

LATHAM & WATKINS LLP

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VIA EMAIL

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Re: DLC's Response to the Copyright Office's June 8, 2020 Letter

Dear Ms. Smith,

I write on behalf of Digital Licensee Coordinator, Inc. ("DLC") in response to the letter of June 8, 2020 from the Copyright Office (the "Office"). In that letter, the Office asks DLC and the mechanical licensing collective ("MLC") a number of specific questions regarding the topic of audio links in connection with the Office's ongoing rulemaking proceeding to implement usage reports and related issues under the Music Modernization Act ("MMA").¹

The Office's letter noted that the DLC was silent about the status of discussions of audio links in its filings in response to the Office's April 22, 2020 NPRMs. That silence should not be mistaken for inactivity. The MLC and DLC have had productive discussions about process improvements in general, and about audio links in particular. Since the publication of the Office's NPRMs on April 22, 2020, the MLC's Operations Advisory Committee ("OAC"), comprised of representatives chosen by the MLC and DLC, has made progress in advancing the issue of the use of audio content by the MLC, and intend to continue that progress. The OAC conversations have been highly productive, addressing questions asked by the Office in its letter as well as other relevant considerations.

DLC emphasizes that the challenges raised by the audio links issue are not a matter of services' unwillingness to engage in or put resources into efforts that improve the ability of the MLC to find and pay copyright owners. And DLC acknowledges that there is potential for improvement through the availability of audio. In fact, most of DLC's members already have a mechanism in place that will allow for relatively easy access to particular audio tracks, by running

¹ 85 Fed. Reg. 22,518 (Apr. 22, 2020); Docket No. 2020-5.

a search on the service’s free tier using the unique service-generated identifier included in the monthly reports.

But the specific request for “audio links,” and the underlying use case, has been evolving over the course of these rulemakings, and remains inadequately defined.² Put another way, we are not yet at the point where there are clear design requirements that the parties have settled on, with the only question remaining being whether the services can implement those requirements. There remains a range of open threshold questions: What links are going to be shared? All works? Or only works that are unmatched and unclaimed? How are those links are supposed to work? Are they supposed to simply redirect users to the services’ platforms? Or are they supposed to enable the MLC to create a common player for all streaming services’ libraries? Will they link only to clips, or to full tracks (which have different licensing implications)? Without answers to those questions (and others that are similarly unresolved), it is hard to identify the full range of potential solutions and accompanying challenges.

To take one example: if the MLC’s goal is to create an embedded player on its website, it faces a critical challenge that is not addressed by the Office’s June 8 letter: the services’ label and performing rights organization (“PRO”) agreements do not include the necessary rights to stream tracks outside their respective platforms. It would be inappropriate for the Office—through a mechanical licensing rulemaking—to effectively require the services to renegotiate the full panoply of these label and PRO deals to allow for streaming via the MLC’s portal; indeed, Congress expressly placed the licensing of public performance rights outside the scope of the MMA.³ Nor would PRO rights be the only licensing challenge; the MLC would also need to license mechanical rights, possibly leading to the bizarre scenario in which the MLC administers its own statutory license. To the extent the MLC wants this functionality, the MLC should itself obtain the necessary rights.

Again, the threshold issues regarding the use cases and design requirements must be resolved before the questions surrounding burdens, feasibility, and implementation can be addressed with the level of specificity the Office has requested. For that reason, DLC believes the Office should adhere to its initial assessment, set forth in the NPRM, that the OAC is the most appropriate forum to continue development of those requirements, which involve highly interrelated and complex engineering and operational questions that do not lend themselves to

² The NPRM itself noted the indeterminacy in the MLC’s proposal. That proposal did not describe how the audio links would be used for matching, and therefore required the Office to reach its own “understand[ing] that the MLC . . . believe[s] that the audio links will be useful not in connection with automated matching efforts, but rather to feature on its online claiming portal.” 85 Fed. Reg. 22,518 at 22,531 (Apr. 22, 2020). But the MLC’s comments did not actually discuss use of audio links in the online claiming portal. *See* the MLC’s Initial Comments in Docket COLC-2019-0002 at 20; the MLC’s Reply Comments in Docket COLC-2019-0002 at 18-19. In any event, other open questions remained. *See* 85 Fed. Reg. at 22,531 (“It is not clear whether links might be featured for all sound recordings . . . or only those with missing or incomplete ownership information.”). And as discussed in the main text, many more questions *still* remain.

³ *See* 17 U.S.C. § 115(d)(13)(B).

regulatory action. Indeed, a too-narrow focus on the specific provision of audio links through monthly usage reports may forestall the development of more constructive solutions. For now, however, we provide some higher-level information about the challenges that will have to be navigated to enable any of the functionality that has been discussed.

Question 1: Describe the estimated burden that individual DLC members anticipate they will incur, in terms of time and expense, to provide the MLC with audio links: (a) via monthly reports of usage for all reported sound recordings; (b) in response to requests from the MLC for unmatched works for the public's use through the MLC's claiming portal; and (c) via any other method(s) the DLC wishes to propose. If the DLC can estimate such information for non-member DMPs, please do so.

The process of providing audio links embeds several distinct technological steps, and that full process is worth reviewing from end to end.

First, the concept of an audio link would have no application at all to a purely app-based service, as opposed to one that has a web-based user interface. Such app-based streaming services would not use URLs to link to tracks; they would have to rebuild their platforms completely to do so.

Second, for those services whose platforms do use audio links, an engineering project would be required to ensure the links can be operationalized for the MLC's claiming portal. This includes how the MLC will provide a unified user interface that incorporates multiple links for each digital music provider. The MLC's chosen design will have upstream effects on the functionality that is provided when a link is engaged (Is it redirecting the user to a different webpage? Is it simply a direct link to the audio asset? Something else?). Once the MLC's needs are established, the specific requirements of that engineering project will vary substantially between streaming services, the designs of their systems, and their in-house resources. Some companies' links are designed to be permanent or stable, some companies' links are unique and usable for a single play only, and other companies fall somewhere in the middle.

