

LIBRARY OF CONGRESS

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:** Interim rule.

SUMMARY: The U.S. Copyright Office is issuing an interim rule 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 notice of proposed rulemaking, the Office is now issuing regulations establishing the timing, form, and delivery of statements accompanying royalty distributions to musical work copyright owners. These regulations concern only royalty statements and distributions regarding matched uses of musical works embodied in sound recordings and do not address issues related to the distribution of unclaimed, accrued royalties.

DATES: Effective October 19, 2020.

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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 on the relevant copyright owner (or file the notice of intention 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.¹

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.² Instead of licensing one song at a time by serving notices of intention 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.³ 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.⁴

On September 24, 2019, the Copyright Office issued a notification of inquiry (“NOI”) to initiate this current proceeding regarding implementing regulations for the blanket license.⁵ The Office invited public comment on regulations that the MMA specifically directs it to adopt, as well as additional regulations that may be necessary or appropriate to effectuate the new blanket licensing structure. Among the issues the notification sought comment on was “the MLC’s payment and reporting obligations with respect to royalties that have been matched to copyright owners, both for works that are matched at the time the MLC receives payment from digital music providers and works that are matched later during the statutorily prescribed holding period for unmatched works.”⁶ On April 22, 2020, the Office issued a

notice of proposed rulemaking (“NPRM”) soliciting public comments on proposed regulations regarding those obligations.⁷ The Office received comments from seven parties in response to the NPRM and engaged in follow-up discussions with interested parties pursuant to its *ex parte* guidelines, as discussed further below.

Commenters largely agreed that the NPRM generally struck the appropriate balance. The MLC said it “appreciates the Office’s consideration of the unprecedented licensing regime that the MLC is responsible to implement from scratch, and finds that the NPRM does an excellent job empowering the MLC to carry out the functions that it was designated to fulfill.”⁸ The Future of Music Coalition (“FMC”) said it “continues to appreciate the Office’s ongoing efforts to implement the Music Modernization Act in ways that accord with legislative intent, that demonstrate ongoing concern for fairness to all parties, that increase transparency, and that harmonize the public interest with the interests of creators, including songwriters and composers.”⁹ Music Reports said it “enthusiastically endorses the overall framework and degree of balance generally achieved throughout.”¹⁰

Having carefully considered the comments and other record materials in this proceeding, the Office now issues an interim rule that overall closely follows the NPRM, but with a number of modifications based upon public comment. Most significantly, the interim rule clarifies the MLC’s timing and delivery obligations with respect to royalty distributions, adjusts the MLC’s

¹ 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).

² 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).

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

⁴ 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 Sept. 1, 2020).

⁵ 84 FR 49966 (Sept. 24, 2019).

⁶ *Id.* at 49972.

⁷ 85 FR 22549 (Apr. 22, 2020). On the same day, the Office issued two other notices of proposed rulemaking and a notification of inquiry regarding separate MMA implementation issues. 85 FR 22518 (Apr. 22, 2020); 85 FR 22559 (Apr. 22, 2020); 85 FR 22568 (Apr. 22, 2020). All rulemaking activity, including public comments, as well as educational material regarding the Music Modernization Act, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization/>. Specifically, comments received in response to the NOI are available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001> and comments received in response to the NPRM are available at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2018-0008>. 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>. References to these comments are by party name (abbreviated where appropriate), followed by “Initial NOI Comment,” “Reply NOI Comment,” “NPRM Comment,” or “*Ex Parte* Letter,” as appropriate.

⁸ MLC NPRM Comment at 1.

⁹ FMC NPRM Comment at 1.

¹⁰ Music Reports NPRM Comment at 2.

certification requirement, and explicitly provides for an annual statement to copyright owners. Additional modifications are made regarding the timing of adjustments, the content of royalty statements, and the minimum payment threshold.

In drafting this interim rule, the Office has been mindful of both its longstanding goals of promulgating practical regulations that result in prompt payment to copyright owners¹¹ and the need to balance the principles identified in the NPRM: Establishing a minimum floor of transparency and accountability that songwriters and publishers can expect of the MLC and avoiding over-regulation by ensuring the MLC retains sufficient flexibility to ably implement a complex and challenging licensing regime.¹² The success of the blanket license is dependent both on the ability of the MLC to administer the license fairly, transparently, and efficiently, and on the confidence songwriters and music publishers (and, for separate aspects, DMPs) have in the process. Copyright Office regulations are an important mechanism for ensuring transparency and accountability in the blanket licensing regime,¹³ but they are not the sole mechanism; other provisions in the statute as well as the governance of the MLC itself provides incentive for it to be responsive to the needs of copyright owners.¹⁴

The Office has determined that it is prudent to promulgate this rule on an

interim basis so that it retains some flexibility for responding to unforeseen complications in royalty reporting once the MLC begins distributing royalties. As noticed in the NPRM, adopting the rule on an interim basis is intended to “facilitate adjustment on topics noticed in this rulemaking if necessary once the MLC begins issuing royalty statements to copyright owners.”¹⁵ Multiple commenters supported that proposal, and none opposed an interim rule.¹⁶

II. Interim Rule

The NPRM addressed the information that the MLC is required to report in royalty statements, as well as the format and delivery of such statements and related distribution payments. The interim rule is intended to balance the primary concerns of copyright owners in getting prompt and accurate royalty payments with the operational realities of the MLC in administering the blanket license. The Office has looked to the existing song-by-song compulsory license as a baseline for the level of information that copyright owners expect under the blanket license, as well as the standard for accuracy in royalty reporting, while bearing in mind any relevant shortcomings of the song-by-song licensing regime that motivated passage of the MMA.

