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November 18, 2021

VIA EMAIL

Kevin Amer
Acting General Counsel and Associate Register of Copyrights
101 Independence Ave. SE
Washington, DC 20540

Re: *Ex Parte* Letter Regarding November 15 Meeting

Dear Mr. Amer:

This letter is to follow up on the *ex parte* meeting held on November 15, 2021, with Digital Licensee Coordinator, Inc. ("DLC")[1] regarding the treatment of public domain works by the Mechanical Licensing Collective ("MLC"), under the blanket license for mechanical rights.

We began by discussing the background of the issue.[2] As we explained, royalties owed for mechanical rights are calculated by first determining a payable royalty pool[3] and then allocating that pool to each musical work performed on a particular service on a per-play basis.[4]

Prior to the implementation of the blanket license at the start of this year, services allocated the payable royalty pool to *all* musical works, which necessarily included works in the public domain. Matched copyright owners were then paid the share of royalties representing performances of works they owned, but received no money allocated to public domain works. But, with the implementation of the blanket license, the MLC has taken responsibility for the royalty allocation process. And contrary to prior practice, the MLC believes that royalties that were previously allocated to public domain works are actually royalties that are owed to copyright owners. We further understand that the MLC has implemented this view in two ways: first, if it matches a sound recording to a public domain musical work, it takes the royalties associated with that work and reallocates them to owners of copyrighted works; and second, any

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[1] Attendees are listed in an addendum to this letter.

[2] Attached to this letter is the short slide deck we showed the Office during our meeting.

[3] Simplifying somewhat, the formula is based on a percentage of a service's revenue or label payments less public performance royalties, subject to a per-subscriber royalty floor.

[4] *See* 37 C.F.R. § 385.22 (2017); 37 C.F.R. § 385.21 (2020).

royalties that happen to be attributable to unmatched public domain works will eventually be distributed to the copyright owners on a market-share basis. Although DLC has explained to the MLC why its view of the relevant rate regulations is incorrect, the MLC has continued to adhere to its position. Attached is the letter DLC sent to the MLC on August 2, which sets forth the DLC's legal views.

We then discussed the significant and serious impact the MLC's view will have on services that focus on classical music. Several services explained that the vast majority of performances on their services are of public domain works, and that the view adopted by the MLC would represent a significant increase in their mechanical royalty payments. One service explained that raising subscription prices to cover this increase is not possible; it had previously attempted a modest price increase, and lost a significant portion of its subscribers.

We also discussed a few practical considerations. First, although the MLC may not currently have an adequate database of public domain works, this is not an insoluble problem. Classical Archives, Idagio and Primephonic have invested significant resources, including engaging musicologists, to build their own databases of public domain works, and have offered to discuss sharing this information with the MLC. In addition, the current usage reporting contemplates services self-identifying public domain works. Second, we discussed the need for a dispute resolution process where a service believes a work is in the public domain and a copyright owner claims an interest in that same work. Third, we discussed that the MLC already has the capability to administer credits to services; indeed, the regulations require the MLC to credit overpaid royalties in various scenarios.[5]

We appreciate the Office's attention to this important issue, and hope the Office supports the goal of maintaining a robust and diverse ecosystem of digital streaming services, including those focused on classical works.

Best regards,

Sy Damle

[5] *See* 37 C.F.R. § 210.27(k)(5).

ADDENDUM A - ATTENDEES

Organization	Representative Name
Amazon	Alan Jennings
	Amy Braun
	Jon Cohen
Apple/Primephonic	Elizabeth Miles
	Jean-Bernard Derquer
	Michelle Choe
	Nick Williamson
	Veronica Neo
Classical Archives	Pierre Schwob
Idagio	Maximilian Merkle
Pandora	Alex Winck
	Angela Abbott
	Danny Walvick
	Iain Morris
Qobuz	Dan Mackta
Spotify	Lisa K. Selden
	Lucy Bridgwood
	Sara Domeier
DLC	Garrett Levin
	Kirsten Donaldson
	Lauren Danzy
Latham & Watkins LLP	Sy Damle
USCO	Jason Sloan
	John Riley
	Kevin Amer
	Shireen Nasir

Royalty Treatment of Public Domain Works Under §115 Blanket License

- The MLC has been "charging" services for royalties associated with the usage of public domain works.
  - For example: if a service has only one copyrighted song in its catalog that one user streamed once, and a broad usage of classical public domain works, that service would have to pay royalties based on all of those public domain works.
- This interpretation is at odds with historical calculation of such works and unsustainable, particularly for small services.
- Instead, the CRB rate regulations are best read to credit services for royalties allocated to streams of Public Domain Works
  - This is consistent with industry practice prior to the start of the blanket license.
  - To determine the per-work royalty allocation, "the result determined in step 3 in paragraph (b)(3) of this section [the "payable royalty pool"] must be allocated to *each musical work* used through the Offering." 37 C.F.R. **§385.21(b)(4)(emphasis added).** Public domain works are "musical works" used through the Offering, thus the royalty pool should be allocated to *each* musical work, including public domain works.

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LATHAM & WATKINS LLP

August 2, 2021

VIA EMAIL

Kristen Johns
Chief Legal Officer
The Mechanical Licensing Collective
Kristen.Johns@themlc.com

Re: Royalty Treatment of Public Domain Works Under Section 115 Blanket License

Dear Kristen,

We write on behalf of the Digital Licensee Coordinator ("DLC") concerning the MLC's treatment of public domain works in its royalty calculations under 17 U.S.C. § 115 and 37 C.F.R. § 385.21.[1] A number of digital music providers have raised the issue that the MLC has been "charging" the services for royalties associated with usage of public domain works. We understand that the MLC's interpretation of the royalty-calculation regulations results in the digital music services paying royalties on public domain works. As detailed further below, we believe the most rational interpretations of the regulations require the MLC to provide a credit to the services to offset these charges for public domain works, which do not require any license or royalty payment. We look forward to discussing further with you.

