

LATHAM & WATKINS^{LLP}

February 14, 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 - Copyright Office Meeting

Dear Ms. Smith,

I write on behalf of Digital Licensee Coordinator, Inc. (“DLC, Inc.”) to follow up on our February 11, 2020 meeting, and to thank you for the opportunity to discuss the regulatory implementation of the Hatch-Goodlatte Music Modernization Act.

The following people were present on behalf of DLC, Inc.: DLC, Inc. Board Chair James Duffett-Smith of Amazon; Board Secretary Lisa Selden of Spotify; Board Treasurer Sarah Rosenbaum of Google; Board Member Cynthia Greer of Pandora; non-voting Board Member Garrett Levin of the Digital Media Association; Vice-President, Legal and Assistant Secretary of DLC, Inc. Kevin Goldberg; Alex Winck and Iain Morris of Pandora; Emery Simon and Lucy Bridgwood of Spotify; Nick Williamson of Apple (by phone); Jen Rosen of Google (by phone); and Sy Damle of Latham & Watkins and Allison Stillman of Mayer Brown as outside counsel to DLC, Inc. Regan Smith, Anna Chauvet, Jason Sloan, Terry Hart, John Riley and Cassandra Sciortino attended on behalf of the Copyright Office.

Attached to this letter is a copy of the slide deck DLC, Inc. presented to the Copyright Office during our meeting, which addresses each of the topics discussed. In particular:

- We provided an update on our educational and outreach efforts, including our efforts to expand the membership of DLC, Inc. and establish a presence on the web.
- We discussed DLC, Inc.’s perspective on the need for a “back-and-forth” process between digital music providers and the MLC, including the particular issues that arise when a digital music provider has voluntary licenses that the MLC cannot administer. In particular, we emphasized the critical nature of the industry-standard “response file” that digital music providers receive from licensing organizations. In this context, we discussed

the concept of imposing an interim deadline on digital music providers for providing usage reporting. As we explained, different services have different internal accounting and payment practices, and imposing a rigid interim reporting deadline on all services will impede rather than accommodate those different practices. For example, some services, as they currently do, will keep money on account with the MLC to satisfy royalty obligations; in those cases, the service would not need an invoice/response file before it can make a payment, and may thus take something approaching 45 days to process and report usage. Services that do need an invoice from the MLC to make payments, however, will naturally provide reporting more quickly, in order to give the MLC time to process the reporting and return the invoice.

- We discussed the details of MLC, Inc.’s expanded metadata requests, and that these requests involve balancing the engineering and operational burdens on the licensees with the benefit to the MLC of these additional pieces of metadata. We explained that the MLC’s obligation to “confirm proper payment of royalties due”¹ is not a valid basis for requiring digital music providers to supply, on a monthly basis, detailed information that is aimed at verifying that the licensee has properly calculated the various inputs into the royalty calculation (*e.g.*, subscriber counts, service revenue, PRO payments, etc.). Instead, the statute provides a separate and explicit “verification” (*i.e.*, audit) process to “verify the accuracy of royalty payments by the digital music providers.”²
- We addressed the competing proposals regarding annual statements of account. In the context of that discussion, you asked us for information regarding adjustments that would need to be made within 18 months. We noted several examples, including that the application of fraud detection measures might result in adjustments to play counts, and technical glitches may require adjustment of other royalty inputs like subscriber counts. We are happy to follow up with more detail about these kinds of adjustments.
- We also discussed the regulatory requirements around notice of licenses, and you asked whether we would object to an amendment requirement. As we explained, an amendment requirement would serve no purpose, in light of the fact that the monthly reports themselves contain all of the necessary information.³ Moreover, such a requirement would serve as a trap for the unwary. It is unclear what the consequences would be for failure to amend, but to the extent they involve loss of the blanket license, that would be an unduly harsh consequence for what is a technical error.
- We also discussed confidentiality requirements, including the need for special rules that govern the participation of DLC, Inc. representatives on the MLC board and committees.

¹ See 17 U.S.C. § 115(d)(3)(G)(i)(I)(bb).

² See 17 U.S.C. § 115(d)(4)(D).

³ To be clear, as with the monthly usage reporting, MLC is also seeking information via the notice of license that is wholly unnecessary to fulfill its core royalty collection and distribution responsibilities.

