

## LIBRARY OF CONGRESS

## U.S. Copyright Office

## 37 CFR Part 210

[Docket No. 2020–5]

**Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment****AGENCY:** U.S. Copyright Office, Library of Congress.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding information to be provided by digital music providers pursuant to the new compulsory blanket license to make and deliver digital phonorecords of musical works established by title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. The law establishes a new blanket license, to be administered by a mechanical licensing collective, and to become available on January 1, 2021. Having solicited public comments through a previous notification of inquiry, through this notice, the Office is proposing regulations concerning notices of license, data collection and delivery efforts, and reports of usage and payment by digital music providers. The Office is also proposing regulations concerning notices of nonblanket activity and reports of usage by significant nonblanket licensees, as well as language addressing data collection efforts by musical work copyright owners.

**DATES:** Written comments must be received no later than 11:59 p.m. Eastern Time on May 22, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office’s website at <https://www.copyright.gov/rulemaking/mma-notices-reports/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at [regans@copyright.gov](mailto:regans@copyright.gov), or Jason

E. Sloan, Assistant General Counsel, by email at [jslo@copyright.gov](mailto:jslo@copyright.gov). Each can be contacted by telephone by calling (202) 707–8350.

**SUPPLEMENTARY INFORMATION:****I. Background**

This notice of proposed rulemaking (“NPRM”) is being issued subsequent to a notification of inquiry, published in the *Federal Register* on September 24, 2019, that describes in detail the legislative background and regulatory scope of the present rulemaking proceeding.<sup>1</sup> The Copyright Office assumes familiarity with that document, and encourages anyone reading this NPRM who has not reviewed it to do so before continuing.

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”) which, among other things, substantially modifies the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>2</sup> It does so by switching from a song-by-song licensing system to a blanket licensing regime that will become available on January 1, 2021 (the “license availability date”), and be administered by a mechanical licensing collective (“MLC”) designated by the Copyright Office. Digital music providers (“DMPs”) will be able to obtain the new compulsory blanket license to make digital phonorecord deliveries (“DPDs”) of musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity,” where such activity qualifies for a compulsory license), subject to compliance with various requirements, including reporting obligations.<sup>3</sup> DMPs may also

<sup>1</sup> 84 FR 49966 (Sept. 24, 2019). All rulemaking activity, including public comments, as well as legislative history and educational material regarding the Music Modernization Act, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization/>. Comments received in response to the September 2019 notification of inquiry are available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dt=PS&D=COLC-2019-0002&refID=COLC-2019-0002-0001>. Related *ex parte* letters are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. References to these comments and letters are by party name (abbreviated where appropriate), followed by “Initial,” “Reply,” or “*Ex Parte Letter*” as appropriate.

<sup>2</sup> Public Law 115–264, 132 Stat. 3676 (2018).

<sup>3</sup> As permitted under the MMA, the Office designated a digital licensee coordinator (“DLC”) to represent licensees in proceedings before the Copyright Royalty Judges (“CRJs”) and the Copyright Office, to serve as a non-voting member of the MLC, and to carry out other functions. 17

continue to engage in those activities through voluntary, or direct licensing with copyright owners, in which case the DMP may be considered a significant nonblanket licensee (“SNBL”) under the statute, subject to separate reporting obligations.

As detailed in the previous notification of inquiry, the statute specifically directs the Copyright Office to adopt a number of regulations to govern the new blanket licensing regime and vests the Office with broad general authority to adopt such regulations as may be necessary or appropriate to effectuate the new blanket licensing structure.

Having solicited public comments through the notification of inquiry, the Office is preparing multiple notices of proposed rulemaking to address various subjects presented in the notification. This NPRM specifically addresses notices of license, notices of nonblanket activity, data collection and delivery efforts, and reports of usage and payment, which were among those topics requested by various commenters to be prioritized because they relate to core information needed by both DMPs and the MLC to prepare and ready their operations in advance of the blanket license becoming available.<sup>4</sup> Notices addressing confidentiality, the musical works database, and accounting statements to copyright owners are being published simultaneously with this NPRM, and the Office will continue to consider whether further rulemakings are appropriate. For example, the Office is separately engaged in a policy study regarding best practices that the MLC may consider to reduce the incidence of unclaimed accrued royalties. A notification of inquiry seeking comment regarding that study will be forthcoming in connection with considerations of potential regulatory activity related to the distribution of such royalties by the MLC to musical work copyright owners identified in the musical works database in years following the license availability date.<sup>5</sup>

The MMA significantly altered the complex music licensing landscape after careful congressional deliberation following extensive input from, and negotiations between, a variety of stakeholders.<sup>6</sup> In this NPRM, as well as

U.S.C. 115(d)(5)(B); 84 FR 32274 (July 8, 2019); see also 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(C).

<sup>4</sup> DLC Reply at 1; MLC Initial at 2; Future of Music Coalition (“FMC”) Reply at 3.

<sup>5</sup> More information about the unclaimed royalties study can be found at <https://www.copyright.gov/policy/unclaimed-royalties/>.

<sup>6</sup> See, e.g., *Music Policy Issues: A Perspective from Those Who Make It: Hearing on H.R. 4706, H.R. 3301, H.R. 831 and H.R. 1836 Before H. Comm.*

the other notices published concurrently, the Copyright Office has endeavored to build upon that foundation and propose a reasonable regulatory framework for the MLC, DMPs, copyright owners and songwriters, and other interested parties to operationalize the various duties and entitlements set out by statute.<sup>7</sup> The subjects of this proposed rule, as much as any the MMA charges the Office with implementing, have made it necessary to propose regulatory language that navigates convoluted nuances of the music data supply chain and differing expectations of the MLC, DMPs, and other stakeholders, while remaining cognizant of the potential effect upon varied business practices across the digital music marketplace.<sup>8</sup> While the

*On the Judiciary*, 115th Cong. 4 (2018) (statement of Rep. Nadler) (“For the last few years, I have been imploring the music community to come together in support of a common policy agenda, so it was music to my ears to see—to hear, I suppose—the unified statement of support for a package of reforms issued by key music industry leaders earlier this month. . . . This emerging consensus gives us hope that this committee can start to move beyond the review stage toward legislative action.”); 164 Cong. Rec. H3522, 3537 (daily ed. Apr. 25, 2018) (statement of Rep. Collins) (“[This bill] comes to the floor with an industry that many times couldn’t even decide that they wanted to talk to each other about things in their industry, but who came together with overwhelming support and said this is where we need to be.”); 164 Cong. Rec. S501, 502 (daily ed. Jan. 24, 2018) (statement of Sen. Hatch) (“I don’t think I have ever seen a music bill that has had such broad support across the industry. All sides have a stake in this, and they have come together in support of a commonsense, consensus bill that addresses challenges throughout the music industry.”); 164 Cong. Rec. H3522, 3536 (daily ed. Apr. 25, 2018) (statement of Rep. Goodlatte) (“I tasked the industry to come together with a unified reform bill and, to their credit, they delivered, albeit with an occasional bump along the way.”). See also U.S. Copyright Office, *Copyright and the Music Marketplace at Preface* (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (noting “the problems in the music marketplace need to be evaluated as a whole, rather than as isolated or individual concerns of particular stakeholders”).

<sup>7</sup> See *Alliance of Artists & Recording Cos. v. DENSO Int’l Am., Inc.*, 947 F.3d 849, 863 (D.C. Cir. 2020) (“[T]he best evidence of a law’s purpose is the statutory text, and most certainly when that text is the result of carefully negotiated compromise among the stakeholders who will be directly affected by the legislation.”) (internal quotation marks, brackets, and citations omitted).

<sup>8</sup> See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X internet Servs.*, 545 U.S. 967, 980 (2005) (“[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.”) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); see also Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 12 (2018), [https://www.copyright.gov/legislation/mma-conference\\_report.pdf](https://www.copyright.gov/legislation/mma-conference_report.pdf) (“Conf. Rep.”) (acknowledging that “it is to be expected that situations will arise that were not contemplated by the legislation,” and that “[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations”).

Office’s task was aided by receipt of numerous helpful and substantive comments representing interests from across the music ecosystem, in many cases, the comments also uncovered divergent assumptions and expectations as to the shouldering and execution of relevant duties assigned by the MMA.

In proposing the following rule, where comments diverged sharply, the Office has proposed regulatory language that it believes best reflects the statutory language and its animating goals in light of the record before it.<sup>9</sup> As the Office previously noted, the “MLC has a tight deadline to become fully operational,” and it encourages continued dialogue to expeditiously resolve or refine areas of disagreement among interested stakeholders.<sup>10</sup> Accordingly, the Office also welcomes parties to file joint comments on issues of common agreement and consensus.<sup>11</sup> If parties disagree with aspects of the Office’s proposal, they are encouraged to provide specific alternative regulatory language for the Office to consider.<sup>12</sup>

The Office seeks public comments on all aspects of this NPRM, but asks that any comments directed at other subjects discussed in the notification of inquiry be reserved for the appropriate notice of proposed rulemaking. In recognition of the significant changes brought by the MMA, and challenges both in setting up a fully functional MLC and for DMPs to adjust their internal practices, the Office also invites comment on whether it would be beneficial to adopt the proposed rule on an interim basis. If necessary, based on feedback received, the Office would make appropriate adjustments to the regulatory language before the rule is finalized, and following the license availability date. This approach would allow the Office

<sup>9</sup> See H.R. Rep. No. 115–651, at 14 (2018); S. Rep. No. 115–339, at 15 (2018); Conf. Rep. at 12 (“The Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation.”); see also 84 FR at 49967–68.

<sup>10</sup> 84 FR at 32296.

<sup>11</sup> See, e.g., Joint Comments of Dig. Media Ass’n, Nat’l Music Publishers’ Ass’n, Recording Indus. Ass’n of Am., Harry Fox Agency, Inc., & Music Reports, Inc. Submitted in Response to U.S. Copyright Office’s July 27, 2012, Notice of Proposed Rulemaking (Oct. 25, 2012) (regarding section 115 statement of account regulations).

<sup>12</sup> Guidelines for *ex parte* communications, along with records of such communications, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. The Office encourages parties to refrain from requesting *ex parte* meetings on this proposed rule until they have submitted written comments. As stated in the guidelines, *ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters.

more flexibly to make necessary modifications in response to new evidence, unforeseen issues, or where something is otherwise not functioning as intended.

## II. Proposed Rule

Having reviewed and considered all relevant comments received in response to the notification of inquiry, and having engaged in a number of *ex parte* communications with commenters, the Office has weighed all appropriate legal, business, and practical implications and equities that have been raised, and proposes the following with respect to notices of license, notices of nonblanket activity, data collection and delivery efforts, and reports of usage and payment under the MMA.<sup>13</sup>

### A. Notices of License and Nonblanket Activity

The MMA requires entities engaging in covered activities to file notice with the MLC regarding such activities. A DMP seeking a blanket license must file a notice of license (“NOL”), while an entity qualifying as an SNBL must file a notice of nonblanket activity (“NNBA”). The Copyright Office must prescribe regulations regarding the form and content for these notices.<sup>14</sup>

#### 1. Notices of License

In response to the Office’s notification of inquiry, the MLC and DLC offer disparate views as to what NOLs should look like and how they should operate. The DLC argues that NOLs should be relatively brief and high-level in describing the DMP’s covered activities, and should only need to be filed once.<sup>15</sup> The MLC seeks considerably more detail about the DMP’s activities, as well as an ongoing duty to file an amended NOL whenever any information changes.<sup>16</sup> The DLC also seeks a harmless error rule (whereby immaterial errors in an NOL would not render it invalid), while the MLC argues against one.<sup>17</sup> Both the MLC and DLC provide specific regulatory language for their competing views.<sup>18</sup> Among other commenters weighing in on the issue of NOLs, the International

<sup>13</sup> In addition to these substantive topics, the rule also proposes a technical reorganization of part 210 of the Office’s regulations, whereby the current subpart A and subpart B are flipped so that when final, subpart A will contain the Office’s current regulations for the non-blanket section 115 license and subpart B will contain the Office’s new regulations for the blanket license.

<sup>14</sup> See 84 FR at 49969.

<sup>15</sup> DLC Initial at 5; DLC Reply at 2–5.

<sup>16</sup> MLC Initial at 2–9; MLC Reply at 2–7; see also Nat’l Music Publishers’ Ass’n (“NMPA”) Reply at 2–3 (agreeing with the MLC’s position).

<sup>17</sup> DLC Initial at 5; MLC Reply at 8–9.

<sup>18</sup> DLC Reply Add. at A–2–3; MLC Reply App. A at 1–3.

Confederation of Societies of Authors and Composers (“CISAC”) & the International Organisation representing Mechanical Rights Societies (“BIEM”) and Monica Corton Consulting advocate for having a clear and sufficiently detailed description of the DMP’s activities.<sup>19</sup> Music Reports proposes that DMPs be required to submit a concise description of their activities, and also information about the individual sound recordings made available.<sup>20</sup> Based on the record before it, the Office proposes the following rules for NOLs.

*Name and contact information.* The Office proposes requiring essentially the same name and contact information for DMPs as proposed by the MLC and DLC, which is also in general accord with the current requirements both for completing a notice of intention to obtain a compulsory license under section 115 (“NOI”)<sup>21</sup> and a notice of use of sound recordings under the sections 112 and 114 statutory licenses (“NOU”).<sup>22</sup>

*Submission.* The Office proposes rules governing the submission criteria for NOLs that are generally in line with the commenters’ proposals and the requirements of existing Copyright Office filings, namely that NOLs be submitted in a manner reasonably determined by the MLC, that NOLs be signed by an appropriate representative of the DMP who certifies to his or her authority to make the submission and the truth of the submitted information, and the MLC confirms receipt of NOLs.<sup>23</sup>

*Description of DMP and its covered activities.* The proposed rule diverges from both the DLC and MLC proposals as to the requisite level of detail NOLs must contain to describe the DMP and its covered activities. At one end, the DLC’s proposal to only provide “[a] general description of the covered activities,” seems inconsistent with the statute.<sup>24</sup> NOLs must “specif[y] the particular covered activities in which the digital music provider seeks to engage.”<sup>25</sup> Moreover, the statute tasks the MLC not merely with “receiv[ing]” NOLs, but also “review[ing], and confirm[ing] or reject[ing]” them.<sup>26</sup> And one of the grounds for rejecting an NOL is if “the digital music provider or notice of license does not meet the

requirements of this section or applicable regulations.”<sup>27</sup> Taken together, the Office believes that the statute requires an NOL to contain a description that is sufficient to reasonably establish the DMP’s eligibility for a blanket license and to provide reasonable notice of the manner in which the DMP seeks to engage in covered activities under the blanket license.

To that end, the rule proposes that NOLs contain a statement from the DMP that it has a good-faith belief in its eligibility for the blanket license and its ability to comply with all payments, terms, and other responsibilities under the blanket license. In specifying its particular covered activities, the Office proposes that the DMP specify or check off each applicable DPD configuration and service type from a list.<sup>28</sup> By DPD configuration, the Office refers to the different types of DPDs a DMP might make, such as permanent downloads, limited downloads, interactive streams, and noninteractive streams. By service type, the Office refers to the general types of offerings through which a user may receive DPDs, such as whether the service is subscription-based, part of a bundle, a locker, free to the user, and/or part of a discount plan. The proposed rule does not require that the description of the DMP’s service type(s) be tied to the specific categories of activities or offerings adopted by the Copyright Royalty Judges (“CRJs”) in 37 CFR part 385 (although such information would be permitted), because such details may go beyond the more general notice function the Office understands NOLs to serve; in any event, that information will be reported in reports of usage, as discussed below.

In proposing this middle-ground approach, the Office tentatively concludes that the MLC’s position bends the statute too far the other way. To the extent the MLC may need any of the more detailed information it proposes to require through NOLs to fulfill its obligations under the statute, the Office generally agrees with the DLC that it would be more appropriate for such information to be provided as part of each DMP’s monthly reports of usage, addressed separately below.<sup>29</sup> While the MLC contends that there is value in obtaining this sort of information ahead of the DMPs’ reports,<sup>30</sup> at least based on

the current record, this potential value does not seem to outweigh the potential burden on DMPs to provide such duplicative information, especially if DMPs are required to amend NOLs with changes of practice, as the MLC proposes.

The Office is inclined, however, to make an exception for information concerning any applicable voluntary license or individual download license the DMP may be operating under concurrently with the blanket license. The Office tentatively agrees with the MLC that obtaining such information from DMPs in advance of any pertinent report of usage is beneficial, because the MLC may need to identify specific musical works subject to such licenses so that they can be carved out from the blanket license royalty calculations, which the MLC asserts will be “very complicated and time-consuming.”<sup>31</sup> While the DLC requests that this not be imposed as a legal requirement in the NOL regulations themselves, the DLC does concede that, “[i]f there is some operational need,” this is reasonable information for the MLC to seek “during the on-boarding process, prior to the filing of the first report of usage.”<sup>32</sup>

*Harmless errors.* In accord with the DLC’s proposal, the Office proposes a harmless error rule similar to others it has previously adopted, including for section 115 notices of intention to obtain a compulsory license sent under the song-by-song licensing process.<sup>33</sup> Given the material consequences of being denied a blanket license that could otherwise result from a trivial deficiency in an NOL, the Office believes that such a provision is reasonable.<sup>34</sup> The Office is inclined to disagree with the MLC’s arguments that such a provision would be ambiguous and unnecessary. While the statutory cure period<sup>35</sup> may lessen the need for a harmless error provision, it does not seem to obviate the need completely. As to any ambiguity, the Office is not aware of any difficulties with applying the Office’s current harmless error rules. Moreover, such a rule would be in accord with the MMA’s default and termination provision, which refers to “material[ ] deficien[ci]es” and noncompliance with “material term[s]

<sup>19</sup> CISAC & BIEM Reply at 4; Monica Corton Consulting Reply at 1.

<sup>20</sup> Music Reports Initial at 2–3.

<sup>21</sup> See 37 CFR 201.18(d)(1)(i) and (ii).

<sup>22</sup> See *id.* at § 370.2(b)(1) through (4).

<sup>23</sup> See, e.g., *id.* at §§ 201.18(c), (d)(3), and (e), 201.35(f)(3), and 370.2(c).

<sup>24</sup> See DLC Reply Add. at A–2.

<sup>25</sup> 17 U.S.C. 115(d)(2)(A) (emphasis added).

<sup>26</sup> *Id.* at 115(d)(3)(F)(i).

<sup>27</sup> *Id.* at 115(d)(2)(A)(iii)(I) (emphasis added).

<sup>28</sup> See MLC Initial at 9 (proposing that information be provided “through a simple ‘check the box’ method”). This is also somewhat similar to how the current NOU form works.

<sup>29</sup> See DLC Reply at 4.

<sup>30</sup> See MLC *Ex Parte* Letter Jan. 29, 2020 (“MLC *Ex Parte* Letter #1”) at 3–4.

<sup>31</sup> See MLC *Ex Parte* Letter Feb. 26, 2020 (“MLC *Ex Parte* Letter #2”) at 2; see also MLC Reply at 3–4.

<sup>32</sup> See DLC Reply at 5.

<sup>33</sup> See 37 CFR 201.18(h); see also *id.* at § 201.10(e) (notices of termination).

<sup>34</sup> See 66 FR 45241, 45243 (Aug. 28, 2001) (“[P]otential licensees should not be denied the use of the license if such errors do not affect the legal sufficiency of the notice.”).

<sup>35</sup> 17 U.S.C. 115(d)(2)(A)(iv).

or condition[s] of the blanket license.”<sup>36</sup>

*Amendments.* In accord with the MLC’s proposal, the rule proposes requiring DMPs to amend their NOLs within 45 days of any information changing. Given the notice function NOLs are supposed to serve, it does not strike the Office as unreasonable to require DMPs to amend NOLs when DMPs make significant changes to how they are engaging, or seeking to engage, in covered activities or when their contact information changes. Having considered the DLC’s arguments on this matter, the Office concludes that the following reasons support an amendment requirement. First, the statute expressly provides for “an amended notice of license” in the context of curing deficiencies in a rejected NOL.<sup>37</sup> Second, there would seem to be little meaning behind the requirement that NOLs “specify] the particular covered activities in which the digital music provider seeks to engage,” if DMPs never need to provide notice of changes to those particulars.<sup>38</sup> Third, the statute requires the MLC to “maintain a *current*, publicly accessible list of blanket licenses that includes contact information for the licensees and the effective dates of such licenses.”<sup>39</sup> The Office has previously adopted an amendment requirement pursuant to a similarly worded statutory provision, and believes one is reasonable in this context as well so as to ensure that the contact information the MLC is required to make publicly available is always kept up to date.<sup>40</sup> Fourth, although section 115 NOLs have no such amendment requirement, NOUs do,<sup>41</sup> meaning that services operating under sections 112 and 114 are already complying with a similar requirement. Finally, between the reasonable amount of information the Office proposes be required, the statutory notice and cure mechanism, and the proposed inclusion of a harmless error rule, the amendment requirement would not be unduly burdensome or amount to a “trap for the unwary” as the DLC contends.<sup>42</sup> The

Office proposes that information about voluntary licenses and individual download licenses be subject to their own amendment requirement, separate from NOL amendments.

*Delegation of authority to the MLC.* The Office generally agrees with the DLC that the MLC need not have authority, delegated by regulation, to require additional substantive information from DMPs with respect to NOLs.<sup>43</sup> If, in the course of establishment, the MLC identifies a legitimate need for additional information, the Office will make adjustment to the regulatory language. Of course, the MLC may ask DMPs for additional information, which DMPs may voluntarily elect to provide. The Office believes that certain matters, such as the precise format and method of submission of NOLs, are best left flexible and subject to the MLC’s commercially reasonable discretion and business judgment.<sup>44</sup>

*Reporting sound recordings.* The Office disagrees with Music Reports’ proposal that NOLs contain a list of all sound recordings made available to the public for substantially the same reasons as set forth by the DLC.<sup>45</sup>

*Transition to blanket licenses.* The rule proposes that DMPs obtaining the blanket license automatically pursuant to 17 U.S.C. 115(d)(9)(A) must still submit valid NOLs.

*Public access.* To govern the MLC’s obligations under 17 U.S.C. 115(d)(3)(F)(i), and for transparency in how the MLC confirms or rejects NOLs, and terminates blanket licenses, the rule proposes that the MLC be required to maintain a current, free, and publicly accessible and searchable online list of all blanket licenses, including various details, such as information from NOLs, whether an NOL has been rejected and why, and whether a blanket license has been terminated and why.

## 2. Notices of Nonblanket Activity

Based on the record before it, the Office generally agrees with commenters that NOLs and NNBAAs should not differ substantially, as they serve similar purposes.<sup>46</sup> Thus, the Office proposes that the regulations for NNBAAs generally

mirror the requirements for NOLs, with conforming adjustments reflecting appropriate distinctions between the two types of notices.

