December 15, 2020

VIA EMAIL
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Regan A. Smith, Esq.
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: December 11, 2020 Copyright Office Virtual Meeting

Dear Ms. Smith,

This letter summarizes the *ex parte* meeting held online between Music Reports, Inc. ("Music Reports"), and the Copyright Office (the "Office") on December 11, 2020. Attending from the Office were John Riley, Jason Sloan, and Cassandra G. Sciortino; attending from Music Reports were Bill Colitre and Robert Shepard.

Music Reports requested the meeting to update the Office on the status of progress since our last meeting[1] and to respond to certain proposals made in the joint *Ex Parte* Letter submitted to the Office on December 9, 2020 by the Digital Licensee Coordinator, Inc. ("DLC") and Mechanical Licensing Collective ("MLC") (the "Joint Letter"), which the Office made publicly available on December 10, 2020. Music Reports discussed the practical challenges raised by the continued evolving state of the regulation governing the contents of the transitional cumulative statement of account ("TCSOA") that must be provided to the MLC by digital music providers by February 15, 2021,[2] particularly in light of the Joint Letter's call for further modifications and introduction of a new reporting requirement.[3] Music Reports then proposed a modification of the Joint Letter's proposed bifurcation of the TCSOA and its associated payment obligation from the proposed supplemental metadata report ("SMR"), in order to fulfill the letter and spirit of the statutory reporting mandate and address the needs of the MLC, digital music providers ("DMPs"), and the music publishing community.

1. Concerns About the Unsettled Provisions of 37 C.F.R. § 210.10

During the *ex parte* meeting, Music Reports emphasized that the necessity for DMPs to prepare and render TCSOAs has existed since enactment of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("the 'MMA") on October 11, 2018.[4] Accordingly, the need to design systems to

[1] *See ex parte* letter dated Sept. 29, 2020, summarizing *ex parte* meeting between the Office and Music Reports held Sept. 25, 2020.
[2] *See* 83 Fed. Reg. 63061 (Dec. 7, 2018) (Interim Rule in Docket No. 2018-10); 85 Fed. Reg. 43517 (Jul. 17, 2020) (Notice of Proposed Rulemaking in Docket No. 2020-12); 85 Fed. Reg. 70544 (Nov. 5, 2020) (Supplemental Notice of Proposed Rulemaking in Docket No. 2020-12) (the "SNPRM"). *See also* 17 U.S.C. § 115(d)(10)(B)(iv)(III)(aa) (statutory basis for TCSOA).
[3] Joint Letter at 2; *see also* Joint Letter, App'x A (proposing revisions to 37 C.F.R. § 210.10 as published in draft form by the Office in the SNPRM.
[4] Pub. L. No. 115-264, 132 Stat. 3676 (2018).

produce such statements has been known for more than two years. As one of the nation's leading administrators of mechanical rights for DMPs, Music Reports early on began preparing to produce TCSOAs on schedule and as mandated by the regulations under Section 115. This was particularly important to Music Reports' client DMPs given that the limitation on liability available under the MMA is dependent on the timely transfer of accrued royalties to the MLC, accompanied by the TCSOA, "not later than 45 calendar days after the [blanket] license availability date."[5] But while the statutory underpinnings of the TCSOAs have been known for more than two years, the regulatory requirements for the contents of such statements—and even the data format in which they are to be presented—remain in flux. Nevertheless, despite repeated revisions to the draft regulation governing the contents of TCSOAs, most recently when the Office issued the SNPRM on November 5, 2020, Music Reports continued the software development necessary to render TCSOAs accurately and on time. Music Reports has committed substantial time, money, and human resources to this effort in good faith, even though the production of TCSOAs is meaningfully outside the scope of its current service agreements with its client DMPs.