You also asked us to follow up with more detail about several additional topics. These include: (1) the proper interpretation of the provision of the MMA referring to reporting “the number of digital phonorecord deliveries of the sound recording, including limited downloads and interactive streams”⁴; (2) whether the “service track ID” metadata field currently reported can be used to look up a specific track on the public interface of each of the digital music providers that constitute the DLC; (3) the difficulty of reporting server fixation date, if that information is already maintained by digital music providers; (4) a more extensive description of DLC Inc.’s proposed confidentiality regulations; (5) a description of the content of the current royalty statements provided to copyright owners by HFA (which we will provide subject to navigating any confidentiality restrictions); and (6) the MLC’s proposal to allow HFA to use information it obtains for other purposes, on an opt-in basis. We have not had sufficient time to fully analyze these additional topics, but will promptly follow up with our analysis of those and any other topics that the Office would find helpful for DLC, Inc. to address.

Thank you again for your time at our meeting and your efforts more generally to ensure that the Music Modernization Act fulfills its promise of a more efficient and transparent mechanical licensing regime.

Best regards,



Sarang V. Damle

Attachment

⁴ 17 U.S.C. § 115(d)(4)(A)(ii)(cc).

DLC, Inc. – Copyright Office Meeting

February 11, 2020

1

Agenda

- Status of operational/regulatory discussions & outreach efforts
- Usage and reporting issues
 - Timing of payment
 - “Back-and-forth” process
 - Metadata reporting to MLC
- Data collection efforts
- Annual statements of account
- Notice of license
- Confidentiality
- Transparency

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Operational/Regulatory Discussions and Outreach Efforts

- Status of ongoing operational advisory discussions
- Regulatory coordination between MLC and DLC
- Outreach to potential DLC members
- Educational efforts

3

Timing of Royalty Payment – Is Payment Due in 20 days?

- Section 115(c)(2)(I) specifies that, for the physical mechanical license, “royalty payments shall be made on or before the twentieth day” --- but does not specify a deadline at all for a monthly statement of account.
- Section 115(d)(4)(A)(I) states that, for the blanket license, follow 115(c)(2)(I), except that “monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.”
- To give effect to that instruction, the 45 days has to be about payment.

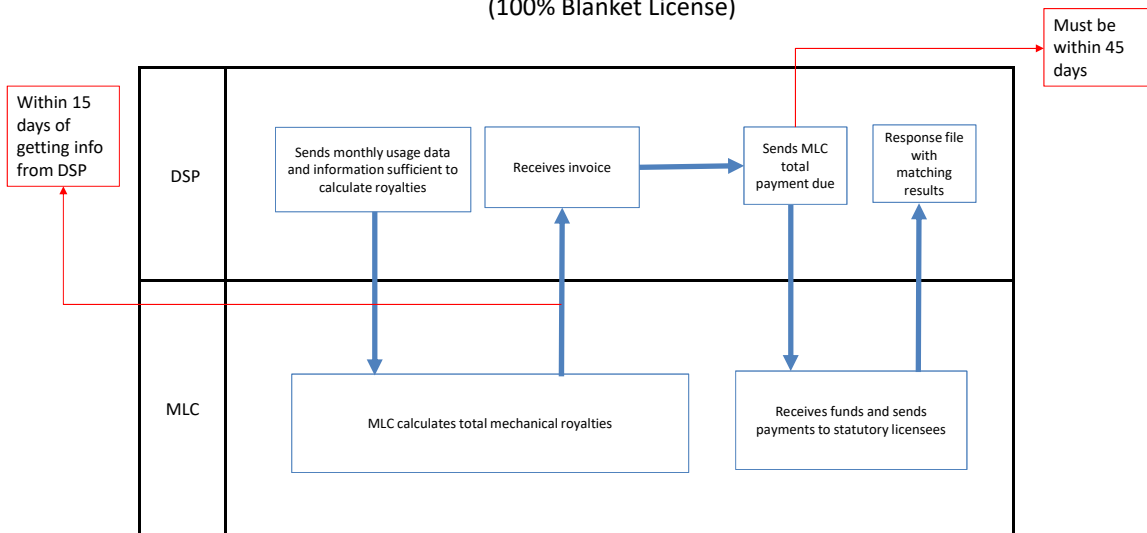
4

Timing of Royalty Payment – Is Payment Due in 20 days?