Third, once a system for creating and maintaining URLs has been implemented, a separate engineering project would be required to automate their inclusion in the streaming service's monthly reports. The difficulty of that engineering project depends in substantial part on the resolution of three inescapable consequences of mandating the inclusion of audio links in monthly reports: (1) the lack of any DDEX or other accepted standard for the reporting and handling of URLs, and (2) the significant expansion of the size and volume of the monthly report that adding those data types would cause (with attendant impacts on the MLC's storage needs); and (3) the need for additional validation if the URLs do not properly resolve or are corrupted. Proceeding to engineer the automated inclusion of URLs before a consensus is reached on how to manage those consequences would be a recipe for data integrity problems.

Fourth, there are also complicated questions about whether and how these new streams via the MLC's claiming portal would be reported for purposes of royalty accounting under the

statutory mechanical license. The current section 115 rates include per-subscriber floor payments,⁴ and it is not clear how users of the MLC claiming portal would be counted for such purposes. There will be similar issues related to the services' record label and PRO deals. Those issues would remain even if the MLC were to take on responsibility for securing those rights directly, in which case the streaming services would have *less* control over royalties negotiations despite retaining their obligation to pay the ultimate cost of those royalties by funding the MLC.

The critical path to resolving all of these issues runs through a question that is still open: if audio links are included in monthly reports, what *exactly* will they be used to accomplish? The links themselves cannot be used for digital fingerprinting or any other computerized matching process, to the extent they merely redirect the user to the streaming service's platform. Users can then listen to the track on that platform, but cannot take custody of the digital asset itself—without which, computerized matching processes are impossible. Moreover, clicking through a link to play a track on the streaming service's website is not materially easier than copying and pasting the service's unique identifier into a search bar or URL—a task that, for most DLC members, requires no additional engineering project at all.

The seriousness of these limitations in the use case for audio links is one of the reasons DLC members have asked the MLC to develop clearer plans for how it would actually deploy audio links in practice (if at all). Without knowing the intended operational function of reported audio links, a given streaming service cannot plan the engineering steps, licensing requirements, or related challenges in standard-setting that are necessary for implementation.

Accordingly, the current state of the parties' dialogue on audio links and their use case makes it impossible for DLC and its members to specify the "time and expense" required to provide the MLC with audio links. That is particularly true given that the incremental burden of those efforts depends on the overall engineering commitments that these open rulemaking proceedings will, when finalized, impose. Currently, only the outlines of the process set forth above can be scoped. Even at this stage, however, it is clear that for some smaller companies, such as Qobuz or MediaNet, the engineering resources required to report audio links on a monthly basis would be a cost-prohibitive nonstarter.

Question #2: Is there any difference in burden between providing links to full tracks versus only linking to shorter clips (e.g., of 30 seconds)?

For most streaming services, shorter clips are not already available and would have to be engineered. Smaller services, such as Qobuz, believe that the costs of engineering shorter clips would be prohibitive for their economics. Even larger services believe the costs and related licensing issues would be significant. Thus, overall, the use of shorter clips would likely *increase* rather than decrease the regulatory burden, because it would require most companies to engineer new capabilities that are not already in place and secure additional rights they do not currently have.

⁴ See generally 37 C.F.R. § 385.22(a) (establishing per-subscriber per-month royalty floors of 15 to 50 cents).

Question #3: Although previously confirmed for some of its members, please confirm whether all DLC members employ DMP identifiers for sound recordings on their services. For those that do not, please identify the service and any anticipated operational issues or transition considerations related to implementing the use of these identifiers. To the extent available, the Office is also interested in information related to similar practices with respect to non-member DMPs.

All DLC members use unique identifiers for tracks. Most DLC members have a publicly accessible search function that uses unique identifiers as inputs, though in a couple of instances it is implemented by adding the identifier to the end of a particular URL rather than by pasting the identifier into the search bar. MediaNet, Qobuz, and SoundCloud do not have a publicly accessible search function that uses unique identifiers as inputs, but DLC is open to discussing cost-effective ways to provide songwriters and copyright owners with equivalent functionality for those services.

Question #4: If the DLC believes that DMPs will not be able to provide audio links in reports of usage as of the license availability date, how long of a transition period is needed? If the DLC believes there are other methods of providing audio links that may require a transition period, what are they and how long of a transition period is needed for them?

The answer to this question varies, and depends on the system designs and engineering resources of each licensee. DLC's response to the Office's first question applies to this question as well: the time requirements to automate reporting of audio links (or address any licensing issues) cannot be quantified at this stage of the audio links discussions, either for an individual streaming service or for the DLC membership in the aggregate. However, it is already clear that some services would not be able to comply with such a requirement on any practicable or commercially feasible timeline, regardless of the transition period.

Question #5: How often does a link for a given recording change?

The answer to this question also depends on the system designs of each licensee. Some licensees' systems are designed to use permanent URLs that generally do not change. Others, such as MediaNet, utilize unique links that are usable for a single play only. Other companies fall between those two poles, depending entirely on the specific ways their platforms are built.

* * *

DLC looks forward to discussing these issues with the Office and with the other parties—and to continuing its dialogue to progress these issues at the OAC level. As for its availability, DLC respectfully requests that the Office set the meeting for June 19 after 1:30 p.m. Eastern.

LATHAM & WATKINS^{LLP}

Best regards,

A handwritten signature in black ink, appearing to read "S. V. Damle". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Sarang V. Damle

CC via email: Jason Sloan
jslo@copyright.gov