

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

October 5, 2020

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
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 summarizes the October 1, 2020 call (“October 1 Call”) between the Mechanical Licensing Collective (the “MLC”) and representatives of the Copyright Office (the “Office”). 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.

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

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The following summarizes the discussion:

The MLC addressed questions from the Office concerning the topics raised in the Proceeding. The MLC confirmed its position that the rule should contain provisions for estimates and adjustments that are analogous to the regulations promulgated in connection with the regular reports of usage (84 Fed. Reg. 58114, Docket No. 2020-5). As those provisions lay out, an estimate must be made in good faith and only when an input cannot be determined due to considerations outside the control of the digital music provider (“DMP”), and an estimate must be clearly and specifically identified, along with an explanation of the need and the basis for the estimate. § 210.27(d)(2) and (3). Records and documents supporting an estimate must be maintained by the DMP and made available to the MLC on reasonable request. § 210.27(m). Reports of adjustment must be mandatory when estimates are finally determined, and must follow specific guidelines for timing and disclosures. § 210.27(k).

In response to questions from the Office concerning the DLC’s proposed regulatory language concerning voluntary settlement agreements, the MLC confirmed that its position remains unchanged from its [Reply Comments](#), posted on December 20, 2019, to the [Notice of Inquiry](#) in the above proceeding (the “NOI,” Docket No. 2019-5, at 84 Fed. Reg. 49971), and the MLC continues to agree with the reasoning of the Office in the [Notice of Proposed Rulemaking](#) in this proceeding (the “NPRM,” at 85 Fed. Reg. at 43522-3) concerning this topic.

Specifically, the MLC emphasized that the DLC proposal directly contradicts the Music Modernization Act (the “MMA”). In order to obtain the limitation on liability set forth in Section 115(d)(10), a DMP must follow extremely specific provisions. These provisions lay out precisely what royalties need to be accrued and held, and the two ways that these royalties can be dispensed. The MMA states that, where uses have not been matched, “the [DMP] shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, 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.” Section 115(d)(10)(B)(iv).

The MMA provisions are clear: the DMP must accrue and hold all unmatched royalties until one of two scenarios arises. First, if the DMP later matches a use to the proper musical work copyright owners, it must pay all accrued royalties for that use to the identified

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copyright owners, and must continue to pay royalties for that use to those identified copyright owners going forward. Section 115(d)(10)(B)(iv)(II). In this scenario, the use is no longer unmatched, but joins the ranks of matched uses that are paid out regularly. There is only one destination for the remaining unmatched, accrued royalties, if the DMP wishes to obtain the limitation on liability: the DMP “shall... transfer all accrued royalties to the [MLC].” Section 115(d)(10)(B)(iv)(II).

There can be no question that, by definition, settlement payments made pursuant to private agreements cannot be considered payments of unmatched royalties. As the MLC explained in its Reply Comments to the NOI:

While prior to the enactment of the MMA, certain DMPs entered into settlement agreements with certain music publishers in connection with disputes arising from their failure to license, match and/or pay royalties due, such settlement payments were definitively not the proper payment of royalties to copyright owners of unmatched uses. More or less by definition, no unclaimed accrued royalties can have been considered paid, because the reason they are unclaimed accrued royalties is because it is not known who should be paid. Unclaimed accrued royalties can be *matched*, thereby ceasing to be unclaimed accrued royalties, and then those matched royalties can be paid. But this is the only way that unclaimed accrued royalty pools can be reduced, namely by matching to the appropriate musical works and copyright owners and paying the accumulated royalties for the matched uses. (MLC Reply Comments at 29)

The MMA’s detailed provisions on accrual and transfer write this simple truth into the law. The DLC proposal asks the Office to promulgate a misguided provision that fabricates a new concept of “re-accrual” and bless the withholding of unmatched royalties by a DMP while still granting the limitation on liability. Such an interpretation is simply not allowed by the MMA, as underscored by the DLC’s very attempt to have the provision promulgated by the Office. As noted above, it cannot be said that the MMA is silent on the issue of accrual and transfer of royalties. Rather, the MMA provisions are extremely detailed. No additional language is needed to fill any gaps in the MMA on this issue. If the DLC believes that the MMA authorizes the deductions that it proposes, then DMPs can operate under the authority of the MMA.¹ The DLC proposal is not an attempt to clarify the MMA, which needs no

¹ To be sure, the DLC’s argument to the Office is that the language of the MMA is clear and addresses this question:

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clarification. Rather, it is an attempt to rewrite the MMA, which is not allowed by these regulations.

The MLC emphasized that the clear operation of these MMA provisions (which were put forward by the DMPs themselves as part of the MMA negotiations) does not leave the DMPs with no remedy for any alleged loss as a result of payments made under private contracts. The MLC reiterates its agreement with the Office’s conclusion in the NPRM that “questions regarding the interpretation of various private contracts may be better resolved by the relevant parties rather than a blanket rule by the Copyright Office.” 85 Fed. Reg. 43523.

