMA") was signed into law.¹ Title I of the MMA addresses the efficiency and fairness of the section 115 "mechanical" license for the reproduction and distribution of musical works embodied in digital phonorecord deliveries, including permanent downloads, limited downloads, and interactive streams.² In relevant part, it eliminates the song-by-song notice of intention process for such uses and creates a new blanket compulsory licensing system for digital music providers engaged in digital phonorecord deliveries.³ The blanket licensing structure is designed to reduce the transaction costs associated with song-by-song licensing by commercial services that strive to offer "as much music as possible," while "ensuring fair and timely payment to all creators" of the musical works used on these digital services.⁴

The MMA directs the Register of Copyrights to designate a nonprofit entity operated by copyright owners, referred to by statute as the mechanical licensing collective ("MLC"), to

¹ Public Law 115-264, 132 Stat. 3676 (2018).

² See S. Rep. No. 115-339, at 1-2 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 1 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf ("Conf. Rep."); see also H.R. Rep. No. 115-651, at 2 (2018) (detailing the House Judiciary Committee's efforts to review music copyright laws).

³ The MMA retains the ability of record companies to obtain an individual download license on a song-by-song basis. 17 U.S.C. 115(b)(3).

⁴ S. Rep. No. 115-339, at 4, 8.

administer this new blanket-licensing system beginning on the "license availability date," that is, January 1, 2021.⁵ As detailed further below, the MLC, through its board of directors and task-specific committees, will be responsible for a variety of duties, including receiving usage reports from digital music providers, collecting and distributing royalties associated with those uses, identifying musical works embodied in particular sound recordings, administering a process by which copyright owners can claim ownership of musical works (and shares of such works), and establishing a musical works database relevant to these activities.⁶

By statute, digital music providers will bear the reasonable costs of establishing and operating the MLC through an administrative assessment, to be determined if necessary by the Copyright Royalty Judges ("CRJs") in a separate proceeding.⁷ The MMA also allows, but does not require, the Register to designate a digital licensee coordinator ("DLC") to represent licensees in this proceeding, to serve as a non-voting member of the MLC, and to carry out other functions.⁸

A. MLC Designation Requirements, Duties, and Functions

The entity designated as the MLC must be:

- A single nonprofit entity that is created by copyright owners to carry out its statutory responsibilities;
- "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;"⁹
- able to demonstrate to the Copyright Office that, by the license availability date, it will have the administrative and technological capabilities to perform the required functions; and
- governed by a board of directors and include committees that are composed of a mix of voting and non-voting members as directed by the statute.¹⁰

If no single entity meets each of these statutory criteria, the Register must designate as the MLC the entity that

⁵ 17 U.S.C. 115(d)(2)(B), (d)(3)(B); see also *id.* at 115(e)(15).

⁶ *Id.* at 115(d)(3)(C).

⁷ *Id.* at 115(d)(7)(D).

⁸ *Id.* at 115(d)(5)(B); see also *id.* at 115(d)(3)(D)(i)(IV), (d)(5)(C).

⁹ *Id.* at 115(d)(3)(A)(ii).

¹⁰ *Id.* at 115(d)(3)(A), (d)(3)(D)(i).

most nearly fits these qualifications.¹¹ After five years, the Register will commence a periodic review of this designation.¹²

The MMA enumerates a number of required functions for the MLC.¹³ A core aspect of the MLC's responsibilities includes identifying musical works and copyright owners, matching them to sound recordings (and addressing disputes), and ensuring that a copyright owner gets paid as he or she should. To that end, the MLC will create and maintain a free, public database of musical work and sound recording ownership information. The MLC will administer processes by which copyright owners can claim ownership of musical works (and shares of such works), and by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners on a market share basis after a required holding period.¹⁴ The MLC will participate in proceedings before the CRJs to establish the administrative assessment that will fund the MLC's activities, as well as proceedings before the Copyright Office with respect to the foregoing activities.¹⁵

The board of the MLC shall consist of fourteen voting members and three nonvoting members.¹⁶ Ten voting members shall be representatives of music publishers that have been assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities, and four other voting members shall be professional songwriters who have retained and exercise exclusive rights of reproduction and distribution for musical works they have authored. There are also three nonvoting members that will represent the interests of songwriters, music publishers, and digital licensees via representatives of relevant trade associations or, in the case of licensees, the DLC, if one has been designated.¹⁷ Within one year of designation, the MLC must establish publicly available bylaws

relating to the governance of the collective, following statutory criteria.¹⁸

By statute, the MLC board must establish three committees. First, an operations advisory committee will make recommendations concerning the operations of the collective, "including the efficient investment in and deployment of information technology and data resources."¹⁹ Second, an unclaimed royalties oversight committee will establish policies and procedures necessary to undertake a fair distribution of unclaimed royalties.²⁰ Third, a dispute resolution committee will establish policies and procedures for copyright owners to address disputes relating to ownership interests in musical works, including a mechanism to hold disputed funds pending the resolution of the dispute.²¹

B. DLC Designation Criteria and Functions

Similar to the MLC, the DLC must:

- Be a single nonprofit entity created to carry out certain statutory responsibilities;
- be endorsed by digital music service providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years; and
- possess the administrative and technological capabilities necessary to carry out a wide array of authorities and functions.²²

The Register is directed to designate the DLC following substantially the same procedure described for designation of the MLC.²³ Unlike the MLC, in the event the Register is unable to identify an entity that fulfills the criteria for the DLC, the Register may decline to designate a DLC; in that event, the statutory references to the DLC go without effect unless or until a DLC is designated.²⁴

The DLC is tasked with coordinating the activities of the licensees.²⁵ The DLC shall make reasonable, good faith efforts

to assist the MLC in its efforts to locate and identify copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications, and conducting in-person outreach activities with songwriters. The DLC is authorized to participate in proceedings before the CRJs to determine the administrative assessment to be paid by digital music providers, and before the Copyright Office with respect to the blanket mechanical license.

C. Designation Process and the Role of the Copyright Office.

The Register is to designate the MLC, along with the DLC (as applicable), by publishing a notice in the **Federal Register** that sets forth "the identity of and contact information for the . . . collective," and "the reasons for the designation."²⁶ These designations are subject to the approval of the Librarian of Congress pursuant to section 702 of title 17.²⁷ The legislative history states that "the Register is expected to allow the public to submit comments on whether the individuals and their affiliations meet the criteria specified in the legislation; make some effort of its own as it deems appropriate to verify that the individuals and their affiliations actually meet the criteria specified in the legislation; and allow the public to submit comments on whether they support such individuals being appointed for these positions."²⁸

On December 21, 2018, the Office issued a Notice of Inquiry ("NOI") setting forth the functions of the MLC and DLC and the statutory criteria for designation, and solicited proposals from entities meeting such criteria and seeking to be designated as the MLC or DLC, as well as relevant public comments.²⁹ The name and affiliation of each proposed board and committee member established by the MLC were

¹¹ *Id.* at 115(d)(3)(B)(iii).

¹² *Id.* at 115(d)(3)(B)(ii); *see also* H.R. Rep. No. 115-651, at 6 (noting that continuity is expected to be beneficial so long as the designated entity has "regularly demonstrated its efficient and fair administration," whereas evidence of "fraud, waste, or abuse," or failure to adhere to relevant regulations should "raise serious concerns" regarding whether re-designation is appropriate); S. Rep. No. 115-339, at 5-6 (same).

¹³ 17 U.S.C. 115(d)(3)(C)(i), (iii) (enumerating thirteen functions, in addition to permission to administer voluntary licenses).

¹⁴ *Id.* at 115(d)(3)(E).

¹⁵ *Id.* at 115(d)(3)(C)(i)(IX)-(X).

¹⁶ *Id.* at 115(d)(3)(D)(i).

¹⁷ *Id.*

¹⁸ *Id.* at 115(d)(3)(D)(ii).

¹⁹ *Id.* at 115(d)(3)(D)(iv). This committee will have an equal number of musical work copyright owners and digital music provider representatives, respectively appointed by the MLC and DLC.

²⁰ *Id.* at 115(d)(3)(D)(v), (d)(3)(J)(ii). This committee of ten will have an equal number of musical work copyright owners and professional songwriters.

²¹ *Id.* at 115(d)(3)(D)(vi), (d)(3)(H)(ii), (d)(3)(K). This committee will consist of at least six members, again equally divided among musical work copyright owners and professional songwriters.

²² *Id.* at 115(d)(5)(A)(i)-(iii).

²³ *Id.* at 115(d)(5)(B).

²⁴ *Id.* at 115(d)(5)(B)(iii).

²⁵ *See generally id.* at 115(d)(5)(C).

²⁶ *Id.* at 115(d)(3)(B)(III), (d)(5)(B)(i)-(ii).

²⁷ *Id.* at 115(d)(3)(A)(iv) ("with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B)"); *id.* at (d)(5)(A)(iv) (same); *see id.* at 702.

²⁸ H.R. Rep. No. 115-651, at 5; S. Rep. No. 115-339, at 5; Conf. Rep. at 4; *see* H.R. Rep. No. 115-651, at 26 ("This requirement is not waivable by the Register and is not subject to the alternate designation language."); S. Rep. No. 115-339, at 23 (same).

²⁹ 83 FR 65747 (Dec. 21, 2018) ("NOI"); *see* 17 U.S.C. 115(d)(3)(B), (d)(3)(D)(iv)-(vi), (d)(5)(B).

solicited as part of the designation process.³⁰

The Office received one proposal for designation as the DLC and two proposals for designation as the MLC, which, in accordance with the NOI, the public was invited to comment upon. The response was considerable; the Office received over 600 comments addressing these proposals, including, but not limited to, musical work copyright owners endorsing one or more of the entities seeking designation. As noticed in the NOI, the Office also considered whether to utilize information meetings subject to established guidelines for such *ex parte* communications.³¹ Determining that follow-up with each of the three candidates would be valuable, the Office issued such guidelines, and on May 28 and 29, the Office met with the three proponents seeking designation as the DLC or MLC, allowing the proponents to supplement their written submissions, but not to address matters wholly outside the record; summaries of those meetings were posted on the Office's website.³²

Beyond the Office's role in designating the MLC and DLC, Congress intended to invest the Register with "broad regulatory authority" to create policies and conduct proceedings as necessary to effectuate the MMA.³³ The statute enumerates several regulations that the Register is specifically directed to promulgate, including regulations regarding the form of the notices of license and notices of nonblanket activity,³⁴ usage reports and adjustments,³⁵ information to be included in the musical works database,³⁶ requirements for the usability, interoperability, and usage restrictions of that database,³⁷ and the disclosure and use of confidential information.³⁸ The legislative history contemplates that the Register will both "thoroughly review[]" policies and procedures established by the MLC, and promulgate regulations that balance

"the need to protect the public's interest with the need to let the new collective operate without over-regulation."³⁹

II. Register's Designation and Analysis

A. Mechanical Licensing Collective

The Office received proposals from two entities seeking to be designated as the MLC: (1) The "Mechanical Licensing Collective, Inc." referred to here as "MLCI"; and (2) the "American Music Licensing Collective," referred to here as "AMLC."⁴⁰ The candidates' respective submissions take differing approaches to demonstrating compliance with the statutory criteria. MLCI provides a detailed outline of its proposed organizational structure, business plan, and overall activities. It provided flowcharts and other illustrative materials setting forth in-depth plans for executing the MLC's administrative and technological responsibilities, including managing compulsory and voluntary licenses, matching songwriters to musical works, and collecting and distributing royalties. It describes its submission as the "music industry consensus proposal" and contends that its selection would facilitate valuable cooperative efforts across the industry.⁴¹ AMLC focuses more specifically on matching unidentified songwriters to their compositions for payment purposes. It argues that the expertise of its proposed board and vendors makes it best positioned to advance that goal,⁴² which the Conference Report describes as "the highest responsibility of the collective" beyond efficient and accurate collection and distribution of royalties.⁴³

The Copyright Office assessed the extent to which each candidate satisfies the statutory requirements for designation, which can be grouped into three categories: (1) Organization, board and committee composition, and governance; (2) endorsement and substantial support from musical work copyright owners; and (3) administrative and technological capabilities. As detailed below, the Office concludes that while both candidates meet the statutory criteria to be a nonprofit created to carry out its

statutory responsibilities, only MLCI satisfies the endorsement criteria, and MLCI also has made a better showing as to its prospective administrative and technological capabilities. The Register is thus designating MLCI, including its individual board members, with the Librarian's approval.

As both proposals demonstrate, the new collective must undertake formidable responsibilities expeditiously and conscientiously to establish a number of operational functions critical to implementation of the new blanket licensing system. While the comprehensive MLCI proposal signals its understanding of the full scope of this project and its importance to songwriters and others in the music community, a successful collective will undoubtedly benefit from input from that broader community much in the way the MMA itself was enacted in a spirit of consensus and compromise.⁴⁴ The Register welcomes the prospect of MLCI working with the broader community of musical work copyright owners and other songwriters, as well as the DLC and individual digital music providers, to realize the promise of the MLC as envisioned by Congress.

1. Organization, Board and Committee Composition, and Governance

As the statute requires, both MLCI and AMLC are constructed as nonprofit entities created by copyright owners to carry out the MLC's statutory responsibilities.⁴⁵ The analysis below will focus on relevant board and committee composition and governance issues.

i. Board and Committee Composition

a. MLCI

In accordance with the statute, MLCI's proposed board includes four professional songwriters: Kara DioGuardi, Oak Fielder, Kevin Kadish, and Tim Nichols.⁴⁶ MLCI notes that these members were selected by a songwriter advisory panel consisting of two professional songwriters from each of the Nashville Songwriters Association International ("NSAI"), Songwriters of North America ("SONA"), Songwriters Guild of America ("SGA"), American Society of

³⁰ 17 U.S.C. 115(d)(3)(B)(i)(I).

³¹ NOI at 65753–54.

³² See U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-designations/ex-parte-communications.html> (last visited June 24, 2019); NOI at 65753–54. Given the relatively robust record, with over 600 written comments received regarding the proposals, and in light of the statutory deadline, the Office elected to limit meetings to the three candidates.

³³ H.R. Rep. No. 115–651, at 5–6; S. Rep. No. 115–339, at 5; see also 17 U.S.C. 115(d)(12).

³⁴ 17 U.S.C. 115(d)(2)(A)(i), (d)(6)(A)(i).

³⁵ *Id.* at 115(d)(4)(A)(iv).

³⁶ *Id.* at 115(d)(3)(E)(ii)(V), (d)(3)(E)(iii)(II).

³⁷ *Id.* at 115(d)(3)(E)(vi).

³⁸ *Id.* at 115(d)(12)(C).

³⁹ H.R. Rep. No. 115–651, at 5–6, 14; S. Rep. No. 115–339, at 5, 15; see also 17 U.S.C. 115(d)(12).

⁴⁰ The incorporator's contact information for these entities are: Benjamin K. Semel, Pryor Cashman LLP, 7 Times Square, New York, NY 10036 (MCLI); Derek C. Crownover, Dickinson Wright, PLLC, 54 Music Square East, Suite 303, Nashville, TN 37203 (AMLC); and Allison Stillman, Mayer Brown LLP, 1221 Avenue of the Americas, New York, NY 10020 (DLCI).

⁴¹ MLCI Proposal at 5, 8.

⁴² *Id.* at 2–5.

⁴³ Conf. Rep. at 7; H.R. Rep. No. 115–651, at 9 (same); S. Rep. No. 115–339, at 9 (same).

⁴⁴ See, e.g., Conf. Rep. at 2 ("Songwriters, artists, publishers, producers, distributors, and other stakeholders involved in the creation and distribution of music collaborated with legislators in both the Senate and the House to find a path forward on music reform.").

⁴⁵ MLCI Proposal at Ex. 1 (Certificate of Incorporation under Delaware law); AMLC Proposal at Schedule B (Certificate of Incorporation under New York law).

⁴⁶ *Id.* at 67–68 (a biography is included for each songwriter board member).

Composers, Authors and Publishers (“ASCAP”), and Broadcast Music, Inc. (“BMI”).⁴⁷ No members of the advisory panel were themselves candidates for the board or any committee.⁴⁸ NSAI reports that the panel considered nearly 300 songwriter applicants as part of this selection process.⁴⁹

To satisfy the requirement of ten music publisher representatives, MLCI’s proposed board includes the following members: Jeff Brabec (BMG); Peter Brodsky (Sony/ATV Music Publishing); Bob Bruderman (Kobalt); Tim Cohan (peermusic); Alisa Coleman (ABKCO); Scott Cutler (Pulse Music Group); Paul Kahn (Warner/Chappell Music Publishing); David Kokakis (Universal Music Publishing Group); Mike Molinar (Big Machine Music); and Evelyn Paglinawan (Concord Music). MLCI notes that these members were selected by an advisory panel comprised of professionals associated with independent music publishers.⁵⁰ The panel “carefully vetted candidates to ensure that the representatives selected to serve on the Board (a) have the requisite expertise and experience to govern MLC; (b) individually and together faithfully reflect the entire music publisher community; and (c) are motivated to serve on the Board and understand and do not underestimate the serious responsibilities entrusted to them.”⁵¹ As described by MLCI, the publisher board members represent a broad range of publishing interests—from a “thirty-employee company established and run by creatives with a catalog of approximately 10,000 songs” to the largest global publishers.⁵²

MLCI’s required nonvoting board members are Danielle Aguirre (NMPA), as a representative of the nonprofit trade association of music publishers that represents the greatest percentage of the licensor market for uses of musical works in covered activities;⁵³ and Bart Herbison (NSAI), as a representative of a nationally recognized nonprofit trade association whose mission is advocacy on behalf of songwriters.⁵⁴ The third

non-voting board member will be a representative of the DLC.⁵⁵

MLCI also submits proposed members for each of the three statutorily required committees. For the operations advisory committee, MLCI has selected copyright owners who have substantial experience with license administration, rights management operations, and the relevant technology.⁵⁶ For the unclaimed royalties oversight committee, the proposed members likewise have extensive experience relevant to that committee’s task of “establish[ing] policies and procedures for the distribution of unclaimed accrued royalties and accrued interest.”⁵⁷ Each publisher representative on the unclaimed royalties committee is affiliated with an independent music publisher, as opposed to a major music publisher, which will help to ensure that smaller rightsholders have a voice in MLC functions.⁵⁸ Finally, consistent with the statute, MLCI proposes a dispute resolution committee made of five professional songwriters and five musical work copyright owners.⁵⁹

Based on the biographies and other information submitted regarding these proposed board and committee members, the Copyright Office determines that the proposed composition of MLCI’s board and committees satisfies the statutory requirements, and moreover, that each of its proposed directors possesses the qualifications necessary for

⁴⁷ *Id.* at 75.

