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August 16, 2020

Via email

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

Re: Summary of ex parte call regarding Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective

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

This letter summarizes the August 12, 2020 call (“August 12 Call”) between the Mechanical Licensing Collective (the “MLC”) and representatives of the Copyright Office (the “Office”). The MLC thanks the Office for its time and attention in meeting with the MLC concerning the above-referenced rulemaking proceeding.

The persons participating in the August 12 Call for the MLC were Kris Ahrend (CEO), Richard Thompson (CIO), Alisa Coleman (Chair of the Board of Directors), Danielle Aguirre (Board member), Abel Sayago (DSP Technical Lead) and counsel Benjamin Semel and Frank Scibilia.

On behalf of the Office, Regan Smith, Anna Chauvet, Jason Sloan, Terrence Hart, John Riley and Cassandra Sciortino participated in the call.

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The following summarizes the discussion and provides additional information in response to questions raised by the Office:

Issues related to the Docket No. 2020-5 proceeding:¹

Reports of adjustment by DMPs.

The Office requested additional comments on the DLC request to modify the provision concerning reports of adjustment (§210.27(k)(3)(ii)) to allow DMPs to provide adjusted royalty calculation information to the MLC, but leave the MLC to do the mathematical steps to calculate the final amount of the royalty adjustment. The MLC confirmed that it will be verifying the math (using the statutory rates) leading from royalty calculation inputs to the royalties due, even if the DMP also did so, and does not oppose this. The MLC proposes the following language, which mirrors language in the monthly usage reporting provisions, to accommodate this request while also confirming that DMPs must always provide all necessary royalty pool calculation information:

§210.27(k)(3)(ii):²

The specific change(s) to the applicable previously delivered monthly reports of usage or annual reports of usage, including ~~the monetary amount of the adjustment and~~ a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the blanket licensee under the blanket license depends. Such description shall include **all information necessary for the mechanical licensing collective to compute, in accordance with the requirements of this section and part 385 of this title, the adjusted royalties payable by the blanket licensee under the blanket license, and all information necessary to enable the mechanical licensing collective to provide** a detailed and step-by-step accounting of the calculation of the adjustment **under applicable provisions of this section and part 385 of this title**, sufficient to allow ~~the mechanical licensing collective~~ **each applicable copyright owner** to assess the manner in which ~~the blanket licensee~~ **the mechanical licensing collective, using the blanket licensee's information**, determined the adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2)(i) of this section.

¹ Reference or citation to public comments herein refer to the respective comments submitted in the respective proceeding being discussed.

² Redlining in this letter shows proposed regulatory language over proposed language from the respective NPRM.

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Response file contents

In response to the Office’s question concerning response file contents, the MLC reiterates its position that the specific contents of the response file need not be set forth in regulations. With respect to the specific data fields identified by the DLC in its comments, the MLC describes the integration of those fields in the current response file specification as follows:

Field ³	Inclusion
Song Title	Included
Vendor-assigned song code	Included (there will be an MLC-assigned song code, which the DLC has confirmed is what it is referring to here)
Composer(s)	Included
Publisher name	This is subsumed by the three different publisher identifications listed below, namely top publisher, original publisher and admin publisher.
Publisher split	Collection share is included, which the MLC understands this to represent.
Vendor-assigned publisher number	Included (there will be an MLC-assigned publisher number, which the DLC has confirmed is what it is referring to here)
Publisher/license status	The DLC has indicated that this is meant to capture whether the music publisher is a voluntary or statutory licensor. The response file will identify whether each work share is subject to a voluntary license or the blanket license (as copyright owners sometimes license only a portion of their catalogs).
Royalties per track	Royalties are identified per work share, not per track. Royalties per work share are included.
Top publisher	Included
Original publisher	Included
Admin publisher	Included
Effective per-play rate	Included
Time-adjusted plays	Included

³ Note that the precise labels or names for these fields in the response file specification has not been finalized yet. This column describes the type of data at issue rather than the precise field name.

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Voluntary license reporting timing

The Office asked for further comment on the DLC request for an exception to the MLC's proposed requirement of advance provision of voluntary license repertoire information (90 days for voluntary licenses covering periods prior to 3/31/21, and 30 days for voluntary licenses covering subsequent periods). (DLC Comments at 4) The DLC's concern relates to voluntary licenses that have retroactive effect, and that the specific regulatory language could imply that that the DMP would be in violation of the regulation where it failed to provide notification of the license prior to the effective date of the license, when such was impossible because the license did not yet exist at the time of the effective date. Importantly, the DLC appears to accept that the MLC should not be responsible for any retroactive royalty processing, as it notes that, "[i]f the royalty terms are different than the statutory rate, there could be a reconciliation that occurs directly between the publisher and the DMP, not involving the MLC." (Id. at 4, fn 17, emphasis added)

The MLC does not oppose clarifying that notice of a retroactive license is not a violation. However, the regulation should be clear that the MLC cannot be required to process voluntary licenses that have not been submitted sufficiently in advance of usage reporting, and also that the voluntary license should be reported promptly, to minimize adjustments that copyright owners would have to address.

