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Via email

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General Counsel and Associate Register of Copyrights
Anna Chauvet
Associate General Counsel
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United States Copyright Office
Library of Congress
101 Independence Ave. SE
Washington, DC 20559-6000

Re: Docket No. 2020-5
Letter re ex parte call concerning altered metadata

Dear Ms. Smith, Ms. Chauvet and Mr. Sloan,

This letter summarizes the participation of the Mechanical Licensing Collective (the “MLC”) in the July 22, 2020 call (the “call”) between the Copyright Office (the “Office”) and numerous other participants concerning the above-referenced proceeding.

The attendees for the call from the MLC were Kris Ahrend (CEO), Richard Thompson (CIO), Ellen Truley (CMO), Abel Sayago (DSP Technical Lead), Alisa Coleman (Chair of the Board of Directors), Danielle Aguirre (Board member), Bart Herbison (Board member) and counsel Benjamin Semel.

The other attendees on the call are listed in Exhibit A hereto.

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The following summarizes the MLC's substantive participation in the call, along with additional comments on topics raised on the call:

The importance of "edge cases"

The call began with a discussion of ARM's position that the MLC should display sound recording data in its public database by "rolling up" DMP usage reporting through cross-matching against SoundExchange's database of sound recording information, so as to only display SoundExchange information in the public database. It was noted that the content of the MLC's musical works database is part of a different rulemaking proceeding (Docket No. 2020-8), and not a topic of the scheduled call.

The MLC explained that it supports initiatives for DMPs to match and clean their data against authoritative sources of sound recording metadata, but tasking the MLC with trying to clean sound recording data for public display by cross-matching and "rolling up" DMP reporting against a third-party database is not part of the MLC's mandate, and further does not address the critical problem of altered metadata for which the call was convened.

Reporting of unaltered metadata is important for every scenario, regardless of whether there is any third-party feed of sound recording data available to the MLC. The RIAA made this point in its initial comments in the NOI phase:

DMPs must populate their reports of usage with unaltered versions of the metadata they receive from sound recording copyright owners or other licensors of sound recordings. To ensure that the sound recording data in the MLC database is as accurate as possible and to facilitate machine matching, the regulations should require that each DMP populate its reports of usage using unaltered versions of the Sound Recording Metadata it receives directly from sound recording copyright owners and other exclusive licensors of sound recordings in the ordinary course of business. If the MLC is required to receive an unaltered metadata feed from a single source... the DMPs could simply query the MLC database and use that data when populating their usage reports. Otherwise, the DMPs would have to look to their own individual metadata feeds from our member companies when populating their reports of usage.

RIAA Initial Comments on NOI (Docket No. 2019-5) at 6.

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As this passage reflects, even if the SoundExchange database was somehow brought into the reporting process (something that these regulations cannot mandate in any event), the importance of reporting unaltered data is undiminished.¹ To begin with, there was broad consensus on the call that cross-matching DMP reporting to a third-party feed cannot be done on ISRC alone, but requires additional fields. Alteration of those additional fields would obstruct even cross-matching. As the DMPs may collectively have as many as a billion track entries to be matched each month, throwing off even a tiny fraction of one percent would throw off an immense number of automated matches.

But more importantly, a cross-matching of DMP usage data against SoundExchange data, even if executed by DMPs and SoundExchange to perfection, simply would not address the primary matching and royalty processing that the MLC must implement. The call indicated that the SoundExchange database represents tracks earning an estimated 90 percent of royalty value, and the MLC explained that the other 10 percent of royalty value likely represents far more than 10 percent of total tracks to be matched, as one can safely assume that the SoundExchange database is likely to cover the more popular tracks. This leaves open that a substantial portion—possibly the majority of track entries that the MLC must match each month²—may be unrepresented in the SoundExchange database. For these millions—possibly hundreds of millions—of track entries across all DMPs that are reported each month and not covered in the SoundExchange database, the MLC must still match and process and pay royalties, and there was no dispute that altered metadata would only obstruct that process. Consistent with the above RIAA comment, multiple attendees from ARM indicated on the call that they support the reporting of unaltered metadata, which would be more reliable and easier to match.