⁴⁸ *Id.* at 76–78 (committee members are Joe Conyers III (Songtrust and Downtown Music Publishing), Scott Farrant (Kobalt), Rell Lafargue (Reservoir Media Management), Michael Lau (Round Hill Music), John Reston (Universal Music Publishing Group), and Bill Starke (Sony/ATV Music Publishing)).

⁴⁹ 17 U.S.C. 115(d)(3)(j)(ii); see MLCI Proposal at 78 (“This Committee includes individuals who have experience in royalty and payment accounting and administration, have served on the boards of independent music publishing trade groups, and have litigated (on behalf of songwriters) the failure of digital music providers to pay royalties due to a claimed inability to identify or ‘match’ recordings to musical works.”).

⁵⁰ MLCI Proposal at 79–80 (committee members are songwriters busbee, Kay Hanley, David Lowery, Dan Navarro, and Tom Shapiro and copyright owner representatives Phil Cialdella (Atlas Music Publishing), Patrick Curley (Third Side Music), Michael Eames (PEN Music Group), Frank Liwall (The Royalty Network, Inc.), and Kathryn Ostien (The Richmond Organization/Essex Music Group)).

⁵¹ MLCI Proposal at 84–86 (committee members are songwriters Aimée Allen, Odie Blackmon, Gary Burr, David Hodges, and Jennifer Schott and copyright owner representatives Alison Koerper (Disney Music Group), Ed Leonard (Daywind Music Group), Sean McGraw (Downtown Music Publishing), Debbie Rose (Shapiro, Bernstein & Co.), and Jason Rys (Wixen Music Publishing)).

appointment to the board.⁶⁰ In addition, MLCI’s submission indicates that its selection procedures were carefully designed to ensure transparency and input from a broad range of industry sectors, as well as to avoid any likelihood of self-selection. MLCI also designed its committee selection process such that committee members do not also serve on the board, helping guard against potential conflicts of interest or undue influence.

b. AMLC

AMLC’s submission provides less information on the mechanics of its board and committee selection processes. For its professional songwriter members, AMLC’s board includes Rick Carnes, Imogen Heap, Zoe Keating, and Maria Schneider.⁶¹ For its music publisher members, AMLC’s board includes Maximo Aguirre (Maximo Aguirre Music Publishing, Inc.), Wally Badarou (ISHE sarl Music), John Barker (ClearBox Rights, LLC), Marti Cuevas (Mayimba Music), Joerg Evers (Eversongs), Brownlee Ferguson (Bluewater Music Corp.), Henry Gradstein (listed as an attorney and independent publisher), Lisa Klein Moberly (Optic Noise), Ricardo Ordóñez (Union Music Group), and Jeff Price (Audiam, Inc.).⁶² AMLC reports that these members were selected following an “active recruitment campaign” and that each selected member was required to have “proven skill sets and practical hands-on work experience” in various industry sectors, as well as “first-hand work experience and knowledge of music rights organizations and how they operate.”⁶³

⁶⁰ AMLC does not dispute that these proposed members possess the required qualifications. The Office received one comment from a songwriter who allegedly observed “collusion” while “serving on the selection committee for the NMPA’s MLC,” without providing substantiation. See Michelle Shocked Reply at 1. While the Office takes such matters seriously, MLCI’s submission did not list this commenter as a member of its songwriter advisory panel and other songwriters praised the selection process. See, e.g., SONA Reply at 2 (signed by Michelle Lewis, a MLCI songwriter advisory panel member, and over twenty other songwriters); MLCI Proposal at Ex. 8 (statement of NSAI). In the absence of more specific information, these allegations do not factor into the Office’s analysis.

⁶¹ AMLC Proposal at 35.

⁶² *Id.* at 35, 49–75 (A biography is included for each board member).

⁶³ *Id.* at 38. Following its meeting with AMLC, the Office understands that an initial core of board members, namely Mr. Barker, Mr. Price, Mr. Ferguson, and Ms. Moberly, served to vet additional members. See AMLC *Ex Parte* Meeting Summary at 22 (June 5, 2019) (“Board member searches were conducted via personal relationships, recommendations, and invitations to submit inquiries of interest via public posting on the AMLC

⁴⁷ *Id.* at 67–69.

⁴⁸ *Id.* at 68; NSAI Reply at 4–5 (discussing conflicts of interest approach).

⁴⁹ NSAI Reply at 5.

⁵⁰ MLCI Proposal at 69; see also NSAI Reply at 4–5 (advisory selection panel contained “only independent music publishers whose interests are best served by selecting the most efficient back office systems, and who have vast experience with potential vendors”).

⁵¹ MLCI Proposal at 69–70 (A biography is included for each music publisher board member).

⁵² *Id.* at 70.

⁵³ *Id.* at 74.

⁵⁴ *Id.* at 74–75.

AMLC includes only one of the three required nonvoting board members, David Wolfert of MusicAnswers, as a representative of a nationally recognized nonprofit trade organization whose primary mission is advocacy on behalf of songwriters in the United States.⁶⁴ AMLC notes that one additional nonvoting board member will be a representative of the DLC, and another will be filled by NMPA as a representative of the nonprofit trade association of music publishers.⁶⁵

In response, MLCI contends that AMLC's proposed board does not adequately represent the entire music publisher community, as it lacks representatives from large or mid-size publishers.⁶⁶ The Office notes, however, that AMLC has offered to replace one of its current publisher board members with a representative of a major publisher if such an organization were to request a voting seat.⁶⁷

AMLC also submits proposed members for each of the designated committees. Unlike MLCI, some of the members on each committee include proposed board members—a structure that potentially could diminish the committees' ability to provide independent recommendations to the board.⁶⁸ As required, AMLC provides four members for the operations advisory committee, and five professional songwriters and five musical work copyright owners for the unclaimed royalties oversight committee.⁶⁹ AMLC notes that the proposed members of the latter committee “have years of experience dealing with double claims, counter claims and registration of song data both in the US and internationally.”⁷⁰ For the dispute resolution committee, AMLC provides three representatives of

website.”). MLCI, however, raised questions as to a lack of transparency and potential conflicts of interest in AMLC's selection process. See MLCI Reply at 16–18.

⁶⁴ AMLC Proposal at 35.

⁶⁵ *Id.*

⁶⁶ MLCI Reply at 18.

⁶⁷ AMLC Proposal at 35.

⁶⁸ *Id.* (AMLC's proposed Operations Advisory Committee members are Frank Liddell (Carnival Music), Caleb Shreve (Killphonic Music), and board members Brownlee Ferguson (Bluewater Music Corp.) and Jeff Price (Audiam, Inc.).)

⁶⁹ *Id.* at 35–36 (AMLC's proposed Unclaimed Royalties Oversight Committee members are songwriters Joerg Evers, Rick Carnes, Zoe Keating, Stewart Copeland, Hélène Muddiman, and Anna Rose Menken and copyright owners Ricardo Ordonez (Union Music Group), Gian Caterine (American Music Partners West), Carlos Martin Carle (Mayimba Music), Juan Hidalgo (Juan y Nelson Entertainment), Al Staehely (listed as an entertainment lawyer and copyright owner), and David Bander (Ultra Music & Ultra International Music Publishing)).

⁷⁰ *Id.* at 41.

musical work copyright owners and three professional songwriters.⁷¹

MLCI argues that certain AMLC board members do not in fact satisfy the relevant statutory criteria.⁷² MLCI specifically questions AMLC proposed board members John Barker, Joerg Evers, and Wally Badarou's status as “publisher representatives,” contending that the entities with which they claim affiliation do not appear to be music publishers.⁷³ MLCI also challenges the characterization of Henry Gradstein as an “independent publisher” on the ground that he is a litigation attorney for whom no publisher affiliation is provided either in AMLC's submission or on his law firm's website.⁷⁴

The Office raised these issues in its meeting with AMLC representatives. In response, AMLC provided specific information regarding the entities with which these individuals are affiliated. AMLC stated that Mr. Barker is the owner and CEO of ClearBox Rights, LLC, an “independent copyright administration company,” which is the “‘exclusive’ agent for licensing and collection of royalties for all types of uses.”⁷⁵ Under AMLC's interpretation, Mr. Barker would be qualified to serve on the board because he represents music publishers through his administration company.⁷⁶ AMLC further provided company names and ASCAP or BMI IPI numbers for publishing companies owned by Mr. Evers, Mr. Badarou, and Mr. Gradstein.⁷⁷

Based on this information, the Register will assume for purposes of this designation that Mr. Evers, Mr. Badarou, and Mr. Gradstein qualify as “representatives of music publishers.”⁷⁸ While Mr. Gradstein in particular appears to be primarily a litigator, he is also the owner of a music publishing company. For the music publishing representatives, the statute does not appear to require that music publishing is a full-time occupation, and Mr. Gradstein has focused his career on issues relevant to his proposed board service.⁷⁹ While Mr. Barker's

⁷¹ *Id.* at 36 (committee members are songwriters Wally Badarou, Imogen Heap, and Jon Siebels and copyright owners Peter Roselli (Bluewater Music Corp.), Hakim Draper (Boogie Shack Music Group), and Jonathan Segel (Copyright Owner)).

⁷² MLCI Reply at 19–20.

⁷³ *Id.* at 20.

⁷⁴ *Id.* at 19.

⁷⁵ AMLC *Ex Parte* Meeting Summary at 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 17 U.S.C. 115(d)(3)(D)(i)(I).

⁷⁹ In contrast, the songwriter board members must be “professional[s],” which the Office regards as a requirement that such board members be primarily songwriters. *Id.* at 115(d)(3)(D)(i)(II)

background similarly demonstrates relevant experience, it is not clear that he meets the statutory criteria, as MLCI raises a colorable argument that representatives of “[e]ntities 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.”⁸⁰ Under that reading, if Mr. Barker's company merely administers licenses on behalf of copyright owners, but has not itself been assigned copyrights, he would not constitute a publisher representative within the meaning of the statute.

Ultimately, the Copyright Office need not resolve this issue because the specific proposal of Mr. Barker does not factor heavily into the Office's assessment. Any conflict with the statute could be cured by replacing him with a publisher representative; indeed, the Office appreciates AMLC's offer to accommodate a major publisher that wishes to join its board. A greater concern, however, is the lack of specific information provided by AMLC on its membership selection processes. Even assuming that its ultimate selections would satisfy the statutory requirements, AMLC's submissions describe a somewhat *ad hoc* decision making process in this area. While many of the proposed AMLC board members demonstrate commendable experience to perform the relevant duties, the Office appreciates MLCI's more comprehensive approach to identifying and selecting potential members, who themselves each appear highly experienced and able to perform the required duties.

ii. Representation and Diversity

The Institute of Intellectual Property and Social Justice (“IIPSJ”), in comments co-signed by several dozen artists and other music industry stakeholders, urged the Register to ensure that the MLC includes “meaningful and significant representatives from the African-American, Latino-American and Asian-American songwriting and music publishing communities, selected by such communities, and encompassing

(regarding “professional songwriters who have retained and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored”) (emphasis added); see also MLCI Proposal at 67 (“In MLC's view, the requirement that four voting board members of MLC be “professional songwriters” means that the songwriter board members must be songwriters who earn a living primarily through their songwriting activities.”).

⁸⁰ MLCI Reply at 20; see also 17 U.S.C. 115(d)(3)(D)(i)(I).

representation from the Hip-Hop, R&B, Latin, Reggae, Jazz and Gospel/Christian music genres.”⁸¹ Pointing to the growing influence of Hip-Hop and Latino music, IIPJS suggests that the statute requires “diverse cultural representation” for the board.⁸² IIPJS believes that the proposed boards of both MLCI and AMLC lack sufficient representation from these communities.⁸³

The Office takes representation concerns seriously and agrees that they should be considered as part of the MLC board and committee selection processes. In meetings with the Office, both MLCI and AMLC expressed a commitment to ensuring diversity in their memberships, though, both questioned the premises of IIPJS’s letter with regards to the sufficiency of representation in their proposed board slates. In addition, MLCI noted that its draft bylaws “contain a diversity provision that calls for a biannual report on the diversity of the board, including diversity as to gender/race/ethnicity, income, musical genre, geography and expertise/experience.”⁸⁴ The report’s conclusions “are to be used by the nominating committees in choosing future candidates” to be proposed for the board.⁸⁵ MLCI further emphasized its capacity to reach a variety of communities, noting “the extensive participation that it has developed through its Board and Committee members and many endorsers,” and that “many groups supporting MLC[I] have international offices that can assist in global outreach.”⁸⁶ AMLC responded by reiterating the diverse nature of its board members and their experience with broad array of genres and creator communities.⁸⁷ AMLC believes that its board members’ experiences would prove beneficial in the development of educational and outreach efforts targeting diverse creators, including those overseas.⁸⁸ Both candidates agreed that securing engagement and trust among varied communities, musical genres, and geographical locations would prove critical to the MLC’s core project of encouraging musical work copyright owners with unclaimed accrued royalties to come forward and claim such monies.

The Copyright Office recognizes the entertainment industry as a whole has been grappling with the question of how best to diversify its leadership and provide opportunities to a broader range of creators. The Office believes that the MLC can play a role in helping to advance these goals within the music industry.⁸⁹ The Office accordingly expects the designated MLC to ensure engagement with a broad spectrum of musical work copyright owners, including from those communities that IIPJS asserts are underrepresented. The Office intends to work with the MLC to help it achieve these goals.⁹⁰

iii. Bylaws, Conflicts of Interest, and Other Governance Issues

Both submissions address the statutory requirement to establish bylaws within one year of designation, including with respect to succession of board members.⁹¹ MLCI has not yet adopted bylaws, but it does have draft bylaws that it will make public “well in advance of the statutory deadline.”⁹² In addition, although it has “not finalized a management structure for daily operations,” MLCI has already established a number of “foundational” policies and procedures designed to ensure accountability, transparency, fairness and confidentiality, including that: (1) All committee recommendations will be subject to board approval; (2) annual reports will be released to the public; (3) the committees will maintain their statutory composition; (4) MLCI will maintain a public list of all unmatched works and engage in public outreach to enhance legitimate ownership claims; and (5) the board will adopt a comprehensive set of written codes, policies, and procedures to govern the board and committees.⁹³ MLCI also commits to “safeguard[ing] private, sensitive, or confidential information.”⁹⁴ With regard to

successive board members, MLCI proposes that songwriter members would be appointed from a slate of candidates chosen by songwriters, and prospective music publisher members would be appointed from candidates chosen by music publishers.⁹⁵ A similar process would be followed for committees.⁹⁶ MLCI proposes that the board conduct regular elections as well as address interim vacancies through an election process based on those nominations.⁹⁷

AMLC has adopted bylaws that detail board members’ obligations with regard to related party transactions and conflicts of interest, including disclosure requirements and procedures for review by fellow board members, although AMLC recognizes that it may have “to ameliorate or conform the bylaws” if they are not consistent with the MMA, the Register’s yet-to-be promulgated regulations, or the New York State Not-for-Profit Corporation Law.⁹⁸

AMLC proposes that replacement board members can be nominated by either the departing member or any other voting members, and that AMLC’s board would select committee members by a majority vote, but its bylaws do not otherwise detail how committee candidates will be nominated.⁹⁹ Beyond these statutorily prescribed committees, AMLC proposes four “additional support committees”—Audit and Finance, Education and Outreach, Technology and Security, and International.¹⁰⁰ It appears there is some potential for overlap, as, for example, strategic technology issues appear to fall under both the Technology and Security Committee and the Operations Oversight Committee, and matters relating to budgeting, vendor contracts, and general operations appear to be germane to the Operations Oversight Committee as well as the Executive and Audit and Finance Committees.¹⁰¹ The Office notes that any additional standing committees should not conflict with the functions of the statutorily mandated committees, which are subject to strict board composition requirements to ensure adequate representation of interests (e.g., songwriters, digital music providers) in

⁸⁹ Cf. Cal. Corp. Code sec. 301.3 (under California law, publicly held corporations whose principal executive offices are located in California must include female board members).

⁹⁰ See H.R. Rep. No. 115–651, at 5–6, 14; S. Rep. No. 115–339, at 5, 15.

⁹¹ 17 U.S.C. 115(d)(3)(D)(ii)(I).

⁹² MLCI Proposal at 86; MLCI *Ex Parte* Meeting Summary at 3 (referencing draft bylaws). MLCI correctly notes that it is not required to have adopted bylaws at this stage. See MLCI Proposal at 115.

⁹³ MLCI Proposal at 86–91 (noting the board’s forthcoming sets of written codes, policies, and procedures, including: Code of Conduct and Ethics; Conflict of Interest Policy; Investment Policy (including an Anti-Comingling Policy); Confidentiality Policy; Whistleblower Policy; Document Retention Policy; Technology and Security Policy; Non-Discrimination Policy; Anti-Sexual Harassment Policy; Social Media Policy; and Gift Acceptance Policy).

⁹⁴ *Id.* at 92–93.

⁹⁵ *Id.* at 87.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ AMLC Proposal at 78, 88–91 (AMLC bylaws).

⁹⁹ *Id.* at 79–80 (AMLC bylaw art. 4.3).

¹⁰⁰ *Id.* at 86, 85 (AMLC bylaw art. 6.5.5–6.5.8).

¹⁰¹ *Id.* at 84–85 (AMLC bylaw art. 6.5.1, 6.5.4, 6.5.5, 6.5.7).

⁸¹ IIPJS Initial at 3.

⁸² *Id.* at 3–4.

⁸³ IIPJS Reply at 4–6.

⁸⁴ MLCI *Ex Parte* Meeting Summary at 3 (June 4, 2019).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ AMLC *Ex Parte* Meeting Summary at 3–4, 15–17.

