National
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February 4, 2022

Via email

John R. Riley, Assistant General Counsel
Jason Sloan, Assistant General Counsel
United States Copyright Office
Library of Congress
101 Independence Ave, SE
Washington, DC 20559-6000

Re: Summary of meeting regarding DLC *ex parte* letters concerning treatment of public domain works by the Mechanical Licensing Collective

Dear Messrs. Riley and Sloan,

This letter summarizes the February 1, 2022 meeting ("February 1 Meeting") that occurred via Zoom videoconference between the National Music Publishers' Association ("NMPA") and representatives of the Copyright Office. NMPA thanks the Copyright Office for its time and attention in meeting with NMPA.

The persons participating in the February 1 Meeting on behalf of NMPA were Danielle Aguirre, EVP and General Counsel, and Shannon Sorensen, VP of Business and Legal Affairs, along with outside counsel for NMPA, Benjamin Semel. On behalf of the Copyright Office, John Riley, Jason Sloan, and Shireen Nasir attended the meeting.

The following summarizes the discussion:

- The parties discussed the subjects raised in the *ex parte* letters filed by the Digital Licensee Coordinator (DLC) on November 18, 2021 and November 23, 2021 (the "DLC Letters").

- NMPA raised a number of concerns regarding inaccurate claims in the DLC Letters. These included inaccurate claims concerning historical practices surrounding the treatment of public domain works and royalty processing under the compulsory mechanical license prior to the Mechanical Licensing Collective (MLC).

Contrary to the implications in the DLC Letters, there has never been a known or accepted practice in the industry whereby digital service providers (DSPs) were credited a portion of the compulsory license royalty pool based upon plays of public domain works. The DLC admitted as much in its August 2, 2021 letter to the MLC, which was attached to its November 18 letter. There, the DLC admitted that, prior to the start of the blanket license, "in the process of matching works, the services matched as much as they could to copyright owners. But, by definition, public domain works had no copyright owners and could not be matched. *For that reason*, royalties allocated to plays of public domain works remained with the services."[1] (emphasis added) This is the accurate understanding of the DSPs' historical practice, in which plays of public domain works were incorrectly treated as plays of unmatched Section 115 copyrighted works, and royalties allocated to those plays de facto "remained" with the DSPs along with other unmatched royalties.

However, this DSP practice of treating public domain works as unmatched copyrighted works, allocating Section 115 royalties to those plays, and then retaining those associated royalties has never been understood as legal or appropriate. On the contrary, public domain works, like other non-Section 115 activities, were never meant to be allocated any Section 115 royalties as they are not covered under the compulsory license. DSPs improperly allocating Section 115 royalties to plays of public domain works, and then withholding those royalties, was a part of the larger unmatched royalties problem prior to the MLC, in which hundreds of millions of dollars in royalties unjustly "remained" with DSPs, and DSPs were exposed to significant liability for copyright infringement. This problem was of course part of what led to the Music Modernization Act (MMA), which created the blanket license and gave DSPs a window to turn over all of their historical unmatched royalties to the MLC to avoid liability for copyright infringement.

Any DSP that wanted to take advantage of the MMA's limitation on liability for historical infringement was required to turn over *all* of its unmatched royalties, including any royalties that the DSP had improperly associated with uses of public domain works.[2] NMPA is not aware of any instance of a DSP asserting the right to credit itself a portion

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[1] NMPA also noted its objection to the DLC's claim in its November 18 Letter that it "confirmed that it is the experience of the DLC members and licensing administration vendors that the MLC is matching far less public domain usage than the vendors had been matching prior to this year." This claim directly conflicts with the DLC's statement quoted above that "by definition" public domain works could not be matched under the prior regime, and the DLC should be pressed to identify which members and administration vendors made this claim and on what basis.

[2] Insofar as any DSP advances an argument that it was permitted to credit itself out of the Section 115 compulsory license royalty pool for public domain usage, NMPA submits that the Office should request clarification from such DSP as to whether it in fact did so, or whether it retained any historical unmatched royalties on such an argument. Such acts would bear directly on whether such DSP is eligible for the limitation on liability under the MMA, and whether the certification acompanying its historical unmatched submissions is accurate.

of historical unmatched royalty pool on the grounds that it had plays of public domain works. Any such claim would have been rejected by NMPA and the copyright owner community because *the Section 115 compulsory license royalty pool is for Section 115 covered activities*. This has always been the industry understanding and is what the text of the statute and regulations makes clear. There has never been a practice of crediting back any portion of that pool to DSPs based on the use of non-Section 115 content. Rather, a DSP that also uses non-Section 115 content must address that content separately. For example, a DSP that streams music videos must *separately* license and *separately* pay for those uses. It cannot dilute the Section 115 royalty pool and divert royalties back to itself based on also engaging in *non*-Section 115 activities, whether those uses are public domain, comedy, sleep sounds, podcasts, music videos, etc. The DLC's insinuations that the MLC's current practice is any different than the historical practice is simply wrong. The difference now is that DSPs no longer retain unmatched royalties – which was exactly the intent of the MMA.

- The context of the DLC Letters was also discussed. It was noted that the DLC's newfound legal theories and public domain issues were not raised during the Office's rulemakings on implementation of the MMA in 2019 and 2020. Rather, the notion of allowing DSPs to credit themselves a portion of the Section 115 royalty pool based on non-Section 115 uses is something DSPs are *proposing* for the first time in connection with the Copyright Royalty Board's *Phonorecords IV* proceeding to set the compulsory mechanical rate for the 2023-2027 period. It is apparent from the DLC's August 2, 2021 letter to the MLC and its initial November 18 *ex parte* letter, that its public domain work theories relate to the Copyright Royalty Board activities of some of its members, and not Copyright Office rulemakings implementing the MMA.

- There was also a discussion of the DLC's specific suggestions, in its November 23 Letter, for actions that the Office might take on these topics. NMPA expressed its belief that all but one of the requests were improper attempts to get the Office to engage in actions that would directly influence the ongoing CRB proceeding.[3] These attempts, including the unprecedented request for the Office to ask the CRB to "offer its views" on a theory in the proposals of DLC board members in an ongoing CRB proceeding, should not be accepted.[4]

[3] The lone other request concerned creation of a policy for disputes over whether works are in the public domain. But the DLC provides no explanation of why this should not be addressed as part of the MLC's regular operations, which include DSP participation at the committee and board level, and no basis for having the Copyright Office address such a particular operational detail through rulemaking.

[4] Although the DLC claimed that its concerns are mainly an issue for specialty classical music services, 19 out of the 22 participants on the November 15 call with the Office were instead affiliated with the large DSPs participating in the CRB *Phonorecords IV* proceeding (or their trade groups), none of whom are specialty classical music services.

NMPA appreciates the Copyright Office's time, effort, and thoughtful inquiries, and is able to provide further information on request.

Sincerely yours,

Danielle M. Aguirre
EVP & General Counsel
National Music Publishers' Assoc.