

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re:

Determination and Allocation of Initial
Administrative Assessment to Fund
Mechanical Licensing Collective

Docket No. 19-CRB-0009-AA

JOINT NOTICE OF SETTLEMENT AND MOTION TO SUSPEND CASE SCHEDULE

The Mechanical Licensing Collective (“the MLC”) and the Digital Licensee Coordinator (“the DLC”) (collectively, the “Participants”), hereby notify the Copyright Royalty Judges (the “Judges”) that they have reached a full settlement of all terms in the above-captioned proceeding (the “Proceeding”) concerning the amount and terms of the initial Administrative Assessment under Section 115 (“Section 115”) (d)(7)(D)(iii) of the U.S. Copyright Act. In light of the foregoing, the Participants respectfully request that the Judges suspend the case schedule and direct the Participants to jointly submit proposed regulatory language implementing the Settlement as detailed below on or before November 26, 2019 (or as otherwise ordered by the Judges).

I. The Participants

The MLC and the DLC are the two required participants in the Proceeding under Section 115(d)(7)(D)(iii)(II), and are the only remaining participants in the Proceeding.¹

¹ Petitions to Participate in the Proceeding were also filed by Circle God Network Inc. d/b/a David Powell (“CGN”) and Songwriters Guild of America, Inc. (“SGA”). SGA withdrew its petition on September 12, 2019 (eCRB Dkt. 7377), and the petition of CGN was dismissed by Order of the CRJs on September 17, 2019 (eCRB Dkt. 8080).

II. Nature of the Settlement

The Participants have agreed that the amount and terms of the initial Administrative Assessment under Section 115(d)(7)(D)(iii) should be as follows (the “Settlement”):

(a) Initial Administrative Assessment periods and amounts

(1) The initial Administrative Assessment shall be assessed in two components: a one-time assessment to cover collective total costs in connection with the MLC’s startup (“Startup Assessment”) and an annual assessment beginning with the calendar year 2021 (“Annual Assessment”) to cover collective total costs on an ongoing basis. The amounts of the initial Administrative Assessment shall be as follows:

- (i) The Startup Assessment shall be in the amount of \$33,500,000;
- (ii) The Annual Assessment for the calendar year 2021 shall be in the amount of \$28,500,000; and
- (iii) For the calendar year 2022 and all subsequent years the amount of the Annual Assessment will be automatically adjusted by increasing the amount from the Annual Assessment of the preceding calendar year by the lesser of (a) 3 percent and (b) the percentage change in the Employment Cost Index (ECI) for Total Compensation (not seasonally adjusted), all civilian workers, as published on the website of the United States Department of Labor, Bureau of Labor Statistics, for the most recent 12-month period for which data are available on the date that is 60 days prior to the start of the calendar year.

(2) The Annual Assessment shall continue from year to year unless and until an adjusted Administrative Assessment is established pursuant to an adjustment proceeding under Section 115(d)(7)(D)(iv).

(b) Annual minimum fee

(1) *Amount.* All Licensees shall pay an annual minimum fee for each Annual Assessment period. The annual minimum fee for Licensees that use fewer than

5,000 Total Sound Recordings shall be \$5,000. The annual minimum fee for Licensees that use 5,000 or more Total Sound Recordings shall be \$60,000.

- (2) *Definition of Total Sound Recordings.* Total Sound Recordings shall mean unique and royalty-bearing sound recordings used in Section 115 covered activities on a monthly average during the respective calculation period, such as would be reflected in the respective Licensee's records of usage required to be reported under Section 115(d). A sound recording reported multiple times with the same metadata would be counted as a single sound recording. A sound recording reported multiple times each with different metadata would be counted multiple times, once for each record with new or different metadata.
- (3) *Calculation Period.* The calculation period for annual minimum fees shall be the 12-month period that ends on the September 30th immediately preceding the start of the assessment period (*i.e.*, the annual minimum fee calculation period for the 2021 Annual Assessment shall be October 1, 2019 to September 30, 2020).
- (4) *Self-certification for 2021 and 2022.* Each Licensee in operation on or before the license availability date shall submit to the MLC, accompanying its Notice of License under Section 115(d)(2)(A) or its Notice of Nonblanket Activity under Section 115(d)(6)(A), no later than February 15, 2021, a certified statement setting forth the Licensee's Total Sound Recordings ("Certified Minimum Fee Disclosure") for the 2021 annual minimum fee (*i.e.*, for the period from October 1, 2019 to September 30, 2020). The appropriate minimum fee (*i.e.*, \$5,000 or \$60,000) for the 2021 Assessment shall accompany the certified statement. Each Licensee shall submit to the MLC by November 1, 2021 a Certified Minimum Fee

Disclosure for the 2022 Assessment, and shall pay the appropriate annual minimum fee by January 15, 2022.

- (5) *Calculation by the MLC starting with 2023.* Beginning with the 2023 Assessment and continuing in subsequent years, the MLC will calculate each Licensee's annual minimum fee based on usage reporting received from Licensees pursuant to Section 115(d)(4). The MLC will send invoices for the appropriate annual minimum fee to each Licensee. Payment of annual minimum fee invoices from the MLC shall be made by the later of (i) 30 days from receipt of the invoice from the MLC or (ii) January 15th of the respective Annual Assessment year. Each Licensee in operation during any portion of an annual minimum fee calculation period shall pay the full amount of the respective annual minimum fee.