⁸⁸ *Id.* at 15–17.

the matters handled by those committees.¹⁰²

With respect to conflicts of interest, MLCI will require all board members and employees to comply with a conflicts policy to be adopted at a later date.¹⁰³ The policy “will require disclosure of all actual or potential conflicts,” including “having a financial interest (direct or indirect) in any contemplated MLC transaction, or relationship with any counterparty to such transaction.”¹⁰⁴ MLCI also states that it “expects all associated persons to fully comply with all applicable law,” including fiduciary and ethical obligations, and that it “will enforce such obligations, which may include removal for cause, in the event of a demonstrated violation.”¹⁰⁵

AMLC disputes that these measures are sufficient to prevent conflicts in the event MLCI were designated. AMLC argues that there is a serious conflict of interest when a MLC board member is eligible to receive a significant portion of the accrued but unpaid royalties—a concern that AMLC believes is salient given the number of major publishers represented on MLCI’s board.¹⁰⁶ Other commenters, some of whom appear affiliated with AMLC, raise similar concerns.¹⁰⁷ In response, NSAI argues that the unclaimed royalties oversight committee will protect against such concerns, noting that MLCI does not include a major publisher on that committee.¹⁰⁸ MLCI further suggests this concern would attach to any board member regardless of which entity is designated, noting that every copyright owner and songwriter on any designated MLC will be eligible to receive a distribution of unclaimed accrued royalties.¹⁰⁹

For its part, AMLC sets forth procedures for disclosing, addressing, and documenting conflicts of interest in its bylaws.¹¹⁰ It asserts that its board will consider such issues carefully in establishing governance procedures and that the unclaimed royalties committee

will establish guidelines and polices to reduce conflicts.¹¹¹

MLCI suggests that AMLC has serious conflicts of interest of its own, alleging that AMLC board members have undisclosed ties to its proposed vendors, in violation of AMLC’s own bylaws.¹¹² These claims, echoed by NSAI,¹¹³ involve allegations that certain AMLC board members have financial interests in the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”), which owns AMLC’s intended vendor partner DataClef.¹¹⁴ AMLC responded that while Mr. Barker previously was in a consulting position with SOCAN, that relationship ended prior to AMLC’s formation.¹¹⁵ AMLC acknowledges that Mr. Price is the founder and CEO of Audiam, a company acquired by a SOCAN holding company, but asserts that the companies are managed separately and that “Audiam is not a vendor and is not going to be one.”¹¹⁶ AMLC also generally asserted that AMLC’s board members currently have “no ties or fiduciary responsibilities to any shareholders.”¹¹⁷

Taking all of this information into account, both MLCI and AMLC have adopted policies and procedures that appear broadly consistent with the statutory requirements on matters of governance. Both submissions show a serious commitment to transparency, accountability, and the protection of confidential information.¹¹⁸

With respect to the purported conflicts of interest of individual board members, although these claims raise serious issues, they ultimately have little impact on the Office’s evaluation of the candidates’ proposals. Regarding MLCI’s board composition, the Office agrees that the unclaimed royalties oversight committee will help mitigate potential conflicts. As discussed below, the Office expects ongoing regulatory and other implementation efforts to further extenuate the risk of self-interest with respect to the distribution of unclaimed accrued royalties. As to the allegations regarding individual AMLC

board members, a more substantial explanation of the relevant business relationships may be required if AMLC were the candidate that otherwise most nearly satisfied the statutory criteria. The Office thus need not resolve whether any specific affiliations of AMLC board members would, in fact, present material conflicts of interest with respect to its intended primary vendor.

More generally, the Copyright Office appreciates that both proponents have pledged to operate under bylaws that will address conflicts of interest and appropriate disclosures in accordance with applicable state laws and professional duties of care.¹¹⁹ Following this designation process, and including through the various statutorily required rulemakings, the Register intends to exercise her oversight role as it pertains to matters of governance, including through promulgation of regulations so that the MLC’s bylaws include an avenue to ensure that subsequent board member selections are made in compliance with all relevant legal requirements.¹²⁰

2. Endorsement and Support

As noted, the MLC must 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.”¹²¹ The Copyright Office made two preliminary interpretations regarding this clause in the NOI.¹²² First, the Office explained that because the section 115 license applies to uses of phonorecords in the United States, the relevant market is the United States market for making and distributing phonorecords of musical works. Thus, endorsement may be shown by including musical work copyright owners located outside the United States so long as they control the relevant rights to works played or otherwise distributed in the United States. Second, the Office stated that because the statute refers to support from “musical work copyright owners,” the relevant support should come from parties who have a relevant ownership

¹⁰² See, e.g., 17 U.S.C. 115(d)(3)(D)(iv)–(vi); see also Conf. Rep. at 19 (“Since the Board of Directors and committee member requirements . . . are statutory in nature, these requirements are not waivable by the Register or subject to modification by the Board of Directors.”).

¹⁰³ MLCI Proposal at 91–92.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 92.

¹⁰⁶ AMLC Proposal at 19, 45–46.

¹⁰⁷ Robert Allen Reply at 3–4; Cameron Ford Reply at 1–2; MusicAnswers Reply at 1–3; Maria Schneider Reply at 1; Rhonda Seegal Reply at 2–3; SGA Reply at 5–8.

¹⁰⁸ NSAI Reply at 4.

¹⁰⁹ MLCI Reply at 33.

¹¹⁰ AMLC Proposal at 89–90 (AMLC bylaw art. 14).

¹¹¹ *Id.* at 19.

¹¹² MLCI Reply at 30–32.

¹¹³ NSAI Reply at 5.

¹¹⁴ MLCI Reply at 30–31.

¹¹⁵ AMLC *Ex Parte* Meeting Summary at 23 (AMLC further offered that “Mr. Barker continues to have an arm’s-length business relationship with SOCAN for certain collection activity”).

¹¹⁶ *Id.* Despite the assertion that Audiam has its own management, AMLC does not state that the Audiam board contains *no* SOCAN executives. See *id.* (noting that Audiam’s board of directors “includes non-SOCAN executives”).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., MLCI Proposal at 88–93; AMLC Proposal at 17, 42, 78.

¹¹⁹ See, e.g., Del. Code Ann. tit. 8, sec. 144(a); N.Y. Not-for-Profit Corp. L. sec. 715.

¹²⁰ See 17 U.S.C. 115(d)(12); see *id.* at 115(d)(3)(D)(i)(I)–(IV); see also H.R. Rep. No. 115–651, at 5–6; S. Rep. No. 115–339, at 5; Conf. Rep. at 4. The Office notes that many commenters supported the Office performing a meaningful oversight role to the extent permissible under the statute. See, e.g., Maria Schneider Reply at 2–3; SGA Reply at 7.

¹²¹ 17 U.S.C. 115(d)(3)(A)(ii).

¹²² NOI at 65753.

interest in the copyright to musical works (or shares of such works), in contrast to parties who do not possess any ownership interest in musical works but only the ability to administer the works. Neither MLC candidate disagrees with these conclusions.¹²³

Under section 115(d)(3)(A)(ii), only those copyright owners comprising a portion of “the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years,” count for purposes of endorsement.¹²⁴ The Office also noted in the NOI that it understood there might be conflicting views regarding how the indicia of endorsement and support should be measured.¹²⁵ This understanding proved correct, as MLCI and AMLC offer competing interpretations. While MLCI argues that the measurement is to be based on market share and licensing revenue, AMLC disagrees. The Office will address these disputed issues of statutory construction before making its evidentiary findings.

i. Statutory Interpretation

a. Candidates' Views

AMLC argues that the endorsement provision “should 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.”¹²⁶ AMLC contends that the statutory language is ambiguous but that its reading is confirmed by the legislative history. It notes that “[t]he [Senate Judiciary] Committee explained that the MLC should be ‘endorsed by and enjoy[] support from the majority of musical works copyright owners as measured over the preceding three years.’”¹²⁷ From this, AMLC asserts that Congress intended that “the parties eligible to endorse the proposed MLC are the musical works copyright owners.”¹²⁸

AMLC also points to a separate provision of the statute, section 115(d)(3)(J), to argue that the endorsement provision “[c]annot [r]efer

to [m]arket [s]hare.”¹²⁹ Section 115(d)(3)(J) states that after unclaimed accrued royalties have been held for the requisite period of time, the MLC is to distribute the royalties to identified copyright owners “in a transparent and equitable manner based on data indicating the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for covered activities for the periods in question.”¹³⁰ AMLC notes that, unlike the endorsement provision, section 115(d)(3)(J) expressly refers to “relative market share.” In its view, “[i]f Congress, in articulating the endorsement criteria, intended for the words ‘licensor market’ to mean ‘relative market share’ (or some equivalent), Congress would have included the words ‘relative market share,’ the methodology to calculate same and the corresponding confidentiality language it included later on when specifically referring to ‘relative market share.’”¹³¹

AMLC also makes the policy argument that “[a]n inherent conflict of interest would be created if the MLC were primarily endorsed and/or constituted by the largest and/or ‘major’ publishers” because, “[s]ince unclaimed or ‘black box’ royalties are to be distributed based on market share, those publishers would be dis-incentivized to account to independent songwriters and independent publishers accurately, *i.e.*, the major publishers would be incentivized to create a larger ‘black box’ from which they could then participate.”¹³² AMLC argues that “[w]ere [these copyright owners] to be in control of such process, the resulting situation would repeat the incentive problem involving digital music services that the statute intended to fix,” and that “the purposes of the MMA would not be best fulfilled if proper incentives are not aligned.”¹³³

In AMLC’s view, because “songwriters . . . are the greatest number of copyright owners relevant to

and able to endorse an MLC,”¹³⁴ endorsement should be measured by counting each musical work copyright owner as one vote.¹³⁵ As evidence of such support, it relies on a list of (in some cases, appending supporting letters from) purported endorsers.¹³⁶

In contrast, MLCI argues that the endorsement provision is unambiguous, and that the “only reasonable interpretation . . . is that the collective shall be the entity that has the endorsement and support of copyright owners that together received during the statutory three-year period the largest aggregate percentage of total mechanical royalties of any entity seeking designation as the collective.”¹³⁷ MLCI primarily relies on the statutory text to assert that “percentage of the . . . market” means “market share,” that the phrase “for uses of [musical] works in covered activities” denotes a measurement based on usage, and that such usage should be measured by looking at licensor revenue from applicable royalty payments.¹³⁸

MLCI contends that other potential metrics—*i.e.*, number of licenses, number of copyright owners, and number of musical works—are not supported by the legislative history and are unworkable as a practical matter.¹³⁹ It disagrees with AMLC’s analysis of section 115(d)(3)(J)’s use of the phrase “relative market share,” arguing that that section “supports, rather than refutes, the fact that the endorsement criterion looks to royalty market share, as both are examples of the MMA’s use of such market share to guide processes under the statute.”¹⁴⁰

As a policy matter, MLCI suggests “that the group of copyright owners with the most royalties at stake—the largest aggregate share of the royalty pool that the collective will have [the] authority to license—should voice who is entrusted with that authority.”¹⁴¹ It would “mak[e] a mockery of the language of the statute,” MLCI contends, to construe the provision to mean that “owners of musical works that are not being streamed or earning royalties could be deemed to have the same market share as owners of works that are

¹²⁹ *Id.* at 44.

¹³⁰ 17 U.S.C. 115(d)(3)(J)(II).

¹³¹ AMLC Proposal at 44–45 (emphasis omitted) (“Generally, statutory language should be internally consistent and considered in light of full statutory context. As such, courts will generally read as meaningful ‘the exclusion of language from one statutory provision that is included in other provisions of the same statute.’”) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006), *superseded by statute on other grounds*, Military Commissions Act of 2006, Public Law 109–366, 120 Stat. 2600 (2006)).

¹³² *Id.* at 45.

¹³³ *Id.* at 46 (contending that “copyright owners controlling the greatest percentage of ‘relative market share’ were not intended to be in control of the process of locating and paying copyright owners who are owed unclaimed royalties”).

¹³⁴ *Id.* at 46–47.

¹³⁵ See AMLC *Ex Parte* Meeting Summary at 24 (“AMLC response is based on the number of copyright owners, not the total number of copyrights.”).

¹³⁶ AMLC Proposal at 46–48, 94–107.

¹³⁷ MLCI Proposal at 96; see also *id.* at 108; MLCI Reply at 5 (“[T]he only reasonable reading of this language is the plain English reading.”).

¹³⁸ See MLCI Proposal at 107–113.

¹³⁹ *Id.* at 108–113; see MLCI Reply at 5–6.

¹⁴⁰ MLCI Reply at 6–7.

¹⁴¹ MLCI Proposal at 107.

¹²³ See AMLC Proposal at 46; MLCI Proposal at 96–97, 113–14.

¹²⁴ MLCI agrees that a “relevant copyright owner” is “an owner of musical works copyrights licensed for covered activities over the preceding three full calendar years.” MLCI Reply at 9.

¹²⁵ NOI at 65753.

¹²⁶ AMLC Proposal at 43 (emphasis omitted).

¹²⁷ *Id.* at 46 (quoting S. Rep. No. 115–339, at 22) (emphasis AMLC’s).

¹²⁸ *Id.*

streamed billions of times and earn substantial royalties.”¹⁴²

b. Copyright Office’s Analysis

Legal Interpretation. Taking all comments into consideration, the Copyright Office concludes that the endorsement provision in section 115(d)(3)(A)(ii) mandates that the entity designated as the MLC be endorsed and supported by musical work copyright owners that together earned the largest aggregate percentage (among MLC candidates) of total royalties from the use of their musical works in covered activities in the U.S. during the statutory three-year period. In other words, the Office agrees with MLCI that the endorsement criterion is a plurality requirement based on market share, measured by applicable licensing revenue. The Office draws this conclusion from the plain meaning of the statutory text, which, after careful review of the statute as a whole, the Office concludes is unambiguous.¹⁴³

First, the phrase “percentage of the . . . market” clearly refers to market share; indeed, it is the actual definition of “market share.”¹⁴⁴ And market share is ordinarily calculated using earned sales revenue.¹⁴⁵ Here, the statute makes clear that endorsement is a metric of “licensor” revenue earned specifically “for uses of [musical] works in covered

activities.”¹⁴⁶ Moreover, Congress’s inclusion of the phrase “uses of [musical] works” suggests that the proper metric is one of licensing revenue (*i.e.*, royalties), rather than numbers of licenses, copyright owners, or works. Under the compulsory license, royalties are calculated based on use, suggesting that Congress intended to define the market for “uses” according to the royalty revenues generated.¹⁴⁷

In contrast, counting up just the number of endorsing copyright owners—from an amateur part-time songwriter whose works have been streamed a handful of times to a major music publisher that has earned millions of dollars from millions of streams of millions of works—says nothing about the actual “uses of [the owners’ musical] works.” Such an interpretation impermissibly reads that language out of the statute.¹⁴⁸ Similarly, looking only to the number of works owned by endorsing copyright owners would not accurately reflect use because it does not differentiate between works streamed once or twice and works streamed millions of times. In the Office’s view, the same kinds of problems exist with counting the number of licenses.

The Office is unpersuaded by AMLC’s argument concerning section 115(d)(3)(J). There is no substantive distinction between the use of “market share[]” in that provision and the use of “percentage of the . . . market” in the endorsement provision. One is the very definition of the other. AMLC relies upon the canon of statutory interpretation under which Congress is presumed to have acted intentionally when it excludes “language from one statutory provision that is included in other provisions of the same statute.”¹⁴⁹ But that canon is inapplicable here, as the cases AMLC cites involve only the wholesale omission of an item from a statutory provision;¹⁵⁰ they do not speak to situations where, as here, there

is no omission and Congress merely used synonyms.¹⁵¹

The Office is likewise unpersuaded that these synonyms should be read differently simply because the unclaimed royalties provision contains different details regarding calculation and confidentiality than the endorsement provision. While both provisions use a similar market share metric, the contexts are different, such that it makes sense that Congress would provide different instructions. Section 115(d)(3)(J) explains how the MLC is to distribute unclaimed royalties after the blanket license becomes available. It is unsurprising that Congress would provide detailed requirements to govern how those payments are to be allocated. In contrast, the designation of an entity to be the MLC involves a higher-level inquiry into the aggregate market share of each candidate’s endorsing copyright owners. Congress could have given the Office detailed instructions as to how to perform this analysis, but it instead left the matter to the Office’s expertise and reasonable discretion. There is nothing inconsistent with Congress establishing differing approaches to accomplishing these different tasks.

The legislative history does not counsel differently. The relevant language, which appears in House and Senate Judiciary Committee Reports, states that the MLC must be “endorsed by and enjoy[] support from the majority of musical works copyright owners as measured over the preceding three years.”¹⁵² This language can best be understood as an imprecise summary of the statutory text, for if it is taken literally, it directly conflicts with the statute, which refers to “endorse[ment] by[] and . . . 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.”¹⁵³ For the statute to mean what the legislative history seems to say, “substantial” could be deleted, “greatest percentage” would need to be replaced with “majority,” and “of the licensor market for uses of such works in covered activities” could also be deleted. It does not seem reasonable for the Office to interpret the statute in this way.¹⁵⁴

¹⁴² *Id.* at 110, n.31.

¹⁴³ See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (“We thus begin and end our inquiry with the text, giving each word its ordinary, contemporary, common meaning.”) (internal quotation marks omitted). AMLC incorrectly suggests that the Office “has acknowledged an ambiguity in the statute.” AMLC Proposal at 46. The Office only acknowledged that “there may be conflicting views” on the matter. NOI at 65753.

¹⁴⁴ See, e.g., *Market Share*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/market%20share> (last visited June 24, 2019) (Market share is “the percentage of the market for a product or service that a company supplies.”); *Market Share*, Investopedia, <https://www.investopedia.com/terms/m/marketshare.asp> (last visited June 24, 2019) (“Market share represents the percentage of an industry, or a market’s total sales, that is earned by a particular company over a specified time period.”).

¹⁴⁵ See, e.g., *Market Share*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/market%20share> (last visited June 24, 2019) (noting the formula for market share as “Market Share = (Particular Company’s Sales Revenue in Time Period X)/(Relevant Market’s Total Sales Revenue in Time Period X)”; *Market Share*, Investopedia, <https://www.investopedia.com/terms/m/marketshare.asp> (last visited June 24, 2019) (noting that in calculating a company’s market share, you must “divide the company’s total revenues by its industry’s total sales”); *Market Share*, The American Heritage Dictionary of the English Language, <https://ahdictionary.com/word/search.html?q=market+share> (last visited June 24, 2019) (Market share is “[t]he proportion of industry sales of a good or service that is controlled by a company.”).

¹⁴⁶ 17 U.S.C. 115(d)(3)(A)(ii).

¹⁴⁷ See 37 CFR 385.11, 385.21. MLCI notes that “[p]ractically speaking, a metric based on user usage is going to align with a metric based on licensor revenues, as the statutory royalty rates for both streaming and downloading are tied to usage,” and that “a musical work with more usage will wind up with more royalty revenues.” See MLCI Proposal at 111–12 & n.34. While not all uses are subject to the same royalty rate, the royalties are nonetheless connected to use.

¹⁴⁸ See, e.g., *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (“Our practice . . . is to give effect, if possible, to every clause and word of a statute.”) (internal quotation marks omitted).

¹⁴⁹ AMLC Proposal at 44 (citing *Hamdan*, 548 U.S. at 578).

¹⁵⁰ See *Hamdan*, 548 U.S. at 578–79; *City of Chi. v. Envtl. Def. Fund*, 511 U.S. 328, 334–37 (1994).

¹⁵¹ See, e.g., *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004) (“It is an elementary principle of statutory construction that similar language in similar statutes should be interpreted similarly.”).

¹⁵² H.R. Rep. No. 115–651, at 26; S. Rep. No. 115–339, at 22; see also Conf. Rep. at 18 (similar).

¹⁵³ 17 U.S.C. 115(d)(3)(A)(ii).

