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June 26, 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: Docket No. 2020-5**  
**Letter re ex parte call concerning server fixation date and termination**

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

This letter summarizes the participation of the Mechanical Licensing Collective (the “MLC”) in the June 22, 2020 call (“June 22 Call”) between the Copyright Office (the “Office”) and numerous other participants concerning the above-referenced proceeding, and provides responses to supplemental questions posed by the Office.

The attendees for the June 22 Call from the MLC were Kris Ahrend (CEO), Richard Thompson (CIO), Ellen Truley (CMO), Abel Sayago (DSP Technical Lead), Maurice Russell (Head of Rights Management), Alisa Coleman (Chair of the Board of Directors), Danielle Aguirre (nonvoting Board member), Bart Herbison (nonvoting Board member) and counsel Benjamin Semel and Frank Scibilia.

The other attendees on the call are listed in Exhibit A hereto.

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The MLC begins by thanking the Office for arranging the call, which clarified the issues. In particular, the call confirmed consensus on the two central points: (1) the regulations promulgated by this rulemaking proceeding should not be construed as changing or interpreting the substantive law governing U.S. statutory terminations; and (2) DMP usage reporting should include a data field identifying a date that reflects the first use of each sound recording by the service.

The following summarizes the MLC's substantive participation in the call, as well as related comments by other participants. The MLC began the call by noting that:

- The MLC does not see its function as enforcing U.S. statutory termination rights or otherwise resolving disputes between parties over statutory terminations or copyright ownership.
- The MLC takes no position on what the law of termination should be, but is seeking to follow the law, welcomes guidance from the Office on the interpretation of the law, and will follow judicial guidance on the law.
- The MLC has always seen this rulemaking proceeding as addressing usage reporting by digital music providers ("DMPs"), and the MLC is not seeking to change the law of termination rights, or enforce such rights or resolve disputes over such rights.
- The MLC is requesting usage reporting by each DMP of a data field to reasonably approximate first use of a sound recording by that DMP, particularly noting that after the license availability date, when DMPs no longer serve NOIs on copyright owners, the MLC may need such data to administer statutory terminations.

The Office confirmed that it also viewed this rulemaking proceeding as concerning usage reporting and not to offer a substantive interpretation of the termination right, including the termination right applied to Section 115 of the U.S. Copyright Act specifically.

The Music Artists Coalition ("MAC") expressed its concern that the rulemaking proceeding not affect substantive termination rights.

The Songwriters Guild of America ("SGA") expressed that it appeared that there was consensus in articulating the intention to preserve the status quo on the substantive law of statutory terminations.

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The Office reiterated that it did not appear that anyone disagreed with the sentiment that the rulemaking is not changing the substantive law of statutory terminations.

Songwriters of North America (“SONA”) discussed its concerns that the rulemaking should not affect substantive termination rights, and noted that it appeared that everyone was in agreement on this point.

In response to a question from the Office concerning the need for usage reporting, Peermusic also agreed that there appeared to be consensus that the rulemaking should not change the status quo on the substantive law of statutory terminations, and explained that the loss of individual NOI license dates will take away a data point that is useful in determining questions of whether a mechanical license was issued prior to termination, and that it will be helpful to have a proxy to replace that objective marker.

The MLC reiterated its statement from its opening comments that it is important to have a date to identify the first use of a sound recording by a service, since that may be relevant for situations involving statutory terminations, particularly in scenarios after blanket licenses have issued.

SONA discussed concepts of utilization versus grants of rights under substantive termination law, stating that the MLC needs to track termination date and first utilization date and pay attention to letters of direction. SONA stated its view that in order to operationalize some terminations, the MLC will need to know when the song was added to each service.

MAC and the Recording Academy reiterated that they do not want the rulemaking to change the substantive law of termination.

SGA expressed that there also appeared to be unanimity that more information is better than less information, and the MLC is seeking more information. SGA further expressed that everyone is already agreed that no one wants to change the substantive law of termination, so that it appeared that everyone could also agree that since the issues may be litigated, the MLC should have as much information in its files as possible, so that it is available to a court when it eventually makes a determination on the nuanced issues of the law.

The Office reiterated that it is unified with everyone that this rulemaking is not addressing a substantive interpretation of statutory termination laws.

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The MLC stated that it supported including language in the regulation to clarify the shared understanding that the regulation would not affect substantive termination law.

In response to questions about letters of direction and voluntary transfers in connection with a statutory termination, the MLC explained that it would of course follow the directions of an agreement by both parties to the extent that it specified who should be paid for each use on each DMP offering. However, it noted that such agreements and letters of direction typically do not have that level of detail, which underscores the importance of having a data point to assist with identifying whether first use by a DMP falls before or after a statutory termination.

The MLC's CIO explained the importance of receiving this data along with the monthly usage reporting in order for the MLC to be able to operationalize it. If instead that data was only maintained in records of use and not reported monthly, the MLC would be required to create a parallel monthly reporting process, and that process would not be able to begin until after the MLC received the regular usage reporting, at which point the MLC would need to contact each DMP each month to request the data, and then each DMP would have to send a separate transmission with such data, which the MLC would have to reintegrate with all of the data that had been reported in the standard monthly reporting. This additional, delayed monthly process would also delay the MLC's ability to provide response files to DMPs and royalty payments to copyright owners.

