

# LATHAM & WATKINS LLP

June 26, 2020

**VIA EMAIL**

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Re: Ex Parte Letter re: June 19, 2020 Copyright Office Webex and Call

Dear Ms. Smith,

I write on behalf of Digital Licensee Coordinator, Inc. (“DLC”) to follow up on the Webex and call hosted by the Copyright Office on June 22, 2020 regarding the mechanical licensing collective (“MLC”)’s request for the retention and reporting of a “server fixation” or other date that can assist the MLC in determining which copyright owner is entitled to royalty payments in the context of a statutory termination of a copyright transfer by a songwriter.<sup>1</sup>

As the Webex made clear, the MLC’s request has uncovered complicated issues related to the ability to “continue to utilize[]” sound recordings under the terms of pre-termination grants.<sup>2</sup> Much of the Webex was focused on those issues.

The DLC does not take a position on the correct interpretation of the Copyright Act’s termination provisions. As we explained during the Webex, if DLC’s members have—and can practicably provide to the MLC—information that is useful to ensure the correct copyright owner receives royalties, they are willing to ensure that the MLC can get access to the information it needs. For that reason, the DLC did not generally object to the Office’s proposed rule requiring retention of a server fixation or other date in its records of use, subject to request for access from

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<sup>1</sup> DLC was represented by Garrett Levin, Sarah Rosenbaum, and Sy Damle. Other participants are listed in Appendix A.

<sup>2</sup> 17 U.S.C. § 203(b)(1).

the MLC.<sup>3</sup> But any regulatory obligations placed on digital music providers should be achievable for the digital music providers, and proportional to the MLC's actual needs.

We understand from Monday's Webex that there is now agreement among all parties that (consistent with the Office's notice of proposed rulemaking) any requirement to retain a "server fixation" or other date would apply only to works added to a digital music provider's service *after* the license availability date. With respect to that category of works, the Webex discussed two issues that the Office needs to address: (1) What is the date that is captured by the digital music provider? (2) How should that date be made available to the MLC?

### **Date to be Captured**

With respect to the date being retained, there was significant discussion during the Webex about a variety of potentially relevant dates. Based on the written comments in response to the NPRM, there appears to be agreement between the Office, MLC and DLC that digital music providers should be given a choice of the date to report, based on the digital music provider's specific operational and technical needs. After the Webex conversation, we believe the following list of options covers those dates that would be feasible for digital music providers (in the aggregate) to retain. Although it may not be possible or practical for digital music providers to retain *all* of the following options, DLC understands that for its members, it is feasible to retain at least one of them.

1. *The date on which the sound recording is first reproduced by the blanket licensee on its server (i.e., "server fixation date").*

There is agreement between the MLC and the DLC that this is an appropriate option. One caveat is that there is sometimes a lengthy ingestion process for sound recordings and associated metadata. In such cases, it may be that the date the first "durable" copy is saved to a server is what can most readily be retained, and it is DLC's assumption that this date would be suitable for the MLC's purposes.

2. *The date on which the blanket licensee first obtains the sound recording from the record label (i.e., "ingestion date").*

Certain DLC members have confirmed that they can capture a date that meets this definition. Accordingly, we strongly urge the Office to retain this as an option. To the extent the MLC needs clarification about what this date captures, that is a topic that can be addressed as part of discussions within the MLC's Operations Advisory Committee. The one caveat here is that record labels may have views about the confidentiality of this data that the Office should explore.

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<sup>3</sup> The DLC sought some modest revisions to the rule to better accommodate the ability to capture a "snapshot" of its sound recording database immediately prior to the effective date of the blanket license, and to add a fourth catch-all option.

3. *The date on which the sound recording was first released on the digital music provider's service by a sound recording copyright owner, licensor or distributor (i.e., "street date").*

During the Webex, the MLC explained more specifically that the MLC is referring to the "StartDate" filed in the ERN standard ("NewReleaseMessage > DealList > ReleaseDeal > Deal > DealTerms > ValidityPeriod > StartDate"). Certain DLC members have confirmed that they can provide this date. We offer a few notes of caution about this option, however. First, this date can often be weeks *after* either the server fixation date or the ingestion date, as record labels will often provide sound recording files to the services well ahead of their commercial release to consumers. Second, this particular date will often change as labels move commercial release dates. Third, this field is part of the "DealTerms" section of the ERN message, and we have been in communication with the RIAA regarding whether its members have views about the propriety of reporting this field. RIAA has told us that it is still looking into the question, but that initial feedback (and DLC's understanding from some of its members) suggests that this date is not a reliable benchmark for the MLC's purposes and may raise confidentiality challenges.

