Direct Dial: 202-637-3332
sy.damle@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

LATHAM & WATKINS LLP

February 24, 2020

VIA EMAIL

Regan Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, DC 20559-6000

Re: Further Information Related to Music Modernization Act Implementation

Dear Ms. Smith,

I write on behalf of Digital Licensee Coordinator, Inc. ("DLC", "we" or "our") to provide further information regarding questions raised by you and your staff during our February 11, 2020 meeting. As always, please feel free to reach out to me with any further questions.

Reporting of Non-"Play" DPDs

The MLC has proposed that digital music providers ("DMP" or "DMPs") report interactive streams or plays of limited downloads that do not count as "Plays" under the relevant rate regulations.[1] Examples include plays of under 30 seconds (unless the track itself is only 30 seconds or less), streams that the DMP has determined were not initiated or requested by a human user, and zero-rate promotional plays (collectively, "Non-Play DPDs").

As we have explained in our comments, this information has no bearing on either the royalties paid by the DMPs, or the distribution of royalties to rightsholders. Neither the calculations used to determine the total royalty pool paid by a DMP, nor the calculations used to determine the per-work royalty allocation, consider plays other than "Plays" as that term is defined in the regulations. *See generally* 37 C.F.R. § 385.21(b). As a result, DMPs have not been reporting Non-Play DPDs to copyright owners in their monthly reporting. There is no practical justification to require that services begin doing so now. Indeed, reporting of these "Non-Play DPDs" will cause significant confusion for copyright owners, who may not fully appreciate the fact that these streams do not affect royalty distribution.

[1] *See generally* 37 C.F.R. § 385.2.

During our meeting, you asked whether the MMA provision regarding the reporting of "the number of digital phonorecord deliveries of the sound recording, including limited downloads and interactive streams"[2] should be understood to mandate the reporting of Non-Play DPDs. The answer is no. That provision, when understood in light of the regulatory background against which Congress was operating and the legislative history, does not require reporting of DPDs that are irrelevant to the MLC's royalty collection and distribution functions.

In 2014, the Copyright Office ("the Office") extensively studied the question of whether to require reporting of zero-rate promotional DPDs under the pre-MMA version of section 115.[3] Digital music providers and rightsholders *jointly* submitted comments to the Office making the following points:[4]

- "The mere fact that information exists somewhere in some form does not mean that it would be easy to gather and report that information and process it through royalty accounting systems. To the contrary, reporting such use would impose significant burdens up and down the license and distribution chain."

- "Reporting zero-rate uses would significantly increase the size of the statements finally delivered to copyright owners. The typical statement size easily could double (or more). Statements for percentage rate uses already can be massive. Doubling the volume of data flowing through music publisher royalty accounting systems would tax the capacity of those systems. Despite all the effort that licensees would have put into collecting and delivering this information to copyright owners, it is quite possible that copyright owners would end up reprogramming their systems to filter out and discard the zero rate data."

- "In the case of preview clips through a download store, reporting the clip streams as well as the downloads sold would likely at least double the volume of data that would need to be processed for the service."

The Office concluded that the statute did not "unambiguously require statements of account to include detailed information (like play counts) about licensees' use of Non-Play DPDs."[5] In declining to require reporting of such zero-rate uses, the Office highlighted the "administrative burden associated with reporting promotional uses in the statements of account," and the fact that

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[2] 17 U.S.C. § 115(d)(4)(A)(ii)(cc).

[3] *See generally* 79 Fed. Reg. 56190, 56200-201 (Sept. 18, 2014).

[4] *See* Digital Media Association, National Music Publishers' Association, Inc., Recording Industry Association of America, Inc., The Harry Fox Agency, Inc. and Music Reports, Inc., Joint Comments at 16-19, *In the Matter of: Mechanical and Digital Phonorecord Delivery Compulsory License*, Docket No. 2012-7 (Oct. 25, 2012).

[5] *Id.* at 56200.

"promotional uses carry a zero rate, and such uses thus have little financial impact on the copyright owners."[6]

The Office should reach the same conclusions here. Given the background regulatory regime against which Congress was acting, Congress would have been explicit if it intended to effectively reverse the Office's 2014 reasoning and require the reporting of information that was unnecessary for either the calculation or allocation of royalties. Moreover, the legislative history specifies that "[a]ny reports should be consistent with then-current industry practices regarding how such limited downloads and interactive streams are tracked and reported."[7] The "current industry practices," here in the United States and around the world, do not require the reporting of these Non-Play DPDs. Moreover, the burdens of requiring services to report such information are just as acute as in 2014: it will still be difficult to gather this data into a form usable by royalty systems and the volume of data that would need to be reported and processed will at least double in size.

