

### C. Alternative Methods for Obtaining Antimicrobial Use Data

FDA is seeking public comment on alternative methods available to the Agency for obtaining additional data and information about the extent of antimicrobial drug use in food-producing animals. Specifically, the Agency is requesting public input on alternative methods for assessing antimicrobial use the Agency can employ within its existing authority that may further support the analysis of factors related to the development and spread of antimicrobial resistance in connection with the use of medically important antibiotics in food-producing animals.

### III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

This advanced notice of proposed rulemaking is issued under section 512 of the FD&C Act (21 U.S.C. 360b) and under the authority of the Commissioner of Food and Drugs.

### IV. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but we are not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.)

1. U.S. General Accounting Office, "Antibiotic Resistance: Agencies Have Made Limited Progress Addressing Antibiotic Use in Animals," GAO-11-801, Washington, DC, General Accounting Office, 2011 (<http://www.gao.gov/new.items/d11801.pdf>).

2. Guidance for Industry #209, entitled "The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals" (<http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm>).

Dated: June 29, 2012.

**Leslie Kux,**

*Assistant Commissioner for Policy.*

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## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Parts 201 and 210

[Docket No. 2012-7]

#### Mechanical and Digital Phonorecord Delivery Compulsory License

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Office of the Library of Congress is proposing to amend its regulations for reporting Monthly and Annual Statements of Account for the making and distribution of phonorecords under the compulsory license, 17 U.S.C. 115, to bring the regulations up to date to reflect recent and pending rate determinations by the Copyright Royalty Judges, which among other things provide new rates for limited downloads, interactive streaming and incidental digital phonorecord deliveries, and to harmonize these reporting requirements with the existing regulations for reporting the making and distribution of physical phonorecords, permanent downloads and ringtones.

**DATES:** Comments are due no later than September 25, 2012. Reply comments are due October 25, 2012.

**ADDRESSES:** The Copyright Office strongly prefers that comments be submitted electronically. A comment submission page is posted on the Copyright Office Web site at <http://www.copyright.gov/docs/section115/soa/comments/>. The Web site interface requires submitters to complete a form specifying name and other required information, and to upload comments as an attachment. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office Web site exactly as they are received, along with names and, if provided, organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at (202) 707-XXXX for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Tanya Sandros, Deputy General

Counsel, or Stephen Ruwe, Attorney Advisor, Office of the General Counsel, PO Box 70400, Washington, DC 20024-0400 Telephone: (202) 707-1673. Telefax: (202) 252-3423.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 115 of the Copyright Act provides a compulsory license for reproducing and distributing phonorecords of a musical work. The mechanical license limits the exclusive rights granted to copyright owners by enabling anyone to make a phonorecord of an eligible musical work for the purpose of distributing it to the public for private use.

The mechanical license may be used once phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner. In order to legally use the mechanical license, the licensee has to comply with the requirements in the statute and pay a royalty fee to the copyright owner. The mechanical license has its limitations; it is only available to make and distribute phonorecords of a musical work and it does not allow the licensee to reproduce and distribute another's sound recording, or change the "basic melody or fundamental character of the work." 17 U.S.C. 115(a)(2).

The mechanical license was established in the 1909 Copyright Act as the first compulsory license in United States copyright law. Congress created the license because it wanted to make musical compositions available for public use, prevent monopoly, and at the same time ensure that compensation is provided to copyright owners. The first mechanical license was established in response to the 1908 Supreme Court holding in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). The Court decided that piano rolls were not considered 'copies' of a musical work because they did not contain a system of notation that could be read. Instead, the Court held they were merely mechanical reproductions made for the purpose of performing music. This decision prompted Congress to extend copyright protection to include the right to make mechanical devices which embody the musical work. H.R. Rep. No. 60-2222, at 9 (1909). However, Congress was concerned that extending the right of reproduction to include mechanical devices like piano rolls would enable a cartel of music publishers to exercise monopoly power over the recording of music to the possible detriment of the copyright owners of the musical work. To ensure a balance, Congress created

the first compulsory license in 1909 to allow anyone to “cover” (*i.e.* make a new recording of) the musical work once a copyright owner made or authorized a recording of his or her musical work, as long as the licensee adhered to the terms of the license and paid the established royalty to the copyright owner.

Whether to retain the compulsory license was a key issue during the discussions on the general revision of the copyright law in the 1960s. The outcome of this review was the decision to retain the license based on a finding that “a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music.” H.R. Rep. No. 83, at 66–67 (1967). In the Copyright Act of 1976, Congress reaffirmed the compulsory license and directed the Copyright Office to establish terms and regulations for the filing of Notices of Intention to Obtain a Compulsory License and for reporting Monthly and Annual Statements of Account. 17 U.S.C. 115(b)(1) and (c)(5). These regulations can now be found within 37 CFR 201.18 and 201.19.

Congress again amended the mechanical license in 1995 when Congress passed the Digital Performance Rights in Sound Recordings Act (“DPRA”). This Act amended section 115 to address the effects of new technology on copyrighted works. DPRA had two main purposes: (1) To ensure that recording artists and record companies will be protected as new technologies affect the way in which their creative works are used, and (2) to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.

Specifically, DPRA amended the section 115 compulsory license to include the ability to distribute a phonorecord through digital transmission, *i.e.*, as a “digital phonorecord delivery.” The Copyright Act defines a “digital phonorecord delivery” in relevant part as “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.” 17 U.S.C. 115(d).

Since passage of the Copyright Royalty and Distribution Reform Act of 2003, the rates and terms for making and distributing phonorecords under the compulsory license have been established by the Copyright Royalty Judges. On January 9, 2006 the

Copyright Royalty Judges published a Notice announcing commencement of a proceeding to determine rates and terms due under the compulsory license. The Copyright Royalty Judges concluded this proceeding in 2009. The new rates maintained a flat penny rate for the making and distribution of physical phonorecords, permanent digital downloads and ringtones. However, the 2009 determination adopting new rates for the section 115 compulsory license included a new definition for ringtones and it set forth more complex methods for calculating the royalty for limited downloads, interactive streaming, and incidental digital phonorecord deliveries, which included a multi-step process and specifications for five different types of services. *Final Determination of Rates and Terms of the Copyright Royalty Board, 2006–3 CRB DPRA (74 FR 4510, January 26, 2009, amended 74 FR 6832, February 11, 2009)*. The Copyright Royalty Judges are also in the final stages of adopting new rates and terms for the next licensing term for these and other new services, including limited offerings, mixed service bundles, paid locker services and purchased content locker services. Proposed rule, Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 77 FR 29259, (May 17, 2012). The new proposed rates are based upon the same basic methodology adopted in the last rate setting proceeding.

The existing regulations addressing Statements of Account are designed to address flat penny rates, such as those that are still applicable for the making and distribution of physical phonorecords, permanent digital downloads and ringtones. However, the current regulations do not specifically accommodate the more complex methods for calculating the royalty for limited downloads, interactive streaming, incidental digital phonorecord deliveries, or the new services identified in the Copyright Royalty Judge’s May 17, 2012 Notice of Proposed Rulemaking. A group of industry stakeholders comprised of Recording Industry Association of America, Inc., National Music Publishers Association, Songwriters Guild of America, Digital Media Association, Music Reports, Inc., RightsFlow, Inc., and American Association of Independent Music (collectively “Stakeholders”) expressed their concern with this state of affairs. Following a number of meetings with the Copyright Office, the Stakeholders offered proposed solutions to a number

of issues for which there was general industry-wide agreement. (Letter from Stakeholders to Copyright Office, dated April 30, 2010).

In light of the changes to the rate structure for use of the license and the Stakeholders’ expressed concerns, the Office is initiating this public notice and comment proceeding to amend its regulations governing the filing of Statements of Account in order to incorporate specific reporting regulations for the making and distribution of these new digital phonorecord formats under the new rate structure established by the Copyright Royalty Judges for these configurations in the Final Determination of Rates and Terms of the Copyright Royalty Board, 2006–3 CRB DPRA, and the proposed new rates and terms for the next licensing period.

The Copyright Office is acting under the authority set forth in 17 U.S.C. 115(c)(5), which grants the Copyright Office authority to issue regulations regarding Statements of Account. “Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records distributed.” 17 U.S.C. 115(c)(5).

Specifically, the Copyright Office proposes the creation of a new Part 210 in title 37 of the Code of Federal Regulations for the regulations governing use of the compulsory license. Subpart A will be reserved for regulations governing the filing of Notices of Intention to Use the Compulsory License. These regulations, currently in § 201.18, are to be incorporated into Subpart A once the Office concludes its ongoing rulemaking proceeding concerning the electronic submission of such notices with the Office. *See* 77 FR 31327 (May 25, 2012). Subparts B and C will contain Statement of Account provisions for reporting royalties for the making and distribution of phonorecords. The Statement of Account provisions in § 201.19 are currently based on the penny rate royalty formula for physical phonorecords and permanent digital phonorecord deliveries. As the a penny rate for this type of licensed activity continues under the existing and

proposed rates the Statement of Account provisions in § 201.19 are incorporated into proposed Subpart B of Part 210 with only minor amendments, as referenced herein. Subpart C, on the other hand, includes new proposed regulations modeled on the current regulations in § 201.19 and are designed to specifically accommodate the new rate structure for limited downloads, interactive streaming, incidental digital phonorecord deliveries, and the proposed new services. Adoption of regulatory amendments specific to the proposed rates and terms for limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services set forth in proposed Subpart C are dependent upon final action by the Copyright Royalty Judges. Should the Copyright Royalty Judges not adopt the proposed rates and terms for these new services, alternative regulatory changes may be adopted in the final rules to cover these services.

In large part, the proposed regulations incorporate by reference the methodology adopted by the Copyright Royalty Judges in their 2009 determination and mirrored in the proposed regulations adopting new rates and terms for the upcoming licensing period. Nevertheless, the Office has identified a number of issues associated with the new rate structure that require careful consideration before adoption of final regulations. Prior to initiating this proceeding, the Office consulted with interested parties on these points for the purpose of understanding the extent of the issues and the need for specific regulations to address these points. Each of these points and proposed amendments to the regulations are discussed herein in light of these initial discussions. The Office seeks public comment on the proposed changes and whether additional changes are needed.

## 1. Issues Presented Involving Calculations of Royalties

### A. Royalties for Public Performances of Musical Works That Are Applicable to the Licensed Activities

Calculation of the royalties for the making and distribution of limited DPDs, interactive streams, incidental DPDs and the proposed new services allows the licensee to deduct royalties due for public performances of musical works that are applicable to the licensed activities. 37 CFR 385.12(b)(2) and proposed 385.22(b)(2). The Office is aware that in some instances these values are unknown, and that the regulations need to address the appropriate method for accounting for

this unknown element in the Statements of Account. Preliminary input from the Stakeholders has indicated general agreement that when the amount of public performance royalties to be deducted pursuant to 37 CFR 385.12(b)(2) and proposed 385.22(b)(2) is not known (*e.g.*, because neither a final nor an interim rate has yet been determined), a licensee may compute the public performance royalty based on a reasonable estimate of the expected final royalties made in accordance with U.S. Generally Accepted Accounting Principles (GAAP) and that the aggregate amount of public performance royalties then sought from the service by performance rights societies may be deducted from the royalties owed for use of the section 115 compulsory license.

