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LATHAM & WATKINS LLP

December 11, 2020

VIA EMAIL

Regan Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, D.C. 20559-6000
regans@copyright.gov

Re: *Ex Parte* Letter re: December 9, 2020 Copyright Office Virtual Meeting

Dear Ms. Smith,

This letter is submitted on behalf of Digital Licensee Coordinator, Inc. ("DLC"), following the *ex parte* meeting held by the Copyright Office on December 9.[1] The meeting focused on several discrete issues concerning the Office's rulemaking on the transition period transfer and reporting of royalties,[2] as well as the open rulemakings on the musical works database[3] and treatment of confidential information by the Mechanical Licensing Collective ("MLC") and DLC.[4] We briefly summarize the key points discussed during the meeting.

Records of Use

DLC addressed the comment, submitted by the MLC, supporting the proposed rule that would require digital music providers ("DMPs") to maintain records of use to support the information set forth in a cumulative statement of account or adjusted statement, but proposing an amendment that would give the MLC "reasonable access" to such records, and requiring a DMP to respond to a "reasonable request" within 30 days.[5] DLC noted that MLC had not offered any explanation for why the value of the records of use provision would be "lost" without this. To the contrary, as DLC explained, the MLC has no need to consult such records of use, as the MLC has no role in enforcing the accuracy of the cumulative statement of account—which is a feature of

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

[2] 85 Fed. Reg. 70544 (Nov. 5, 2020) ("SNPRM").

[3] 85 Fed. Reg. 58170 (Sept. 17, 2020).

[4] 85 Fed. Reg. 22559 (Apr. 22, 2020).

[5] MLC SNPRM Comments at 14 n.6.

the limitation on liability, and *not* the blanket license. In the event that a copyright owner has questions or wishes to challenge the propriety of a cumulative statement or adjusted statement, it may do so with the DMP. Indeed, the only reason any records of use related to the cumulative statement of account would be relevant is in the context of such a challenge, which is always—and only—available to a copyright owner. Thus, DLC is not aware of a scenario in which any request for MLC access to records of use would be reasonable.

Harmless error

DLC addressed the Office's inquiry in the SNPRM as to whether to adopt a harmless error provision, similar to that which exists for usage reporting by significant nonblanket licensees, and in regulations governing the pre-MMA monthly and annual statements. DLC emphasized the need for such a provision to likewise apply to the cumulative statements, for the same reasons that such provisions were necessary and appropriate in the other circumstances in which they are found. The cumulative statements will necessarily be prepared using at least some of the same processes that DMPs must use to generate monthly and annual statements, and include specifically the information that would have been included at the time of the use. Thus, the treatment of harmless errors should be the same.

Moreover, the proposed estimate and adjustment mechanism doesn't obviate the need for a harmless error provision with respect to the cumulative statements (or statements of adjustment), because some harmless errors might not result from the use of an estimate, and/or might not be appropriate for adjustment. Examples include royalty calculation errors that would not result in a change in payment to an individual copyright owner, or that would result in only overpayments to copyright owners, or shortfalls of *a de minimis* amount. One type of example would be a mistake in calculating revenue has no impact because royalties are paid under the per-subscriber minimum prong rather than the percentage of revenue prong in the statutory royalty formula.[6] (The same might occur in the reverse: an error in calculating the number of subscribers that has no material effect on the royalties paid because the percentage of revenue prong applies.) The regulations governing the royalty calculation methodology and certification procedures for statements of account have always contemplated the possibility of these kinds of immaterial error, and the process of generating the cumulative statement of account is no different.[7]

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[6] 37 C.F.R. 385.12(b)(1) (2017) (providing that the "all-in royalty . . . is the greater of . . . [t]he applicable percentage of service revenue . . . and . . . [t]he minimum specified in §385.13"); 37 C.F.R. § 385.2(b)(3) (2019) (defining the "payable royalty pool" to be "greater of" two figures).