Throughout the call, references were made by other participants to practices or solutions that could address all but “edge cases.” The MLC cannot emphasize enough its view that, insofar as “edge cases” refers to the use of works in recordings that are not part of established catalogs

¹ As the RIAA comments also explain, cross-matching against SoundExchange data is in any event something to be done *by DMPs*, not the MLC. If SoundExchange data was available in the MLC database, “the DMPs could simply query [the SoundExchange data in] the MLC database and use that data when populating their usage reports.” (*Id.*) It also goes without saying that the DMPs could just query the SoundExchange database directly. The MLC fully supports an initiative between DMPs, sound recording licensors and SoundExchange, whereby DMPs could query the SoundExchange database and clean up their sound recording metadata before reporting to the MLC. For those sound recording licensors with SoundExchange as an authorized metadata representative, the cleaned metadata from SoundExchange would be considered unaltered data for DMP reporting purposes.

² https://en.wikipedia.org/wiki/Pareto_principle

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or in the majority of streaming volume, the MLC sees the matching of these “edge cases” as perhaps its most critical mandate. The problems necessitating the establishment of the MLC were not centered around the matching of works embodied in established catalogs and hits. Although the MLC intends to improve in this area as well, the prior system largely handled this matching. The MLC reads its mandate to involve a special focus on matching the large pools of unmatched uses. This central duty of the MLC is certainly not lost on the Office, which the MMA tasked with undertaking a study on how to reduce the incidence of the unclaimed royalties. The MMA did not task the Office with a study in how best to publicly display sound recording data from established catalogs, as this is not what the MMA was enacted to address. As the Office noted in the NPRM in this proceeding (Docket No. 2020-5, the “NPRM”), DMP reporting is to facilitate “the core project of matching musical works to sound recordings embodying those works, and identifying and locating the copyright owners of those works (and shares thereof).” (85 Fed. Reg. 22521) The challenge of this core project is not the easy matches, but the difficult matches, and any process or solution that is not directly aimed at “edge cases” misses the mandate of the MLC entirely.

Indeed, the MLC is confident that the Office’s unclaimed royalties study will indicate the broad agreement that the reporting of unaltered metadata is an important tool to increase matching performance and thereby reduce the incidence of unclaimed royalties. The DLC was the only commenter to take a position in favor of reporting altered data in the submissions, and its position was not predicated on matching performance, but on the self-interest of its members in retaining lower-maintenance status quo practices, an interest directly at odds with the core MMA goal that the Office is tasked with supporting through its study recommendations.

The absence of any showing of undue burden on DMPs

The DLC argued on the call that, because the MLC could not prove the precise effect that the reporting of unaltered data would have on future matching, therefore reporting of unaltered data should not be required. The MLC submits that any burden of proof here runs precisely in the opposite direction. The MLC was designated by the Register of Copyrights to fulfill the statutory purposes of the MMA, and to design and implement an unprecedented platform to further those goals and reduce the incidence of unclaimed royalties. To that end, the MLC has clearly explained in this rulemaking how the reporting of intentionally-altered metadata obstructs its performance, a concern echoed by multiple other commenters. The MLC does not understand why this showing would not be sufficient to support a rule require such reporting, absent DMPs providing clear and detailed evidence of their undue burden, of which there is none.

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To be clear, DMP “burden” should not be an obstacle to anything, since *due* burden is entirely appropriate. The MMA intended to place substantial burdens on DMPs, in return for which DMPs receive blanket compulsory mechanical licenses to use musical works without having to negotiate in the free market or even notify copyright owners. Unreasonableness is not baked into the simple term “burden.” The DLC uses the word “burden” expansively, describing anything additional as “burden,” whether due or not. The DLC has described the reporting of any additional fields of metadata as “added burdens.” DLC Reply Comments on NOI (Docket No, 2019-5) at 17. Simply gathering metadata is a “burden” in the DLC’s language. (*Id.* at 6)

The conclusion from this is that DLC statements of “burden” must not obstruct the requirement to report unaltered metadata. Such statements do not speak to whether burden is *due* or not. Nor do conclusory proclamations of undue burden from the DLC speak to actual undue burden. The DLC claimed that retaining records for more than three years would be “unsupportable and unduly burdensome,” despite every DMP being subject to laws requiring the maintenance of numerous types of records well beyond three years. (*Id.* at 23) The DLC claimed “significant regulatory burden” from simply having to amend Notices of License. The DLC even claimed that the Office’s proposed provision granting the MLC “reasonable access” to DMP records of use “would be unduly burdensome on DMPs” if not further restricted, ignoring that its position reduced to an argument that reasonable access would be unreasonable. (*Id.* at 20)

