

Benjamin K. SemelDirect Tel: 212-326-0131
bsemel@pryorcashman.com

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Via email

Regan Smith
General Counsel and Associate Register of Copyrights
Anna Chauvet
Associate General Counsel
Jason Sloan
Assistant General Counsel
United States Copyright Office
Library of Congress
101 Independence Ave. SE
Washington, DC 20559-6000

Re: Docket No. 2020-12
Supplemental summary of ex parte call regarding Transition Period Cumulative Reporting and Transfer of Royalties to the Mechanical Licensing Collective (the “Proceeding”)

Dear Ms. Smith, Ms. Chauvet and Mr. Sloan,

This letter provides additional information concerning discussions on the October 1, 2020 call (“October 1 Call”) between the Mechanical Licensing Collective (the “MLC”) and representatives of the Copyright Office (the “Office”), supplementing the letter submitted by the MLC on October 5, 2020 (“October 5 Letter”). The MLC thanks the Office for its time and attention in meeting with the MLC concerning the Proceeding.

The persons participating in the October 1 Call for the MLC were Kris Ahrend (CEO), Richard Thompson (CIO), Abel Sayago (DSP Technical Lead), Alisa Coleman (Chair of the Board of Directors), Bart Herbison (Board member), Danielle Aguirre (Board member), and counsel Benjamin Semel and Frank Scibilia.

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On behalf of the Office, Regan Smith, Anna Chauvet, Jason Sloan, John Riley and Cassandra Sciortino participated in the call.

The following summarizes issues from the discussion in addition to those discussed in the October 5 Letter:

In response to a question from the Office, the MLC clarified that it would not be appropriate for a DMP to try to use a provision on estimates and adjustments to extend the deadlines for the statutory option to obtain the limitation on liability until after resolution of legal disputes concerning private settlements. Estimates are only appropriate where there is a genuine inability to determine a royalty pool calculation input, and such estimates are best understood as being part of the royalty calculation process itself. The DLC argument about withholding unmatched royalties due to voluntary settlements is not a claim that DMPs are unable to determine what the royalty pool was for historical periods. On the contrary, DMPs calculated the royalty pools for each period at issue in connection with the payment of all of the matched uses for such period (and may have properly worked with estimates of the public performance royalty component in the process of doing so). The DLC argument concerning voluntary settlements is simply a question of whether DMPs transfer specific royalties to the MLC or not, which is not a question of estimation.

The MLC also noted that a DMP's decision not to turn over historical unmatched royalties under Section 115(d)(10)(B)(iv)(II) is not a requirement of the blanket license and would not be enforced by the MLC, but would expose the DMP to copyright infringement liability to copyright owners for past unlicensed uses. If a DMP chose not to turn over unmatched royalties because it had entered into private settlements, leading to infringement claims being asserted, and the DMP's defense to liability under Section 115(d)(10)(A) was rejected by a court because the DMP had improperly failed to follow the directives of Section 115(d)(10)(B), the DMP could not then go back and retroactively adjust its Section 115(d)(10)(B)(iv)(II) payment after the statutory deadline to obtain the limitation on liability and negate such court ruling.

There was a discussion of the precise statutory language in subsection iv of Section 115(d)(10)(B) (“(10)(B)”). The MLC explained its plain reading that this language provides that, on enactment of the MMA, DMPs must accrue and hold royalties for all of their historical and ongoing unmatched uses, with such accrued royalties to be calculated at the statutory rate and to cover all uses from initial use of the work, with such accrued royalties to be held through the date when the royalties are either (a) matched and distributed to the proper

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copyright owner pursuant to subsection II or (b) transferred to the MLC pursuant to subsection III. The MLC reiterated that it does not see any ambiguity in the statutory directive. The first clause of (10)(B)(iv) (“If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work”) mirrors the first clause of (10)(B)(iii) (“If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work”) and serves to identify what is being addressed by the provision, namely all unmatched works and associated royalties.¹ The second clause of (10)(B)(iv) (“the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work”) sets forth the unambiguous obligation to accrue and hold royalties at the statutory rate. The statutory obligation to accrue and hold these royalties begins on the enactment date, and the third clause of (10)(B)(iv) details the scope of the accrual to be made, the time frame for holding, and the ultimate payment obligation, namely “from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective.”