The Office should accordingly reject the MLC's proposal to require DMPs to begin reporting Non-Play DPDs.

Link to Audio File versus Service Track ID

The MLC has proposed DMPs be required to provide, for each sound recording, a link to an audio file .[8] Our understanding is this request is aimed at reducing the burden of manual matching done by the MLC—that is, a human reviewer can click the link to listen to the actual recording, and use that to help identify the underlying musical work.

This provision is unnecessary. For all of the services represented by DLC, Inc.—Amazon, Apple, Google, Pandora, and Spotify—the "service track ID" field that is part of standard reporting can be used on the consumer-facing application to search for songs.[9] Given that fact, requiring all digital music providers to engineer their systems to provide the MLC with an active link to the sound recording being reported is unnecessary.

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[6] *Id.*

[7] H.R. Rep. No. 115-651, at 12 (2018); *see also* S. Rep. No. 115-339, at 13 (2018) (same).

[8] MLC Initial Comments at 20.

[9] For example, Amazon has a "ASIN" that is currently reported and can be used to look up a specific track on the Amazon Music service. Thus, searching for "B06XT7Q3FL" on Amazon Music returns a search result for Baloji's "Capture (Remix) [Radio Edit]." Similarly, YouTube has a "Video ID" field that can be used to search for tracks; searching for 'xZdj3LM5X1M' on YouTube pulls up Lizzo's recording "Good as Hell."

Server Fixation Date

The MLC has proposed requiring digital music providers to report "[t]he date on which each sound recording was first fixed on the server of the DMP."[10] It asserts that this information "is useful for identifying, in the event of a statutory termination under Section 203 or 304 of the Act, whether the use of a particular sound recording embodying a musical work is covered by the derivative works exception contained in those sections."[11] It is unclear how this information will in fact serve its claimed purpose. The "derivative works exception" turns on the date that the derivative work was *prepared*, rather than the date when it was first stored on any particular digital music provider server.[12] The relevant derivative work information (i.e. when it was created and under what authority) would be held by the sound recording copyright owner, not the digital music provider. Indeed, in the case of older works to which the termination right applies, the derivative sound recording would have been created well before any digital music provider would have received it. In addition, given that different services will have different dates on which a particular recording was fixed on its servers—indeed, *new* services will have dates that are in the future—the MLC will receive inconsistent information, and will have to reconcile this conflicting data.

During our meeting, your staff asked whether we would be opposed to a requirement that the digital music provider report the server fixation date of the recordings in its system, if the provider already stores that information in its relevant royalty accounting and reporting systems. The Office should not impose even that requirement, absent a much clearer explanation from the MLC about how this information is relevant to any of the MLC's core functions.

Confidentiality

During our meeting, you requested a more extensive explanation of our proposed confidentiality regulations.

DLC, Inc.'s proposed confidentiality regulations encompass two distinct sets of rules. One set of rules—everything in subsections (a) through (d) of the proposed § 210.7—govern confidential information obtained ***by the MLC or DLC from third parties***. The second set of rules—contained in subsection (e) of the proposed § 210.7—provide special confidentiality rules for information ***created by the Mechanical Licensing Collective*** (defined as "MLC Confidential Information") ***and shared with DLC representatives serving on the boards or committees of the MLC.*** This could be information such as particular data standards under consideration or information about new technological systems being implemented. We will discuss each of these in turn.

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[10] MLC Initial Comments at 20.

[11] *Id.*

[12] *See* 17 U.S.C. § 203(b)(1) ("A derivative work *prepared* under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend *to the preparation* after the termination of other derivative works based upon the copyrighted works covered by the terminated grant." (emphasis added)); *see also* 17 U.S.C. § 304(c)(6)(A).

In subsection (a), "Confidential Information" is broadly defined to include, at a minimum, all the usage and royalty information received by the MLC from a digital music provider. Out of concern that there may be additional information received by the MLC (e.g., from copyright owners) or DLC (e.g., from its members) that should properly be treated as confidential, the definition also includes "any other information submitted by a third party" to the MLC or DLC.

This broad definition is cabined in a couple of important ways, however. "Confidential Information" does not include "documents or information that may be made public by law." This provision is rooted in the acknowledgment that the MLC will be under certain legal transparency requirements, and this provision is intended to ensure that the confidentiality regulations do not stand in the way of that transparency. Second, the definition also excludes information that is "public knowledge" at the time; this is a standard provision of confidentiality regulations.

Should the Office be concerned about the breadth of the second prong of this definition, DLC, Inc. would not be opposed to a limitation: that "Confidential Information" includes "any other information submitted by a third party, ***as reasonably designated as confidential by the party submitting the information.***"[13] (To be clear, under this revised proposal, usage and royalty reporting from digital music providers would still always be treated as confidential, without the need for designation.)