The DLC has conclusorily claimed “burden” as to dozens of issues in this rulemaking, with no evidence to support the claims. And the DLC maintains those claims of burden as long as the Office entertains its empty complaints. The MLC focuses on this point because, again, it does not understand why, ten months into this rulemaking, empty DLC complaints that remain unsupported by any evidence of undue burden would still be entertained. The Office’s June 30, 2020 Letter posed three separate questions on burden to the DLC, and not a single question was answered with any explanation of undue burden.³ Rather, in response to Question 3, the DLC

³ Indeed, the DLC’s inability to identify undue burden has been repeatedly called out, with the DLC ignoring the issue time and again. *See* MLC January 29, 2020 Ex Parte Letter at 2 (“there is no articulated burden to the DMPs to provide the requested metadata in usage reporting as the data already exists”); MLC April 3, 2020 Ex Parte Letter at 9 (“as the MLC has repeatedly pointed, notably absent from the DLC’s March 4 Letter was any evidence of hardship on the DMPs from passing along data as it is received from labels prior to alteration.”); MLC Comments on NPRM at 23 (“The MLC has submitted substantial evidence regarding the importance of the unaltered data to improved matching, and the DMPs have not submitted any evidence that providing it would be a substantial burden.”) The DLC should not succeed in obstructing important usage reporting through repetition of empty complaints and rebuff of the Office’s direct questions.

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stated that for most DMPs, the cost to report unaltered metadata by the LAD “would be minimal.” (DLC June 13, 2020 Ex Parte Letter at 5) For the “other DMPs,” the DLC skirted the issue of burden, only saying opaquely that “the engineering roadmap and resources dedicated to building the DMP-to-MLC pipeline have progressed to a point where the reporting of unaltered metadata is likely to be impossible before the LAD,” and that “[i]mplementing new data reporting requirements requires significant, cross-functional engineering resources that, after the LAD, will not remain on standby nor be subject to immediate re-activation.” (*Id.*)

The DLC’s comments in this rulemaking two months ago said nothing about July being a deadline for DMPs to be able to adjust reporting formats. Rather, on May 22, the DLC stated that it supports “finalization” of rules so that DMPs have clarity “as they begin to build systems to accommodate that regime.” DLC Comments on NPRM at 1. The DLC now asks the Office to believe that, over the course of two months, while still over seven months from required usage reporting, these unnamed “other DMPs” switched from seeking clarity, so as to begin building systems, to creating roadmaps that lock out change before clarity is provided (and the DLC provided no notice to the Office or the MLC of the plans). Particularly without copies of the alleged engineering roadmaps, and explanations of why a DMP would design such a problematic roadmap, these empty claims (which do not even claim undue burden) cannot be the basis for allowing a continuing stream of altered metadata to flow into the MLC’s matching platform.

As discussed in the MLC’s advance letter, there is a dramatic asymmetry in the lifts required by the two sides to this issue. MLC July 13, 2020 Ex Parte Letter at 5-6. Proper reporting of unaltered metadata requires the DMPs to engineer a one-time adjustment to their reporting workflow, after which reporting operates automatically and without friction, and no submission in this rulemaking has identified any undue burden to make this adjustment. Altered metadata reporting leaves the MLC with a perpetual stream of monthly reportings that include millions of track entries with altered metadata that degrade matching algorithm performance and multiply burdens on manual matching resources. The demonstration of burden on this issue unequivocally favors the reporting of unaltered metadata.