- Legislative history is absolutely clear that both reporting and payment is due 45 days after the end of a monthly reporting period.
 - See H. Rep. No. 115-651, at 27 (“Subparagraph A identifies the data that must be reported to the collective by a digital music provider *along with* its royalty payments due 45 calendar days after the end of a monthly reporting period.”); S. Rep. No. 115-339, at 82 (same).
- The MLC proposal makes little practical sense -- How would services know how much to pay without the usage reports, and what would the MLC even do with that payment without the usage reports?

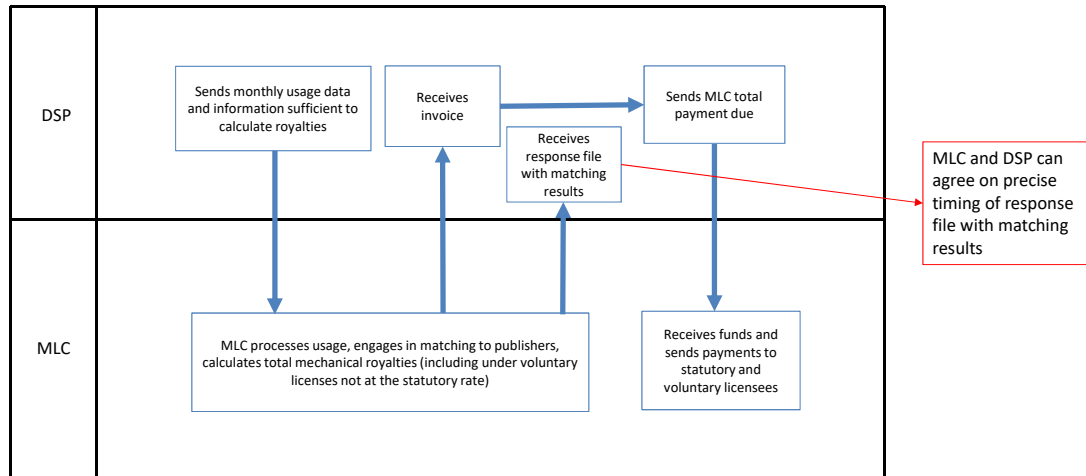
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DLC-Proposed Usage Reporting and Payment Model (100% Blanket License)



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DLC-Proposed Usage Reporting and Payment Model (MLC Administering Voluntary License)



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There is no requirement to use the MLC to administer voluntary licenses

- The MLC “may administer, including by collecting and distributing royalties, voluntary licenses issued by . . . copyright owners . . . for which the [MLC] shall charge reasonable fees for such services.” § 115(d)(3)(C)(iii).

8

There is no requirement to use the MLC to administer voluntary licenses

- “Musical work copyright owners may not require as a condition for entering into a direct license that the mechanical licensing collective administer a voluntary license.” S. Rep. No. 115-339, at 10.

9

There is no requirement to use the MLC to administer voluntary licenses

- In many cases the MLC *cannot* administer voluntary licenses.
 - The MLC cannot administer non-mechanical rights.
 - MLC cannot administer rights outside the US.

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What if the MLC is not administering the voluntary license?

- Raises a threshold question: What activities are within the MLC's *core duties*, that the administrative assessment should cover, and what count as *administering a voluntary license*, for which the MLC "shall charge reasonable fees."

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MLC Core Duties vs. Administration of Voluntary Licenses

- *Core duties include engaging in matching efforts*
 - MLC is to "[e]ngage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works)." § 115(d)(3)(G).

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MLC Core Duties vs. Administration of Voluntary Licenses

- *Core duties include engaging in matching efforts*
 - MLC is to “[e]ngage in efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such musical works (and shares thereof), and update such data as appropriate.” § 115(d)(3)(E).

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MLC Core Duties vs. Administration of Voluntary Licenses

- *Core duties include engaging in determining works subject to voluntary licenses and those not*
 - DMP must report “musical work copyright owners ... as to which a voluntary license, rather than a blanket license, is in effect” § 115(d)(4)(A)(ii)(II).

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MLC Core Duties vs. Administration of Voluntary Licenses

- *Core duties include engaging in determining works subject to voluntary licenses and those not*
 - MLC must “confirm uses of musical works subject to voluntary license . . . and the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license.” § 115(d)(3)(G)(i)(I)(bb).

