

U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

Designation of Mechanical Licensing
Collective and Digital Licensee
Coordinator

Docket No. 2018-11



COMMENTS FROM THE BOARD OF DIRECTORS OF THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

Nashville Songwriters Association International
1710 Roy Acuff Place
Nashville, TN 37203

April 19, 2019

Karyn A. Temple
Register of Copyrights
Library of Congress
101 Independence Ave. SE
Washington, DC 20540

Dear Ms. Temple:

We, the 27-member all songwriter board of the Nashville Songwriters Association International (NSAI) are writing in support of the Mechanical Licensing Collective (MLC) and to counter claims made by the American Music Licensing Collective (AMLC).

Two organizations are asking to be designated by the U.S. Register of Copyrights as the new agency to oversee the issuance of blanket mechanical licenses for digital streaming activity in the United States, as outlined under the Music Modernization Act. NSAI along with the National Music Publishers Association (NMPA) and Songwriters of North America (SONA) are assisting the MLC which is endorsed by virtually the entire American music industry. There is one specific topic about which the competing group, the AMLC, has made repeated public claims that are lacking in detail at best and dangerously misleading at worst. That topic is the distribution of unclaimed funds.

We'd like to take this opportunity to offer information about this matter, explain our many years of work to evolve how unclaimed royalties flow to songwriters and how NSAI spearheaded, including within the Music Modernization Act, historic rules for the distribution of unclaimed funds.

First, some background. There have been different methodologies used over time for distributing unclaimed funds to songwriters. Years ago, in an era when those funds primarily came from record labels, music publishers would receive what was termed a "market share" distribution of those monies. Market share was typically defined as a publisher's percentage of "total annual revenue." Publishing companies would receive a lump sum payment based on such "market shares," regardless of whether their company actually generated the same percentage of revenue from the source/time period of the unclaimed funds. Publishers had no statutory requirement to distribute those funds to songwriters they had under contract.

NSAI has worked with NMPA for a decade to evolve that system. In 2009-10, with a large pending and unmatched funds settlement on the horizon, NSAI and NMPA worked with American record labels to develop a set of "best practices" for distributing unidentified money from record labels to music publishers and songwriters. NSAI was also singularly responsible for the Harry Fox Agency requiring, *for the first time in history*, that music publishers pay pending and unmatched funds forward to songwriters for the period of time those funds were collected, by negotiating verbiage on checks binding a publisher to pass through to songwriters their share of the distributions. The

initial amount was \$275 million and millions more have since been distributed under the system we helped establish. Because those funds were “unclaimed” music publishers employed several different methodologies when they distributed the funds to songwriters.

Under the MMA, NSAI fought for specific language enumerating how publishers should pay unclaimed funds to songwriters that will flow through the new mechanical licensing agency the bill establishes. Because of that work, songwriters will see a statutory activity-based formula when unclaimed funds are handled. Now, for the first time by law, those distributions will be based on market shares determined by specific activity and will also be required to be shared with songwriters under contract with music publishers. Even songwriters without publishing deals will now receive such distributions.

Here is what the Music Modernization Act, in **Section 115(d)(3)(J)** clearly states on this topic:

(i)(II) Copyright owners’ payment shares for unclaimed accrued royalties for particular reporting periods shall be determined 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, including, in addition to usage data provided to the mechanical licensing collective, usage data provided to copyright owners under voluntary licenses and individual download licenses for covered activities, to the extent such information is available to the mechanical licensing collective. In furtherance of the determination of equitable market shares under this subparagraph.

(iv) SONGWRITER PAYMENTS.—Copyright owners that receive a distribution of unclaimed accrued royalties and accrued interest shall pay or credit a portion to songwriters (or the authorized agents of songwriters) on whose behalf the copyright owners license or administer musical works for covered activities, in accordance with applicable contractual terms, but notwithstanding any agreement to the contrary—

(I) such payments and credits to songwriters shall be allocated in proportion to reported usage of individual musical works by digital music providers during the reporting periods covered by the distribution from the mechanical licensing collective; and

(II) in no case shall the payment or credit to an individual songwriter be 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.

Under the MMA a minimum distribution of 50% of unclaimed funds to songwriters will be required by law. Because many songwriters by contract receive a larger than 50%

share of royalties generated, many writers will actually receive 75% or more of unclaimed funds!

When NMPA had litigated or reached a settlement with a digital streaming company for unclaimed funds, only dues-paying NMPA members received a portion of those settlements. Now, under this agreement which became part of the MMA, an agreement which NSAI and NMPA helped craft, all songwriters will be able to receive such unclaimed funds based on what they earned during the activity period for which those funds were collected, and AT NO COST, regardless of NMPA affiliation! Said another way, many, many songwriters who presently receive zero unclaimed funds, will begin receiving a portion of those monies which will go directly to them if self-published.

The new methodology reflects a key shift in how unclaimed funds are distributed and was a major accommodation by NMPA and the American music publishing industry to benefit ALL songwriters, one which completely contradicts unsubstantiated accusations to the contrary.