Timing and distribution of royalties and royalty statements. The MLC commented that the proposed requirement to report newly reported royalties, newly matched royalties, and adjustments simultaneously “would cause needless operational complexity and reporting delays to copyright owners.”¹⁷ The Office’s intent in proposing concurrent reporting was to “minimize and simplify administration for both the MLC and copyright owners.”¹⁸ Given the MLC’s response that concurrent reporting would instead make administration more difficult, the Office has adopted the MLC’s proposed language clarifying that while royalties in either case must be reported monthly,

there is no requirement that the reports are made simultaneously.

The Office made further updates related to the timing and delivery of royalty statements in light of the public comments. The interim rule has removed the phrase “for the month next preceding” in the provision for distribution of royalties based on comments by SoundExchange and supported by the MLC, emphasizing the practical difficulties in meeting this requirement.¹⁹ The aim of that language, carried over from the statutory requirements for the song-by-song licensing framework,²⁰ was to indicate that the MLC would distribute all royalties that have become payable since the prior monthly distribution, but the MLC and SoundExchange suggested this language was ambiguous.²¹ In addition, the Office considered several comments that suggested adding an additional timing requirement and offered various periods, triggers, and exceptions upon which to base this requirement.²² For its part, the MLC opposed adding a further requirement that obligated the distribution of royalties within a certain period beyond establishing a monthly cadence for reporting, calling it “overly prescriptive.”²³ It explained that it “already has a substantial interest in ensuring royalties are timely reported and distributed in the most efficient manner possible.”²⁴ It added that its royalty processing activities will “depend heavily on the quality and timeliness of DMP usage reporting to the MLC” and sought to avoid regulatory language that would connect the MLC’s reporting obligations to external dependencies, such as the receipt of

¹¹ 45 FR 79038, 79039 (Nov. 28, 1980).

¹² 85 FR at 22551–52; S. Rep. No. 115–339, at 15 (“[T]he Register is expected to promulgate the necessary regulations required by the legislation in a manner that balances the need to protect the public’s interest with the need to let the new collective operate without over-regulation.”).

¹³ 17 U.S.C. 115(d)(3)(B)(ii) (instructing the Register of Copyrights to periodically review designation of mechanical licensing collective); S. Rep. No. 115–339 at 5 (“[T]he failure to follow the relevant regulations adopted by the Copyright Office [] over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective.”); H.R. Rep. No. 115–651, at 6 (same).

¹⁴ See, e.g., 85 FR at 22554 (“[S]ignificant nonregulatory incentives are . . . in place to ensure timely distribution of royalties. For one, the MLC represented in its designation proposal that it intends to provide prompt, complete, and accurate payments to all copyright owners. In addition, because the MLC is governed by the very copyright owners that it will be serving, and because it must maintain the support of copyright owners, it shares their interest in prompt reporting and distribution (internal quotation marks omitted).”); 17 U.S.C. 115(d)(3)(D)(vii) (annual report requirement for MLC); see also MLC NPRM Comment at 2–3 (“The MLC has a clear interest in ensuring accurate, transparent and timely reporting to the songwriters and music publishers who govern it and to whom it is accountable.”); SoundExchange NPRM Comment at 2–3 (similar).

¹⁵ 85 FR at 22552.

¹⁶ See, e.g., Music Reports NPRM Comment at 3 (“[I]t would be beneficial for the Office to adopt the proposed rule on an interim basis due to the intricacies of the subject matter and the further issues likely to arise during the MLC’s first full year of operation following the blanket license availability date.”); The International Confederation of Societies of Authors and Composers (“CISAC”) & The International Organisation representing Mechanical Rights Societies (“BIEM”) NPRM Comment at 5 (saying it is “advisable to enable the Copyright Office to conduct an assessment of the Proposed Rulemaking after a one-year period once the MLC has started to operate and to further consult with stakeholders in order to adjust, if necessary, the relevant Regulation.”).

¹⁷ MLC NPRM Comment at 5.

¹⁸ 85 FR at 22553.

¹⁹ SoundExchange NPRM Comment at 5 (“This particular formulation may go too far given the practicalities of royalty collection and distribution”).

²⁰ 17 U.S.C. 115(c)(2)(I).

²¹ While the Office agrees with SoundExchange that the monthly distributions should include any interest that has accrued pursuant to section 115(d)(3)(G)(i)(III), it believes the rule is already clear that such interest is to be included with the payment, as indicated in § 210.29(c)(4)(iv) of the interim rule. See SoundExchange NPRM Comment at 8–9.

