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March 14, 2022

VIA EMAIL

Suzanne Wilson
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, D.C. 20559-6000
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Re: Ex Parte Letter re: March 10, 2022 Copyright Office Virtual Meeting

Dear Ms. Wilson,

This letter is submitted on behalf of Digital Licensee Coordinator, Inc. (“DLC”), following the *ex parte* meeting held by the Copyright Office on March 10.¹ The meeting focused on two related topics: (1) the process of providing annual reports of usage (AROU) and associated payments to the Mechanical Licensing Collective (“MLC”) and (2) the process of providing reports of adjustment of previously delivered reports of usage.

We discussed several operational and compliance challenges with the existing AROU and adjustment regulations, and potential solutions to those challenges. The identified challenges stem principally from differences between the regulations governing AROUs and adjustments on the one hand, and the regulations governing monthly reporting under the blanket license that licensees and the MLC have now been successfully operating under for over a year.

With respect to AROUs, we noted that the regulations contemplate that, by the 20th day of the sixth month after the close of a blanket licensee’s fiscal year, they are required to provide precise information about the total amount due to the MLC for the full year and the appropriate payment. For instance, the annual report must include “[t]he **total** royalty payable by the blanket licensee under the blanket license,” the “total sum paid to the mechanical licensing collective including the amount of any adjustment delivered contemporaneously with the annual report of usage,” and the “total adjustment(s) made by any report of adjustment adjusting any monthly report of usage covered by the applicable annual reporting period.” 37 C.F.R. § 210.27(f)(4)(i)-(iii). We noted that this aspect of the AROU regulations is a vestige of the old annual statement of account regulations, now found in 37 C.F.R. § 210.7. Under the old regime, licensees were responsible for matching and calculating royalties owed to individual publishers and delivering

¹ A list of attendees is provided in an addendum.

annual statements directly to those publishers. In that context, it made sense to make services calculate these totals and report them.

But, under the blanket license, the MLC is, on a month-to-month basis, responsible for matching usage, calculating the amount of royalties owed, and ultimately for confirming proper payment. The monthly report of usage process accounts for that fact by providing a mechanism by which a service can request and obtain an invoice and/or response file. See 37 C.F.R. § 210.27(g)(1), (2)(v). The annual report of usage procedure, however, does not provide a similar mechanism; this has created operational issues for services that depend on the MLC to engage in the calculations necessary to ensure the proper amounts are reported and paid. This issue, as we discussed, is not limited to services that have voluntary licenses for which MLC matching is required; it is our understanding that licensees of all sizes that use the blanket license for all covered activities have come to rely on the MLC to calculate the amount of royalties owed.

This issue might be of limited import if the AROU process were merely an exercise in adding together figures reported and paid as part of monthly reporting. But, as we discussed, the reality is that nearly every service engages in a process of adjustment as part of the year end process.² Because the section 115 royalty rates formula relies on inputs that are not finalized until the end of a year, most, if not all, DMPs will need to adjust previously reported information to the MLC as part of the AROU process and will need the MLC to calculate the amount of royalties owed.

That leads to the second issue, which relates to the report of adjustment provision, 37 C.F.R. § 210.27(k). The report of adjustment provision allows a blanket licensee to adjust a previously delivered report of usage. As we discussed, this process is used for two purposes: to address one-off issues uncovered by the blanket licensee or the MLC after the initial monthly report of usage is delivered, and for purposes of the annual adjustment process that most blanket licensees must engage in after the close of their fiscal year.

The adjustment provision (unlike the annual report of usage provision) does appear to contemplate some process by which the MLC can inform a service of the amount of money owed after submission of the report of adjustment. *Id.* § 210.27(k)(4) (“In the case of an underpayment of royalties, the blanket licensee shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the report of adjustment *or promptly after being notified by the mechanical licensing collective of the amount due.*” (emphasis added)). But that provision—unlike the provision for regular monthly reports of usage—does not specify that a response file shall be sent from the MLC to the blanket licensee. The lack of a response file provision is particularly problematic for services that have voluntary licenses. Because many blanket licensees are adjusting both the top line royalty figures *and* usage figures, the MLC matching and response file process is critical to allow those services to accurately pay their voluntary license partners as well as the MLC, just as it is in the ordinary course of monthly reporting.

