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June 1, 2022

VIA EMAIL

Suzanne Wilson
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, D.C. 20559-6000

Re: *Ex Parte* Letter re: May 27, 2022 Copyright Office Meeting

Dear Ms. Wilson,

This letter is submitted on behalf of the Digital Licensee Coordinator, Inc. ("DLC"), following the *ex parte* meeting held by the Copyright Office on May 27, 2022.[1] The meeting focused on issues relating to the timing of retroactive adjustments and ongoing reporting in light of the Copyright Royalty Board's pending *Phonorecords III* remand proceeding.

The DLC and its members are dedicated to ensuring that royalties continue to flow to copyright owners with minimal disruption and that any changes to the rates for prior time periods be addressed efficiently and effectively. We are also aware that the *Phonorecords III* remand proceeding presents a unique set of challenges for the entire industry, including operational challenges that will be shared by the digital music providers ("DMPs"), the Mechanical Licensing Collective ("MLC"), and their vendors alike. As part of our commitment to expeditious implementation, we raise these challenges to the Office now, before details of the final rates and specific timing needs are known, so that it can begin to consider these issues and minimize the impact of rulemaking activity.

First, the rate period straddles two very different statutory licensing regimes: (a) the pre-MMA song-by-song regime, under which DMPs made payments directly to identified publishers, and under which adjustments may apply, and (b) the newer blanket licensing regime administered by the MLC. Making adjustments under both regimes simultaneously will be a challenge, particularly within the timeframes currently contemplated by the statute and corresponding regulations.

Second, even within the blanket licensing regime, there are two types of adjustments that are necessary under the existing interim regulations, given the amount of time that has passed without final rates and terms: one set of adjustments for the 2021 fiscal year, which will require

[1] A list of attendees is provided in an addendum.

adjusted annual reports of usage (including a new certification by a CPA); and another set of adjustments for usage that has occurred in fiscal year 2022.

Third, some DMPs have voluntary licenses that similarly bridge that change in regimes and therefore will be simultaneously handling the operational complexity of adjusting royalty payments pursuant to such voluntary licenses.

Fourth, DMPs that took advantage of the limitation on liability in 17 U.S.C. § 115(d)(10) must recalculate unclaimed royalties and provide an updated cumulative statement of account to the MLC.

And, finally, DMPs and the MLC will have to retool their ongoing reporting systems to account for the new rates and terms, with potentially no lead time before the final rates become effective.[2]

DLC members have been hard at work developing plans to ensure the continued flow of royalties going forward, as well as reconciliation of past due amounts. Those plans include in house preparation as well as working with the two primary outside vendors, HFA and MRI, keeping in mind that HFA is also the primary vendor for the MLC and that the industry has a shared interest in HFA prioritizing its processing of ongoing monthly distributions for the MLC under the blanket licensing regime.

While the outcome of the remand proceeding is uncertain, including whether historic rates will be increased or decreased and to what extent other royalty inputs and calculations might change that impact reporting requirements, DLC members have been scoping the range of engineering and operational work that is likely to be required regardless of the specifics of the determination. Since the original rules were issued prior to the transition to the blanket license, at least three developments have made it clear that the transition to the new rates and terms is likely to be more challenging than originally anticipated. First, the length of time that it has taken for the remand proceedings to conclude has meant that a full year of blanket license reporting has occurred and certification of the annual report of usage is already underway. Second, in December, the Copyright Royalty Board issued a "working" proposal that suggests it is considering substantial changes to the rate structure, which could increase the complexity of the work that will be required to implement the final determination. Third, conversations with the services' main vendors in recent months suggest that their resources are significantly more constrained than anticipated.[3] Based on their analysis, DLC members have come to the

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[2] Although the CRB will issue an initial determination prior to the issuance of the final determination, there could be changes to material terms as a result of rehearing motions. *See generally* 17 U.S.C. § 803(c)(2); 37 C.F.R. § 353.1. And in the sixty-day period between issuance of the final determination and its publication in the Federal Register, the Register could review the determination and find that elements of it are based on legal error. 17 U.S.C §§ 802(f)(1)(D) 803(c)(6).