²² CISAC & BIEM NPRM Comment at 4 (suggesting a maximum deadline of 9–12 months “from the end of the financial year in which the rights were collected”); Music Reports NPRM Comment at 3 (proposing requirement to distribute royalties within 90 days following end of applicable month); Songwriters Guild of America, Inc. (“SGA”) NPRM Comment at 4 (suggesting required payment of royalties for matched works within three months of receipt). See also FMC NPRM Comment at 1 (supporting rule as proposed but expressing appreciation that the Office reserved the right to impose a timing requirement in the future).

²³ MLC NPRM Comment at 12.

²⁴ *Id.*

untimely or incomplete information from blanket licensees.²⁵

After considering the comments and the MLC's reported operational expectations, the interim rule replaces the phrase "for the month next preceding" with alternative language similar to that proposed by the MLC to clarify that the MLC will pay out all royalties ready to be distributed to copyright owners when the MLC makes its regular monthly distributions. This encompasses royalties that have been reported by DMPs and matched to musical works, where the musical work copyright owner is known and located, where the MLC has all the necessary tax and financial information from the copyright owner to make a payment, and where the royalties are not subject to any dispute or other legal hold. This approach is intended to take into account the role of third parties, including DMPs and musical work copyright owners, for many of the inputs needed by the MLC before royalties can be distributed.

The Office believes that the interim rule strikes an appropriate balance in solidifying the expectation that the MLC will promptly pay copyright owners all royalties that can be paid on a monthly basis, while avoiding a requirement that may overlook the potential impact of dependencies outside the MLC's control. The Office acknowledges the MLC's statements that it has an inherent interest in timely payments to copyright owners, given that it is governed by and accountable to those copyright owners, and it is required to pay interest on accrued royalties for unmatched works.²⁶ To promote transparency in the timeliness of payments, the Office is separately considering whether the MLC should be required to report average royalty processing and distribution times as part of its annual report in a separate rulemaking and can revisit this issue if warranted.²⁷

The MLC also objected that the requirement to immediately report adjustments on a monthly basis "could be tremendously burdensome."²⁸ It explained that "reports of adjustment from DMPs are likely to relate to royalty pool calculations, and to therefore result in a recalculation of the effective per-

play rate, which would require an adjustment to all distributed (and undistributed) royalties."²⁹ The MLC also maintained it "could be extremely costly with little benefit to copyright owners."³⁰ Instead, the MLC proposed that the rule only require it "to report adjustments to copyright owners after it has received the total adjustments reported in the annual reports of usage delivered to the MLC by DMPs pursuant to proposed regulation § 210.27(f)."³¹ The MLC noted that this would "alleviate the immense administrative burden" of processing all adjustments immediately, though it also would not prevent the MLC from reporting adjustments more frequently than annually.³² The Office did not receive any comments suggesting there was a need to report adjustments monthly, or opposing the MLC's proposal.

The Office finds the MLC's proposal reasonable and has adjusted the rule accordingly. The Office observes that changing the requirement to report adjustments at least on an annual basis may increase the value of the MLC providing a defined annual statement to copyright owners, as discussed below. As the MLC notes, an adjustment that affects royalty pool calculations would affect all previously reported royalties; an annual statement could significantly assist copyright owners—particularly independent songwriters and smaller music publishers—in reconciling their bookkeeping following a reported adjustment.

Content. The interim rule also includes several adjustments to the content that the MLC is required to report in royalty statements to copyright owners based on unopposed comments it has received.³³ Notably, the interim

rule has added, at the suggestion of the MLC and FMC, a requirement to report "[a] detailed and step-by-step accounting of the calculation of royalties under applicable provisions of part 385 of this title, sufficient to allow the copyright owner to assess the manner in which the royalty owed was determined and the accuracy of the royalty calculations, which shall include details on each of the components used in the calculation of the payable royalty pool."³⁴ This information is provided to copyright owners under the song-by-song license.³⁵ It will continue to be reported by DMPs to the MLC as part of their monthly reports of usage,³⁶ and the MLC intends to pass along this information to copyright owner.³⁷ The

to be consistent with the statute, which uses the term to mean the primary recording artist. See 17 U.S.C. 115(d)(3)(E)(ii)(IV)(bb), (d)(3)(E)(iii)(I)(dd), (d)(4)(A)(ii)(I)(aa), (d)(10)(B)(i)(I)(aa).

In its NPRM, the Office sought comment on "whether it is necessary to require reporting of sound recording copyright owner on royalty statements," given comments raising concerns about potential confusion since "the legal owner of a sound recording copyright is not always the same as the party identified as the sound recording copyright owner in royalty metadata currently used in the digital music marketplace." 85 FR at 22555. FMC responded that this information would be "at minimum, potentially useful"—particularly for self-published songwriters. FMC NPRM Comment at 1. Songwriters of North America ("SONA") and Music Artists Coalition ("MAC") supported inclusion of this field. SONA & MAC NPRM Comment at 4. SoundExchange, by contrast, recommended against requiring this field, citing "serious doubts about the MLC's ability to report sound recording copyright owner accurately, because the MLC has no reason to track that data the way SoundExchange does" as well as "concerns about the confusion that could result from the MLC's widely disseminating that information even if accurate, since it may not correspond to other source information metadata used in the marketplace." SoundExchange NPRM Comment at 4 n.5. To the extent SoundExchange's concerns are warranted, the Office believes they are better addressed in provisions addressing DMP records of use and/or the MLC's public database. The presumption for this proceeding is that any information required to be included in the public database would be worthwhile of being reported to copyright owners in the royalty statements.