I. The CRB Rate Regulations Are Best Read to Credit Services for Royalties Allocated to Streams of Public Domain Works

For several reasons, we believe that the CRB rate regulations require the MLC to provide a credit to services for streams of public domain works. To determine the per-work royalty allocation, "the result determined in step 3 in paragraph (b)(3) of this section [the "payable royalty pool"] must be allocated to *each musical work* used through the Offering." *Id*. (emphasis added). 37 C.F.R. § 385.21(b)(4). Public domain works are "musical works" used through the Offering. Accordingly, the royalty pool should be allocated to *each* musical work, including public domain works, but licensees should not be charged for royalties that have been allocated to those public domain works. 37 C.F.R. §385.1(c) (mechanical license regulations only meant to require royalties "for situations in which the exclusive rights of a Copyright Owner are implicated . . .")

[1] Although this letter cites the relevant regulations from *Phonorecords III*, the discussion applies equally to the *Phonorecords II* regulations.

Indeed, that is exactly what would happen with voluntary licenses that have a zero royalty rate; royalties would be allocated to plays of those voluntarily licensed, but the MLC would not invoice the service for those plays. There is no sound reason a different result should obtain for public domain works. Moreover, a contrary interpretation would lead to absurd results in the context of a service that streams mostly public domain compositions (e.g., services devoted to classical music). To take an extreme but illustrative example, if a service has one copyrighted song in its catalog that one user streamed once, and a broad usage of classical public domain works, that service would have to pay royalties based on all of those public domain works and the service's royalty pool would be allocated to the one copyrighted work. The real world examples are not that far off. As you know, for instance, for the classical music service Classical Archives, in the month of February 2021, public domain works accounted for 81% of unadjusted plays, and works under copyright accounted for 19% of unadjusted plays.

We understand the MLC's position is that the next sentence in the regulation—which refers to dividing the royalty pool by the "total number of Plays"—necessarily excludes public domain works because the term "Play" indirectly incorporates the definition of "Stream," which is defined in part as a transmission "that is subject to licensing as a public performance of the musical work." 37 C.F.R. §§ 385.21(b)(4), 385.2. The MLC might also take the view that the reference to allocating royalties to "each musical work *used through the Offering*" necessarily excludes public domain works from the allocation step of the calculation, because the term "Offering" is defined to mean engagement in "Licensed Activity," which in turn specifically refers to delivery of musical works "under voluntary or statutory license," and also indirectly incorporates the definition of "Stream." *See* 37 C.F.R. § 385.2.

The problem with this approach is that it would necessarily *also* suggest that *revenues* attributable to the use of public domain works should be excluded from the payable royalty pool. See 37 C.F.R. § 385.2 ("All revenue from End Users recognized by a Service Provider *for the provision of any Offering*"); *id.* (providing that a service is entitled to "exclude revenue derived by the Service Provider solely in connection with activities *other than Offering(s)*"). That would require the services to exclude the portion of revenue derived from uses of public domain works from "service revenue" and reported in the total royalty pool.

There are significant practical problems with that view of the regulations, however, since it requires services to estimate the amount of revenue that is attributable specifically to public domain musical works. The more practical approach—and one that is consistent with the regulations—would be to include revenue recognized for the use of all musical works in the total royalty payment pool, and carve out royalties that are allocated to plays of public domain works in invoices to the services.

II. The Process of Identifying/Matching Public Domain Works Requires The Crediting of Public Domain Streaming Royalties to Services

Crediting royalties attributable to public domain streams back to the digital music service would also be consistent with industry practice prior to the start of the blanket license. As we

understand it, services calculated a per-play royalty rate using all musical works on their service, without necessarily identifying which ones were public domain works. Then, in the process of matching works, the services matched as much as they could to copyright owners. But, by definition, public domain works had no copyright owners and could not be matched. For that reason, royalties allocated to plays of public domain works remained with the services. The MLC's position would be inconsistent with that prevailing practice (which we are not aware of ever having been questioned), instead delivering windfall royalties to copyright owners whose works are played on services with significant public domain catalogues.

And the prevailing practice is how it *has to* work, because otherwise the service (or now the MLC) would have to continuously re-calculate the per-play royalty rate every time a public domain work is identified. In order to exclude public domain works from the allocation process to determine the per-stream rate from the royalty pool, the MLC would have to correctly identify all public domain compositions in advance of calculating the per-stream royalty rate each month. Otherwise, the monthly per-stream royalty rate would change every time a composition is identified as being in the public domain – or the reverse, where a composition is later matched to a copyright owner after having been originally identified as public domain.[2] A never-ending recalculation of royalties across every digital music provider's entire catalog is plainly not contemplated by the statute or regulations.

* * *

Based on the above, we believe the best accounting treatment of public domain usage is for the digital music providers to retain or be credited for royalties associated with streams matched to public domain works. We look forward to discussing this further with you.

Sincerely,

Alli Stillman

Cc: Ben Semel, bsemel@pryorcashman.com

Garrett Levin, garrett@dima.org

[2] In this scenario, where the MLC has credited the DMP for those royalties as public domain, and then later matches the work to a copyright owner, the MLC would invoice the DMP for those royalties to be paid to the MLC.