## B. Data Collection and Delivery Efforts

While the MLC is ultimately tasked with the core project of matching musical works to sound recordings embodying those works, and identifying and locating the copyright owners of those works (and shares thereof), the MMA outlines roles for certain DMPs and copyright owners to facilitate this task by collecting and providing related data to the MLC. DMPs using the blanket license must “engage in good-faith, commercially reasonable efforts to obtain” various sound recording and musical work information from sound recording copyright owners and other licensors of sound recordings made available through the DMP’s service.<sup>47</sup> As the Office observed in the notification of inquiry, this obligation is directly connected to the reports of usage discussed below. The MMA also obligates musical work copyright owners with works that are listed in the MLC’s database to “engage in commercially reasonable efforts to deliver” to the MLC for the database, if not already listed, “information regarding the names of the sound recordings in which that copyright owner’s musical works (or shares thereof) are embodied, to the extent practicable.”<sup>48</sup> In the notification of inquiry, the Office asked whether it is appropriate to promulgate regulations concerning these provisions.<sup>49</sup>

### 1. Efforts by Digital Music Providers

Most comments received by the Office concerning data collection and delivery efforts pertain to requirements for DMPs under the blanket license; the MLC and DLC each propose specific regulatory language. The MLC’s proposal is expansive.<sup>50</sup> First, it would require DMPs to collect and provide “all identifying information” about relevant sound recordings and musical works from “the record label or other entity furnishing rights to the sound recording” that is “in the entity’s

<sup>47</sup> 17 U.S.C. 115(d)(4)(B).

<sup>48</sup> *Id.* at 115(d)(3)(E)(iv).

<sup>49</sup> See 84 FR at 49969–70.

<sup>50</sup> See MLC Reply App. B at 7–8; see also MLC Reply at 10 (“[T]he DMPs’ existing mechanisms for obtaining sound recording information have been insufficient, resulting in numerous recordings that cannot be matched to musical compositions, which led to the MMA specifically requiring greater efforts from the DMPs.”); NMPA Reply at 3–4 (same); FMC Reply at 3 (“Clear and robust guidelines are necessary to ensure that licensees are making aggressive efforts to get the data as complete and accurate as possible.”).

<sup>36</sup> See *id.* at 115(d)(4)(E)(i) (emphasis added).

<sup>37</sup> See *id.* at 115(d)(2)(A)(iv).

<sup>38</sup> See *id.* at 115(d)(2)(A); see also MLC Reply at 5–6.

<sup>39</sup> *Id.* at 115(d)(3)(F)(i) (emphasis added).

<sup>40</sup> See 37 CFR 201.38(c)(3) (a requirement to “timely updat[e] information when it has changed,” adopted under 17 U.S.C. 512(c)(2), which states that the Copyright Office “shall maintain a current directory of agents available to the public for inspection”).

<sup>41</sup> *Id.* at § 370.2(e).

<sup>42</sup> Cf. 81 FR 75695, 75704 (Nov. 1, 2016) (with respect to adopting a renewal requirement for online service providers to keep current their designations with the Copyright Office for purposes

of the section 512 safe harbor, the Office concluded that “[n]or does the rule create ‘a trap for the unwary’ as some opponents allege,” because “[i]f, after [receiving] multiple reminders, a service provider fails to renew its designation, it can hardly be said to have let its designation lapse unwittingly”).

<sup>43</sup> See DLC Reply at 6.

<sup>44</sup> See SoundExchange Initial at 15–16.

<sup>45</sup> See DLC Reply at 6.

<sup>46</sup> See DLC Initial at 3; MLC Initial at 10–11; MLC Reply at 8; Music Reports Initial at 2–3; CISAC & BIEM Reply at 4.

possession.”<sup>51</sup> Second, DMPs would have to undertake “all reasonable steps” to ensure collection of this information, “including affirmatively requiring” the entity to provide it “whether through contract or otherwise.”<sup>52</sup> Third, it would require a DMP to also provide “all information that is in its possession concerning sound recording[s] and musical work[s] used on its service,” regardless of when, how, or from where it was obtained.<sup>53</sup> Fourth, it would require all collected information to be provided to the MLC promptly after being received and contemporaneously with monthly reports of usage.<sup>54</sup> Fifth, the information would have to be delivered to the MLC in the same format with the same content as it was delivered to the DMP, without any revisions, re-titling, or other modifications to the information.<sup>55</sup> Sixth, DMPs would have to provide timely updates to all such information.<sup>56</sup> Lastly, DMPs would have to certify as to their compliance with these requirements.<sup>57</sup>

The DLC strongly opposes the MLC’s proposal, arguing that DMPs’ obligations should be limited to providing whatever information can be obtained from record labels and distributors, and passing that information on to the MLC.<sup>58</sup> The DLC contends that DMPs have no ability to compel record labels and distributors to provide them with information, and further asserts that DMPs are only obligated to provide information to the MLC via their reports of usage.<sup>59</sup> The DLC’s competing proposal essentially restates the statute as to what is required of DMPs, but further proposes that DMPs can satisfy their obligations under section 115(d)(4)(B) “by collectively arranging for the [MLC] to obtain” the required information from SoundExchange,<sup>60</sup> “which shall provide this information at reasonable or no cost.”<sup>61</sup>

Two particular issues surrounding these proposals were discussed at length

in the comments and during several *ex parte* communications. The first is the DLC’s proposal for DMPs to be able to satisfy their section 115(d)(4)(B) obligations by arranging for the MLC to receive data from SoundExchange. Several commenters assert that the record labels themselves are the best source of authoritative sound recording data, and that it is important that the MLC’s sound recording information come from an authoritative source.<sup>62</sup> The DLC and others (including A2IM, RIAA, and industry standards consultant Paul Jessop<sup>63</sup>) further argue that a single, aggregated, unaltered, regularly updated, and verified feed of this information from SoundExchange (which is sourced directly from sound recording copyright owners) would be ideal, and avoid the possibility that different DMPs would submit disparate and potentially contradictory data that the MLC would need to expend time and resources to reconcile.<sup>64</sup> The DLC also argues that under this proposal, the MLC could rely on only a single or limited number of data fields from DMPs’ reports of usage (e.g., international standard recording code (“ISRC”)) to find the sound recording to engage in matching efforts.<sup>65</sup>

The MLC, while acknowledging that it “intends to use SoundExchange as a valuable source of information for sound recording identifying information,” opposes this proposal.<sup>66</sup> A main argument of the MLC is that even if the DMPs were to provide the MLC with access to SoundExchange’s data to satisfy their data collection obligations, it would not be a substitute for their reporting obligations because the DMPs are the only ones with the authoritative data as to what they actually streamed.<sup>67</sup> The MLC also says that receiving only ISRCs from DMPs, as the DLC suggests, would be insufficient for proper sound recording

identification, contending that “[t]here is no comprehensive, authoritative, central database for matching ISRC codes with other metadata fields, there are incorrect ISRC codes in use, and attempting to match streaming uses based on ISRC reporting alone would be unreliable, unprecedented and highly inappropriate.”<sup>68</sup>

The second issue concerns the MLC’s proposal to require DMPs to provide the MLC with the information provided by sound recording copyright owners and licensors in the original, unmodified form in which it is received by the DMP, without any revisions, re-titling, or other edits or changes. The MLC and others explain that DMPs alter some amount of sound recording data, generally titles, artist names, and versions for display purposes in their public-facing service (e.g., changing “Hello” to “Hello (Radio Edit),” or changing “Puff Daddy,” “P. Diddy,” and “Puffy” all to “Diddy”), and suggest that merely passing on the modified data to the MLC would frustrate matching efforts.<sup>69</sup> The MLC also argues that, in connection with the proposal to permit DMPs to provide access to SoundExchange’s data to avoid having to report unaltered data, having to match the DMPs’ reports against SoundExchange’s data in an attempt to recapture what was originally delivered to the DMPs by record labels and distributors is “unworkable and wildly inefficient.”<sup>70</sup>

On the other hand, to support their position that the MLC should obtain authoritative sound recording data from a single source for its database, A2IM & RIAA point out that their “member labels vary the metadata they send the different DMPs in order to meet the services’ idiosyncratic display requirements. Even if the DMPs were to pass on those feeds to the MLC unaltered, the MLC would still receive conflicting data that it will have to spend time and resources reconciling.”<sup>71</sup> Music Reports similarly points out that “a row of sound recording metadata provided by one DMP in relation to a discrete sound recording may differ from the row of metadata a second DMP provides in relation to the same sound recording, with additional or different data fields

<sup>62</sup> See Recording Industry Association of America, Inc. (“RIAA”) Initial at 4; American Association of Independent Music (“A2IM”) & RIAA Reply at 2–3; Jessop Initial at 2–3; Recording Academy Initial at 2.

<sup>63</sup> Mr. Jessop, a former U.S. and U.K. recording association executive, has participated in the development or revision of various relevant standards bodies or individual codes, including ISRC, ISWC, and ISNI. Jessop Initial at 1–2.

<sup>64</sup> DLC Reply at 10; RIAA Initial at 4–5; A2IM & RIAA Reply at 2–3 (also noting that record labels vary their own data sent to different DMPs to meet different DMP requirements); Jessop Reply at 2; see also Universal Music Group (“UMG”) & RIAA *Ex Parte* Letter at 2 (“SoundExchange gets the same data feeds as the DMPs . . . but then it dedupes and deconflicts the data.”); Sony Music (“Sony”) & RIAA *Ex Parte* Letter at 2.

<sup>65</sup> DLC Reply at 10.

<sup>66</sup> MLC Reply at 11 n.7.

<sup>67</sup> MLC *Ex Parte* Letter #2 at 5, 7; see MLC *Ex Parte* Letter #1 at 2.

<sup>68</sup> MLC Reply at 16 n.9; MLC *Ex Parte* Letter #2 at 5; MLC *Ex Parte* Letter Apr. 3, 2020 (“MLC *Ex Parte* Letter #4”) at 9.

<sup>69</sup> MLC Reply at 11; RIAA Initial at 3, 5–6; Sony & RIAA *Ex Parte* Letter at 2 (Dec. 9, 2019); MLC *Ex Parte* Letter #1 at 2; MLC *Ex Parte* Letter #2 at 5–6; MLC *Ex Parte* Letter #4 at 8–9; Jessop Initial at 2–3; A2IM & RIAA Reply at 2–3, 3 n.1.

<sup>70</sup> MLC *Ex Parte* Letter #2 at 5–6.

<sup>71</sup> A2IM & RIAA Reply at 2.

<sup>51</sup> MLC Reply App. B at 7.

<sup>52</sup> *Id.* at 7; see also Barker Initial at 10 (proposing that DMPs not release sound recordings unless and until they receive appropriate data from the record label); CISAC & BIEM Reply at 6 (agreeing with the MLC that DMPs should take “all reasonable steps”).

<sup>53</sup> MLC Reply App. B at 7.

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> DLC Initial at 7; DLC Reply at 6–11.

<sup>59</sup> DLC Reply at 8–9.

<sup>60</sup> SoundExchange is the collective designated by the CRJs to collect and distribute royalties under the section 112 and section 114 statutory licenses concerning noninteractive digital audio transmissions of sound recordings.

<sup>61</sup> DLC Reply Add. at A–4; see also DLC Reply at 10–11.

or identifiers unique to that DMP.”<sup>72</sup> The MLC does not address this issue in its comments.

The DLC readily acknowledges that individual DMPs may alter certain data fields, characterizing it as necessarily cleaning and fixing the data so that information related to a recording’s artist name, title, or other listener-facing fields are normalized.<sup>73</sup> The DLC asserts that it would be highly burdensome for DMPs to retain and report unaltered data, because for many services, usage reporting pipelines have been designed to pull data from product databases that feature the “corrected” fields; it suggests that the MLC’s proposal would require an unnecessary maintaining of a parallel archive of data that may entail material engineering efforts.<sup>74</sup> The DLC also argues that providing each of these fields unaltered is unlikely to palpably improve the MLC’s matching efforts, because other data fields that remain unaltered, in particular the ISRC (which both the DLC and MLC seem to agree exists for over 99% of reported tracks), are far better for identifying sound recordings.<sup>75</sup> The DLC also states that alteration happens relatively infrequently, citing that for at least two DMPs, fewer than 1% of track titles are modified, and that alterations are minor, such that any reasonably sophisticated matching algorithm should not be stymied.<sup>76</sup>

The MMA was designed in part to address challenges related to data delivery in the digital supply chain, and after analyzing the comments and conducting repeated meetings with the MLC, DLC, and recording company and publishing interests, it is apparent to the Copyright Office that abstruse business complexities and misunderstandings persist. As discussed further below, it is not clear that the relevant parties agree on exactly which fields reported from sound recording owners or distributors to DMPs are most useful to pass through to the MLC, which fields the MLC should be expected or does expect to materially rely upon in conducting its matching efforts, or which fields are

typical or commercially reasonable for DMPs to alter, such as in the course of arranging for all songs by the same artist (e.g., “Diddy”) to be retrieved in an organized fashion in response to an end user’s search. And while the Office reached out to the MLC and DLC shortly after these entities were designated to encourage cooperation on these business-specific questions in anticipation of the significant prospective regulatory work, and understands they have engaged in dialogue, particularly after the submission of initial comments, it does not appear that discussions have yet bridged these areas of difference.<sup>77</sup>

To a certain extent, the MLC and DLC also appear to advance positions that go somewhat further than necessary even under their preferred approaches. For example, although the MLC does not intend to use every required or requested field in its matching processes,<sup>78</sup> its proposed language would require every reportable sound recording field to be provided in unaltered form.<sup>79</sup> Similarly, the Office understands that DMPs may typically alter only a few fields (e.g., titles, artist names, and versions) relevant to its consumer-facing platform fronts, yet the DLC has proposed language that would not restrict services from editing even universal identifiers. Relatedly, both parties may somewhat underestimate certain business realities that drive the

other’s positions: It seems reasonable to the Office both that different streaming services may choose to display the same artist or recording title in a different way as a competitive or data architecture matter (e.g., “I Feel Good” vs. “I Got You (I Feel Good)”) and have designed reporting systems around the fields as used on their products, and also that such discrepancies in artist or title names may add complexity to the MLC’s efforts to match sound recordings to underlying musical works. Based on the record, it thus appears that the MLC’s matching efforts will need to involve analysis of multiple fields (i.e., not just ISRCs), and also that the MLC will need to reconcile certain sound recording information against its database.

In light of these disagreements and areas of uncertainty, and the considerable, yet non-exhaustive,<sup>80</sup> information submitted in this rulemaking, the Office sought to craft a reasonable approach that satisfies the main concerns of the most interested parties. Based on the record before it, the Office proposes the following rules with respect to DMP data collection and delivery efforts.

*Relationship to reports of usage.* The MMA’s data collection efforts and reports of usage provisions are best read together, with section 115(d)(4)(B) describing the appropriate efforts DMPs must engage in to acquire the information to be reported to the MLC in reports of usage under section 115(d)(4)(A). Section 115(d)(4)(B) only refers to “[c]ollect[ing]” and “obtain[ing]” information, while section 115(d)(4)(A) refers to “reporting” and expressly requires that certain information “acquired” by the DMP, “including pursuant to [section 115(d)(4)(B)],” be reported.<sup>81</sup> Consequently, the rule proposes that the data collected pursuant to section 115(d)(4)(B) be delivered to the MLC in DMPs’ reports of usage in accordance with the rules governing such reports (discussed below). This would not foreclose the MLC from seeking information from DMPs outside of their

<sup>80</sup> For example, while all were discussed at length in concept, the Office did not receive a full listing of which fields in the ERN specification any of the parties wish to be passed through, a comparison to licensable fields in the SoundExchange database, or certain “information concerning the use in the DDEX DSRF format of different metadata fields related to identification of sound recordings and musical works identification.” See MLC *Ex Parte* Letter #3 at 3. At this stage, commenters remain encouraged to submit additional data, but along with a clear explanation of why such data might support a change in the proposed regulatory language.

<sup>81</sup> See 17 U.S.C. 115(d)(4)(A)–(B).

<sup>72</sup> See MLC Initial at 1 n.2 (“While the MLC and the [DLC] have not collaborated on the submission of initial comments in this proceeding, collaboration has been discussed and is anticipated in connection with reply comments, with the intent to provide supplemental information in reply comments as to any areas of common agreement.”); DLC Initial at 2 n.3 (“While the MLC and DLC have not collaborated on the submission of initial comments in this proceeding, collaboration has been discussed and is anticipated in connection with reply comments, with the intent to provide supplemental information in reply comments as to any areas of common agreement.”); MLC Reply at 1 n.2 (“Following the filing of the initial comments, the DLC and the MLC have engaged in a concerted effort to reach compromise on regulatory language. While the complexity of the issues has made it difficult to reach compromise, the DLC and the MLC plan to continue discussions and will revert back to the Office with any areas of compromise.”); DLC Reply at 1 n.3 (“Following the filing of the initial comments, DLC and MLC have engaged in a concerted effort to reach compromise on regulatory language. While the complexity of the issues has made it difficult to reach compromise, the DLC and MLC plan to continue discussions and will revert back to the Office with any areas of compromise.”). To the Office’s knowledge, the MLC and DLC were not able to reach agreement on any areas.

<sup>78</sup> MLC *Ex Parte* Letter #4 at 10–11 (noting that the MLC “does not anticipate” the “sound recording copyright owner” or “producer” fields “being utilized in matching,” and contemplates using “some, but not all” of other specific fields for matching).

<sup>79</sup> See MLC Reply App. C at 11.

<sup>72</sup> Music Reports Initial at 3.

<sup>73</sup> DLC Reply at 9–10; DLC *Ex Parte* Letter Feb. 14, 2020 (“DLC *Ex Parte* Letter #1) Presentation at 15 (discussing “Hello (Radio Edit)” example; explaining that a DMP may receive information from different sources listing a band name in various fashions such as “Cure,” “The Cure,” and “Cure, The” which would be reconciled into “The Cure” for display on the service’s platform).

<sup>74</sup> See DLC *Ex Parte* Letter #1 Presentation at 15.

<sup>75</sup> DLC *Ex Parte* Letter Mar. 4, 2020 (“DLC *Ex Parte* Letter #3”) at 2.

<sup>76</sup> DLC *Ex Parte* Letter #3 at 2 (discussing MediaNet and YouTube, and noting that all of MediaNet’s alterations are made at the request of the record labels).

reports of usage on a voluntary basis, or even potentially that, upon a different showing, a different rule requiring delivery of certain information outside of reports of usage could be appropriate.

*Appropriate efforts.* At least on the record before it, the Office declines to propose a one-size-fits-all approach as to what constitutes “good-faith, commercially reasonable efforts to obtain,” and so is disinclined to adopt a rule as strict as the MLC proposes. First, what may be commercially reasonable for one DMP may not be commercially reasonable for another, and even for the same DMP, a commercially reasonable action with respect to one sound recording copyright owner may not be commercially reasonable with respect to another. Second, the MMA did not impose a data delivery burden on sound recording copyright owners and licensors, so any rule compelling their compliance would seem to be at odds with Congress’s intent. DMPs must make genuine efforts to attempt to collect information from record labels and other distributors, but if those parties ultimately refuse, it does not necessarily mean that the DMP has not satisfied its collection effort obligations. Thus, the Office is wary of proposals mandating DMPs to require delivery of information from sound recording copyright owners and licensors through contractual or other means. Third, while it is important for DMPs to genuinely and fruitfully engage in appropriate collection and reporting efforts, the primary tasks of matching and data curation are assigned to the MLC, and the DMPs must fully fund the MLC’s undertaking of these critical tasks. Fourth, it does not appear that DMPs are necessarily required by the statute to deliver all pertinent information known to them or in their possession. For example, section 115(d)(4)(B) only refers to information obtained specifically “from sound recording copyright owners and other licensors of sound recordings,” and the musical work information required to be reported under section 115(d)(4)(A)(ii)(I)(bb) is limited to information “acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities.”<sup>82</sup>

With these observations in mind, the Office proposes to codify a minimal floor requirement that should not unduly burden DMPs, but which will still constitute a continuous and

ongoing obligation to attempt to collect relevant data. The Office also proposes, in accord with the DLC’s proposal, to adopt a rule providing that a DMP may satisfy its obligations under section 115(d)(4)(B) by arranging for the MLC to receive appropriate data from an authoritative source, such as SoundExchange. Though, as explained further below, this would not obviate the need to report data to the MLC in reports of usage.

Under the proposed floor requirement, where a DMP has not obtained all applicable sound recording and musical work information from sound recording copyright owners and licensors, the DMP will have a continuous and ongoing obligation to formally request such information in writing on a quarterly basis. The rule further proposes that DMPs request updates for obtained data periodically and at the MLC’s request. This proposal is to ensure that DMPs make ongoing active efforts to get missing and outdated information from record labels and distributors without burdening DMPs or sound recording copyright owners and licensors in ways the statute does not seem to intend.

The Office is generally inclined to agree with commenters regarding provision of access to the SoundExchange database, and proposes that it be an option for interested DMPs. Based on all of the comments, it seems efficient for the MLC to have access to an aggregated, regularly updated, and verified feed of the applicable data sourced directly from copyright owners, rather than consistently need to sort through potentially contradictory DMP-provided label data—especially where the Office has been told that labels sometimes provide different data for the same works to different DMPs, and that labels themselves sometimes send updates that alter previously-reported fields.<sup>83</sup> To be clear, DMPs would not be required to arrange for the MLC to have access to SoundExchange’s data; it would just be one option for complying with their data collection obligations. And the MLC would not be required to rely on these data; it would also receive data from monthly reports of usage and from musical work copyright owners, and would remain free to gather data from other sources to build and supplement its database as well. In sum, the record suggests that access to such a sound recording database can be expected to provide the MLC with more authoritative sound recording ownership data than it may otherwise

get from individual DMPs engaging in separate efforts to coax additional information from entities that are under no obligation to provide it for purposes of the section 115 license.

In particular, SoundExchange’s repertoire database appears to be a reasonable analog for the data DMPs might otherwise obtain from sound recording copyright owners and licensors through the collection efforts mandated by section 115(d)(4)(B). In its role as administrator under the section 112 and section 114 licenses, SoundExchange appears to receive largely the same record label and distributor data feeds that the DMPs receive.<sup>84</sup> And its database appears to be robust:

SoundExchange has worked for years and spent many millions of dollars to develop its repertoire database, an authoritative repository of information identifying approximately 30 million sound recordings, all of which was sourced directly from the copyright owners of the recordings. . . . This database collects about 50 fields of information on each recording in the database, and includes [ISRCs] for all of those recordings. . . . To keep this database up to date with information about new releases, SoundExchange receives electronic data feeds directly from record companies and distributors that together cover more than 100 rights owners. This real-time data covers almost all commercially-significant U.S. recordings, and a large number of foreign-origin recordings as well. We have also received repertoire information in other forms from more than 20,000 other rights owners.<sup>85</sup>

The Office is, however, inclined to agree with the MLC that DMPs are the only authoritative source for what they actually used, and no amount of data from other sources can tell the MLC what was truly played on the DMP’s service. Therefore, the proposed rule makes clear that while DMPs may satisfy their section 115(d)(4)(B) collection obligations in this manner, it does not excuse DMPs from their reporting obligations under section 115(d)(4)(A) (discussed below). DMPs would still have to report all required information, subject to the applicable qualifications (*e.g.*, having been acquired in the metadata provided to the DMP by sound recording copyright owners). There would just not be any further obligation to take affirmative steps to obtain additional information beyond what the DMP otherwise

<sup>84</sup> See, *e.g.*, UMG & RIAA *Ex Parte* Letter at 2 (Dec. 6, 2019) (“SoundExchange gets the same data feeds as the DMPs. . . . SoundExchange receives data from approximately 3400 labels, including certain independent distributors (*e.g.*, CdBaby).”).

