National Music Publishers' Association

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June 13, 2022

VIA EMAIL

Suzanne Wilson
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
Library of Congress
101 Independence Ave., SE
Washington, DC 20559-6000

Re: Summary of *Ex Parte* Meeting Regarding Request by Digital Services for an Indefinite Extension of Time to Adjust Royalty Reporting Following Decision in *Phonorecords III* Remand

Dear Ms. Wilson:

This letter summarizes the June 9, 2022 meeting ("June 9 Meeting") that occurred via Zoom videoconference between the National Music Publishers' Association ("NMPA") and representatives of the Copyright Office. NMPA thanks the Copyright Office for its time and willingness to meet with NMPA.

The representatives participating in the June 9 Meeting on behalf of NMPA were Danielle Aguirre, EVP and General Counsel, and Christopher Bates, SVP for Legal and Business Affairs. The representatives participating on behalf of the Copyright Office were Suzanne Wilson, John Riley, Jason Sloan, and Shireen Nasir.

NMPA requested the meeting to share with the Copyright Office NMPA's serious concerns regarding the recent request by the Digital Licensee Coordinator ("DLC") and its members for an indefinite extension of time for digital music providers ("DMPs") to submit reports of adjustment following a decision in the *Phonorecords III* remand proceeding. Under current regulations, DMPs will have six months following a final determination in the *Phonorecords III* remand — a period that will not start to run until the final determination is published in the Federal Register — to submit reports of adjustment to past annual usage reports under the Section 115 digital blanket license and statements of adjustment to pre-blanket license unmatched usage reported to the Mechanical Licensing Collective ("MLC"). *See* 37 C.F.R. §§ 210.10(k)(6)(i), 210.27(g)(4)(ii). The regulations do not provide an express deadline for submitting adjusted statements of account for pre-blanket license matched usage, although they do provide for a similar six-month window to adjust statements of account based on changes between expected and actual performance

royalties. *See id.* § 210.7(d)(2)(iii). The DLC and its members have also advised that, "practically speaking," reprocessing and adjustments for pre-blanket license matched usage "must be done at the same time" as reprocessing and adjustments for pre-blanket license unmatched usage, for which, as noted, an express six-month deadline applies. Letter from Sy Damle to Suzanne Wilson, Gen. Counsel & Assoc. Register of Copyrights ("June 2022 DLC Letter") (June 1, 2022), at 3.

In their recent request to the Copyright Office, the DLC and its members asked for an indefinite extension of the six-month deadline for adjusting past reporting following a final determination in the *Phonorecords III* remand. Specifically, the DLC and its members asked that the six-month deadline be placed on indefinite hold "while the Office conducts a rulemaking to collect input from the entire industry on the challenges involved in adjusting reporting for those prior periods." *Id.* at 4. The DLC and its members justified this request based on the asserted need to avoid potential "uncertainty" and "harms" from a change in rates on remand, as well as "inefficient allocation of resources." *Id.*

As NMPA stated during the June 9 Meeting, NMPA, on behalf of its members, has serious concerns with the request for an indefinite extension of the deadline for adjusting past reporting. Rightsholders are now nearly halfway through the *final* year of the *Phonorecords III* rate period and are *still* being paid under the prior *Phonorecords II* rates as a result of the vacatur and remand that the DMPs themselves sought and obtained from the D.C. Circuit. Those same services now seek to indefinitely delay any requirement that they pay additional royalties to rightsholders — royalties to which rightsholder are entitled by law — for the portions of the rate period that have already passed in the event the Copyright Royalty Board ("CRB") orders higher rates in its final remand determination.

This request is simply part and parcel of the DMPs' strategy throughout the *Phonorecords III* proceeding to do everything possible to delay paying higher rates for as long as possible. When the CRB decided to increase the royalty rates in its original *Phonorecords III* determination, the DMPs appealed immediately to the D.C. Circuit and obtained a vacatur and remand of the higher rates. Once the D.C. Circuit Court issued a decision remanding the proceeding back to the CRB, the DMPs started paying at the lower 2012 *Phonorecords II* rates during the pendency of the remand. Now, on the eve of a remand decision, and concerned that the CRB will reinstitute higher rates, the DMPs ask for an indefinite delay of their obligation to pay rightsholders additional royalties for past usage. The Copyright Office should not enable further delay of their obligation to pay royalties that are much needed by songwriters and music publishers.

Moreover, as NMPA explained during the June 9 Meeting, the DLC and its members' vague warnings of "uncertainty" and "harm" do not remotely justify the further delays they seek.

As stated above, the DMPs knew full well when they appealed the CRB's original determination and argued for reinstatement of the *Phonorecords II* rates during remand that there

would need to be an adjustment after the CRB issued its remand determination. So the current situation comes as no surprise. Indeed, it's the exact scenario the DMPs *asked for*.