² We also note that the AROU requires accompanying CPA-certification which, combined with the MLC’s audit right essentially means that the MLC will be auditing already-audited records in a way that raises questions of efficiency and reasonable costs.

To address these issues, we have suggested proposed regulatory changes as an attachment to this letter. These would do the following:

- Amend § 210.27(f)(4)(ii) to require reporting of the sum paid to the mechanical licensing collective during the fiscal year, prior to any adjustments being made. This is a useful piece of information, so that the MLC can readily calculate any overpayment or underpayment. Eliminate § 210.27(4)(i) and (iii) as unnecessary. The MLC will be required in any event to calculate the total royalty payable after adjustments are made, and the two provisions are redundant of each other.
 - In the event the Office declines to accept this proposal, we would propose in the alternative that language be added to § 210.27(k)(1) (as follows) to allow the use of estimates in § 210.27(f)(4)(i) – (iii), if the service cannot calculate the actual amounts owed:

“(k) Adjustments.

(1) A blanket licensee may adjust one or more previously delivered monthly reports of usage or annual reports of usage, including related royalty payments, by delivering to the mechanical licensing collective a report of adjustment. A report of adjustment adjusting one or more monthly reports of usage may, but need not, be combined with the annual report of usage for the annual period covering such monthly reports of usage and related payments. In such cases, such an annual report of usage shall also be considered a report of adjustment, and must satisfy the requirements of both paragraphs (f) and (k) of this section, **except that with respect to the requirements in paragraph (f)(4)(i), (ii) and (iii), such report may include estimates from the blanket licensee.**

- Amend § 210.27(g)(3) to allow the delivery of any royalty payment either contemporaneously with the AROU or promptly after being notified by the MLC about the amount owed.
- Add a new paragraph to § 210.27(k)(8) to create a response file process for all reports of adjustment, with a 45-day deadline to deliver a response file if a service states a response file is necessary to timely submit an annual report of usage.

During the meeting, we discussed the timing of any regulatory action. Given the time pressure for those services that are currently in the AROU process, we urge the Office to consider adopting an immediately effective interim rule to at least require immediate processing of adjustments to usage reporting and provision of response files to those services that need them to fulfill their annual reporting obligations under the blanket license and voluntary licenses, while allowing for a comment period on that aspect of the interim rule and any other amendments the Office is considering. There is precedent for doing this; the Office took that approach to address an issue related to permanent download pass-through licenses. *See* 85 Fed. Reg. 84,243 (Dec. 28, 2020); 86 Fed. Reg. 12,822 (Mar. 5, 2021).

The Office also raised the possibility of postponing the deadline for the 2021 annual reports of usage entirely until some period after the Copyright Royalty Board (“CRB”) decides the *Phonorecords III* rate proceeding. We would welcome that as a solution as well. To the extent the decision from the CRB contains any alterations over the applicable rates and terms under which services reported to the MLC in 2021, every service is going to have to rerun—and recertify—the annual reporting after that decision. The high likelihood of a need for adjusted AROUs from all services underscores that delay may also be more efficient for the MLC, in that there appears to be little to no reason to process the majority of AROUs for 2021 until such time as the *Phonorecords III* determination is issued. It would likely be far more efficient for both services and the MLC to go through the 2021 AROU process only once for 2021.³

To be clear, there are likely to be a number of other impacts of the *Phonorecords III* determination on the operational needs of both DMPs and the MLC. At this stage, it is difficult to scope the full range of work that will need to be undertaken by all parties, including the ability of third-party vendors on which both DMPs and the MLC rely for certain critical functions. To the extent the Office is inclined to postpone the AROU filing deadline, DLC requests that such postponement not initially include a date certain for submission, in order to allow all parties to more accurately assess the post-determination operational landscape and potentially develop a collaborative approach to appropriately and effectively prioritize the necessary work.