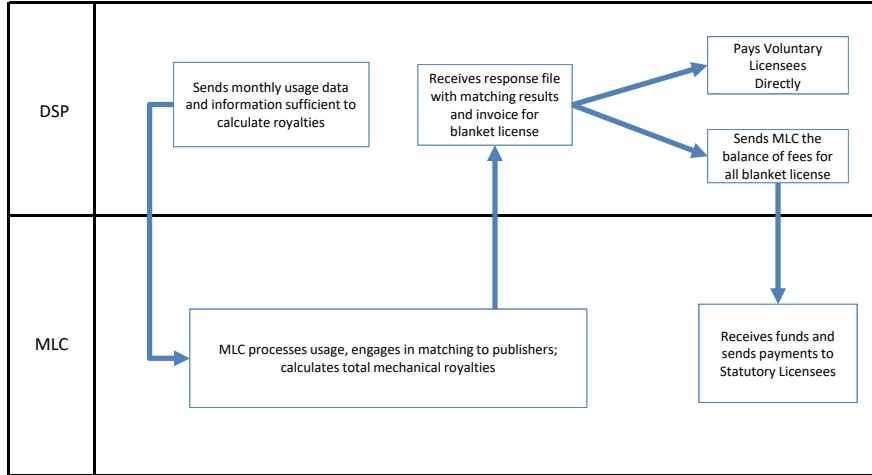
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MLC Core Duties vs. Administration of Voluntary Licenses

- *Administering a voluntary license includes:*
 - “Collecting and distributing royalties” <- § 115(d)(3)(C)(iii)
 - Preparing and mailing royalty statements
 - Related back office functions

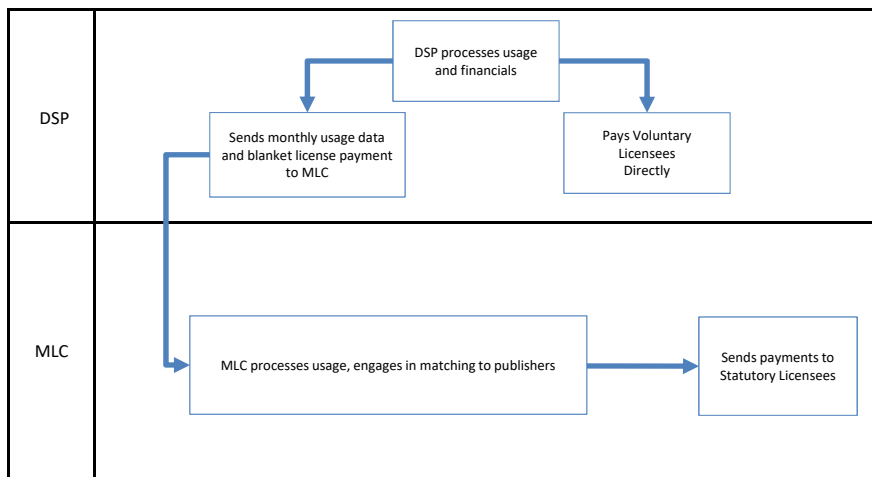
16

DLC-Proposed Usage Reporting and Payment Model (MLC Not Administering Voluntary License)



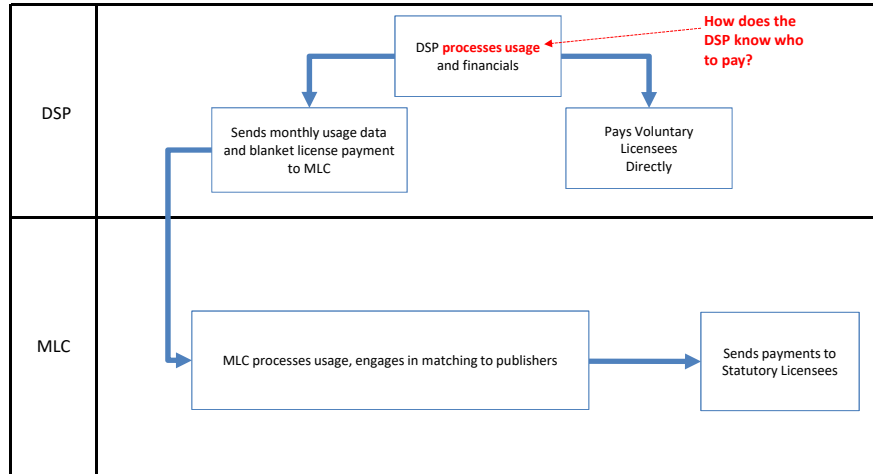
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MLC-Proposed Usage Reporting and Payment Model (MLC Not Administering Voluntary License)