In response to a question from the Office, the MLC confirmed that monthly reporting of street date for each sound recording would appropriately satisfy the MLC's concerns. The DLC indicated that if there is an agreement that street date is the appropriate date, it could take that proposal to its members, but it wanted to make sure that there is agreement before its members started building reporting systems or records maintenance systems.

The MLC explained that it would not be appropriate to refer to the month that a sound recording was first included in a DMP usage report, since many sound recordings are not streamed immediately and the relevant data point is not when the sound recording is streamed but when it is first added to the service (noting also that usage reports do not even provide a date certain within the respective month).

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Responses to supplemental questions from the Office

The MLC responds here to the supplemental questions raised by the Office:

Question 1: *The NPRM stated that the Office was not intending to offer its interpretation of the scope of the derivative works exception in this particular rulemaking proceeding. The comments and subsequent joint ex parte call suggested a consensus that if the rule requires DMPs to report or make available records pertaining to certain dates for purposes of helping the MLC operationalize aspects of its administration of recaptured rights, the regulatory language also specify that this provision is not intended as a substantive interpretation by the Copyright Office with respect to the proper relationship between the termination provisions of sections 203 and 304 and the section 115 blanket license. The parties are invited to propose suggested regulatory language that achieves this end. See Sona & MAC Comments at 12 (“The records required to be collected and maintained under paragraph (m)(2) shall not be construed to alter, limit, or diminish the ability of an author, an author’s heirs, or the representatives of an author’s estate to exercise rights of termination as provided in sections 203 and 304(c) of title 17.”).*

The MLC proposes the following language:

**This provision shall not be construed to alter or affect the law regarding statutory terminations as provided in sections 203 and 304(c) of title 17, and shall not be construed as a substantive interpretation by the Copyright Office with respect to termination rights or their relationship with the section 115 blanket license.**

Question 2: *If the rule were to specify reporting of input(s) that may be treated by parties as a reasonable estimate of the date the sound recording was first used on a DMP’s service within the U.S. under the applicable license, what date(s) or field(s) would be appropriate on a monthly reporting basis? Would these date(s) or field(s) change if DMPs saved this information in their records of use, but did not report them on a monthly basis? Inputs discussed on the call as being potentially relevant included server fixation date, the first date a song appears on a monthly report of usage, and a recording’s street date, as well as the DLC’s suggestion that DMPs may alternatively provide their own reasonable estimates of first*

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*distribution in the U.S., and the MLC's similar proposal of any date that reasonably approximates the date of first use of the recording embodying the musical work on the DMP's service.*

The MLC has proposed that monthly reporting by DMPs include, for each sound recording, either server fixation date, street date or another date that reasonably approximates the date of first use by the DMP. (MLC comments at Appendix C, §210.27(e)(1)(i)(F)) It appears from the further discussions that street date is acceptable to DMPs as well as the MLC. If so, street date would be the appropriate field. Barring such agreement, the language proposed by the MLC in its comments is appropriate.

The answer is the same if the data was only to be stored in the DMPs' records of use, but it is important that the data be included in the standard monthly reporting. As the MLC's CIO explained on the call, the MLC will need the information for processing in every reporting cycle, and so if it is not included in the standard monthly reporting, the MLC would have to establish an entirely parallel monthly reporting process, and one which could not begin until regular usage reporting was received, thus causing substantial burden and expense, as well as delays in providing response files and royalty payments.

Question 3: *In addition, the Copyright Office welcomes the MLC to comment upon the DLC's request "to limit the required data fields for the snapshot or archive to those that the MLC reasonably requires to fulfill its statutory duties (and that each DMP has reasonably available)" and to take the snapshot at a time that is "reasonably approximate" to the license availability date. See DLC Comments at 15-16.*

The MLC understands the DLC proposal to be that the snapshot required under Section 210.27(m)(2)(ii) "should be limited to the minimum requirements for monthly reporting of sound recording usage." See Proposed Rule, Section 210.27(e)(1)(A)-(D). Specifically, these are the sound recording names; featured artists; unique identifier(s) assigned by the blanket licensee, if any, including any code(s) that can be used to locate and listen to the sound recording through the blanket licensee's public facing service; and playing time." (DLC Comments at 16, fn 66.)

The MLC believes that the DMPs should not limit the snapshot to a subset of fields, but should include in the snapshot the same sound recording information that will be included in the monthly usage reporting, and does not understand how this could be a problem for any DMP, given that DMPs must report this data every month. For example, ISRC code (210.27(e)(1)(G)(3)) and Sound Recording Version Title (210.27(e)(1)(G)(5)) can be critical for

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aligning the records where the unique identifier fails (as would be expected to happen in some cases). It should also be clarified that the licensee unique identifier field (210.27(e)(1)(C)) must be the same identifier field that the MLC receives in the regular monthly reporting, so that the snapshot can be aligned to the monthly reporting.

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

Sincerely yours,



Benjamin K. Semel

# **EXHIBIT 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