Thank you for your time and continued attention to these issues.

Best regards,



Sy Damle

³ We note that for some services that have independent annual reporting obligations under voluntary licenses, those services may still require response files from the MLC to fulfill existing obligations. But presumably if all annual reporting to the MLC were postponed, the MLC would then have sufficient bandwidth to address the needs of those services.

Attendees at 3/10/2022 Copyright Office Ex Parte Meeting

Digital Licensee Coordinator, Inc.

Kirsten Donaldson
Lauren Danzy
Garrett Levin (as DLC Board Member)

Latham & Watkins (counsel to DLC, Inc.)

Sarang V. Damle
Allison L. Stillman

Amazon Music

Alan Jennings
Olivia Delao-Ng

Apple

Nick Williamson

Audiomack

Vanessa Wilkins

Google/YouTube

Jen Rosen

Pandora

Alex Winck
Danny Walvick

SoundCloud

Dan Shumate

Spotify

Lisa Selden
Lucy Bridgwood

U.S. Copyright Office

Suzanne Wilson
Jason Sloan
John Riley
Shireen Nasir

REGULATORY PROPOSAL OF DLC, INC.

§ 210.27

* * *

(f) Content of annual reports of usage. An annual report of usage, covering the full fiscal year of the blanket licensee, shall be clearly and prominently identified as an “Annual Report of Usage Under Compulsory Blanket License for Making and Distributing Phonorecords,” and shall include a clear statement of the following information:

(1) The fiscal year covered by the annual report of usage.

(2) The full legal name of the blanket licensee and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the blanket licensee engages in covered activities. If the blanket licensee has a unique DDEX identifier number, it must also be provided.

(3) The full address, including a specific number and street name or rural route, of the place of business of the blanket licensee. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(4) The following information, cumulative for the applicable annual reporting period, for each month for each applicable activity or offering including as may be defined in part 385 of this title, and broken down by month and by each such applicable activity or offering:

~~(i) The total royalty payable by the blanket licensee under the blanket license, computed in accordance with the requirements of this section and part 385 of this title.~~

(ii) The total sum paid to the mechanical licensing collective under the blanket license during the fiscal year, exclusive of including the amount of any additional amounts owed due to adjustments made after the close of the fiscal year ~~delivered contemporaneously with the annual report of usage.~~

~~(iii) The total adjustment(s) made by any report of adjustment adjusting any monthly report of usage covered by the applicable annual reporting period, including any adjustment made in connection with the annual report of usage as described in paragraph (k)(1) of this section.~~

(iv) The total number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each sound recording used, whether pursuant to a blanket license, voluntary license, or individual download license.

(v) To the extent applicable to the calculation of royalties owed by the blanket licensee under the blanket license:

(A) Total service provider revenue, as may be defined in part 385 of this title.

(B) Total costs of content, as may be defined in part 385 of this title.

(C) Total deductions of performance royalties, as may be defined in and permitted by part 385 of this title.

(D) Total subscribers, as may be defined in part 385 of this title.

(5) The amount of late fees, if applicable, included in any payment associated with the annual report of usage.

(g) Processing and timing.

* * *

(3) Each annual report of usage ~~and, if any, related royalty payment~~ must be delivered to the mechanical licensing collective no later than the 20th day of the sixth month following the end of the fiscal year covered by the annual report of usage. **Any related royalty payment must be delivered to the mechanical licensing collective contemporaneously with the annual report of usage or promptly after being notified by the mechanical licensing collective of the amount due.**

(4) The required timing for any report of adjustment and, if any, related royalty payment shall be as follows:

(i) Where a report of adjustment adjusting a monthly report of usage is not combined with an annual report of usage, as described in paragraph (k)(1) of this section, a report of adjustment adjusting a monthly report of usage must be delivered to the mechanical licensing collective after delivery of the monthly report of usage being adjusted and before delivery of the annual report of usage for the annual period covering such monthly report of usage.