(c) Annual Assessment allocation and payment

- (1) *Allocation Formula.* For purposes of allocation, each Annual Assessment shall first be divided into four equal parts, with each part to be allocated and paid on a calendar quarterly basis (each a "Quarterly Allocation"). Each Quarterly Allocation shall then be divided into two equal parts, and allocated among Licensees according to the following formula:
- (i) *All Licensee Assessment Pool.* The All Licensee Assessment Pool shall equal 50% of each Annual Assessment and Quarterly Allocation. The All Licensee Assessment Pool shall be allocated on a *pro rata* basis across all Licensees based on each Licensee's share of the Aggregate Total Sound Recordings count of all Licensees. The Aggregate Total Sound Recordings count of all Licensees is the sum of the Total Sound Recordings count of each and every Licensee for the respective Quarterly Allocation calculation period.
 - (ii) *Threshold Licensee Assessment Pool.* The Threshold Licensee Assessment Pool shall equal the remaining 50% of each Annual Assessment and Quarterly Allocation. A Threshold Licensee is a Licensee that reports at

least 7.5% of the Aggregate Total Sound Recordings count of all Licensees. The Threshold Licensee Assessment Pool shall be allocated on a *pro rata* basis across Threshold Licensees based on each Threshold Licensee's share of the Aggregate Total Sound Recordings count of all Threshold Licensees.

- (2) *Calculation Periods and Timing.* The calculation period for each Quarterly Allocation shall be the three-month period that ends three months prior to the start of the respective quarter, except that the calculation period for the Quarterly Allocation for the first and second quarters of 2021 shall be the same as for the annual minimum fee for the 2021 Annual Assessment, and shall be calculated based upon the information provided in the Certified Minimum Fee Disclosures, as required hereunder. The MLC shall make all calculations for each respective period based upon the reporting for such period received from Licensees as of the time of calculation by the MLC (which calculation time shall not be earlier than the legal deadline for submission of reporting by Licensees for the respective period). The MLC shall promptly notify the DLC of any known Licensees who have not timely submitted Total Sound Recordings reporting.
- (3) *Payment.* Invoices from the MLC for Quarterly Allocation shares shall be payable pursuant to the MLC invoice, but no earlier than the later of (i) 30 days from receipt of the invoice from the MLC or (ii) the first day of the next calendar quarter. Invoices from the MLC to Licensees shall be deemed received on the business day after electronic transmission.
- (4) *Format of Invoices.* The quarterly invoices issued by the MLC shall include at least the following information: (i) Invoice issuance date; (ii) Invoice payment due date; (iii) Amount owed, by share of All Licensee Assessment Pool and Threshold Licensee Assessment Pool (where applicable); (iv) Allocation of Startup Costs

(where applicable); (v) Offset of minimum fee payment against quarterly assessment; and (vi) Amount of credit for un-recouped minimum fee (where applicable). Invoices issued as a result of an allocation adjustment (in accordance with section (5) below) shall include all of the information set forth in (i)-(vi) herein that may be relevant, as well as an explanation of the change from the prior invoices that are affected, and the reason(s) for the adjustment.

(5) *Recalculation of Allocated Assessment Invoices.* The MLC may decide to recalculate allocations and adjust prior invoices, up to twelve months after initial issuance, if new usage reporting is received, the MLC discovers an error in its processing, or other circumstances arise that may substantially alter allocation shares, with the written consent of the DLC. The MLC shall report to the DLC no later than 75 days after the end of every quarter the Aggregate Total Sound Recordings for that quarter.

(6) *Recoupment of Minimum Fee.* Each Licensee's annual minimum fee will be offset against its Quarterly Allocation shares, and additional payment will not be due from a Licensee unless and until its total Quarterly Allocation shares exceed its annual minimum fee payment. To the extent that a Licensee's annual minimum fee exceeds that Licensee's Quarterly Allocation shares for a given Assessment period, the excess amounts will be pooled and credited *pro rata* to all Licensees based on the Quarterly Allocation shares for the first quarter of the following year.

(d) Startup Assessment allocation and payment. The Startup Assessment shall be allocated and paid in the same manner and on the same dates as the 2021 Annual Assessment,

including as to each of the applicable provisions above, and shall be separately itemized in invoices from the MLC to Licensees.

III. Supersedence of the MLC's Proposed Assessment

This Settlement shall amend and supersede the MLC's Proposed Assessment as set forth in its Opening Submission in the Proceeding, and shall constitute the joint proposed initial Administrative Assessment of the MLC and DLC.

IV. Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 115(d)(7)(D)(v):

In lieu of reaching their own determination based on evaluation of relevant data, the Copyright Royalty Judges shall approve and adopt a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by the mechanical licensing collective and the digital licensee coordinator... except that the Copyright Royalty Judges shall have the discretion to reject any such agreement for good cause shown. An administrative assessment adopted under this clause shall apply to all digital music providers and significant nonblanket licensees engaged in covered activities during the period the administrative assessment is in effect.

Importantly, the settlement of this Proceeding is not subject to public comment. *See id.* (noting that the Participants are the parties that have to agree to settle this Proceeding); *see also* 37 CFR § 355.4(c)(4) (outlining procedure by which only other *participants*, and no others, may file comments on a proposed settlement within five days of the filing of a proposed settlement); Order Granting Joint Motion to Modify the Case Scheduling Order (setting the schedule for non-settling *participants*, and no others, to comment on any proposed settlement). The Participants are pleased to have reached the Settlement, which meets the statutory requirements of Section 115(d)(7)(D) for the initial Administrative Assessment.

The Participants respectfully request that the Judges grant this motion to suspend the case schedule and direct the Participants to submit proposed regulatory language implementing the Settlement by November 26, 2019.

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Thursday, November 14, 2019, I provided a true and correct copy of the Joint Notice of Settlement and Motion to Suspend Case Schedule to the following:

Digital Licensee Coordinator, Inc., represented by Allison Stillman, served via Electronic Service at astillman@mayerbrown.com

Signed: /s/ Benjamin K Semel