¹⁵⁴ See, e.g., *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 634 n.9 (2018) (“[A]mbiguous

Policy Considerations. With respect to AMLC's policy arguments, they mirror the same conflict-of-interest concerns raised by AMLC and discussed in connection with board composition. The Office takes these concerns seriously, but they do not compel a different interpretation of the plain text of the statute.¹⁵⁵ Rather, there are other ways that the statute addresses these issues and protects smaller independent songwriters, as the following examples illustrate.¹⁵⁶

First, the statute provides for equal representation of musical work copyright owners and professional songwriters on the unclaimed royalties oversight committee, which is charged with "establish[ing] policies and procedures for the distribution of unclaimed accrued royalties and accrued interest."¹⁵⁷ By law, any copyright owner receiving such a distribution must pay or credit to an individual songwriter no "less than 50 percent of the payment received by the copyright owner attributable to usage of musical works (or shares of works) of that songwriter."¹⁵⁸

Second, the statute requires the MLC to undertake a number of duties with respect to unclaimed royalties, including maintaining a public online list of unmatched musical works through which ownership can be

legislative history cannot trump clear statutory language.") (internal quotation marks omitted); *R.R. Comm'n of Wis. v. Chi., Burlington & Quincy R.R. Co.*, 257 U.S. 563, 589 (1922) ("Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. Such aids are only admissible to solve doubt and not to create it." (internal citations omitted)); see also *Pattern Makers' League of N. Am., AFL-CIO v. N.L.R.B.*, 473 U.S. 95, 112 (1985) (finding "ambiguous legislative history" to "fall[] far short of showing that the [agency's] interpretation of the [statute] is unreasonable").

¹⁵⁵ Cf. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019) (noting that "the statutory scheme has not worked as Congress likely envisioned," but that "[u]nfortunate as [that] may be, that factor does not allow us to revise [the statute's] congressionally composed text").

¹⁵⁶ See SGA Reply at 3 ("SGA is far more concerned with ensuring that music creator rights are fully protected against conflicts of interest and impingements upon the rights and interests of songwriters and composers under all circumstances, than in supporting one or the other candidate vying to be selected as the Mechanical Collective.").

¹⁵⁷ 17 U.S.C. 115(d)(3)(D)(v), (d)(3)(f)(ii).

¹⁵⁸ *Id.* at 115(d)(3)(f)(iv)(II); see also S. Rep. No. 115-339, at 14 ("The 50% payment or credit . . . is intended to be treated as a floor, not a ceiling, and is not meant to override any applicable contractual arrangement providing for a higher payment or credit of such monies to a songwriter.").

claimed.¹⁵⁹ The MLC must "engage in diligent, good-faith efforts to publicize, throughout the music industry," the existence of the MLC, procedures to claim unclaimed royalties, any transfer of royalties under section 115(d)(10)(B), and any pending distribution of unclaimed accrued royalties and accrued interest not less than 90 days before distribution.¹⁶⁰ More generally, the statute expressly requires the MLC to "ensure that the policies and practices of the [MLC] are transparent and accountable."¹⁶¹ The MLC must issue a detailed annual report, including describing "how royalties are collected and distributed," and "the efforts of the [MLC] to locate and identify copyright owners of unmatched musical works (and shares of works)."¹⁶² And every five years, the MLC must retain an independent auditor to "examine the books, records, and operations of the [MLC]" and prepare a report addressing, among other things, "the implementation and efficacy of procedures" "for the receipt, handling, and distribution of royalty funds, including any amounts held as unclaimed royalties," and "to guard against fraud, abuse, waste, and the unreasonable use of funds."¹⁶³

Third, the Copyright Office has been provided with "broad regulatory authority" to conduct proceedings as necessary to effectuate the statute with the Librarian's approval.¹⁶⁴ In addition to the regulations that the Office is specifically directed to promulgate, the legislative history contemplates that the Office will "thoroughly review[]" policies and procedures established by the MLC.¹⁶⁵ The legislative history suggests that the Office promulgate the necessary regulations in a way that "balances the need to protect the public's interest with the need to let the new collective operate without over-regulation."¹⁶⁶ The Office intends to conduct its oversight role in a fair and impartial manner; songwriters are encouraged to participate in these future rulemakings.

Fourth, the MLC must be redesignated every five years.¹⁶⁷ In the legislative history, Congress explained that

¹⁵⁹ 17 U.S.C. 115(d)(3)(f)(iii)(I).

¹⁶⁰ *Id.* at 115(d)(3)(f)(iii)(II).

¹⁶¹ *Id.* at 115(d)(3)(D)(ix)(I)(aa).

¹⁶² *Id.* at 115(d)(3)(D)(vii)(bb), (hh).

¹⁶³ *Id.* at 115(d)(3)(D)(ix)(II).

¹⁶⁴ H.R. Rep. No. 115-651, at 5-6; S. Rep. No. 115-339, at 5; Conf. Rep. at 4; see 17 U.S.C. 115(d)(12).

¹⁶⁵ H.R. Rep. No. 115-651, at 5-6; S. Rep. No. 115-339, at 5; Conf. Rep. at 4; see 17 U.S.C. 115(d)(12).

¹⁶⁶ H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15; Conf. Rep. at 12.

¹⁶⁷ 17 U.S.C. 115(d)(3)(B)(ii).

"evidence of fraud, waste, or abuse, including the failure to follow the relevant regulations adopted by the Copyright Office, over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective," and that in such cases, the Office should consider selecting a new entity "even if not all criteria are met pursuant to section 115(d)(3)(B)(iii)."¹⁶⁸ The Office thus agrees that "it seems highly implausible . . . that Congress intended that the 'licensor market support' criterion be the primary, deciding factor as to whether a full investigation and analysis by the Register and the Copyright Office of each serious [MLC] candidate is necessary."¹⁶⁹ The Office believes that, among other scenarios, if the designated entity were to make unreasonable distributions of unclaimed royalties, that could be grounds for concern and may call into question whether the entity has the "administrative and technological capabilities to perform the required functions of the [MLC]."¹⁷⁰

Fifth, Congress has asked the Office to study the issue of unclaimed royalties and to provide a report by July 2021 that recommends best practices for the MLC to identify and locate copyright owners with unclaimed royalties, encourage copyright owners to claim their royalties, and reduce the incidence of unclaimed royalties.¹⁷¹ The MLC must give "substantial weight" to these recommendations when establishing its procedures to identify and locate copyright owners and to distribute unclaimed royalties.¹⁷²

Sixth, in addition to the various ways the MLC is required to publicize unclaimed royalties,¹⁷³ the MLC must assist with publicity for unclaimed royalties by encouraging digital music providers to publicize information on the existence of the MLC and on claiming royalties on websites and applications, and conducting in-person outreach activities with songwriters.¹⁷⁴ The Copyright Office, too, is tasked with engaging in public outreach and

¹⁶⁸ H.R. Rep. No. 115-651, at 6; S. Rep. No. 115-339, at 5-6; Conf. Rep. at 4.

¹⁶⁹ SGA Reply at 9.

¹⁷⁰ 17 U.S.C. 115(d)(3)(A)(iii).

¹⁷¹ Public Law 115-264, sec. 102(f), 132 Stat. at 3722-23.

¹⁷² *Id.* at sec. 102(f)(2), 132 Stat. at 3723.

¹⁷³ 17 U.S.C. 115(d)(3)(f)(iii) (including maintenance of an online list of unmatched works through which ownership can be claimed, notification prior to any distribution, and participation in music industry conferences and events).

¹⁷⁴ *Id.* at 115(d)(5)(C)(i)(VII), (d)(5)(C)(iii).

educational activities that must specifically include “educating songwriters and other interested parties” about how “a copyright owner may claim ownership of musical works (and shares of such works)” and how “royalties for works for which the owner is not identified or located shall be equitably distributed to known copyright owners.”¹⁷⁵

Finally, the Office suggests there may be other reasons for the statutory requirement that the MLC enjoy “substantial support” from the largest market share of musical work copyright owners. Without minimizing the importance of ensuring that unidentified copyright owners have the opportunity to come forward and effectively claim their works to receive accrued royalties, there are other duties of the MLC that also serve the paramount goal of “ensuring that a songwriter actually gets paid.”¹⁷⁶ As MLCI notes, already identified copyright owners have an interest in ensuring the efficient and accurate collection and distribution of royalties.¹⁷⁷ Further, the MLC will participate in proceedings before the CRJs, and having the support of publishers with prior experience before the CRJs may be beneficial. Establishment of the statutorily-required database will likely also benefit from initial support of music publishers and other relevant copyright owners with large quantities of authoritative versions of data for works that together will comprise the bulk of royalty distributions.¹⁷⁸ As these examples illustrate, having strong support from key copyright owners may assist in ensuring that the MLC is in the best possible position to succeed in effectively carrying out the whole of its assigned responsibilities.

ii. Evidentiary Findings

a. Market Share

With respect to the information submitted in the proceeding, AMLC does not provide market share data for its endorsing copyright owners. Nor do its endorsers provide sufficient information from which the Office can reasonably determine their aggregate applicable market share. In contrast,

MLCI provides multiple data points regarding the market share of its endorsers.

For purposes of calculating market share, MLCI counts 132 musical work copyright owners it calls the “Supporting Copyright Owners.”¹⁷⁹ According to MLCI:

The Supporting Copyright Owners include copyright owners of all sizes who own the relevant rights in musical works covering the spectrum of musical genres—including pop, rap, hip hop, R&B, country, rock, metal, reggae, folk, electronic, jazz, classical—and from every era—including popular current hits and “evergreen standards.” Their sizes range from major music publishers who own the relevant rights to millions of songs, to small, family-owned companies that focus on a particular genre or sub-genre. The Supporting Copyright Owners own the mechanical rights to, at a minimum, well over seven million musical works.¹⁸⁰

A sworn declaration from David M. Israelite of the NMPA states that the Supporting Copyright Owners “own [] the U.S. mechanical rights to millions of works” and “have confirmed that they exclusively endorse MLC[I] to be the collective, and have pledged to provide substantial support to MLC[I].”¹⁸¹ A group endorsement letter from the Supporting Copyright Owners further states that they “all own, and have during the preceding three years owned, exclusive rights to license musical works for use in covered activities in the United States and have licensed those rights to digital music providers.”¹⁸² The Supporting Copyright Owners thus appear to be relevant copyright owners who may be counted for endorsement purposes. While MLCI states that it is also endorsed by “over 2,400 songwriters”—of whom “[o]ver 1,400” “have reported that they are self-

published songwriters, meaning they are not signed to or affiliated with a music publisher and manage their own musical work copyrights”—they are not included in MLCI’s market share calculations.¹⁸³

According to MLCI, “[i]ndustry data, including revenue information that NMPA collects from its members on an annual basis and publicly available data, demonstrates that the Supporting Copyright Owners represent between 85% and 90% of the licensor market for all uses of musical works during the [statutory three-year period from 2016 through 2018].”¹⁸⁴ Additionally, Mr. Israelite’s declaration provides data from *Billboard Magazine* showing the average combined market share of Supporting Copyright Owners appearing in *Billboard’s* quarterly top ten rankings of music publishers over the last three years to be 87.83%.¹⁸⁵

Mr. Israelite states that these data figures are “a fair proxy for estimating the Supporting Copyright Owners’ market share for uses of musical works in covered activities, as there is no reason to believe that the Supporting Copyright Owners’ market share for uses of their musical works in covered activities should deviate significantly from their market share for their uses of musical works generally.”¹⁸⁶ In support, MLCI states that “NMPA was able to confirm from information regarding the U.S. mechanical royalties paid by Apple Music and Spotify—the largest and most popular services in the market—that the Supporting Copyright Owners have together received the substantial majority of total mechanical royalties for uses of musical works in covered activities in the U.S. during the [statutory three-year period from 2016 through 2018].”¹⁸⁷ As discussed below, Digital Licensee Coordinator, Inc. (“DLCI”) follows a similar market share-based approach to establish its endorsement by digital music providers and significant non-blanket licensees.¹⁸⁸

AMLC does not contest these market share figures; indeed, a comment supporting AMLC submitted on behalf

¹⁷⁹ *Id.* at 98.

¹⁸⁰ *Id.* (citations omitted); *see id.* at Ex. 11–8–9 (stating that “a partial count of information obtained from less than half of the Supporting Copyright Owners shows that together they own (now and over the preceding 3 full calendar years) the right to reproduce and distribute over 7.3 million musical works in Section 115 covered activities in the U.S.”) (declaration of David M. Israelite).

¹⁸¹ *Id.* at Ex. 11–5.

¹⁸² *Id.* at Ex. 11–A–1; *see, e.g., id.* at Ex. 11–B–1 (“Sony owns the exclusive rights to license millions of musical works written by tens of thousands of songwriters, including for use in Section 115 covered activities. Sony has for well over the last three years licensed these rights to digital services through the Section 115 compulsory licensing process and, in some cases, through voluntary licenses.”); *id.* at Ex. 11–D–1 (“Reel Muzik Werks is the owner or the exclusive licensee of the rights to engage and to license others to engage in Section 115 covered activities Reel Muzik Werks has during the last three full calendar years licensed its rights in and to musical works to digital music providers for use in covered activities.”).

¹⁸³ *Id.* at 98–99 & n.22.

¹⁸⁴ *Id.* at 99 (citation omitted); *see also id.* at Ex. 11–5–7 (declaration of David M. Israelite).

¹⁸⁵ *Id.* at Ex. 11–6–7. The Office notes that *Billboard* appears to only “measure the market share . . . of the top 100 radio airplay songs.” *See, e.g.,* Ed Christman, *Music Publishers’ 4th Quarter Report: Top 3 Companies Have the Same No. 1 Song*, *Billboard* (Feb. 3, 2017), <https://www.billboard.com/articles/business/7677913/music-publishers-4th-quarter-report>.

¹⁸⁶ MLCI Proposal at Ex. 11–7.

¹⁸⁷ *Id.* at 99–100; *see also id.* at Ex. 11–7–8 (describing methodology) (declaration of David M. Israelite).

¹⁸⁸ *See* DLCI Proposal at 4–7.

¹⁷⁵ Public Law 115–264, sec. 102(e)(2), 132 Stat. at 3722.

¹⁷⁶ 164 Cong. Rec. S6292, 6292 (daily ed. Sept. 25, 2018) (statement of Sen. Hatch).

¹⁷⁷ MLCI Proposal at 107.

¹⁷⁸ For example, a number of MLCI’s largest endorsers state that each intends to work with MLCI to incorporate its musical work data into the musical works database. *See, e.g.,* MLCI Proposal at Exs. 11–B–2 (Sony/ATV Music Publishing), 11–C–2 (Kobalt Music Publishing America, Inc.), 11–N–2 (Warner/Chappell Music, Inc.), 11–P–2 (Universal Music Publishing Group).

of a group of songwriters that includes two AMLC board members concedes that “Sony/EMI, Warner, and Universal”—each of which exclusively endorse MLCI—“control about 65% of the market for music publishing.”¹⁸⁹ The Office notes that other sources confirm that MLCI is supported by a majority of the music publishing market; according to *Music & Copyright’s* annual survey “based on revenue,” Sony,¹⁹⁰ Universal, and Warner/Chappell together had an average combined global market share of 58.65% for 2017 and 2018.¹⁹¹

Based on the foregoing, the Office finds that there is substantial evidence to demonstrate that MLCI is endorsed and supported by the required plurality of relevant endorsing copyright owners, based on applicable market share. Given the overwhelming majority market share of MLCI’s Supporting Copyright Owners and the data from Apple Music and Spotify, and in the absence of any evidence to the contrary, the above-discussed market share figures appear more likely than not to be a sufficient proxy for estimating market share based on royalties earned from covered activities in the U.S. Even if that were not the case, the Office finds, based on the foregoing, that MLCI would still be “the entity that most nearly fulfills” the section 115(d)(3)(A)(ii) qualification.¹⁹²

b. Number of Copyright Owners

In any event, even under the metric for which AMLC provides evidence—number of copyright owners—AMLC would not be the candidate that satisfies the endorsement provision.

The Office received comments from a significant portion of the music industry, voicing support for either MLCI or AMLC. Endorsements came from a diverse array of large and small publishers¹⁹³ as well as from thousands of songwriters from across the country and beyond representing virtually every major genre, including pop, hip hop, rap, rock, country, R&B, alternative, electronic, dance, folk, jazz, classical, Broadway/musical theatre, blues, Christian, gospel, Latin, bluegrass, and

soul.¹⁹⁴ These songwriters include writers of #1 hit songs, Grammy Award winners and nominees, a Rock and Roll Hall of Fame inductee, members of the Nashville Songwriters Hall of Fame, film and television composers, and numerous less established or part-time writers.

The Office also heard from a broad assortment of trade groups and other organizations (some of which the Office understands to be members or subgroups of each other) representing publisher and songwriter interests. Groups listed as supporting AMLC include international alliances and collectives like the Music Creators of North America (“MCNA”), European Composer and Songwriter Alliance, Pan-African Composers’ and Songwriters’ Alliance, Asia-Pacific Music Creators Alliance, and Alianza Latinoamericana de Compositores y Autores de Música, and other groups like the Songwriters Guild of America, Screen Composers Guild of Canada, American Composers Forum, and Music Answers.¹⁹⁵ Groups listed as supporting MLCI include the National Music Publishers’ Association, Association of Independent Music Publishers, International Confederation of Music Publishers, Nashville Songwriters Association International, Songwriters of North America, Music Publishers Association, American Composers Alliance, Gospel Music Association, Church Music Publishers Association, Americana Music Association, Copyright Alliance, and Creative Future.¹⁹⁶ In addition, performing rights organizations ASCAP, BMI, SESAC, and Global Music Rights all endorse MLCI, as do many representatives from the recorded music industry, including the Recording Industry Association of America, the American Association of

Independent Music, the major record labels, and SoundExchange.¹⁹⁷ Lastly, in one of the few comments from an organization that waited to review the proposals before endorsing a candidate, the Recording Academy, whose membership includes “thousands of working songwriters and composers, many of whom are independent, self-published, or unaffiliated songwriters,” states that it “believes that the MLC[I] submission is best equipped to satisfy the statutory requirements of the MMA.”¹⁹⁸

As noted above, and as both candidates agree, not every commenter can be counted for purposes of the endorsement provision—even under AMLC’s interpretation. If the statute were to require only a headcount, it would still be a headcount of relevant copyright owners. In this proceeding, some endorsers, for example, are attorneys that give no indication that they are also relevant copyright owners.¹⁹⁹ Some endorsers do not give any indication of their connection to the industry.²⁰⁰ And some endorsers who state that they are songwriters are not clear about whether they are also relevant copyright owners for their songs.²⁰¹ Many of the endorsements contain ambiguities such as these.

A separate issue concerns the treatment of the international alliances, performing rights organizations, trade groups, and other endorsing organizations. MLCI does not contend that these types of organizations are relevant copyright owners.²⁰² AMLC, on the other hand, appears to count not only each of its supporting organizations, but the individual members of each of those organizations.²⁰³ MLCI strongly disapproves of this approach.²⁰⁴ The Office finds it difficult to credit these purported endorsements, as there is insufficient evidence to demonstrate that every member of each of these

¹⁸⁹ Robert Allen Reply at 6.