The Office also observes that there may be cases in which there will be interim royalties and that therefore it is prudent to allow licensees to compute the public performance royalty based on the royalties that have been established on an interim basis. In addition, the Stakeholders generally agree that an adjustment to account for the determination of the service's aggregate final public performance royalties then would be made in an amended Annual Statement of Account for the year in which a service's aggregate final public performance royalty rate is determined.

In the past, the Copyright Office has applied GAAP when estimates are required to complete a formula under section 115. GAAP was first applied to the section 115 compulsory license in 1978 when the Office adopted its *Final Regulations of Compulsory License for Making and Distributing Phonorecords*, 45 FR 79038 (November 28, 1980). In taking this approach, the Office noted that Congress's intention was to have some assurance that record companies would not manipulate their statements when allowing an estimate to be made in the reserve calculation. "The Office believes that the statutory requirement for an annual CPA audit, coupled with our regulatory requirements including the application of 'generally accepted accounting principles' (GAAP) to the recognition of revenue from the sale of phonorecords, should go a long way toward assuring copyright owners payment of all monies to which they are entitled—that is, statutory royalties for all phonorecords shipped, minus phonorecords returned within a reasonable time-frame." 45 FR 79038. Additionally the regulations stated, "The Copyright Office believes that the application of GAAP will reduce the likelihood of unusually high reserves,

thereby minimizing the possibility for losses of earned interest." *Id.*

Currently, GAAP applies to several different provisions in the section 115 regulations adopted by the Copyright Royalty Judges. Their regulations state that GAAP should be applied to the calculations of service revenue. 37 CFR 385.11; *also see* proposed 37 CFR 385.21. Additionally, GAAP is applied to situations where the licensee calculates an applicable percentage based on offering type. 37 CFR 385.13(b) and (c); *also see, e.g.*, proposed 37 CFR 385.23(b). Finally in 37 CFR 201.19(f)(6)(ii) of the Office's regulations, GAAP is applied not only to the reserve calculation but also to the certification statement, which states that the auditing CPA will review the statements in accordance with GAAP.

In light of the history that GAAP has had in the administration of the compulsory license, the proposed regulations adopt this approach. The Copyright Office would like comments on whether to apply GAAP for the estimate of the public performance rights royalty calculation in the absence of an interim or final rate; and alternatively if GAAP is not the right approach, identification of an alternative methodology.

### B. Application of Negative Reserve Balances in Calculating Payment Amounts

Under the existing Statement of Account regulations designed to address flat penny rates, licensees are permitted to account for negative reserve balances in calculating their royalty payments. By way of explanation, a negative reserve balance exists when physical phonorecords are returned to a compulsory licensee after the corresponding reserves for returns, and all other eligible reserves, have been eliminated. The result is that the compulsory licensee has paid royalties for the returned physical phonorecords and can include that amount as a credit in calculating the royalty payment for the current accounting period. While the Stakeholders agree that a licensee is permitted to establish reserves based only on its shipments of physical phonorecords, they disagree as to whether a compulsory licensee is and should be permitted to apply a negative reserve balance to future DPD distributions.

Copyright owners have stated that negative reserve balances only apply to physical phonorecords. In doing so, they have pointed out that the existing regulations specifically state that "[t]o the extent that the terms reserve, credit and return appear in this section, such

provisions shall not apply to digital phonorecord deliveries.” 37 CFR 201.19(a)(9). Copyright owners have also argued that it is bad policy to allow licensees to apply royalties associated with negative reserve balances against royalties due for digital uses as it would encourage the practice of overshipping.

Record labels have stated that they understand that negative reserve balances cannot be established for DPD distributions. Nevertheless, they contend that the current regulations clearly allow credits for negative reserve balances created by returns of physical phonorecords to be applied to royalties due for digital uses. They have argued that there is no justification for requiring a compulsory licensee to pay royalties on new DPD distributions when, due to returns of physical phonorecords, it has overpaid the same copyright owner in a previous period for these same physical phonorecords that have not been distributed within the meaning of 17 U.S.C. 115(c)(2). They have added that it is absurd to think that record companies would incur additional costs to “overship” products.

While the Office has not proposed an amendment to allow licensees to apply a credit for a negative reserve balance to royalties due for digital uses, it would like to receive comments on whether there is statutory authority for allowing the application of a credit for negative reserve balances to digital phonorecord deliveries. Assuming there is statutory authority to allow the application of credits for negative reserve balances to the “net balance” owed, are there reasons to limit the application of credits for negative reserve balances to physical phonorecords? If licensees should be allowed to apply credits for negative reserve balances to royalties due for digital uses, should the credits for negative reserve balances be calculated on a per work basis or should the regulations permit the application of credits for negative reserve balances to be cross-collateralized to royalties due to a particular copyright owner for different works? And, in what form should such regulations be established?

### *C. Degree of Rounding for Decimal Points*

For purposes of consistency, the Copyright Office would like to address the degree of rounding appropriate when computing the royalty in the Statements of Account. It appears that the appropriate per work royalty allocation, in terms of the number of decimal places, is undetermined. Fractions of a penny can quickly add up to substantial sums of money if the volume of transactions is high.

Consequently, the Office requests suggestions as to the degree of rounding that would be appropriate for reporting royalties associated with limited downloads, interactive streams, and incidental digital phonorecord deliveries made under the compulsory license. In considering the appropriate level for reporting royalty fees, the Office notes that past rates for the public performance of sound recordings and for ephemeral recordings have been set out to between four and six decimal places based upon a fraction of a dollar rate. See 17 CFR 380.3. Consideration should be given to whether a variance can be allowed based on the system of accounting, or whether reporting to a certain decimal place should be completely uniform.

## **2. Issues Presented Involving Method of Payment and Delivery of Royalties**

### *A. Electronic Payment*

The current regulations for section 115 provide that the Statements of Account shall be “served on the copyright owner or the agent with authority to receive Monthly Statements of Account on behalf of the copyright owner to whom or which it is directed, together with the total royalty for the month covered by the Monthly Statement, by mail or by reputable courier service.” 37 CFR 201.19(e)(7)(i). The Stakeholders have informed the Office that they agree in principle that a compulsory licensee should be able to make royalty payments by electronic funds transfer if the copyright owner and compulsory licensee (or its agent) so agree, regardless of the means of delivery of Statements of Account. They also agreed that when both the Monthly Statement of Account and payment are sent by mail or courier service, they should be sent together; otherwise they should be sent contemporaneously.

In light of the general agreement by the Stakeholders regarding payment, the Office proposes to maintain the current default requirement that payment be sent by mail or courier service. The Office also proposes to allow copyright owners and licensees to agree to alternatives to the current default methods of payment through mail or courier service. Finally, the Office proposes to maintain the requirement that when both the Monthly Statement of Account and payment are sent by mail or courier service, they should be sent together and that otherwise they should be sent contemporaneously. The Copyright Office requests comments on these proposals.

### *B. Electronic Statements of Account*

The Stakeholders generally support the idea that the Office’s section 115 regulations should permit electronic delivery of Statements of Account. However, the Stakeholders were not able to agree on the circumstances, if any, in which it should be mandatory for compulsory licensees to provide, and copyright owners to accept, Statements of Account by electronic means.

Copyright owners who have expressed an opinion to the Office on this topic support mandatory electronic reporting as a general default rule for both copyright owners and compulsory licensees. They would allow however that if any copyright owner, or its agent, does not, in the ordinary course of operating its business, conduct business via the internet, or if a compulsory licensee or its agent does not make a printable and electronically downloadable version available by posting such Statements of Account to a password-protected internet account created for the copyright owner or its agent, the copyright owner or its agent may request, and the compulsory licensee shall provide, paper Statements of Account.

Representatives of digital music services (DiMA) and licensing services (MRI, RightsFlow) support the default rule proposed by copyright owners. However, they take no position as to the need for electronic reporting between record companies and publishers, noting that consideration should be made for the unique historical business practices between record labels and publishers.

Record labels believe that the Office should not require record companies doing their own reporting to transition to electronic reporting on any particular timetable. They pointed out that in cases where neither the record company nor the publisher has felt a need to abandon paper-based processes that have worked for decades, forcing such a transition would be a massive and highly disruptive process. As such they urge that electronic reporting should be a permissible option, unless the copyright owner indicates that it would rather stick with paper reporting.

The Office is not persuaded that it is wise to compel copyright owners to accept and licensees to serve Statements of Account via an electronic transmission as a default rule. The Office is concerned that, as a practical matter, many copyright owners may not be equipped to accept Statements of Account in this manner. As such, the Office proposes to maintain the current

requirement that Statements of Account be sent by mail or courier service as a default rule.

However, the Office does understand that in many cases a copyright owner may reasonably wish to compel certain licensees, who submit voluminous Statements of Account, to serve them in electronic format. The Office notes that the regulations for filing Notices of Intention to use the compulsory license allows for filing the Notice electronically and for copyright owners to require submission of Notices of Intention in an electronic format in the case where the Notice covers more than 50 musical works. 37 CFR 201.18(f)(6). Section 201.18(a)(7) also allows copyright owners to offer alternative means for service, including by means of electronic transmission. The Office has adopted these rules to increase efficiencies for both the copyright owners and the licensees and has provided an exception to the requirement for a handwritten signature when service is made electronically. Because these rules appear to be working well and offer flexibility for electronic submissions of Notices, the Office proposes adopting parallel provisions for filing a Statement of Account, whereby copyright owners may require a licensee submitting a Statement of Account covering more than 50 works to provide the copyright owner with an electronic copy of the Statement of Account, and whereby a copyright owner may make known its willingness to accept Statements of Account and payment by means of electronic transmission. Furthermore, the Office proposes an exception to the requirement for a handwritten signature when service is made electronically, and a new provision for retention of records that support certification of Statements of Account that are served electronically. The Copyright Office requests comments on these proposals regarding submission of Statements of Account in electronic format and by electronic transmission. Additionally, the Office would like to know whether there are copyright owners that prefer paper statements and to what extent digital reporting has become the normal course of business.

### C. Minimum Amount for Payment

The royalty formula is based on a percentage of income or based on the number of plays for each work. In some cases, either when revenue is small or a particular work has not received many plays, the royalty owed for payment is nominal. The Copyright Office is aware that the transactional efforts and costs to provide payment can, in some

situations, be more burdensome for both copyright owners and licensees than the actual value of the payment.

It has been suggested that a minimum Monthly Statement of Account threshold should be met before payment is due in order to make processing payment for the Statements of Account more manageable. The Stakeholders have suggested that a royalty amount of at least 50 dollars should be owed to a copyright owner before payments are made, and Monthly Statements of Account are required, unless the copyright owner requests otherwise.

The question is whether this proposal is permissible under the statute. The statute states that “royalty payments shall be made on or before the 20th of each month and shall include all royalties for the month next proceeding” 17 U.S.C. 115(c)(5). This language seems to preclude setting a minimum amount for payment, and to date the Office has not adopted regulations to defer *de minimis* payment nor has any party raised this issue.