Thus, to address the initial 90-day advance notice requirement, the provision could read as follows:

§210.24(b)(9):

Notwithstanding the date of submission of the notice of license, for voluntary licenses taking effect before March 31, 2021, the information required in this subsection (b)(8) must be provided by such digital music provider at least ninety (90) days prior to the first reporting of usage under such voluntary license(s), or 10 days after the execution of the voluntary license, whichever is later. The mechanical licensing collective shall not be required to process, or include in any response files to a digital music provider, any voluntary license for any period prior to March 31, 2021 for which the voluntary license information required by paragraph (b)(8) of this section was not provided to the mechanical licensing collective at least 90 days prior to the delivery of a report of usage for such period.

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To address the 30-day amendment notice requirement, the final sentence of §210.24(f) could be modified as follows:

To the extent commercially reasonable, the digital music provider must deliver such updated information at least 30 calendar days before delivering a report of usage covering a period where such license is in effect, **or 10 days after the execution of the voluntary license, whichever is later. The mechanical licensing collective shall not be required to process, or include in any response files to a digital music provider, any voluntary license for any period for which the voluntary license information required by paragraph (b)(8) of this section was not provided to the mechanical licensing collective at least 30 days prior to the delivery of a report of usage for such period.**

Notices of license submission timing

The Office noted that certain DMPs have expressed an interest in submitting a notice of license (NOL) prior to the license availability date (LAD). The MLC intends to accept NOL submissions (and notice of nonblanket activity submissions) as soon as these regulations have been promulgated and the MLC is able to complete its online NOL form and make it available, which it expects to be before the LAD (although of course any blanket licenses would not become effective until the LAD).

Voluntary license identifiers

The Office asked for comment on the Music Reports, Inc. request for a regulation requiring DMPs to include in monthly usage reporting a unique numeric identifier showing the voluntary license associated with each musical work share. The MLC intends to include in response files a persistent and unique (to that DMP) identifier for voluntary licenses. DMPs would provide those identifiers when they provide (or update) their voluntary license repertoires. The MLC does not believe that DMPs need to be required to include these identifiers in their monthly usage reporting, since requiring DMPs to include a unique voluntary license identifier for each work share in their monthly usage reports would require DMPs to know which uses are matched to which voluntary licenses before they report, which would require DMPs to either pre-match their usage themselves or hire an outside vendor (like Music Reports, Inc.) to pre-match all of their usage, duplicating the matching work that the MLC is doing.

Issues related to the Docket No. 2020-6 proceeding:

MLC certification of royalty statements

The MLC addressed the proposed regulation concerning the MLC's certification of royalty statements, agreeing with the concerns raised by SoundExchange, particularly that the

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data on usage and royalty pools does not come from the MLC, and therefore the MLC is not able to certify that royalty statements “accurately reflect, in all material respects, the blanket licensee’s usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.” See Docket No. 2020-6, NPRM, §210.29(g)(ii); SoundExchange Comments at 10-12.

Rather, this language is appropriately part of the DMP certification that must accompany usage reporting, since it is the DMP that reports the data reflecting usage and underlying the royalty pool calculation. See Docket No. 2020-5 NPRM, §210.27(i)(5)(ii). While the proposed MLC certification was carried over from the prior regulations (see 37 CFR §210.16(f)(v)(B)), in the prior regulations it was the DMP making the certification.

The MLC can only certify its allocation and statementing processes, which are entirely dependent on third-party data, namely usage and royalty data from DMPs and works information from copyright owners.

The MLC also reiterates that requiring an audit of these allocation processes is unnecessary because all of the steps in the allocation will be fully visible to copyright owners. The information coming from DMPs concerning usage and royalties is the critical information that is not transparent and should have audited processes. By contrast, the MLC is simply allocating this DMP-certified information using the publicly-available ownership information in its database. The MLC’s work could hardly be more transparent. Royalty statements to copyright owners will show the royalty pool information received from DMPs, show the simple mathematical steps leading from those inputs to the effective per-play rate (using the statutory rates), and show the stream counts received from DMPs, which are multiplied by the effective per-play rate to generate the royalty per work share. There is no need to audit this process because every step of it is fully transparent and visible to the copyright owner (in contrast to the DMP usage and royalty information, as to which copyright owners have no visibility, and which should require this audited certification).