³⁴ MLC NPRM Comment App. at ii; FMC NPRM Comment at 2. See also Lowery Reply NOI Comment at 6 ("[T]he MLC should be required to publicly post at least an aggregated version of all information it receives from DMPs supporting the calculation of royalties (transactions, TCC, deductions from gross, etc.). It will be impossible for songwriters to conduct a desktop audit of their statements with their accountants if key elements of the calculations are missing."). Although the interim rule does not, as Lowery proposed, require the MLC to publicly post this information, its provision on royalty statements will provide individual copyright owners with the ability to confirm the calculation of their royalties.

³⁵ 37 CFR 210.16(c)(2).

³⁶ See U.S. Copyright Office, Interim Rule, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the **Federal Register**.

³⁷ MLC NPRM Comment at 6.

²⁹ *Id.* at 3-4.

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.* Under rules the Office is promulgating in a separate proceeding, DMPs may report adjustments in combination with their annual report of usage, but they are not required to do so. See U.S. Copyright Office, Interim Rule, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the **Federal Register**.

³³ The Office notes the use of the term "featured artist" as one of the required sound recording information fields reported on royalty statements. In comments responding to a separate notification of inquiry, the Alliance for Recorded Music ("ARM") raised a concern that the term could cause "confusion," saying, "[f]rom a digital supply chain perspective, 'primary artist' is the preferred term as 'featured artist' is easily confused with the term 'featured' on another artist's recording, as in Artist X feat. Artist Y." ARM NOI Comment at 6, U.S. Copyright Office Dkt. No. 2020-8, available at <https://beta.regulations.gov/document/COLC-2020-0006-0001>. The Office appreciates ARM's concern, but will continue to use the term "featured artist"

²⁵ *Id.* SoundExchange asserted in its comments that "[u]nder the Section 112/114 statutory licenses . . . it routinely receives late payments and reporting." SoundExchange NPRM Comment at 6.

²⁶ MLC *Ex Parte* Letter Aug. 16, 2020 at 7; see 17 U.S.C. 115(d)(3)(H)(ii).

²⁷ See U.S. Copyright Office, Notice of Proposed Rulemaking, *The Public Musical Works Database and Transparency of the Mechanical Licensing Collective*, Dkt. No. 2020-8, published elsewhere in this issue of the **Federal Register**.

²⁸ MLC NPRM Comment at 3.

MLC expressed concern that unless the regulations explicitly require it to report this information to copyright owners, the Office's separate confidentiality regulations might prevent disclosure.³⁸ The Office has added an explicit requirement in the regulations to clarify that the accounting information would not be considered confidential information and its disclosure to copyright owners by the MLC could not be prevented under confidentiality regulations.³⁹

Several commenters suggested making certain content fields mandatory to report, including IPI, ISWC, and universal product code (UPC), which the Office has done.⁴⁰ In doing so, the Office reiterates that the interim rule only establishes a floor of what the MLC can report, and the Office understands that the MLC intends to report most, if not all, information it receives regarding royalties to copyright owners.⁴¹

The NPRM also solicited comments on whether the phrase “known to the MLC” is “an appropriate standard for triggering an obligation to report information that the MLC is not expected to have for all musical works, sound recordings, and/or copyright owners?”⁴² The MLC responded affirmatively,⁴³ while SGA disagreed and said the MLC should be required to undertake best efforts to collect information it does not have.⁴⁴ After considering the comments, the Office

has determined that “known to the MLC” is an appropriate standard for reporting certain types of information to copyright owners that the MLC may not necessarily have. To the extent the MLC has obligations to collect information related to identification of musical works and sound recordings, those obligations are already addressed elsewhere in the statute.⁴⁵ To report and distribute royalties, the MLC will need sufficient information to have matched the royalties to the works and identified the copyright owner, so any efforts to collect information and identify works and copyright owners—including policies and procedures for verifying information received from third parties and dealing with potentially conflicting information—occurs at an earlier stage than the one addressed by this rule, and the information reported to copyright owners will presumably also connect to information that the MLC makes available through the statutorily-prescribed public database. Additionally, the MLC has commented that it “intends to provide as much data in the royalty statements as it has and that may be useful to copyright owners.”⁴⁶

Delivery of royalty statements. The Office has clarified the provision regarding delivery of royalty statements to copyright owners to address issues raised by commenters. The interim rule provides that, by default, royalty statements will be delivered to copyright owners electronically, including through a password-protected online portal.⁴⁷ The Office understands the MLC intends to provide a number of alternative types of royalty reporting at the request of copyright owners, but the interim rule states that at a minimum the MLC will provide a simplified report containing fewer data fields at the request of copyright owners.⁴⁸ The interim rule has also updated this provision with respect to the provision of paper statements. As the MLC has requested, the provision clarifies that a

copyright owner may request to receive royalty statements by mail, and the MLC will be obliged to send a physical copy in simplified or summary format upon request where the statement reports “a total royalty payable to the copyright owner for the month covered that is equal or greater than \$100.”⁴⁹