<sup>85</sup> SoundExchange Initial at 2–3.

<sup>82</sup> See *id.* at 115(d)(4)(A)–(B).

<sup>83</sup> See A2IM & RIAA Reply at 2; DLC *Ex Parte* Letter #3 at 2.



acquires in the ordinary course of engaging in covered activities.

The Office's proposed rule makes other additional adjustments to the DLC's proposal. First, the source of the data could be another similarly authoritative source with a database size similar to SoundExchange; it would not specifically have to be SoundExchange. Second, the proposed rule would not require the authoritative source to provide its data at "reasonable or no cost." As discussed above, the statute does not impose reporting burdens on sound recording copyright owners and, by extension, SoundExchange. Third, the Office proposes that if the DMP knows that a specific sound recording or set of recordings is not in the database, then provision of access to that database is insufficient and the DMP must, for such recording(s), formally request information in writing on a quarterly basis from the label or other distributor who supplied the recording, as described above.

*Appropriate information.* The Office is inclined to disagree with the breadth of the MLC's proposal to require the collection of "all identifying information." The statute specifically enumerates information that is required to be collected, which is connected with the list of information required to be reported.<sup>86</sup> Thus, the rule instead proposes that collection efforts extend to the statutorily enumerated information and any additional information required by the Copyright Office to be included in reports of usage (discussed below).

With respect to the question of whether DMPs must provide the applicable information in unaltered form, the Office proposes a compromise approach. The Office notes that the proposed regulatory language addresses this in the section on reports of usage, rather than data collection, but since this issue was mostly raised by commenters in the context of data collection efforts, it is discussed here instead of below. The Office has essentially been told by the DLC that retaining and reporting unaltered data is generally burdensome and unhelpful for matching, while the MLC and others argue that it is generally needed and helpful for matching. Both positions seem to have at least some degree of merit with respect to certain aspects. The Office therefore offers what it believes to be a reasonable middle ground to balance these competing concerns.

Instead of requiring DMPs to always report unaltered data or permitting

DMPs to never report it, the rule proposes that a DMP can satisfy its reporting obligations by reporting either the originally acquired version of data within a specific field or the modified version, but subject to important limitations.

First, the DMP would have to report the unaltered data in any of the following three cases: (1) Where the MLC has adopted a nationally or internationally recognized standard, such as DDEX, that is being used by the particular DMP, and either the unaltered version or both versions are required to be reported under that standard; (2) where either the unaltered version or both versions are reported by the particular DMP pursuant to any voluntary license or individual download license; or (3) where either the unaltered version or both versions were periodically reported by the particular DMP to its licensing administrator or to copyright owners directly prior to the license availability date. The first scenario tethers the requirement to provide unaltered data to whether a recognized standard setting body, for a standard the DMP uses, concludes that the information is important enough to be required. In such cases, it seems reasonable to require DMPs to undertake such burdens as may be necessary to comply with that decision.<sup>87</sup> The second and third scenarios connect the requirement to provide unaltered data to the capabilities of the DMP's systems. If a DMP was reporting the unaltered version, or both versions, prior to the license availability date or reports the unaltered version, or both versions, under other licenses, the DMP must similarly report such data to the MLC. The Office is also contemplating a fourth scenario for commenters to consider: Where the unaltered version or both versions are/were commonly reported in the industry by a majority of DMPs of comparable size and sophistication to the particular DMP either currently or prior to the license availability date.

The second limitation would be that DMPs would not be permitted to only report modified versions of any unique identifier, playing time, or release date. The record does not suggest that DMPs typically adjust these particular items, but to the extent they do or might consider it in the future, it would seem to be particularly harmful to the MLC's matching efforts. The DLC itself

acknowledges the primacy of unique identifiers like ISRCs. And playing time and release date seem to be particularly helpful for matching, especially when distinguishing between different recorded versions of a song by the same artist. The Office invites comment on this aspect of the proposed rule, including whether "release date" should be further qualified as "release year."

Third, a DMP would not be permitted to only report modified versions of information belonging to categories that the DMP was not periodically altering prior to the license availability date. That would ensure that to the extent a DMP makes changes to its systems to alter new types of data, the DMP would need to retain the ability to report the unaltered versions.

*Certification.* The Office is inclined to agree with the MLC's proposal to require DMPs to certify as to their compliance with their section 115(d)(4)(B) obligations, and proposes that such a certification be included in DMPs' reports of usage. Such a requirement would be analogous to other related certification requirements.<sup>88</sup>

## 2. Efforts by Copyright Owners

Only a few commenters spoke to the collection efforts of copyright owners; the MLC and DLC each propose specific regulatory language. The MLC's proposed language essentially restates the statute.<sup>89</sup> The MLC argues that what constitutes commercially reasonable efforts for all musical work copyright owners cannot be defined because of the broad spectrum of musical work copyright owners, ranging from multinational publishing companies to individual do-it-yourself singer-songwriters.<sup>90</sup> The MLC's comments characterize its proposal as imposing an obligation on musical work copyright owners "to provide information in their possession, custody or control," ensuring "that large music publishers with detailed records of sound recordings embodying their musical compositions will be obligated to provide such information to the MLC, while still allowing for individual songwriters to comply with the regulation without undue hardship."<sup>91</sup> The MLC also asserts that DMPs are better positioned to collect sound recording data because they deal directly with sound recording copyright

<sup>88</sup> See 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa); 37 CFR 201.18(d)(1)(vi).

<sup>89</sup> MLC Reply App. B at 8.

<sup>90</sup> MLC Initial at 15.

<sup>91</sup> MLC Reply at 12.

<sup>86</sup> See 17 U.S.C. 115(d)(4)(A)–(B).

<sup>87</sup> See DLC *Ex Parte* Letter #3 at 4 ("DDEX has an extensive and rigorous process of evaluating the fields that are required to be reported to assist with matching.")



owners and licensors, whereas the existence of the compulsory license makes it so that many musical work copyright owners have no relationship with sound recording copyright owners or licensors, and so it would be inappropriate to require them to seek out and deliver information they do not already have.<sup>92</sup>

The DLC's proposal would require musical work copyright owners to engage in commercially reasonable efforts to collect all available information about the applicable sound recordings, including at least the title, featured artist, and, if available, ISRC.<sup>93</sup> The DLC's proposal would also require copyright owners to provide the MLC with all available information related to performing rights societies through which performance rights in each musical work are licensed.<sup>94</sup> The DLC asserts that copyright owners are best positioned to provide the relevant information and disagrees with the MLC's characterization, stating that musical work copyright owners can obtain sound recording information in a variety of ways.<sup>95</sup>

A2IM & RIAA also commented on this issue, related to their overall viewpoint that the MLC should get sound recording data from a single authoritative source, rather than from DMPs and musical work copyright owners.<sup>96</sup> They further suggest that publishers should have to provide sufficient information to unambiguously identify sound recordings, which they say would generally entail a title, featured artist, and ISRC.<sup>97</sup>

Based on the record before it, the Office proposes the following rules with respect to musical work copyright owner data collection and delivery efforts.

*Appropriate efforts.* The Office agrees with the MLC that the wide variety of musical work copyright owners makes it challenging to adopt a one-size-fits-all approach as to what constitutes "commercially reasonable efforts to deliver." Consequently, the Office proposes to codify a minimal floor requirement that should not unduly burden less-sophisticated musical work copyright owners—similar in approach

to the minimal floor requirement discussed above for DMPs. The rule proposes that musical work copyright owners periodically monitor the MLC's database for missing and inaccurate sound recording information relating to their musical works, and if an issue is discovered, then the copyright owner must provide the pertinent sound recording information to the MLC if the information is known to the copyright owner or, as the MLC proposes, is otherwise within the copyright owner's possession, custody, or control. By limiting the obligation in this manner, musical work copyright owners would not have to affirmatively seek out information from sound recording copyright owners or licensors they may have no relationship with, but would have to provide information that may be contained in some of the sources the DLC discusses (*e.g.*, royalty statements under the compulsory license and reporting from performing rights organizations). As to the proposal from A2IM & RIAA, the statute imposes a requirement on musical work copyright owners—not the MLC—so the Office does not interpret this provision to encompass requiring the MLC to obtain sound recording data from certain sources.

*Appropriate information.* The Office is inclined to agree with the DLC and A2IM & RIAA that more than just the sound recording title should be provided. Section 115(d)(3)(E)(iv) refers to "information regarding the names of the sound recordings," while in other places, the MMA only refers to "the name of the sound recording" or "sound recording name."<sup>98</sup> Moreover, as the RIAA points out, in most cases, sound recordings are likely to share the same name as the underlying musical work, making a requirement limited to the sound recording's title largely meaningless.<sup>99</sup> Thus, the rule proposes, in accord with the comments of the DLC and A2IM & RIAA, that sound recording titles, including alternative and parenthetical titles, featured artists, and ISRCs should all be provided (subject to the appropriate efforts discussed above). The Office does not agree with the DLC's proposal regarding performing rights organization information for musical works, as that information does not seem to fit within the meaning of "information regarding the names of the sound recordings."<sup>100</sup>

### *C. Reports of Usage and Payment—Digital Music Providers*

As discussed in the notification of inquiry, DMPs operating under the blanket license must report their usage of musical works and pay applicable royalties to the MLC. The statute contains two relevant reporting and payment provisions, sections 115(c)(2)(I) and 115(d)(4)(A), and the Copyright Office is to prescribe regulations pursuant to both.<sup>101</sup> These regulations are to cover matters such as the form, content, delivery, certification, and adjustment of reports of usage and payment, as well as requirements under which records of use must be maintained and made available to the MLC by DMPs.<sup>102</sup>

Various commenters spoke to issues concerning reports of usage in responding to the notification of inquiry, and the MLC, DLC, and Music Reports provided proposed regulatory language.

In promulgating reporting and payment rules for the section 115 license, the Copyright Office has long followed a "guiding principle" that "the regulations should preserve the compulsory license as a workable tool, while at the same time assuring that copyright owners will receive full and prompt payment for all phonorecords made and distributed."<sup>103</sup> The Office has "accordingly evaluated proposed regulatory features using 'three fundamental criteria'": (1) "the accounting procedures must not be so complicated as to make use of the compulsory license impractical;" (2) "the accounting system must insure full payment, but not overpayment;" and (3) "the accounting system must insure prompt payment."<sup>104</sup> The Office has also previously stressed that "transparency is critical where copyright owners are compelled by law to license their works."<sup>105</sup> Today, the Office reaffirms these conclusions, which the Office has carefully considered in formulating this proposed rule. The Office also credits Congress's intention that, under the MMA, reports of usage "should be consistent with then-current industry practices regarding how . . . limited downloads and interactive streams are tracked and reported."<sup>106</sup>

<sup>92</sup> MLC Initial at 16; MLC Reply at 13.

<sup>93</sup> DLC Reply Add. at A-4.

<sup>94</sup> *Id.* at A-5.

<sup>95</sup> DLC Initial at 8; DLC Reply at 12, Add. A-5.

<sup>96</sup> A2IM & RIAA Reply at 2; *see also* RIAA Initial at 9 (proposing that "commercially reasonable efforts" be defined as requiring the MLC to leverage existing industry infrastructure, including DDEX, SoundExchange's ISRC lookup service, and SoundExchange's Music Data Exchange).

<sup>97</sup> A2IM & RIAA Reply at 12-13; *see also* RIAA Initial at 7-9.

<sup>98</sup> Compare 17 U.S.C. 115(d)(3)(E)(iv) (emphasis added) with *id.* at 115(d)(3)(E)(ii)(IV)(bb), (d)(3)(E)(iii)(I)(dd), (d)(4)(A)(ii)(I)(aa).

<sup>99</sup> *See* RIAA Initial at 8-9; *see also* DLC Initial at 8.

<sup>100</sup> *See* 17 U.S.C. 115(d)(3)(E)(iv) (emphasis added).

<sup>101</sup> *See* 84 FR at 49970-71.

<sup>102</sup> *See id.*

<sup>103</sup> 79 FR 56190, 56190 (Sept. 18, 2014) (internal quotation marks omitted) (quoting 45 FR 79038, 79039 (Nov. 28, 1980)).

<sup>104</sup> *Id.* (internal brackets omitted) (quoting 45 FR 79038, 79039 (Nov. 28, 1980)).

<sup>105</sup> 79 FR at 56201.

<sup>106</sup> *See* H.R. Rep. No. 115-651, at 12; S. Rep. No. 115-339, at 13; Conf. Rep. at 10; *see also* U.S.

Based on the record before it, and with these guiding principles in mind, the Office proposes the following rules with respect to reports of usage and payment to be delivered to the MLC by DMPs under the blanket license.

*General operation and timing.* The rule proposes a general scheme whereby DMPs operating under the blanket license must report usage and pay royalties to the MLC on a monthly basis, with a cumulative annual report due each year, and an ability to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated inputs with finally determined figures.

As required by section 115(d)(4)(A)(i), the rule proposes that monthly reports of usage and related royalty payments must be delivered to the MLC within 45 days of the end of the applicable monthly reporting period.<sup>107</sup> The Office disagrees with the MLC, which would read the statute as requiring royalty payments to be due within 20 days rather than within the same 45-day period as their associated reports of usage.<sup>108</sup> As the DLC points out, the statute and legislative history counsel that both are due within 45 days.<sup>109</sup> Section 115(d)(4)(A)(i) states that DMPs shall “report and pay” “in accordance with” section 115(c)(2)(I), “except that the *monthly reporting* shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period,” while section 115(c)(2)(I) states that “[e]xcept as provided in paragraph[] (4)(A)(i) . . . of subsection (d), *royalty payments* shall be made on or before the twentieth day of each month.”<sup>110</sup> Given that one provision refers to “monthly reporting” and the other refers to “royalty payments,” in order to give meaning to the “except” language, it would seem that both provisions must be read as referring to both reporting and payment. The legislative history confirms this intent.<sup>111</sup> And it is in accord with the

Office’s longstanding interpretation of section 115.<sup>112</sup>

Under the proposed rule, an annual report of usage would be due on the 20th day of the sixth month after the end of the DMP’s fiscal year—the same timing as currently required for annual statements of account under the non-blanket section 115 license, and the same timing as proposed by Music Reports.<sup>113</sup> The Office is inclined to disagree with the DLC that the statute does not require annual reporting certified by a certified public accountant (“CPA”).<sup>114</sup> The Office has reasonably considered the DLC’s various arguments on this subject, but the plain language of section 115(c)(2)(I) seems to clearly state that “detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for *every* compulsory license under subsection (a).”<sup>115</sup> Even if that were not the case, the Office tentatively concludes that requiring CPA certification of annual reporting, pursuant to the Office’s broad regulatory authority, is reasonable and appropriate. While, as the DLC notes, the MMA creates a new triennial audit right, copyright owners remain unable to directly audit DMPs—they can only audit the MLC, which may, but is not required to, audit DMPs.<sup>116</sup> And certified annual reporting may diminish the need to initiate the same level of audits of individual DMPs by the MLC; as the DLC is well-aware, DMPs effectively fund such audits through the administrative assessment. An annual CPA certification would also occur more frequently than these triennial audits, to the extent audits occur at all.<sup>117</sup> Thus, requiring an annual CPA-certified report would ensure that copyright owners continue to be given at least as much comfort in the accuracy of DMP reporting as before the MMA.<sup>118</sup> The MMA is intended to increase transparency, not diminish it.<sup>119</sup>

<sup>112</sup> See 37 CFR 201.19(b)(5) (1978) (“Each Monthly Statement of Account shall be served . . . together with the total royalty . . . on or before the twentieth day of the immediately succeeding month.”) (emphasis added).

<sup>113</sup> See *id.* at § 210.17(g)(1); Music Reports Initial at 18.

<sup>114</sup> See DLC Initial at 9–12; DLC Reply at 22 n.97.

<sup>115</sup> See 17 U.S.C. 115(c)(2)(I) (emphasis added).

<sup>116</sup> See *id.* 115(d)(3)(L), (d)(4)(D).

<sup>117</sup> See MLC *Ex Parte* Letter #2 at 4 (noting that the MLC is not funded at a level necessary to audit every DMP every three years).

<sup>118</sup> See 79 FR at 56203 (“[T]he purpose of the CPA certification requirement is to give the copyright owner firm assurance that it is receiving all the royalties to which it is entitled.”).

<sup>119</sup> As the DLC points out, the audit right was adopted in part upon the recommendation of the Copyright Office; this recommendation was not made with a corresponding suggestion to decrease

Regarding adjustments, the rule proposes that a report adjusting a monthly report of usage can be delivered to the MLC any time between delivery of the monthly report being adjusted and delivery of the annual report covering that monthly report. The rule would also permit a DMP, at its option, to forego filing a separate report of adjustment and instead combine it with the applicable annual report. The latter option is similar to how adjustments to monthly statements currently operate under the non-blanket section 115 license,<sup>120</sup> and the former option, allowing adjustments to be made at an earlier point in time, is something both the MLC and DLC propose and that the Office believes reasonably provides additional flexibility and may facilitate more prompt and accurate payments to copyright owners.<sup>121</sup> In accord with the DLC’s proposal, and as is the case currently for monthly accounting statements under the non-blanket section 115 license, this effectively would require any adjustment to a monthly report of usage to be made within six months<sup>122</sup> of the end of the relevant annual period covering that monthly report (which, as discussed above, is the proposed deadline for delivering the annual report).<sup>123</sup>

The Office is inclined to agree with both the MLC and DLC that certain items may still need to be adjusted after the end of this six-month period,<sup>124</sup> as is permitted currently in connection with performance royalty estimates under the non-blanket section 115 license.<sup>125</sup> The Office thus proposes that an annual report of usage may be adjusted within six months (the same

the potential reliability of indicia provided in licensee annual statements. See DLC Initial at 11 (citing U.S. Copyright Office, Copyright and the Music Marketplace at 173–74). See also, e.g., 164 Cong. Rec. S6292, 6293 (daily ed. Sept. 25, 2018) (statement of Sen. Hatch) (“I need to thank Chairman Grassley, who shepherded this bill through the committee and made important contributions to the bill’s oversight and transparency provisions.”); 164 Cong. Rec. S501, 504 (daily ed. Jan. 24, 2018) (statement of Sen. Coons) (“This important piece of legislation will bring much-needed transparency and efficiency to the music marketplace.”); Proposal of DLC Submitted in Response to U.S. Copyright Office’s Dec. 21, 2018, Notice of Inquiry, Ex. C at 2 (Mar. 21, 2019) (recognizing “the goals of the MMA to provide licensing efficiency and transparency”).

<sup>120</sup> See 37 CFR 210.16(d)(3)(i), 210.17(d)(2)(ii).

<sup>121</sup> See DLC Reply at 21–22, Add. A–10–11; MLC Initial at 19–20; MLC Reply at 27, App. C at 14.

<sup>122</sup> Technically the 20th day of the sixth month.

<sup>123</sup> See DLC Reply at 21–22, Add. A–10–11. While the MLC proposes a different deadline, the MLC seems to concede that the DLC’s proposed timing would be reasonable. See MLC Reply at 27.

<sup>124</sup> See DLC Reply at 22, Add. A–10–11; MLC Initial at 19–20; MLC Reply App. C at 14.

<sup>125</sup> See 37 CFR 210.17(d)(2)(iii) (describing amended annual statements of account).

Copyright Office, Copyright and the Music Marketplace at 30–31 (noting that pre-MMA, mechanical licenses were overwhelmingly administered through direct licenses).

<sup>107</sup> See 17 U.S.C. 115(d)(4)(A)(i).

<sup>108</sup> See MLC Reply at 23.

<sup>109</sup> See DLC *Ex Parte* Letter #1 Presentation at 2–3.

<sup>110</sup> 17 U.S.C. 115(c)(2)(I), (d)(4)(A)(i) (emphasis added).

<sup>111</sup> See H.R. Rep. No. 115–651, at 27

(“Subparagraph A identifies the data that must be reported to the collective by a digital music provider along with its royalty payments due 45 calendar days after the end of a monthly reporting period.”) (emphasis added); S. Rep. No. 115–339, at 24 (same); Conf. Rep. at 20 (same).

timing as is currently permitted in connection with performance royalty estimates<sup>126</sup>) of any one of the following occurrences, which are drawn from both the MLC and DLC proposals and strike the Office as being reasonable: (1) Exceptional circumstances; (2) when adjusting a previously estimated input after the input becomes finally established (see below); (3) following an audit; or (4) in response to a change in applicable rates or terms under 37 CFR part 385.<sup>127</sup>

*Processing, invoices, and response files.* A significant issue raised by the DLC throughout the rulemaking proceeding is that there must be a back-and-forth process through which DMPs receive royalty invoices and response files<sup>128</sup> from the MLC after delivering monthly reports of usage, but before royalty payments are made or deducted from a DMP's account with the MLC. The DLC states that this process is an industry-standard practice for many DMPs that use third-party vendors to calculate and process their royalty payments.<sup>129</sup> The DLC is specifically concerned with the handling of voluntary licenses, explaining that because such licenses are often procured through blanket deals covering all musical works in a publisher's catalog, the DMP usually does not know which specific musical works are covered, and will be reliant on the MLC to make that determination based on its statutorily directed matching efforts; this in turn affects the amount of royalties the DMP owes under the blanket license.<sup>130</sup> The DLC seems especially worried that if invoices and response files are not required, DMPs will be effectively compelled to also use the MLC to administer their voluntary licenses (compared to a DMP processing in-house or through an alternate vendor) because the DMPs will not otherwise be able to properly account to copyright owners under these direct deals.<sup>131</sup> At bottom, the DLC ostensibly seeks to

retain the status quo for these deliverables whereby the MLC, in fulfilling the matching and calculation role previously performed by DMPs and their vendors, would provide the royalty invoices and response files DMPs either generated or received from their vendors under the pre-MMA regime.<sup>132</sup>

To this end, the DLC proposes that DMPs first deliver their monthly reports of usage to the MLC, and that the MLC then use the reported data to match reported sound recordings to musical works and their copyright owners, confirm uses subject to voluntary licenses and the corresponding amounts to be deducted from royalties otherwise due under the blanket license, calculate royalties owed under the blanket license, and deliver an invoice to the DMP setting forth the royalties owed along with a response file.<sup>133</sup> The DLC proposes not to prescribe when a DMP must deliver its report of usage, so long as it is before the statutory 45-day deadline, but would require the MLC to provide invoices and the response file within 15 days of receiving a monthly report of usage.<sup>134</sup>

The MLC does not seem to generally disagree with this choreography and ultimately states that it intends to provide DMPs with both invoices and response files, but argues that such matters, particularly with respect to timing, are not ripe for rulemaking.<sup>135</sup> The MLC further states that to be logistically workable, there must be a fixed DMP reporting deadline, to provide the MLC with predictability in its staffing and resources.<sup>136</sup> It proposes that, to the extent the Office adopts a rule, DMPs be required to deliver reports within 15 days after the end of the monthly reporting period and believes it can process them within 25 days, which would then allow 5 days to remit payment (or have the MLC charge a DMP's account) before the statutory 45-day deadline expires.<sup>137</sup>

Having carefully considered this issue, the Office proposes a process that would require the MLC to provide invoices and response files generally along the outlines of the DLC's

proposal.<sup>138</sup> The Office, however, generally proposes to adopt the timing deadlines that the MLC indicates would be acceptable to its operations. Given that the current non-blanket section 115 license requires monthly reporting and payment within 20 days, and commenters state that DMPs generally report to their vendors within 10 days or less,<sup>139</sup> the proposed 15-day deadline should not be burdensome. To the extent it is, it is optional; a DMP could take the full 45 days permitted under the statute, but it would not be entitled to an invoice if it does, absent special arrangement with the MLC (see "Voluntary agreements to alter process" below). The rule further proposes that response files must be requested by DMPs, in which case they must be delivered by the MLC within the same 25-day period the MLC will have to process reports.<sup>140</sup> The Office believes the proposed rule is a reasonable approach to ensuring that DMPs that need invoices and response files can get them, while providing the MLC the time it needs to generate them. The proposed rule is intended to further the Office's longstanding policy objective that the compulsory license should be a realistic and practical alternative to voluntary licensing. The Office appreciates the MLC's position requesting the Office refrain from issuing a rule on this matter for the time being, but tentatively agrees with the DLC that a rule would ultimately be valuable to build reliance that DMPs can obtain these items. The Office is not opposed to revisiting the precise choreography at a later date.

