

# LATHAM & WATKINS LLP

March 4, 2020

**VIA EMAIL**

Regan Smith  
General Counsel and Associate Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave. SE  
Washington, DC 20559-6000

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Re: Ex Parte Letter – March 2, 2020 Meeting

Dear Ms. Smith,

I write on behalf of Digital Licensee Coordinator, Inc. (“DLC”) to follow up on our March 2, 2020 meeting. In accordance with the Office’s ex parte meeting policy, this letter summarizes the discussion that took place. In addition, I am attaching copies of the two documents we provided during the meeting: a sample report with direct deal information, and a sample monthly statement of account.

The following people were present on behalf of DLC by phone: DLC Board Chair James Duffett-Smith of Amazon; Board Secretary Lisa Selden of Spotify; Board Treasurer Sarah Rosenbaum of Google; Alex Winck of Pandora; Alan Jennings of Amazon; Jen Rosen and Dan Pifer of Google; Seth Goldstein of MediaNet; and Allison Stillman of Mayer Brown. Attending in person on behalf of DLC were non-voting Board Member Garrett Levin of the Digital Media Association; Vice-President, Legal and Assistant Secretary of DLC Kevin Goldberg; Board Member Nick Williamson of Apple; and Sy Damle of Latham & Watkins as outside counsel to DLC. Regan Smith, Anna Chauvet, Jason Sloan, Terry Hart, and Cassandra Sciortino attended on behalf of the Copyright Office.

*DLC’s Newest Member - MediaNet*

We took the opportunity to introduce the newest DLC member, MediaNet, and Mr. Goldstein explained during the meeting his perspective on many of the usage reporting and payment issues from the perspective of a smaller licensee.

### *Unaltered Sound Recording Metadata*

DLC emphasized that digital music providers are willing to provide metadata that is useful to the matching process, provided that the administrative burdens of supplying that data are justified by an actual improvement in matching. We explained that the MLC's proposal that so-called "unaltered" metadata from the record labels be preserved and reported to MLC will not actually materially improve matching. DLC also explained the practical problems with maintaining unaltered metadata, including the difficulty of defining what precisely counts as "unaltered," given that there is typically some back and forth with a label, which often will itself update that metadata, and challenges involving back catalog data that a digital music provider already possesses. In addition, DLC emphasized the fact that the MLC's request seems ill-suited for its stated ends, as digital music providers receive different metadata at different times, and over 99% of tracks reported already have an ISRC from the labels, which is a far better mechanism to identify the sound recording.

At the Office's request, we have also asked DLC members to estimate the percentage of track titles that are altered when received from record labels. MediaNet estimated that fewer than 1% of track titles are altered, and in every case at the request of the labels. YouTube also confirmed that fewer than 1% of the tracks it ingests are altered. Other DLC members are continuing to look into this question, and we can revert back with any further data we receive. It is also our understanding that the alterations are fairly minor, and do not obscure the identity of the track; any reasonably sophisticated matching algorithm would be able to handle those alterations.

We also discussed whether SoundExchange's database has a sufficiently global reach. As we explained, this is a question best directed to SoundExchange itself. But, as discussed, DLC sees no reason why SoundExchange's database would be insufficient for the MLC's purposes, given that the MLC is responsible for collecting royalties for *domestic* uses. Moreover, SoundExchange has to collect sound recording information for purposes of the statutory license under section 114, and it is not clear why this would not be sufficient for the statutory license under section 115.

We addressed the MLC's apparent concern about the expense of having to engage in multiple rounds of matching with SoundExchange. We made the point that the DLC member's incentives are aligned with the MLC's—we want this process done in the most efficient way possible—but that the MLC's suggestion to obtain disparate sound recording data from every digital music provider and significant non-blanket licensee is far less efficient than obtaining it from a single source like SoundExchange.

### *Level of Accounting Detail*

We discussed the MLC's proposals to require more detail about royalty accounting than is directly relevant to the core function of collecting royalties, matching recordings to musical works, and paying the appropriate copyright owners.