¹⁹⁰ See *Global Recorded-music and Music Publishing Market Share Results for 2018*, Music & Copyright (May 8, 2019), <https://musicandcopyright.wordpress.com/2019/05/08/global-recorded-music-and-music-publishing-market-share-results-for-2018/>.

¹⁹¹ *Id.* (this calculation includes figures from Sony/ATV, Sony Music Publishing Japan, and EMI Music Publishing and includes all revenue, not just for covered activities).

¹⁹² 17 U.S.C. 115(d)(3)(B)(iii).

¹⁹³ See, e.g., MLCI Proposal at 98, Ex. 11–A–X; KDE LLC Reply at 1 (supporting AMLC); Secretly Publishing Reply at 1 (supporting MLCI).

¹⁹⁴ See, e.g., AMLC Proposal at 47–75; MLCI Proposal at Exs. 5–A, 6–10; Robert Allen Reply; Board of Directors of NSAI Reply; Maria Schneider Reply; Spence Burton Reply; Michael Busbee Reply; Britt Daley Reply; Barry DeVorzon Reply; Jerry Emanuel Reply; Beckie Foster Reply; Jan Garrett Reply; Ben Glover Reply; Dan Gutenkauf Reply; John Harding Reply; Aaron Johns Reply; Brett Jones Reply; Amy Kinast Reply; Wayne Kirkpatrick Reply; Sonia Kiva Reply; Bill LaBounty Reply; David Lauer Reply; Daniel Leathersich Reply; Alejandro Martinez Reply; Dennis Matkosky Reply; Steve Miller Reply; Clay Mills Reply; Vincent Mullin Reply; Kerry Muzzey Reply; Rick Nowels Reply; Melissa Peirce Reply; Jim Photoglo Reply; Deric Ruttan Reply; Jerry Schneyer Reply; Joie Scott Reply; Pamela Schuler Reply; Karen Sotomayor Reply; Miki Speer Reply; Even Stevens Reply; Paris Strachan Reply; Eleisa Trampler Reply; Kelly Triplett Reply; Danny Wells Reply; Anna Wilson Reply.

¹⁹⁵ AMLC Proposal at 47–48; see generally *id.* at 94–107.

¹⁹⁶ MLCI Proposal at 100, Ex. 11–X; International Confederation of Music Publishers Reply at 1.

¹⁹⁷ MLCI Proposal at 100, Ex. 11–X

¹⁹⁸ Recording Academy Reply at 1, 3.

¹⁹⁹ See, e.g., Jay A. Rosenthal et al. Reply.

²⁰⁰ See, e.g., Jared Burton Reply; Brandon Dudley Reply; Earl Vickers Reply.

²⁰¹ See, e.g., Ashley Gorley Reply; Chris Myers Reply; Jeff Rodman Reply; Chris Xefos Reply.

²⁰² See MLCI Proposal at 100, Ex. 11–9 (referring to them as “non-musical work copyright owner[] groups”).

²⁰³ See AMLC Proposal at 47–48 (claiming its endorsers “represent hundreds of thousands of separate and unique music publishers whose music is distributed on digital streaming services in the United States”).

²⁰⁴ See MLCI Reply at 11 (“MLC[I] 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[I], as that would be misleading.”).

organizations actually endorses AMLC. While surely each referenced association on a general level represents the interests of their members, none of AMLC's group endorsements indicate that they have the authority to endorse an MLC candidate on their members' behalf. For example, the submissions do not indicate that any kind of resolution to endorse was passed by their members, and if one was, whether their members voted unanimously (as would be necessary to claim that every member should be counted). In many cases, moreover, it is difficult to tell whether the endorsements are submitted on behalf of the organization, or from individuals associated with the organizations acting in their personal capacities or in their capacity as an individual board member.²⁰⁵ In fact, two organizations listed by AMLC as endorsers in its proposal subsequently disavowed the purported endorsements and clarified that they do not in fact support AMLC.²⁰⁶

If the Office were to credit these kinds of endorsements, it would raise unresolvable practical problems. For many of these organizations, no membership numbers are provided,²⁰⁷ and for others, only an indefinite range or rounded figure is given, making a precise headcount impossible.²⁰⁸

²⁰⁵ See, e.g., AMLC Proposal at 95 (letter from the Chairman of the Asia-Pacific Music Creators Alliance, providing no information about the organization or its membership, and stating that "I hereby voice my support to" AMLC) (emphasis added); *id.* at 98 (same with respect to Alianza Latinoamericana de Compositores y Autores de Música); *id.* at 103 (same with respect to Pan-African Composers' and Songwriters' Alliance); see also AMLC *Ex Parte* Meeting Summary at 24 ("Some [organizational] endorsements were interpreted to be an endorsement by the individual, and others on behalf of the entire membership.").

²⁰⁶ See APRA AMCOS Reply at 1 (clarifying that APRA AMCOS does not endorse AMLC and was "misrepresented in the AMLC's submission," and that the letter appended to AMLC's proposal was "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"); *Statement from CISAC and CIAM on the U.S. Music Licensing Collective*, International Confederation of Societies of Authors and Composers (Apr. 5, 2019), <https://www.cisac.org/Newsroom/Articles/Statement-from-CISAC-and-CIAM-on-the-U.S.-Music-Licensing-Collective> ("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.").

²⁰⁷ See, e.g., AMLC Proposal at 95 (Asia-Pacific Music Creators Alliance); *id.* at 98 (Alianza Latinoamericana de Compositores y Autores de Música); *id.* at 102 (Society of Authors and Composers of Colombia); *id.* at 104 (Screen Composers Guild of Canada); *id.* at 106 (ABRAMUS/ALCAM).

²⁰⁸ See, e.g., *id.* at 99 (stating that European Composer and Songwriter Alliance "represents over

Additionally, without a list of member names, the Office cannot determine whether individual members are being counted more than once due to membership in multiple endorsing organizations or because the individual filed his or her own comment with the Copyright Office directly.²⁰⁹ By not identifying purported endorsing members, the possibility also exists for conflicting endorsements.²¹⁰ For example, AMLC board members Zoe Keating, Maria Schneider, and Rick Carnes appear to be affiliated with ASCAP,²¹¹ which endorses MLCI. These individuals presumably would object to MLCI counting them among its endorsers merely because ASCAP has endorsed MLCI.

Lastly, AMLC's proposal refers to "100+ various individual composers/writers/publishers/organizations who have signed an AMLC endorsement document" and "600+ endorsements via [the] AMLC website," which suffer from the same kinds of practical problems.²¹² Because these individuals are not specifically identified, the Office cannot determine their precise number or if any of them additionally submitted comments directly to the Office such that they may be counted more than once.

Nonetheless, even if these ambiguities are resolved in favor of counting each endorsement (except for the individual members of the endorsing organizations discussed above and the two organizations that repudiated their purported endorsements), AMLC still would have substantially fewer endorsements than MLCI.²¹³ Applying

50,000 professional composers and songwriters"); *id.* at 100 (stating that MCNA has an "approximate collective membership of between 7,500 to 8,500 songwriters and composers"); *id.* at 105 (stating that Music Answers has "more than 3,500 supporters"); SGA Reply at 1 ("membership ranges between 3,500 and 5,000 members").

²⁰⁹ For example, it seems that the memberships of SGA and Screen Composers Guild of Canada may be subsumed within the membership of MCNA. See AMLC Proposal at 100 (listing SGA and SCGC as "member organizations" of MCNA).

²¹⁰ While the Office made clear in the NOI that endorsements need not be exclusive, this is a different issue that speaks to whether the candidate is in fact supported by an individual.

²¹¹ See *Sue (or In a Season of Crime)*, ACE Repertory, <https://www.ascap.com/repertory#ace/search/workID/888244289> (last visited June 24, 2019) (listing Maria Schneider's PRO affiliation as ASCAP); *Across the Street (Live)*, ACE Repertory, <https://www.ascap.com/repertory#ace/search/workID/886237406> (last visited June 24, 2019) (listing Zoe Keating's PRO affiliation as ASCAP); *Hangin' Around*, ACE Repertory, <https://www.ascap.com/repertory#ace/search/workID/380230553> (last visited June 24, 2019) (listing Rick Carnes's PRO affiliation as ASCAP).

²¹² AMLC Proposal at 48.

²¹³ The Office's methodology was as follows. First, the Office counted all endorsements provided

these assumptions, AMLC would have around 1,000 endorsements, while MLCI would have about three times that number. Even if based only on MLCI's Supporting Copyright Owners and the songwriters listed in MLCI's proposal who identified as self-published, MLCI would still have hundreds more endorsers than all of the comments submitted in support of AMLC. Thus, under both the proper metric of market share, and the alternative metric of number of copyright owners, MLCI is the candidate that satisfies the endorsement requirement.

As noted in conclusion below, the MMA was enacted only after an extensive effort to build consensus amongst musical work copyright owners and songwriters with various, sometimes competing, interests. The Register expects that the designated MLC will endeavor to equally represent the interests of those who did not endorse it, and that interested sides will continue to come together to make the implementation of this historic new licensing scheme a success, building upon the cooperative spirit that facilitated the MMA's passage.²¹⁴

3. Administrative and Technological Capabilities

The statute requires that the designated entity "has, or will have prior to the license availability date, the administrative and technological capabilities to perform the required functions of the mechanical licensing collective."²¹⁵ The NOI requested that each proposal include specific information to demonstrate the candidate's ability to meet this

by AMLC and MLCI in their respective proposals, including counting all proposed board and committee members. Then, the Office counted every endorsement contained in other comments. The Office did not, however, count the individual members of any endorsing groups or organizations for the reasons stated above. To be as equitable as possible, the Office treated every endorsement as coming from a relevant copyright owner, except where the record affirmatively stated otherwise. Because AMLC did not provide the identities of the bulk of their endorsers, the Office could not compare most of the endorsers from AMLC's proposal to the individual endorsements received in the comments, meaning the Office could not ascertain whether there might be duplicate endorsements. Because the Office could not deduplicate AMLC's endorsements, the Office did not deduplicate MLCI's endorsements either, so as to apply a consistent methodology to both candidates.

²¹⁴ See, e.g., *Music Policy Issues: A Perspective from Those Who Make It: Hearing on H.R. 4706, H.R. 3301, H.R. 831 and H.R. 1836 Before the H. Comm. on the Judiciary*, 115th Cong. 4 (2018) (statement of Ranking Member Nadler); 164 Cong. Rec. S501, 502 (daily ed. Jan. 24, 2018) (statement of Sen. Hatch); 164 Cong. Rec. H3522, 3536 (daily ed. Apr. 25, 2018) (statement of Rep. Goodlatte).

²¹⁵ 17 U.S.C. 115(d)(3)(A)(iii).

requirement, organized into enumerated categories.

i. Overview of Proposals, Including Business Planning and Budgeting

The Office requested that each entity provide “a business plan, including a statement of purpose or principles, proposed schedule, and available budgetary projections, for the establishment and operation of the proposed MLC for the first five years of its existence.”²¹⁶ The NOI noted that although the MLC designation process is separate from the establishment of an administrative assessment by the CRJs, “understanding the proposed funding for the MLC (in advance of the establishment of the administrative assessment)” and budgetary planning generally can be “important to confirming that the MLC will be ready to adequately perform its required functions by the license availability date and beyond.”²¹⁷ Accordingly, the Office’s interest in the candidates’ budgetary materials is “for the purposes of this designation process only, and without prejudice to the future administrative assessment proceeding.”²¹⁸

Considering both proposals at a very high level, there are a number of similarities, including a shared intention to set up offices in or near Nashville, Tennessee.²¹⁹ Both candidates envision using a primary vendor to build out the required musical works database, and to varying degrees signaled intentions or openness to working with additional vendors.²²⁰ In recognition that the creation of a comprehensive musical works database has long been an aim of various segments of the music community, both candidates plan to “utilize systems that are tested”²²¹ or “leverage[] existing technology and data providers”²²² Both propose to rely on automated processes for the bulk of identifying songs recorded and matching them to copyright holders, augmented with manual processing as needed.²²³ To that end, both note the importance of compatibility with existing music industry standards, including

communicating information in accordance with the Common Works Registration (“CWR”) format and DDEX standards, and a willingness to explore other relevant existing or emerging standards or open protocols.²²⁴

Similarly, AMLC and MLCI each express an understanding of the need to address policies and actions related to distributions of unclaimed accrued royalties with care, including providing adequate notice before such distributions occur.²²⁵ They commit to engage in education and outreach efforts to publicize the collective, including procedures by which copyright owners may identify themselves to claim accrued royalties.²²⁶ They both appropriately focus on the need to operate a user-friendly claiming portal, for, as the legislative history notes, “the simple way to avoid any distribution to other copyright owners and artists is to step forward and identify oneself and one’s works to the collective, an exceedingly low bar to claiming one’s royalties.”²²⁷

Although the proposals share certain commonalities, they diverge on details, sometimes significantly, including at times on the level or evidence of planning disclosed in response to the NOI. These differences were reflected in the proposed budgetary estimates, including the specific line items, put forth by each candidate.

a. MLCI

Out of the two candidates, MLCI provides a more detailed organizational model for its operations and reports that it “has already begun the process of assuring the timely acquisition of these capabilities”²²⁸ necessary to fulfill the statutory functions. This framework is organized into three categories of activities: Strategic Processes, defined as “the management processes that empower the operational capabilities of the collective”; Core Processes, defined as “capabilities and processes in the core tasks” including “how the MLC performs the central ownership and license administration responsibilities”; and Foundational Processes, defined as

“necessary support capabilities and processes, usually typical of most businesses (payroll, legal, etc.)”²²⁹ These categories in turn comprise ten functions that the MLC will carry out on behalf of songwriters, musical works owners, and the public, explained by a series of detailed flow charts.²³⁰

While MLCI has not yet determined the precise management structure for daily operations or full staffing, it includes a series of organizational charts, which propose fifty-five employees.²³¹ It also has retained consultant support in overseeing technology strategy, the RFI/RFP process, and operations design, and reports that its board members have dedicated a considerable amount of time to this planning process.²³²

MLCI intends to “utilize a single primary vendor for core usage processing functions, with consideration of secondary vendors to augment in specific areas.”²³³ Sixteen vendors participated in its RFI process, and MLCI selected seven of those to participate in the RFP process.²³⁴ MLCI notes that, in aggregate, these RFI participants “have processed nearly 20 trillion lines of sound recording usage and more than \$4.2 billion in royalties for the U.S. territory over the past 3 calendar years, and have more than 20 million unique works in rights databases and existing connectivity with approximately 50,000 publishers.”²³⁵

MLCI estimates its total startup costs through the license availability date to be between \$26 and \$48 million, with annual operating costs between \$25 and \$40 million.²³⁶ To obtain funding, it has engaged in “good faith negotiations with the major licensee services in an attempt to reach agreement on voluntary contributions.”²³⁷ If such an agreement is not realized, MLCI will participate in the assessment proceeding.²³⁸ In that

²²⁹ *Id.* at 12.

²³⁰ *Id.* at 13.

²³¹ *Id.* at 25; *see id.* at 25–29 (detailed description of employee roles).

²³² *Id.* at 3–4; *see also* MLCI *Ex Parte* Meeting Summary at 2.

²³³ MLCI *Ex Parte* Meeting Summary at 2.

²³⁴ MLCI Proposal at 55 (listing RFI participants ASCAP, AxisPoint, BackOffice, BMI, BMAT, Crunch Digital, DDEX, Gracenote, ICE, Music Reports, Inc. (“MRI”), Open Music Initiative (OMI), Sacem/IBM, SESAC/HFA, SOCAN/DataClef, SourceAudio, and SXWorks); *id.* at 59 (listing RFP participants ASCAP, BackOffice, ICE, MRI, SESAC/HFA, SXWorks, and Sacem/IBM); *id.* at Exs. 3, 4 (providing RFI and RFP). MLCI did not include copies of RFI or RFP responses, stating they are subject to nondisclosure agreements and include confidential information. *Id.* at 59.

²³⁵ *Id.* at 56–57.

²³⁶ *Id.* at 31–32.

²³⁷ *Id.* at 59.

²³⁸ *Id.* at 61.

²¹⁶ NOI at 65751 (requesting each plan also include “a description of the intended technological and/or business methods” for accomplishing the MLC’s statutory obligations).

²¹⁷ *Id.* at 65752.

²¹⁸ *Id.*

²¹⁹ MLCI Proposal at 66; AMLC Proposal at 48, 76.

²²⁰ MLCI *Ex Parte* Meeting Summary at 2; AMLC *Ex Parte* Meeting Summary at 7–9.

²²¹ MLCI Proposal at 39.

²²² AMLC Proposal at 5.

²²³ MLCI Proposal at 18–19, 41; AMLC Proposal at 10–11.

²²⁴ MLCI Proposal at 35, 38, 57–58; AMLC Proposal at 15; *see also* Berklee College of Music & MIT Connection Science Comments at 2–5.

²²⁵ *See, e.g.*, MLCI Proposal at 43–44; AMLC Proposal at 18–19; AMLC *Ex Parte* Meeting Summary at 14.

²²⁶ MLCI Proposal at 62–63; AMLC Proposal at 30–33.

²²⁷ S. Rep. No. 115–339, at 14 (2018) (stating that “[t]his process ensures that copyright owners and artists benefit” in contrast to views of “some copyright owners and/or artists who would prefer that such money be escrowed indefinitely until claimed”).