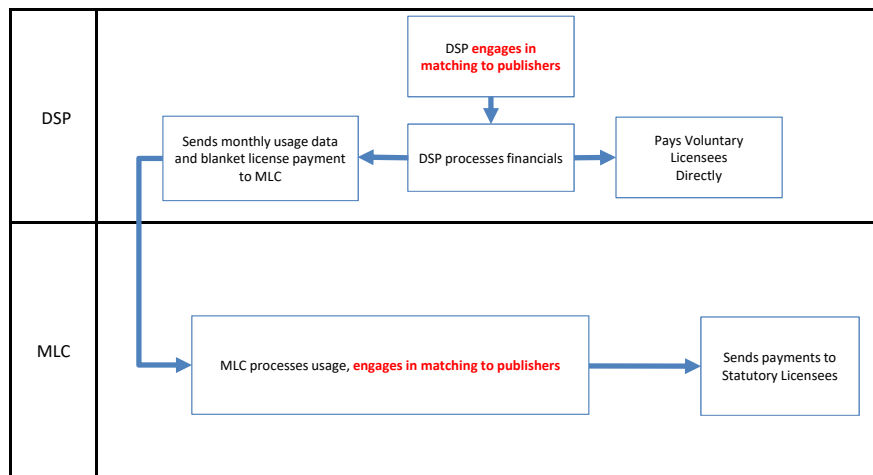
18

MLC-Proposed Usage Reporting and Payment Model (MLC Not Administering Voluntary License)



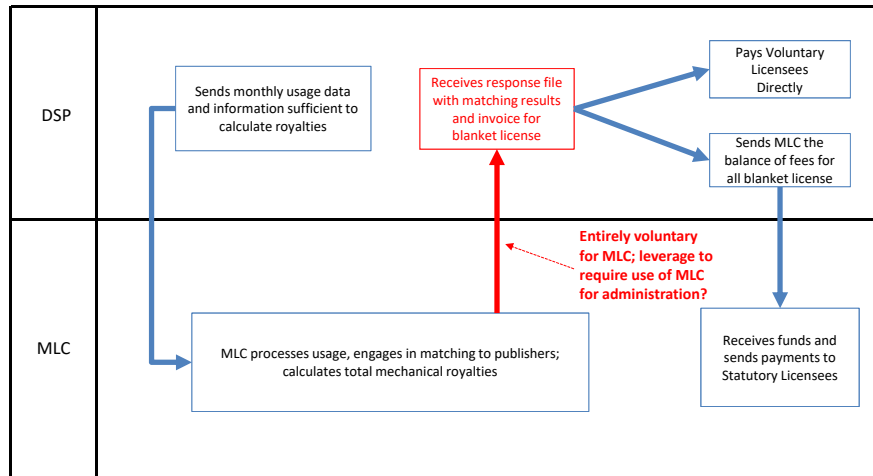
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MLC-Proposed Usage Reporting and Payment Model (MLC Not Administering Voluntary License)



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MLC Response to DLC (MLC Not Administering Voluntary License)



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Back-and-forth is the industry standard

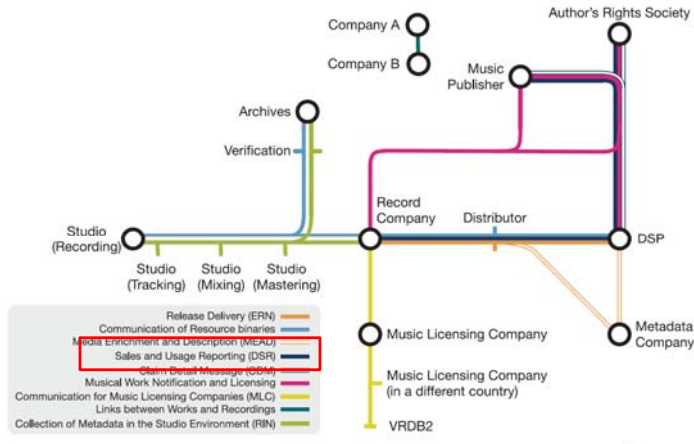
Existing vendors currently provide response files that include (at least) the following information:

- Song (composition) title
- Vendor-assigned song code
- Composer(s)
- Publisher name
- Publisher split
- Vendor-assigned publisher number
- Publisher/license status (*i.e.*, blanket/direct)
- Royalties per track

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Back-and-forth is the industry standard

Mark Isherwood Presentation, USCO Unclaimed Royalty Symposium

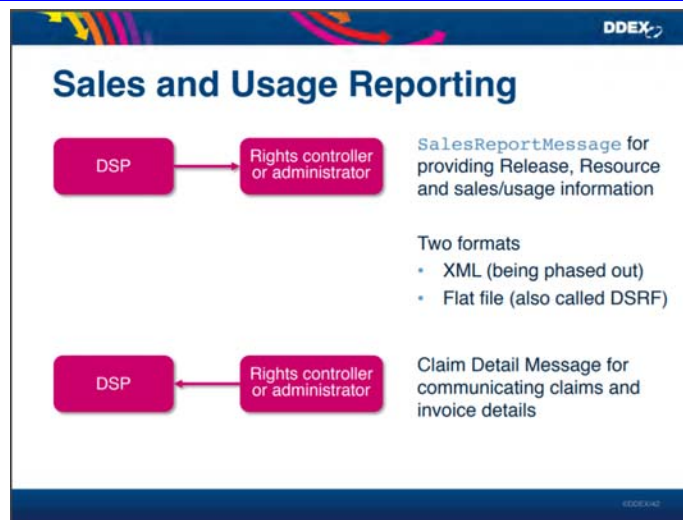


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Back-and-forth is the industry standard

<https://ddex.net/wp-content/uploads/2018/11/General-Overview-Slides@190115Standard.pdf>

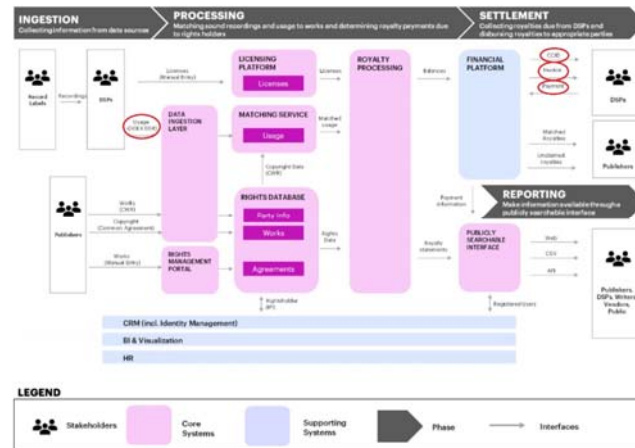


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Back-and-forth is the industry standard

Mechanical Licensing Collective, USCO Designation Proposal Exh. 3

Figure 1: Conceptual Solution Architecture and Integrations



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Other reasons services need a “response file”

- Respond to questions from licensors (*e.g.*, questioning whether we are properly licensed)
- Accounting (*e.g.*, recoupment of advances and minimum guarantees)
- If tracks are covered under blanket vs. direct
- Business intelligence (*e.g.*, what direct deals to do)

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Details on MLC Metadata Requests

- Plays not subject to statutory royalties (non-music performances; promotional plays; etc.)
- “Unaltered” metadata from the sound recording licensors
- Track links
- Server fixation date

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MLC is asking for more data than necessary to calculate royalties

Maps onto 37
C.F.R. Part 385
offerings

Sample of
current **Monthly
Revenue Report**
to License
Administrator

Period Start Date	Period End Date	Subscriber Count	Service Revenue	Label Payments	PRO Payments	Service Offering Name
2019-01-01	2019-01-31	53535353	5555555.55	27272727.27	555555.55	free
2019-01-01	2019-01-31	35353535	33333333.33	15151515.15	777777.77	premium
2019-01-01	2019-01-31	5555	20000.00	10000.00	5000.00	bundle

Additional
details in MLC's
proposed regs:

- Provide # of promotional subscribers

- Provide details on discounts, deductions, or exclusions

- Break out service offerings into more granular tiers.
- Identify products and/or services that constitute the bundle including pricing details about the bundle

The MLC has not explained why it needs this data to perform its core matching, collection, and distribution activities. Moreover, these changes will be a substantial engineering challenge. For instance, the inputs into determining the prices of the elements of a bundle are not data that is stored in a format amenable to reporting.