Interest, however, does exist today to consider regulations that would defer payment of royalties until the amount owed reached an established level as a way to avoid overly burdensome costs for making payments valued at less than the cost of making the payment. The Copyright Office requests comments on whether it has authority to adopt such a regulation and whether (and if so, why and how) the minimum payment issue should be addressed.

### 3. Issues Presented Involving Reporting on Statements of Account

#### A. Promotional Digital Phonorecord Deliveries

Promotional Digital Phonorecord Deliveries are often an important tool for record labels and services to attract new listeners, create awareness about a particular artist, and increase plays. The regulation adopted by the Copyright Royalty Judges in 37 CFR 385.14 establishes a royalty rate of zero for certain promotional digital phonorecord deliveries when they are offered for free trial periods to promote the sale or other paid use of sound recordings. *Also see* proposed 37 CFR 385.24, Free Trial Periods. Even though no royalty is owed in these circumstances, it is unclear whether licensees should give a full accounting of all the phonorecords made under the license in the Statement of Account. The Stakeholders feel that it is unnecessary to report promotional digital phonorecord deliveries in the Statements of Account.

Nevertheless, the proposed regulations require a licensee to report

all phonorecords made and distributed under the section 115 license including digital promotional deliveries. This requirement would not seem to be a hardship on the licensees in light of the proposed recordkeeping requirement for the new trial periods applicable to limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services which requires retention of complete and accurate records of the relevant authorization, identification of each sound recording of a musical work made available through the free trial period, the activity involved, and the number of plays and downloads for each recording. *See* 77 FR 29259, 29269 (May 17, 2012) (proposing new 37 CFR 385.24(a)(4)(i), (b) and (c)).

The Copyright Office asks for comments on whether the statute requires that Statements of Account contain play information on promotional digital phonorecord deliveries. Specifically, the Office asks for comments that address the Register’s conclusion that “[t]here is no statutory authority for an exception to [the section 115(c)(5)] requirement for certain types of ‘phonorecords.’” *Review of Copyright Royalty Judges Determination* 74 FR 4537, 4543 (January 26, 2009). If the conclusion is that there is no statutory requirement, comments should address whether digital phonorecords offered at a promotional rate or for a free trial period should be reported and with what frequency, *e.g.*, monthly or annually.

#### B. Reporting the Identification of Third Party Licensees

While the Statement of Account provisions require detailed information as to the number of plays, neither the current Statement of Account provisions nor the proposed regulations require licensees to account for the location of the place of origin of the plays. The Copyright Office is aware that in many instances third parties make and distribute the phonorecords under the authority of the licensee and that different opinions exist as to whether the regulations should require the identification of these parties.

Copyright Owner stakeholders favor amending the regulations to require compulsory licensees to report on the number of Digital Phonorecord Deliveries made by each third party service operating under their authority. They believe that this information is necessarily available to compulsory licensees who need to rely on this information in order to assess whether their accounting statements are accurate. Copyright owners assert that

such information should not be kept from them and that they should be able to use the information to assess the usage and payment for their works. Furthermore, since Digital Phonorecord Deliveries are tracked electronically, they feel it is reasonable and feasible for record companies to provide this information, and believe it will ensure transparency in the digital environment.

Licensee stakeholders have a different view. They note that identifying distributors has never been required, and nothing in the Copyright Royalty Judges' determination requires imposing such new requirements for Digital Phonorecord Delivery configurations other than interactive streams and limited downloads. Moreover, they maintain that the regulations should not be amended to require this information because it would impose substantial costs on the licensees to provide unnecessary information since the Statement of Account provisions require an annual audit by a CPA to ensure reliability.

MRI, an independent licensing agent, has informed the Office that it has the ability to report the identification of the distributor, except where licensees are unable to supply the information to them and would support an agreement among the Stakeholders requiring the identification of third party distributors on statements when those statements are prepared by common agents. It did, however, have some reservations about an absolute requirement and suggested that where its principals may be unable to provide this information, some leniency should be given. This may be the case where distribution statements through third party distributors/ aggregators fail to provide information to the record companies, or due to other bona fide technological limitations.

The Copyright Office would like comments concerning the views set forth above and how the alternatives could potentially affect copyright owners and licensees. To what degree would these requirements burden or benefit licensees and copyright owners?

### C. Certification Language

The certification statement in 37 CFR 201.19 is meant to provide additional assurance to the copyright owner that the Statements of Account are reliable and truthful. "The Register shall also prescribe regulations under which detailed cumulative Annual Statements of Account, certified by a certified public accountant, shall be filed for every compulsory license under this section." 17 U.S.C. 115(c)(5). When 17 U.S.C. 115 was first implemented by Congress, the CPA requirement was

included with the intention of ensuring accurate payment to copyright owners. Congress, however, recognized that a balance was necessary. "Neither the record-keeping nor the CPA audit requirements should be so burdensome or expensive as to undermine the Congressional intention by putting compulsory licensing out of the reach of record companies." 45 FR at 79039.

The Office has previously been urged to provide that the language of the CPA certification required in Annual Statements of Account is "illustrative" rather than required. The Office declined such a course and instead required adherence to the existing clear and unambiguous statement, which fulfills Congress's purpose in requiring certification of the Annual Statement. 43 FR at 44515-44516. For purposes of this proposed rulemaking proceeding, the Office has retained the current regulations for certifying a Statement of Account. Nevertheless, the Copyright Office is aware that licensees have expressed interest in adopting alternative methods of certifying the Statement of Account to accommodate large volumes of statements and welcomes suggestions on modifications to the process provided that any proposed alternative form of certification fits within the statutory requirements and complies with the original intentions of the CPA requirement. The CPA requirement should assure that copyright owners receive the royalties to which they are entitled, but the requirement should not burden the licensee to the point that it would prevent the compulsory license from being a practical option for record companies or services. Are there alternative certification methods that satisfy both goals and should be considered by the Office?

### D. Adjustment of Timetables for Reporting

The accounting methodology and timetables for reporting overpayments or underpayments were originally set forth to accommodate the penny rate royalty for section 115. Given the increased complexity of calculating royalties for interactive streaming, limited downloads and the proposed new services in the Annual Statement of Account, an extension for statutory licensees to file their Statements of Account appears to be reasonable.

The Stakeholders' preliminary input indicates a general agreement that an extension for the deadline of the Annual Statement of Account would be appropriate because the calculation of interactive streaming/limited download royalties, for example, has increased the

complexity of compiling the statement. The Stakeholders suggest extending the deadline from three months after the close of the licensee's fiscal year to six months after the close of the licensee's fiscal year. See 37 CFR 201.19(f)(7)(i). Based on these early discussions, the Office proposes amending its regulations and adopting the later deadline for filing the Annual Statement of Account. The Office requests comments from the relevant parties as to whether this additional time is required to create an accurate Statement of Account for annual statements.

### E. Service of Statements of Account for Periods Prior to Enactment of New Regulations

Pursuant to section 115(c)(5), the Office's existing regulations require licensees to serve Monthly and Annual Statements of Account for the making and distribution of phonorecords. As explained in the introduction, the current regulations in § 201.19 are an ill fit for reporting royalties for the new digital phonorecord delivery configurations identified in 37 CFR subpart B and proposed new Subpart C of Part 385 because of the change in the rate structure. Nevertheless, the Office is required to establish regulations to cover these new types of phonorecords, including the establishment of dates for filing the Statements of Account to cover all past reporting periods since the establishment of the new rates set according to regulations, which took effect on March 1, 2009. For that reason, the Office is proposing a new regulation to address the reporting periods prior to the effective date of these regulations. Specifically, the proposed regulations require that Statements of Account for any prior accounting period shall be due 180 days after the date the regulations become effective. This should not be an undue burden on the licensees, since as a matter of good business practice, licensees should have retained the necessary records to make these filings in accordance with the records retention provision the current regulations in § 201.19.

### F. Retention of Records (AKA Documentation)

The existing regulations require licensees to keep and retain in their possession all records and documents necessary and appropriate to support fully the information set forth in the Annual Statement of Account and in the Monthly Statements of Accounts for three years from the date of service of such statements. The Stakeholders have agreed in principle that it would be appropriate to extend the general record

retention period from three to five years after service of Statements of Account. In light of this agreement among the Stakeholders, the proposed regulations require retention of supporting records for five years after service of Statements of Account. The proposed amendment to this section also addresses situations in which it may be necessary to retain records even longer in the case where public performance rates have not been set at the time of filing the Statements of Account. To that end, the proposed regulation requires retention of records for a period of at least five years from the date of service of an Annual Statement of Account or for a period of at least three years from the date the relevant public performance royalty fees have been set, whichever is longer. Comment on this approach is requested.

#### G. Harmless Error Provision

Section 201.19 of the Office's regulations provides detailed requirements on how to prepare and file a Statement of Account, along with specific elements that are to be included. This information allows the copyright owner to evaluate the Statements of Account efficiently and aids in ensuring reliability and accuracy. Because of the detailed requirements in the regulations, licensees' accounting statements may contain inadvertent errors.

In the past, harmless error provisions have been adopted in an attempt to protect licensees from infringement liability and loss of their license for inconsequential mistakes. For this reason, a harmless error provision was included in the 2004 *Final Rule on Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 69 FR 34578, which amended 37 CFR 201.18 setting forth the requirements for filing a Notice of Intention to obtain a compulsory license. The intent of the harmless error provision with respect to a Notice of Intention was to prevent licensees from losing the right to use the license for errors that did not affect the legal sufficiency of the Notice. 66 FR 45241, 45243. For the Notice of Intention provision, the Office further observed that it would not have any role in resolving the disputes as to whether or not an error was actually harmless, and instead left these disputes to be adjudicated in the courts. *Id.*

Interested parties representing both copyright owners and licensees have suggested that a harmless error provision should be included in the section 115 regulations. The Copyright Office has reached no preliminary determination on this point and the

proposed regulations do not include a harmless error provision. However, the Copyright Office asks for comments on the Office's authority to include a harmless error provision and whether such a provision in Statement of Account regulations would be useful as a way to protect licensees from inadvertent errors that do not materially affect the adequacy of the information provided on the Statement of Account.

#### H. Confidentiality Provision

The Copyright Office observes that the Stakeholders' newly proposed rates for the compulsory license included provisions requiring that Statements of Account submitted to copyright owners must be kept confidential. While the proposed term illustrates a general desire among licensees and licensors for maintaining confidentiality of information contained in Statements of Account, the Copyright Office questions the need for the broadly framed confidentiality provision in the *Proposed rule, Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords* (77 FR 29259, 29262, May 17, 2012, proposing 37 CFR 385.12(f)).<sup>1</sup> The Office notes that the confidentiality provision negotiated by the participants in the rate proceeding does not, for example, accommodate a copyright owner's disclosure in litigation of information provided by a licensee.

Therefore, the Copyright Office asks for comments as to what would be the appropriate limits to such a requirement, as well as on its authority to require copyright owners to keep information contained in Statements of Account confidential.

