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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. 2020-5
Summary of ex parte call regarding Treatment of Confidential Information By The Mechanical Licensing Collective and Digital Licensee Coordinator (the "Proceeding")

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

This letter summarizes the October 9, 2020 call ("October 9 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 9 Call for the MLC were Kris Ahrend (CEO), Alisa Coleman (Chair of the Board of Directors), Bart Herbison (Board member), Danielle Aguirre (Board member), and counsel Benjamin Semel.

On behalf of the Office, Regan Smith, Anna Chauvet, Terrence Hart and Cassandra Sciortino participated in the call.

The following summarizes the discussion:

The proposed provisions concerning disclosure of information to MLC board and advisory committee members were discussed. The MLC explained its position that confidential information concerning specific, identified copyright owners should not be shared with other copyright owners or songwriters, including the MLC's board of directors and advisory committees. This rule would preclude sharing with the board or advisory committees information such as royalty payments or voluntary license status. The MLC explained that the qualifier "identified" copyright owners is important because detailed information on unmatched royalties might be examined as part of the work of the board or the Unclaimed Royalties Oversight Committee to create policies and procedures to minimize the incidence of unclaimed accrued royalties. For example, in analyzing matching performance and confidence levels, it may be appropriate to not just look at aggregate data analysis but to look at specific examples of potential matches to get a concrete understanding of what types of results fall into different confidence levels. Since there is an argument that information on unmatched works still relates to specific copyright owners (it is just not yet known which ones), the MLC proposes to make clear that this information can be shared, so that the work of minimizing unclaimed royalties is not obstructed.

The MLC also explained that it does not believe that it would be appropriate to promulgate a regulation that prevents the MLC's governance from seeing DMP-specific information, subject to appropriate written confidentiality agreements and the restriction that they not see information relating to specific, identified copyright owners. This is primarily because the MLC board oversees the blanket license administration and administrative assessment collection processes, and must be able to be informed as to compliance with these processes. Since compliance is an individual DMP issue, not an industry issue, it is critical that the MLC governance be informed at the DMP level, not just the industry-aggregate level.

Moreover, the MLC is not aware of data that DMPs will report to the MLC that would cause competitive harm to a DMP if it was disclosed to MLC governance as part of its oversight of blanket license and assessment administration. Most of the data that is required to be reported to the MLC by DMPs is either (i) data to be included in the MLC's public database; (ii) royalty pool calculation information (discussed further below), which is currently reported without confidentiality restrictions and should continue to be so reported; or (iii) information about specific, identified copyright owners (such as royalty payments for specific works or

voluntary license status), which would not be shared with the board or committees.[1] Two primary types of DMP-specific information that the MLC will have beyond these three categories are important for license and assessment administration. First is aggregate or compilation data that is anonymized as to specific copyright owners but not as to DMP. This is essential for communicating compliance problems as to specific DMPs, such as problems relating to metadata being reported. Second is information relating to DMP interactions with the MLC itself, such as compliance with regulations concerning certifications, efforts obligations, or other reporting or royalty payment obligations. The MLC believes that it is appropriate and necessary for the MLC to be permitted to share these types of information with its board of directors.[2] This information can be essential context for substantial decisions as to compliance that the board is tasked in the MMA with overseeing, such as whether to audit, notice a default or take other action against a DMP. Further, information that drills beyond a single picture of the entire DMP industry is also important to help the MLC be responsive to stakeholder needs, such as to budget for targeted outreach and support to assist with DMP performance under the MMA.

With respect to the MLC's advisory committees, as noted above the MLC envisions that the Unclaimed Royalties Oversight Committee would review DMP-specific data as to unmatched works and royalties. The MLC does not at this time envision that its Dispute Resolution Committee would be working with DMP-specific data, and as the Operations Advisory Committee is composed in part of representatives of DMPs, the MLC does not envision that this committee would be working with information as to specific DMPs (except insofar as a DMP may voluntarily share such information with the committee).

The MLC's position concerning royalty pool calculation information was discussed. The MLC's understanding remains the same as reflected in its comments, namely that royalty pool calculation information has always been reported by DMPs without any confidentiality restrictions. As the Office noted in the preamble, it "previously considered and expressly rejected the idea of placing a confidentiality requirement on copyright owners receiving statements of account under the Section 115 statutory license due to the inclusion of

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[1] Any information that is not required to be reported, but that a DMP wishes to share with the MLC voluntarily, can be protected by the DMP using a confidentiality agreement (as discussed further below).

[2] The MLC believes that this data should not be considered sensitive or confidential. However, given the vagueness of "sensitive business information" (and the fact that the regulations are not finalized and language will change further), the MLC believes it is more appropriate to avoid ambiguity as to the ability of the MLC's statutory governance body to review such important information as to statutory compliance.