*Content of monthly reports of usage.* In addition to basic information like the covered period and the name of the DMP and its associated services, the rule proposes that monthly reports of usage contain a detailed statement covering the royalty payment and accounting information and sound recording and musical work information discussed below. Such information would be required for each sound recording embodying a musical work

<sup>126</sup> See *id.*

<sup>127</sup> See DLC Reply at 22, Add. A-10-11; MLC Reply App. C at 14.

<sup>128</sup> The DLC describes "response files" as detailing the results of the matching process and essentially serving as the "backup" to the invoice, confirming where royalties are being paid. DLC Reply at 16, and including such information as song title, vendor-assigned song code, composer(s), publisher name, publisher split, vendor-assigned publisher number, publisher/license status, and royalties per track. DLC *Ex Parte* Letter #1 Presentation at 11.

<sup>129</sup> See DLC Initial at 13-14; DLC Reply at 13-16; DLC *Ex Parte* Letter Feb. 14, 2020 ("DLC *Ex Parte* Letter #1") at 1-2; DLC *Ex Parte* Letter #1 Presentation at 3-13; DLC *Ex Parte* Letter #3 at 4.

<sup>130</sup> DLC Initial at 13-14; DLC Reply at 13-16; DLC *Ex Parte* Letter #1 Presentation at 3-13.

<sup>131</sup> DLC *Ex Parte* Letter #1 Presentation at 3-13.

<sup>132</sup> DLC Reply at 16.

<sup>133</sup> *Id.* at Add. A-9; see also *id.* at 15-16.

<sup>134</sup> *Id.* at Add. A-9; DLC *Ex Parte* Letter #3 at 4; see also DLC *Ex Parte* Letter #1 at 1-2 ("[D]ifferent services have different internal accounting and payment practices, and imposing a rigid interim reporting deadline on all services will impede rather than accommodate those different practices.")

<sup>135</sup> MLC *Ex Parte* Letter #2 at 2-3.

<sup>136</sup> *Id.* at 2.

<sup>137</sup> The MLC addressed planned timing with the Office during its February 21, 2020, *ex parte* communication. See generally MLC *Ex Parte* Letter #2 at 2.

<sup>138</sup> The Office is inclined to disagree with the DLC's proposal that the MLC provide the DMP with the amount of royalties owed under voluntary licenses. See DLC Reply Add. at A-9. That seems more like something the MLC would only be obligated to calculate and provide if it is privately engaged as the DMPs administrator for such voluntary licenses. See 17 U.S.C. 115(d)(3)(C)(iii); see also MLC *Ex Parte* Letter #2 at 3.

<sup>139</sup> See Music Reports Initial at 7; MLC *Ex Parte* Letter #2 at 2.

<sup>140</sup> The rule also proposes that a DMP may request a response file even when it is not entitled to an invoice because the information may still be of use to the DMP, such as for its voluntary licenses. In such cases, the MLC would have 25 days from the end of the 45-day reporting deadline to deliver the response file.

that is used by the DMP in covered activities during the applicable monthly reporting period.<sup>141</sup> As required by the statute, this would cover “usage data for musical works used under the blanket license and usage data for musical works used in covered activities under voluntary licenses and individual download licenses.”<sup>142</sup> The rule proposes, in accord with the proposals of the MLC and DLC, that information be reported in such a manner as from which the MLC may separate the reported information for each different applicable activity or offering, including each different applicable activity and offering defined by the CRJs in 37 CFR part 385.<sup>143</sup> This seems necessary for the MLC to be able to properly confirm DMP royalty payments considering that different activities and offerings are subject to different rate calculations under part 385, and part 385 specifically provides that “royalties must be calculated separately with respect to *each* Offering taking into consideration Service Provider Revenue and expenses associated with *each* Offering.”<sup>144</sup> Monthly reports would also have to contain appropriate information about applicable voluntary licenses and individual download licenses to the extent not otherwise provided separately as discussed above with respect to NOLs.<sup>145</sup>

The MLC asks the Office to clarify “that offerings with different consumer price points are different offerings to be reported separately.”<sup>146</sup> The DLC disagrees.<sup>147</sup> This issue does not seem appropriate for the Office to opine on one way or the other. The CRJs in part 385 use the terms “Licensed Activity” and “Offering,” and provide definitions for both, which are relevant to the rate calculations.<sup>148</sup> Any concerns should be addressed to the CRJs.

The Office is inclined to disagree with the MLC with respect to requiring DMPs to report usage for non-music content (e.g., podcasts).<sup>149</sup> Such information seems only relevant if somehow necessary for calculating statutory

royalties, in which case, the proposed rule would cover it. The Office, at least on the record before it, is not persuaded by the MLC’s more general argument that nascent DMPs may not understand the difference between section 115 offerings and non-section 115 offerings.<sup>150</sup>

As with NOLs discussed above, the Office is also not inclined to provide the MLC with authority to require additional substantive information from DMPs in connection with their reports of usage, as the MLC proposes, although such information could be provided permissively.<sup>151</sup> Particularly if issued on an interim basis, the Office will consider adjusting the relevant rule in the future if necessary.

The Office is also not inclined to adopt a default rule entitling DMPs to provide various required information to the MLC separately from their reports, as the DLC proposes.<sup>152</sup> The Office has concerns about potential logistical challenges it could create for the MLC, but has no objection to DMPs doing this if the MLC agrees (see “Voluntary agreements to alter process” below).

*Royalty payment and accounting information.* With respect to specific accounting information and royalty calculation details required to be reported, the Office proposes to essentially retain the current rule governing non-blanket section 115 licenses, but with two paths to account for whether the DMP delivering the report is entitled to an invoice or not (which in turn, depends upon the date on which the DMP’s report is delivered to the MLC).<sup>153</sup> Where the DMP will receive an invoice, it would be required to report all information necessary for the MLC to compute the royalties payable under the blanket license, in accordance with part 385, and all information necessary to enable the MLC to provide a detailed and step-by-step accounting of the calculation of such royalties, sufficient to allow each applicable copyright owner, in turn, to assess the manner in which the MLC, using the DMP’s information, determined the royalty owed and the accuracy of the royalty calculations. Where the DMP is not entitled to an invoice, it would be required to make its own calculations and provide the same detailed and step-by-step accounting of the calculation of such royalties,

sufficient for the MLC to assess their accuracy. In both cases, the DMP would be required to report the number of payable units (e.g., permanent downloads, plays, constructive plays) for each reported sound recording, whether pursuant to a blanket license, voluntary license, or individual download license. In neither case would the DMP be expected to calculate or estimate per-work royalty allocations.

In proposing to carry forward the current regulatory construct, the Office observes that the MMA does not appear to require any specific accounting or calculation details beyond the number of DPDs,<sup>154</sup> and, as noted above, the MMA’s legislative history suggests that Congress did not intend for such reporting details to necessarily change.<sup>155</sup> The Office, therefore, is not inclined to substantially deviate from its existing rule.

The MLC and DLC sharply disagree on this matter. The MLC argues that the current level of accounting detail in reporting is insufficient and opaque, and proposes that the regulations remedy this by enumerating a considerable amount of detailed royalty accounting calculation and background information that DMPs must be required to report.<sup>156</sup> The DLC objects to the MLC’s purported need for much of this information, and argues that compiling that level of information into monthly reports would be operationally burdensome and “will be a substantial engineering challenge.”<sup>157</sup> The DLC further argues that it would be more appropriate for the information sought by the MLC to be obtained via the

<sup>154</sup> See 17 U.S.C. 115(d)(4)(A)(ii); see also Music Reports Initial at 4 (observing that the MMA has “a glaring gap” that “omits any requirement that DMPs deliver to the MLC . . . any of the underlying information that would be required to show how the DMPs have calculated their royalty payments”).

<sup>155</sup> See H.R. Rep. No. 115–651, at 12; S. Rep. No. 115–339, at 13; Conf. Rep. at 10.

<sup>156</sup> See MLC Initial at 19; MLC Reply at 14, 19–20, App. C at 9–12; MLC *Ex Parte* Letter #2 at 3. Some examples of what the MLC seeks include information regarding how the DMP calculates service revenue and total cost of content (including e.g., categories of revenue, subscription prices, deductions from revenue, and the types of consideration expensed for obtaining sound recording rights), information about bundles, discounts, free trials, and promotional offerings (including e.g., family and student plan data, which products/services constitute a bundle, and bundle component pricing), and information about DPDs for which the DMP does not pay royalties.

<sup>157</sup> DLC *Ex Parte* Letter #1 at 2; DLC *Ex Parte* Letter #1 Presentation at 14 (“The MLC has not explained why it needs this data to perform its core matching, collection, and distribution activities. Moreover, these changes will be a substantial engineering challenge. For instance, the inputs into determining the prices of the elements of a bundle are not data that is stored in a format amenable to reporting.”); DLC Reply at 17–20.

<sup>141</sup> See MLC Reply App. C at 9–10; DLC Reply Add. at A–6.

<sup>142</sup> See 17 U.S.C. 115(d)(4)(A)(ii).

<sup>143</sup> See MLC Initial at 18; MLC Reply App. C at 9; DLC Reply Add. at A–6.

<sup>144</sup> See 37 CFR 385.21(b) (emphasis added).

<sup>145</sup> See 17 U.S.C. 115(d)(4)(A)(ii)(II).

<sup>146</sup> MLC *Ex Parte* Letter #2 at 4; see MLC *Ex Parte* Letter Mar. 24, 2020 (“MLC *Ex Parte* Letter #3”) at 2.

<sup>147</sup> DLC *Ex Parte* Letter #3 at 3 (“The rates established by the Copyright Royalty Board, however, are not based on customer price points, which is why reporting based on those distinctions should not be required.”).

<sup>148</sup> See 37 CFR 385.2, 385.21, 385.22, 385.31.

<sup>149</sup> See MLC Reply App. C at 12.

<sup>150</sup> See MLC Initial at 5, 18–19; see also DLC Reply at 20 (opposing the MLC’s proposal).

<sup>151</sup> See MLC Reply App. C at 10, 12; see also DLC Reply at 20 (opposing the MLC’s proposal).

<sup>152</sup> See DLC Reply at 17, Add. A–7.

<sup>153</sup> See 37 CFR 210.16(c)(2); see also MLC Initial at 18 (supporting retention); Music Reports Initial at 11 (same).

statutorily permitted audits.<sup>158</sup> The MLC contends that these triennial audits are insufficient.<sup>159</sup>

Regardless of whatever the current reporting situation may be, the Office tentatively concludes that the MLC should have access to much of the information it seeks, but that it may be appropriate for some of this underlying backup information to be made available separate from monthly reports of use. As previously noted, “transparency is critical where copyright owners are compelled by law to license their works,”<sup>160</sup> and so it seems appropriate for the MLC to have access to as much information as is reasonably necessary for it to “engage in efforts to . . . confirm proper payment of royalties due.”<sup>161</sup> That the scope of that information may be cumbersome for DMPs is a product of the complexity of the rate structure adopted by the CRJs (which presumably could be changed in future ratemakings). The Office, however, is also mindful of other previously noted guiding principles, that the compulsory license must remain a “workable tool” and that “the accounting procedures must not be so complicated as to make use of the compulsory license impractical.”<sup>162</sup> To appropriately balance these competing concerns, the Office proposes a compromise approach whereby DMPs must make much of the information proposed by the MLC available to the MLC as part of their records of use.<sup>163</sup> As discussed below in more detail, the Office proposes to clarify its recordkeeping rule with enumerated examples of the types of records DMPs must retain and make available.

The MLC and DLC both acknowledge the practical reality that reporting will need to use estimates in certain circumstances,<sup>164</sup> as is permitted for performance royalties under the current rules governing the non-blanket section 115 license.<sup>165</sup> While the MLC proposes that estimates be limited to performance royalties,<sup>166</sup> the DLC proposes a broader provision covering any royalty calculation “input that is unable to be finally determined.”<sup>167</sup> The DLC asserts that this expansion is appropriate because there are other royalty calculation inputs, such as the

applicable consideration expended for sound recording rights, that may not be established when an applicable report may be due.<sup>168</sup>

The rule proposes that a reasonable estimate be permitted for any royalty calculation input that is unable to be finally determined at the time the report is delivered to the MLC, if the reason the input cannot be finally determined is outside the DMP’s control. It seems reasonable to permit such estimations, but only where the DMP cannot unilaterally finalize the input. The proposed rule would allow use of an estimate where an input remains uncertain because of a bona fide dispute between the DMP and another party. But using an estimate because of a purely internal tracking or accounting issue, for example, would not be acceptable. The rule would require the DMP to deliver a report of adjustment after any estimated input becomes finally determined. The Office also proposes to specifically permit DMPs to calculate their total royalties owed under the blanket license by using a reasonable estimate of the amount to deduct for usage subject to voluntary licenses and individual download licenses, where the DMP is not entitled to an invoice but still dependent on the MLC to confirm such usage. The rule would require the DMP to deliver a report of adjustment after the MLC confirms such usage.

The Office is not inclined to adopt the DLC’s proposal to clarify that making any adjustments to these estimates would not be a basis for charging late fees, terminating a blanket license, or requiring payment of audit fees.<sup>169</sup> Any applicable late fees are governed by the CRJs, and any clarification should come from them. Whether or not payment of audit fees is incurred is governed by 17 U.S.C. 115(d)(4)(D). And whether or not the license can be terminated is governed by 17 U.S.C. 115(d)(4)(E).

*Sound recording and musical work information.* With respect to the specific information required to be reported for purposes of identifying each sound recording embodying a musical work used by a DMP, the proposed rule is derived from the statute, current regulations, and the public comments (including the specific proposals of the MLC and DLC). In alignment with the statute, the proposed rule essentially has three tiers of information: (1) Sound recording information that must always

be reported (*e.g.*, sound recording name and featured artist); (2) sound recording information that must be reported “to the extent acquired by the [DMP] in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to [section 115(d)(4)](B)” (*e.g.*, sound recording copyright owner, producer, and ISRC); (3) and associated musical work information that must be reported “to the extent acquired by the [DMP] in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, including pursuant to [section 115(d)(4)](B)” (*e.g.*, songwriter, publisher, and international standard musical work code (“ISWC”)).<sup>170</sup>

In addition to the statutorily enumerated information, the Office is proposing certain additional data fields that the record indicates are likely to be beneficial to the MLC’s key function of engaging in matching efforts to identify reported sound recordings, the musical works embodied in them, and the related copyright owners due royalties. For example, within the first tier described above—that must always be reported—the Office proposes including playing time<sup>171</sup> and any unique identifier assigned by the DMP (including any code that can be used to locate and listen to the sound recording on the DMP’s service).<sup>172</sup> Besides being helpful for matching, particularly where there are multiple versions of a recording, playing time can be necessary for computing royalties.<sup>173</sup>

Regarding DMP identifiers, at this time, the Office is inclined to agree with the DLC’s proposal that DMPs provide these in lieu of the audio links the MLC requests.<sup>174</sup> The MLC argues that these links may be critical to properly match and pay royalties because the audio is “the only truly authoritative evidence of the digital use,” and claims that it would not be burdensome for DMPs to provide them.<sup>175</sup> Specifically, it points out that audio links have been provided by certain DMPs in connection with past settlements related to unclaimed

<sup>170</sup> See 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa)–(bb).

<sup>171</sup> See 37 CFR 210.16(c)(3)(v); Music Reports Initial at 12; DLC Reply Add. at A–7; MLC Reply App. C at 11; RIAA Initial at 6; Recording Academy Initial at 3; FMC Reply at 4.

<sup>172</sup> See 37 CFR 210.16(c)(3)(iii)(C); Music Reports Initial at 12.

<sup>173</sup> See *id.* at § 385.11(a) and 385.21(c).

<sup>174</sup> See DLC *Ex Parte* Letter #1 Presentation at 15; DLC *Ex Parte* Letter #2 at 3; MLC Initial at 20; MLC Reply at 18–19, App. C at 10.

<sup>175</sup> MLC Reply at 18–19; see also MLC *Ex Parte* Letter #1 at 2–3; MLC *Ex Parte* Letter #4 at 5.

<sup>158</sup> DLC Reply at 17; DLC *Ex Parte* Letter #1 at 2.

<sup>159</sup> MLC *Ex Parte* Letter #2 at 4.

<sup>160</sup> 79 FR at 56201.

<sup>161</sup> See 17 U.S.C. 115(d)(3)(G)(i)(I)(cc).

<sup>162</sup> 79 FR at 56190.

<sup>163</sup> See 17 U.S.C. 115(d)(4)(A)(iii), (iv)(I).

<sup>164</sup> See DLC Reply at 16, Add. A–8; MLC Reply App. C at 13.

<sup>165</sup> See 37 CFR 210.16(d)(3)(i).

<sup>166</sup> MLC Reply App. C at 13.

<sup>167</sup> DLC Reply Add. at A–8.

<sup>168</sup> DLC Reply at 16; see also DLC Initial at 15–16.

<sup>169</sup> See DLC Reply at 16–17, Add. A–8; see also MLC *Ex Parte* Letter #2 at 7–8 (opposing the DLC’s proposal).

royalties, and suggests that audio links would be particularly useful to reduce the incidence of unclaimed royalties and ownership disputes.<sup>176</sup> The DLC contends that it would be burdensome to require “all digital music providers to engineer their systems” to provide active links in monthly reporting, and suggests that identifiers serve as a workable alternative, stating that, at least for Amazon, Apple, Google, Pandora, and Spotify, these identifiers would be sufficient for the MLC to locate and listen to a particular track using the search feature on each DMP’s consumer-facing service.<sup>177</sup>

The Office understands the MLC to believe that audio links will be most useful not in connection with automated matching efforts, but rather to feature on its online claiming portal, similar to claiming portals used in connection with class settlements over unclaimed royalties or collective management organizations that operate claims-based systems.<sup>178</sup> It is not clear whether links might be featured for all sound recordings embodying musical works listed in the database, or only those with missing or incomplete ownership information. Either way, while the planned inclusion of audio links is commendable, the record to date does not establish that the method by which the MLC receives audio links should be a regulatory issue, rather than an operational matter potentially resolved by MLC and DLC members, including through the MLC’s operations advisory committee.

For example, while the DLC suggests that inclusion of audio links for every recording reported on a monthly basis by each DMP would be burdensome, a few DLC members suggested in passing to the Office that they could just provide the MLC with a free monthly subscription in lieu of such reporting. It is not clear to what extent the parties have engaged on such logistical discussions to determine if this, or other operational solutions, may serve as a workable alternative. The Office declines at this time to propose a rule including audio links in monthly reporting, but encourages the parties, including individual DLC members, to further collaborate upon a solution for the MLC portal to include access to

specific tracks (or portions thereof) when necessary, without cost to songwriters or copyright owners. The Office hopes that this matter can be resolved after the parties confer further, but remains open to adjusting this aspect of the proposed rule if developments indicate it is necessary.

In the second tier described above—sound recording information that must only be reported to the extent acquired—the rule proposes to include version,<sup>179</sup> release date,<sup>180</sup> album title,<sup>181</sup> label name,<sup>182</sup> distributor,<sup>183</sup> and other unique identifiers beyond ISRC, including catalog number,<sup>184</sup> universal product code,<sup>185</sup> and any distributor-assigned identifier.<sup>186</sup>

In the third tier described above—related musical work information that must only be reported to the extent acquired in the metadata provided by sound recording copyright owners and licensors—the rule proposes to include musical work name,<sup>187</sup> musical work copyright owner,<sup>188</sup> and international standard name identifier (“ISNI”) and interested parties information code (“IPI”) for each songwriter, publisher, and musical work copyright owner.<sup>189</sup>

The Office disagrees with the MLC’s proposal that the musical work information enumerated in the statute be required “to the extent otherwise known by the [DMP].”<sup>190</sup> This seems directly at odds with the statute, which states that such information shall be provided “to the extent acquired by the [DMP] in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound

recordings of musical works to engage in covered activities, including pursuant to [section 115(d)(4)](B).”<sup>191</sup> As the Office previously cautioned, “while the Office’s regulatory authority is relatively broad, it is obviously constrained by the law Congress enacted; the Office can fill statutory gaps, but will not entertain proposals that conflict with the statute.”<sup>192</sup>

In addition to establishing the three tiers described above, the Office further proposes that certain information, primarily that covered by the second and third tiers, must only be reported to the extent “practicable,” a term defined in the proposed rule. Similar to the arguments made with respect to the collection and reporting of unaltered data discussed above, the DLC asserts that it would be burdensome from an operational and engineering standpoint for DMPs to report additional categories of data not currently reported, and that DMPs should not be required to do so unless it would actually improve the MLC’s matching ability.<sup>193</sup> The record suggests that all of the data categories described above possess some level of utility, although, as noted above, there is disagreement as to the particular degree of usefulness of each. It would seem that different data points may be of varying degrees of helpfulness depending on what other data points for a work may or may not be available.

The proposed rule therefore defines “practicable” in a very specific way. First, the proposed definition would always require reporting of the expressly enumerated statutory categories (e.g., sound recording copyright owner, producer, ISRC, songwriter, publisher, ownership share, and ISWC must always be reported, to the extent appropriately acquired, regardless of any associated DMP burden). Second, it would require reporting of any other applicable categories of information (e.g., catalog number, version, release date, ISNI, etc.) under the same three scenarios discussed above with respect to unaltered data, and for the same reasons discussed above: (1) Where the MLC has adopted a nationally or internationally recognized standard, such as DDEX, that is being used by the particular DMP, and the information belongs to a category of information required to be reported under that standard; (2) where the information belongs to a category of information that is reported by the

<sup>179</sup> See DLC Reply Add. at A-7; MLC Reply App. C at 11; RIAA Initial at 6; Recording Academy Initial at 3; FMC Reply at 4.