<sup>1</sup> When the Copyright Royalty Judges published proposed regulations offered by the parties in the ongoing proceeding to set new rates and terms for use of the section 115 compulsory license, they noted that two proposed provisions appeared to exceed the scope of the requirements in the regulations governing Statements of Account and issued under the authority of the Register of Copyrights. 77 FR 29259 (May 17, 2012). They further noted that authority to issue regulations on Statements of Account is "the exclusive domain of the Register." 77 FR at 29261, citing to *Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License*, Final order, Docket No. 2008-1, 73 FR 48396, 48398 (January 26, 2009). The Copyright Office agrees. While the Copyright Royalty Judges do not have authority to alter the regulations governing the Statement of Accounts, the Register recognizes the Stakeholders' interest in making the statements confidential and addresses the issue here. Moreover, these proposed Statements of Account regulations would require the licensees to include all calculations on the Statements of Account, as proposed in the rate setting regulations published by the Copyright Office Judges on May 17, 2012 for public comment.

#### Conclusion

The section 115 compulsory license for incidental digital phonorecord delivery and interactive streaming provides a useful tool for record companies and services to further create and distribute content through new technology. The Office is proposing modifications to its regulations that will allow copyright owners to receive a full and accurate accounting of the various types of digital phonorecord deliveries that are made under the section 115 license which are subject to the rates and terms adopted under 17 U.S.C. Chapter 8. Further comments are invited regarding issues relating to this subject that have been not addressed today, but may be relevant to ensure a better system of accounting.

#### List of Subjects

37 CFR Part 201

Copyright.

37 CFR Part 210

Copyright, Phonorecords, Recordings.

#### Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes amending part 201 and adding part 210 to Chapter II of Title 37 of the Code of Federal Regulations as follows:

#### PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

#### § 201.19 [Removed and reserved]

2. Remove and reserve § 201.19.  
3. Add new part 210 to read as follows:

#### PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL WORKS

##### Subpart A—[Reserved]

Sec.

210.1–210.10 [Reserved]

##### Subpart B—Royalties and Statements of Account Under Compulsory License for Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones

210.11 General.

210.12 Definitions.

210.13 Accounting requirements where sales revenue is "recognized."

210.14 Accounting requirements for offsetting phonorecord reserves with returned phonorecords.

210.15 Situations in which a compulsory licensee is barred from maintaining reserves.



- 210.16 Monthly statements of account.  
 210.17 Annual statements of account.  
 210.18 Documentation.  
 210.19 Timing of filing statements of account.

**Subpart C—Royalties and Statements of Account Under Compulsory License for Interactive Streaming, Limited Downloads and Other Digital Phonorecord Delivery Services**

- 210.21 General.  
 210.22 Definitions.  
 210.23 Monthly statements of account.  
 210.24 Annual statements of account.  
 210.25 Amended annual statements of account.  
 210.26 Documentation.  
 210.27 Timing of filing statements of account.

Authority: 17 U.S.C. 115, 702.

**Subpart A—[Reserved]**

**§§ 210.1–210.10 [Reserved]**

**Subpart B—Royalties and Statements of Account Under Compulsory License for Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones**

**§ 210.11 General.**

This subpart prescribes the rules pertaining to the preparation and service of Statements of Account covering compulsory licenses for the making and distribution of phonorecords, including by means of a digital phonorecord delivery, pursuant to 17 U.S.C. 115 and the regulations in 37 CFR part 385 governing rates and terms for use of musical works under compulsory license for the making and distribution of phonorecords.

**§ 210.12 Definitions.**

As used in this subpart:

(a) A *Monthly Statement of Account* is a statement accompanying monthly royalty payments identified in 17 U.S.C. 115(c)(5), as amended by Public Law 94–553, and required by that section to be made under the compulsory license to make and distribute phonorecords of nondramatic musical works, including by means of a digital phonorecord delivery.

(b) An *Annual Statement of Account* is a statement identified in 17 U.S.C. 115(c)(5), as amended by Public Law 94–553, and required by that section to be filed for every compulsory license to make and distribute phonorecords of nondramatic musical works.

(c) A “digital phonorecord delivery” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording,

regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.

(d) A “ringtone” means a phonorecord of a partial musical work distributed as a digital phonorecord delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communications or message or to alert the receiver to the fact that there is a communication or message.

(e) The term *copyright owner*, in the case of any work having more than one copyright owner, means any one of the co-owners.

(f) The service of a *Statement of Account* on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of the Statement of Account on one co-owner or upon an agent of one of the co-owners shall be sufficient with respect to all co-owners.

(g) A *compulsory licensee* is a person or entity exercising the compulsory license to make and distribute phonorecords of nondramatic musical works as provided under 17 U.S.C. 115, including by means of a digital phonorecord delivery.

(h) A digital phonorecord delivery shall be treated as a type of phonorecord configuration, and a digital phonorecord delivery shall be treated as a phonorecord, with the following clarifications:

(1) A digital phonorecord delivery shall be treated as a phonorecord made and distributed on the date the phonorecord is digitally transmitted; and

(2) A digital phonorecord delivery shall be treated as having been *voluntarily distributed* and *relinquished from possession*, and a compulsory licensee shall be treated as having *permanently parted with possession* of a

digital phonorecord delivery, on the date that the phonorecord is digitally transmitted.

(i) Except as provided in paragraph (h) of this section, a phonorecord is considered *voluntarily distributed* if the compulsory licensee has voluntarily and permanently parted with possession of the phonorecord. For this purpose, and subject to the provisions of paragraph (d) of this section, a compulsory licensee shall be considered to have “permanently parted with possession” of a phonorecord made under the license:

(1) In the case of phonorecords relinquished from possession for purposes other than sale, at the time at which the compulsory licensee actually first parts with possession;

(2) In the case of phonorecords relinquished from possession for purposes of sale without a privilege of returning unsold phonorecords for credit or exchange, at the time at which the compulsory licensee actually first parts with possession;

(3) In the case of phonorecords relinquished from possession for purposes of sale accompanied by a privilege of returning unsold phonorecords for credit or exchange:

(i) At the time when revenue from a sale of the phonorecord is “recognized” by the compulsory licensee; or

(ii) Nine months from the month in which the compulsory licensee actually first parted with possession, whichever occurs first. For these purposes, a compulsory licensee shall be considered to “recognize” revenue from the sale of a phonorecord when sales revenue would be recognized in accordance with generally accepted accounting principles as expressed by the American Institute of Certified Public Accountants or the Financial Accounting Standards Board, whichever would cause sales revenue to be recognized first.

(j) To the extent that the terms *reserve*, *credit* and *return* appear in this section, such provisions shall not apply to digital phonorecord deliveries.

(k) A *phonorecord reserve* comprises the number of phonorecords, if any, that have been relinquished from possession for purposes of sale in a given month accompanied by a privilege of return, as described in paragraph (i)(3) of this section, and that have not been considered voluntarily distributed during the month in which the compulsory licensee actually first parted with their possession. The initial number of phonorecords comprising a phonorecord reserve shall be determined in accordance with generally accepted accounting principles as expressed by the American



Institute of Certified Public Accountants or the Financial Accounting Standards Board.

(l) A *negative reserve balance* comprises the aggregate number of phonorecords, if any, that have been relinquished from possession for purposes of sale accompanied by a privilege of return, as described in paragraph (i)(3) of this section, and that have been returned to the compulsory licensee, but because all available phonorecord reserves have been eliminated, have not been used to reduce a phonorecord reserve.

(m) An *incomplete transmission* is any digital transmission of a sound recording which, as determined by means within the sole control of the distributor, does not result in a specifically identifiable reproduction of the entire sound recording by or for any transmission recipient.

(n) A *retransmission* is a subsequent digital transmission of the same sound recording initially transmitted to an identified recipient for the purpose of completing the delivery of a complete and usable reproduction of that sound recording to that recipient.

**§ 210.13 Accounting requirements where sales revenue is “recognized.”**

Where under § 210.12(i)(3)(i), revenue from the sale of phonorecords is “recognized” during any month after the month in which the compulsory licensee actually first parted with their possession, said compulsory licensee shall reduce particular phonorecord reserves by the number of phonorecords for which revenue is being “recognized,” as follows:

(a) If the number of phonorecords for which revenue is being “recognized” is smaller than the number of phonorecords comprising the earliest eligible phonorecord reserve, this phonorecord reserve shall be reduced by the number of phonorecords for which revenue is being “recognized.” Subject to the time limitations of § 210.12(i)(3)(ii), the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(b) If the number of phonorecords for which revenue is being “recognized” is greater than the number of phonorecords comprising the earliest eligible phonorecord reserve but less than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall first eliminate those phonorecord reserves, beginning with the earliest eligible phonorecord reserve and continuing to the next succeeding phonorecord reserves, that are

completely offset by phonorecords for which revenue is being “recognized.” Said licensee shall then reduce the next succeeding phonorecord reserve by the number of phonorecords for which revenue is being “recognized” that have not been used to eliminate a phonorecord reserve. Subject to the time limitations of § 210.12(i)(3)(ii), the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(c) If the number of phonorecords for which revenue is being “recognized” equals the number of phonorecords comprising all eligible phonorecord reserves, the person or entity exercising the compulsory license shall eliminate all of the phonorecord reserves.

**§ 210.14 Accounting requirements for offsetting phonorecord reserves with returned phonorecords.**

(a) In the case of a phonorecord that has been relinquished from possession for purposes of sale accompanied by a privilege of return, as described in § 210.12(i)(3), where the phonorecord is returned to the compulsory licensee for credit or exchange before said compulsory licensee is considered to have “permanently parted with possession” of the phonorecord under § 210.12(i), the compulsory licensee may use such phonorecord to reduce a “phonorecord reserve,” as defined in § 210.12(k).

(b) In such cases, the compulsory licensee shall reduce particular phonorecord reserves by the number of phonorecords that are returned during the month covered by the Monthly Statement of Account in the following manner:

(1) If the number of phonorecords that are returned during the month covered by the Monthly Statement is smaller than the number comprising the earliest eligible phonorecord reserve, the compulsory licensee shall reduce this phonorecord reserve by the total number of returned phonorecords. Subject to the time limitations of § 210.12(i)(3), the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(2) If the number of phonorecords that are returned during the month covered by the Monthly Statement is greater than the number of phonorecords comprising the earliest eligible phonorecord reserve but less than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall first eliminate those phonorecord reserves, beginning with the earliest eligible phonorecord reserve, and

continuing to the next succeeding phonorecord reserves, that are completely offset by returned phonorecords. Said licensee shall then reduce the next succeeding phonorecord reserve by the number of returned phonorecords that have not been used to eliminate a phonorecord reserve. Subject to the time limitations of § 210.12(i)(3)(ii), the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(3) If the number of phonorecords that are returned during the month covered by the Monthly Statement is equal to or is greater than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall eliminate all eligible phonorecord reserves. Where said number is greater than the total number of phonorecords comprising all eligible phonorecord reserves, said compulsory licensee shall establish a “negative reserve balance,” as defined in § 210.12(l).