4. *The date that, in the assessment of the digital music provider, provides a reasonable estimate of the date the sound recording was first distributed on its service within the United States.*

There seems to be general agreement that a flexible, catch-all provision is necessary.<sup>4</sup> That is because there may be any number of scenarios where the first three dates cannot be captured or would not make sense to report.

### **How the Date Information Should Be Provided to the MLC**

During the Webex the MLC asserted its need for the server fixation or other date on a continual basis. But the MLC has failed to show that any such need actually exists. First, termination is relevant to only a subset of musical works. In the case of self-published songwriters, there is no initial grant to terminate in the first place. And only a (likely small) subset of grants are terminated in any event. Second, the Webex discussion revealed that in many instances, the terminating songwriter and original publisher can negotiate how royalties from the MLC should be distributed, and provide instructions to the MLC in a letter of direction. In that scenario, those instructions would control, rather than the particular date reported by the digital music provider. Third, as to each work, termination is an event that happens once every few *decades*.

It thus stands to reason that the server fixation or other similar date would be relevant infrequently to a relatively small number of works. Given that context, DLC does not understand

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<sup>4</sup> The MLC had proposed regulatory language providing the option to capture "any other date that reasonably approximates the date of first use of the recording on the digital music provider's service pursuant to the blanket license or other applicable voluntary or statutory mechanical license." MLC NPRM Comments at App. xiv. DLC believes it is important to make clear that the digital music provider has discretion to select the appropriate date.

why the MLC would need to receive these dates for *every work, every month*, as part of the reports of usage. The MLC has not adequately justified imposing the investment that would be required by DSPs to engineer their reports of usage to include this date field. We therefore encourage the Office to adhere to the approach taken in the NPRM, and require digital music providers to simply retain this date information in their records of use, subject to reasonable requests for access from the MLC.

If the Office is inclined to require some sort of affirmative reporting of this date information from digital music providers, we ask the Office to mitigate the burdens on digital music providers by adopting two accommodations: (1) provide digital music providers the option to report the date information quarterly rather than monthly, in a separate file indexed using the service's unique track identifier; and (2) regardless of whether the requirement is monthly or quarterly, provide digital music providers with a one-year transition period to begin to report the date information for tracks added to the service after license availability date.

Both of these accommodations would allow the MLC to receive the information it needs in a timely fashion, without undue burden. The inescapable fact at this point is that we are approximately six months from license availability date, and digital music providers do not have idle engineering resources to commit to changes to the reports of usage that require addition of fields (like the server fixation date) that are not contemplated by the DDEX reporting standard that the MLC has stated it is going to use. Given the central importance of usage reporting to the blanket licensing system, it would be unwise to impose an obligation to incorporate such non-standard data fields into the report of usage, and risk errors or delays in those reports.

### **Snapshots**

In correspondence sent after the Webex, the Office invited DLC to elaborate on its statement in its rulemaking comment that “works that are added to the service while the snapshotting or archiving process is underway may not ultimately be captured in the archive” and to address the “challenges, if any, ... to adding those works to the snapshot after it has been initially generated.”

The purpose of the caveat in the DLC's rulemaking comment was to emphasize the uncertainty surrounding the Office's request, given that such a “snapshot” is not something that services have ever had to do previously. The services' catalogs are incredibly massive, and pulling even just a limited set of metadata fields from that catalog can be a several-day process. According to engineers from at least one digital music provider, it may not be feasible to track what recordings are loaded into the systems during the snapshot process that were not captured during the multiday snapshot process. The Office should regulate with these technological realities in mind.

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DLC thanks the Copyright Office for hosting the June 22, 2020 Webex and call. As always, we stand ready to offer any further information that the Office would find useful.

Best regards,

A handwritten signature in black ink, appearing to read "S. V. Damle". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Sarang V. Damle

CC via email: Jason Sloan  
jslo@copyright.gov

**APPENDIX A**  
**Attendees for 6/22/2020 Ex Parte Call**

U.S. Copyright Office

Regan Smith  
Anna Chauvet  
Jason Sloan  
John Riley  
Terry Hart  
Cassandra Sciortino

MLC

Kris Ahrend  
Richard Thompson  
Ellen Truley  
Alisa Coleman  
Bart Herbison  
Danielle Aguirre  
Ben Semel  
Frank Scibilia  
Abel Sayago  
Maurice Russel

DLC

Garrett Levin  
Sy Damle  
Sarah Rosenbaum

Music Artists Coalition

Susan Genco  
Ned Waters

Peermusic

Timothy A. Cohan

Recording Academy

Todd Dupler

Songwriters Guild of America

Rick Carnes  
Charles J. Sanders

Songwriters of North America

Lauren Hancock  
Jacqueline Charlesworth  
Dina LaPolt  
Michele Lewis  
Jack Kugell  
Adam Gorgoni  
Cameron Berkowitz