[7] We also briefly discussed the DLC's proposed changes to the statute of limitations waiver. Those changes were intended to clarify two points: First, it clarifies that the waiver applies when a DMP fails to properly remedy an underpayment of royalties, not merely because it has used the estimate procedures. Second, it clarifies that the "asserted underpayment" must be one asserted *by the MLC* in accordance with the procedures for determining underpayments of estimated payments as set forth in paragraph (c)(5)(iv) of the proposed regulations, rather than an underpayment asserted, *e.g.*, by a litigant in the context of a lawsuit.

Accordingly, DLC proposes using similar language as that of the harmless error provision for pre-MMA monthly and annual statements (37 C.F.R. 210.9):

> Errors in a Cumulative Statement of Account or Statement of Adjustment that do not materially prejudice the rights of the copyright owner shall be deemed harmless, and shall not render that statement of account invalid.[8]

Partial-share payments

With respect to the proposed rule regarding aggregate paid share information, DLC members observed that the hypothetical scenario posited by the MLC in its comments, as a basis for needing individual share payment info, is not one that tends to occur in reality; where multiple shares have been matched and paid, any remaining unmatched shares are typically owned by a third-party copyright owner, not one that has already been paid some portion of the royalties. So the proposal to require information on the share percentages addresses an issue that is more hypothetical than real. DLC reiterated its two principal concerns: (1) publisher agreements require keeping individual shares confidential, and (2) vendor agreements require confidential treatment of that same information. DLC highlighted Music Reports' support of the Office's revision to the rule, which is based on DLC's understanding that MRI would be far more comfortable providing aggregated data to services and is likely to impose burdensome conditions on disaggregating the split data.

Database Rulemaking

In connection with the rulemaking concerning the musical works database, DLC revisited the issue of whether information concerning performing rights organization ("PRO") affiliation should be captured by the MLC and included in the database. DLC reiterated the point it had made in prior comments that including such information is important, and it simply makes no sense not to include it. To the extent the MLC receives PRO affiliation data, it should be made available as part of the rights-holder information in the database.

Indeed, as explained before, the MLC will be receiving PRO affiliation data anyway in the Common Works Registration ("CWR") files that it receives from publishers.[9] Contrary to the MLC's suggestion, this information is not wholly unrelated to the MLC's mission to match sound recordings to musical works, and identify copyright owners of those musical works. As the

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[8] The language in the harmless error provision governing significant nonblanket licensee reporting requirements (37 C.F.R. 210.28(k)) differs slightly from this, in that it is tailored toward a report of information that serves a purpose other than payment of royalties to copyright owners. It also includes a good faith requirement, which is already separately included as a requirement in the proposed rule concerning the calculation and certification of the cumulative statement, so need not be repeated in this harmless error provision.

[9] *See* CISAC, CWR User Manual at 22 (Sept. 23, 2011) (noting that the "USA License Ind." field "indicates whether rights for this publisher flow through ASCAP, BMI, or SESAC for the U.S."), *available at* https://members.cisac.org/CisacPortal/consulterDocument.do?id=22272.

Songwriters of North America ("SONA") point out, "information related to PRO affiliation could be informative in some instances."[10] For instance, "if a licensee knows the creator of a musical work is affiliated with a particular PRO, it could help to identify the appropriate copyright owner of the work."[11] For instance, a songwriter affiliated with ASCAP could target their searches of the MLC's database for works that the MLC has affiliated with ASCAP. Songwriters could also more readily confirm that the PRO and MLC databases contain consistent information regarding information such as share splits and unique identifiers—in other words, it will make the MLC database a useful cross-check for PRO data.

In addition, BMI has taken the position that it is not barred from licensing mechanical rights in addition to public performance rights, and ASCAP has sought an amendment to its consent decree permitting it to engage in such licensing.[12] If the PROs begin to administer mechanical rights in the United States, then including information about PRO affiliation in the MLC's database will be especially important.