²²⁸ MLCI Proposal at 7.

event, it “will seek bridge funding to cover any gaps,” and expresses confidence that “its extensive network of support and trust throughout the industry, and the reputations of its leadership, will assist it in obtaining support for its continued operations.”²³⁹ MLCI expects to have no need to apply unclaimed royalties to defray costs, though it notes that the statute permits it to do so on an interim basis.²⁴⁰

b. AMLC

AMLC aspires to adopt a leaner approach to these issues. Upon its launch, it will rely on incumbent services and vendors that have been “vetted and approved” by the Digital Media Association (“DiMA”).²⁴¹ It intends to add technology applications, features, and solution providers incrementally over time “as a series of steps on top of [this] pre-existing solid foundation.”²⁴² AMLC reports that it “has taken significant input from key stakeholders, potential vendors, performing rights organizations, labels, and most importantly, publishers and songwriters in formulating [its] technology plan,” and states that it will have further discussions in designing and implementing solutions if it is designated.²⁴³ It intends to hire eleven employees, and has engaged a technology consultant.²⁴⁴ However, AMLC cautions that “although there ha[ve] been significant discussions and planning . . . much of the details need to be formalized once the mandate decision is made.”²⁴⁵

AMLC established several requirements that potential vendors must meet, including that the entity is “in good standing”; has no pending litigation; has worked with or for the major music publishers, independent music publishers, and self-published

songwriters; has worked with at least one of the major digital service providers (“DSPs”); and has distributed at least \$100 million to rightsholders each year for the last two years.²⁴⁶ Having held discussions with four primary vendors, AMLC “expects to engage foundational vendors” DataClef and MRI to enable it to provide a comprehensive interoperable database.²⁴⁷ It notes that DataClef has access to the CIS-NET Works Information Database (“WID”), which includes over 81.1 million musical works.²⁴⁸ Beyond these vendors, AMLC states that additional incumbent entities employed by DSPs have confirmed that if AMLC is designated, they would play a role if requested or needed.²⁴⁹

In response, MLCI expresses concern regarding the perceived lack of explanation of AMLC’s RFI process, and doubts the ability of the potential AMLC vendors to provide key capabilities such as access to relevant databases, specifically challenging whether AMLC will be legally entitled to access the WID for its purposes.²⁵⁰

AMLC submitted substantially lower cost estimates for its activities, estimating total costs of approximately \$43.9 million for its first five years, broken out across fewer categories than MLCI.²⁵¹ Like MLCI, AMLC intends to negotiate with DiMA on a final budget to be submitted to the CRJs for approval.²⁵² AMLC does not intend to utilize debt, except perhaps during the initial MLC startup phase.²⁵³ AMLC believes it is inappropriate to apply songwriters’ and publishers’ royalties to cover the MLC’s operating costs, but states that interest income earned from the unclaimed accrued royalties may be used to defer initial operating costs during the startup phase.²⁵⁴

MLCI characterizes AMLC’s budget and development timeframe as vague

and unrealistic.²⁵⁵ Noting that AMLC’s cost projections are far below the \$30 million annual cost estimate provided by the Congressional Budget Office (“CBO”),²⁵⁶ MLCI argues that AMLC’s budget “would result in a grossly underfunded collective that could not diligently protect the rights and royalties of songwriters and copyright owners.”²⁵⁷ Other commenters, some but not all affiliated with AMLC, praised AMLC’s approach as reflecting the advantages of a startup or small company, or otherwise favored its proposed budget.²⁵⁸

Indeed, in some instances it is unclear whether AMLC’s budget estimates anticipate each of its statutorily required activities in the manner it envisions executing them, which makes it difficult to assess AMLC’s degree of advance planning. For instance, AMLC does not indicate which expenditures are encompassed by its “OpEx” budget item, which averages approximately \$600,000 per year during its first two full years.²⁵⁹ By comparison, MLCI’s estimated operational costs include specific line items for premises, office expenses, accounting services, finance and insurance, and travel expenses, among other expenditures.²⁶⁰ The comparative lack of specificity calls into question the extent to which AMLC considered the full range of the MLC’s necessary operational costs. Similarly, AMLC projects annual expenditures of approximately \$600,000 to \$730,000 for licensing and legal activities for the first five years of its operation.²⁶¹ It is unclear whether these allocated amounts fully anticipate the MLC’s statutory obligations in this area, which include participating in Copyright Office rulemakings and the CRJs’ administrative assessment proceedings, and “[e]ngag[ing] in legal and other efforts to enforce rights and obligations” under section 115(d), “including by filing bankruptcy proofs of claims for amounts owed under licenses” or commencing actions for damages and injunctive relief in federal court.²⁶²

²³⁹ *Id.*

²⁴⁰ *Id.* at 61–62 (citing 17 U.S.C. 115(d)(7)(C)).

²⁴¹ AMLC Proposal at 4.

²⁴² *Id.*

²⁴³ *Id.* at 6.

²⁴⁴ *Id.* at 26.

²⁴⁵ *Id.* at 6. AMLC subsequently reported that although several vendors have agreed to work with it in the event it is selected as the MLC, many “were concerned [that] they would suffer negative consequences if they were listed in the AMLC application.” AMLC *Ex Parte* Meeting Summary at 8. To the extent such vendors believe they are prohibited from contracting with both candidates, that understanding is not supported by the statute. As noted in the NOI, “while the statutory language authorizes the MLC to arrange for services of outside vendors, nothing suggests that such a vendor must offer exclusive services to that MLC candidate.” NOI at 65749. At the same time, the statute does not regulate parties’ ability to enter into exclusive relationships or other arrangements that may affect the information that can be disclosed in the candidates’ submissions.

²⁴⁶ AMLC *Ex Parte* Meeting Summary at 7–8.

²⁴⁷ AMLC Proposal at 4; *see also* AMLC *Ex Parte* Meeting Summary at 8–9 (indicating AMLC selected DataClef as their vendor, as well as a continued willingness to consider other vendors).

²⁴⁸ AMLC Proposal at 7–8. It is unclear how DataClef qualifies as a vendor under AMLC’s criteria, as it was launched in late 2018 and would not have distributed at least \$100 million over the last two years. *See SOCAN Launches DataClef Music Services* (Oct. 22, 2018), <https://www.socan.com/socan-launches-dataclef-music-services/>.

²⁴⁹ AMLC Proposal at 4.

²⁵⁰ MLCI Reply at 22–24 (“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.”).

²⁵¹ AMLC Proposal at 28.

²⁵² *Id.*

²⁵³ *Id.* at 28–29 (outlining potential sources of debt financing).

²⁵⁴ *Id.* at 29.

²⁵⁵ MLCI Reply at 25–29.

²⁵⁶ CBO, *Congressional Budget Office Cost Estimate, S. 2823 Music Modernization Act* (Sept. 12, 2018, revised Sept. 17, 2018), <https://www.cbo.gov/system/files/2018-09/s2823.pdf>.

²⁵⁷ MLCI Reply at 25.

²⁵⁸ *See* Peter Jessel Reply at 1; Peter Resnikoff Reply at 1; H. Hendricks Reply at 1; Alfons Karabuda Reply at 1; Betsy Tinney Reply at 1.

²⁵⁹ *See* AMLC Proposal at 28.

²⁶⁰ *See* MLCI Proposal at 32.

²⁶¹ AMLC Proposal at 28.

²⁶² 17 U.S.C. 115(d)(3)(C)(i)(VIII)–(XI); *id.* at 115(d)(6)(C)(i); *see also* AIPLA, 2017 Report of the Economic Survey 44 (2017).

ii. Ownership Information, Matching, and Claiming Process

As noted, a key aspect of the MLC's collection and distribution responsibilities includes ingesting data regarding musical works and uses under the license, and identifying musical works and copyright owners, matching them to sound recordings, and ensuring that a copyright owner gets paid as he or she should.²⁶³

Both proposals appropriately focus on this core task.²⁶⁴ As noted, both AMLC and MLCI intend to employ established and standard data formats and architectural practices to support data exchange functions, including development of Application Programming Interfaces ("APIs") to allow bulk processing of data for larger users²⁶⁵ and supporting a variety of formats for new submissions "to accommodate copyright owners who are unable to convert data to standard formats themselves."²⁶⁶ Each expresses a willingness to utilize current and emerging technologies to match sound recordings to musical works, including hashes and watermarking or fingerprinting technologies.²⁶⁷ Finally, both wisely point to usage reporting as the primary determinant with respect to prioritization of matching resources.²⁶⁸

In terms of populating ownership information, MLCI envisions updates to the database being built into industry deals involving assignment of copyright interests, and by establishing a simple, user-friendly, and ADA-compliant web portal.²⁶⁹ According to MLCI, "[o]nce the rights database, claiming portal, and license administration are fully operational, the industry will have a single, transparent, publicly-accessible resource for establishing and identifying ownership of mechanical rights."²⁷⁰

²⁶³ Indeed, many interested commenters focused on these "core" or "principal" duties. See, e.g., Recording Academy Reply at 3; DiMA Reply at 2.

²⁶⁴ See Recording Academy Reply at 3 ("Both have also demonstrated a clear commitment to the rights of songwriters.").

²⁶⁵ MLCI Proposal at 34–35, 37; AMLC Proposal at 5, 11, 15. Berklee College of Music and MIT Connection Science also noted the importance of the MLC using standardized APIs open protocols and accessibility. Berklee College of Music & MIT Connection Science at 2–5.

²⁶⁶ MLCI Proposal at 37; see AMLC Proposal at 10 (similar, referencing need to ingest comma separated values ("CSV") files, Excel files, DDEX files, or data via an online user interface with fields that the end user will populate).

²⁶⁷ AMLC Proposal at 16; MLCI Proposal at 48.

²⁶⁸ MLCI Proposal at 41 (stating "[t]otal royalties accrued has been a common metric for prioritization, simply because it aims to minimize the total amount of unmatched royalties" and that "[u]sage and vintage of usage are metrics that are related to total royalties"); AMLC Proposal at 12.

²⁶⁹ MLCI Proposal at 37 & n.6.

²⁷⁰ *Id.* at 34.

MLCI "would undertake targeted activities to clean and improve the initial ownership and matching data using independent data assets . . . drawing on MLCI's unparalleled access to data resources from its industry supporters."²⁷¹ While noting that all usage data would be run through matching software, MLCI notes that it plans to develop policies to address issues related to calibration of confidence levels to ensure reliable matching, and prioritization of manual processing through the operations advisory committee in the context of specific unmatched pools.²⁷² MLCI asserts that for at least two years beyond the license availability date, and perhaps longer, any previously accrued unmatched uses will be analyzed by the MLC matching systems and will be publicly available on the rights portal for members of the public to claim.²⁷³ MLCI adds that it intends to make repeated attempts to match "until such time as the Unclaimed Royalties Committee and the Board of Directors . . . determine that a distribution of those unmatched royalties is fair and appropriate under the statute."²⁷⁴

MLCI contends that "[t]here is no standard format for modeling musical works ownership agreement information in databases," as there is disagreement over which terms are important to capture, a problem paralleled in capturing chain of title data.²⁷⁵ MLCI therefore presumes a necessity to merge "information between databases," which "can require complex reformatting of data."²⁷⁶ In response, DiMA suggested that "it may be more effective and efficient to focus efforts on increasing the accuracy of automated methods."²⁷⁷ DiMA also suggests that improving the standardization of metadata might be achievable at lower cost by making such issues a focus of education and outreach efforts, as distinguished from the more labor- and cost-intensive approach of allowing data submission in a variety of different

²⁷¹ *Id.*

²⁷² *Id.* at 41; see also MLCI *Ex Parte* Meeting Summary at 3 (stressing "the importance of robust manual efforts to match uses and locate owners of works").

²⁷³ MLCI Proposal at 43–44.

²⁷⁴ *Id.* at 44. The Recording Academy urged the Register to seek further information on MLCI's commitments to match works and on when such commitments may reasonably be exhausted. See Recording Academy Reply at 4–5. In its *ex parte* meeting with the Office, MLCI reiterated its intention to "exceed the statutory minimums related to notice and distribution in order to maximize matching success." MLCI *Ex Parte* Meeting Summary at 3.

²⁷⁵ MLCI Proposal at 36.

²⁷⁶ *Id.*

²⁷⁷ DiMA Reply at 10.

formats.²⁷⁸ In its meeting with the Office, MLCI reiterated its intention to accept submission of data in multiple formats as a way to accommodate the needs and technical sophistication of a wide array of copyright owners. It also affirmed its commitment to education and outreach, noting that such efforts will inform the design of its rights portal and options for data submission.²⁷⁹

AMLC commits to continually engaging with stakeholders to monitor and review new frameworks, and has established an advisory technology committee comprised of members with significant technology backgrounds.²⁸⁰ AMLC plans to "build a robust interface to allow for bulk transitions of catalog or individual ownership changes . . . to be properly updated through the chosen authoritative data partners and vendors."²⁸¹ AMLC professes that its system will be designed in part for self-published songwriters, who represent the largest percentage of music owners but in many cases have the lowest level of understanding of copyright requirements.²⁸² AMLC anticipates that incomplete DSP data will be analyzed and segmented based on the distributor of the underlying recording, and repeatedly expresses optimism that the MLC and DSPs could work collaboratively to address such issues.²⁸³

Regarding the claiming process specifically, MLCI is confident that its ownership claiming portal will be usable by stakeholders of any sophistication level, and it will dedicate staff to assist copyright owners with troubleshooting and claims submission.²⁸⁴ Likewise, AMLC intends to utilize DataClef's pre-built "claiming portal," allowing copyright owners to search a database of unmatched and/or partial ownership recordings, and identify recordings of their compositions.²⁸⁵ AMLC envisions implementing a change management module and reliance upon "chosen authoritative data partners and vendors."²⁸⁶ It proposes that its portal will stream 30-second preview clips to

²⁷⁸ *Id.* at 10–11.

²⁷⁹ MLCI *Ex Parte* Meeting Summary at 2–3.

²⁸⁰ AMLC Proposal at 15–16, 36.

²⁸¹ *Id.* at 10.

²⁸² *Id.*

²⁸³ See, e.g., *id.* at 4 ("our first priority is to meet with DiMA members and other DSPs to collaborate, white-board, diagram/discuss and further work through technology topics").

²⁸⁴ MLCI Proposal at 37 & n.6.

²⁸⁵ AMLC Proposal at 9.

²⁸⁶ *Id.* at 9–10.

allow rightsholders to confirm matches.²⁸⁷

In response to the Office's request for "target goals or estimates for matching works in each of the first five years,"²⁸⁸ MLCI states that its target "is, and will always be, 100% success."²⁸⁹ But it argues that because match rates are easily manipulated, "the critical question is not match rate, but the quality of matches."²⁹⁰ Therefore, MLCI will "fine-tune[]" its algorithms based on system complaints, feedback, and disputes, and will investigate inaccurate matches.²⁹¹ MLCI also notes that it will explore developments in algorithms, machine learning, and artificial intelligence.²⁹²

For its part, AMLC believes that it can establish a dataset of 80 million works and recordings, "with corresponding works that are matched with high confidence to recordings of approximately 70%, or 56 million works."²⁹³ It estimates that the percentage of works matched will exceed 90% by 2024.²⁹⁴ AMLC's estimates are based on several key assumptions, including 15% growth per year in works and recordings used in covered activities.²⁹⁵

Based on these submissions, the Copyright Office finds that both candidates have demonstrated a reasonable ability to acquire and build the necessary data processing capabilities for ownership identification, matching, and claiming processes. In particular, the Office appreciates the level of detail provided by both entities on their approach to matching works, description of plans to implement public claiming portals, and commitment to prioritizing usage, or total royalties accrued, when focusing on minimizing the incidence of unmatched sound recordings. The Office also appreciates that both candidates intend to adhere to established formats for data transfers, as well as use standard identifiers currently used by the global music industry. The Office expects the selected designee to follow through on these commitments, to continue to explore technological developments in matching works, and to publicly disclose and update the methods used in its matching efforts.

²⁸⁷ *Id.* at 9.

²⁸⁸ NOI at 65751.

²⁸⁹ MLCI Proposal at 42.

²⁹⁰ *Id.* at 43.

²⁹¹ MLCI Proposal at 43; *see also* MLCI *Ex Parte* Meeting Summary at 2–3.

²⁹² MLCI Proposal at 39.

²⁹³ AMLC Proposal at 12.

²⁹⁴ *Id.* at 12.

²⁹⁵ *Id.* at 12–13.

iii. Dispute Resolution

As noted, the MLC dispute resolution committee will establish policies and procedures for copyright owners to address disputes relating to ownership interests in musical works. Neither candidate has developed detailed procedures governing this committee's activities, but both provided sufficient information regarding their understanding of the scope of its responsibilities.

MLCI will address disputed claims of ownership using existing tools commonly used in the industry, including algorithms used to detect fraud, establishing a process by which users can be authenticated, and tracking changes made by MLCI employees.²⁹⁶ It notes that its dispute resolution committee and board have extensive experience in ownership matters, including the role of abandoned property laws, processes for validating copyrighted arrangements of public domain works, public domain fraud, and implementation of legal holds.²⁹⁷

Similarly, AMLC states that its conflict resolution committee will recommend and implement policies to address discrepancies, disputes, and fraudulent claims.²⁹⁸ It reiterates that it will work with DSPs to identify the origin of false claims and create incentives for distributors to reduce fraud.²⁹⁹ As noted above, it also envisions employing a robust data change management module.³⁰⁰

In *ex parte* meetings, both MLCI and AMLC confirmed their understanding that the dispute resolution committee's role does not include adjudicating ownership disputes on the merits. Rather, both expressed their understanding that the committee's function is limited to the establishment of policies and procedures to govern the resolution of such disputes.

iv. Maintenance of Musical Works Database

The Office requested input regarding the operation and maintenance of a well-functioning database, including specific information on how each entity would address issues of security, redundancy, privacy, and transparency.³⁰¹ Both depict a technological approach that is fully scalable and reliable, with the ability to

²⁹⁶ MLCI Proposal at 44–45.

²⁹⁷ *Id.* at 45–46.

²⁹⁸ AMLC Proposal at 14.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 10.

³⁰¹ NOI at 65751.

handle large data sets.³⁰² They also each commit to establishing an information security management system that is certified with ISO/IEC 27001 and meets the EU General Data Protection Regulation requirements, and other applicable laws, and to employing redundancy practices to minimize data loss.³⁰³

While its policies and procedures for accessing information in the databases are not yet finalized, MLCI commits to following the regulations promulgated by the Register concerning "the usability, interoperability, and usage restrictions of the musical works database."³⁰⁴

AMLC proposes two types of access to the musical works database. First, the general public would have access to "a minimal amount of data that is generally available to the public already."³⁰⁵ Second, AMLC will offer "DSPs and other key constituents" access to feeds with "more comprehensive data that is generally not public, but necessary for proper royalty and ownership processing (such as splits, territorial rights etc.)."³⁰⁶ It proposes to develop data access rules "in collaboration between publishers" to ensure confidentiality and compliance with domestic and international privacy and data security policies.³⁰⁷ AMLC's submission does not explicitly acknowledge the statutory requirements for provision of access, although elsewhere AMLC has pledged to conform any policies to subsequent regulatory activities.³⁰⁸

Based on this information, the Office finds that both MLCI and AMLC have the capability to maintain and provide access to the required public database of musical works. The Office appreciates each entity's commitment to ensure compliance with all relevant legal obligations with respect to privacy and security.

v. Notices of License, Collection and Distribution of Royalties, Including Unclaimed Accrued Royalties

The MLC's administrative role includes accepting notices of license (and terminating them when the licensee is in default), and collecting and distributing royalties for covered

³⁰² AMLC Proposal at 16; MLCI Proposal at 49; *see also* DIMA Reply at 9–10 (addressing potential volume of transactions to be processed by the MLC).

³⁰³ MLCI Proposal at 50; AMLC Proposal at 17.

³⁰⁴ MLCI Proposal at 50 (quoting 17 U.S.C.

115(d)(3)(E)(vi)).