Certification. In a carry-over from a requirement of the song-by-song statutory licensing regime, the NPRM proposed to require the MLC to certify monthly royalty statements under the blanket license where the total royalties distributed during the period covered by the statement exceed \$100 using one of two statements.⁵⁰ This proposal was “applaud[ed]” by SGA,⁵¹ and, as noted in the NPRM, had been supported by Music Reports in an earlier stage of comment.⁵² SoundExchange, however, called the requirement “unfair and unnecessary” because “the MLC simply cannot know if the service provider’s royalty calculations and usage data were accurate.”⁵³ The MLC voiced similar concerns, noting that the cost of the associated annual audit that would be required under the second proposed certification statement “is expected to exceed \$100,000—an expenditure that was not contemplated in the MLC’s initial budgeting.”⁵⁴ The MLC proposed that the requirement be removed entirely or, alternatively, be amended with language suggested by the MLC,⁵⁵ which clarifies that “[t]he MLC can only certify its allocation and statementing processes.”⁵⁶ The MLC sought an *ex parte* meeting to agree with the concerns raised by SoundExchange with respect to the MLC’s inability to certify the accuracy of data on usage and royalty pools that emanates from the DMPs rather than the MLC, and proposed alternate language if the Office elected to retain the certification requirement.⁵⁷

As background, the Office notes that the MMA includes additional

⁴⁹ MLC NPRM Comment App. at iv; MLC NPRM Comment at 9–11 (describing potential “operational and cost difficulties” necessitating this threshold); see also SoundExchange NPRM Comment at 13–14 (describing operational concern with language that would entitle receipt of “monthly payments by an expensive payment method even when the payment is only one cent”).

⁵⁰ Under the non-blanket statutory license, licensees are required to certify to the truth of the statements made in monthly statements of account. 37 CFR 210.16(f). Annual statements of account are required to be certified by a Certified Public Accountant. 37 CFR 210.17(f).

⁵¹ SGA NPRM Comment at 8.

⁵² 85 FR at 22556 (citing Music Reports Initial NOI Comment at 5).

⁵³ SoundExchange NPRM Comment at 10–12.

⁵⁴ MLC NPRM Comment at 11.

⁵⁵ *Id.* at 11, App. at v.

⁵⁶ MLC *Ex Parte* Letter Aug. 16, 2020 at 6; see MLC NPRM Comment at 11.

⁵⁷ MLC *Ex Parte* Letter Aug. 16, 2020 at 5–7.

³⁸ *Id.* at 7.

³⁹ *Id.*

⁴⁰ CISAC & BIEM NPRM Comment at 4; SONA & MAC NPRM Comment at 4–5.

⁴¹ The Office declines to adopt SGA’s suggestion that royalty splits reported on statements be subject to confidentiality requirements. SGA NPRM Comment at 6, 7. The MMA expressly forecloses the possibility for ownership shares of musical works to remain confidential because this information is required to be included in the public musical works database. 17 U.S.C. 115(d)(3)(E)(i). The Office has previously considered and rejected confidentiality requirements that would prevent disclosure and use of information included in Statements of Account under the song-by-song license. 79 FR 56190, 56206 (Sept. 18, 2014) (noting such a proposal would have “barred copyright owners from disclosing the contents of the statements of account to other parties who were downstream beneficiaries of the statutory royalties (such as songwriters entitled to receive a share of the royalties as part of their publishing contracts.)”). The Office notes additionally that in a concurrent proceeding on confidentiality requirements, one songwriter group has strongly opposed placing any confidentiality obligations on copyright owners regarding information contained in royalty statements issued to them. SONA NPRM Comment at 3–4, U.S. Copyright Office Dkt. No. 2020–7, available at <https://beta.regulations.gov/document/COLC-2020-0004-0001>. The MLC has expressed the same concern in this proceeding. MLC NPRM Comment at 7. See generally 85 FR 22559, 22561 (Apr. 22, 2020).

⁴² 85 FR at 22557–58.

⁴³ MLC NPRM Comment at 14.

⁴⁴ SGA NPRM Comment at 7.

⁴⁵ 17 U.S.C. 115(d)(3)(C)(i)(III), (d)(3)(C)(i)(V). The statute also creates obligations for musical work copyright owners and DMPs to engage in efforts to provide information to the MLC. *Id.* at 115(d)(3)(E)(iv), (d)(4)(B).

⁴⁶ MLC NPRM Comment at 13; see also *id.* (“The Proposed Regulation is clear that it is identifying the minimum level of data that must be provided in monthly royalty statements.”).

⁴⁷ SGA endorsed the electronic delivery of royalty statements by default. SGA NPRM Comment at 4–5. SoundExchange noted the impracticalities of delivering statements by paper and even email given the file sizes involved. SoundExchange NPRM Comment at 14.