Subsection I of (10)(B)(iv) (“[a]ccrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles”) was also discussed. The MLC underscored that (10)(B)(iv) sets out a statutory accrual and payment obligation that identifies precisely what must be accrued, the time frame for holding and the two accepted ways the accrued royalties can be paid (all unmatched royalties from initial use until disposition under subsections II or III) and includes the method of calculation for the accrual (applicable statutory rate in accordance with usage). Reading the generic direction to “maintain” royalties in accordance with GAAP as overriding the detailed statutory instructions and producing a result where the DMP in fact does *not* maintain the accrued royalties and does *not* transfer them under either subsection II or III—the exact opposite of the explicit statutory directive—does not appear reasonable. Nor does an interpretation that unmatched royalties would be somehow exempted because they were “de-accrued” before the statutory accrual obligation was even enacted seem reasonable, and the coining of a term for this suggested practice does not inspire confidence in its reasonableness. Alleged releases

¹ The required matching process set forth in Section (10)(B) applies to all uses by a DMP of sound recordings, including historical uses, continued uses, and new uses of sound recordings. Since new uses would hopefully be matched right away, subsection (iii) addresses that situation briefly. Subsection (iv) addresses every other situation except new uses that are immediately matched—in other words, all unmatched works and associated royalties.

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obtained by DMPs from particular copyright owners are contractual provisions that only settle rights as between the particular parties to the contract. They do not extinguish the statutory obligations in (10)(B)(iv), which are unconnected to the rights of any particular copyright owner, and relate to unmatched royalties for which the copyright owner is not identified or located.²

The MLC emphasized its position that this issue is sufficiently addressed by the detail in the MMA. The Office need not and should not resolve allegations about the propriety of particular GAAP interpretations or applications concerning specific financial and contractual situations. The DLC's own argument is that DMPs have all the authority that they need in the statute. Even if the Office somehow felt that GAAP might be used to override detailed statutory obligations, nothing in the statute indicates that the Office should provide advisory opinions, let alone promulgate regulations, taking a position on specific applications of law and GAAP to the facts of particular private agreements (which could have nonperformance, modification and other validity, enforceability or interpretation issues of which the Office may not even be aware) entered into by particular companies, which is what the DLC's proposed regulation effectively requests.

As noted in the October 5 Letter, the MLC stated that it does not have information as to the amounts at issue with respect to unmatched royalties that DMPs are currently holding. Despite repeated requests for over a year, the DMPs have uniformly refused to provide details about their unmatched royalty amounts. The MLC's statement in the October 5 Letter that it does not have information about how settlement payments between DMPs and music publishers were subsequently distributed by music publishers was in response to the Office's inquiry, "to the MLC's knowledge, to what extent have songwriters been paid or credited any money received by music publishers under the agreements at issue, including with respect to any agreement's market share-based distribution?"

The Office also requested additional information from the Nashville Songwriters Association International (NSAI) concerning the September 17, 2020 ex parte call with several songwriter groups. NSAI's Executive Director Bart Herbison is the nonvoting Songwriter Trade Group Representative on the MLC's board of directors, and provides the

² The statutory provision that seems to come closest to implicating the "rights" that the DLC argues were extinguished by private agreements is Section 115(d)(3)(J), which addresses distribution of unclaimed accrued royalties to particular copyright owners on a market share basis. There is nothing in (10)(B)(iv) that is susceptible to being "extinguished" by a private agreement.

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following information concerning NSAI's participation on that call (which is summarized in general in a [September 22, 2020 ex parte letter](#)):

NSAI discussed that the accounting methodology the services were proposing (*i.e.*, they only transfer to the MLC unclaimed royalties after deducting what they paid out in negotiated settlements and then pay any additional money necessary as the MLC matches the usage) was a backward approach to the accounting. NSAI stated its understanding of the statute is that it requires that the services turn over the amount of money that equates to the unclaimed usage in order to take advantage of the limitation on liability. NSAI suggested that to the extent any negotiated settlement terms were made known to the MLC and letters of direction were issued by copyright owners to implement those settlements, then the MLC would presumably arrange for the services to be reimbursed the moneys that would have been paid out to the settling parties, pursuant to those letters of direction. NSAI also stated that this approach was important to the aspect of the MMA that ensures songwriters receive at least 50% of unclaimed funds distributions.

The MLC appreciates the Office's time, effort and thoughtful inquiries, and is available to provide further information on request.

Sincerely yours,



Benjamin K. Semel