

Sloan, Jason

From: Sloan, Jason

Sent: Monday, June 22, 2020 10:06 PM

Subject: U.S. Copyright Office Rulemaking 2020-5

Dear Commenters:

Thank you for participating in today's teleconference on server fixation date and termination. A list of all attendees is attached. As a reminder, each participating group should submit a letter summarizing your substantive participation in the call, in conformance with the Office's *ex parte* guidelines (available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>). As mentioned during the call, we have some follow up items, listed below. If you would like to respond to any of them, please do so in an addendum to your *ex parte* letter. To provide additional time to respond to these items, the deadline for all *ex parte* letters for this call is extended to no later than June 26, 2020.

All parties are welcome to provide the Copyright Office with updated proposed regulatory language regarding the matters discussed on the call, and specifically:

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.").
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 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.

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.

Also, the DLC is invited to elaborate on its statement that "works that are added to the service while the snapshotting or archiving process is underway may not ultimately be captured in the archive." What challenges, if any, are there to adding those works to the snapshot after it has initially been generated?

Sincerely,

Jason E. Sloan
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U.S. Copyright Office