To suggest that NSAI, NMPA, SONA and many music publishing companies would support a collective that would somehow deliberately break the law, intentionally not match works and be complicit in distributing funds in ways contrary to those proscribed in the MMA is offensive to us. But that is what the AMLC has repeatedly claimed. Our organizations were the ones primarily responsible for adoption of the MMA and all of the language it contains on this important topic. NSAI negotiating the activity-based method of paying unclaimed funds with the NMPA is one of the major accomplishments in our 52-year history. To minimize those efforts and make false allegations about a nefarious conspiracy to skirt the rules contained in the MMA amounts to nothing more than a desperate fear tactic by the AMLC designed to mislead songwriters to support their competing submission.

At the insistence of NSAI, NMPA and SONA, the MMA also stipulates the creation of an Unclaimed Royalties Oversight Committee to ensure compliance with the legislation's goals of unclaimed funds distributions. NSAI and NMPA included creation of the Unclaimed Royalties Oversight Committee in our earliest draft of the bill. Additionally, the MLC has appointed an Unclaimed Royalties Oversight Committee that does not include a representative of a single major music publisher. Rather, as described in the MLC submission, it is comprised of songwriters carefully selected from a pool of hundreds of applicants and independent music publishers whose interests also demand an activity-based disbursement of unclaimed funds. Publishers both large and small and songwriters agreed on the MLC Unclaimed Royalties Oversight Committee composition because we all want to ensure unclaimed funds practices outlined in the bill are strictly enforced.

Music publishers chosen to serve on the MLC board and committees were selected by a well-respected advisory panel of representatives of 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. The MLC songwriter board and committee members were chosen by representatives of songwriter organizations in an open, inclusive and thoroughly vetted procedure that reviewed nearly 300 songwriter applications. No member of that selection body was eligible to serve on the MLC board or a committee in an effort to carefully avoid conflicts of interest. Any songwriter in America was invited to apply in a transparent process to serve on the MLC Board or committees. The AMLC's board members were apparently self-selected and it appears that many don't meet the letter or spirit of statutory eligibility criteria set forth in the MMA for board service. (This point and others are more thoroughly explored in MLC's reply comments to the U.S. Copyright Office.)

We understand MLC's board is presently developing many written governance rules and policies, including ones to address any conflicts of interest, not only when it comes to the distribution of unclaimed funds, but for any matter under MLC's jurisdiction. Bart Herbison, NSAI Executive Director, has a non-voting seat on the MLC board, to go along with the numerous respected songwriters and publisher representatives that have MLC board and committee seats. We are confident that MLC policies will be transparent and enforced. In contrast, several AMLC directors and committee members are involved in business partnerships with SOCAN, whose subsidiary DataClef is one of the two vendors identified in their initial submission to the U.S. Copyright Office. Others are consultants for or have business relationships with SOCAN. These conflicts of interest were not disclosed by the AMLC.

NSAI has until now avoided responding to the AMLC directly. We made a decision to let them make their case as the selection process evolved, as MLC would make ours. After much thought we now believe it necessary to directly address the public smears, half-truths and outright untruths on the topic of unclaimed funds. We hope that this explanation of NSAI's work will help correct the misleading public allegations made by the AMLC.

NSAI has changed American tax laws for songwriters, been involved in dozens of legislative battles, courtroom fights, and every day promotes and protects us. We trust them, have 52 years of history that they are working in our best interests and continuously produce results not just for Nashville songwriters, but for every songwriter in our country.

The subject of distributions of unclaimed funds has been a controversial one for decades. We are all sensitive that it involves money that someone unknown has earned. As the MLC continues its vendor selection process, inspects their systems and plans future portals and processes, we are committed now and into the future to having the best and most transparent user-friendly technology for songwriters and small publishers, enabling them to easily identify their works and claim them. MLC's goal is the lowest possible amount of songwriter royalties remaining unidentified. As an organization NSAI is committed to work hand-in-hand with MLC on technical solutions, comparisons with other databases, educational efforts, media campaigns and

grassroots work to find writers and publishers before their funds become unclaimed. We will use all the resources at our disposal to do that.

NSAI worked tirelessly to change the law to require the fairest possible distributions of unclaimed funds to songwriters. We are fully prepared for the challenge of engaging the American songwriter community to set a new precedent for the smallest pool of unclaimed money possible and look forward to a new and more efficient era of digital mechanical licensing.

Signed by NSAI's 27-member songwriter Board of Directors:

Rhett Akins, Tony Arata, Jim Beavers, Steve Bogard, Roger Brown, Sarah Buxton, Jeff Cohen, Corey Crowder, Chris DeStefano, Nicolle Galyon, Ben Glover, Connie Harrington, Byron Hill, Brett James, Lee Thomas Miller, Tim Nichols, Josh Osborne, Liz Rose, Rivers Rutherford, Jenn Schott, Anthony Smith, Caitlyn Smith, Bobby Tomberlin, Laura Veltz, Troy Verges, Danny Wells and Jimmy Yeary