³⁰⁵ AMLC Proposal at 17 (detailing fields with respect to musical works and sound recordings).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 78 (AMLC bylaw art. 3).

activities, including unclaimed funds after the prescribed holding period.³⁰⁹

With respect to notices of license, MLCI reports that it “will strictly enforce the monthly reporting requirements under Section 115(d)(4)(A), and will promptly issue notices of default and terminations of licenses where applicable.”³¹⁰ It adds that it will distribute royalty pools obtained through legal proceedings to copyright holders based on usage reports and that where funds do not match the full amount of royalties due, they would be distributed on a *pro rata* basis.³¹¹ AMLC notes that its board members have “extensive experience in all matters of resolution of royalty collections and payments, including bankruptcy proceedings,” and therefore it will be well positioned to adopt policies “to manage all known situations” related to licensee and licensor payments.³¹²

With respect to distributions, MLCI intends to provide “prompt, complete, and accurate payments to all copyright owners.”³¹³ It interprets section 115(d)(3)(J)(i)(I)—which provides that the first distribution of unclaimed accrued royalties “shall occur on or after January 1 of the second full calendar year to commence after the license availability date”—to provide that no such distribution shall occur prior to 2023.³¹⁴ Additionally, MLCI interprets the statute as providing discretion to retain unclaimed accrued royalties beyond the statutory holding period to allow for additional efforts at matching and claiming, and promises to do so where there is “reasonable evidence” that such efforts may bear fruit.³¹⁵ It is committed to diligent efforts to match uses and works, including “robustly and relentlessly” deploying its matching system with respect to unmatched works, and holding unclaimed accrued royalties beyond the statutory eligibility for distribution, to obtain more matches, and distribute more royalties to rightful owners.³¹⁶

MLCI further states that its royalty payment systems will comply with relevant tax law obligations, “including

collection of valid documentation (e.g., IRS Forms W–8 and W–9), administration of information statements and other reporting requirements (e.g., IRS Forms 1099 and 1042), and, where applicable, the accurate withholding and depositing of U.S. tax payments.”³¹⁷ It also notes that its board members have experience overseeing all aspects of royalty payment processing.³¹⁸

AMLC does not specifically address timing of initial and annual distribution of unclaimed royalties, instead emphasizing that it intends to keep distribution of unclaimed royalties to the lowest possible limit, and to only make such distributions “as a last resort after every possible effort is put into identifying the rights holder(s).”³¹⁹ It further notes that its unclaimed royalties committee will seek to develop a policy “to ensure the reserve fund is sized and managed appropriately.”³²⁰ In addition, AMLC plans to use actuarial data to make more accurate projections regarding accrued and unclaimed liquidations, interest earned, and potential claims.³²¹

AMLC will outsource royalty payment to established payment vendors, “or an entity that . . . has built the needed workflow/infrastructure into the existing work process that can be repurposed for AMLC distributions, such as . . . MRI and/or DataClef.”³²² This entity “will also be responsible for the storage of personal information (including tax ID, name, address, bank info etc.) under security compliant systems.”³²³

In general, the Office is persuaded that both candidates, through vendors or a combination of vendors and in-house capabilities, are capable of carrying out functions relating to collection and distribution of royalties. As with some other requirements, however, MLCI’s submission provides a more thorough explanation of how it would approach these matters. It articulates several policies it intends to implement to maximize matching, including holding accrued royalties beyond the statutory holding period, making information on unmatched works available on a public portal, and undertaking outreach and education efforts. Moreover, AMLC does not specifically address MLC functions regarding notices, recordkeeping, and collection under the license. For these

reasons, MLCI has made a more persuasive showing with respect to these requirements.

With respect to the distribution of unclaimed, accrued royalties, the Copyright Office agrees with MLCI that the statute does not permit the first such distribution to occur before January 1, 2023.³²⁴ The Office also agrees that unclaimed accrued royalties may be retained beyond the statutory holding period.³²⁵

vi. Education and Outreach

Both candidates appear to have developed multifaceted education and outreach plans to fulfill this statutory duty.³²⁶ MLCI notes that it is already engaged in significant education and outreach efforts to inform the relevant industries and the general public.³²⁷ It plans to continue these efforts through the MLC’s launch, and thereafter will “provide regular information and updates to the public,” including through “press releases, social media, articles and advertisements in trade publications, and speaking engagements at music industry events, conferences, and festivals.”³²⁸ MLCI notes that its board includes prominent music industry professionals who will use their expertise and connections to ensure that information is disseminated throughout the industry.³²⁹

AMLC has developed a strategy focused on three tasks: Engagement, education, and follow-up efforts.³³⁰ It seeks to reach as many potential users as possible through a variety of channels, including advertising, social media, industry conferences, and sponsorships, and relying on its own board members’ connections.³³¹ It specifically commits to making information available in “English, Spanish, and additional languages on an

³²⁴ See 17 U.S.C. 115(d)(3)(J)(i)(I) (“The first such distribution shall occur on or after January 1 of the second full calendar year to commence after the license availability date, with not less than 1 such distribution to take place during each calendar year thereafter.”).

³²⁵ See *id.* at 115(d)(3)(H)(i) (“The mechanical licensing collective shall hold accrued royalties associated with particular musical works (and shares of works) that remain unmatched for a period of *not less than* 3 years after the date on which the funds were received by the mechanical licensing collective, or *not less than* 3 years after the date on which the funds were accrued by a digital music provider that subsequently transferred such funds to the mechanical licensing collective pursuant to paragraph (10)(B), whichever period expires sooner.”) (emphasis added).

³²⁶ See generally, MLCI Proposal at 62–63; AMLC Proposal at 30–33.

³²⁷ MLCI Proposal at 62.

³²⁸ *Id.* at 63.

³²⁹ *Id.*

³³⁰ AMLC Proposal at 30–33.

³³¹ *Id.* at 30.

³⁰⁹ 17 U.S.C. 115(d)(3)(C)(i)(I)–(II).

³¹⁰ MLCI Proposal at 51.

³¹¹ *Id.* at 52.

³¹² AMLC Proposal at 18.

³¹³ MLCI Proposal at 52.

³¹⁴ 17 U.S.C. 115(d)(3)(J)(i)(I); MLCI Proposal at 52.

³¹⁵ *Id.* at 52–53.

³¹⁶ *Id.* at 43–44, 53–54 (discussing “mak[ing] information on its unmatched works available to the public on its rights portal” and undertaking “significant outreach to educate the public on accessing this information and making claims”).

³¹⁷ *Id.* at 51.

³¹⁸ *Id.*

³¹⁹ AMLC Proposal at 18–19.

³²⁰ *Id.* at 19.

³²¹ *Id.*

³²² *Id.* at 18.

³²³ *Id.*

as needed basis for targeted songwriting communities where the MLC determines special outreach is needed.”³³² AMLC also plans to produce a series of tutorial videos on specific aspects of the royalty collection and distribution process.³³³

The Recording Academy asserts that “[w]ithout an effective outreach program, the Collective will not succeed.”³³⁴ While noting that both proposals contain information regarding public outreach, the Recording Academy suggests that both are insufficiently detailed with respect to clear and executable plans, and how each will measure the effectiveness of outreach.³³⁵ The Office questioned each candidate about specific plans and metrics in subsequent meetings. AMLC expressed a variety of ambitious outreach ideas, although it was not necessarily clear whether it had yet established a specific plan and timeline (or whether all intended activities were reflected in its budget planning).³³⁶ MLCI represented that “numerous educational and outreach documents have been drafted and release is pending the determination on designation.”³³⁷ It plans to utilize focus groups with respect to design of the rights portal, and leverage its board and committee members, as well as endorsers, in national and international outreach.³³⁸

Ultimately, the Office finds that both candidates have the capability to undertake the education and outreach efforts required of the MLC. Following this designation, the selected entity should work with the Office, the DLC, and other stakeholders to ensure that rightsholders are adequately informed about the new licensing framework and the MLC’s functions. These efforts should include “clear benchmarks that measure [the MLC’s] outreach effectiveness so that it can modify and adapt its strategies and tactics to best serve the entire songwriter community.”³³⁹ In addition, as per Congress’s directive, the Office will consider best practices in education and outreach efforts as part of its study on unclaimed royalties.³⁴⁰

vii. Copyright Office’s Analysis

Overall, the submissions suggest that both MLCI and AMLC have or will have the basic administrative and technological capabilities to perform the required functions under the statute. For the reasons discussed above, however, MLCI has demonstrated a greater capacity to carry out several of these responsibilities. In particular, it is apparent that MLCI has established a more detailed operational framework and has garnered input from a broader set of interested parties. MLCI’s submission reflects substantially more detailed planning with respect to organizational structure, vendor selection, and collection and distribution procedures.

Indeed, the Recording Academy, a rare organization to withhold endorsement until it was able to study each candidates’ proposals, weighed in on the perceived capabilities of the two proposals, ultimately endorsing MLCI “upon careful consideration of both submissions.”³⁴¹ While praising the AMLC’s commitment and role in “opening up dialogue” on issues with respect to transparency and board representation, the Academy noted that MLCI’s “submission embodies a thoughtful, meticulous, and comprehensive approach,” concluding that it was “best equipped to satisfy” the duties of the MMA.³⁴²

For somewhat similar reasons, the Copyright Office concludes that MLCI is better equipped to operationalize the many statutory functions required by the MMA. To be sure, AMLC’s goals and principles are laudable, and its submission includes a number of ideas that should be given further consideration. But while AMLC’s leaner approach potentially could provide certain benefits, MLCI’s planning and organizational detail provide a more reliable basis for concluding that it will be able to meet the MLC’s administrative obligations by the license availability date.³⁴³ The MLC is not a start-up venture or small business that can adjust its rollout timing or pivot its focus; rather, it is tasked with establishing, for the first time, a complex and highly regulated administrative framework designed to serve all who are subject to (or make use

of) the statutory license, under legally-mandated timeframes.

MLCI’s proposal as a whole reflects a more realistic understanding of the MLC’s responsibilities under this new system and indicates that it is better positioned to undertake and execute the full range of administrative functions required of the MLC within these critical first five years.³⁴⁴ The Office expects that MLCI will build upon its considerable planning in a flexible and conscientious manner that also considers input from the to-be-designated DLC non-voting or committee members, as well as the broader musical work copyright owner and songwriting communities.

B. Digital Licensee Coordinator

The Office received one proposal, by DLCI, for designation as the DLC.³⁴⁵ DLCI’s founding members are five of the largest digital music providers—Spotify USA Inc., Apple Inc., Amazon Digital Services LLC, Google LLC, and Pandora Media, LLC. DLCI’s submission includes a proposal directly responding to the NOI, and a variety of supporting documents such as a certificate of incorporation, bylaws, and a five-year business plan.³⁴⁶ For the reasons described below, the Register has concluded that DLCI meets each of the statutory criteria required of the digital licensee coordinator, and that each of its individual board members are well-qualified to perform the statutory functions. Accordingly, the Register designates DLCI and its members, with the Librarian’s approval.

As noted above, in designating a DLC, the Register must apply similar statutory criteria regarding nonprofit status, endorsement (from digital music providers in this instance), and ability to perform the DLC’s administrative capabilities. Unlike the MLC, the Register may decline to designate a DLC if she is unable to identify an entity that fulfills each of the statutory qualifications; in that event, the statutory references to the DLC go without effect unless or until a DLC is designated.³⁴⁷ But designation of a DLC would allow that entity to start doing important work. The DLC’s authorities and functions include enforcing notice and payment obligations with respect to the administrative assessment, publicizing the ability of copyright owners to claim unmatched musical

³³² *Id.*

³³³ *Id.* at 32–33.

³³⁴ Recording Academy Reply at 5.

³³⁵ *Id.* at 5–6.

³³⁶ See AMLC *Ex Parte* Meeting Summary at 17–20.

³³⁷ MLCI *Ex Parte* Meeting Summary at 3.

³³⁸ *Id.*

³³⁹ Recording Academy Reply at 5.

³⁴⁰ Public Law 115–264, sec. 102(f), 132 Stat. at 3722–23.

³⁴¹ Recording Academy Reply at 2–3. The Recording Academy noted that it represents “thousands of working songwriters and composers, many of whom are independent, self-published, or unaffiliated songwriters.” *Id.* at 1.

³⁴² *Id.* at 3.

³⁴³ AMLC’s failure to file a reply comment in this proceeding underscores this conclusion.

³⁴⁴ Indeed, MLCI has pointed out that its budget is far more in line with the CBO estimate than is AMLC’s. MLCI Reply at 25.

³⁴⁵ DLCI Proposal at Ex. A–1–2 (certificate of incorporation).

³⁴⁶ See DLCI Proposal.

³⁴⁷ 17 U.S.C. 115(d)(5)(B)(iii).

work royalties through the MLC, appointing representatives of digital music providers to the MLC's operations advisory committee and generally representing digital music providers' interests as a non-voting member on the MLC board, and participating in proceedings before the CRJs and the Copyright Office.³⁴⁸ As a result, it is important that the DLC is a well-qualified representative of both digital music providers who take advantage of the section 115 blanket license and significant nonblanket licensees who will benefit from the new MLC database.

1. Organization, Board Composition, and Governance

Beginning with the first required statutory qualification, DLCI's proposal sufficiently demonstrates that it is a nonprofit created to carry out responsibilities under the MMA. DLCI is a Delaware nonprofit "organized to represent digital music providers in connection with the administration of the mechanical license provided under Section 115 of the United States Copyright Act."³⁴⁹ DLCI thus satisfies the first statutory criterion that it be a single nonprofit entity created to carry out certain statutory responsibilities.³⁵⁰

DLCI's board is composed of the following initial members: Nick Williamson (Apple, Inc.), Lisa Selden (Spotify), Sarah Rosenbaum (Google), James Duffett-Smith (Amazon Music), and Cynthia Greer (Sirius XM Radio Inc., the parent of Pandora Media, LLC). Collectively and individually, these individuals have a significant and diverse background in the music licensing marketplace, including representing digital music providers and in music database administration, and thus qualify for appointment to the board.³⁵¹ DLCI has selected three officers: James Duffett-Smith as board chair, Sarah Rosenbaum as treasurer, and Lisa Selden as secretary, and anticipates hiring an executive

director.³⁵² "Subject to input from and discussion with the MLC," DLCI anticipates designating a non-director, officer, or employee to serve as the non-voting member of the MLC board; this potentially may be DiMA's CEO.³⁵³

In response to a request from the Office, DLCI named its representatives to the MLC's operations advisory committee.³⁵⁴ Because MLCI and AMLC proposed different numbers of their own representatives to the operations advisory committee (six and four, respectively), DLCI stated that it will "work with the [designated] MLC to finalize the appointees to the Committee following designation."³⁵⁵ DLCI also anticipates creating several committees not required by the MMA. The Executive Committee will exercise the powers of the board, if and when the board exceeds nine members.³⁵⁶ The Compliance Committee will be responsible for "receiving and following up on reports from the MLC of non-compliant nonblanket licensees."³⁵⁷ The Regulatory Committee will engage in both CRJ and Copyright Office proceedings.³⁵⁸ And the Re-Designation Committee will prepare for a possible redesignation of DLCI as the DLC.³⁵⁹

DLCI's bylaws outline rules governing membership eligibility, voting, and dues; meetings and schedules; its board, committees, and officers; and other rules and operational provisions. DLCI creates three classes of membership (principal, charter, and general); until 2024, the principal members are DLCI's founding members.³⁶⁰ Beginning in 2024, the principal members will be determined on a share basis by those charter members with the five highest stream counts, determined every two years.³⁶¹ Charter members are those who have adhered to the mission and standards of DLCI for at least two years and have paid relevant dues.³⁶² The bylaws also set out the voting structure,

a meeting schedule, and a structure for collecting dues and funding the DLC.³⁶³

2. Endorsement

Under the second designation criterion, the DLC must be "endorsed by and enjoy[] substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years."³⁶⁴ The Office asked for "an explanation of how the proposed DLC has verified, calculated, and documented such endorsement and substantial support, including how the licensee market was calculated."³⁶⁵ In response, DLCI indicated that it interprets the statutory term "uses" as referring to "actual use of music pursuant to covered activities," and that such use could be measured in "number of subscribers, number of streams, or amount of royalties paid."³⁶⁶ DLCI stated that Congress could have chosen a different term if it wanted to measure endorsement by reference to, for example, a percentage of music providers engaged in covered activities or the number of musical works available.³⁶⁷ DLCI did not disclose usage metrics for its member companies, stating that for "any individual music service" usage metrics are "extremely confidential and proprietary."³⁶⁸ Instead, DLCI offered aggregated metrics provided by the Harry Fox Agency ("HFA") and MRI. This information indicated that DLCI members "represented by [HFA and MRI] combined had over 84% of the aggregate streams, over 94% of the aggregate subscribers, and over 88% of the aggregate royalties paid" over the last three years.³⁶⁹

The Copyright Office is tasked with evaluating the support of both digital music providers who will use the blanket license as well as significant nonblanket licensees.³⁷⁰ But since it is currently before the license availability date, it is unclear which digital music providers will be taking advantage of

³⁵² DLCI *Ex Parte* Meeting Summary at 1 (June 4, 2019); DLCI Proposal at Ex. B-18.

³⁵³ DLCI Proposal at 8; *see id.* at Ex. B-16-18.

³⁵⁴ Letter from DLCI to U.S. Copyright Office at 1 (June 13, 2019) (proposed committee members are Lisa Selden (Spotify), Nick Williamson (Apple Music), Alan Jennings (Amazon), Alex Winck (Pandora Media LLC), and Jennifer Rosen (Google Play Music and YouTube Music)); *see also* DLCI Proposal at Ex. C-12.

³⁵⁵ Letter from DLCI to U.S. Copyright Office at 1.

³⁵⁶ DLCI Proposal at Ex. B-13-14.

³⁵⁷ *Id.* at Ex. C-7.

³⁵⁸ *Id.* at Ex. C-11.

³⁵⁹ *Id.* at Ex. C-12-13.

³⁶⁰ *Id.* at Ex. B-2-3.

³⁶¹ *Id.* at Ex. B-3.

³⁶² *Id.* at Ex. B-2-3.

³⁶³ Meetings will be as-needed and at least annual, with specified advance notice. *Id.* at Ex. B-7. All members have one vote, with some exceptions. *Id.* at Ex. B-4. DLCI's annual budget is dues-funded; at least 60% of is paid for by Charter Members and not more than 40% will be paid for by General Members. *Id.* at Ex. B-5. The board may also approve special assessments under certain circumstances. *Id.* at Ex. B-5-6.

³⁶⁴ 17 U.S.C. 115(d)(5)(A)(ii).

³⁶⁵ NOI at 65753.

³⁶⁶ DLCI Proposal at 4-5.

³⁶⁷ *Id.* at 4.

³⁶⁸ *Id.* at 5.

³⁶⁹ *Id.* at 5-6 (emphasis omitted).

³⁷⁰ 17 U.S.C. 115(d)(5)(A)(ii).

³⁴⁸ *See generally, id.* at 115(d)(5)(C).

³⁴⁹ DLCI Proposal at Ex. C-1; *id.* at Ex. A-1 (certificate of incorporation) (stating that "[n]o part of the net earnings of [DLCI] shall inure to the benefit of, or be distributable to, its members, trustees, directors, officers or other private persons.").