⁴⁸ MLC NPRM Comment at 13 (“[T]he MLC intends to make all information that would be helpful to copyright owners in a number of meaningful ways.”).

verification mechanisms. Correcting the longstanding lack of an audit right under the old section 115 statutory license in contrast to voluntary licensing practices, it allows the MLC to “conduct an audit of a digital music provider operating under the blanket license to verify the accuracy of royalty payments by the digital music provider to the mechanical licensing collective.”⁵⁸ And it added two separate audit provisions for the MLC itself. First, the statute requires the MLC itself to retain a qualified auditor to examine the books, records, and operation of the MLC beginning in the fourth full calendar year after initial designation of the MLC and every five years afterward.⁵⁹ The auditor is required to prepare a report addressing “the implementation and efficacy of procedures of the mechanical licensing collective—(AA) for the receipt, handling, and distribution of royalty funds, including any amounts held as unclaimed royalties; (BB) to guard against fraud, abuse, waste, and the unreasonable use of funds; and (CC) to protect the confidentiality of financial, proprietary, and other sensitive information.”⁶⁰ The report is required to be delivered to the MLC’s board of directors and the Register of Copyrights and be made publicly available.⁶¹ The MMA also permits a copyright owner entitled to receive payments of royalties for covered activities from the mechanical licensing collective to conduct an audit of the mechanical licensing collective to verify the accuracy of royalty payments by the mechanical licensing collective to such copyright owner.⁶² The MMA’s adoption of these audit provisions had been praised by stakeholders, although some have also noted that the adopted language also carries limits.⁶³

Considering these provisions and the additional comments, the Office has retained the certification requirement, but with adjustments in light of the MLC and SoundExchange’s comments. As explained in the NPRM, while the certification of usage reports by the DMPs, as required by the statute, serves

an important purpose, that certification does not account for the additional processing of statements performed by the MLC, and the new audit right may not ameliorate the value of certification to copyright owners, including the minority of owners accustomed to receiving monthly certifications under the prior song-by-song statutory licensing system.⁶⁴ The Office acknowledges that it would be inappropriate for the MLC to certify as to facts and processes outside its control, and is therefore modifying the scope of the certification requirement to limit the statement to those facts that the MLC has knowledge about, as the MLC has proposed. The Office is also deferring (but not eliminating) the CPA review requirement for one year to provide time for the MLC to undertake a CPA examination of its processes and internal controls. Overall, this requirement is intended to assure copyright owners that the various inputs and calculations that result in a final royalty payment are verified, as is presently the case with the non-blanket license, although in this case the certification has been split to reflect the respective duties of the DMPs and the MLC.

Payment thresholds. Several commenters noted that the proposed minimum payment thresholds of \$2 for direct deposit, \$100 for paper checks, and \$250 for wire transfer in the NPRM were appropriate;⁶⁵ however, both the MLC and SoundExchange found them low.⁶⁶ The MLC provided a table of payment thresholds from various U.S. and foreign collective management organizations and rights management organizations in one of its *ex parte* submissions, which helpfully provides data points for industry practices on this issue.⁶⁷ Based on these submissions, the interim rule raises the minimum payment threshold for direct deposit from \$2 to \$5, as suggested by the MLC.⁶⁸ These thresholds are ceilings; the MLC may in its judgment establish lower thresholds.⁶⁹

The interim rule adds an additional provision, at the MLC’s request, specifying that where the collective elects to defer the royalty payment and statement because the accrued royalties did not exceed the applicable threshold, if a copyright owner submits a written request, the mechanical licensing collective will make available information detailing the accrued unpaid royalties processed as of the date of the request, and removes the proposed provision that would obligate the MLC to pay royalties below the \$5 threshold upon such requests.⁷⁰ This clarification is intended to promote operational efficiencies while still preserving the ability of copyright owners to obtain sufficient information with respect to accrued royalties below the \$5 threshold.⁷¹

Annual statements. The NPRM did not require the MLC to provide annual statements to musical work copyright owners, but sought comment on this issue. In response, the MLC agreed with the proposed rule’s approach, stating “a regulation at the outset of its operations requiring reporting in annual statements that would not, as acknowledged, provide any additional information would be overly prescriptive.”⁷² But CISAC & BIEM,⁷³ FMC,⁷⁴ and SGA⁷⁵ commented in support of requiring an annual statement. SGA wrote, “Annual Statements serve an important purpose for small businesses (including independent creators acting as their own music publishing entities), which generally lack extensive accounting resources and need as many available resources as possible in conducting their own annualized, internal bookkeeping audits.”⁷⁶ FMC similarly said annual statements “would be helpful for small publishers and self-published writers’ accounting and tax purposes” and added that “while the MMA did not include making accounting more efficient for smaller copyright holders as an explicit objective, it conforms to the overarching goal of creating a more functional ecosystem.”⁷⁷

due to the COVID–19 pandemic and its aftermath.” SGA NPRM Comment at 8. The interim rule would permit the MLC to do just that.

⁷⁰ MLC NPRM Comment at 9, App. at v–vi.

⁷¹ *Id.* at 9 (“[A]n unfettered ability to request royalty statements for royalties falling below the threshold would substantially increase the MLC’s processing costs and would require the MLC to engage in additional technological programming to accommodate these requests.”).

⁷² MLC NPRM Comment at 13–14.

⁷³ CISAC & BIEM NPRM Comment at 4.

⁷⁴ FMC NPRM Comment at 2.

⁷⁵ SGA NPRM Comment at 8–9.

⁷⁶ *Id.* at 9.