Nor are any of the "challenges" the DMP's identify in their letter as justifying the need for an indefinite delay in submitting adjustments, *see* June 2022 DLC Letter, at 1-2, new or unexpected. To the contrary, all were well understood *before* the Copyright Office finalized its rules imposing the six-month deadlines. *See Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective*, 86 Fed. Reg. 2176, 2207 (Jan. 11, 2021) (pre-blanket license unmatched usage); *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, 85 Fed. Reg. 58,114, 58, 151 (Sept. 17, 2020) (blanket license matched usage). By that point, the D.C. Circuit had already vacated and remanded the original *Phonorecords III* determination, and by the time the second rule was finalized, the CRB had already reinstated the *Phonorecords II* rates. The DMPs well understood that the *Phonorecords III* rate period "straddles" two different licensing regimes (the pre-Music Modernization Act ("MMA") song-by-song regime and the post-MMA digital blanket license regime), that there would need to be separate adjustments for separate years, that some DMPs have voluntary licenses, that payments for historical unmatched royalties would need to be adjusted, and that DMPs may need to "retool" their reporting systems "to account for the new rates and terms." June 2022 DLC Letter, at 1-2.

Yet they waited until this extraordinarily late date — nearly two years after the D.C. vacated and remanded the original final determination, over three months after closing argument in the remand, and on the eve of the remand determination — to request a delay of the regulatory deadlines. Indeed, not only did the DMPs well understand the above "challenges" before the adjustment rules were finalized, but they also submitted comments on the second rule *after* the D.C. Circuit's decision came down. In its final rule setting the six-month reporting adjustment deadline for pre-blanket license unmatched usage, the Copyright Office stated that DMPs would be permitted to submit adjusted statements of account in five scenarios, including "in response to a change in applicable rates or terms by the CRJs"; that "where more than one scenario necessitates the same adjustment, the six-month period to make the adjustment" would run from the earliest triggering event; and that "[t]he MLC and DLC both signaled support for [this] approach, and the Office received no comments opposing it." 86 Fed. Reg. at 2183-84.

Simply put, the DMPs have long been on notice that adjustments would be necessary after the CRB issues its remand determination, and in fact had ample opportunity to raise their putative concerns with the six-month adjustment deadlines *before* the rules setting the deadlines were even finalized. They chose not to, thus evading the transparency and public comment that a proper rulemaking would have provided on this improper and unjust proposal.

Nor do the reasons the DMPs provide justify an indefinite delay in the adjustment reporting requirements. The DMPs state that they have been "developing plans" and "scoping the range of operational and engineering work" that will be needed once the CRB issues its remand

determination, June 2022 DLC Letter, at 2, but do not provide any details regarding what they have actually done in the nearly *two years* since the D.C. Circuit's decision to prepare for adjustments. What is clear, however, is that with respect to adjustments for periods after January 1, 2021 (i.e., the blanket license period), *the MLC handles all of the processing and distribution*. The DMPs' adjustment reporting obligation for this period thus will be limited to providing updated royalty *pool* information (and turning over any additional royalties). Their letter does not articulate any reasonable basis as to why DMPs have bona-fide operational issues that would prevent them from providing updated royalty pool information for the blanket license period within the six-month timeframe. Rather, their requested relief seems focused on recent conversations with vendors regarding adjustments related to *pre*-2021 payments. But even there, the DMPs fully understood as early as 2018 that adjustments would be necessary and at that time had ongoing relationships with vendors, such as HFA and MRI, to address those circumstances. While it is unclear whether the DMPs allowed their vendor relationships to lapse following the 2021 blanket license availability date, what is clear from their *ex parte* letter is that with knowledge that adjustments would be needed for the pre-2021 period, they did not timely work with their vendors to prepare for this outcome. Nor do they specify whether they have reached out to (or engaged) any accounting firms for purposes of reviewing and certifying the forthcoming adjustments, even while raising the need for certification as another reason for delay. *See id.* at 3 n.5.

The DMPs also fail to specify what the threatened "uncertainty" and "harm" caused by the current six-month deadlines actually is. To the extent the DMPs are concerned they may not be able to meet the six-month deadline for all of the necessary adjustments, Section 115 already provides what happens in that scenario—the DMPs face a late fee, calculated from the date on which the payment is due. 17 U.S.C. § 115(d)(8)(B). It bears emphasis that this date will be six months after the *final* remand determination is published. This means that DMPs will actually have *more* than six months to make the necessary adjustments after the CRB's initial remand decision comes down. They will have the six months provided under the regulations, *plus* the period of time between the initial determination and publication of the final determination in the Federal Register, during which time the DMPs will have notice of the overall rate structure and terms.