Music Reports applauds the DLC and MLC for seeking and proposing a creative approach to providing detailed data on the calculation of accrued royalties owed to the MLC, on one hand, and supplemental sound recording and musical work metadata, on the other hand, in two separate reports. However, the Joint Letter throws into relief the unsettled state of the TCSOA reporting requirements just weeks before the blanket license availability date and little more than two months before February 15, 2021, when the TCSOAs are due. The approach to the TCSOA described in the Joint Letter and elaborated in the accompanying Appendix A maintains already-complex reporting requirements for the TCSOA while adding new ones (including two "unique identifiers").[6] At the same time, it necessitates the commencement of new software development to separate what would have been a single report into two reports, in some cases with overlapping information and in other cases different information. As Music Reports commented during the *ex parte* meeting, the reporting requirements of Subpart 210.10(c)(4), as set forth in the SNPRM, required Music Reports to compile and present tens of millions of rows of information *per service, per offering, and per month* for DMPs whose usage commenced, in some cases, a decade or more in the past and comprises literally trillions of plays. Music Reports has been prepared to execute this reporting; but where, at this late date, new technical requirements are still being introduced, the reasonable likelihood that such substantial and complex reporting can be delivered as currently required on February 15, 2021 is rapidly diminishing.

Moreover, as the Joint Letter indicates, the DLC and MLC have not resolved differences over the presentation of musical work share information.[7] As Music Reports noted during the meeting, software engineers require clear instructions in order to develop and execute new forms of reporting. They cannot begin to write the software that will construct reports when the determination of the information to be included in such reports, or how that information is to be presented, has not been made. While the Joint Letter attempts to set forth a "simplified framework"[8] for reporting, it fails to take into account the development lead times necessary to process and present billions of rows of data (per service) in a new format. From Music Reports' standpoint, this proposal—like many revisions to the TCSOA reporting requirements before it—has created greater complexity requiring a greater expenditure of time, effort, and expense. We are concerned that the purported consensus reached by the DLC and MLC and presented in their Joint Letter, while praiseworthy, was reached without any input—nor any request for input—from Music Reports, the third-party provider best situated to provide clarity as to the

[5] 17 U.S.C. § 115(d)(10)(B)(iv)(III)(aa).
[6] Joint Letter, App'x A at 6.
[7] *Id.* at 9.
[8] *Id.* at 1.

technical challenges involved.[9] Music Reports believes the unresolved state of subpart 210.10 has already made it questionable whether TCSOAs can be rendered for all of its client DMPs on the statutory schedule. In response to a query from the Office, we observed that we are unable to speculate as to how DMPs may have arrived at the view, as described by the Office, that there would be no problem rendering the TCSOAs on schedule, given that even now there isn't a final rule we can deliver to our engineers on how the reports should be constructed. It isn't a question of data availability or technical capability, but merely a question of the volume of the work and the time remaining in which to do it. We observed that the Office undoubtedly would have preferred to adopt final regulations sooner. Therefore Music Reports raised the question whether the means exist to extend the statutory deadline for filing TCSOAs,[10] or work with the bifurcation suggestion of the Joint Letter to make the reporting more manageable.

Music Reports also observed that the principal innovation the DLC and MLC are proposing—creation of the SMR to be rendered in June—provides an excellent opportunity to simplify the reporting requirements for TCSOAs, maximize the potential to render on-time royalty payments in February, and honor the letter and intent of Section 115. We therefore endorse the two-part reporting process the Joint Letter proposes, subject to modifications that will clarify and simplify the division of data between the February and June reports.

2. Music Reports' Proposed Modifications

During the *ex parte* meeting, Music Reports noted that Section 115(d)(10) requires TCSOAs to include "all of the information that would have been provided to the copyright owner had the digital music provider been serving monthly statements of account ["MSOAs"] on the copyright owner from initial use of the work in accordance with this section and applicable regulations."[11] These statements must be accompanied by "all accrued royalties."[12] However, draft Subpart 210.10(c) allows that, where a DMP has a "reasonable good-faith belief" that such royalties are less than the total royalties, and the unmatched status of relevant musical works makes it impossible to calculate the precise total, "a reasonable estimation" may be used."[13] Music Reports has been working since August, 2020 to collate the required data for all of its clients and begin calculation of unpaid royalties per service, offering, and period for all periods finalized to date, and to estimate, with great specificity and in accordance with GAAP, the corresponding royalties that will become due for the last quarter of 2020 not yet completed. We expect all final calculations, net of payments made pursuant to CSOAs for works recently matched in relation to periods going back to the inception of our DMP clients, on or before the statutory

[9] Moreover, this consensus is presented as the result of collaboration by the DLC and MLC "over a lengthy period of time to develop this proposal." Joint Letter at 2. This suggests that the parties had ample time to inquire as to the technical feasibility of further modifying the requirements for the TCSOA while implementing development of an entirely new SMR regime. Their failure to make such inquiries of Music Reports, coupled with the presentation of their proposal in mid-December, just two days before closure of the *ex parte* consultation process, suggests a determination to proceed with minimal comment from other stakeholders.