(ii) A report of adjustment adjusting an annual report of usage must be delivered to the mechanical licensing collective no later than 6 months after the occurrence of any of the scenarios specified by paragraph (k)(6) of this section, where such an event necessitates an adjustment. Where more than one scenario applies to the same annual report of usage at different points in time, a separate 6-month period runs for each such triggering event.

* * *

(k) Adjustments.

(1) A blanket licensee may adjust one or more previously delivered monthly reports of usage or annual reports of usage, including related royalty payments, by delivering to the mechanical licensing collective a report of adjustment. A report of adjustment adjusting one or more monthly reports of usage may, but need not, be combined with the annual report of usage for the annual period covering such monthly reports of usage and related payments. In such cases, such an annual report of usage shall also be considered a report of adjustment, and must satisfy the requirements of both paragraphs (f) and (k) of this section.

(2) A report of adjustment, except when combined with an annual report of usage, shall be clearly and prominently identified as a “Report of Adjustment Under Compulsory Blanket License for Making and Distributing Phonorecords.” A report of adjustment that is combined with an annual report of usage shall be identified in the same manner as any other annual report of usage.

(3) A report of adjustment shall include a clear statement of the following information:

(i) The previously delivered monthly reports of usage or annual reports of usage, including related royalty payments, to which the adjustment applies.

(ii) The specific change(s) to the applicable previously delivered monthly reports of usage or annual reports of usage, including a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the blanket licensee under the blanket license depends. Such description shall include all information necessary for the mechanical licensing collective to compute, in accordance with the requirements of this section and part 385 of this title, the adjusted royalties payable by the blanket licensee under the blanket license, and all information necessary to enable the mechanical licensing collective to provide a detailed and step-by-step accounting of the calculation of the adjustment under applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the mechanical licensing collective, using the blanket licensee's information, determined the adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2)(i) of this section.

(iii) Where applicable, the particular sound recordings and uses to which the adjustment applies.

(iv) A description of the reason(s) for the adjustment.

(4) In the case of an underpayment of royalties, the blanket licensee shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the report of adjustment or promptly after being notified by the mechanical licensing collective of the amount due. A report of adjustment and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the report of adjustment to the payment.

(5) In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the blanket licensee's account, or upon request, issue a refund within a reasonable period of time.

(6) A report of adjustment adjusting an annual report of usage may only be made:

(i) In exceptional circumstances;

(ii) When making an adjustment to a previously estimated input under paragraph (d)(2)(i) of this section;

(iii) Following an audit under 17 U.S.C. 115(d)(4)(D);

(iv) Following any other audit of a blanket licensee that concludes after the annual report of usage is delivered and that has the result of affecting the computation of the royalties payable by the blanket licensee under the blanket license (e.g., as applicable, an audit by a sound recording copyright owner concerning the amount of applicable consideration paid for sound recording copyright rights); or

(v) In response to a change in applicable rates or terms under part 385 of this title.

(7) A report of adjustment adjusting a monthly report of usage must be certified in the same manner as a monthly report of usage under paragraph (i) of this section. A report of adjustment adjusting an annual report of usage must be certified in the same manner as an annual report of usage under paragraph (j) of this section, except that the examination by a certified public accountant under paragraph (j)(2) of this section may be limited to the adjusted material and related recalculation of royalties payable. Where a report of adjustment is combined with an annual report of usage, its content shall be subject to the certification covering the annual report of usage with which it is combined.

(8) If requested by a digital music provider, the mechanical licensing collective shall deliver a response file to the digital music provider within a reasonable period of time after the report of adjustment is received. Notwithstanding the foregoing, if the digital music provider states that a response file is necessary to the digital music provider's ability to timely submit an annual report of usage, the MLC shall deliver an invoice and/or a response file to the digital music provider within 45 days. The response file shall contain such information as is common in the industry to be reported in response files, backup files, and any other similar such files provided to digital music providers by applicable third-party administrators.