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DDEX implementation timing

The MLC explained on the call, as noted in its comments in this proceeding, that DDEX is awaiting this rulemaking to do a revision to the DSR Standard. This is expected to be done with enough time to be implemented before reporting is required. The MLC's comments explain in detail the catch-22 with making usage reporting contingent on the DDEX standard first being revised to include the fields, as the DMPs can block any such DDEX update and thus eviscerate the Office's rule.⁴ (MLC Comments on NPRM at 22-23)

The MLC noted on the call that numerous times recently, DDEX formats have been updated to address requirements of various bodies, and that it would be putting the cart before the horse for the Office to make its rules contingent on prior DDEX implementation. As ARM's comment explained:

[W]e strongly caution the Office against formulating its regulations around the contents of existing DDEX messages. DDEX is a membership organization with established procedures for updating and modifying its existing messaging standards and developing new ones. All of the major DMPs and the MLC are members of DDEX. See <https://ddex.net/membership/current-members/>. As such, and within reason, DDEX can be expected to adjust its standard electronic messages to accommodate whatever reporting requirements are promulgated as a result of this rulemaking.

ARM Comments on NPRM at 10 (emphasis added).

Insofar as the Office has lingering concerns about a reporting format being available in time to be implemented, the MLC submits that, as the Office retains flexibility to adjust this interim rule, this issue can be revisited if for some reason expected DDEX practices do not follow. But the proper sequence of first issuing requirements that DDEX then implements (as is done in every other jurisdiction) must be followed for the rulemaking to work. The MLC's CIO is a former Chair of DDEX, and the MLC is not advocating for reporting rules that DDEX cannot accommodate. No one involved in the royalty administration process benefits from a reporting system that does not function. Concerns about potential unlikely events that could come to pass

⁴ Likewise, making the reporting contingent on the field being "mandatory" in the DDEX format would nullify the rule, since DDEX formats serve multiple territories, and fields required in the U.S. would not be "mandatory" in the format itself.

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should not derail proper regulations, but should instead be addressed in the unlikely event that they occur, much like the multiple adjustments to regulatory timing provisions that the Office has made already due to this year's unlikely events.

With respect to the specific adjustments to be made by DDEX to accommodate the regulation, the MLC reiterated that the focus of the Office should be to “describe the requirement, not the implementation.” The MLC further explained that it would expect there to be several fields added to the DSR Standard to specifically address unaltered metadata, since it is not good data practice to change the existing use of a field (particularly where it may remain in its existing use in other territories). To be clear, the best data practice would have been for DMPs to have reported the unaltered metadata in the respective DSR fields in the first place. However, given that this has not happened, two wrongs would not make a right by changing the existing use of the fields.

The MLC was asked on the call if it was proposing that both altered and unaltered metadata be reported. The MLC explained, as indicated in the proposed regulatory language attached to its comments (MLC Comments on NPRM, Appendix D at xxxiii), its focus is on receiving unaltered metadata and that is what it proposes be required at a minimum. The MLC further noted that, since the expected DDEX implementation is to add additional fields for unaltered metadata rather than change the use of fields currently populated with altered metadata, the MLC expects that many DMPs will also continue to report the fields that they currently populate with altered metadata, and will thereby report both altered and unaltered metadata for those fields, even if the altered metadata reporting is not specifically required by the regulation.⁵

⁵ The MLC notes that usage reporting of both unaltered and altered metadata is the only way that one could precisely quantify the effect of altered metadata reporting on matching performance. On the call, the DLC argued that the MLC cannot say now exactly how many works will go unmatched because of altered metadata, somehow concluding that this should weigh against the reporting requirement. But of course, in order to answer the question as to exactly how bad the effects of altered metadata are on matching, the DMPs first have to report the unaltered metadata. The inability to know exactly what the reporting says before it is reported cannot weigh against the reporting. On the contrary, there is no dispute that altered metadata makes matching performance *worse*, whether it is automated (by degrading algorithm performance) or manual (by proliferating multiple variations that require checking). This undisputed reality should be sufficient to support the reporting requirement.

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Implicated metadata fields

The DLC's July 13, 2020 Ex Parte Letter identified eleven fields that are "sometimes" modified by "certain DMPs." For some of these fields, this was the first disclosure that they were being modified. The Office asked DMPs on the call whether regulations should address the question of reporting altered metadata as all or nothing, or field by field.

The MLC submits that the regulation should mandate reporting of unaltered metadata for all fields, but in light of the DLC's new disclosure, the MLC would agree to a carve out for the following fields: **LabelName**, **PLine**, **Producer** and **marketing release date** (not street date, which is sometimes referred to as release date). The regulations could further provide that **Playing Time** could be reported either as the unaltered version or as calculated automatically based upon an analysis of the audio file being streamed. As noted on the call, it is important that correct Playing Time be reported to the MLC, since it is implicated in the calculation of royalties due to copyright owners.