Moreover, capturing this information would further the MMA's overarching goal of improving data transparency in the music ecosystem. No one—not even the MLC—questions the tremendous value of capturing and publishing this data in one central location. To the extent MLC's objection to including it relates to timing and resource constraints, DLC notes that no specific details have been offered as to the nature of such constraints. As noted, DLC is not requesting that an entirely new database be created to comprehensively report PRO information. DLC is merely requesting that the MLC *not throw away valuable musical works metadata it is receiving* anyway, and instead simply capture those additional fields of data and publish the information to the public. That said, the DLC would not be opposed to an accommodation such as a six-month transition period for this aspect of the database.

The Office has a golden opportunity to bring transparency into this area of the market, through a very simple move—requiring the MLC to capture data it is receiving anyway, and publish that data in one extra field in a database it is already spending millions to build. We encourage the Office in the strongest terms to grab that opportunity now.

Confidentiality of MLC and DLC information

Finally, the Office sought clarification with respect to categories of confidential information. Specifically, the Office asked for further clarification of the DLC's proposed definition of "MLC Internal Information," which is intended to capture information generated by the MLC that (a) may be shared with members of the MLC Boards and Committees and (b) should

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[10] SONA Docket No. 2020-8, NOI Comments at 6.

[11] *Id.*

[12] BMI DOJ Comments at 2 n.5 (Nov. 20, 2015), *at* https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi18.pdf; ASCAP DOJ Comments at 33-34 (Aug. 9, 2019), *at* https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf.

not be shared outside the MLC. Examples include information related to personnel actions (e.g., hiring decisions and disciplinary actions), competing vendor bids, and procurement contracts.

During our meeting, the Office noted that the definition of MLC Internal Information could create confusion because it incorporates the definition of Confidential Information, which encompasses information that would be shared outside the MLC, such as information related to the calculation of royalties that may be shared with copyright owners.[13] The DLC's rule attempted to address that issue by carving out "Confidential Information from a copyright owner, digital music provider, or significant nonblanket licensee" from the definition of MLC Internal Information. That said, we appreciate the Office's concern, and so would be open to a revision to the definitions of "MLC Internal Information" and "DLC Internal Information." Importantly, however, those definitions should still incorporate the exceptions to the definition of Confidential Information, which exclude information that is public or may be made public by law or regulation, including information that the MLC must include in its annual report, audit report or other required public disclosures:

> (3) "MLC Internal Information" means sensitive financial or business information created or collected by the mechanical licensing collective for purposes of its internal operations, such as personnel, procurement, or technology information, subject to the exclusions in paragraph (b)(2)(i), (ii), and (iii).
>
> (4) "DLC Internal Information" means sensitive financial or business information created or collected by the digital licensee coordinator for purposes of its internal operations, such as personnel, procurement, or technology information, subject to the exclusions in paragraph (b)(2)(i), (ii), and (iii).

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

Best regards,

Sarang V. Damle

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[13] Note, however, that the DLC believes that the Office is required to impose confidentiality restrictions on such information even if shared with copyright owners. *See* DLC Comment, Docket No. 2020-7, at 4-5.

LATHAM & WATKINS LLP

Attendees at 12/9 Copyright Office Ex Parte Meeting

Digital Licensee Coordinator, Inc.

Lauren Danzy
Kevin Goldberg
Garrett Levin (as DLC Board Member)

Latham & Watkins (counsel to DLC, Inc.)

Sarang V. Damle
Allison L. Stillman

Amazon

Jon Cohen
Alan Jennings

Apple

Nick Williamson

Google

Jen Rosen

Pandora

David Ring
Cynthia Greer
Tsholo Moraba

Qobuz

Dan Mackta

Soundcloud

Daniel Susla

Spotify

Kevan Choset

Tidal

Justin Joel

Beatport

Brandon Shevin

U.S. Copyright Office

Regan Smith
Anna Chauvet
Jason Sloan
John Riley
Cassie Sciortino