Subsection (b), in turn, contains the core limits on the use of confidential information by the MLC and DLC. Subsection (b)(1) ensures that the MLC does not misuse sensitive information that it receives from digital music providers and others. For instance, a music publisher representative on the MLC Board should not be able to see the financial terms that a digital music provider agreed to as part of a voluntary license with one of its competitors—or even that such a voluntary license exists. Similarly, subsection (b)(2) prevents DLC, Inc. from engaging in similar misuse of information it obtains from its members.

Subsection (c) then provides a list of persons and entities with whom "Confidential Information" can be shared. Subsection (c)(1) permits the MLC and DLC employees, agents, consultants, and contractors to obtain access to the information necessary to fulfill their responsibilities to the MLC or DLC, subject to a confidentiality agreement. This provision includes an important prophylactic provision, preventing an employee or officer of a music publisher from evading this restriction by being hired as a consultant to the MLC. Subsection (c)(2) permits an auditor or outside lawyer with authority to act as part of an audit to gain access to the information.

Subsection (c)(3) is directly relevant to a specific question asked during our ex parte meeting. That provision states that "[c]opyright owners, including their designated agents" may obtain "Confidential Information," so long as they sign an appropriate confidentiality agreement with the MLC. It is our understanding that copyright owners today receive certain confidential information from digital services as part of the statements of account. Specifically, the current reporting

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[13] *Cf.* 37 CFR § 380.5(a) (including a similar limitation for confidentiality regulations under the section 112/114 license).

regulations require reporting a step-by-step accounting of how the royalties were calculated, which would include such figures as service revenues, subscriber counts, and performing rights fees.[14] Subsection (c)(3) would allow the MLC to share confidential information with copyright owners, but only to the extent necessary to facilitate the payment of royalties and under restrictions that ensure copyright owners do not misuse that information for other purposes.[15]

Finally, subsection (d) provides standards related to the safeguarding of "Confidential Information" received by the MLC or DLC. This provision extends to those who are given access to this information under paragraph (c).

As we explained in our comments and during the ex parte meeting, the DLC's proposed subsection (e) is meant to address a specific and unique concern created by the MMA—the fact that representatives of the *licensees* serve on MLC boards and committees. This is not an idle concern—during the establishment of the operations advisory committee, the MLC insisted that committee members sign nondisclosure agreements in *their personal capacities*. As we explained during our meeting, some companies prohibit taking on such personal liability for actions taken in the scope of employment. The MLC's approach also makes little sense—the purpose of requiring DLC-appointed representatives to serve on MLC boards and committees is to permit them to represent the licensee community as a whole, rather than themselves or their individual companies. Restricting their ability to share information within that community would undermine the congressional design.

Accordingly, subsection (e) includes several provisions to protect the ability of DLC-appointed representatives to fulfill their statutory function while still recognizing the critical need to ensure the overall confidentiality of relevant information. Subsection (e)(3) makes clear that they serve "as representatives of "digital licensees as a whole, not in their individual capacities or as representatives of their individual employers." That provision goes on to list the specific persons who are entitled to obtain MLC Confidential Information outside the individuals serving on boards and committees. Finally, subsection (e)(4) ensures that the MLC does not attempt to undermine the purpose of these regulations by separately imposing additional restrictions by contract.

MLC Proposal to Allow HFA To Use Information For Other Purposes

In its ex parte letter, the MLC expressed that "it intends to provide users who submit confidential data to the MLC an ability to voluntarily 'opt in' to share that data for general use by its primary royalty processing vendor, the Harry Fox Agency, and emphasized that MLC users will not be required to opt in to any such sharing in order for the MLC to fully process and pay all royalties

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[14] *See* 37 C.F.R. § 210(c)(2).

[15] To take one example, under this provision a copyright owner may be able to obtain play count data for its own works, but would not be able to obtain play count data for *other* copyright owners' works. Indeed, that data is competitively sensitive both for digital music providers and for copyright owners themselves.

due to them under the blanket license."[16] During our ex parte meeting, the Office asked for DLC, Inc.'s view of that proposal.

It is difficult to understand from the brief mention in the MLC's letter (1) what confidential information it intends this proposal to apply to—whether information from publishers or from digital music providers, and (2) what "general use" Harry Fox Agency intends for that information. If the MLC provides more details about this proposal, the DLC will be better able to respond in full.

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We thank you again for your time and considered attention to this important series of rulemakings. Please do not hesitate to contact me if you have any further questions or if we can be of any further assistance.

Best regards,

Sarang V. Damle

[16] MLC Jan. 29, 2020 Ex Parte Letter at 4.