[3] There are a limited number of vendors capable of undertaking the necessary adjustments and reporting on behalf of DMPs and, to date, these vendors have not committed to providing even ballpark estimates of the time it will take to transition to the new rates and terms after they are adopted.

conclusion that the timelines contemplated by the existing regulations—where they exist—are likely inadequate to completely and accurately recalculate the amounts due, regardless of how the rates are ultimately decided.

Specifically, the existing regulations contemplate that adjustments to (i) past annual reports of usage under the blanket license including required CPA certifications and (ii) pre-blanket license unmatched usage that has been reported to the MLC must occur within six months of the publication of the final determination of rates and terms. Pre-blanket-license matched usage is not subject to any specific deadline or even clearly addressed in the regulations,[4] but practically speaking the reprocessing and adjustment of such usage must be done at the same time as the reprocessing of unmatched reporting in the pre-blanket reporting period. And the regulations are silent on the transition period for forward-looking reporting that comports with new rates and terms, although a transition period will be necessary to properly program reporting systems and ensure accurate usage reporting.

Completing all of the steps above requires significant engineering, quality control, and coordination by and among the services, their vendors, the MLC and rightsowners, in addition to the lead time needed to engage CPAs for analysis and certification of 2021 adjusted annual reporting.[5] We have serious concerns about the ability to do all of this for every category of reporting— simultaneously—within the time provided in the regulations.

Instead, what the DLC proposes, given the unique circumstances here, is a staggered approach to the adjustments. First and foremost, the DLC and its members believe that full resources should be devoted to keeping ongoing royalties flowing with minimal interruption. With the other accommodations we seek here, the DLC's members believe[6] an appropriate transition period would be to require reporting under the new *Phonorecords III* rates in the

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[4] 37 C.F.R. § 210.7

[5] With respect to the required certifications, it is unclear whether the certification of adjusted reporting requires the service to attest that all of the information (including historical usage information that may be unaffected by the change in rates and terms) is accurate based on the service's best current knowledge. *See, e.g.*, 37 C.F.R. § 210.10(j)(5)(i) (requiring certification that "all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith."). If the certification is interpreted that way, then it is likely that services will have to reprocess all of their usage for past years based on, *e.g.*, their current understanding of how to detect artificial streaming, or their current knowledge of historic copyright ownership, which will significantly inflate the time needed to submit adjusted reporting. Such an approach would also require significant coordination with the MLC to reconcile the service's updated usage processing with the work the MLC may already have done and royalties already paid out for a particular set of usage that might need to be returned, adding a layer of complexity that would seem entirely unintended by the MMA. If, instead (and more sensibly, given the context), the certification were interpreted to require the service to attest as to the accuracy of the information that has been *changed* as a result of the change in rates and terms, the volume of work will be more limited.

[6] This belief is based on the publicly available briefing documents and materials in the *Phonorecords III* remand proceeding, which indicate that a decision will not encompass changes beyond changes to the rate structure or inputs. Changes beyond the rate structure or inputs, such as changes to categories of "service offerings" or the like, would likely require additional time to implement.

second full reporting period after the final determination. In other words, if the *Phonorecords III* final determination were to be published anytime in the month of June 2022, DMPs would have until submission of August 2022 usage reporting to begin reporting under the new *Phonorecord III* rates.[7] In this scenario, June and July 2022 usage reporting would be made in a timely manner under *Phonorecord II* rates (or the existing rates used by a DMP) and would then be adjusted, along with any other prior 2022 monthly reporting, in the ordinary course during the annual report of usage process. This will ensure that there are no gaps in usage reporting or royalty payments while accommodating the need to adjust reporting systems to reflect new rates.