³⁵⁰ 17 U.S.C. 115(d)(5)(A)(i).

³⁵¹ DLCI Proposal at Ex. C-14-17 (for example, Williamson previously headed the "music industry technical standards body, DDEX"; Selden works to improve copyright matching at Spotify and, while at ASCAP, processed royalties "for Amazon, Apple, Pandora and YouTube"; Rosenbaum has experience at both Google and Music Reports, where she launched a section 115 rights-claiming portal; and Duffett-Smith and Greer each have over fifteen years of experience licensing music for digital services).

the blanket license. DLCI does not describe whether its founding members would qualify as significant nonblanket licensees or blanket licensees but states that it is “committed to soliciting other interested licensee services to participate in all aspects of the DLC” and plans to “bolster its support and endorsement” going forward.³⁷¹

In submitting the aggregated HFA and MCI metrics, DLCI offers three different criteria for evaluation (*i.e.*, subscribers, streams, or royalties paid). As the statutory language here is similar to the MLC endorsement/support criteria,³⁷² the Office believes that the DLC endorsement/support standard is intended to parallel the MLC standard. Thus, the entity designated as the DLC should be endorsed and supported by digital music providers and significant nonblanket licensees that together paid the largest aggregate percentage (among DLC candidates) of total royalties from the use of their musical works in covered activities in the United States during the statutory three-year period. In any event, DLCI is the sole candidate, and each criterion signals support over 80% of the relevant pool. DLCI thus satisfies the second statutory criterion for designation.

3. Administrative and Technical Capabilities

General. In response to questions regarding its administrative capabilities, DLCI submitted a five-year business plan, which includes plans for establishing and enforcing administrative assessment payment obligations, identifying unmatched musical work owners, including outreach, participating in MLC governance and CRJ proceedings, maintaining records of its activities, and an anticipated budget.³⁷³

DLCI’s “primary purpose will be to coordinate the activities of the digital

music services relating to the mechanical license provided under Section 115, including through the specific authorities and functions identified in the statute.”³⁷⁴ It will “fairly represent digital licensee services, and effectively coordinate with the MLC, to help realize the goals of the MMA to provide licensing efficiency and transparency, and to ensure that the new blanket licensing system is, and remains, workable for digital music providers as well as copyright owners.”³⁷⁵ DLCI describes its administrative capabilities as being “managed by subject-matter experts with relevant industry experience and relationships” to “carry out its statutory functions and help ensure that the blanket licensing system is implemented successfully, to the benefit of all stakeholders in the industry.”³⁷⁶

Membership. Although DLCI represents a large swath of the relevant licensee market, it does not represent all licensees, and presumably the market will see new entrants over the next five years.³⁷⁷ Indeed, DLCI’s membership is identical to DiMA’s membership. DLCI has explained that it is committed to growing its membership to other DSPs and it is confident it will do so, noting that any digital music provider or significant nonblanket licensee can become a member of DLCI and smaller licensees will enjoy some protections, as the bylaws require certain actions to be passed by a supermajority of members.³⁷⁸ DLCI’s bylaws further outline how different membership tiers will be charged dues, and its business plan explains that operating expenses will be “modest, and intend[ed] to minimize overhead costs to the extent possible.”³⁷⁹

Administrative Assessment. DLCI asserts that it wishes to “minimize the need for contested proceedings or enforcement actions, by prioritizing negotiations and cooperation among licensees and the MLC.”³⁸⁰ DLCI is developing an agreement regarding the apportionment of the administrative assessment among the digital music licensees and significant non-blanket licensees “and expects to be able to establish a plan for that allocation before—or shortly after—the DLC is

designated.”³⁸¹ Should the administrative assessment be decided by the CRJs, DLCI suggests it is “uniquely positioned to support the [Copyright Royalty Board] in its assessments of ‘reasonable costs,’ based on its members’ experience with large-scale data management practices.”³⁸²

While it does not endorse either candidate for the MLC, DLCI has been communicating with the two MLC candidates “to support the development of efficient MLC operations and foster a collaborative working relationship” regarding payment enforcement responsibilities.³⁸³

MLC Participation. DLCI hopes that its representatives “will be able to help facilitate discussions between the MLC and DLC regarding the ongoing evaluation of the administrative assessment, and help streamline any potential [Copyright Royalty Board assessment] proceedings” and apportionment.³⁸⁴ While the administrative assessment proceeding will be conducted by the CRJs and its cost is beyond the ambit of the designation process, the Office notes that in some areas, DiMA—whose membership is coextensive with DLCI’s founding and current members—appeared to envision a narrower range of activities, such as those related to manual claims processing and enforcement, than either of the MLC candidates.³⁸⁵ Given the nascent status of operations, the Office would expect DLCI’s participation on the MLC board to be flexible, as the Office expects from the MLC. In any event, DLCI suggested that coordination and communication may improve following conclusion of the designation process.

Confidentiality. To fulfill its statutory function of records maintenance, DLCI selected a secretary who will be responsible for “ensuring that books, reports, statements, certificates, and all other documents and records are properly kept and filed”³⁸⁶ and for “managing the confidentiality and security of sensitive information” shared between it and the MLC.³⁸⁷ With respect to confidentiality and the DLC representative on the MLC board, DLCI states that in addition to designating a

³⁷¹ DLCI Proposal at 6–7; *see also Oversight of the U.S. Copyright Office, Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Rep. Escobar) (indicating that the DLC should not overlook smaller digital platforms and new market entrants).

³⁷² *Compare* 17 U.S.C. 115(d)(5)(A)(ii) (The DLC shall be “a single entity that . . . is endorsed by and enjoys substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years.”), *with id.* at 115(d)(3)(A)(ii) (The MLC shall be “a single entity that . . . is endorsed by, and enjoys substantial support from, musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years.”).

³⁷³ *See* NOI at 65753; DLCI Proposal at Ex. C; *see also* 17 U.S.C. 115(d)(5)(C) (outlining authorities and functions of DLC regarding these topics).

³⁷⁴ DLCI Proposal at Ex. C–1.

³⁷⁵ *Id.* at Ex. C–2.

³⁷⁶ *Id.* at Ex. C–13.

³⁷⁷ For example, DLCI membership does not include TIDAL, Deezer, Soundcloud, iHeartRadio, or Napster.

³⁷⁸ DLCI Proposal at Ex. C–13–14; DLCI *Ex Parte* Meeting Summary at 2.

³⁷⁹ DLCI Proposal at Ex. C–18.

³⁸⁰ *Id.* at Ex. C–3.

³⁸¹ *Id.* at Ex. C–4, C–5.

³⁸² *Id.* at Ex. C–6.

³⁸³ *Id.* at Ex. C–3.

³⁸⁴ *Id.* at Ex. C–9–10.

³⁸⁵ *Compare* DiMA Reply Comments at 10, and DLCI *Ex Parte* Meeting Summary at 2, *with* MLCI Proposal at 36 (“Merging data from multiple sources on conflicts will require significant manual processing and will be very resource-intensive.”).

³⁸⁶ DLCI Proposal at Ex. C–11; DLCI *Ex Parte* Meeting Summary at 1.

³⁸⁷ DLCI Proposal at Ex. C–12.

non-DLCI director, officer, or employee, it plans on “establishing, through agreement, appropriate limitations on the information that may be shared between [the MLC and DLC], as well as procedures for shielding information concerning individual licensee service members of the DLC from other licensee service members.”³⁸⁸ If necessary, DLCI states that it could address any confidentiality or administration issues with the MLC’s vendors in specific agreements.³⁸⁹ The Copyright Office is hopeful that relevant parties will agree on appropriate procedures to protect confidential, proprietary, or otherwise sensitive information, and notes that the Register has ultimate responsibility to proscribe regulations related to the protection of confidential information by the MLC, DLC, and their employees, committees, or board members.³⁹⁰

Education and Outreach. DLCI expects to “develop standardized text identifying and providing contact information for the MLC, and instructions for how a songwriter or other copyright owner of musical compositions can claim accrued royalties by providing the necessary information to the MLC” for digital licensees to post on their services.³⁹¹ DLCI generally expressed intentions to engage in educational efforts and plans to coordinate outreach efforts with the MLC to inform songwriters and publishers of the MLC and how to claim royalties, including by “develop[ing] a protocol to guide its members’ individual outreach” and “participat[ing] in songwriter and publisher industry events, including those organized by the MLC.”³⁹² DLCI has also committed to participating in outreach events with the Copyright Office.³⁹³

The Office finds that DLCI has addressed the main issues regarding its administrative capabilities. DLCI proposed a thorough and thoughtful governance structure, criteria for membership, and dues structure, and appears well-positioned to participate in an administrative assessment proceeding if necessary. Other DLCI functions, such as educational and outreach efforts, plans to enforce notice and payment obligations, and ensuring that DLCI has the broadest possible support of the licensee market, appear more inchoate and may benefit from

continued refinement. Overall, the Office concludes that DLCI satisfies the third statutory criterion for designation as the DLC and has demonstrated a commitment to building out its operations and execution of its statutory functions.

C. Conclusion

For the reasons set forth above, the Register is selecting and designating MLCI and DLCI, and their individual board members, which Librarian approves. MLCI has demonstrated it meets each of the statutory criteria; indeed, it is the only candidate that satisfies the requirement of being endorsed by, and enjoying substantial support from, musical work copyright owners that represent the greatest percentage of the licensor market for covered activities in the past three years. Further, by articulating a more thoughtful, methodical, and comprehensive approach towards executing the many important administrative and technological duties of the collective, MLCI has also demonstrated that it is better positioned to perform the required functions. The Register has reviewed and determined that each of MLCI’s individual board members are well-qualified to serve on the board in accordance with the statutory criteria. Similarly, DLCI has demonstrated that it fulfills each of the statutory criteria for designation, and that its individual board members are well-qualified to serve on its board pursuant to the statute.

Importantly, both the MLCI and the DLCI submissions acknowledge that their intended roles carry the responsibility to broadly represent the interests of musical work copyright owners and songwriters, or digital music providers, respectively, with respect to the section 115 mechanical license. In particular, the Office appreciates AMLC’s proposal. The Office hopes that MLCI will consider whether any aspects of the AMLC’s proposal should be incorporated into its future planning.

As the legislative history amply documents, this historic music copyright legislation was enacted only in the wake of significant consensus-building and cooperation across a wide berth of industry stakeholders.³⁹⁴ Now

that it is time to roll up sleeves, sustained dedication to these worthy goals will be critical as the MLC and DLC turn to the many tasks involved in preparation for the license availability date.

The Copyright Office looks forward to working with the MLC, DLC, and other interested parties on next steps in MMA implementation. As noted, the MLC and DLC, along with the Copyright Office, are asked to facilitate education and outreach regarding the new blanket licensing system to the broader songwriting community. In the coming months, the Office will initiate additional regulatory activities required under the statute and begin planning its public policy study regarding best practices, which the MLC may implement to identify musical work copyright owners with unclaimed accrued royalties and reduce the incidence of unclaimed royalties. Future information regarding those activities will be made available at: <https://www.copyright.gov/music-modernization/>.

Finally, the Copyright Office finds that there is good cause to make the codification of this designation effective on publication. Timely designation of the MLC and DLC are vital to the success of Congress’s reform of the section 115 statutory license. Indeed, by the statutory language, the designation would be timely based solely upon the date of publication in the **Federal Register**, but reflecting the designation in Copyright Office regulations will be helpful to the public.³⁹⁵ The statutory designation deadline is the same deadline for the CRJs to commence a

reforms issued by key music industry leaders earlier this month. Many of these measures, such as the CLASSICS Act and the Music Modernization Act, are supported by stakeholders on both sides, by digital service providers as well as by music creators. This emerging consensus gives us hope that this committee can start to move beyond the review stage toward legislative action.”); 164 Cong. Rec. H3522, 3537 (daily ed. Apr. 25, 2018) (statement of Rep. Collins) (“[This bill] comes to the floor with an industry that many times couldn’t even decide that they wanted to talk to each other about things in their industry, but who came together with overwhelming support and said this is where we need to be.”); 164 Cong. Rec. S501, 502 (daily ed. Jan. 24, 2018) (statement of Sen. Hatch) (“I don’t think I have ever seen a music bill that has had such broad support across the industry. All sides have a stake in this, and they have come together in support of a commonsense, consensus bill that addresses challenges throughout the music industry.”); 164 Cong. Rec. H3522, 3536 (daily ed. Apr. 25, 2018) (statement of Rep. Goodlatte) (“I tasked the industry to come together with a unified reform bill and, to their credit, they delivered, albeit with an occasional bump along the way.”); 164 Cong. Rec. S6259, 6260 (daily ed. Sept. 18, 2018) (statement of Sen. Alexander on behalf of Sen. Grassley) (“This bill is the product of long and hard negotiations and compromise.”).

³⁹⁵ 17 U.S.C. 115(d)(3)(B)(i), (d)(5)(B)(i).

³⁸⁸ NOI at 65753; DLCI Proposal at 8; *see also id.* at Ex. C–9.

³⁸⁹ DLCI Proposal at 10.

³⁹⁰ 17 U.S.C. 115(d)(12)(C).

³⁹¹ DLCI Proposal at Ex. C–8.

³⁹² *Id.*

³⁹³ DLCI *Ex Parte* Meeting Summary at 2.

³⁹⁴ *See, e.g., Music Policy Issues: A Perspective from Those Who Make It: Hearing on H.R. 4706, H.R. 3301, H.R. 831 and H.R. 1836 Before H. Comm. On the Judiciary*, 115th Cong. 4 (2018) (statement of Rep. Nadler) (“For the last few years, I have been imploring the music community to come together in support of a common policy agenda, so it was music to my ears to see—to hear, I suppose—the unified statement of support for a package of

proceeding to establish the initial administrative assessment, which anticipates MLC and DLC participation.³⁹⁶ Further, given the license availability date of January 1, 2021, the MLC has a tight deadline to become fully operational, and both the MLC and DLC have important roles in educating the public on the royalty claiming process, which may be unnecessarily encumbered if designation were delayed.³⁹⁷ The public had ample opportunity to comment on the proposals for parties to be named the MLC and DLC and did, in fact, file over six hundred comments in response to the different proposals.

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 210 as follows:

PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL WORKS

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 17 U.S.C. 115, 702.

■ 2. Add subpart A, consisting of §§ 210.1 through 210.10, to read as follows:

Subpart A—Blanket Compulsory License, Mechanical Licensing Collective, and Digital Licensee Coordinator

Sec.

210.1 Designation of the Mechanical Licensing Collective and Digital Licensee Coordinator.

210.2–210.10 [Reserved]

§ 210.1 Designation of the Mechanical Licensing Collective and Digital Licensee Coordinator.

The following entities are designated pursuant to 17 U.S.C. 115(d)(3)(B) and (d)(5)(B). Additional information regarding these entities will be made available on the Copyright Office's website.

(a) Mechanical Licensing Collective, Inc., incorporated in Delaware on March 5, 2019, is designated as the Mechanical Licensing Collective; and

(b) Digital Licensee Coordinator, Inc., incorporated in Delaware on March 20, 2019, is designated as the Digital Licensee Coordinator.

³⁹⁶ *Id.* at 115(d)(3)(B)(i), (d)(5)(B)(i), (d)(7)(D)(iii)(f).

³⁹⁷ *See id.* at 115(d)(3)(f)(iii), (d)(5)(C)(iii).

§§ 210.2–210.10 [Reserved]

Dated: July 1, 2019.

Karyn A. Temple,

Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2019–14376 Filed 7–5–19; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Parts 303, 350, 355, 370, 380, 382, 383, 384, and 385

[Docket No. 18–CRB–0012 RM]

Copyright Royalty Board Regulations Regarding Procedures for Determination and Allocation of Assessment To Fund Mechanical Licensing Collective and Other Amendments Required by the Hatch-Goodlatte Music Modernization Act

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges (Judges) adopt regulations governing proceedings to determine the reasonableness of, and allocate responsibility to fund, the operating budget of the Mechanical Licensing Collective authorized by the Music Modernization Act (MMA). The Judges also adopt proposed amendments to extant rules as required by the MMA.

DATES: Effective July 8, 2019.

FOR FURTHER INFORMATION CONTACT:

Anita Blaine, CRB Program Specialist, by telephone at (202) 707–7658 or email at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On March 13, 2019, the Copyright Royalty Judges (Judges) published proposed regulations governing proceedings to determine the reasonableness of, and allocate responsibility to fund, the operating budget of the Mechanical Licensing Collective authorized by the Music Modernization Act (MMA). The Judges also proposed amendments to extant rules as required by the MMA. 84 FR 9053. The Judges received comments from the Digital Music Association (DiMA), The National Music Publishers Association (NMPA), and SoundExchange, Inc.¹ The commenters generally support the Judges' proposal

¹ The proposal was further to a Notice of Inquiry that the Judges published on November 5, 2018. 83 FR 55334.

while recommending certain adjustments, many of which the Judges accept as improvements to the rules as originally proposed. The Judges hereby adopt the proposed rules as amended.

Background

The MMA amended title 17 of the United States Code (Copyright Act) to authorize, among other things, designation by the Register of Copyrights (with the approval of the Librarian of Congress) of a Mechanical Licensing Collective (MLC). 17 U.S.C. 115(d)(3)(A)(iv) and 17 U.S.C. 115(d)(3)(B)(i). The MLC is to be a nonprofit entity created by copyright owners to carry out responsibilities set forth in sec. 115 of the Copyright Act. 17 U.S.C. 115(d)(3)(A)(i). The Copyright Act sets forth the governance of the MLC, which shall include representatives of songwriters and music publishers (with nonvoting members representing licensees of musical works and trade associations). 17 U.S.C. 115(d)(3)(D). The MLC is authorized expressly to carry out several functions under the Copyright Act, including offering and administering blanket licenses and collecting and distributing royalties. 17 U.S.C. 115(d)(3)(C)(i) and (iii).

Section 115(d)(5)(A) of the MMA defines a second entity, the Digital Licensee Coordinator (“DLC”), a single nonprofit entity not owned by any other entity, created to carry out responsibilities under the MMA. The DLC must be endorsed by and enjoy substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding three calendar years. 17 U.S.C. 115(d)(5)(A). The DLC will be designated by the Register, with the approval of the Librarian, and is authorized to perform certain functions under the Copyright Act, including establishing a governance structure, criteria for membership, and dues to be paid by its members.² The DLC is also authorized to engage in efforts to enforce notice and payment obligations with respect to the administrative assessment, including by receiving information from and coordinating with the MLC. The DLC is also authorized to initiate and participate in proceedings before the Judges to establish the

² The Register may decline to designate a DLC if she is unable to identify an entity that fulfills the qualifications for the DLC set forth in the MMA. 17 U.S.C. 115(d)(5)(B)(iii).