(c) Except where a negative reserve balance exists, a separate and distinct phonorecord reserve shall be established for each month during which the compulsory licensee relinquishes phonorecords from possession for purposes of sale accompanied by a privilege of return, as described in § 210.12(i)(3) of this section. In accordance with paragraph (ii) of § 210.12(i)(3), any phonorecord remaining in a particular phonorecord reserve nine months from the month in which the particular reserve was established shall be considered “voluntarily distributed”; at that point, the particular monthly phonorecord reserve shall lapse and royalties for the phonorecords remaining in it shall be paid as provided in § 210.16(d).

(d) Where a negative reserve balance exists, the aggregate total of phonorecords comprising it shall be accumulated into a single balance rather than being separated into distinct monthly balances. Following the establishment of a negative reserve balance, any phonorecords relinquished from possession by the compulsory licensee for purposes of sale or otherwise, shall be credited against such negative balance, and the negative reserve balance shall be reduced accordingly. The nine-month limit provided by § 210.12(i)(3)(ii) shall have no effect upon a negative reserve balance; where a negative reserve balance exists, relinquishment from possession of a phonorecord by the compulsory licensee at any time shall be used to reduce such balance, and shall not be considered a “voluntary

distribution” within the meaning of § 210.12(i).

(e) In no case shall a phonorecord reserve be established while a negative reserve balance is in existence; conversely, in no case shall a negative reserve balance be established before all available phonorecord reserves have been eliminated.

**§ 210.15 Situations in which a compulsory licensee is barred from maintaining reserves.**

Notwithstanding any other provisions of this section, in any case where, within three years before the phonorecord was relinquished from possession, the compulsory licensee has had final judgment entered against it for failure to pay royalties for the reproduction of copyrighted music on phonorecords, or within such period has been definitively found in any proceeding involving bankruptcy, insolvency, receivership, assignment for the benefit of creditors, or similar action, to have failed to pay such royalties, that compulsory licensee shall be considered to have “Permanently parted with possession” of a phonorecord made under the license at the time at which that licensee actually first parts with possession. For these purposes the “compulsory licensee,” as defined in § 210.12(g), shall include:

(a) In the case of any corporation, the corporation or any director, officer, or beneficial owner of twenty-five percent (25%) or more of the outstanding securities of the corporation;

(b) In all other cases, any entity or individual owning a beneficial interest of twenty-five percent (25%) or more in the entity exercising the compulsory license.

**§ 210.16 Monthly statements of account.**

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Monthly Statements of Account.

(b) *General content.* A Monthly Statement of Account shall be clearly and prominently identified as a “Monthly Statement of Account Under Compulsory License for Making and Distributing Phonorecords,” and shall include a clear statement of the following information:

(1) The period (month and year) covered by the Monthly Statement;

(2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(3) The full address, including a specific number and street name or rural

route, of the place of business of the compulsory licensee. A post office box or similar designation will not be sufficient for this purpose, except where it is the only address that can be used in that geographic location;

(4) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the Monthly Statement and the name of the author or authors of such work or works, if known;

(5) For each nondramatic musical work that is owned by the same copyright owner being served with the Monthly Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (c) of this section;

(6) The total royalty payable for the month covered by the Monthly Statement, computed in accordance with the requirements of this section and the formula specified in paragraph (d) of this section, together with a Statement of Account showing in detail how the royalty was computed; and

(7) In any case where the compulsory licensee falls within the provisions of § 210.15, a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that paragraph.

(c) *Specific content of monthly statements: Identification and accounting of phonorecords.* (1) The information called for by paragraph (b)(5) of this section shall, with respect to each nondramatic musical work, include a separate listing of each of the following items of information:

(i) The number of phonorecords, including digital phonorecord deliveries, made during the month covered by the Monthly Statement;

(ii) The number of phonorecords that, during the month covered by the Monthly Statement and regardless of when made, were either:

(A) Relinquished from possession for purposes other than sale;

(B) Relinquished from possession for purposes of sale without any privilege of returning unsold phonorecords for credit or exchange;

(C) Relinquished from possession for purposes of sale accompanied by a privilege of returning unsold phonorecords for credit or exchange;

(D) Returned to the compulsory licensee for credit or exchange;

(E) Placed in a phonorecord reserve (except that if a negative reserve balance exists give either the number of

phonorecords added to the negative reserve balance, or the number of phonorecords relinquished from possession that have been used to reduce the negative reserve balance);

(F) Never delivered due to a failed transmission; or

(G) Digitally retransmitted in order to complete a digital phonorecord delivery.

(iii) The number of phonorecords, regardless of when made, that were relinquished from possession during a month earlier than the month covered by the Monthly Statement but that, during the month covered by the Monthly Statement either have had revenue from their sale “recognized” under § 210.12(i)(3)(i), or were comprised in a phonorecord reserve that lapsed after nine months under § 210.12(i)(3)(ii).

(2) Each of the items of information called for by paragraph (c)(1) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(i) The catalog number or numbers and label name or names, used on the phonorecords;

(ii) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(iii) The playing time on the phonorecords of each nondramatic musical work covered by the statement; and

(iv) Each phonorecord configuration involved (for example: single disk, long-playing disk, cartridge, cassette, reel-to-reel, digital phonorecord delivery, or a combination of them).

(v) The date of and a reason for each incomplete transmission.

(d) *Royalty payment and accounting.* (1) The total royalty called for by paragraph (b)(6) of this section shall be payable for every phonorecord “voluntarily distributed” during the month covered by the Monthly Statement.

(2) The amount of the royalty payment shall be calculated in accordance with the following formula:

(i) *Step 1: Compute the number of phonorecords shipped for sale with a privilege of return.* This is the total of phonorecords that, during the month covered by the Monthly Statement, were relinquished from possession by the compulsory licensee, accompanied by the privilege of returning unsold phonorecords to the compulsory licensee for credit or exchange. This total does not include:

(A) Any phonorecords relinquished from possession by the compulsory

licensee for purposes of sale without the privilege of return; and

(B) Any phonorecords relinquished from possession for purposes other than sale.

(ii) *Step 2: Subtract the number of phonorecords reserved.* This involves deducting, from the subtotal arrived at in Step 1, the number of phonorecords that have been placed in the phonorecord reserve for the month covered by the Monthly Statement. The number of phonorecords reserved is determined by multiplying the subtotal from Step 1 by the percentage reserve level established under Generally Accepted Accounting Practices. This step should be skipped by a compulsory licensee barred from maintaining reserves under § 210.15.

(iii) *Step 3: Add the total of all phonorecords that were shipped during the month and were not counted in Step 1.* This total is the sum of two figures:

(1) The number of phonorecords that, during the month covered by the Monthly Statement, were relinquished from possession by the compulsory licensee for purposes of sale, without the privilege of returning unsold phonorecords to the compulsory licensee for credit or exchange; and

(2) The number of phonorecords relinquished from possession by the compulsory licensee, during the month covered by the Monthly Statement, for purposes other than sale.

(iv) *Step 4: Make any necessary adjustments for sales revenue "recognized," lapsed reserves, or reduction of negative reserve balance during the month.* If necessary, this step involves adding to or subtracting from the subtotal arrived at in Step 3 on the basis of three possible types of adjustments:

(A) *Sales revenue "recognized."* If, in the month covered by the Monthly Statement, the compulsory licensee "recognized" revenue from the sale of phonorecords that had been relinquished from possession in an earlier month, the number of such phonorecords is added to the Step 3 subtotal;

(B) *Lapsed reserves.* If, in the month covered by the Monthly Statement, there are any phonorecords remaining in the phonorecord reserve for the ninth previous month (that is, any phonorecord reserves from the ninth previous month that have not been offset under FOFI, the first-out-first-in accounting convention, by actual returns during the intervening months), the reserve lapses and the number of phonorecords in it is added to the Step 3 subtotal.

(C) *Reduction of negative reserve balance.* If, in the month covered by the Monthly Statement, the aggregate reserve balance for all previous months is a negative amount, the number of phonorecords relinquished from possession by the compulsory licensee during that month and used to reduce the negative reserve balance is subtracted from the Step 3 subtotal.

(D) *Incomplete transmissions.* If, in the month covered by the Monthly Statement, there are any digital transmissions of a sound recording which do not result in specifically identifiable reproductions of the entire sound recording by or for any transmission recipient, as determined by means within the sole control of the distributor, the number of such phonorecords is subtracted from the Step 3 subtotal.

(E) *Retransmitted digital phonorecords.* If, in the month covered by the Monthly Statement, there are retransmissions of a digital phonorecord to a recipient who did not receive a complete and usable phonorecord during an initial transmission, and such transmissions are made for the sole purpose of delivering a complete and usable reproduction of the initially requested sound recording to that recipient, the number of such retransmitted digital phonorecords is subtracted from the Step 3 subtotal.

(v) *Step 5: Multiply by the statutory royalty rate.* The total monthly royalty payment is obtained by multiplying the subtotal from Step 3, as adjusted if necessary by Step 4, by the statutory royalty rate of 9.1 cents or 1.75 cents per minute or fraction of playing time, whichever is larger for every physical phonorecord delivery and permanent digital download, and by the statutory royalty rate of 24.0 cents for every ringtone made and distributed.

(3) Each step in computing the monthly payment, including the arithmetical calculations involved in each step, shall be set out in detail in the Monthly Statement.

(e) *Clear statements.* The information required by paragraphs (b) and (c) of this section requires intelligible, legible, and unambiguous statements in the Monthly Statements of Account without incorporation of facts or information contained in other documents or records.

(f) *Certification.* (1) Each Monthly Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is the licensee certifying the Monthly Statement of Account;

(ii) If the compulsory licensee is a partnership or a corporation, by the title

or official position held in the partnership or corporation by the person certifying the Monthly Statement of Account;

(iii) The date of certification;

(iv) A statement of the capacity of the person making the certification; and

(v) The following statement:

I certify that I have examined this Monthly Statement of Account and that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(2) If the Monthly Statement of Account is served by mail or by reputable courier service, certification of the Monthly Statement of Account by the licensee shall be made by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if the compulsory licensee is a partnership, the signature shall be that of a partner.

(3) If the Monthly Statement of Account is served electronically, the licensee and the copyright owner shall establish a procedure to verify that the certification of the Monthly Statement of Account by the licensee is made upon proper authority.

(g) *Service.* (1) Each Monthly Statement of Account shall be served on the copyright owner or the agent with authority to receive Monthly Statements of Account on behalf of the copyright owner to whom or which it is directed, together with the total royalty for the month covered by the Monthly Statement, by mail or by reputable courier service on or before the 20th day of the immediately succeeding month. However, in the case where the licensee has served its Notice of Intention upon an agent of the copyright owner pursuant to § 201.18 of this chapter, the licensee is not required to serve Monthly Statements of Account or make any royalty payments until the licensee receives from the agent with authority to receive the Notice of Intention notice of the name and address of the copyright owner or its agent upon whom the licensee shall serve Monthly Statements of Account and the monthly royalty fees. Upon receipt of this information, the licensee shall serve Monthly Statements of Account and all royalty fees covering the intervening period upon the person or entity identified by the agent with authority to receive the Notice of Intention by or before the 20th day of the month following receipt of the notification. It shall not be necessary to file a copy of the Monthly Statement in the Copyright Office.