In addition, the DLC would propose a temporary pause of prior-year retroactive adjustment timing (*i.e.*, for 2021 annual reporting under the blanket license, and for both matched and unmatched pre-blanket-license-period reporting) while the Office conducts a rulemaking to collect input from the entire industry on the challenges involved in adjusting reporting for those prior periods. Once DLC members and their vendors can take stock of any required operational adjustments stemming from the publication of the final determination, we intend to propose a reasonable timeframe for adjustments that is realistic while prioritizing the payment of any additional monies to identified rights holders.[8]

As we discussed. the DLC believes it is within the Office's power to adopt these transition periods. Section 115 gives the Office broad authority to prescribe the requirements under which monthly payments shall be made. 17 U.S.C. § 115(c)(2)(I), (d)(4)(A)(iii). In addition, the Office has the authority to "adopt regulations . . . regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods." *Id.* § 115(d)(4)(A)(iv)(II). The transition period rules fall squarely within the scope of these provisions. In effect, the proposed rules provide for later adjustment of some reports of usage filed after publication of the Final Determination in the Federal Register, just as the rules already provide for later adjustment of reports of usage filed prior to the publication of the Federal Register. Moreover, to the extent there is any question about the Office's authority, it may rely on the general authority to "conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection." *Id.* § 115(d)(12)(A). Providing an appropriate transition period so that the entire industry—the services, their vendors, the MLC and rights owners—have time to properly pay and process royalties under the new *Phonorecords III* rates is entirely in furtherance of the provisions of section 115.

Nor is the Office's regulatory authority displaced by the Copyright Royalty Board's authority to establish rates and terms for the statutory license. The Board has no authority over usage reporting and royalty payment requirements. *See Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License*, 73 Fed. Reg. 48,396, 48,398 (Aug. 19, 2008) ("Authority to issue regulations regarding … statements of account is the exclusive domain of the Register."). Moreover, the Register's

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[7] For a reference to usage reporting periods and due dates, see https://www.themlc.com/dsp-key-dates-0.

[8] One option may be to stagger the adjustment deadlines, so that adjustment of 2021 annual reports of use would be prioritized first, followed by unmatched reporting for 2020, then 2019, and so forth.

authority is not constrained by the effective date of the rates and terms. We already know that the effective date of the new rates will be retroactive to the start of the *Phonorecords III* rate period, and at any rate, that is a statutory, not regulatory matter. *See Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020) (affirming Board's finding that the participants had agreed to an effective date of January 1, 2018); see also 17 U.S.C. § 803(d)(2)(B). The effective date of the rates and terms is thus a logically distinct question from when the reporting under those rates and terms must begin.

You asked how this proposed rule would intersect with the provisions related to late fees. The CRB has the authority to adopt a late fee. But a late fee is due only if the reporting is late; determining the due dates for adjusted usage reporting is, again, within the scope of the *Register's* authority, not the CRB's. *See* 73 Fed. Reg. at 38,399 ("Under section 803(c)(7), the CRJs have a clear authority to include terms with respect to late payments. However, the Register notes that this authority applies solely to payments that are in fact past due."). If the Office were to adopt a rule providing a transition period, then any reporting in compliance with the deadlines under those rules would not be subject to a late fee.

In terms of the regulatory process, we would propose that the Office initially adopt an interim rule that has immediate effect which (1) specifies a reasonable deadline for transitioning to the new *Phonorecords III* rates going forward, and (2) suspends all other deadlines for retroactive adjustments to rates (matched and unmatched) pending rulemaking. The Office has authority to adopt rules without notice and comment and make them effective immediately where good cause is shown.[9] The Office has used that authority repeatedly in circumstances like these, where waiting until the completion of the full notice-and-comment rulemaking process before adopting a rule would have undermined the very goals of the rule.[10] Here, there is good cause to adopt an immediately effective interim rule, in light of the imminence of the *Phonorecords III* remand determination, and the need for services, their vendors, and the MLC to appropriately prioritize their engineering and other operational efforts once that determination is finalized. Waiting for a notice-and-comment process at this point in time would introduce uncertainty and precipitate the very harms the rule is meant to address, by requiring inefficient allocation of resources to multiple streams of work simultaneously.