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MLC is asking for metadata detail that is not helpful for matching

Sample of current "License Request File" to License Administrator:

Label Name	ISRC	Total Play Time (Minutes)	Total Play Time (Seconds)	Artist Name	Track Title	Composer Title	Album Name	Album UPC Code	Distribution Date	Service Track ID
Smith Records	USSM19804756	2	49	John Smith	My Best Song (Live Version)	Jane Smith	Early Songs	706301594728	20150401	waZMEXTypqcppvj4EV

Note: Under song-by-song licensing, this was the first step of a two stage process. Under blanket license this information can be reported with the monthly report.

99% of reported tracks have an ISRC today; can use this to get all the metadata from SX

Examples of how services currently transforms titles (and versions) in usage reporting:

1. Artist name fix ("Cure"; "The Cure"; "Cure, The" → "The Cure")
2. Clean up metadata to ensure contributors are credited correctly
3. Merge name + version. If given the name "Hello" and "Radio Edit." This will be merged into "Hello (Radio Edit)".
4. Cleanup illegal characters, remove redundant space. Convert half-width, double-width to "normal" given the language. Use NFC unicode normalization.

This can be used to look up the track on the service itself; no need for a link

Additional details in MLC's proposed regs:

- All Sound Recording information should be provided in the "same manner and format it was received from the record label...shall not revise or re-title any metadata collected"
- Link to an audio file
- Version (where there are multiple versions)
- Server Fixation Date

Would require maintaining a parallel archive of data. This is unnecessary.

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MLC seeking more detail regarding play count data that is not necessary for distribution of royalties

Sample of Monthly Track Usage file that is currently sent to HFA:

Period Start Date	Period End Date	Service Track ID	Mechanical Rights Flag	Play Count	Service Offering Name
2014-07-01	2014-07-31	waZMEXTypqcppvj4EV	Y	3	premium
2014-07-01	2014-07-31	waZMEXTypqcppvj4EV	Y	2	free
2014-07-01	2014-07-31	waZMEXTypqcppvj4EV	Y	3	bundle

Highlights of additional details in MLC's proposed regs:

- Exclusions:
- # of promotional Plays
 - # of plays under :30
 - # of plays of tracks owned by DSP
 - Fraudulent streams

Again, the MLC has not explained why it needs this data to perform its core matching, collection, and distribution activities. This is information it could seek to obtain in an audit.