(2)(i) In any case where a Monthly Statement of Account is sent by mail or reputable courier service and the Monthly Statement of Account is returned to the sender because the copyright owner or agent is no longer located at that address or has refused to accept delivery, or in any case where an address for the copyright owner is not known, the Monthly Statement of Account, together with any evidence of mailing or attempted delivery by courier service, may be filed in the Licensing Division of the Copyright Office. Any Monthly Statement of Account submitted for filing in the Copyright Office shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Monthly Statements of Account under this section.

(iii) Neither the filing of a Monthly Statement of Account in the Copyright Office, nor the failure to file such Monthly Statement, shall have effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Monthly Statements of Account submitted to the Copyright Office under this section. Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(3) A separate Monthly Statement of Account shall be served for each month during which there is any activity relevant to the payment of royalties under 17 U.S.C. 115, and under this subpart. The Annual Statement of Account identified in § 210.17 of this subpart does not replace any Monthly Statement of Account.

(4) If a Monthly Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If a Monthly Statement of Account is delivered by a reputable courier, documentation from the courier showing the first date of attempted delivery shall also be sufficient to prove that service was timely. In the absence of a receipt from the United States Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier, the compulsory licensee shall bear the burden of proving that the Monthly Statement of Account was served in a timely manner.

(5) If a Monthly Statement of Account covers reporting for more than 50 works that are embodied in phonorecords

made under the compulsory license, the copyright owner or the authorized agent may send the licensee a demand that the Monthly Statement of Account be resubmitted in an electronic format and that future Statements of Account be submitted in an electronic format. The statement may be submitted on a data storage medium widely used at the time for electronic storage of data, in the form of a flat file, word processing document or spreadsheet readable with computer software in wide use at such time, with the required information identified and/or delimited so as to be readily discernible. The Statement of Account may be submitted by means of electronic transmission (such as email) if the demand from the copyright owner or authorized agent states that such submission will be accepted. As provided in paragraph (f) of this section, the licensee and the copyright owner shall establish a procedure to verify that the certification portion of the statement is made upon the authority of the licensee.

(6) The copyright owner and the licensee or authorized agent may agree upon alternative methods of payment, provided that when the Monthly Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Monthly Statements of Account shall be sent and payment shall be made on or before the 20th day of each month and shall include all royalties for the month next proceeding. Any Monthly Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g)(1) of this section regarding service by mail or by reputable courier service of the Monthly Statements of Account together with the total royalty for the month covered by the Monthly Statement.

(7) For purposes of this section, a copyright owner or an agent of a copyright owner with authority to receive a Monthly Statement of Account may make public a written policy that it will accept a Monthly Statement of Account by means of electronic transmission and include in that written policy procedures for making royalty payments. When the Monthly Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Monthly Statements of Account shall be sent and payment shall be made on or before the 20th day of each month and shall include all royalties for the month next proceeding. Any Monthly Statement of Account or payment

provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g)(1) of this section regarding service by mail or by reputable courier service of the Monthly Statements of Account together with the total royalty for the month covered by the Monthly Statement.

#### **§ 210.17 Annual statements of account.**

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Annual Statements of Account.

(b) *Annual period.* Any Annual Statement of Account shall cover the full fiscal year of the compulsory licensee.

(c) *General content.* An Annual Statement of Account shall be clearly and prominently identified as an "Annual Statement of Account Under Compulsory License for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(1) The fiscal year covered by the Annual Statement;

(2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(3) If the compulsory licensee is a business organization, the name and title of the chief executive officer, managing partner, sole proprietor or other person similarly responsible for the management of such entity.

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

(5) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the Annual Statement and the name of the author or authors of such work or works, if known;

(6) The playing time of each nondramatic musical work on such phonorecords;

(7) For each nondramatic musical work that is owned by the same copyright owner being served with the Annual Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (d) of this section;

(8) The total royalty payable for the fiscal year covered by the Annual Statement computed in accordance with the requirements of this section, together with a statement of account showing in detail how the royalty was computed. For these purposes, the applicable royalty as specified in § 385.3 shall be payable for every phonorecord “voluntarily distributed” during the fiscal year covered by the Annual Statement;

(9) The total sum paid under Monthly Statements of Account by the compulsory licensee to the copyright owner being served with the Annual Statement during the fiscal year covered by the Annual Statement; and

(10) In any case where the compulsory license falls within the provisions of § 210.15, a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that paragraph.

(d) *Specific content of annual statements: Identification and accounting of phonorecords.* (1) The information called for by paragraph (c)(7) of this section shall, with respect to each nondramatic musical work, include a separate listing of each of the following items of information separately stated and identified for each phonorecord configuration (for example, single disk, long playing disk, cartridge, cassette, or reel-to-reel) made:

(i) The number of phonorecords made through the end of the fiscal year covered by the Annual Statement, including any made during earlier years;

(ii) The number of phonorecords which have never been relinquished from possession of the compulsory licensee through the end of the fiscal year covered by the Annual Statement;

(iii) The number of phonorecords involuntarily relinquished from possession (as through fire or theft) of the compulsory licensee during the fiscal year covered by the Annual Statement and any earlier years, together with a description of the facts of such involuntary relinquishment;

(iv) The number of phonorecords “voluntarily distributed” by the compulsory licensee during all years before the fiscal year covered by the Annual Statement;

(v) The number of phonorecords relinquished from possession of the compulsory licensee for purposes of sale during the fiscal year covered by the Annual Statement accompanied by a privilege of returning unsold records for credit or exchange, but not “voluntarily distributed” by the end of that year;

(vi) The number of phonorecords “voluntarily distributed” by the

compulsory licensee during the fiscal year covered by the Annual Statement, together with:

(A) The catalog number or numbers, and label name or names, used on such phonorecords; and

(B) The names of the principal recording artists or groups engaged in rendering the performances fixed on such phonorecords.

(2) If the information given under paragraph (d)(1)(i) through (vi) of this section does not reconcile, the Annual Statement shall also include a clear and detailed explanation of the difference. For these purposes, the information given under such paragraphs shall be considered not to reconcile if, after the number of phonorecords given under paragraphs (d)(1)(ii), (iii), (iv) and (v) of this section are added together and that sum is deducted from the number of phonorecords given under paragraph (d)(1)(i), the result is different from the amount given under paragraph (d)(1)(vi).

(e) *Clear statement.* The information required by paragraph (c) of this section requires intelligible, legible, and unambiguous statements in the Annual Statement of Account without incorporation by reference of facts or information contained in other documents or records.

(f) *Certification.* (1) Each Annual Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is the licensee certifying the Annual Statement of Account;

(ii) The date of certification;

(iii) If the compulsory licensee is a partnership or a corporation, the title or official position held in the partnership or corporation who is making the certification;

(iv) A statement of the capacity of the person making the certification; and

(v) The following statement:

I certify that I have examined this Annual Statement of Account and that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(2)(i) Each Annual Statement of Account shall also be certified by a licensed Certified Public Accountant. Such certification shall consist of the following statement.

We have examined the attached “Annual Statement of Account Under Compulsory License For Making and Distributing Phonorecords” for the fiscal year ended (date) of (name of the compulsory licensee) applicable to phonorecords embodying (title or titles of nondramatic musical works embodied in phonorecords made under the compulsory license) made under the

provisions of 17 U.S.C. 115, as amended by Public Law 94–553, and applicable regulations of the United States Copyright Office. Our examination was made in accordance with generally accepted auditing standards and accordingly, included tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion the Annual Statement of Account referred to above presents fairly the number of phonorecords embodying each of the above-identified nondramatic musical works made under compulsory license and voluntarily distributed by (name of the compulsory licensee) during the fiscal year ending (date), and the amount of royalties applicable thereto under such compulsory license, on a consistent basis and in accordance with the above cited law and applicable regulations published thereunder.

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(City and State of Execution)

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(Signature of Certified Public Accountant or CPA Firm)

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Certificate Number

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Jurisdiction of Certificate

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(Date of Opinion)

(ii) The certificate shall be signed by an individual, or in the name of a partnership or a professional corporation with two or more shareholders. The certificate number and jurisdiction are not required if the certificate is signed in the name of a partnership or a professional corporation with two or more shareholders.

(3) If the Annual Statement of Account is served by mail or by reputable courier service, the certification of the Annual Statement of Account by the licensee shall be made by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if that compulsory licensee is a partnership, the signature shall be that of a partner.

(4) If the Annual Statement of Account is served electronically, the licensee may serve an electronic facsimile of the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant. The licensee shall retain the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant, which shall be made available to the copyright owner upon demand.

(5) If the Annual Statement of Account is served electronically, the licensee and the copyright owner shall

establish a procedure to verify that the certification of the Annual Statement of Account by the licensee is made upon proper authority.

(g) *Service.* (1) Each Annual Statement of Account shall be served on the copyright owner or the agent with authority to receive Annual Statements of Account on behalf of the copyright owner to whom or which it is directed by mail or by reputable courier service on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. It shall not be necessary to file a copy of the Annual Statement in the Copyright Office. An Annual Statement of Account shall be served for each fiscal year during which at least one Monthly Statement of Account was required to have been served under § 210.16(g).

(2) In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(8) of this section is greater than the amount stated in that Annual Statement under paragraph (c)(9) of this section, the difference between such amounts shall be delivered to the copyright owner together with the service of the Annual Statement. The delivery of such sum does not require the copyright owner to accept such sum, or to forego any right, relief, or remedy which may be available under law.

(3)(i) In any case where an Annual Statement of Account is sent by mail or by reputable courier service and is returned to the sender because the copyright owner or agent is not located at that address or has refused to accept delivery, or in any case where an address for the copyright owner is not known, the Annual Statement of Account, together with any evidence of mailing or attempted delivery by courier service, may be filed in the Licensing Division of the Copyright Office. Any Annual Statement of Account submitted for filing shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Annual Statements of Account under this paragraph (g)(3).

(iii) Neither the filing of an Annual Statement of Account in the Copyright Office, nor the failure to file such Annual Statement, shall have any effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Annual Statements of Account submitted to the Copyright

Office under this paragraph (g)(3). Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(4) If an Annual Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If an Annual Statement of Account is delivered by a reputable courier, documentation from the courier showing the first date of attempted delivery shall also be sufficient to prove that service was timely. In the absence of a receipt from the United States Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier, the compulsory licensee shall bear the burden of proving that the Annual Statement of Account was served in a timely manner.

(5) If an Annual Statement of Account covers reporting for more than 50 works that are embodied in phonorecords made under the compulsory license, the copyright owner or the authorized agent may send the licensee a demand that the Annual Statement of Account be resubmitted in an electronic format and that future Annual Statements of Account be submitted in an electronic format. The statement may be submitted on a data storage medium widely used at the time for electronic storage of data, in the form of a flat file, word processing document or spreadsheet readable with computer software in wide use at such time, with the required information identified and/or delimited so as to be readily discernible. The Statement of Account may be submitted by means of electronic transmission (such as email) if the copyright owner or authorized agent states that such submission will be accepted. As provided in paragraph (f) of this section, the licensee and the copyright owner shall establish a procedure to verify that the certification portion of the statement is made upon the authority of the licensee.