The Office could then publish a notice of proposed rulemaking seeking input from any interested parties on the appropriate deadlines for adjusting reporting for 2021 and earlier, including pre-blanket license usage. Because the MLC will ultimately need to process much of the adjusted reporting and pay rightsholders, the DLC is actively conferring with the MLC about these timing issues and technological limitations, and for its part, the DLC is receptive to reasonable joint proposals either with the MLC or with rightsholders. That said, the DLC current

[9] 5 U.S.C. § 553(b)(3)(B), (d)(3).

[10] *See, e.g.*, 85 Fed. Reg. 84,243 (Dec. 28, 2020) (adopting supplemental interim rule related to permanent download reporting "[b]ecause of the short amount of time remaining before the January 1, 2021 license availability date"); 70 Fed. Reg. 15,587 (Mar. 28, 2005) (amending rule related to group registration of photographs without notice and comment because "compliance with the normal APA procedures would jeopardize the agency's assigned missions").
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request would not add new MLC obligations and/or duties with respect to any of the usage at issue.

To assist the Office's consideration of our proposal, we have provided proposed regulatory language in an addendum.

Thank you for your time and continued attention to these issues.

Best regards,

Sy Damle

APPENDIX – REGULATORY PROPOSAL OF DIGITAL LICENSEE COORDINATOR, INC.

§ 210.27 Reports of usage and payment for blanket licensees.

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(g) Processing and timing.

(1) Each monthly report of usage and related royalty payment must be delivered to the mechanical licensing collective no later than 45 calendar days after the end of the applicable monthly reporting period. Where a monthly report of usage satisfying the requirements of 17 U.S.C. 115 and this section is delivered to the mechanical licensing collective no later than 15 calendar days after the end of the applicable monthly reporting period, the mechanical licensing collective shall deliver an invoice to the blanket licensee no later than 40 calendar days after the end of the applicable monthly reporting period that sets forth the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, which shall be broken down by each applicable activity or offering including as may be defined in part 385 of this title. **When there has been a change in rates and terms under part 385 of this title via the publication of a final determination of rates and terms in the Federal Register, (1) the monthly report of usage and related royalty payment comporting with the new rates and terms must be delivered by the applicable deadline for the second next full month after such publication of the final determination of rates and terms published in the Federal Register and the prior rates and terms shall be applicable to monthly reporting until that time occurs (*e.g.* if a final determination of rates and terms is published in the Federal Register in June, the monthly report of usage for June and July would be under the prior rate structure, but the monthly report of usage for August would being reporting under the new rate structure); (2) any unadjusted prior monthly usage for the current fiscal year may be adjusted with the annual report of usage.**

§ 210.34 Temporary suspension of certain reporting deadlines in light of change in rates and terms.

Pending further rulemaking by the Office, the following reporting deadlines for adjusted reports of usage and adjusted cumulative statements of account are suspended, solely to the extent the requirement to adjust such reporting is triggered by the publication of a final determination of the rates and terms under part 385 of this title: § § 210.10(k); § 210.27(g)(4)(ii).

Attendees at May 27, 2022 Copyright Office *Ex P*arte Meeting

The Copyright Office
John Riley
Jason Sloan
Shireen Nasir

Digital Licensee Coordinator, Inc.
Kirsten Donaldson
Lauren Danzy
Garrett Levin (as DLC Board Member)

Latham & Watkins LLP (counsel to DLC, Inc.)
Sarang V. Damle
Allison L. Stillman

Amazon Music
Alan Jennings

Apple
Meghna Viswanadha

Beatport
Torben MacCarter

Google/YouTube
Jen Rosen

Pandora
Alex Winck
David Ring

Spotify
Lisa Selden

Tidal
Angela Abbott
Les Watkins