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LATHAM & WATKINS LLP

November 23, 2021

VIA EMAIL

Kevin Amer
Acting General Counsel and Associate Register of Copyrights
101 Independence Ave. SE
Washington, DC 20540

Re: *Ex Parte* Letter Regarding November 19 Meeting

Dear Mr. Amer:

This letter is to follow up on the *ex parte* meeting held on November 19, 2021, with Digital Licensee Coordinator, Inc. ("DLC") regarding treatment of public domain works under the blanket license for mechanical rights. Garrett Levin, Kirsten Donaldson, Lauren Danzy, Sy Damle and Alli Stillman attended on behalf of the DLC. In addition to you, John Riley, Jason Sloan, and Shireen Nasir attended from the Copyright Office.

We first followed up on a few issues discussed in our November 15, 2021 meeting, specifically: (1) The significance of this issue—and the immediacy of the concern[1]—to digital music providers, particularly those focused on classical music. As one example, a digital service had indicated that the MLC's current treatment of public domain works results in a 40% to 50% increase in mechanical royalties as compared to the approach DLC submits is the proper one under the statute and regulations. (2) We confirmed that while some services, such as Classical Archives, Idagio and Primephonic, have robust databases of public domain works, most other services rely on the MLC to match and identify public domain works. (3) We also confirmed that it is the experience of the DLC members and licensing administration vendors that the MLC is matching far less public domain usage than the vendors had been matching prior to this year.

We then further discussed the statutory and regulatory structure for royalty calculations under section 115. As set forth in detail in the addendum to our letter to you following our November 15 meeting, the relevant rate regulations , in the final step of the calculation, plainly provide that royalties should be allocated from the royalty pool on a per-play basis to *all musical*

[1] In this connection, we noted that this issue is currently being raised in the context of the *Phono IV* rate setting proceeding.

works, which necessarily include public domain works. 37 C.F.R. § 385.21(b)(4) (2020).[2] It is then the Office's role to provide the rules that specify that royalties allocated to public domain works should be excluded from the royalty calculation. The royalty allocation to public domain works should be treated the same way as the royalty allocations to musical works covered by voluntary licenses—a process clearly established in the regulations and currently followed by the MLC—such that the MLC can then deduct the allocation to public domain works from the blanket license royalties charged to the digital music provider, just as the MLC deducts the statutory royalties allocated to usage of compositions covered by voluntary licenses.

Specifically, pursuant to 37 CFR § 210.27(g)(2)(ii), "[t]he mechanical licensing collective shall engage in efforts to confirm uses of musical works subject to voluntary licenses and individual download licenses, and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license. These efforts may include providing copyright owners with information on usage of their respective musical works that was identified by a digital music provider as subject to a voluntary license or individual download license." The Office can clarify in the regulations that this existing process may also be used to identify or confirm uses of musical works that are in the public domain, and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license.

We also briefly discussed other regulatory provisions potentially implicated by this issue:

- 37 C.F.R. § 210.27(c)(4), which sets forth usage and royalty reporting rules, arguably does not require reporting usage of recordings embodying public domain works at all because such recordings are not being used in "covered activities."[3] But that is only operationally feasible where the blanket licensee has identified all recordings of public domain musical works, which most licensees rely on the MLC to do. This approach also assumes that the licensee is calculating and paying a royalty pool to the MLC that is limited to the revenue associated with the "Offering," which, in turn, is limited to "Licensed Activity," meaning delivery of musical works under voluntary or statutory license. 37 C.F.R. § 385.2. As noted in prior submissions, blanket licensees have generally not deducted service revenue attributable to usage of public domain works, as it is logistically more

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[2] To the extent that the MLC feels constrained not to allocate royalties from the pool to public domain works on the ground that streams of public domain works are not "Plays" of musical works, as that term is defined in section 385, then that constraint must also apply to the construction of "Offering," which, as noted, is limited to Licensed Activity; thus, on the MLC's reading, the payable royalty pool must then also exclude revenue attributable to the usage of public domain works.

[3] The term ''covered activity'' means the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under this section. 17 U.S.C. § 115(e)(7).

complex than the far simpler approach of crediting royalties allocated to usage of public domain works at the last step of the royalty calculation (which was the industry standard approach prior to 2021). The Office could provide additional clarity in this section that, to the extent recordings embodying public domain works are reported, they will be allocated per-stream royalties from the royalty pool, which will be credited back to the licensee.

- Relatedly, 37 C.F.R. § 210.27(d)(2)(ii) permits licensees that are dependent on the mechanical licensing collective to confirm usage subject to applicable voluntary licenses to use a reasonable estimation "of the amount of payment for such non-blanket usage to be deducted from royalties."[4] The Office could clarify in this section that licensees may similarly rely on estimates of public domain usage when reporting to the MLC, subject to later adjustment when the MLC confirms usage of public domain works.

We also discussed the limitations of the existing dispute resolution procedures under 17 U.S.C. § 115(d)(3)(K)—which call for the MLC to establish policies and procedures for copyright owners to address disputes relating to ownership interests in musical works licensed under section 115—and 17 U.S.C. § 115(d)(4)(E), which addresses notice of default and termination of blanket license, and federal district court review. Neither process is expressly designed for disputes between the licensees and the MLC or between licensees and claiming copyright owners regarding the public domain status of a given musical work, although the MLC dispute policy could be adapted to this context.[5] The existing regulations do, however, contemplate that individual licensees may self-identify (rather than rely on the MLC to identify) public domain works, as this is used to determine a given licensee's requirement administrative assessment payments. *See* 37 C.F.R. § 390.1 (defining "Unique Sound Recording Count" to exclude "a sound recording of a musical work that is in the public domain *and designated as such in a monthly report of use*" (emphasis added)). The Office could establish by regulation a dispute-resolution procedure to fill this gap, pursuant to its ongoing authority to adopt such regulations "as may be necessary or appropriate to effectuate the provisions" of the blanket license. 17 U.S.C. § 115(d)(12).

We also discussed the possibility that the Copyright Royalty Board be asked to offer its views on this issue in response to a request from the Office and/or in the context of any rulemaking.

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[4] Alternatively, if the proper approach is to exclude revenues attributable to public domain works from service revenues, *see supra* n.1, the reasonable estimation provision in 37 C.F.R. § 210.27(d)(2)(i) would presumably be available to make this estimation where needed.

[5] The current dispute policy applies to conflicting ownership claims, and is available at https://themlc.com/dispute-policy.

We appreciate the Office's time and attention to this important issue.

Best regards,

Sy Damle