(6) The copyright owner and the licensee or authorized agent may agree upon alternative methods of payment, provided that when the Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Annual Statements of Account shall be sent and any additional payment shall be made on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. Any Annual Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of

paragraph (g) of this section regarding service by mail or by reputable courier service of the Annual Statements of Account together with the total additional royalty covered by the Annual Statement.

(7) For purposes of this section, a copyright owner or an agent of a copyright owner with authority to receive an Annual Statement of Account may make public a written policy that it will accept an Annual Statement of Account by means of electronic transmission and include in that written policy procedures for making any additional royalty payments. When the Annual Statement of Account and any additional payment are not sent together by mail or courier service, they shall be sent contemporaneously. Annual Statements of Account shall be sent and payment shall be made on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. Any Annual Statement of Account provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of this paragraph (g) regarding service by mail or by reputable courier service of the Annual Statement of Account together with any additional royalty payment.

#### **§ 210.18 Documentation.**

All compulsory licensees shall, for a period of at least five years from the date of service of an Annual Statement of Account, keep and retain in their possession all records and documents necessary and appropriate to support fully the information set forth in such Annual Statement and in Monthly Statements served during the fiscal year covered by such Annual Statement.

#### **§ 210.19 Timing of statements of account.**

Statements of Accounts for an accounting period which closes after the effective date of this regulation shall be due as provided in §§ 210.16(g)(1) and 210.17(g)(1). Statements of Account for any prior reporting period shall be due 180 days after the effective date of this regulation.

### **Subpart C—Royalties and Statements of Account Under Compulsory License for Interactive Streaming, Limited Downloads and Other Digital Phonorecord Delivery Services**

#### **§ 210.21 General.**

This subpart prescribes the rules pertaining to the preparation and service of Statements of Account covering compulsory licenses for the making and distribution of phonorecords, by certain services which

offer digital phonorecord deliveries, pursuant to 17 U.S.C. 115 and the regulations in 37 CFR part 385 governing rates and terms for use of musical works under compulsory license for the making and distribution of phonorecords.

#### § 210.22 Definitions.

As used in this subpart:

(a) A *Monthly Statement of Account* is a statement accompanying monthly royalty payments identified in 17 U.S.C. 115(c)(5), as amended by Public Law 94–553, and required by that section to be made under the compulsory license to make and distribute phonorecords of nondramatic musical works, including by means of a digital phonorecord delivery.

(b) An *Annual Statement of Account* is a statement identified in 17 U.S.C. 115(c)(5), as amended by Public Law 94–553, and required by that section to be filed for every compulsory license to make and distribute phonorecords of nondramatic musical works.

(c) A “*digital phonorecord delivery*” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.

(d) A *limited download* means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening if—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription

transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery as defined in this section.

(e) An *interactive stream* means a stream of a sound recording of a musical work, where the performance of the sound recording by means of a stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114(d)(2).

(f) A *phonorecord* is used as a general term in this subpart to refer to all configurations of a phonorecord made and distributed under 17 U.S.C. 115, including a limited download, an incidental digital phonorecord delivery, and an interactive stream.

(g) The term *copyright owner*, in the case of any work having more than one copyright owner, means any one of the co-owners.

(h) The *service of a Statement of Account* on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of the Statement of Account on one co-owner or upon an agent of one of the co-owners shall be sufficient with respect to all co-owners.

(i) A *compulsory licensee* is a person or entity exercising the compulsory license to make and distribute phonorecords of nondramatic musical works as provided under 17 U.S.C. 115, including by means of a digital phonorecord delivery.

(j) A limited download, an incidental digital phonorecord delivery, and an interactive stream shall be treated as a type of phonorecord configuration:

(1) Distributed on the date the phonorecord is digitally transmitted; and

(2) As having been *voluntarily distributed and relinquished from*

*possession* on the date that the phonorecord is digitally transmitted.

(k) An *incomplete transmission* is any digital transmission of a sound recording which, as determined by means within the sole control of the distributor, does not result in a specifically identifiable reproduction of the entire sound recording by or for any transmission recipient.

(l) A *retransmission* is a subsequent digital transmission of the same sound recording initially transmitted to an identified recipient for the purpose of completing the delivery of a complete and usable reproduction of that sound recording to that recipient.

#### § 210.23 Monthly statements of accounts.

(a) *Forms*. The Copyright Office does not provide printed forms for the use of persons serving Monthly Statements of Account.

(b) *General content*. A Monthly Statement of Account shall be clearly and prominently identified as a “Monthly Statement of Account Under Compulsory License for Making and Distributing Phonorecords,” and shall include a clear statement of the following information:

(1) The period (month and year) covered by the Monthly Statement;

(2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords.

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

(4) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the Monthly Statement and the name of the author or authors of such work or works, if known;

(5) For each nondramatic musical work that is owned by the same copyright owner being served with the Monthly Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (c) of this section;

(6) The total royalty payable for the month covered by the Monthly Statement, computed in accordance with the requirements of this section specified in paragraph (d) of this



section, together with a Statement of account showing in detail how the royalty was computed; and

(c) *Specific content of monthly statements: Identification and accounting of phonorecords.* (1) The information called for by paragraph (b)(5) of this section shall, with respect to each each nondramatic musical work, include a separate listing of each of the following items of information:

(i) The number of phonorecords accounted for in this subpart, including the number of limited downloads, incidental digital phonorecord deliveries, and interactive streams made during the month covered by the Monthly Statement;

(ii) The number of promotional interactive streams and promotional promotional limited downloads; and

(iii) The number of phonorecords that were never delivered due to a failed transmission; or digitally retransmitted in order to complete a digital phonorecord delivery.

(2) Each of the items of information called for by paragraph (c)(1) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(i) The catalog number or numbers and label name or names, used on the phonorecords;

(ii) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(iii) The playing time on the phonorecords of each nondramatic musical work covered by the statement; and

(iv) Each phonorecord configuration involved (for example, a limited download, an incidental digital phonorecord delivery, an interactive stream or a combination of these configurations).

(v) The date of and a reason for each incomplete transmission.

(d) *Royalty payment and accounting.*

(1) The total royalty called for by paragraph (b)(6) of this section shall be payable for every phonorecord "voluntarily distributed" during the month covered by the Monthly Statement.

(2) The amount of the royalty payment for each offering, e.g., a limited download or an interactive stream, shall be calculated separately:

(i) In accordance with the methodology specified in §§ 385.12 through 385.14, for each standalone non-portable subscription—streaming only service; standalone non-portable subscription—mixed service; standalone portable subscription service; bundled subscription service; and free

nonsubscription/ad-supported service, and

(ii) In accordance with the methodology specified in §§ 385.22 through 385.24, for each limited offering, mixed service bundle, music bundle, paid locker service, and purchased music content locker service.

(3) Each Statement of Account shall include each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to § 385.13 and § 385.23 does or does not apply).

(4) In computing royalty payment pursuant to paragraph (d)(2) of this section, a licensee may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid made in accordance with U.S. Generally Accepted Accounting Principles (GAAP). Royalty payments based on anticipated payments or interim public performance royalty rates must be reconciled on the Annual Statement of Account or, if the final public performance royalty rate is determined after the filing of the Annual Statement of Account, within six months of obtaining the information concerning the amount of public performance royalties actually paid during the relevant accounting period by filing an Amended Annual Statement of Account for this purpose.

(e) *Clear statements.* The information required by paragraphs (b) and (c) of this section requires intelligible, legible, and unambiguous statements in the Monthly Statements of Account without incorporation of facts or information contained in other documents or records, except in the case of promotional interactive streaming activities, certain promotional limited downloads and free trial periods. Information concerning promotional activities and free trial periods shall be maintained and made available as prescribed in § 385.14 and § 385.24.

(f) *Certification.* (1) Each Monthly Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is the licensee certifying the Monthly Statement of Account;

(ii) If the compulsory licensee is a partnership or a corporation, by the title or official position held in the

partnership or corporation by the person certifying the Monthly Statement of Account;

(iii) The date of certification;

(iv) A statement of the capacity of the person making the certification; and

(v) The following statement:

I certify that I have examined this Monthly Statement of Account and that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(2) If the Monthly Statement of Account is served by mail or by reputable courier service, certification of the Monthly Statement of Account by the licensee shall be made by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if the compulsory licensee is a partnership, the signature shall be that of a partner.

(3) If the Monthly Statement of Account is served electronically, the licensee and the copyright owner shall establish a procedure to verify that the certification of the Monthly Statement of Account by the licensee is made upon proper authority.

(g) *Service.* (1) Each Monthly Statement of Account shall be served on the copyright owner or the agent with authority to receive Monthly Statements of Account on behalf of the copyright owner to whom or which it is directed, together with the total royalty for the month covered by the Monthly Statement, by mail or by reputable courier service on or before the 20th day of the immediately succeeding month. However, in the case where the licensee has served its Notice of Intention upon an agent of the copyright owner pursuant to § 201.18 of this chapter, the licensee is not required to serve Monthly Statements of Account or make any royalty payments until the licensee receives from the agent with authority to receive the Notice of Intention notice of the name and address of the copyright owner or its agent upon whom the licensee shall serve Monthly Statements of Account and the monthly royalty fees. Upon receipt of this information, the licensee shall serve Monthly Statements of Account and all royalty fees covering the intervening period upon the person or entity identified by the agent with authority to receive the Notice of Intention by or before the 20th day of the month following receipt of the notification. It shall not be necessary to file a copy of the Monthly Statement in the Copyright Office.

(2)(i) In any case where a Monthly Statement of Account is sent by mail or

reputable courier service and the Monthly Statement of Account is returned to the sender because the copyright owner or agent is no longer located at that address or has refused to accept delivery, or in any case where an address for the copyright owner is not known, the Monthly Statement of Account, together with any evidence of mailing or attempted delivery by courier service, may be filed in the Licensing Division of the Copyright Office. Any Monthly Statement of Account submitted for filing in the Copyright Office shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Monthly Statements of Account under this section.

(iii) Neither the filing of a Monthly Statement of Account in the Copyright Office, nor the failure to file such Monthly Statement, shall have effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Monthly Statements of Account submitted to the Copyright Office under this section. Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(3) A separate Monthly Statement of Account shall be served for each month during which there is any activity relevant to the payment of royalties under 17 U.S.C. 115, and under this section. The Annual Statement of Account identified in § 210.24 of this subpart does not replace any Monthly Statement of Account.

(4) If a Monthly Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If a Monthly Statement of Account is delivered by a reputable courier, documentation from the courier showing the first date of attempted delivery shall also be sufficient to prove that service was timely. In the absence of a receipt from the United States Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier, the compulsory licensee shall bear the burden of proving that the Monthly Statement of Account was served in a timely manner.