We expressed concern with the MLC's apparent intent to report through this detailed and competitively sensitive information to publishers. We shared a sample HFA report to publishers,

and noted that we are comfortable with continuing to provide that level of detail to publishers, provided the Office adopts rules provide for confidentiality of that data.<sup>1</sup> The Office asked about the administrative burdens of providing this data as part of the usage reporting, and each of the DLC members spoke about the particular issues they would face in trying to report at a more detailed level of granularity. In particular, MediaNet, as a small digital music provider, explained that the burden on it would be substantial, given the small size of its engineering team. MediaNet explained that it is likely representative of most small licensees.

We also discussed the MLC's claim that reporting in other territories requires reporting based on customer price points (family, student, etc.). We explained that in all territories, including the United States, reporting is based on how rates are established. Thus, if in a particular country rates are based on different customer price points, the reporting reflects that rate structure. The rates established by the Copyright Royalty Board, however, are not based on customer price points, which is why reporting based on those distinctions should not be required. Thus, the DLC's proposal is consistent with international practice—it ties reporting to the different categories of “offerings” as the CRB has defined them.

The Office asked DLC to provide a reaction to a potential alternative proposal to the MLC's: whether DLC members would be comfortable agreeing to keep the information the MLC is seeking as part of the “records of use” that are to be “maintained and made available to the mechanical licensing collective by digital music providers,”<sup>2</sup> rather than including them in our monthly reporting. As understood by DLC, this would be analogous to the existing recordkeeping regulations for promotional uses, but would be expanded to some additional level of accounting detail based on the information the MLC is seeking. The Office asked us to assume that this information would be available only to the MLC and not reported to publishers.

DLC is open to further exploration of this alternative proposal, subject to resolution of questions around the availability of the records of use to the MLC (including reasonable interpretation of what it means for the records to be “made available,” such as potential limits on the frequency with which the MLC can request this information), and the imposition of appropriate confidentiality restrictions related to this commercially sensitive data.

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<sup>1</sup> To reiterate a point made at the meeting, the MMA *obligates* the Office to adopt confidentiality rules that “ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used.” 17 U.S.C. § 115(d)(12)(C). The information currently provided on the section 115 statements of account—financial data like service revenues and commercially sensitive data like subscriber counts—unquestionably constitutes “confidential, private, proprietary, or privileged” information. Although, prior to the enactment of the MMA, the Office had rejected a joint regulatory proposal by copyright owners and licensees to adopt confidentiality restrictions with respect to information contained in section 115 statements of account, 79 Fed. Reg. 56190, 56206 (Sept. 18, 2014), the MMA's unambiguous language now supplants and overrides that previous rulemaking.

<sup>2</sup> 17 U.S.C. § 115(d)(4)(iii).

### *Sound Recording Copyright Owner Data*

The Office raised an issue relating to the RIAA's concern that the MLC's database will be populated with information in the "sound recording copyright owner" field that may be misleading as to the actual copyright owner of a sound recording. The RIAA has suggested that other fields may be less misleading: the "party ID" field, the "imprint label" field,<sup>3</sup> or the "PLine" field, which are apparently part of DDEX's "electronic release notification" ("ERN") message standard.<sup>4</sup>

The Office asked us to follow up with information about (a) whether we maintain the specific fields mentioned above ("party ID"; "label imprint"; and "PLine") and (b) whether we could report them to the MLC if needed. It is our understanding that these fields are part of the ERN standard, but are listed as optional fields in the DDEX specification. In other words, labels may not report these fields to digital music providers as part of their ERN messages. To the extent the MLC adopts the DDEX standard for reporting by digital music providers to the MLC, and digital music providers receive this data from record labels, it may be possible to report these fields through to the MLC. At the same time, this seems to be yet another reason to rely on a single authoritative source of sound recording data—like SoundExchange—which can collect whatever data the labels feel reflect the best information about their works. Moreover, as DLC noted at the meeting, DDEX has an extensive and rigorous process of evaluating the fields that are required to be reported to assist with matching, and the Office should be wary of requiring digital music providers to report metadata that DDEX has not deemed necessary.