⁷⁷ FMC NPRM Comment at 2.

⁵⁸ 17 U.S.C. 115(d)(4)(D). See U.S. Copyright Office, Copyright and the Music Marketplace 108–09 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (decrying lack of audit right); Tr. at 7036:14–21 (May 19, 2008), Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. 2006–3–CRB DPRA, <https://app.crb.gov/case/viewDocument/12669> (describing audit process under voluntary licenses).

⁵⁹ 17 U.S.C. 115(d)(3)(D)(ix)(II).

⁶⁰ *Id.* at 115(d)(3)(D)(ix)(II)(bb).

⁶¹ *Id.* at 115(d)(3)(D)(ix)(II).

⁶² *Id.* at 115(d)(3)(L).

⁶³ See, e.g., Lowery Reply NOI Comment at 7, 11.

⁶⁴ 85 FR at 22556.

⁶⁵ SGA NPRM Comment at 8; FMC NPRM Comment at 2.

⁶⁶ SoundExchange NPRM Comment at 12–13 (“Making frequent small payments to some copyright owners (particularly by an expensive payment method) diverts resources that otherwise could be used to benefit royalty recipients generally, such as by the MLC’s hiring more customer service representatives, investing in improvements to its copyright owner portal, or engaging in outreach to unregistered publishers.”).

⁶⁷ MLC *Ex Parte* Letter Apr. 3, 2020 at 12.

⁶⁸ MLC NPRM Comment at 8.

⁶⁹ SGA suggested lowering the payment threshold “in light of the difficult economic times many music creators are facing or are about to confront

The MLC responded to these comments in a follow-up *ex parte* meeting.⁷⁸ There, the MLC represented that “it intends to provide copyright owners with the ability to access their royalty information in a number of ways through the MLC Portal, including to allow copyright owners to view reports of information on an annual basis.”⁷⁹ It reiterated that it does not believe regulations should include a formal requirement to provide annual reports, saying the best way to address songwriters’ needs for annual statements “will be by providing functionality in the MLC Portal that enables songwriters and publishers to view their royalty data across multiple periods that *they* select,” and adding that “[t]his approach will allow each copyright owner to define the start and end dates of these annual (or other) periods based on their own preferences (e.g., calendar year versus fiscal year).”⁸⁰

The Office appreciates the MLC’s response. While its proposed approach is not unreasonable, the Office ultimately concludes that, given the requirement for annual statements in the existing song-by-song compulsory license, the support expressed by other commenters for regulatory certainty with respect to an annual statement requirement, and the MLC’s intent to provide the ability to generate annual statements, it is appropriate for the interim rule to include an annual statement requirement. As noted, other comments indicate that certainty of an annual roll-up may be beneficial to smaller businesses, and so the regulatory language requires the MLC to deliver a cumulative statement including the information reported in monthly statements as well as any adjustment. But the language adopted provides the MLC with flexibility in implementing it, and it seems it would not require any more from the MLC than what it is already planning to provide. But at the same time, it communicates a level of certainty for purpose of stakeholder expectations and planning, which is intended to further the overall operation of the blanket license regime.

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

Interim Regulations

For the reasons set forth in the preamble, the Copyright Office amends 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 B—Blanket Compulsory License for Digital Uses, Mechanical Licensing Collective, and Digital Licensee Coordinator

■ 2. Add § 210.29 to read as follows:

§ 210.29 Reporting and distribution of royalties to copyright owners by the mechanical licensing collective.

(a) *General.* This section prescribes reporting obligations of the mechanical licensing collective to copyright owners for the distribution of royalties for musical works, licensed under the blanket license for digital uses prescribed in 17 U.S.C. 115(d)(1), that have been matched, either through the processing by the mechanical licensing collective upon receipt of a report of usage and royalty payment from a digital music provider, or during the holding period for unmatched works as defined in 17 U.S.C. 115(d)(3)(H)(i).

(b) *Distribution of royalties and royalty statements.* (1) Royalty distributions shall be made on a monthly basis and shall include, separately or together:

(i) All royalties payable to a copyright owner for a musical work matched in the ordinary course under 17 U.S.C. 115(d)(3)(G)(i)(II); and

(ii) All accrued royalties for any particular musical work that has been matched and a proportionate amount of accrued interest associated with that work.

(2) Royalty distributions based on adjustments to reports of usage by digital music providers in prior periods shall be made by the mechanical licensing collective at least once annually, upon submission of the annual reports of usage by digital music providers reporting total adjustments to the mechanical licensing collective pursuant to § 210.27(f) and (g)(3) and (4).

(3) Royalty distributions shall be accompanied by corresponding royalty statements containing the information set forth in paragraph (c) of this section for the royalties contained in the distribution.

(c) *Content.*—(1) *General content of royalty statements.* Accompanying the distribution of royalties to a copyright owner, the mechanical licensing

collective shall provide to the copyright owner a statement that includes, at a minimum, the following information:

(i) The period (month and year) covered by the statement, and the period (month and year) during which the reported activity occurred. For adjustments, the mechanical licensing collective shall report both the period (month and year) during which the original reported activity occurred and the date on which the digital music provider reported the adjustment.

(ii) The name and address of the mechanical licensing collective.