(5) If a Monthly Statement of Account covers reporting for more than 50 works that are embodied in phonorecords made under the compulsory license, the copyright owner or the authorized agent

may send the licensee a demand that the Monthly Statement of Account be resubmitted in an electronic format and that future Statements of Account be submitted in an electronic format. The statement may be submitted on a data storage medium widely used at the time for electronic storage of data, in the form of a flat file, word processing document or spreadsheet readable with computer software in wide use at such time, with the required information identified and/or delimited so as to be readily discernible. The Statement of Account may be submitted by means of electronic transmission (such as email) if the demand from the copyright owner or authorized agent states that such submission will be accepted. As provided in paragraph (f) of this section, the licensee and the copyright owner shall establish a procedure to verify that the certification portion of the statement is made upon the authority of the licensee.

(6) The copyright owner and the licensee or authorized agent may agree upon alternative methods of payment, provided that when the Monthly Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Monthly Statements of Account shall be sent and payment shall be made on or before the 20th day of each month and shall include all royalties for the month next proceeding. Any Monthly Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g)(1) of this section regarding service by mail or by reputable courier service of the Monthly Statements of Account together with the total royalty for the month covered by the Monthly Statement.

(7) For purposes of this section, a copyright owner or an agent of a copyright owner with authority to receive a Monthly Statement of Account may make public a written policy that it will accept a Monthly Statement of Account by means of electronic transmission and include in that written policy procedures for making royalty payments. When the Monthly Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Monthly Statements of Account shall be sent and payment shall be made on or before the 20th day of each month and shall include all royalties for the month next proceeding. Any Monthly Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for

failing to comply with the specific requirements of paragraph (g)(1) of this section regarding service by mail or by reputable courier service of the Monthly Statements of Account together with the total royalty for the month covered by the Monthly Statement.

#### § 210.24 Annual statements of accounts.

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Annual Statements of Account.

(b) *Annual period.* Any Annual Statement of Account shall cover the full fiscal year of the compulsory licensee.

(c) *General content.* An Annual Statement of Account shall be clearly and prominently identified as an "Annual Statement of Account under Compulsory License for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(1) The fiscal year covered by the Annual Statement;

(2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(3) If the compulsory licensee is a business organization, the name and title of the chief executive officer, managing partner, sole proprietor or other person similarly responsible for the management of such entity.

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

(5) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the Annual Statement and the name of the author or authors of such work or works, if known;

(6) The playing time of each nondramatic musical work on such phonorecords;

(7) For each nondramatic musical work that is owned by the same copyright owner being served with the Annual Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (d) of this section;

(8) The total royalty payable for the fiscal year covered by the Annual

Statement computed in accordance with the requirements of this section, together with a statement of account showing in detail how the royalty was computed. For these purposes, the applicable royalty as specified in §§ 385.12 through 385.14 and §§ 385.22 through 385.24, shall be payable for every phonorecord “voluntarily distributed” during the fiscal year covered by the Annual Statement;

(9) The total sum paid under Monthly Statements of Account in accordance with the requirements of this section by the compulsory licensee to the copyright owner being served with the Annual Statement during the fiscal year covered by the Annual Statement; and

(10) Any adjustments for public performance royalties deducted from the monthly royalty payments made during the fiscal year covered by the Annual Statement.

(d) *Specific content of annual statements: Identification and accounting of phonorecords.* (1) The information called for by paragraph (c)(7) of this section shall, with respect to each nondramatic musical work, include a separate listing for each phonorecord configuration (for example, limited download, an incidental digital phonorecord delivery, and an interactive stream) made the number of phonorecords made and voluntarily distributed” by the compulsory licensee through the end of the fiscal year covered by the Annual Statement, together with:

(i) The catalog number or numbers, and label name or names, used on such phonorecords; and

(ii) The names of the principal recording artists or groups engaged in rendering the performances fixed on such phonorecords.

(2) If the information given under paragraphs (d)(1) and (c)(8) of this section does not reconcile, the Annual Statement shall also include a clear and detailed explanation of the difference. For these purposes, the information given under these paragraphs shall be considered not to reconcile if the number of phonorecords and royalties reported under these paragraphs are different from the sum of these amounts reported on the Monthly Statements of Account covered by the Statement of Account.

(e) *Clear statement.* The information required by paragraph (c) of this section involves intelligible, legible, and unambiguous statements in the Annual Statement of Account itself and without incorporation by reference of facts or information contained in other documents or records, except in the case of promotional interactive streaming

activities, certain promotional limited downloads and free trial periods. Information concerning promotional activities and free trial periods shall be maintained and made available as prescribed in § 385.14 and § 385.24.

(f) *Certification.* (1) Each Annual Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is the licensee certifying the Annual Statement of Account;

(ii) The date of certification;

(iii) If the compulsory licensee is a partnership or a corporation, the title or official position held in the partnership or corporation who is making the certification;

(iv) A statement of the capacity of the person making the certification; and

(v) The following statement:

I certify that I have examined this Annual Statement of Account and that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(2)(i) Each Annual Statement of Account shall also be certified by a licensed Certified Public Accountant. Such certification shall consist of the following statement.

We have examined the attached “Annual Statement of Account Under Compulsory License For Making and Distributing Phonorecords” for the fiscal year ended (date) of (name of the compulsory licensee) applicable to phonorecords embodying (title or titles of nondramatic musical works embodied in phonorecords made under the compulsory license) made under the provisions of 17 U.S.C. 115, as amended by Public Law 94–553, and applicable regulations of the United States Copyright Office. Our examination was made in accordance with generally accepted auditing standards and accordingly, included tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion the Annual Statement of Account referred to above presents fairly the number of phonorecords embodying each of the above-identified nondramatic musical works made under compulsory license and voluntarily distributed by (name of the compulsory licensee) during the fiscal year ending (date), and the amount of royalties applicable thereto under such compulsory license, on a consistent basis and in accordance with the above cited law and applicable regulations published thereunder.

(City and State of Execution)

(Signature of Certified Public Accountant or CPA Firm)

Certificate Number

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#### Jurisdiction of Certificate

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##### (Date of Opinion)

(ii) The certificate shall be signed by an individual, or in the name of a partnership or a professional corporation with two or more shareholders. The certificate number and jurisdiction are not required if the certificate is signed in the name of a partnership or a professional corporation with two or more shareholders.

(3) If the Annual Statement of Account is served by mail or by reputable courier service, the certification of the Annual Statement of Account by the licensee shall be made by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if that compulsory licensee is a partnership, the signature shall be that of a partner.

(4) If the Annual Statement of Account is served electronically, the licensee may serve an electronic facsimile of the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant. The licensee shall retain the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant, which shall be made available to the copyright owner upon demand.

(5) If the Annual Statement of Account is served electronically, the licensee and the copyright owner shall establish a procedure to verify that the certification of the Annual Statement of Account by the licensee is made upon proper authority.

(g) *Service.* (1) Each Annual Statement of Account shall be served on the copyright owner or the agent with authority to receive Annual Statements of Account on behalf of the copyright owner to whom or which it is directed by mail or by reputable courier service on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. It shall not be necessary to file a copy of the Annual Statement in the Copyright Office. An Annual Statement of Account shall be served for each fiscal year during which at least one Monthly Statement of Account was required to have been served under § 210.23(g).

(2) In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(8) of this section is greater than the

amount stated in that Annual Statement under paragraph (c)(9) of this section, the difference between such amounts shall be delivered to the copyright owner together with the service of the Annual Statement. The delivery of such sum does not require the copyright owner to accept such sum, or to forego any right, relief, or remedy which may be available under law.

(3)(i) In any case where an Annual Statement of Account is sent by mail or by reputable courier service and is returned to the sender because the copyright owner or agent is not located at that address or has refused to accept delivery, or in any case where an address for the copyright owner is not known, the Annual Statement of Account, together with any evidence of mailing or attempted delivery by courier service, may be filed in the Licensing Division of the Copyright Office. Any Annual Statement of Account submitted for filing shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Annual Statements of Account under this paragraph (g)(3).

(iii) Neither the filing of an Annual Statement of Account in the Copyright Office, nor the failure to file such Annual Statement, shall have any effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Annual Statements of Account submitted to the Copyright Office under this paragraph (g)(3). Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(4) If an Annual Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If an Annual Statement of Account is delivered by a reputable courier, documentation from the courier showing the first date of attempted delivery shall also be sufficient to prove that service was timely. In the absence of a receipt from the United States Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier, the compulsory licensee shall bear the burden of proving that the Annual Statement of Account was served in a timely manner.

(5) If an Annual Statement of Account covers reporting for more than 50 works that are embodied in phonorecords made under the compulsory license, the

copyright owner or the authorized agent may send the licensee a demand that the Annual Statement of Account be resubmitted in an electronic format and that future Annual Statements of Account be submitted in an electronic format. The statement may be submitted on a data storage medium widely used at the time for electronic storage of data, in the form of a flat file, word processing document or spreadsheet readable with computer software in wide use at such time, with the required information identified and/or delimited so as to be readily discernible. The Statement of Account may be submitted by means of electronic transmission (such as email) if the copyright owner or authorized agent states that such submission will be accepted. As provided in paragraph (f) of this section, the licensee and the copyright owner shall establish a procedure to verify that the certification portion of the statement is made upon the authority of the licensee.

(6) The copyright owner and the licensee or authorized agent may agree upon alternative methods of payment, provided that when the Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Annual Statements of Account shall be sent and any addition payment shall be made on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. Any Annual Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g) of this section regarding service by mail or by reputable courier service of the Annual Statements of Account together with the total additional royalty covered by the Annual Statement.

(7) For purposes of this section, a copyright owner or an agent of a copyright owner with authority to receive an Annual Statement of Account may make public a written policy that it will accept an Annual Statement of Account by means of electronic transmission and include in that written policy procedures for making any additional royalty payments. When the Annual Statement of Account and any additional payment are not sent together by mail or courier service, they shall be sent contemporaneously. Annual Statements of Account shall be sent and payment shall be made on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. Any Annual Statement of Account provided in

accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of this paragraph (g) regarding service by mail or by reputable courier service of the Annual Statement of Account together with any additional royalty payment.

#### **§ 210.25 Amended annual statements of account.**

In any case where an Annual Statement of Account has been served prior to the final determination of public performance royalties for the reported musical works, all compulsory licensees shall serve Amended Annual Statement of Accounts within six months from the date final rates for public performance royalties for the reported musical works have been established. The Amended Annual Statements of Account shall recalculate the royalty fees reported on the relevant Annual Statements of Account to adjust for any change to the public performance rate used to calculate the royalties reported pursuant to § 210.24. Service shall be made in accordance with § 210.24(g) of this subpart.

#### **§ 210.26 Documentation.**

All compulsory licensees shall, for a period of at least five years from the date of service of an Annual Statement of Account or for a period of at least three years from the date the relevant public performance royalty fees have been set, whichever is longer, keep and retain in their possession all records and documents necessary and appropriate to support fully the information set forth in such Annual Statement and in Monthly Statements served during the fiscal year covered by such Annual Statement.

#### **§ 210.27 Timing of statements of account.**

Statements of Accounts for any accounting period which closes after the effective date of this regulation shall be due as provided in §§ 210.23(g)(1) and 210.24(g)(1). Statements of Account for any prior reporting period shall be due 180 days after the effective date of this regulation.

Dated: July 23, 2012.

**Tanya M. Sandros,**

*Deputy General Counsel.*

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