The MLC proposes the following language for the allocation certification that it would provide alongside its royalty statements:

This statement was prepared by the Mechanical Licensing Collective and/or its agent using processes and internal controls that were ~~subject to an examination, during the past year, by a licensed Certified Public Accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls~~ suitably designed to generate monthly statements that accurately **allocate royalties using usage and royalty information provided by digital music providers and musical works information as reflected in the Mechanical**

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Licensing Collective's musical works database. ~~reflect, in all material respects, the blanket licensee's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations~~

Distribution timing

The Office requested further comment from the MLC on SoundExchange's comments concerning the timing for the MLC's distribution of royalties to copyright owners. The MLC expressed its general agreement with SoundExchange's comments on the content and timing of the MLC's reporting to copyright owners. As SoundExchange notes, "the MLC was designed to be accountable to and controlled by its royalty recipients... the MLC's board is representative of music publishers of varying sizes, as well as songwriters... the MLC can safely be expected to be highly responsive to the needs and desires of royalty recipients." (SoundExchange Comments at 2-3)

The MLC believes that the current proposed regulation's requirement of monthly distributions is consistent with both the MLC's and SoundExchange's position on this issue. With respect to the timing of royalty distributions, SoundExchange noted, "[t]he regulations should reflect reasonable expectations about the flow of royalties through the MLC... and may not need to say more than that payable royalties are to be distributed on a monthly basis with interest when it has been accrued pursuant to Section 115(d)(3)(G)(i)(III)." (SoundExchange Comments at 5) The Office similarly concluded that, "the better regulatory approach is to ensure the MLC has sufficient flexibility to maximize its matching efforts before distributing royalties, subject to the commitment to report royalties on a monthly basis." 85 Fed. Reg. 22554.

With respect to precisely what royalties are included in each monthly distribution, the MLC intends to include all royalties that are matched and ready for payment in its distributions. SoundExchange's comments are instructive of why further specification is problematic. (SoundExchange Comments at 5-9) There are a number of steps between usage reporting and payability, some of which rely on DMP inputs and some of which rely on copyright owner inputs (such as current tax and payment information). There is no succinct way to summarize items that are matched and ready for payment. Even the term "payable" is ambiguous, as this could be understood to mean due and owing, even if payment is not possible due to missing bank information, although to others it means ready for payment.

The current proposed regulation distinguishes royalties to be included in distributions as being those that are "matched," which is defined in the statute as meaning "that the copyright owner of such work (or share thereof) has been identified and located." In the context of distributions, this could be read to mean ready for payment, as identification and location of a copyright owner for distributions can be read to mean having the necessary contact, tax and

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payment information to make the distribution. The MLC supports clarification in the regulation that the MLC must have all of the necessary information to make payment in advance of the monthly payment cut-off date in order to include it in that month's distribution. This could be done by revising the regulation as follows:

§210.29(b):

Distribution of royalties and royalty statements. (1) Royalty distributions shall be made on a monthly basis and shall include, **separately or together:**

(i) All royalties to a copyright owner for a musical work **that is** matched in the ordinary course under 17 U.S.C. 115(d)(3)(G)(i)(II) for the month ~~next preceding~~ **identified in subsection (c)(1)(i) below, that is not subject to dispute or legal hold, and for which the mechanical licensing collective has all information necessary for it to make payment; and**

(ii) All accrued royalties for any particular musical work that has been matched ~~in the month next preceding and identified in subsection (c)(1)(i) below, that is not subject to dispute or legal hold, and for which the mechanical licensing collective has all information necessary for it to make payment, together with~~ **and a** the proportionate amount of **any** accrued interest associated with that work; ~~and~~

~~(iii) Any overpayment or underpayment of royalties in prior periods based on adjustments to reports of usage by digital music providers.~~

(2) Royalty distributions based on adjustments to reports of usage by digital music providers in prior periods shall be made by the mechanical licensing collective at least once annually, upon submission of the annual reports of usage by digital music providers reporting total adjustments to the mechanical licensing collective pursuant to §210.27(f), (g)(3), and (g)(4).

Annual statements to copyright owners

The Office asked the MLC for further comment on the concerns of Future of Music Coalition, Songwriters Guild of America, and CISAC/BIEM, concerning the provision of annual statements. The MLC explained that it intends to provide copyright owners with the ability to access their royalty information in a number of ways through the MLC Portal, including to allow copyright owners to view reports of information on an annual basis. The MLC fully supports the desires of songwriters and publishers to be able to aggregate and then view information about the royalties they receive during multiple monthly periods, including on an annual basis. However, rather than requiring the MLC to generate and then send out formal annual statements for specific periods prescribed by regulation, the MLC believes the best way to address these

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desires will be by providing functionality in the MLC Portal that enables songwriters and publishers to view their royalty data across multiple periods that they select. This approach will allow each copyright owner to define the start and end dates of these annual (or other) periods based on their own preferences (e.g., calendar year versus fiscal year).

Issues related to the Docket No. 2020-8 proceeding:

The Office raised questions concerning a number of topics related to the Docket No. 2020-8 proceeding, to which the MLC will be responding in a subsequent letter promptly.

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

Sincerely yours,



Benjamin K. Semel