Indeed, it is quite simple for parties to vindicate contractual rights. It is not an understatement to say that virtually the entire business of every DMP—outside of the compulsory mechanical license—is based on private agreements. It is simply not plausible for any party, let alone sophisticated DMPs, to claim that they have contractual rights but no way to enforce such rights. The courts are of course a well-established and foolproof way to get resolution on any contractual dispute. However, litigation is usually not required, as the vast majority of contracts are simply performed by their clear terms, since there is generally no benefit for a party to go to litigation on a losing case. The DLC claims that the private settlement agreements at issue are clear and that it is “common ground” that they serve to preclude the right of settling publishers to receive royalties from the MLC for the periods covered by the agreements. DLC Ex Parte Letter, August 11, 2020. The DLC characterizes any such royalties as “double payments.” The DLC has thus framed straightforward contract rights and obligations. If such obligations are clear, one can expect that that the contracting parties will either agree to honor them or be met with swift judgment against them in court. And if the alleged contract obligations are not clear, then the DLC proposal—which asks the Office to effectively ensconce its interpretation of the contracts in federal law—would be fundamentally unjust (in addition to conflicting with the provisions of the MMA).

[T]he MLC’s position is contrary to the clear text of the statute. The MMA expressly states that “accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.[”] Those principles provide that an accrual may not be maintained when an obligation is paid—and therefore require the elimination of paid-out royalties from the accrued amount. (DLC Comments to NPRM at 12)

The MLC disagrees with the DLC on this interpretation (GAAP is not a tool to evade statutory requirements), but *everyone is in agreement that the MMA clearly addresses this issue*, confirming that it is unnecessary for the Office to promulgate additional regulatory language to address the DLC’s concerns, particularly language that conflicts with the plain language reading of the MMA.

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The MLC also confirmed that, in the event of any such legal dispute between a DMP and a copyright owner concerning the right to receive unmatched royalties that the DMP had turned over under the MMA, the MLC would hold such unmatched royalties pending the resolution of the dispute. Indeed, it seems clear from the MMA that Congress intended for the MLC to be that trusted party to receive unmatched royalties and ensure that they are paid to the right parties, with interest (for the period that the MLC held such royalties). This of course includes following the direction of the parties or appropriate courts as to how royalties should be distributed pursuant to private agreements. The DLC proposal, namely that DMPs should retain unmatched royalties pending the resolution of any disputes over rights, is precisely the type of situation that the MMA sought to, and did, end.

The MLC also addressed the threat laid out by the DLC that, due to claimed uncertainty over the right to deduct settlement payments from unmatched royalties, a DMP may choose to forego the limitation on liability and retain all unmatched royalties. DLC Comments to NPRM at 3-4. The MLC noted that Section 115(d)(10)(B) was incorporated into the MMA at the request of the DMPs, and has always been optional. The blanket license is not contingent on a DMP turning over its unmatched royalties, and the failure to do so does not amount to any default under the blanket license. Rather, it simply means that the DMP is not shielded from liability for past infringement. The MMA clearly contemplates a DMP choosing to retain unmatched royalties and foregoing the limitation on liability. What the MMA does not contemplate is that a DMP could choose to retain unmatched royalties and still obtain the limitation on liability.

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 also stated that it does not have information about how settlement payments between DMPs and music publishers were subsequently distributed by music publishers.

In response to a question about works initially unmatched that are later matched to voluntary licenses, the MLC discussed that, for periods prior to the license availability date, the MMA provides for payments of matched royalties to be made to copyright owners, and does not provide for the MLC to carve out voluntary agreements (indeed, the distinction between blanket license coverage and voluntary license coverage only exists after the license availability date). Section 115(d)(3)(I).

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The MLC explained that the DLC's proposal concerning reporting on partially-matched works would not provide the MLC with adequate information to ensure proper payment allocation. The MLC then discussed that the two DLC objections to providing adequate reporting of partially-matched works were not persuasive. The first objection, namely that Music Reports, Inc. refuses to provide such information, has been refuted by Music Reports. Music Reports Ex Parte Letter, September 29, 2020. The second objection, namely that the reporting of information about copyright owner splits "are subject to [publishers'] own confidentiality restrictions," (DLC Comments to NPRM at 6-7) simply holds no water. Copyright owners will be providing their claimed splits to the MLC to receive royalty distributions, and the MMA directs that such splits be included in the MLC's public database. Furthermore, the logical conclusion of the DLC's argument is that it could not report any partially-paid royalty information where there was only one partially-paid copyright owner, since the aggregate percentage paid would of course reveal the percentage of the single copyright owner that was paid. The DLC has not objected to reporting on partial payments to single copyright owners, and there is conceptually no distinction with respect to split confidentiality between such reporting and the reporting that the MLC has requested for multiple copyright owners, without which the MLC cannot properly allocate partially-matched royalties. Rather, the reporting compromise that the Office fashioned in the NPRM is appropriate, whereby percentage shares that have been paid are reported, but the amount of royalties paid need not be reported for payments made under voluntary deals (thereby preserving confidentiality of voluntary license payment terms). § 210.24(e)(6).

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