'competitively sensitive' information." 85 Fed. Reg. at 22561. The MLC's proposed provision at § 210.33(b)(3)(v) is simply meant to ensure that the regulation does not unintentionally impede the reporting of royalty pool calculation information to copyright owners. Since the Office's proposed definition of Confidential Information included "sensitive financial or business information," and DMPs claim that royalty pool calculation information is sensitive information, the MLC proposed this explicit carve out for royalty pool calculation information, to avoid any conflict in the regulations and any dispute over the reporting of this information without restriction.

The MLC was asked if a template confidentiality agreement for board and advisory committee members will be made publicly available. The MLC does not know whether its confidentiality expectations for board and committee members will all be captured in a template agreement. However, as part of its ongoing and general informational activities, in addition to following the Office's regulations as to confidential information, the MLC intends to provide information to the public as to any additional confidentiality expectations that it has for its board and advisory committee members, whether through posting template or exemplar agreements or otherwise identifying such confidentiality expectations.

The MLC clarified that it does not in any way object to the use of appropriate written confidentiality agreements by the MLC or the DLC. To the contrary, the MLC believes that appropriate written confidentiality agreements are critical to effectively protecting privacy and maintaining confidentiality. The regulations cannot, and should not attempt to, address every aspect of confidentiality procedures (which deal with myriad situations including subpoenas and legal process, disputes over scope, return/destruction of materials, remedies and much more). Rather, these aspects should be handled by appropriate written agreements. The MLC's concern is rather that the regulation must not limit the scope of such written agreements, which must have provisions and restrictions that are broader than the regulations themselves to be effective.

Further to that point, the MLC explained its position that the DLC's proposed categories of "MLC Internal Information" and "DLC Internal Information" are unnecessary. The MLC and DLC can control disclosures of their internal information through appropriate written confidentiality agreements. These agreements will of course be subject to the Office's regulations as to (a) confidentiality of data from copyright owners, DMPs or sound recording copyright owners, insofar as such data may be identifiable in internal information (as is being addressed elsewhere in this Proceeding), and (b) public disclosure of certain MLC internal information (as is being addressed in the Docket 2020-8 proceeding). Beyond complying with these provisions, disclosure of internal information is voluntary, and there is no reason to

regulate the terms of voluntary disclosures, since the disclosing party can do that itself. The regular business of most companies involves entering into nondisclosure or confidentiality agreements concerning voluntary disclosures of internal information, and the MLC and DLC have been effectively protecting such information to date using voluntary agreements.

The MLC clarified its proposed language providing that the MLC may disclose confidential information "to those authorized by the MLC to receive such information for use in the performance of the authorized functions of the MLC or DLC under Section 115(d), and only subject to an appropriate written confidentiality agreement." MLC Comments to NPRM at Appendix A, § 210.33(c)(1). The MLC explained this language was included to reinforce the MLC's ability to share information with its vendors and other agents who will be carrying out day-to-day operational tasks for the MLC. One of the explicit statutory functions of the MLC is to "arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective," and the MLC's activities will be carried out by third-party vendors, consultants, auditors, attorneys and other agents, as well as the MLC's employees. 17 U.S.C. 115(d)(3)(C)(i)(VII). While the Office's proposed regulation does appear to contemplate this situation by including "employees, agents, consultants, vendors [and] independent contractors" alongside its reference to the MLC under § 210.33(c), these groups are not incorporated into the definition of MLC, and so to avoid ambiguity, this language directly addresses the appropriateness of such disclosures (subject to appropriate written confidentiality agreements).

The MLC's comments concerning regulation of disclosure and use, but not receipt, of information were discussed. MLC Comments to NPRM at 10-11. As noted in its comments, the MLC believes that the regulation of disclosure of information, rather than receipt of information, is appropriate. Recipients would be in a catch-22 for confidentiality compliance, since they may not know whether they are allowed to receive information until after they have received it and reviewed it, at which point it would be too late to comply. Rather, confidentiality agreements typically put the onus for compliance on the discloser, who is in a better position to ensure the desired results. The MLC agrees with the Office that it is appropriate to regulate the use of information, but emphasizes that the MLC must be allowed to use confidential information for any and all of its statutory functions. As noted in the comments, choosing a subset of statutory functions is unnecessary and problematic, as it omits activities where confidential information will be used, and creates an untenable ambiguity for the MLC to try to parse whether a particular action is part of "activities directly related" to a select subset of the statutory activities. *Id.* Perhaps most importantly, there is simply no reason why the MLC should not be allowed to use any and all information it has in connection with any and all of its authorized functions under Section 115(d), where such information may be useful to carrying out those functions.

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