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By Telecopier № +1 (202) 707-8366

Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Re: Copyright Office/Sec 115/Statements of Account—Correspondence

Dear Register Pallante:

I write today to respectfully bring to your attention an important matter. From time to time we receive inquiries from our clients regarding the administration of the statutory license for musical works under 17 U.S.C. Sec. 115 (the "***Statutory Mechanical License***") and the accompanying regulations at 37 C.F.R. Sec. 201.19 (the "***Accounting Regulations***").

I write to you today to respectfully request clarification on a point regarding the practical application of the Accounting Regulations regarding monthly statements of account under subparagraph (e) and annual statements of account under subparagraph (f) that has come up several times over the last year. The question appears to be affecting a large number of copyrights in musical works, including copyrights owned, controlled or administrated by our clients.

I respectfully ask the following questions: To your knowledge, has the Congress, the Copyright Office or any other authoritative body or agency suspended the requirements of the Statutory Mechanical License or the Accounting Regulations that require a supposed licensee to render monthly and annual statements of account? If not, is compliance by a supposed licensee with the requirements of the Statutory Mechanical License or the Accounting Regulations being delayed or excused due to any activity of the Copyright Office, including any rulemaking, either currently or over the last three years?

You may well wonder what the genesis of these questions is, and I can provide you with what I judge to be the typical fact pattern.

In short, some digital service providers of online music services (each a "***Service***"), particularly streaming services, ignore the requirements of both the Statutory Mechanical License and the Accounting Regulations. These Services are unilaterally determining what musical works they wish to exploit, what form of statements they wish to use and the frequency with which they wish to account, all apparently without regard to applicable law and without the consent of the copyright owner to vary the law. They then seek to bootstrap their noncompliance into a refusal to allow their books and records to be examined by the copyright owner, which refusal forces the copyright owner's hand to terminate whatever licenses the Service purportedly had (if any such license existed) and potentially to resort to litigation.

Thus, musical works are being exploited, but no statements are certified and it does not appear there will be a royalty examination absent litigation so the statements that are rendered cannot be verified—a "gotcha" moment.

In more detail, a Service asserts that the company intends to rely on the Statutory Mechanical License by purporting to have sent a timely notification of the Service's intention to obtain a compulsory license for the musical work concerned under 17 U.S.C. Section 115(b) (each, an "***NOI***"). The Service then unilaterally renders uncertified statements in the Service's own format to the copyright owner, typically on a quarterly basis but in any event on a basis other than monthly. These uncertified statements are sent without regard to the Accounting Regulations. The Service may never have complied with the Accounting Regulations (and may well have a pattern of failing to timely send NOIs).

When the copyright owner seeks to conduct a royalty examination of the books and records of the Service based on the improper statements for the convenience of all concerned, the copyright owner is told that it lacks the basis for the examination because the Accounting Regulations do not permit it—even though the Service has failed to comply with the Accounting Regulations. This refusal requires the copyright owner to decide whether to rely on the improper statements provided by the Service or to treat the Service as a potential infringer and send a termination notice under 17 U.S.C. 115(c)(6).

When the copyright owner points out that the Service has failed to comply with the Accounting Regulations and that an audit would be a more cooperative and constructive alternative to the termination permitted by the Copyright Act (and any subsequent litigation), the Service informs the copyright owner that the issue is part of some

rulemaking at the Copyright Office and that the Service need not comply with the Accounting Regulations during the pendency of that rulemaking. In some instances, the Service tells the copyright owner that the rulemaking will resolve the issue retroactively, which in some cases would be for many years of accounting statements.

We are not able to determine what Copyright Office rulemaking is being referred to and contacted the Copyright Office staff last year in an attempt to determine the existence and subject matter of any such rulemaking. We were informed that regardless of any rulemaking, there was no intention on the part of the Copyright Office to attempt to create a retrospective remedy that would prevent copyright owners from enjoying their rights under the Accounting Regulations. We conveyed this information to a copyright owner who in turn conveyed it to a Service or its representative. We were told that the Service's reaction was that the Copyright Office should not be having "ex parte discussions"—a statement that may have many attributes aside from the principal one of being nonresponsive.

We would appreciate your confirming once and for all whether there is any rulemaking at the Copyright Office that would provide a basis upon which a Service can claim a legal right not to comply with the Accounting Regulations so that your answer can be disseminated to our clients in an effort to avoid yet more costly and inefficient litigation in the nascent online market for music.

While I realize that the Copyright Office does not give legal advice, I hope you can understand the frustration of a client being told that a Service need not comply with the Accounting Regulations because of some kind of Copyright Office proceeding, but also being told that the copyright owner cannot petition their government for clarification. A clear statement from the Copyright Office one way or another would, I should think, not be legal advice and would prevent the Copyright Office from being used as a kind of shield.

Thank you for your attention to this matter.

Sincerely,

Christian L. Castle

CLC/sc