



August 24, 2020

Via email at regans@copyright.gov and jslo@copyright.gov

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

Re: August 20, 2020 Ex Parte Meeting Regarding the Confidentiality of Certain Dates, Docket No. 2020-5

Dear Ms. Smith and Mr. Sloan,

On August 20, 2020, at your request, Ken Doroshow and I attended an online meeting with the two of you and the following additional members of the Office staff: Terry Hart, John Riley and Cassandra Sciortino. The purpose of the meeting was to share our members' views regarding the confidentiality of certain dates that the Office is considering requiring digital music providers ("DMPs") to report to the MLC.

We understand that four dates are currently under consideration by the Office for this purpose: the server fixation date,¹ the date of ingestion,² the "street date,"³ or a "catch-all" date.⁴ During the meeting, we explained that the only proposed date that does not raise confidentiality concerns for our members is the actual – not the intended – street date, meaning the date a sound recording is actually first made available to users of a particular DMP. We explained why we consider the other proposed dates to be

¹ The date on which the sound recording is first reproduced by the blanket licensee on its server.

² The date on which the blanket licensee first obtains the sound recording from the record.

³ The date on which the sound recording is first released on the DMP's service by a sound recording copyright owner or other distributor.

⁴ A date that, in the assessment of the DMP, provides a reasonable estimate of the date the sound recording was first distributed on its service within the United States.

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confidential. When asked by the Office, we indicated that the date a track is streamed for the first time by a given DMP would also not raise confidentiality concerns.

The Office indicated that various songwriter groups are pushing for the DMPs to retain more than one of the above-referenced dates in case they become necessary in connection with future litigation regarding who the rightful royalty recipient is following a songwriter's exercise of her statutory termination rights. We have no objection to a requirement that this data be preserved for potential access in connection with such litigation. However, we do not agree that this commercially sensitive data should be disclosed to the MLC (or any other outside party) as part of any reporting obligation. While the Office raised the possibility of imposing confidentiality restrictions to protect such data from unwarranted disclosure, we cannot assess the adequacy of those restrictions in the abstract, nor is it clear what remedies, if any, would be available in the event that any applicable confidentiality requirements were violated.

Given these concerns, we suggest the following alternative approach, which balances our members' confidentiality concerns with the songwriters' legitimate interests in access to information in the event of litigation: rather than requiring DMPs to produce these commercially-sensitive dates to the MLC, the Office can instead (1) require the DMPs to preserve whichever dates the Office determines, after appropriate input from the songwriter groups, could become relevant in the context of a relevant future lawsuit brought by or against a songwriter; and (2) prohibit those dates from being disclosed except to actual litigants in a termination dispute pursuant to a court order and an appropriate court-issued protective order. Such an approach would ensure that the data remains available to a songwriter seeking to exercise termination rights (subject to judicially enforceable sanctions for violations of the protective order), while protecting from disclosure the vast amount of other commercially sensitive data that is irrelevant to the particular dispute.

The meeting also included a brief review of the concerns discussed at our June 12 *ex parte* meeting with the Office regarding the need to protect the extremely confidential agreements between our members and the DMPs in the context of an audit of one or more DMPs. See June 16, 2020 letter, which summarized that meeting, available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte/riaa.pdf>. As we said then, with respect to total content costs ("TCC"), any audit of a DMP should be limited to confirming that the DMP accurately reported to the MLC the aggregated TCC figure kept on its books.

We appreciate the opportunity to share our views on these important issues. If you have any further questions, please do not hesitate to contact us.

Sincerely,



Susan Chertkof
Senior Vice President, Legal and Regulatory Affairs