<sup>180</sup> See DLC Reply Add. at A-7; MLC Reply App. C at 11; RIAA Initial at 6; Recording Academy Initial at 3; FMC Reply at 4.

<sup>181</sup> See DLC *Ex Parte* Letter #1 Presentation at 15; MLC *Ex Parte* Letter #4 at 11.

<sup>182</sup> See 37 CFR 210.16(c)(3)(iii)(A); Music Reports Initial at 12; MLC *Ex Parte* Letter #4 at 11.

<sup>183</sup> See DLC Reply Add. at A-7; MLC Reply App. C at 10.

<sup>184</sup> See 37 CFR 210.16(c)(3)(iii)(A); Music Reports Initial at 12; MLC *Ex Parte* Letter #4 at 11.

<sup>185</sup> See 37 CFR 210.16(c)(3)(iii)(B); Music Reports Initial at 12; DLC *Ex Parte* Letter #1 Presentation at 15; MLC *Ex Parte* Letter #4 at 11.

<sup>186</sup> See 37 CFR 210.16(c)(3)(iii)(C); Music Reports Initial at 12.

<sup>187</sup> See 37 CFR 210.16(c)(3)(i); Music Reports Initial at 12.

<sup>188</sup> Though the statute already requires songwriter, publisher, and respective ownership share, the publisher may not always be the copyright owner, and in some cases, the owner may be neither the publisher nor the songwriter.

<sup>189</sup> See 37 CFR 210.16(c)(3)(vii); Music Reports Initial at 12; MLC *Ex Parte* Letter #4 at 11.

<sup>190</sup> See MLC Reply App. C at 11; see also MLC Initial at 17 n.7.

<sup>191</sup> See 17 U.S.C. 115(d)(4)(A)(ii)(I)(bb); see also DLC Reply at 18 (disagreeing with the MLC’s proposal for the same reason).

<sup>192</sup> 84 FR at 49968 (citations omitted).

<sup>193</sup> See DLC *Ex Parte* Letter #1 at 2; DLC *Ex Parte* Letter #3 at 2.

<sup>176</sup> MLC *Ex Parte* Letter #1 at 2–3.

<sup>177</sup> See DLC *Ex Parte* Letter #2 at 3; see also DLC Reply at 17–18; DLC *Ex Parte* Letter #1 Presentation at 15. The MLC disputes the utility and widespread existence of such identifiers. MLC *Ex Parte* Letter #2 at 6; MLC *Ex Parte* Letter #4 at 5.

<sup>178</sup> See MLC *Ex Parte* Letter #4 at 5 (“[I]t would be unfair, and economically infeasible for many songwriters, to require the purchase of monthly subscriptions to each DMP service in order to fully utilize the statutorily-mandated claiming portal.”).

particular DMP pursuant to any voluntary license or individual download license; or (3) where the information belongs to a category of information that was periodically reported by the particular DMP to its licensing administrator or to copyright owners directly prior to the license availability date. The Office is also contemplating a fourth scenario for commenters to consider: Where the information belongs to a category of information that is/was commonly reported in the industry by a majority of DMPs of comparable size and sophistication to the particular DMP either currently or prior to the license availability date. As with the rules about whether a DMP needs to provide unaltered data, the Office's proposed compromise seeks to appropriately balance the need for the MLC to receive detailed reporting with the burden that more detailed reporting may place on certain DMPs.<sup>194</sup>

With respect to the term "producer," the Office agrees with commenters that it may be confusing and warrants definition.<sup>195</sup> The Office proposes to adopt the proposal to use the Recording Academy's Producers and Engineers Wing definition.<sup>196</sup>

With respect to the term "sound recording copyright owner," A2IM & RIAA raise concerns over the reporting of this information and its use by the MLC, asserting that there is a disconnect between the use of the term in the statute and the actual information included in the digital supply chain about different parties associated with a given sound recording.<sup>197</sup> In light of this discussion, the Office proposes that DMPs may satisfy their obligations to report sound recording copyright owner information by reporting the three DDEX fields identified by A2IM & RIAA as being most relevant (to the extent such data is provided to DMPs by sound recording copyright owners or

licensors): DDEX Party Identifier (DPID), LabelName, and PLine.<sup>198</sup>

*Server fixation date and termination.* With respect to the MLC's proposal to require DMPs to report the date on which each sound recording is first reproduced by the DMP on its server, the rule proposes an alternative approach. As a result of the new blanket licensing system, the MLC contends that the server fixation date is "required to determine which rights owner is to be paid where one or more grants pursuant to which a musical work was reproduced in a sound recording has been terminated pursuant to Section 203 or 304 of the [Copyright] Act."<sup>199</sup> The Copyright Act permits authors or their heirs, under certain circumstances and within certain windows of time, to terminate the exclusive or nonexclusive grant of a transfer or license of an author's copyright in a work or of any right under a copyright.<sup>200</sup> The statute, however, contains an exception with respect to derivative works, stating that "[a] derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant."<sup>201</sup>

As the MLC explains it, "because the sound recording is a derivative work, it may continue to be exploited pursuant to the 'panoply of contractual obligations that governed pre-termination uses of derivative works by derivative work owners or their licensees.'" <sup>202</sup> The MLC contends that the section 115 compulsory license can be part of this "panoply," and therefore, if the compulsory license "was issued before the termination date, the pre-termination owner is paid. Otherwise, the post-termination owner is paid."<sup>203</sup> The MLC further explains that "under the prior NOI regime, the license date for each particular musical work was considered to be the date of the NOI for

that work," but "[u]nder the new blanket license, there is no license date for each individual work."<sup>204</sup> Thus, the MLC believes that "the date that the work was fixed on the DMP's server—which is the initial reproduction of the work under the blanket license—is the most accurate date for the beginning of the license for that work."<sup>205</sup>

The MLC argues that including the server date in reports of usage should not be burdensome for DMPs because they currently possess and report this information.<sup>206</sup> The DLC disagrees, stating that not all DMPs store this information, let alone report it.<sup>207</sup> The DLC also attacks the merits of the MLC's reason for wanting the server date, but at a relatively high-level.<sup>208</sup> No other commenter directly spoke to this issue, though one commenter with experience in music publishing administration suggests concurrence with the MLC's position.<sup>209</sup>

The MLC's interpretation of the derivative works exception seems at least colorable, and no publisher or songwriter (or representative organization) submitted comments disagreeing with what the MLC characterizes as industry custom and understanding.<sup>210</sup> Under the MMA, the MLC's dispute resolution committee will establish policies and procedures to address ownership disputes (though not resolve legal claims), and, at least where there is no live controversy between parties, practices regarding the default payee pursuant to the derivative works exception is an area where the MLC may need to adopt a policy for handling in the ordinary course.<sup>211</sup> Of course, any songwriter or publisher (or other relevant party) disagreeing with the

<sup>204</sup> MLC *Ex Parte* Letter #4 at 6–7.

<sup>205</sup> MLC *Ex Parte* Letter #2 at 6–7.

<sup>206</sup> See MLC Reply at 19; MLC *Ex Parte* Letter #1 at 3; MLC *Ex Parte* Letter #2 at 6–7 ("Server Fixation Date is currently a mandatory field that is reported on the License Request Form from HFA."); MLC *Ex Parte* Letter #4 at 6–7 ("[A]ll file storage systems log such dates.").

<sup>207</sup> DLC *Ex Parte* Letter #2 at 4; DLC *Ex Parte* Letter #3 at 5.

<sup>208</sup> See DLC *Ex Parte* Letter #2 at 4.

<sup>209</sup> See Barker Initial at 3–4 ("When [termination] occurs, the law allows the original copyright owner of the . . . terminated work to continue to collect royalties for certain uses licensed prior to the effective date of . . . termination of transfer, while the new copyright owner of the work may exclusively license all future uses, and collect royalties for those and certain earlier uses.').

<sup>210</sup> See *Woods*, 60 F.3d at 986–88. The Office does not foreclose the possibility of other interpretations, but also does not find it prudent to itself elaborate upon or offer an interpretation of the scope of the derivative works exception in this particular rulemaking proceeding, which is not primarily focused on termination issues and which has thus far engendered relatively little commentary on this discrete point.

<sup>211</sup> See 17 U.S.C. 115(d)(3)(K).

<sup>194</sup> See also 17 U.S.C. 115(d)(4)(E)(i)(III) (one of the conditions of default is where a DMP provides a report "that, on the whole, is . . . materially deficient as a result of inaccurate, missing, or unreadable data, where the correct data was available to the [DMP] and required to be reported").

<sup>195</sup> See RIAA Initial at 11; Recording Academy Initial at 3; see also MLC Reply at 34–35 (explaining the MLC's own confusion over the term).

<sup>196</sup> See RIAA Initial at 11; Recording Academy Initial at 3.

<sup>197</sup> See A2IM & RIAA Reply at 8–9. Because the main of those concerns centers around the potential for confusion in the MLC's public database, the Office has addressed this issue in more depth in connection with a separately-issued notification of inquiry. See U.S. Copyright Office, Notification of Inquiry, *Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information*, Dkt. No. 2020–8, published elsewhere in this issue of the **Federal Register**.

<sup>198</sup> See A2IM & RIAA Reply at 8–9 (explaining the details of these different fields and asserting that "each may assist the MLC in different ways with its task of associating sound recordings with musical works"); see also MLC *Ex Parte* Letter #4 at 10.

<sup>199</sup> MLC Reply at 19; see also MLC Initial at 20; MLC *Ex Parte* Letter #2 at 6–7; MLC *Ex Parte* Letter #4 at 6–7.

<sup>200</sup> See 17 U.S.C. 203, 304(c).

<sup>201</sup> *Id.* at 203(b)(1), 304(c)(6)(A).

<sup>202</sup> MLC Reply at 19 (quoting *Woods v. Bourne Co.*, 60 F.3d 978, 987 (2d Cir. 1995)); see also MLC *Ex Parte* Letter #2 at 6–7; MLC *Ex Parte* Letter #4 at 6–7.

<sup>203</sup> See MLC *Ex Parte* Letter #2 at 6–7; MLC *Ex Parte* Letter #4 at 6–7.



MLC's approach may also challenge such practice, but to the extent the MLC's approach is not invalidated, or superseded by precedent, it seems reasonable for the MLC to want to know the applicable license date.

It is not clear to the Office, however, whether the MLC has a need for the server fixation dates of musical works licensed by DMPs prior to the license availability date, even under its legal theory. With respect to most musical works first used before the license availability date, an NOI should have been served on the copyright owner or filed with the Copyright Office, or the work should have been otherwise licensed by a voluntary agreement. In cases where the license was obtained by service of an NOI upon the copyright owner, it would seem that the MLC could continue to use the relevant NOI date for termination purposes, as it asserts has been the customary practice.<sup>212</sup> Since the MLC represents that this practice was working fairly well prior to the MMA, the rule does not now propose regulatory language on this issue. And for those works used via voluntary license, presumably the parties have relevant records of this agreement, but in any event, addressing issues related to the administration of such voluntary agreements may be outside the ambit of the proposed rule. The Office welcomes comment on this understanding.

In other cases, the effective date of a DMP's blanket license (which for any currently-operating DMP should ostensibly be the license availability date) would seem to be the relevant license date, including for some musical works already being used by DMPs prior to obtaining a blanket license. For those works being used by a DMP under the authority of NOIs that had been filed with the Copyright Office, the statute provides that such "notices of intention filed before the enactment date will no longer be effective or provide license authority with respect to covered activities," and so the blanket license date may become a new, relevant license date.<sup>213</sup> Musical works may also have been previously used without a license, whether because the use qualified for a copyright exception, limitation, or safe harbor (such as

<sup>212</sup> See *id.* at 115(d)(9)(A) ("On the license availability date, a blanket license shall, without any interruption in license authority enjoyed by such digital music provider, be automatically substituted for and supersede any existing compulsory license previously obtained under this section by the digital music provider from a copyright owner to engage in 1 or more covered activities with respect to a musical work.")

<sup>213</sup> See *id.* at 115(d)(9)(D)(ii).

section 512 or the current transition period for good faith efforts made under section 115(d)(10)), or because the use may have been infringing, including in cases where the NOI was not valid or appropriately served. For uses of those works, the effective date of the DMP's blanket license may similarly be the relevant license date for termination purposes. A record of the DMP's repertoire as of that date could be relevant to demonstrate which works were being used at the time the blanket license attached. To accommodate those instances, the rule proposes that each DMP take a snapshot of its sound recording database or otherwise make an archive as it exists immediately prior to the effective date of its blanket license.<sup>214</sup>

Going forward, to accommodate those musical works that subsequently become licensed pursuant to a blanket license after the effective date of a given DMP's blanket license,<sup>215</sup> the rule proposes that each DMP operating under a blanket license keep and retain at least one of three dates for each sound recording embodying such a musical work. First, the rule proposes including the server fixation date sought by the MLC. Because it is not clear, however, that this date is the best or only potential proxy for the relevant license date, the rule also proposes two other date options as reasonable proxies for the relevant license date: The date of the grant first authorizing the DMP's use of the sound recording and the date on which the DMP first obtains the sound recording.<sup>216</sup> Permitting multiple reasonable options may also help alleviate any particular operational burdens that may exist with respect to a DMP being required to track the server date specifically. The Office seeks comment specifically on this aspect of the proposed rule.

The rule proposes that the required information described above need not be reported to the MLC in monthly

<sup>214</sup> Cf. Music Reports Initial at 3 (proposing that DMPs be required in their NOLs "to include lists of sound recordings they make available to the public").

<sup>215</sup> See 17 U.S.C. 115(d)(1)(B)(i) ("A blanket license . . . covers all musical works (or shares of such works) available for compulsory licensing under this section for purposes of engaging in covered activities, except as provided in subparagraph (C) [discussing voluntary licenses and individual download licenses]."). Cf. U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 2310.3(C)(3) (3d ed. 2017) ("[A] transfer that predates the existence of the copyrighted work cannot be effective (and therefore cannot be 'executed') until the work of authorship (and the copyright) come into existence.")

<sup>216</sup> Indeed, in many cases the Office assumes these three dates would likely be very close in time, and perhaps even be identical.

reports of usage. Rather, the Office proposes that such information be kept by the DMP in its records of use, which must be made available to the MLC. These particular records would be subject to the same five-year retention period proposed for other records, but since they may be pertinent to administering the blanket license decades later, the DMP would be required to provide the MLC with at least 90 days' notice and an opportunity to claim and retrieve the records before they can be destroyed or discarded.

It generally seems reasonable to expect that DMPs would track dates relevant to the licensing of sound recordings, and in the context of the blanket license, which was specifically adopted to increase transparency and better ensure that copyright owners receive their due royalties, it seems particularly reasonable to require DMPs to provide information that may bear on termination issues that are potentially clouded by the creation of the blanket license. The Office recognizes that this particular area is one of the more complicated ones in this proceeding, and additional comments are especially welcome on this topic.

*Content of annual reports of usage.* In general accord with the MLC's proposal, the Office proposes that annual reports contain cumulative information for the applicable fiscal year, broken down by month and by activity and offering, including the total royalty payable, the total sum paid, the total adjustments made, the total number of payable units, and to the extent applicable to calculating the royalties owed, total service provider revenue, total costs of content, total performance royalty deductions, and total subscribers.<sup>217</sup> Receiving these totals and having them broken down this way seems beneficial to the MLC in confirming proper royalties, while not unreasonably burdening DMPs, who would not have to re-provide all of the information contained in the monthly reports covered by the annual reporting period.

*Format and delivery.* The Office proposes, in accord with the MLC's proposal, that separate monthly reports of usage must be delivered for each month during which there is any activity relevant to the payment of mechanical royalties for covered activities, and that an annual report must be delivered for each year during which at least one monthly report was required to be delivered.<sup>218</sup>

The Office proposes that reports of usage must be delivered to the MLC in

<sup>217</sup> See MLC Reply App. C at 13–14.

<sup>218</sup> See *id.* at 16.

a machine-readable format that is compatible with the information technology systems of the MLC as reasonably determined by the MLC, which in turn must take into consideration relevant industry standards and the potential for different degrees of sophistication among DMPs. In accord with both the MLC and DLC proposals, the Office does not propose to provide more detailed requirements in the regulations, in order to leave flexibility as to the precise standards and formats.<sup>219</sup> For this reason, the Office is not inclined to require that reporting must specifically utilize DDEX, as proposed by some<sup>220</sup>—though the Office notes that the MLC plans to support DDEX for reports of usage.<sup>221</sup> The Office further proposes to specifically require the MLC to offer at least two options, where one is dedicated to smaller DMPs that may not be reasonably capable of complying with the requirements that the MLC may see fit to adopt for larger DMPs. This would help ensure that all those qualifying for the blanket license can make use of it as a practical matter.<sup>222</sup> The Office invites comment on this aspect of the proposed rule.

To maintain appropriate flexibility, the Office also proposes that royalty payments similarly must be delivered in such manner and form as the MLC may reasonably determine. The Office further proposes a mechanism by which the MLC may modify its formatting and delivery requirements after providing appropriate notice to DMPs. The rule proposes an extended notice period for certain significant changes because of the level of effort that could potentially be involved for a DMP to comply.<sup>223</sup>

The Office also proposes a mechanism by which a DMP may be excused from default under the blanket license and any incurred late fees because of an untimely delivered report or payment where the reason for the untimeliness is either the MLC's fault or results from an issue with the MLC's applicable IT systems. This seems like a reasonable and equitable accommodation where

<sup>219</sup> See MLC Initial at 20; MLC Reply at 21, App. C at 16; DLC Initial at 15; DLC Reply at 21, Add. A-8; see also SoundExchange Initial at 16.

<sup>220</sup> See A2IM & RIAA Reply at 11; Jessop Reply at 2.

<sup>221</sup> MLC Reply at 21–22, 35.

<sup>222</sup> See *id.* at 21–22 (“While the MLC supports the use of [the DDEX] format . . . it is mindful of the varying data formats used by DMPs with varying resources.”); DLC Reply at 21 (stating that the regulations must “ensure that the full range of licensees will be able to report their usage to the MLC without substantial upfront burdens”).

<sup>223</sup> The Office's proposed rule is somewhat similar to the MLC's proposal for changing data formats or standards in the context of the musical works database. See MLC Reply App. F at 22.

DMPs are statutorily required to rely on the MLC and its systems to satisfy certain obligations.

*Certifications.* The Office proposes applying the current certification requirements in 37 CFR 210.16(f) and 210.17(f) for monthly and annual statements of account under the non-blanket section 115 license to monthly and annual reports of usage under the blanket license.<sup>224</sup> The current certification requirements were adopted in 2014 after careful consideration by the Office,<sup>225</sup> and the Office is disinclined to relitigate the details of these provisions unless presented with a strong showing that they are unworkable either because of something specifically to do with the changes made by the MMA or some other significant industry change that occurred after they were adopted.

*Content of reports of adjustment.* In general accord with both the MLC and DLC proposals, the Office proposes that reports of adjustment contain the following information: (1) An identification of the previously delivered monthly or annual report(s) being adjusted; (2) the specific change(s) to such report(s), including the monetary amount of the adjustment and a detailed description of any changes to any of the inputs upon which computation of the payable royalties depends, along with appropriate step-by-step calculations; (3) the particular sound recordings and uses to which the adjustment applies; and (4) a description of the reason(s) for the adjustment.<sup>226</sup> The proposed rule is also in general accord with the MLC and DLC proposals with respect to the mechanisms to account for overpayment and underpayment of royalties: an underpayment will need to accompany delivery of the report of adjustment, while an overpayment will be credited to the DMP's account by the MLC.<sup>227</sup> These requirements strike the Office as reasonable, and the proposed content should provide the MLC with sufficient information to confirm the adjustment and properly account for it to copyright owners.

*Voluntary agreements to alter process.* The Office tentatively agrees with both

<sup>224</sup> See MLC Reply App. C at 15 (proposing retention of current monthly certification); DLC Reply Add. at A-8 (proposing a monthly certification that is substantially similar to one of the current monthly certification options); Music Reports Initial at 13, 16–17 (proposing retention of one of the current monthly certification options and one of the current annual certification options).

<sup>225</sup> See 79 FR 56190.

<sup>226</sup> See DLC Reply Add. at A-10; MLC Reply App. C at 14.

<sup>227</sup> See DLC Reply Add. at A-10; MLC Reply App. C at 14.

the MLC and DLC that it would be beneficial to permit individual DMPs and the MLC to agree to vary or supplement the particular reporting procedures adopted by the Office—such as the specific mechanics relating to adjustments or invoices and response files.<sup>228</sup> This would permit a degree of flexibility to help address the specific needs of a particular DMP. The Office proposes two caveats to this proposal to safeguard copyright owner interests because they would not be party to any such agreements. First, any voluntarily agreed-to changes could not materially prejudice copyright owners owed royalties under the blanket license. Second, the procedures surrounding the certification requirements would not be alterable because they serve as an important check on the DMPs that is ultimately to the benefit of copyright owners.

*Documentation and records of use.* The rule proposes, in accord with the MLC's proposal, to generally carry forward the current rule under the non-blanket section 115 license, whereby DMPs would be required to keep and retain all records and documents necessary and appropriate to support fully all of the information set forth in their reports of usage for a period of at least five years from the date of delivery of the particular report.<sup>229</sup> The Office is not inclined to shorten the retention period to three years as the DLC proposes<sup>230</sup> given that the Office in 2014 found it appropriate to extend the period from three years to five years.<sup>231</sup> If anything, the Office may consider extending the retention period to seven years to align with the statutory recordkeeping requirements the MMA places on the MLC.<sup>232</sup> The Office is also not inclined to adopt the DLC's proposal that recordkeeping requirements be subject to each DMP's “generally applicable privacy and data retention policies,” and be limited merely to the “data included in” the report of usage.<sup>233</sup> That proposal is a step in the wrong direction with respect to transparency.<sup>234</sup> In accordance with the MMA's requirement that records of use be “made available to the [MLC] by [DMPs],” the rule proposes that the

<sup>228</sup> See DLC Reply Add. at A-11; MLC Reply App. C at 17.

<sup>229</sup> See MLC Reply App. C at 16; 37 CFR 210.18.

<sup>230</sup> See DLC Reply at 23, Add. A-11.

<sup>231</sup> See 79 FR at 56205; see also MLC *Ex Parte* Letter #2 at 5 (“[T]he three-year audit period look back does not mean that documents dated more than three years earlier are not relevant to audits.”).

<sup>232</sup> See 17 U.S.C. 115(d)(3)(M)(i).

<sup>233</sup> See DLC Reply Add. at A-11.

<sup>234</sup> See MLC Reply at 25–26 (“Each DMP should not be permitted to self-determine its recordkeeping requirements.”).

