



August 08, 2022

VIA EMAIL

Mr. John Riley
Assistant General Counsel, U.S. **Copyright Office**
Library of Congress
101 Independence Ave., SE
Washington, DC 20559-6000

Re: Summary of Comments of *Ex Parte* Meeting Regarding Request by Digital Services for an Indefinite Extension of Time to Adjust Royalty Reporting Following Decision in *Phonorecords III* Remand

Dear Mr. Riley:

The Association of Independent Music Publishers (AIMP) would like to thank the Representatives of the Copyright Office for their time, courtesy, and consideration in meeting with the AIMP on August 4, 2022. This letter serves as a summary of our comments stemming from the August 4 meeting.

The representatives who participated in the August 4th Meeting on behalf of AIMP were John Ozier, Nashville President & National Chair, Teri Nelson Carpenter LA Chapter President and Michael Lau, New York Chapter President. The representatives participating on behalf of the Copyright Office were John Riley, Jason Sloan, and Shireen Nasir.

The Association of Independent Music Publishers (AIMP) is a national organization originally formed in 1977 by a group of Los Angeles music publishers, and currently has local chapters in Los Angeles, New York, Nashville and Atlanta. We are the largest Independent Music Publisher organization in the world. The organization's primary focus is to advocate, educate and inform music publishers about the most current industry trends and practices by providing a forum for the discussion of the issues and problems confronting the music publishing industry. The AIMP includes in its membership not only independent music publishers, but those publishers that are affiliated with record labels or motion picture and television production companies. In addition, individuals from other areas of the entertainment community, such as motion picture, television, multimedia and home video producers, the record industry, music licensing and supervision, songwriters, artist managers and members of the legal and accounting professions are active in the AIMP.

The AIMP requested the meeting to share with the Copyright Office AIMP's concerns regarding the recent request by the Digital Licensee Coordinator ("DLC") and its members for an indefinite extension of time for DMPs to submit reports of adjustment following a decision in the *Phonorecords III* remand proceeding. Currently, the digital music providers ("DMPs") will have a six month period following the final determination in the *Phonorecords III* remand to submit reports of adjustment to past annual usage reports under the Section 115 digital blanket license and statements of adjustment to pre-blanket license unmatched usage reported to the Mechanical Licensing Collective ("MLC"). This period would not start to run until the final determination is published in the Federal Register.

The request from the DLC and DMP for an indefinite extension of time will seriously affect members of our organization from self-published songwriters all the way to larger independents who have already had to wait for their rights to be fully litigated through this appellate process, and will compound the damage caused by Covid-19 to our members'



businesses. This request seems out of line with appropriate business practices and is made with no regard to the rightsholders who have been waiting so long for these earnings which are needed now more than ever.

The DLC and its members asked that the Copyright Office place the six-month deadline on indefinite hold “while the Office conducts a rulemaking to collect input from the entire industry on the challenges involved in adjusting reporting for those prior periods.” The DLC and its members justified this request based on the asserted need to avoid potential “uncertainty” and “harms” from a change in rates on remand, as well as “inefficient allocation of resources.” The AIMP believes that this rationale is at best, incorrect, and at worst, disingenuous.

There is no meaningful “uncertainty,” as the DMPs will be able to make the adjustments in the current six-month deadline.

- The DMPs already have the underlying data (i.e., monthly song and transaction data) necessary to calculate any adjustment. The DMPs well understood that the *Phonorecords III* rate period “straddles” two different licensing regimes (the pre-Music Modernization Act (“MMA”) song-by- song regime and the post-MMA digital blanket license regime), that there would need to be separate adjustments for separate years, that some DMPs have voluntary licenses, that payments for historical unmatched royalties would need to be adjusted, and that DMPs may need to “retool” their reporting systems “to account for the new rates and terms.” The DMPs should have prepared for such adjustment and certainly are not short of resources to apply any adjustments to the existing data.
- The so-called “challenges” that the DLC and its members face are nothing different than what all publishers face in paying their clients both current royalties and adjusting royalties. Indeed, AIMP members often have to pay out more royalty types under more configurations and for more periods than the DMPs will under any adjustments required by *Phonorecords III*. No matter the size of AIMP member companies, the responsibilities are the same. Further, PROs and CMOs both face the same issue and are able to render current and adjusted statements of royalties on a massive scale without delay. Actually, they are perfecting their systems even in light of constant challenges that they face and are paying on a shorter turnaround than any other time in history. Just look at what the MLC has done in such a short period of time. In fact, with respect to adjustments for periods after January 1, 2021 (i.e., the blanket license period), *the MLC handles all of the processing and distribution*. The DMPs’ adjustment reporting obligation for this period thus will be limited to providing updated royalty *pool* information (and turning over any additional royalties).
- The DMPs have not articulated any reasonable basis as to why DMPs have bona-fide operational issues that would prevent them from providing updated royalty pool information for the blanket license period within the six-month timeframe. Rather, their requested relief seems focused on recent conversations with vendors regarding adjustments related to *pre-2021* payments. But even there, the DMPs fully understood as early as 2018 that adjustments would be necessary and at that time had ongoing relationships with vendors, such as HFA and MRI, to address those circumstances. While it appears they did not timely work with their vendors to prepare for this outcome, there is still ample time to make any necessary adjustments.

The only “harm” to the DMPs is the natural consequence of any failure to comply with the known regulatory framework, and this is far outweighed by the harm actually done to music publishers by having their lawful compensation unjustly withheld.