The MLC submits that the remaining six fields must be reported in the unaltered version, and notes that they are all important to matching. Using the DLC's descriptors, these are: **Sound recording name**; **Featured artist**; **ISRC**; **Version**; **Album title**; and **Songwriter**. And as the DLC indicates that no other fields are modified by DMPs, there is no complaint about a requirement that other fields be reported in the unaltered version.

As noted on the call, while the implementation of the requirements should not be a concern of the Office, the MLC expects that, once the regulation issues, the DSR Standard will be revised to add additional fields to capture unaltered metadata for five of the six fields noted above that are modified by DMPs and must be reported in the unaltered version. The MLC does not expect that an additional ISRC field would be added to the DSR format, since the DMPs indicated that ISRC codes themselves are never changed, just potentially formatting around the codes. The MLC agrees to a clarification in the regulation that modifications in the ISRC field that do not change the alphanumeric characters or sequence of the ISRC code, would not be considered a modification of that field.

The MLC also confirmed on the call what it had stated in its July 13, 2020 Ex Parte Letter concerning blank fields, namely that where a sound recording licensor has failed to provide any metadata for a particular field, and the DMP has filled the blank field with metadata received from another source, the MLC would not consider such metadata to be "altered" so as to trigger a preclusion on reporting.

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Absence of historical unaltered data

Certain DMPs stated on the call that, while they could retain unaltered metadata going forward, they have already altered some metadata in the past without retaining any records as to what was the unaltered metadata provided by the sound recording licensors. The MLC indicated that, subject to certification by the DMP that it in fact has no records indicating what was unaltered versus altered metadata, the regulations could allow initial reporting of only the data as retained by the DMP. For such a provision, the MLC proposes the following language:

§ 210.28 (e)(4)

Notwithstanding paragraph (2) of this section, a digital music provider who, prior to the effective date of this regulation, had modified metadata for a particular field called for in paragraph (e)(1) of this section, and who does not have possession, custody or control of any record of the metadata for that field as provided by sound recording licensors, may report only the version of the metadata that it has in its records, to be reported as the modified version. As and when the digital music provider receives metadata from sound recording licensors for any field reported pursuant to this paragraph, the digital music provider shall also report such metadata as the licensor-provided version.⁶ A digital music provider who wishes to report pursuant to this paragraph must submit a certification to the mechanical licensing collective identifying each field for which such reporting will occur, and stating that:

I certify that (1) I am duly authorized to sign this certification on behalf of [the digital music provider], (2) I have examined all metadata records related to sound recordings in the possession, custody or control of [the digital music provider]; (3) prior to [the effective date of these regulations], the [digital music provider] modified metadata that was provided by sound recording licensors for [the identified metadata fields]; (4) since [the effective date of these regulations], the [digital music provider] has had no records of the metadata, as received from the sound recording licensors, in its possession, custody or control.

The question was raised on the call whether the DMPs' continuing obligation to use efforts to obtain metadata from sound recording licensors should include efforts to obtain the metadata that would be covered by this provision, namely metadata that was altered and for

⁶ The MLC notes that the call discussion and its July 13, 2020 Ex Parte Letter clarified that metadata acquired from sound recording licensors would be the most recently updated version of such metadata, not merely the first transmission. As such, the use of the term "originally acquired version" may be misleading, and the use of a term such as "licensor-provided version" may be more clear.

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which the DMP retained no record of what was the unaltered metadata. The MLC believes that there should be no carve out from the DMP efforts obligation for this metadata, and further that an efforts carve out would conflict with the MMA's unreserved efforts requirement. And while sound recording licensors are not directly regulated by the DMP efforts provisions, the MLC believes that many sound recording licensors will want to resend metadata to ensure that the MLC receives the unaltered source metadata as it was sent to the DMPs, both for matching and public display purposes. The MLC sees no reason or statutory latitude to carve out these potentially substantial portions of DMP libraries from the statutory efforts requirement.

The MLC appreciates the Copyright Office's time, and is available to provide further information on request.

Sincerely yours,



Benjamin K. Semel

EXHIBIT A

MMA ex parte meeting participant list – 7/22/2020

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