MLC be entitled to reasonable access to these records and documents upon reasonable request, subject to any applicable confidentiality rules the Office may adopt (and the Office has concurrently published a notice of proposed rulemaking regarding confidentiality issues).<sup>235</sup>

As noted above, the Office is proposing to clarify its recordkeeping rules by enumerating several nonexclusive examples of the types of records DMPs are obligated to retain and make available to the MLC. The Office continues to generally agree with the “minimalist approach” it took in 2014 with respect to importing details from the CRJs’ rates and terms regulations in 37 CFR part 385, and therefore the Office is not inclined to include the level of detail contained in the MLC’s comments.<sup>236</sup> Rather, the Office proposes to more broadly articulate requirements encompassing what the MLC seeks. For example: Records accounting for non-play and other non-royalty-bearing DPDs, records of promotional and free trial uses required to be maintained under part 385, records describing each of the DMP’s activities or offerings in sufficient detail to reasonably demonstrate which activities or offerings they are under part 385 and which rates and terms apply to them, records with sufficient information to reasonably demonstrate whether service revenue and total cost of content are properly calculated in accordance with part 385, records with sufficient information to reasonably demonstrate whether and how any royalty floor under part 385 does or does not apply, and records with such other information as is necessary to reasonably support and confirm all usage and calculations contained in each report of usage, including relevant information about subscriptions, bundles, devices, discount plans, and subscribers.

Each DMP operating under the blanket license will need to know this information (to the extent applicable to its services), and so the Office expects it should not be burdensome to retain and make available corresponding records.<sup>237</sup> While described in more generalized terms than proposed by the MLC, the Office recognizes that the above list is still fairly tailored to the

CRJs’ *Phonorecords III* determination; the Office will be prepared to revise these examples as necessary to align with such royalty rates and terms as the CRJs may subsequently adopt.

#### *D. Reports of Usage—Significant Nonblanket Licensees*

As discussed in the notification of inquiry, SNBLs are also required to deliver reports of usage to the MLC.<sup>238</sup> Although the Office asked “how such reports may differ from the reports filed by digital music providers under the blanket license,” the comments received in response were fairly sparse.<sup>239</sup> The MLC argues that reports of usage for SNBLs should be essentially the same as those of DMPs operating under the blanket license.<sup>240</sup> While the MLC concedes various differences between blanket licensees and SNBLs, it asserts that it needs the same information because the MLC must (1) administer the process by which unclaimed royalties are to be distributed to copyright owners identified in the records of the MLC based on market share of usage under both statutory and voluntary licenses, and (2) administer collections of the administrative assessment paid by both blanket licensees and SNBLs to fund the MLC.<sup>241</sup> The DLC argues that SNBL reports should be different and need not contain as much information because “they do not need to provide information related to calculation or payment of royalties.”<sup>242</sup> The DLC’s proposal for SNBLs omits items contained in its proposal for blanket licensees, such as royalty calculation data, estimates, adjustments, processing, and records of use.<sup>243</sup> The DLC does not directly respond to the MLC’s assertions. Music Reports proposes that blanket licensee and SNBL reports be substantially the same, except that SNBL reports need not contain any royalty calculation information.<sup>244</sup>

The statutory requirements for blanket licensees and SNBLs differ in a number of material ways. Most notably, SNBLs do not operate under the blanket license and do not pay statutory royalties to the MLC. Moreover, royalties paid under voluntary licenses are generally calculated pursuant to those private agreements, rather than being tied to particular rates and terms established by

the CRJs in 37 CFR part 385. While blanket licensees must deliver reports of usage under section 115(d)(4)(A), SNBLs are “not obligated to provide reports of usage reflecting covered activities under subsection (d)(4)(A),” but rather report under section 115(d)(6)(A)(ii).<sup>245</sup> While that provision states that SNBL reports of usage are to “contain[] the information described in paragraph (4)(A)(ii),” the other requirements of section 115(d)(4), such as with respect to reporting in accordance with section 115(c)(2)(I), formatting, adjustments, and records of use, do not expressly apply.<sup>246</sup> By not being required to report in accordance with section 115(c)(2)(I), SNBLs are not required to deliver CPA-certified annual reports.<sup>247</sup> SNBLs are also not subject to data collection efforts under section 115(d)(4)(B) or audits under section 115(d)(4)(D).

With these observations in mind, it seems reasonable to fashion the proposed rule for SNBL reports of usage as an abbreviated version of the reporting provided by blanket licensees. The proposed rule for SNBLs generally tracks the proposed rule for blanket licensees, but makes several changes, somewhat along the lines of the DLC’s proposal. For example, provisions about estimates, processing, and records of use are omitted. The proposed rule also omits an annual reporting requirement. In contrast to the DLC’s proposal, the Office does, however, propose to require SNBLs to report their payable royalties for covered activities under relevant voluntary licenses and individual download licenses, but without reporting any underlying calculations. The proposed rule also contains an adjustments provision so that SNBLs have a mechanism to update anything if needed, such as if a play count error is discovered later on.

In light of the particularly thin record on SNBLs, the Office encourages further comment on these issues to better inform the rulemaking process. For example, do other commenters agree with the MLC that the main purposes of SNBL reporting are to assist the MLC in distributing unclaimed royalties and collecting the administrative assessment? If commenters believe that SNBL reporting should serve other purposes (for example, assisting the MLC’s overall matching efforts), they should identify those additional aims, along with any adjustments to the information the rule proposes to be reported. Noting that the MLC must

<sup>235</sup> See 17 U.S.C. 115(d)(4)(A)(iii), (iv)(I); U.S. Copyright Office, Notice of Proposed Rulemaking, *Treatment of Confidential Information by the Mechanical Licensing Collective and Digital Licensee Coordinator*, Dkt. No. 2020–7, published elsewhere in this issue of the **Federal Register**.

<sup>236</sup> See 79 FR at 56193.

<sup>237</sup> See DLC *Ex Parte* Letter #3 at 3 (noting the DLC’s openness to this proposal).

<sup>238</sup> 84 FR at 49971.

<sup>239</sup> See *id.*

<sup>240</sup> MLC Initial at 20–21; see MLC Reply App. C.

<sup>241</sup> See MLC Initial at 10–11, 20–21; MLC Reply at 21.

<sup>242</sup> DLC Initial at 16; see also DLC Reply at 23.

<sup>243</sup> Compare DLC Reply Add. at A–6–11 with *id.* at A–12–14.

<sup>244</sup> Music Reports Initial at 4.

<sup>245</sup> See 17 U.S.C. 115(e)(31).

<sup>246</sup> See *id.* at 115(d)(6)(A)(ii) (only).

<sup>247</sup> See *id.* at 115(c)(2)(I) (only requiring such reporting for “compulsory license[s]”).

distribute unclaimed accrued royalties “to copyright owners identified in the records of the collective,” the Office also seeks comment regarding whether and to what extent the MLC anticipates incorporating SNBL-supplied information into its public database.<sup>248</sup>

Further, the Office solicits comment regarding whether the proposed rule appropriately prescribes reporting of information relevant to the MLC’s tasks in distributing unclaimed royalties and collecting the administrative assessment. The Office specifically seeks comment as to what extent the information sought by the MLC is relevant to the administrative assessment, noting that the method for allocating the assessment among blanket licensees and SNBLs adopted by the CRJs is based solely on “the number of unique and royalty-bearing sound recordings used per month . . . in Section 115 covered activities.”<sup>249</sup> Similarly, the Office welcomes comment regarding whether the proposed rule provides adequate (or excessive) information to the MLC for purposes of the MLC calculating market share for distributing unclaimed royalties.<sup>250</sup> As noted above, the Office will separately consider any regulatory activity related to the distribution of such royalties in connection with its ongoing related policy study.

### III. Subjects of Inquiry

The proposed rule is designed to reasonably implement a number of regulatory duties assigned to the Copyright Office under the MMA and facilitate the MLC’s administration of the blanket licensing system. The Office solicits additional public comment on all aspects of the proposed rule.

#### List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

#### Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes amending 37 CFR part 210 as follows:

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

■ 1. The authority citation for part 210 continues to read as follows:

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

##### Subpart A [Removed]

■ 2. Remove subpart A.

##### Subpart B [Redesignated as Subpart A] and §§ 210.11 Through 210.21 [Redesignated as §§ 210.1 Through 210.11]

■ 3. Redesignate subpart B as subpart A and, in newly redesignated subpart A, §§ 210.11 through 210.21 are redesignated as §§ 210.1 through 210.11.

##### Subpart A [Amended]

■ 4. In newly redesignated subpart A:

■ a. Remove “§ 210.12” and add in its place “§ 210.2”;

■ b. Remove “§ 210.15” and add in its place “§ 210.5”;

■ c. Remove “§ 210.16” and add in its place “§ 210.6”;

■ d. Remove “§ 210.17” and add in its place “§ 210.7”;

■ e. Remove “§ 210.21” and add in its place “§ 210.11”.

■ 5. Amend newly redesignated § 210.1 by adding a sentence after the first sentence to read as follows:

##### § 210.1 General.

\* \* \* Rules governing notices of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works are located in § 201.18. \* \* \*

##### §§ 210.12 through 210.20 [Added and Reserved]

■ 6. Add reserve §§ 210.12 through 210.20.

■ 7. Add a new subpart B to read as follows:

##### Subpart B—Blanket Compulsory License for Digital Uses, Mechanical Licensing Collective, and Digital Licensee Coordinator

Sec.

210.21 General.

210.22 Definitions.

210.23 Designation of the mechanical licensing collective and digital licensee coordinator.

210.24 Notices of blanket license.

210.25 Notices of nonblanket activity.

210.26 Data collection and delivery efforts by digital music providers and musical work copyright owners.

210.27 Reports of usage and payment for blanket licensees.

210.28 Reports of usage for significant nonblanket licensees.

##### § 210.21 General.

This subpart prescribes rules for the compulsory blanket license to make and distribute digital phonorecord deliveries of nondramatic musical works pursuant to 17 U.S.C. 115(d), including rules for digital music providers, significant nonblanket licensees, the mechanical licensing collective, and the digital licensee coordinator.

##### § 210.22 Definitions.

For purposes of this subpart:

(a) Unless otherwise specified, the terms used have the meanings set forth in 17 U.S.C. 115(e).

(b) A *blanket licensee* is a digital music provider operating under a blanket license.

(c) The term *DDEX* means Digital Data Exchange, LLC.

(d) The term *GAAP* means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as “GAAP” for purposes of this section.

(e) The term *IPI* means interested parties information code.

(f) The term *ISNI* means international standard name identifier.

(g) The term *ISRC* means international standard recording code.

(h) The term *ISWC* means international standard musical work code.

(i) The term *producer* means the primary person(s) contracted by and accountable to the content owner for the task of delivering the sound recording as a finished product.

(j) The term *UPC* means universal product code.

##### § 210.23 Designation of the mechanical licensing collective and digital licensee coordinator.

The following entities are designated pursuant to 17 U.S.C. 115(d)(3)(B) and (d)(5)(B). Additional information regarding these entities is available on the Copyright Office’s website.

(a) Mechanical Licensing Collective, Inc., incorporated in Delaware on March

<sup>248</sup> *Id.* at 115(d)(3)(f).

<sup>249</sup> See 37 CFR 390.1 (defining “Unique Sound Recordings Count”) (emphasis added).

<sup>250</sup> For example, the MLC’s proposed language seeks information specific to the part 385 calculations. Does the MLC seek to take SNBL usage data and apply the part 385 royalty rate calculations used for blanket licensees as part of determining a transparent and equitable manner of distribution?

5, 2019, is designated as the mechanical licensing collective; and

(b) Digital Licensee Coordinator, Inc., incorporated in Delaware on March 20, 2019, is designated as the digital licensee coordinator.

**§ 210.24 Notices of blanket license.**

(a) *General.* This section prescribes rules under which a digital music provider completes and submits a notice of license to the mechanical licensing collective pursuant to 17 U.S.C. 115(d)(2)(A) for purposes of obtaining a statutory blanket license.

(b) *Form and content.* A notice of license shall be prepared in accordance with any reasonable formatting instructions established by the mechanical licensing collective, and shall include all of the following information:

(1) The full legal name of the digital music provider and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the digital music provider is engaging, or seeks to engage, in any covered activity.

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

(3) A telephone number and email address for the digital music provider where an individual responsible for managing the blanket license can be reached.

(4) Any website(s), software application(s), or other online locations(s) where the digital music provider's applicable service(s) is/are, or expected to be, made available.

(5) A description sufficient to reasonably establish the digital music provider's eligibility for a blanket license and to provide reasonable notice to the mechanical licensing collective, copyright owners, and songwriters of the manner in which the digital music provider is engaging, or seeks to engage, in any covered activity pursuant to the blanket license. Such description shall be sufficient if it includes at least the following information:

(i) A statement that the digital music provider has a good-faith belief, informed by review of relevant law and regulations, that it:

(A) Satisfies all requirements to be eligible for a blanket license, including that it satisfies the eligibility criteria to be considered a digital music provider pursuant to 17 U.S.C. 115(e)(8); and

(B) Is, or will be before the date of initial use of musical works pursuant to the blanket license, able to comply with all payments, terms, and responsibilities associated with the blanket license.

(ii) A statement that where the digital music provider seeks or expects to engage in any activity identified in its notice of license, it has a good-faith intention to do so within a reasonable period of time.

(iii) A general description of the digital music provider's service(s), or expected service(s), and the manner in which it uses, or seeks to use, phonorecords of nondramatic musical works.

(iv) Identification of each of the following digital phonorecord delivery configurations the digital music provider is, or seeks to be, making as part of its covered activities:

- (A) Permanent downloads.
- (B) Limited downloads.
- (C) Interactive streams.
- (D) Noninteractive streams.
- (E) Other configurations,

accompanied by a brief description.

(v) Identification of each of the following service types the digital music provider offers, or seeks to offer, as part of its covered activities (the digital music provider may, but is not required to, associate specific service types with specific digital phonorecord delivery configurations or with particular types of activities or offerings that may be defined in part 385 of this title):

- (A) Subscriptions.
- (B) Bundles.
- (C) Lockers.
- (D) Discounted, but not free-to-the-user, services.
- (E) Free-to-the-user services.
- (F) Other applicable services,

accompanied by a brief description.

(vi) Any other information the digital music provider wishes to provide.

(6) The date, or expected date, of initial use of musical works pursuant to the blanket license.

(7) Identification of any amendment made pursuant to paragraph (f) of this section, including the submission date of the notice being amended.

(8) A description of any applicable voluntary license or individual download license the digital music provider is, or expects to be, operating under concurrently with the blanket license that is sufficient for the mechanical licensing collective to fulfill its obligations under 17 U.S.C. 115(d)(3)(G)(i)(I)(bb). This description should be provided as an addendum to the rest of the notice of license to help preserve any confidentiality it may be entitled to under regulations adopted by the Copyright Office. Such description

shall be sufficient if it includes at least the following information:

(i) An identification of each of the digital music provider's services, including by reference to any applicable types of activities or offerings that may be defined in part 385 of this title, through which musical works are, or are expected to be, used pursuant to any such voluntary license or individual download license. If such a license pertains to all of the digital music provider's applicable services, it may state so without identifying each service.

(ii) The start and end dates.

(iii) The musical work copyright owner, identified by name and any known and appropriate unique identifiers, and appropriate contact information for the musical work copyright owner or for an administrator or other representative who has entered into an applicable license on behalf of the relevant copyright owner.

(iv) A satisfactory identification of any applicable catalog exclusions.

(v) At the digital music provider's option, and in lieu of providing the information listed in paragraph (b)(8)(iv) of this section, a list of all covered musical works, identified by appropriate unique identifiers.

(c) *Certification and signature.* The notice of license shall be signed by an appropriate duly authorized officer or representative of the digital music provider. The signature shall be accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that he or she has appropriate authority to submit the notice of license to the mechanical licensing collective on behalf of the digital music provider and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith.

(d) *Submission, fees, and acceptance.* Except as provided by 17 U.S.C.

115(d)(9)(A), to obtain a blanket license, a digital music provider must submit a notice of license to the mechanical licensing collective. Notices of license shall be submitted to the mechanical licensing collective in a manner reasonably determined by the collective. No fee may be charged for submitting notices of license. Upon submitting a notice of license to the mechanical licensing collective, a digital music provider shall be provided with a prompt response from the collective confirming receipt of the notice and the date of receipt. The mechanical

licensing collective shall send any rejection of a notice of license to both the street address and email address provided in the notice.

(e) *Harmless errors.* Errors in the submission or content of a notice of license that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the notice invalid or provide a basis for the mechanical licensing collective to reject a notice or terminate a blanket license. This paragraph (e) shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(f) *Amendments.* A digital music provider may submit an amended notice of license to cure any deficiency in a rejected notice pursuant to 17 U.S.C. 115(d)(2)(A). A digital music provider operating under a blanket license must submit a new notice of license within 45 calendar days after any of the information required by paragraphs (b)(1) through (6) of this section contained in the notice on file with the mechanical licensing collective has changed. An amended notice shall indicate that it is an amendment and shall contain the submission date of the notice being amended. The mechanical licensing collective shall retain copies of all prior notices of license submitted by a digital music provider. Where the information required by paragraph (b)(8) of this section has changed, instead of submitting an amended notice of license, the digital music provider must promptly deliver updated information to the mechanical licensing collective in an alternative manner reasonably determined by the collective. To the extent commercially reasonable, the digital music provider must deliver such updated information at least 30 calendar days before delivering a report of usage covering a period where such license is in effect.

(g) *Transition to blanket licenses.* Where a digital music provider obtains a blanket license automatically pursuant to 17 U.S.C. 115(d)(9)(A) and seeks to continue operating under the blanket license, a notice of license must be submitted to the mechanical licensing collective within 45 calendar days after the license availability date. In such cases, the blanket license shall continue to be effective as of the license availability date, rather than the date on which the notice is submitted to the collective.

(h) *Additional information.* Nothing in this section shall be construed to prohibit the mechanical licensing collective from seeking additional

information from a digital music provider that is not required by this section, which the digital music provider may voluntarily elect to provide, provided that the collective may not represent that such information is required to comply with the terms of this section.

(i) *Public access.* The mechanical licensing collective shall maintain a current, free, and publicly accessible and searchable online list of all blanket licenses that, subject to any applicable confidentiality rules established by the Copyright Office, includes:

(1) All information contained in each notice of license, including amended and rejected notices;

(2) Contact information for all blanket licensees;

(3) The effective dates of all blanket licenses;

(4) For any amended or rejected notice, a clear indication of its amended or rejected status and its relationship to other relevant notices;

(5) For any rejected notice, the collective's reason(s) for rejecting it; and

(6) For any terminated blanket license, a clear indication of its terminated status, the date of termination, and the collective's reason(s) for terminating it.

#### § 210.25 Notices of nonblanket activity.

(a) *General.* This section prescribes rules under which a significant nonblanket licensee completes and submits a notice of nonblanket activity to the mechanical licensing collective pursuant to 17 U.S.C. 115(d)(6)(A) for purposes of notifying the mechanical licensing collective that the licensee has been engaging in covered activities.

(b) *Form and content.* A notice of nonblanket activity shall be prepared in accordance with any reasonable formatting instructions established by the mechanical licensing collective, and shall include all of the following information:

(1) The full legal name of the significant nonblanket licensee and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the significant nonblanket licensee is engaging, or expects to engage, in any covered activity.

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

(3) A telephone number and email address for the significant nonblanket licensee where an individual responsible for managing licenses associated with covered activities can be reached.

(4) Any website(s), software application(s), or other online locations(s) where the significant nonblanket licensee's applicable service(s) is/are, or expected to be, made available.

(5) A description sufficient to reasonably establish the licensee's qualifications as a significant nonblanket licensee and to provide reasonable notice to the mechanical licensing collective, digital licensee coordinator, copyright owners, and songwriters of the manner in which the significant nonblanket licensee is engaging, or expects to engage, in any covered activity. Such description shall be sufficient if it includes at least the following information:

(i) A statement that the significant nonblanket licensee has a good-faith belief, informed by review of relevant law and regulations, that it satisfies all requirements to qualify as a significant nonblanket licensee under 17 U.S.C. 115(e)(31).

(ii) A statement that where the significant nonblanket licensee expects to engage in any activity identified in its notice of nonblanket activity, it has a good-faith intention to do so within a reasonable period of time.

(iii) A general description of the significant nonblanket licensee's service(s), or expected service(s), and the manner in which it uses, or expects to use, phonorecords of nondramatic musical works.

(iv) Identification of each of the following digital phonorecord delivery configurations the significant nonblanket licensee is, or expects to be, making as part of its covered activities:

- (A) Permanent downloads.
- (B) Limited downloads.
- (C) Interactive streams.
- (D) Noninteractive streams.

(E) Other configurations, accompanied by a brief description.

(v) Identification of each of the following service types the significant nonblanket licensee offers, or expects to offer, as part of its covered activities (the significant nonblanket licensee may, but is not required to, associate specific service types with specific digital phonorecord delivery configurations or with particular types of activities or offerings that may be defined in part 385 of this title):

- (A) Subscriptions.
- (B) Bundles.
- (C) Lockers.

(D) Discounted, but not free-to-the-user, services.

(E) Free-to-the-user services.

(F) Other applicable services, accompanied by a brief description.

(vi) Any other information the significant nonblanket licensee wishes to provide.

(6) Acknowledgement of whether the significant nonblanket licensee is operating under one or more individual download licenses.

(7) The date of initial use of musical works pursuant to any covered activity.

(8) Identification of any amendment made pursuant to paragraph (f) of this section, including the submission date of the notice being amended.

(c) *Certification and signature.* The notice of nonblanket activity shall be signed by an appropriate duly authorized officer or representative of the significant nonblanket licensee. The signature shall be accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that he or she has appropriate authority to submit the notice of nonblanket activity to the mechanical licensing collective on behalf of the significant nonblanket licensee and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith.

(d) *Submission, fees, and acceptance.* Notices of nonblanket activity shall be submitted to the mechanical licensing collective in a manner reasonably determined by the collective. No fee may be charged for submitting notices of nonblanket activity. Upon submitting a notice of nonblanket activity to the mechanical licensing collective, a significant nonblanket licensee shall be provided with a prompt response from the collective confirming receipt of the notice and the date of receipt.

(e) *Harmless errors.* Errors in the submission or content of a notice of nonblanket activity that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the notice invalid or provide a basis for the mechanical licensing collective or digital licensee coordinator to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C). This paragraph (e) shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(f) *Amendments.* A significant nonblanket licensee must submit a new

notice of nonblanket activity with its report of usage that is next due after any of the information required by paragraphs (b)(1) through (7) of this section contained in the notice on file with the mechanical licensing collective has changed. An amended notice shall indicate that it is an amendment and shall contain the submission date of the notice being amended. The mechanical licensing collective shall retain copies of all prior notices of nonblanket activity submitted by a significant nonblanket licensee.

(g) *Transition to blanket licenses.* Where a digital music provider that would otherwise qualify as a significant nonblanket licensee obtains a blanket license automatically pursuant to 17 U.S.C. 115(d)(9)(A) and does not seek to operate under the blanket license, if such licensee submits a valid notice of nonblanket activity within 45 calendar days after the license availability date in accordance with 17 U.S.C.

115(d)(6)(A)(i), such licensee shall not be considered to have ever operated under the statutory blanket license until such time as the licensee submits a valid notice of license pursuant to 17 U.S.C. 115(d)(2)(A).

(h) *Additional information.* Nothing in this section shall be construed to prohibit the mechanical licensing collective from seeking additional information from a significant nonblanket licensee that is not required by this section, which the significant nonblanket licensee may voluntarily elect to provide, provided that the collective may not represent that such information is required to comply with the terms of this section.