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Data Collection Efforts

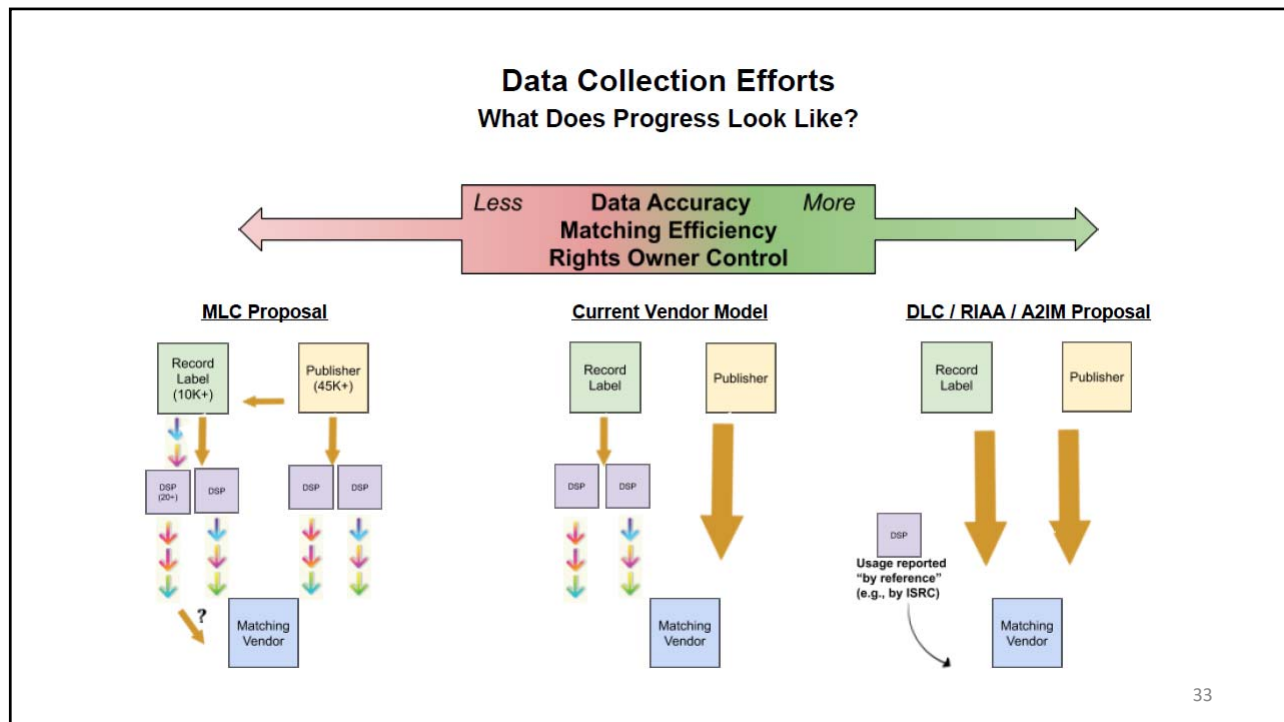
- DSPs do not have the ability to “require” labels and distributors to provide sound recording data.
- “Commercially reasonable” refers to what happens in the market.

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Data Collection Efforts What Does Progress Look Like?

- **DATA FROM THE SOURCE:** “It is the experience of many practitioners in this area that data degrades the further it gets from the source... The MLC should obtain sound recording information from as close to the source as possible.” -Paul Jessop, Former CTO at IFPI/RIAA, *Initial Comments to U.S. the Copyright Office*
- **MATCHING EFFICIENCY:** “If the MLC is faced with multiple data sources for a given [] data record, it will be faced with the task of reconciling them and re-creating a single authentic data record. This will be difficult, expensive and probably unreliable.” -Paul Jessop, Former CTO at IFPI/RIAA, *Initial Comments to U.S. the Copyright Office*
- **RIGHTS OWNER CONTROL:** DSPs should “arrange for the MLC to receive ... Sound Recording Metadata sourced directly from sound recording copyright owners... from a single, authoritative source, such as SoundExchange.” -RIAA and A2IM, *Reply Comments to the U.S. Copyright Office*

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We Should Not Relitigate Issues Decided in the Legislative Process

- **AMENDMENT:** Concerns regarding data accuracy, matching efficiency, rights owner control, and general scope of the statute were presented to members of Congress by DiMA and its member companies during the legislative process. In response (and in the face of the same objections voiced by MLC's counsel now), Congress amended the MMA bill language as follows:

“(bb) to the extent ~~reasonably available to~~ **acquired by** the digital music provider **in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of music works to engage in covered activities, including pursuant to subparagraph (B),** provide information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share), and the international standard musical work code;”

- **GOAL:** The goal of the amendment was to reduce data intermediaries and to create a direct connection between copyright owners and the party responsible for collecting and matching their data, the MLC.
- **CONFLICT:** An attempt to expand DSP data obligations and to bear down on DSP usage reporting as a primary source of ownership data runs directly in contradiction to the intent of this amendment.

Annual Statements of Account

- Agreement that no CPA certification of annual statement is necessary
- Cumulative annual statement requirement does not make sense in light of ability to adjust reports.

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Notices of License

- MLC does not explain why it needs such a level of detail in the notice of license, given the detail in the monthly statements of account.

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Confidentiality

- MLC proposal unworkable because it gives itself complete authority.
- Need for special rules for DLC participation on MLC board and committees
 - This is a distinct feature of this statutory scheme, that warrants a distinct regulatory regime

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Transparency

- MMA imposes a variety of general reporting obligations, without much detail
- Important for the entire ecosystem to understand the operations and performance of the MLC
- Office should consider requiring reporting of specific, measurable metrics

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