



November 17, 2020

**Via email**

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

Re: Docket No. 2020-12 and November 13 *Ex Parte* Conference Call

Dear Ms. Smith and Mr. Sloan,

On November 13, the Recording Academy (“Academy”) and Songwriters of North America (“SONA”) participated in a conference call convened by the U.S. Copyright Office (“Office”) to discuss the Office’s ongoing rulemaking pursuant to the Music Modernization Act (“MMA”). Specifically, the call was arranged to discuss industry agreements between music publishers and certain digital music providers (“DMPs”) and the impact those agreements should have, if any, on the transfer of royalties to the Mechanical Licensing Collective (“MLC”). The Academy was represented by Todd Dupler, Managing Director of Advocacy and Public Policy. SONA was represented by Executive Director Michelle Lewis, Cameron Berkowitz, Adam Gorgoni, Lauren Hancock, Abby North, and Sarah Robertson.<sup>1</sup>

At the beginning of the conference call, the Copyright Office gave the organizations representing songwriters the opportunity to speak first. During this opening, the Academy and SONA each established that their primary concern is ensuring that songwriters are paid appropriately for the royalties they are due in accordance with the MMA. The Academy further expressed an openness and desire to hear the DMPs explain how their proposal to offset or discount royalties transferred to

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<sup>1</sup> Lauren Hancock served as the primary spokesperson for SONA. Also participating on the call were representatives from the MLC, the DLC, Artists Rights Alliance, DiMA, Music Artists Coalition, NMPA, NSAI, Society of Composers & Lyricists, Songwriters Guild of America, and Spotify.

the MLC by the amounts paid under negotiated agreements with music publishers is permissible under the MMA.

DiMA, on behalf of the DMPs, sought to assure the songwriter groups that the DMPs were committed to paying everything that is owed to songwriters and publishers that did not participate in the negotiated agreements. DiMA's representatives went on to explain how a reference to "generally accepted accounting principles" ("GAAP") in the statute allowed them to deduct the monies paid to publishers under private agreements from the accrued royalties that must be transferred to the MLC under the MMA. In DiMA's view, these agreements, which extinguish the legal claims that participating publishers may have had against DMPs for the unlicensed use of musical works, also satisfy the requirements of the statute.

However, as the Academy articulated, this requires a very expansive reading of the statutory language. 17 U.S.C. § 115(d)(10)(B) sets forth a very detailed and specific course of action that DMPs must follow in order to take advantage of the limitation on liability for unlicensed uses provided by the MMA. A DMP must first attempt to match every unlicensed musical work used to the correct copyright owner. If it successfully does so, it must pay the appropriate royalties to the owner along with a statement of account. If it cannot locate the owner, it must hold onto the royalties and at the appropriate time transfer the royalties to the MLC along with a statement of account. The negotiated agreements do not represent the payment of accrued royalties for unmatched works that have been properly matched to the copyright owner. The provision to "maintain" accrued royalties in accordance with GAAP is meant to safeguard the royalties until they can be successfully matched to the owner or transferred to the MLC. It is not intended to provide a trap door through which accrued royalties can be disposed of in a way not prescribed in the statute.

This prompted further discussion of the agreements themselves, and whether publishers passed through the money they received to their songwriters. Many songwriter groups expressed continued frustration that so little is known about the agreements, including how much money was involved, how the money was accounted for, and whether songwriters benefitted from it. However, it was noted that even if songwriters did share in the revenue from the agreements, that did not necessarily satisfy the requirements of the MMA.

The discussion later shifted to the Office's Supplemental Notice of Proposed Rulemaking issued on November 5. The proposed rule largely adopted the recommendations of the DMPs and accepted their view that they are not obligated to transfer to the MLC all accrued royalties for unmatched and unlicensed works. In particular, the proposed rule appears to adopt the DMPs reliance on GAAP. SONA inquired about the Office's interpretation of GAAP and sought more insight into the Office's analysis that produced the supplemental proposed rule. The Office declined to provide additional information regarding its decision-making process.

The conference call did not lead to resolution or agreement on any of the issues. However, the discussion did expose that there are clear differences in opinion regarding the plain meaning of the statute and whether the Office's attempt to resolve the disagreement through rulemaking is appropriate or advisable. The discussion also highlighted that there is still an underlying lack of transparency with regard to the private agreements between the DMPs and publishers. Our respective organizations look forward to providing additional input on these matters in response to the Supplemental Notice of Proposed Rulemaking.

The Recording Academy and SONA appreciate the Office's continued commitment to seek input from the songwriter community as it oversees implementation of the Music Modernization Act. The Office has an indispensable role in safeguarding the interests of songwriters and ensuring that the MMA fulfills congressional intent. Our organizations remain available to provide additional input and assist however we can as the Office carries out its duties.

Respectfully Submitted,

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