(i) *Public access.* The mechanical licensing collective shall maintain a current, free, and publicly accessible and searchable online list of all significant nonblanket licensees that, subject to any applicable confidentiality rules established by the Copyright Office, includes:

(1) All information contained in each notice of nonblanket activity, including amended notices;

(2) Contact information for all significant nonblanket licensees;

(3) The date of receipt of each notice of nonblanket activity; and

(4) For any amended notice, a clear indication of its amended status and its relationship to other relevant notices.

**§ 210.26 Data collection and delivery efforts by digital music providers and musical work copyright owners.**

(a) *General.* This section prescribes rules under which digital music providers and musical work copyright owners shall engage in efforts to collect

and provide information to the mechanical licensing collective that may assist the collective in matching musical works to sound recordings embodying those works and identifying and locating the copyright owners of those works.

(b) *Digital music providers.* (1) Pursuant to 17 U.S.C. 115(d)(4)(B), in addition to obtaining sound recording names and featured artists and providing them in reports of usage, a digital music provider operating under a blanket license shall engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service(s) of such digital music provider the following information for each such sound recording embodying a musical work:

(i) The sound recording copyright owner(s), producer(s), ISRC(s), and any other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody as may be required by the Copyright Office to be included in reports of usage provided to the mechanical licensing collective by digital music providers.

(ii) With respect to the musical work embodied in such sound recording, the songwriter(s), publisher name(s), ownership share(s), ISWC(s), and any other musical work authorship or ownership information as may be required by the Copyright Office to be included in reports of usage provided to the mechanical licensing collective by digital music providers.

(2) As used in paragraph (b)(1) of this section, "good-faith, commercially reasonable efforts to obtain" shall include performing all of the following acts, subject to paragraph (b)(3) of this section:

(i) Where the digital music provider has not obtained from applicable sound recording copyright owners or other licensors of sound recordings (or their representatives) all of the information listed in paragraph (b)(1) of this section, or where any such information was obtained before [effective date of final rule] and is no longer in such form that the digital music provider can use it to comply with paragraph (b)(2)(iii) of this section, the digital music provider shall have an ongoing and continuous obligation to, at least on a quarterly basis, request in writing such information from applicable sound recording copyright owners and other licensors of sound recordings. Such requests may be directed to a representative of any such owner or licensor.



(ii) With respect to any of the information listed in paragraph (b)(1) of this section that the digital music provider has obtained from applicable sound recording copyright owners or other licensors of sound recordings (or their representatives), the digital music provider shall have an ongoing and continuous obligation to, on a periodic basis or as otherwise requested by the mechanical licensing collective, request in writing from such owners or licensors any updates to any such information. Such requests may be directed to a representative of any such owner or licensor.

(iii) Any information listed in paragraph (b)(1) of this section, including any updates to such information, provided to the digital music provider by sound recording copyright owners or other licensors of sound recordings (or their representatives) shall be delivered to the mechanical licensing collective in reports of usage in accordance with § 210.27(e).

(3) Notwithstanding paragraph (b)(2) of this section, a digital music provider may satisfy its obligations under 17 U.S.C. 115(d)(4)(B) with respect to a particular sound recording by arranging, or collectively arranging with others, for the mechanical licensing collective to receive the information listed in paragraph (b)(1) of this section from an authoritative source, such as the collective designated by the Copyright Royalty Judges to collect and distribute royalties under the statutory licenses established in 17 U.S.C. 112 and 114, provided that such digital music provider does not know such source to lack such information for the relevant sound recording. Satisfying the requirements of 17 U.S.C. 115(d)(4)(B) in this manner does not excuse a digital music provider from having to report sound recording and musical work information in accordance with § 210.27(e).

(4) The requirements of paragraph (b) of this section are without prejudice to what a court of competent jurisdiction may determine constitutes good-faith, commercially reasonable efforts for purposes of eligibility for the limitation on liability described in 17 U.S.C. 115(d)(10).

(c) *Musical work copyright owners.* (1) Pursuant to 17 U.S.C. 115(d)(3)(E)(iv), each musical work copyright owner with any musical work listed in the musical works database shall engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, to the extent such information is not then available in

the database, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent practicable.

(2) As used in paragraph (c)(1) of this section, "information regarding the names of the sound recordings" shall include, for each applicable sound recording:

(i) Sound recording name(s), including any alternative or parenthetical titles for the sound recording;

(ii) Featured artist(s); and

(iii) ISRC(s).

(3) As used in paragraph (c)(1) of this section, "commercially reasonable efforts to deliver" shall include:

(i) Periodically monitoring the musical works database for missing and inaccurate sound recording information relating to applicable musical works; and

(ii) After finding any of the information listed in paragraph (c)(2) of this section to be missing or inaccurate as to any applicable musical work, promptly delivering complete and correct sound recording information to the mechanical licensing collective, by any means reasonably available to the copyright owner, if the information is known to or otherwise within the possession, custody, or control of the copyright owner.

#### **§ 210.27 Reports of usage and payment for blanket licensees.**

(a) *General.* This section prescribes rules for the preparation and delivery of reports of usage and payment of royalties for the making and distribution of phonorecords of nondramatic musical works to the mechanical licensing collective by a digital music provider operating under a blanket license pursuant to 17 U.S.C. 115(d). A blanket licensee shall report and pay royalties to the mechanical licensing collective on a monthly basis in accordance with 17 U.S.C. 115(c)(2)(I), 17 U.S.C. 115(d)(4)(A), and this section. A blanket licensee shall also report to the mechanical licensing collective on an annual basis in accordance with 17 U.S.C. 115(c)(2)(I) and this section. A blanket licensee may make adjustments to its reports of usage and royalty payments in accordance with this section.

(b) *Definitions.* For purposes of this section, in addition to those terms defined in § 210.22:

(1) The term *report of usage*, unless otherwise specified, refers to all reports of usage required to be delivered by a blanket licensee to the mechanical licensing collective under the blanket

license, including reports of adjustment. As used in this section, it does not refer to reports required to be delivered by significant nonblanket licensees under 17 U.S.C. 115(d)(6)(A)(ii) and § 210.28.

(2) A *monthly report of usage* is a report of usage accompanying monthly royalty payments identified in 17 U.S.C. 115(c)(2)(I) and 17 U.S.C. 115(d)(4)(A), and required to be delivered by a blanket licensee to the mechanical licensing collective under the blanket license.

(3) An *annual report of usage* is a statement of account identified in 17 U.S.C. 115(c)(2)(I), and required to be delivered by a blanket licensee annually to the mechanical licensing collective under the blanket license.

(4) A *report of adjustment* is a report delivered by a blanket licensee to the mechanical licensing collective under the blanket license adjusting one or more previously delivered monthly reports of usage or annual reports of usage, including related royalty payments.

(c) *Content of monthly reports of usage.* A monthly report of usage shall be clearly and prominently identified as a "Monthly Report of Usage Under Compulsory Blanket 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 report of usage.

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

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

(4) For each sound recording embodying a musical work that is used by the blanket licensee in covered activities during the applicable monthly reporting period, a detailed statement, from which the mechanical licensing collective may separate reported information for each applicable activity or offering including as may be defined in part 385 of this title, of all of:

(i) The royalty payment and accounting information required by paragraph (d) of this section; and

(ii) The sound recording and musical work information required by paragraph (e) of this section.

(5) For any voluntary license or individual download license in effect during the applicable monthly reporting period, the information required under § 210.24(b)(8). If this information has been separately provided to the mechanical licensing collective, it need not be contained in the monthly report of usage, provided the report states that the information has been provided separately and includes the date on which such information was last provided to the mechanical licensing collective.

(6) Where the blanket licensee is not entitled to an invoice under paragraph (g)(1) of this section:

(i) The total royalty payable by the blanket licensee under the blanket license for the applicable monthly reporting period, computed in accordance with the requirements of this section and part 385 of this title, and including detailed information regarding how the royalty was computed, with such total royalty payable broken down by each applicable activity or offering including as may be defined in part 385 of this title; and

(ii) The amount of late fees, if applicable, included in the payment associated with the monthly report of usage.

(d) *Royalty payment and accounting information.* The royalty payment and accounting information called for by paragraph (c)(4)(i) of this section shall consist of the following:

(1) *Calculations.* (i) Where the blanket licensee is not entitled to an invoice under paragraph (g)(1) of this section, a detailed and step-by-step accounting of the calculation of royalties payable by the blanket licensee under the blanket license under applicable provisions of this section and part 385 of this title, sufficient to allow the mechanical licensing collective to assess the manner in which the blanket licensee determined the royalty owed and the accuracy of the royalty calculations, including but not limited to the number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording, whether pursuant to a blanket license, voluntary license, or individual download license.

(ii) Where the blanket licensee is entitled to an invoice under paragraph (g)(1) of this section, all information necessary for the mechanical licensing collective to compute, in accordance with the requirements of this section and part 385 of this title, the royalties payable by the blanket licensee under the blanket license, and all information necessary to enable the mechanical

licensing collective to provide a detailed and step-by-step accounting of the calculation of such royalties under applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the mechanical licensing collective, using the blanket licensee's information, determined the royalty owed and the accuracy of the royalty calculations, including but not limited to the number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording, whether pursuant to a blanket license, voluntary license, or individual download license.

(2) *Estimates.* (i) Where computation of the royalties payable by the blanket licensee under the blanket license depends on an input that is unable to be finally determined at the time the report of usage is delivered to the mechanical licensing collective and where the reason the input cannot be finally determined is outside of the blanket licensee's control (e.g., as applicable, the amount of applicable public performance royalties and the amount of applicable consideration for sound recording copyright rights), a reasonable estimation of such input, determined in accordance with GAAP, may be used or provided by the blanket licensee. Royalty payments based on such estimates shall be adjusted pursuant to paragraph (k) of this section after being finally determined.

(ii) Where the blanket licensee is not entitled to an invoice under paragraph (g)(1) of this section, and the blanket licensee is dependent upon the mechanical licensing collective to confirm usage subject to applicable voluntary licenses and individual download licenses, the blanket licensee shall compute the royalties payable by the blanket licensee under the blanket license using a reasonable estimation of the amount of payment for such non-blanket usage to be deducted from royalties that would otherwise be due under the blanket license, determined in accordance with GAAP. Royalty payments based on such estimates shall be adjusted pursuant to paragraph (k) of this section after the mechanical licensing collective confirms such amount to be deducted and notifies the blanket licensee under paragraph (g)(2) of this section. Where the blanket licensee is entitled to an invoice under paragraph (g)(1) of this section, the blanket licensee shall not provide an estimate of or deduct such amount in the information delivered to the mechanical licensing collective under paragraph (d)(1)(ii) of this section.

(3) *Good faith.* All information and calculations provided pursuant to paragraph (d) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief of the blanket licensee at the time the report of usage is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section.

(e) *Sound recording and musical work information.* (1) The following information must be provided for each sound recording embodying a musical work required to be reported under paragraph (c)(4)(ii) of this section:

(i) Identifying information for the sound recording, including but not limited to:

(A) Sound recording name(s), including, to the extent practicable, all known alternative and parenthetical titles for the sound recording;

(B) Featured artist(s);

(C) Unique identifier(s) assigned by the blanket licensee, if any, including any code(s) that can be used to locate and listen to the sound recording through the blanket licensee's public-facing service;

(D) Playing time; and

(E) To the extent acquired by the blanket licensee in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to 17 U.S.C. 115(d)(4)(B), and to the extent practicable:

(1) Sound recording copyright owner(s);

(2) Producer(s);

(3) ISRC(s);

(4) Any other unique identifier(s) for or associated with the sound recording, including any unique identifier(s) for any associated album, including but not limited to:

(i) Catalog number(s);

(ii) UPC(s); and

(iii) Unique identifier(s) assigned by any distributor;

(5) Version(s);

(6) Release date(s);

(7) Album title(s);

(8) Label name(s);

(9) Distributor(s); and

(10) Other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody.

(ii) Identifying information for the musical work embodied in the reported sound recording, to the extent acquired by the blanket licensee in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of

sound recordings of musical works to engage in covered activities, including pursuant to 17 U.S.C. 115(d)(4)(B), and to the extent practicable:

(A) Information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording, including but not limited to:

- (1) Songwriter(s);
- (2) Publisher(s) with applicable U.S. rights;
- (3) Musical work copyright owner(s);
- (4) ISNI(s) and IPI(s) for each such songwriter, publisher, and musical work copyright owner; and
- (5) Respective ownership shares of each such musical work copyright owner;

(B) ISWC(s) for the musical work embodied in the sound recording; and

(C) Musical work name(s) for the musical work embodied in the sound recording, including any alternative or parenthetical titles for the musical work.

(iii) Whether the blanket licensee, or any corporate parent or subsidiary of the blanket licensee, is a copyright owner of the musical work embodied in the sound recording.

(2) Subject to paragraph (e)(3) of this section, where any of the information called for by paragraph (e)(1) of this section is acquired by the blanket licensee from sound recording copyright owners or other licensors of sound recordings (or their representatives), and the blanket licensee revises, re-titles, or otherwise edits or modifies the information, it shall be sufficient for the blanket licensee to report either the originally acquired version or the modified version of such information to satisfy its obligations under paragraph (e)(1) of this section, unless one or more of the following scenarios apply, in which case either the unaltered version or both versions must be reported:

(i) If the mechanical licensing collective has adopted a particular nationally or internationally recognized reporting or data standard or format (e.g., DDEX) that is being used by the particular blanket licensee, and either the unaltered version or both versions are required to be reported under such standard or format.

(ii) Either the unaltered version or both versions are reported by the particular blanket licensee pursuant to any voluntary license or individual download license.

(iii) Either the unaltered version or both versions were periodically reported by the particular blanket licensee prior to the license availability date.

(3) Notwithstanding paragraph (e)(2) of this section, a blanket licensee shall not be able to satisfy its obligations

under paragraph (e)(1) of this section by reporting a modified version of any information belonging to a category of information that was not periodically revised, re-titled, or otherwise edited or modified by the particular blanket licensee prior to the license availability date, and in no case shall a modified version of any unique identifier (including but not limited to ISRC and ISWC), playing time, or release date be sufficient to satisfy a blanket licensee's obligations under paragraph (e)(1) of this section.

(4) Any obligation under paragraph (e)(1) of this section concerning information about sound recording copyright owners may be satisfied by reporting the information for applicable sound recordings provided to the blanket licensee by sound recording copyright owners or other licensors of sound recordings (or their representatives) contained in each of the following DDEX fields: DDEX Party Identifier (DPID), LabelName, and PLine. Where a blanket licensee acquires this information in addition to other information identifying a relevant sound recording copyright owner, all such information must be reported to the extent practicable.

(5) As used in paragraph (e) of this section, it is *practicable* to provide the enumerated information if:

(i) It belongs to a category of information expressly required by the enumerated list of information contained in 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa) or (bb);

(ii) Where the mechanical licensing collective has adopted a particular nationally or internationally recognized reporting or data standard or format (e.g., DDEX) that is being used by the particular blanket licensee, it belongs to a category of information required to be reported under such standard or format;

(iii) It belongs to a category of information that is reported by the particular blanket licensee pursuant to any voluntary license or individual download license; or

(iv) It belongs to a category of information that was periodically reported by the particular blanket licensee prior to the license availability date.

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

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

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

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

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

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

(ii) The total sum paid to the mechanical licensing collective under the blanket license, including the amount of any adjustment delivered contemporaneously with the annual report of usage.

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

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

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

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

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

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

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

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

(g) *Processing and timing.* (1) Each monthly report of usage and related royalty payment must be delivered to the mechanical licensing collective no later than 45 calendar days after the end of the applicable monthly reporting period. Where a monthly report of usage satisfying the requirements of 17 U.S.C. 115 and this section is delivered to the mechanical licensing collective no later than 15 calendar days after the end of the applicable monthly reporting period, the blanket licensee shall be entitled to receive an invoice from the mechanical licensing collective setting forth the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, which shall be broken down by each applicable activity or offering including as may be defined in part 385 of this title.

(2) After receiving a monthly report of usage, the mechanical licensing collective shall engage in the following actions, among any other actions required of it:

(i) The mechanical licensing collective shall engage in efforts to identify the musical works embodied in sound recordings reflected in such report, and the copyright owners of such musical works (and shares thereof).

(ii) The mechanical licensing collective shall engage in efforts to confirm uses of musical works subject to voluntary licenses and individual download licenses, and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license.

(iii) Where the blanket licensee is not entitled to an invoice under paragraph (g)(1) of this section, the mechanical licensing collective shall engage in efforts to confirm proper payment of the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, computed in accordance with the requirements of this section and part 385 of this title, after accounting for, if applicable, amounts to be deducted under paragraph (g)(2)(ii) of this section.

(iv) Where the blanket licensee is entitled to an invoice under paragraph (g)(1) of this section, the mechanical licensing collective shall engage in efforts to compute, in accordance with the requirements of this section and part 385 of this title, the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, after accounting for, if applicable, amounts to be deducted under paragraph (g)(2)(ii) of this section.

(v) Where the blanket licensee is entitled to an invoice under paragraph

(g)(1) of this section, the mechanical licensing collective shall deliver such invoice to the blanket licensee no later than 40 calendar days after the end of the applicable monthly reporting period.

(vi) The mechanical licensing collective shall deliver a response file to the blanket licensee if requested by the blanket licensee. Where the blanket licensee is entitled to an invoice under paragraph (g)(1) of this section, the mechanical licensing collective shall deliver the response file to the blanket licensee contemporaneously with such invoice. Where the blanket licensee is not entitled to an invoice under paragraph (g)(1) of this section, the mechanical licensing collective shall deliver the response file to the blanket licensee no later than 70 calendar days after the end of the applicable monthly reporting period. In all cases, the response file shall contain such information as is common in the industry to be reported in response files, backup files, and any other similar such files provided to digital music providers by applicable third-party administrators, and shall include the results of the process described in paragraphs (g)(2)(i) through (iv) of this section on a track-by-track and ownership-share basis, with updates to reflect any new results from the previous month.

(3) Each annual report of usage and, if any, related royalty payment must be delivered to the mechanical licensing collective no later than the 20th day of the sixth month following the end of the fiscal year covered by the annual report of usage.

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

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

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

period runs for each such triggering event.

(h) *Format and delivery.* (1) Reports of usage shall be delivered to the mechanical licensing collective in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective as reasonably determined by the mechanical licensing collective and set forth on its website, taking into consideration relevant industry standards and the potential for different degrees of sophistication among blanket licensees. The mechanical licensing collective must offer at least two options, where one is dedicated to smaller blanket licensees that may not be reasonably capable of complying with the requirements of a reporting or data standard or format that the mechanical licensing collective may see fit to adopt for larger blanket licensees with more sophisticated operations. Nothing in this section shall be construed as prohibiting the mechanical licensing collective from adopting more than two reporting or data standards or formats.

(2) Royalty payments shall be delivered to the mechanical licensing collective in such manner and form as the mechanical licensing collective may reasonably determine and set forth on its website. A report of usage and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the report of usage to the payment.

(3) The mechanical licensing collective may modify the requirements it adopts under paragraphs (h)(1) and (2) of this section at any time, provided that advance notice of any such change is reflected on its website and delivered to blanket licensees using the contact information provided in each respective licensee's notice of license. A blanket licensee shall not be required to comply with any such change before the first reporting period ending at least 30 calendar days after delivery of such notice, unless such change is a significant change, in which case, compliance shall not be required before the first reporting period ending at least 6 months after delivery of such notice. For purposes of this paragraph (h)(3), a *significant change* occurs as to a particular blanket licensee where the mechanical licensing collective changes any policy requiring information to be provided under particular reporting or data standards or formats being used by the blanket licensee, or where the mechanical licensing collective has

adopted a particular nationally or internationally recognized reporting or data standard or format (e.g., DDEX) that is being used by the blanket licensee and such standard or format is modified by the standard-setting organization. Where delivery of the notice required by this paragraph (h)(3) is attempted but unsuccessful because the contact information in the blanket licensee's notice of license is not current, the grace periods established by this paragraph (h)(3) shall begin to run from the date of attempted delivery.

(4) The mechanical licensing collective shall, by no later than the license availability date, establish an appropriate process by which any blanket licensee may voluntarily make advance deposits of funds with the mechanical licensing collective against which future royalty payments may be charged.

(5) A separate monthly report of usage shall be delivered for each month during which there is any activity relevant to the payment of mechanical royalties for covered activities. An annual report of usage shall be delivered for each fiscal year during which at least one monthly report of usage was required to have been delivered. An annual report of usage does not replace any monthly report of usage.

(6) Where a blanket licensee attempts to timely deliver a report of usage and/or related royalty payment to the mechanical licensing collective but cannot because of the fault of the collective or an error, outage, disruption, or other issue with any of the collective's applicable information technology systems (whether or not such issue is within the collective's direct control), if the blanket licensee attempts to contact the collective about the problem within 2 business days, provides a sworn statement detailing the encountered problem to the Copyright Office within 5 business days (emailed to the Office of the General Counsel at [USCOGeneralCounsel@copyright.gov](mailto:USCOGeneralCounsel@copyright.gov)), and delivers the report of usage and/or related royalty payment to the collective within 5 business days after receiving written notice from the collective that the problem is resolved, then the mechanical licensing collective shall act as follows:

(i) The mechanical licensing collective shall fully credit the blanket licensee for any applicable late fee paid by the blanket licensee as a result of the untimely delivery of the report of usage and/or related royalty payment.

(ii) The mechanical licensing collective shall not use the untimely delivery of the report of usage and/or related royalty payment as a basis to

terminate the blanket licensee's blanket license.

(i) *Certification of monthly reports of usage.* Each monthly report of usage shall be accompanied by:

(1) The name of the person who is signing and certifying the monthly report of usage.

(2) A signature, which in the case of a blanket licensee that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(3) The date of signature and certification.

(4) If the blanket licensee is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the monthly report of usage.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this monthly report of usage on behalf of the blanket licensee; (2) I have examined this monthly report of usage; and (3) 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.

(ii) Statement two:

I certify that (1) I am duly authorized to sign this monthly report of usage on behalf of the blanket licensee, (2) I have prepared or supervised the preparation of the data used by the blanket licensee and/or its agent to generate this monthly report of usage, (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this monthly report of usage was prepared by the blanket licensee and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly reports of usage that accurately reflect, in all material respects, the blanket licensee's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(6) A certification that the blanket licensee has, for the period covered by the monthly report of usage, engaged in good-faith, commercially reasonable efforts to obtain information about applicable sound recordings and musical works pursuant to 17 U.S.C. 115(d)(4)(B) and § 210.26.

(j) *Certification of annual reports of usage.* (1) Each annual report of usage shall be accompanied by:

(i) The name of the person who is signing the annual report of usage on behalf of the blanket licensee.

(ii) A signature, which in the case of a blanket licensee that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(iii) The date of signature.

(iv) If the blanket licensee is a corporation or partnership, the title or official position held in the partnership or corporation by the person signing the annual report of usage.

(v) The following statement: I am duly authorized to sign this annual report of usage on behalf of the blanket licensee.

(vi) A certification that the blanket licensee has, for the period covered by the annual report of usage, engaged in good-faith, commercially reasonable efforts to obtain information about applicable sound recordings and musical works pursuant to 17 U.S.C. 115(d)(4)(B) and § 210.26.