At the end of the day, the only real "harm" the DMPs might face from missing the deadline to submit reporting adjustments is the payment of late fees. But the DMPs have known all along that this was a possibility, and, as noted above, did not object to the six-month adjustment deadline when given an opportunity to do so during the relevant rulemakings. That the DMPs now, apparently, worry that meeting the deadline will be difficult does not excuse them from their obligation to pay late fees.

On the other side of the ledger, as NMPA explained during the June 9 Meeting, rightsholders face very real and significant harms if the DMPs are allowed to continue delaying paying higher rates. In contrast to the DMPs — which include some of the largest, wealthiest, and most successful companies on earth — many rightsholders are small business with limited resources who depend on royalty payments to stay afloat. And the songwriters to whom such

royalties ultimately flow are individuals often working multiple jobs just to make ends meet. At the same time the DMPs complain about "inefficient allocation of resources," June 2022 DLC Letter, at 5, many rightsholders continue to face serious economic hardship from the lingering effects of the COVID-19 pandemic and have now been waiting for *years* to receive the full increased royalties they would have been entitled to by law had the DMPs not chosen to appeal the original *Phonorecords III* determination. The Copyright Office should not amplify this hardship by enabling DMPs to further delay paying rightsholders the higher royalties they are owed once the remand decision comes down. Rather, consistent with its mission to promote creativity and free expression, the Copyright Office should ensure that rightsholder are fairly and timely compensated if and when the CRB orders higher rates in the *Phonorecords III* remand.

NMPA thus respectfully urges the Copyright Office to reject the DMPs' request to indefinitely place on hold the six-month adjustment reporting requirement following a final determination in the *Phonorecords III* remand. If the DMPs are unable to meet the deadline, they can and should be required to pay the late fees provided under Section 115 and the implementing regulations.

In addition to requesting an indefinite delay of the six-month adjustment deadline, the DLC and its members also asked for a brief, two-month transition period after the CRB issues a final remand decision in *Phonorecords III* before DMPs will be required to begin reporting under the final rates for the remaining months of the *Phonorecords III* rate period. In theory, NMPA does not object to this request, provided the standard adjustment requirements and deadlines apply to payments made during the two-month transition period. However, as noted above, the MLC is the entity responsible for adjusting payments and distributing future royalties under any new *Phonorecords III* determination. It is unclear that any significant changes will be needed to the DMPs' reporting systems, or usage reporting provided by DMPs, in order to make these distributions. NMPA thus submits that the DMPs should be required to provide additional information to elucidate the actual burden and specific changes needed to be implemented internally by the DMPs that would necessitate this transition period prior to the Office granting this request.

During the June 9 Meeting, Copyright Office representatives asked NMPA's views on whether missing the six-month adjustment reporting deadline could be grounds for default and termination of the blanket license, or whether the penalty would simply be payment of late fees. As NMPA understands the statute, failure to report accurately can be grounds for termination if the accurate information was available to the DMP, and the DMP both fails to report the information and then fails to cure the avoidable default for 60 days after receiving notice of default. *See* 17 U.S.C. 115(d)(4)(E). In other words, DMPs are protected against unavoidable reporting failures, and would be liable only for late fees in those innocent situations. Thus, if a DMP truly could not process and obtain the necessary reporting information within the regulatory time frame, then the MMA would appear to protect the DMP against default for that failure. This is the proper dividing line, as it separates bona fide delays from willful truancy in paying royalties. The Office

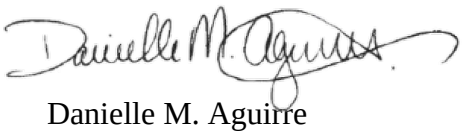
thus need not and should not give DMPs a free pass around the MMA's reporting standards by extending deadlines even where accurate royalty reporting is available to the DMP.

The Copyright Office also asked NMPA's views on whether, when a DMP submits a report or statement of adjustment, the DMP must certify as to the accuracy of *all* information in the report or statement — including information that has not changed — or instead must certify only as to the accuracy of any new or changed information. NMPA believes that the answer to this question depends on the context for the particular adjustment, but that the guidelines are laid out clearly in 37 CFR 210.27(k)(7):

> A report of adjustment adjusting a monthly report of usage must be certified in the same manner as a monthly report of usage under paragraph (i) of this section. A report of adjustment adjusting an annual report of usage must be certified in the same manner as an annual report of usage under paragraph (j) of this section, except that the examination by a certified public accountant under paragraph (j)(2) of this section may be limited to the adjusted material and related recalculation of royalties payable. Where a report of adjustment is combined with an annual report of usage, its content shall be subject to the certification covering the annual report of usage with which it is combined.

NMPA appreciates the Copyright Office's time and attention to this matter and stands ready to provide further information on request.

Sincerely yours,



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