[10] During the *ex parte* meeting, Music Reports raised the possibility that the Office may have authority pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act) to temporarily adjust the timing of the deadline to file TCSOAs. *See* Pub. L. No. 116-136, § 19011, 134 Stat. 281 (2020). On further review, this supposition appears to be correct. Specifically, The CARES Act added Section 710 (Emergency Relief Authority) to the Copyright Act. *Id.* Section 710 provides, *inter alia*, that under emergency conditions that have already occurred, "the Register may, on a temporary basis, toll, waive, adjust, or modify any timing provision (including any deadline or effective period, except as provided in subsection (c)) or procedural provision contained in this title or chapters II or III of title 37, Code of Federal Regulations, for no longer than the Register reasonably determines to be appropriate to mitigate the impact of the disruption caused by the national emergency." 17 U.S.C. § 710(a). Adjustment of the license availability date is, itself, expressly recognized as a possibility, and the draft regulation governing TCSOAs, 37 C.F.R. § 210.10, will be incorporated in Chapter II of Title 37. *See id.* § 710(d).

[11] 17 U.S.C. § 115(d)(10)(B)(iv)(aa).

[12] *Id.*

[13] *See* 85 Fed. Reg. 70548 (Nov. 5, 2020).

deadline. We therefore proposed that TCSOAs incorporate all of the information that would have been provided to musical work copyright owners in the form of MSOAs *as such information relates to the calculation of the accompanying royalty payments*.

A literal interpretation of the phrase "all of the information" required to be included in MSOAs makes no sense. For example, it is impossible to include "[t]he total royalty payable to the relevant copyright owner"[14] when one or more such owners are unknown—the reason the TCSOA exists and was designed to aggregate royalties accrued for all unknown share owners. Accordingly, the most sensible reading of Section 115(d)(10)(B)(iv)(aa) is that TCSOAs include all of the information that would have been included in MSOAs *and* that is applicable to the new reporting regime instituted by the MMA.

Music Reports further noted that monthly statements of account generally consist of three sets of information: (1) a summary identifying, *inter alia*, the licensee, service, offering, and total royalties due; (2) a detailed accounting showing all 26 steps calculating the applicable royalty pool and per play rate; and (3) a final page applying the per play rate to each royalty-bearing sound recording performed on that service and offering in that period, and detailing the metadata for those sound recordings and their embodied musical compositions. We proposed that the summary and financial accounting information be included in TCSOAs on February 15, 2021, but that the metadata detail reporting be included in the SMR on June 15, 2021. This approach will allow the timely transfer of accrued royalties to the MLC with all accompanying accounting backup as it would have been provided on MSOAs, and provide more time for the DLC and MLC to agree on the level of granularity that should be included in the supplemental metadata reporting. The need to develop reporting processes to accommodate the SMR concept is a practical reason to require such reporting in June rather than February. Taking this approach will provide a more reasonable amount of time to ensure that the final form of that extensive and complex reporting can be finalized by the Office, with sufficient time that it can be prepared for the MLC's handling. Music Reports notes that the MLC has three years in which to action this data for the benefit of the publishers of heretofore unmatched works, and has only just begun the process of onboarding publishers and their catalogs—a lengthy pre-condition for any project to match the data in SMRs to those catalogs. Since this minor variance in timing can therefore have no impact on publishers, the MLC would likely prefer a thoughtful and deliberate delivery of the required data in June over what might result from a rushed exercise in February.

Music Reports thanks the Copyright Office for providing the opportunity for interested parties to engage with the Office through the *ex parte* process. We expressly thank the aforementioned Office personnel for making themselves available at short notice during the exceptionally busy and complex closing weeks before the blanket license availability date. We believe the Office's emphasis on clarity, transparency, and a complete record throughout this period has set an ideal example for all of the constituencies working to implement the MMA.

Sincerely,

MUSIC REPORTS, INC.

William B. Colitre
Vice President & General Counsel

[14] 37 C.F.R. § 210.6(b)(5).