### *Invoice and Response File*

We discussed a number of specific questions regarding invoices and response files. We explained that under our proposal, the invoice and response file would come in simultaneously. In fact, as we explained, HFA (the MLC's chosen vendor) refers to the relevant response file as "royalty invoice backup file."<sup>5</sup> We intend to provide the Copyright Office a document reflecting HFA's specification for this file, which includes the full range of fields reported back to digital music providers, subject to DLC's ability to navigate any confidentiality restrictions that apply to that document.

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<sup>3</sup> We understand that DDEX refers to this as the "LabelName" field.

<sup>4</sup> Dec. 6, 2019 Letter from S. Chertkoff, RIAA, to R. Smith, U.S. Copyright Office; Dec. 9, 2019 Letter from S. Chertkoff, RIAA, to R. Smith, U.S. Copyright Office.

<sup>5</sup> Under current practice, there are actually two "response files." One is the "license response file," which is used for purposes of song-by-song licensing, when content is added to a service. Second is the "invoice backup file" mentioned above. In light of the new blanket license, DLC anticipates that the content of these separate response files would be merged into a specific response file.

*Server Fixation Date*

We discussed the MLC's proposal to require digital music providers to report the date on which a sound recording was first fixed on the server operated by the digital music provider. As we explained, not all digital music providers today even store this information, let alone report it. It continues to be unclear to us how this information is relevant to the legal question of which party should get paid for uses of sound recordings when the grant of rights in the musical work has been terminated. We welcome further conversation with the MLC to better understand the purpose of this request.

*Outreach and Communications Efforts*

DLC and the Office also discussed outreach and communications efforts to educate stakeholders. DLC expressed its high level of interest in engaging in outreach efforts, and doing so in a coordinated fashion with the MLC and the Copyright Office. Office staff indicated that they are also interested in such coordination and raised the idea of a joint meeting to discuss these efforts. DLC looks forward to continuing that discussion with the Office and the MLC.

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Thank you again for your continued attention to this rulemaking, and as always we are available to answer any questions you have.

Best regards,



Sarang V. Damle

Attachments

**Monthly Statement of Account**

**Interactive Streaming Statutory Rate Calculation**

Service Offering: [REDACTED]  
Licensee: [REDACTED]  
Licensee Address: [REDACTED]

Period: October 2019

**Inputs**

|   |    |            |
|---|----|------------|
| Subscribers                                   |    | [REDACTED] |
| Service Revenues                              | \$ | [REDACTED] |
| Total Cost of Content                         | \$ | [REDACTED] |
| Performance Royalties                         | \$ | [REDACTED] |
| Plays (total plays adjusted for playing time) |    | [REDACTED] |

**Step 1**

|                                    |            |            |
|------------------------------------|------------|------------|
| All-in Royalty Pool, greater of:   |            |            |
| a) 12.30% of Service Revenue       | \$         | [REDACTED] |
|                                    | <b>and</b> |            |
| b) 23.10% of Total Cost of Content | \$         | [REDACTED] |
| All-In Royalty Pool equals         | \$         | [REDACTED] |

**Step 2**

|   |    |            |
|---|----|------------|
| Performance Royalties                               | \$ | [REDACTED] |
| Separate Mechanical from Performance (less 1209.35) | \$ | [REDACTED] |

**Step 3**

|  |            |            |
|--|------------|------------|
| Greater of Step 2 Result               | \$         | [REDACTED] |
|  | <b>and</b> |            |
| \$0.15/qualified subscriber/month      | \$         | [REDACTED] |
| Payable Mechanical Royalty Pool equals | \$         | [REDACTED] |
| Effective Mechanical Rate per Play     | \$         | [REDACTED] |

To request records of any promotional or free trial uses of the works, please contact:  
publisherinfo@[REDACTED]

|  |
|--|
| <b>HFA Service Offering Key:</b>   |
| S1 = Standalone Non-Portable Streaming Only (a service where use is only interactive streams w/ non-portable device to which the streams were originally transmitted while device has a live network connection) |
| S2 = Standalone Non-Portable Mixed Use (service where use is either interactive streams or limited download but only from a non-portable device to which the streams or downloads were originally transmitted)   |
| S3 = Standalone Portable Mixed Use (service where use is interactive streams or limited downloads from a portable device)  |
| S5 = Free and Ad-Supported Services (free of charge to the end user)   |