(2) Each annual report of usage shall also be certified by a licensed certified public accountant. Such certification shall comply with the following requirements:

(i) Except as provided in paragraph (j)(2)(ii) of this section, the accountant shall certify that it has conducted an examination of the annual report of usage prepared by the blanket licensee in accordance with the attestation standards established by the American Institute of Certified Public Accountants, and has rendered an opinion based on such examination that the annual report of usage conforms with the standards in paragraph (j)(2)(iv) of this section.

(ii) If such accountant determines in its professional judgment that the volume of data attributable to a particular blanket licensee renders it impracticable to certify the annual report of usage as required by paragraph (j)(2)(i) of this section, the accountant may instead certify the following:

(A) That the accountant has conducted an examination in accordance with the attestation standards established by the American Institute of Certified Public Accountants of the following assertions by the blanket licensee's management:

(1) That the processes used by or on behalf of the blanket licensee, including calculation of statutory royalties, generated annual reports of usage that conform with the standards in paragraph (j)(2)(iv) of this section; and

(2) That the internal controls relevant to the processes used by or on behalf of the blanket licensee to generate annual reports of usage were suitably designed and operated effectively during the

period covered by the annual reports of usage.

(B) That such examination included examining, either on a test basis or otherwise as the accountant considered necessary under the circumstances and in its professional judgment, evidence supporting the management assertions in paragraph (j)(2)(ii)(A) of this section, including data relevant to the calculation of statutory royalties, and performing such other procedures as the accountant considered necessary in the circumstances.

(C) That the accountant has rendered an opinion based on such examination that the processes used to generate the annual report of usage were designed and operated effectively to generate annual reports of usage that conform with the standards in paragraph (j)(2)(iv) of this section, and that the internal controls relevant to the processes used to generate annual reports of usage were suitably designed and operated effectively during the period covered by the annual reports of usage.

(iii) In the event a third party or third parties acting on behalf of the blanket licensee provided services related to the annual report of usage, the accountant making a certification under either paragraph (j)(2)(i) or (ii) of this section may, as the accountant considers necessary under the circumstances and in its professional judgment, rely on a report and opinion rendered by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants that the processes and/or internal controls of the third party or third parties relevant to the generation of the blanket licensee's annual reports of usage were suitably designed and operated effectively during the period covered by the annual reports of usage, if such reliance is disclosed in the certification.

(iv) An annual report of usage conforms with the standards of this paragraph (j) if it presents fairly, in all material respects, the blanket licensee's usage of the copyright owner's musical works under blanket license during the period covered by the annual report of usage, the statutory royalties applicable thereto, and such other data as are relevant to the calculation of statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(v) Each 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 report of usage is delivered electronically, the blanket licensee may deliver an electronic facsimile of the original certification of the annual report of usage signed by the licensed certified public accountant. The blanket licensee shall retain the original certification of the annual report of usage signed by the licensed certified public accountant for the period identified in paragraph (m) of this section, which shall be made available to the mechanical licensing collective upon demand.

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

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

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

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

(ii) The specific change(s) to the applicable previously delivered monthly reports of usage or annual reports of usage, including the monetary amount of the adjustment and a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the blanket licensee under the blanket license depends. Such description shall include a detailed and step-by-step accounting of the calculation of the adjustment sufficient to allow the mechanical licensing collective to assess the manner in which the blanket licensee determined the

adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2)(i) of this section.

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

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

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

(5) In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the blanket licensee's account.

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

(i) In exceptional circumstances;

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

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

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

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

(l) *Clear statements.* The information required by this section requires intelligible, legible, and unambiguous statements in the reports of usage, without incorporation by reference of facts or information contained in other documents or records.

(m) *Documentation and records of use.* (1) Each blanket licensee shall, for

a period of at least five years from the date of delivery of a report of usage to the mechanical licensing collective, keep and retain in its possession all records and documents necessary and appropriate to support fully the information set forth in such report of usage, including but not limited to the following:

(i) Records and documents accounting for digital phonorecord deliveries that do not constitute plays, constructive plays, or other payable units.

(ii) Records and documents pertaining to any promotional or free trial uses that are required to be maintained under applicable provisions of part 385 of this title.

(iii) Records and documents identifying or describing each of the blanket licensee's applicable activities or offerings including as may be defined in part 385 of this title, including information sufficient to reasonably demonstrate whether the activity or offering qualifies as any particular activity or offering for which specific rates and terms have been established in part 385 of this title, and which specific rates and terms apply to such activity or offering.

(iv) Records and documents with information sufficient to reasonably demonstrate, if applicable, whether service revenue and total cost of content, as those terms may be defined in part 385 of this title, are properly calculated in accordance with part 385 of this title.

(v) Records and documents with information sufficient to reasonably demonstrate whether and how any royalty floor established in part 385 of this title does or does not apply.

(vi) Records and documents containing such other information as is necessary to reasonably support and confirm all usage and calculations contained in the report of usage, including but not limited to, as applicable, relevant information concerning subscriptions, devices and platforms, discount plans (including how eligibility was assessed), bundled offerings (including their constituent components and pricing information), and numbers of end users and subscribers (including unadjusted numbers and numbers adjusted as may be permitted by part 385 of this title).

(vii) Any other records or documents that may be appropriately examined pursuant to an audit under 17 U.S.C. 115(d)(4)(D).

(2) Each blanket licensee shall, for the period described in paragraph (m)(3) of this section, keep and retain in its possession the following additional records and documents:

(i) With respect to each sound recording, that embodies a musical work, first licensed or obtained for use in covered activities by the blanket licensee after the effective date of its blanket license, one or more of the following dates:

(A) The date on which the sound recording is first reproduced by the blanket licensee on its server;

(B) The date on which the blanket licensee first obtains the sound recording; or

(C) The date of the grant first authorizing the blanket licensee's use of the sound recording.

(ii) A record of all sound recordings embodying musical works in its database or similar electronic system as of immediately prior to the effective date of its blanket license.

(3) The records and documents described in paragraph (m)(2) of this section must be kept and retained for a period of at least five years from the relevant date described in paragraph (m)(2) of this section, provided that at least 90 calendar days before destroying or discarding any such records or documents the blanket licensee notifies the mechanical licensing collective in writing and provides an opportunity for the collective to claim and retrieve such records and documents. In no event shall a blanket licensee be required to keep and retain any such records or documents for more than 50 years.

(4) The mechanical licensing collective or its agent shall be entitled to reasonable access to all records and documents described in this paragraph (m) upon reasonable request, subject to any applicable confidentiality rules established by the Copyright Office. Each report of usage must include clear instructions on how to request such access to such records and documents.

(n) *Voluntary agreements with mechanical licensing collective to alter process.* Subject to the provisions of 17 U.S.C. 115, a blanket licensee and the mechanical licensing collective may agree to vary or supplement the procedures described in this section, including but not limited to pursuant to an agreement to administer a voluntary license, provided that any such change does not materially prejudice copyright owners owed royalties due under a blanket license. The procedures surrounding the certification requirements of paragraphs (i) and (j) of this section may not be altered by agreement.

#### **§ 210.28 Reports of usage for significant nonblanket licensees.**

(a) *General.* This section prescribes rules for the preparation and delivery of

reports of usage for the making and distribution of phonorecords of nondramatic musical works to the mechanical licensing collective by a significant nonblanket licensee pursuant to 17 U.S.C. 115(d)(6)(A)(ii). A significant nonblanket licensee shall report to the mechanical licensing collective on a monthly basis in accordance with 17 U.S.C. 115(d)(6)(A)(ii) and this section. A significant nonblanket licensee may make adjustments to its reports of usage in accordance with this section.

(b) *Definitions.* For purposes of this section, in addition to those terms defined in § 210.22:

(1) The term *report of usage*, unless otherwise specified, refers to all reports of usage required to be delivered by a significant nonblanket licensee to the mechanical licensing collective, including reports of adjustment. As used in this section, it does not refer to reports required to be delivered by blanket licensees under 17 U.S.C. 115(d)(4)(A) and § 210.27.

(2) A *monthly report of usage* is a report of usage identified in 17 U.S.C. 115(d)(6)(A)(ii), and required to be delivered by a significant nonblanket licensee to the mechanical licensing collective.

(3) A *report of adjustment* is a report delivered by a significant nonblanket licensee to the mechanical licensing collective adjusting one or more previously delivered monthly reports of usage.

(c) *Content of monthly reports of usage.* A monthly report of usage shall be clearly and prominently identified as a "Significant Nonblanket Licensee Monthly Report of Usage 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 report of usage.

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

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

(4) For each sound recording embodying a musical work that is used



by the significant nonblanket licensee in covered activities during the applicable monthly reporting period, a detailed statement, from which the mechanical licensing collective may separate reported information for each applicable activity or offering including as may be defined in part 385 of this title, of all of:

(i) The royalty payment and accounting information required by paragraph (d) of this section; and  
(ii) The sound recording and musical work information required by paragraph (e) of this section.

(5) For each voluntary license and individual download license in effect during the applicable monthly reporting period, the information required under § 210.24(b)(8). If this information has been separately provided to the mechanical licensing collective, it need not be contained in the monthly report of usage, provided the report states that the information has been provided separately and includes the date on which such information was last provided to the mechanical licensing collective.

(d) *Royalty payment and accounting information.* The royalty payment and accounting information called for by paragraph (c)(4)(i) of this section shall consist of the following:

(1) The mechanical royalties payable by the significant nonblanket licensee for the applicable monthly reporting period for engaging in covered activities pursuant to each applicable voluntary license and individual download license.

(2) The number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording.

(e) *Sound recording and musical work information.* (1) The following information must be provided for each sound recording embodying a musical work required to be reported under paragraph (c)(4)(ii) of this section:

(i) Identifying information for the sound recording, including but not limited to:

(A) Sound recording name(s), including, to the extent practicable, all known alternative and parenthetical titles for the sound recording;

(B) Featured artist(s);

(C) Unique identifier(s) assigned by the significant nonblanket licensee, if any, including any code(s) that can be used to locate and listen to the sound recording through the significant nonblanket licensee's public-facing service;

(D) Playing time; and

(E) To the extent acquired by the significant nonblanket licensee in

connection with its use of sound recordings of musical works to engage in covered activities, and to the extent practicable:

(1) Sound recording copyright owner(s);

(2) Producer(s);

(3) ISRC(s);

(4) Any other unique identifier(s) for or associated with the sound recording, including any unique identifier(s) for any associated album, including but not limited to:

(i) Catalog number(s);

(ii) UPC(s); and

(iii) Unique identifier(s) assigned by any distributor;

(5) Version(s);

(6) Release date(s);

(7) Album title(s);

(8) Label name(s);

(9) Distributor(s); and

(10) Other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody.

(ii) Identifying information for the musical work embodied in the reported sound recording, to the extent acquired by the significant nonblanket licensee in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, and to the extent practicable:

(A) Information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording, including but not limited to:

(1) Songwriter(s);

(2) Publisher(s) with applicable U.S. rights;

(3) Musical work copyright owner(s);

(4) ISNI(s) and IPI(s) for each such songwriter, publisher, and musical work copyright owner; and

(5) Respective ownership shares of each such musical work copyright owner;

(B) ISWC(s) for the musical work embodied in the sound recording; and

(C) Musical work name(s) for the musical work embodied in the sound recording, including any alternative or parenthetical titles for the musical work.

(iii) Whether the significant nonblanket licensee, or any corporate parent or subsidiary of the significant nonblanket licensee, is a copyright owner of the musical work embodied in the sound recording.

(2) Subject to paragraph (e)(3) of this section, where any of the information called for by paragraph (e)(1) of this section is acquired by the significant

nonblanket licensee from sound recording copyright owners or other licensors of sound recordings (or their representatives), and the significant nonblanket licensee revises, re-titles, or otherwise edits or modifies the information, it shall be sufficient for the significant nonblanket licensee to report either the originally acquired version or the modified version of such information to satisfy its obligations under paragraph (e)(1) of this section, unless one or more of the following scenarios apply, in which case either the unaltered version or both versions must be reported:

(i) If the mechanical licensing collective has adopted a particular nationally or internationally recognized reporting or data standard or format (e.g., DDEX) that is being used by the particular significant nonblanket licensee, and either the unaltered version or both versions are required to be reported under such standard or format.

(ii) Either the unaltered version or both versions are reported by the particular significant nonblanket licensee pursuant to any voluntary license or individual download license.

(iii) Either the unaltered version or both versions were periodically reported by the particular significant nonblanket licensee prior to the license availability date.

(3) Notwithstanding paragraph (e)(2) of this section, a significant nonblanket licensee shall not be able to satisfy its obligations under paragraph (e)(1) of this section by reporting a modified version of any information belonging to a category of information that was not periodically revised, re-titled, or otherwise edited or modified by the particular significant nonblanket licensee prior to the license availability date, and in no case shall a modified version of any unique identifier (including but not limited to ISRC and ISWC), playing time, or release date be sufficient to satisfy a significant nonblanket licensee's obligations under paragraph (e)(1) of this section.

(4) Any obligation under paragraph (e)(1) of this section concerning information about sound recording copyright owners may be satisfied by reporting the information for applicable sound recordings provided to the significant nonblanket licensee by sound recording copyright owners or other licensors of sound recordings (or their representatives) contained in each of the following DDEX fields: DDEX Party Identifier (DPID), LabelName, and PLine. Where a significant nonblanket licensee acquires this information in addition to other information

identifying a relevant sound recording copyright owner, all such information must be reported to the extent practicable.

(5) As used in paragraph (e) of this section, it is *practicable* to provide the enumerated information if:

(i) It belongs to a category of information expressly required by the enumerated list of information contained in 17 U.S.C.

115(d)(4)(A)(ii)(I)(aa) or (bb);

(ii) Where the mechanical licensing collective has adopted a particular nationally or internationally recognized reporting or data standard or format (e.g., DDEX) that is being used by the particular significant nonblanket licensee, it belongs to a category of information required to be reported under such standard or format;

(iii) It belongs to a category of information that is reported by the particular significant nonblanket licensee pursuant to any voluntary license or individual download license; or

(iv) It belongs to a category of information that was periodically reported by the particular significant nonblanket licensee prior to the license availability date.

(f) *Timing.* (1) An initial report of usage must be delivered to the mechanical licensing collective contemporaneously with the significant nonblanket licensee's notice of nonblanket activity. Each subsequent monthly report of usage must be delivered to the mechanical licensing collective no later than 45 calendar days after the end of the applicable monthly reporting period.

(2) A report of adjustment may only be delivered to the mechanical licensing collective once annually, between the end of the significant nonblanket licensee's fiscal year and 6 months after the end of its fiscal year. Such report may only adjust one or more previously delivered monthly reports of usage from the applicable fiscal year.

(g) *Format and delivery.* (1) Reports of usage shall be delivered to the mechanical licensing collective in any format accepted by the mechanical licensing collective for blanket licensees under § 210.27(h). With respect to any modifications to formatting requirements that the mechanical licensing collective adopts, significant nonblanket licensees shall be entitled to the same advance notice and grace periods as apply to blanket licensees under § 210.27(h), except the mechanical licensing collective shall use the contact information provided in each respective significant nonblanket licensee's notice of nonblanket activity.

(2) A separate monthly report of usage shall be delivered for each month during which there is any activity relevant to the payment of mechanical royalties for covered activities.

(3) Where a significant nonblanket licensee attempts to timely deliver a report of usage to the mechanical licensing collective but cannot because of the fault of the collective or an error, outage, disruption, or other issue with any of the collective's applicable information technology systems (whether or not such issue is within the collective's direct control), if the significant nonblanket licensee attempts to contact the collective about the problem within 2 business days, provides a sworn statement detailing the encountered problem to the Copyright Office within 5 business days (emailed to the Office of the General Counsel at [USCOGeneralCounsel@copyright.gov](mailto:USCOGeneralCounsel@copyright.gov)), and delivers the report of usage to the collective within 5 business days after receiving written notice from the collective that the problem is resolved, then neither the mechanical licensing collective nor the digital licensee coordinator may use the untimely delivery of the report of usage as a basis to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C).

(h) *Certification of monthly reports of usage.* Each monthly report of usage shall be accompanied by:

(1) The name of the person who is signing and certifying the monthly report of usage.

(2) A signature, which in the case of a significant nonblanket licensee that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(3) The date of signature and certification.

(4) If the significant nonblanket licensee is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the monthly report of usage.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this monthly report of usage on behalf of the significant nonblanket licensee; (2) I have examined this monthly report of usage; and (3) 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.

(ii) Statement two:

I certify that (1) I am duly authorized to sign this monthly report of usage on behalf of the significant nonblanket licensee, (2) I have prepared or supervised the preparation of the data used by the significant nonblanket licensee and/or its agent to generate this

monthly report of usage, (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this monthly report of usage was prepared by the significant nonblanket licensee and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly reports of usage that accurately reflect, in all material respects, the significant nonblanket licensee's usage of musical works and the royalties applicable thereto.

(i) *Adjustments.* (1) A significant nonblanket licensee may adjust one or more previously delivered monthly reports of usage by delivering to the mechanical licensing collective a report of adjustment.

(2) A report of adjustment shall be clearly and prominently identified as a "Significant Nonblanket Licensee Report of Adjustment for Making and Distributing Phonorecords."

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

(i) The previously delivered monthly report(s) of usage to which the adjustment applies.

(ii) The specific change(s) to the applicable previously delivered monthly report(s) of usage.

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

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

(4) A report of adjustment must be certified in the same manner as a monthly report of usage under paragraph (h) of this section.

(j) *Clear statements.* The information required by this section requires intelligible, legible, and unambiguous statements in the reports of usage, without incorporation by reference of facts or information contained in other documents or records.

(k) *Harmless errors.* Errors in the delivery or content of a report of usage that do not materially affect the adequacy of the information required to serve the purpose of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the report invalid or provide a basis for the mechanical licensing collective or digital licensee coordinator to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C). This paragraph (k) shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(l) *Voluntary agreements with mechanical licensing collective to alter process.* Subject to the provisions of 17 U.S.C. 115, a significant nonblanket licensee and the mechanical licensing collective may agree to vary or supplement the procedures described in this section, including but not limited to pursuant to an agreement to administer a voluntary license, provided that any such change does not materially prejudice copyright owners owed royalties due under a blanket license. The procedures surrounding the certification requirements of paragraph (h) of this section may not be altered by agreement.

Dated: April 15, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

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**BILLING CODE 1410-30-P**

## LIBRARY OF CONGRESS

### U.S. Copyright Office

#### 37 CFR Part 210

[Docket No. 2020-6]

#### Reporting and Distribution of Royalties to Copyright Owners by the Mechanical Licensing Collective

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding the obligations of the mechanical licensing collective to report and distribute royalties paid by digital music providers under the blanket license to musical work copyright owners under title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act. After soliciting public comments through a notification of inquiry, the Office is now proposing regulations establishing the timing, form, delivery, and certification of statements accompanying royalty distributions to musical work copyright owners. The Office solicits additional public comments on the proposed rule. This notice concerns only royalty statements and distributions regarding matched uses of musical works embodied in sound recordings and does not address issues related to the distribution of unclaimed, accrued royalties.

**DATES:** Written comments must be received no later than 11:59 Eastern Time on May 22, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <https://www.copyright.gov/rulemaking/mma-royalty-statements>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:**

Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at [regans@copyright.gov](mailto:regans@copyright.gov) or Terry Hart, Assistant General Counsel, by email at [tehart@copyright.gov](mailto:tehart@copyright.gov). Each can be contacted by telephone by calling (202) 707-8350.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Title I of the Music Modernization Act (“MMA”), the Musical Works Modernization Act, substantially modifies the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works available under 17 U.S.C. 115. Prior to the MMA, a compulsory license was obtained by licensees on a per-work, song-by-song basis, and required a licensee to serve a notice of intention to obtain a compulsory license (“NOI”) on the relevant copyright owner (or file the NOI with the Copyright Office if the Office’s public records did not identify the copyright owner and include an address at which notice could be served) and then pay applicable royalties accompanied by accounting statements.<sup>1</sup>

The MMA amends this regime in multiple ways, most significantly by establishing a new blanket compulsory license that digital music providers (“DMPs”) may obtain to make digital phonorecord deliveries (“DPDs”) of musical works, including in the form of permanent downloads, limited downloads, or interactive streams.<sup>2</sup> Instead of licensing one song at a time by serving NOIs on individual copyright

owners, the blanket license will cover all musical works available for compulsory licensing and will be centrally administered by a mechanical licensing collective (“MLC”), which has been designated by the Register of Copyrights.<sup>3</sup> Under the MMA, compulsory licensing of phonorecords that are not DPDs (e.g., CDs, vinyl, tapes, and other types of physical phonorecords) (the “non-blanket license”) continues to operate on a per-work, song-by-song basis, the same as before.<sup>4</sup>

By statute, digital music providers will bear the reasonable costs of establishing and operating the MLC through an administrative assessment, to be determined, if necessary, by the Copyright Royalty Judges (“CRJs”).<sup>5</sup> As permitted under the MMA, the Office designated a digital licensee coordinator (“DLC”) to represent licensees in proceedings before the CRJs and the Copyright Office, to serve as a non-voting member of the MLC, and to carry out other functions.<sup>6</sup>

#### A. Reporting and Payment Obligations Under Non-Blanket License

The proposed rule is informed by the preexisting section 115 regulations that still apply to non-blanket licenses. Under a non-blanket license, copyright owners receive royalties and statements of account directly from compulsory licensees. Timely payment and statements of account are a condition of the non-blanket compulsory license, and failure to comply with the requirements could lead to default.<sup>7</sup> Default can subject a licensee to the remedies provided by sections 502 through 506 for infringement.<sup>8</sup> The statute requires licensees to make monthly and annual statements of account, along with payment of royalties, in compliance with regulations promulgated by the Office.<sup>9</sup> Regulations covering monthly and annual statements of account prescribe, among other things, requirements regarding the content such statements

<sup>3</sup> 17 U.S.C. 115(d)(1), (3); 84 FR 32274 (July 8, 2019).

<sup>4</sup> 17 U.S.C. 115(b)(1); see H.R. Rep. No. 115-651, at 3 (noting “[t]his is the historical method by which record labels have obtained compulsory licenses”); S. Rep. No. 115-339, at 3 (same); see also U.S. Copyright Office, Orrin G. Hatch-Bob Goodlatte Music Modernization Act, <https://www.copyright.gov/music-modernization/> (last visited Apr. 2, 2020).

<sup>5</sup> 17 U.S.C. 115(d)(7)(D).

<sup>6</sup> *Id.* at 115(d)(5)(B); 84 FR at 32274; see also 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(C).

<sup>7</sup> 17 U.S.C. 115(c)(2)(f).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 115(c)(2)(f). See generally 37 CFR 210.11.

<sup>1</sup> See 17 U.S.C. 115(b)(1), (c)(5) (2017); U.S. Copyright Office, Copyright and the Music Marketplace 28-31 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (describing operation of prior section 115 license).

<sup>2</sup> 17 U.S.C. 115(d)(1), (e)(7); see H.R. Rep. No. 115-651, at 4-6 (describing operation of the blanket license and the new mechanical licensing collective); S. Rep. No. 115-339, at 3-6 (same).