- The DMPs have failed to specify what the threatened “uncertainty” and “harm” caused by the current six-month deadlines actually is. To the extent the DMPs are concerned they may not be able to meet the six-month deadline for all of the necessary adjustments, Section 115 already provides what happens in that scenario. It bears emphasis that this date will be six months after the *final* remand determination is published. This means that DMPs will actually have *more* than six months to make the necessary adjustments after the CRB’s initial remand decision comes down. They will have the six months provided under the regulations, *plus* the period of time between the initial determination and publication of the final determination in the Federal Register, during which time the DMPs will have notice of the overall rate structure and terms.
- As the AIMP understands the statute, failure to report accurately can be grounds for termination if the accurate information was available to the DMP, and the DMP both fails to report the information and then fails to cure the avoidable default for 60 days after receiving notice of default. See 17 U.S.C. 115(d)(4)(E). In other words, DMPs are protected against unavoidable reporting failures, and would be liable only for late fees in those innocent situations. Thus, if a DMP truly could not process and obtain the necessary reporting information within the regulatory time frame, then the MMA would appear to protect the DMP against default for that failure. This is the proper dividing line, as it separates bona fide delays from willful truancy in paying royalties. The Office thus need not and should not give DMPs a free pass around the MMA’s reporting standards by extending deadlines even where accurate royalty reporting is available to the DMPs. If the DMPs are unable to meet the deadline, they can and should be required to pay the late fees provided under Section 115 and the implementing regulations. At the end of the day, the only real “harm” the DMPs might face from missing the deadline to submit reporting adjustments is the payment of late fees. But the DMPs have known all along that this was a possibility, and, they did not object to the six-month adjustment deadline when given an opportunity to do so during the relevant rulemakings. That the DMPs now, apparently, worry that meeting the deadline will be difficult does not excuse them from their obligation to pay late fees.
- Conversely, as AIMP explained during the August 4 Meeting, rightsholders face very real and significant harms if the DMPs are allowed to continue delaying paying higher rates. In contrast to the DMPs — which include some of the largest, wealthiest, and most successful companies on earth — many rightsholders are small businesses with limited resources who depend on royalty payments to stay afloat. The songwriters to whom such royalties ultimately flow are individuals often working multiple jobs just to make ends meet.

The DMP’s late request for a delay of the regulatory deadlines is curious.

- The DMPs waited until very late in the proceedings to request a delay of the regulatory deadlines. The DMPs well understood the above “challenges” before the adjustment rules were finalized. The DMPs have long been on notice that adjustments would be necessary after the CRB issues its remand determination. The DMPs state that they have been “developing plans” and “scoping the range of operational and engineering work” that will be needed once the CRB issues its remand determination, but do not provide any details regarding what they have actually done in the nearly *two years* since the D.C. Circuit’s decision to prepare for adjustments.
- Given that the DMPs will be *able* to make the adjustments within the six-month deadline, and will not endure unnecessary harm in doing so, it appears that the DMPs are simply continuing to utilize the same strategy as they have used throughout the *Phonorecords III* proceeding, which is to do everything possible to delay paying higher rates for as long as possible. When the CRB decided to increase the royalty rates in its original *Phonorecords III* determination, the DMPs appealed immediately to the D.C. Circuit and obtained a vacatur and remand of the higher rates. Once the D.C. Circuit Court issued a decision remanding the proceeding back to the



CRB, the DMPs started paying at the lower 2012 *Phonorecords II* rates during the pendency of the remand. Now, on the eve of a remand decision, and concerned that the CRB will reinstitute higher rates, the DMPs ask for an indefinite delay of their obligation to pay rightsholders additional royalties for past usage. Given this pattern, there does not appear to be any credibility to the DLC and its members' vague warnings of "uncertainty" and "harm," and there is no actual justification the further delays they seek.

While the DMPs complain about "inefficient allocation of resources," many rightsholders continue to face serious economic hardship from the lingering effects of the COVID-19 pandemic and have now been waiting for *years* to receive the full increased royalties they would have been entitled to by law had the DMPs not chosen to appeal the original *Phonorecords III* determination. The AIMP is asking the Copyright Office to not allow this hardship to continue by enabling DMPs to further delay paying rightsholders the higher royalties they are owed once the remand decision comes down. Rather, consistent with its mission to promote creativity and free expression, the Copyright Office should ensure that rightsholder are fairly and timely compensated if and when the CRB orders higher rates in the *Phonorecords III* remand.

Rightsholders are almost halfway through the *final* year of the *Phonorecords III* rate period and are *still* being paid under the prior *Phonorecords II* rates. DMPs now seek to indefinitely delay any requirement that they pay additional royalties to rightsholders — **royalties to which rightsholders are entitled by law** — for the portions of the rate period that have already passed in the event the Copyright Royalty Board ("CRB") orders higher rates in its final remand determination.

In closing, the AIMP feels that the DLC and its members have had ample time to prepare for the remand decision. We respectfully urge The Copyright Office to consider the songwriters and publishers who have had to wait an unreasonable amount of time already to realize earnings due to them. The thought that the DLC is requesting an indefinite additional amount of time for not doing what all other businesses must do to meet current and future challenges which is simply to be prepared defies logic. We are all seriously affected when revenue is not realized. It is beyond any good business standard to continue this financial hardship on rights owners who rely on DMPs that have collected our earnings and have not paid us in full.

The AIMP appreciates the time and attention of the Copyright Office's regarding this matter. Please do not hesitate to contact us as we are ready and willing to provide further assistance as needed.

Sincerely yours,

John Ozier
Nashville Chapter President
on behalf of the Nashville Chapter Board

Teri Nelson-Carpenter
Los Angeles Chapter President
on behalf of the Los Angeles Chapter Board

Michael Lau
New York Chapter President
on behalf of the New York Chapter Board