(iii) The name and mechanical licensing collective identification number of the copyright owner.

(iv) ISNI and IPI name and identification number for each songwriter, administrator, and musical work copyright owner, to the extent it has been provided to the mechanical licensing collective by a copyright owner.

(v) The name and mechanical licensing collective identification number of the copyright owner’s administrator (if applicable), to the extent one has been provided to the mechanical licensing collective by a copyright owner.

(vi) Payment information, such as check number, automated clearing house (ACH) identification, or wire transfer number.

(vii) The total royalty payable to the relevant copyright owner for the month covered by the royalty statement.

(2) *Musical work information.* For each matched musical work owned by the copyright owner for which accompanying royalties are being distributed to that copyright owner, the mechanical licensing collective shall report the following information:

(i) The musical work name, including primary and any alternative and parenthetical titles for the musical work known to the mechanical licensing collective.

(ii) ISWC for the musical work, to the extent it is known to the mechanical licensing collective.

(iii) The mechanical licensing collective’s standard identification number of the musical work.

(iv) The administrator’s unique identifier for the musical work, to the extent one has been provided to the mechanical licensing collective by a copyright owner or its administrator.

(v) The name(s) of the songwriter(s), to the extent they are known to the mechanical licensing collective.

(vi) The percentage share of musical work owned or controlled by the copyright owner.

⁷⁸ See MLC *Ex Parte* Letter Aug. 16, 2020 at 8–9.

⁷⁹ *Id.* at 8.

⁸⁰ MLC *Ex Parte* Letter Aug. 16, 2020 at 8–9.

(vii) For each sound recording embodying the musical work, the identifying information enumerated in paragraph (c)(3) of this section and the royalty information enumerated in paragraph (c)(4) of this section.

(3) *Sound recording information.* (i) For each sound recording embodying a musical work included in a royalty statement, the mechanical licensing collective shall report the following information:

(A) The sound recording name(s), including all known alternative and parenthetical titles for the sound recording.

(B) The featured artist(s).

(ii) The mechanical licensing collective shall report the following information to the extent it is known to the mechanical licensing collective:

(A) The record label name(s).

(B) ISRC(s).

(C) The sound recording copyright owner(s).

(D) Playing time.

(E) Album title(s) or product name(s).

(F) Album or product featured artist(s), if different from sound recording featured artist(s).

(G) Distributor(s).

(H) UPC(s).

(4) *Royalty information.* The mechanical licensing collective shall separately report, for each service, offering, or activity reported by a blanket licensee, the following royalty information for each sound recording embodying a musical work included in a royalty statement:

(i) The 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.

(ii) The service tier or service description.

(iii) The use type (download, limited download, or stream).

(iv) The number of payable units, including, as applicable, permanent downloads, plays, and constructive plays.

(v) A detailed and step-by-step accounting of the calculation of royalties under applicable provisions of part 385 of this title, sufficient to allow the copyright owner to assess the manner in which the royalty owed was determined and the accuracy of the royalty calculations, which shall include details on each of the components used in the calculation of the payable royalty pool.

(vi) The royalty rate and amount.

(vii) The interest amount.

(viii) The distribution amount.

(d) *Cumulative statements of account, and adjustments.* (1) For royalties

reported under paragraph (b)(1)(ii) of this section, the mechanical licensing collective shall provide a cumulative statement of account that includes, in addition to the information in paragraph (c) of this section, a clear identification of the total period covered and the total royalty payable for the period.

(2) For adjustments reported under paragraph (b)(2) of this section, the mechanical licensing collective shall clearly indicate the original reporting period of the royalties being adjusted.

(e) *Delivery of royalty statements.* (1) Royalty statements may be delivered electronically, including by providing access to statements through an online password protected portal, accompanied by written notification of the availability of the statement in the portal.

(2) The mechanical licensing collective shall provide by request a separate, simplified report containing fewer data fields that may be more understandable for the copyright owner, and may provide royalty information to copyright owners by request in alternative formats.

(3) Upon written request of the copyright owner, the mechanical licensing collective may deliver a physical statement by mail where the statement reports a total royalty payable to the copyright owner for the period covered that is equal or greater than \$100. Royalty statements delivered by mail are not required to contain all information identified in paragraph (c) of this section, but may instead provide information in a simplified or summary format.

(f) *Clear statements.* The information required by paragraph (c) of this section requires intelligible, legible, and unambiguous statements in the royalty statements without incorporation of facts or information contained in other documents or records.

(g) *Certification.* (1) Each royalty statement in which the total royalty payable to the relevant copyright owner for the month covered is equal to or greater than \$100 shall be accompanied by:

(i) The name of the person who is signing and certifying the statement.

(ii) A signature of a duly authorized officer of the mechanical licensing collective.

(iii) The date of signature and certification.

(iv) The title or official position held by the person who is signing and certifying the statement.

(v) The following statement: This statement was prepared by the Mechanical Licensing Collective and/or its agent using processes and internal controls that were suitably designed to

generate monthly statements that accurately allocate royalties using usage and royalty information provided by digital music providers and musical works information as reflected in the Mechanical Licensing Collective's musical works database.

(2) Beginning in the first calendar year following the license availability date, the certification must also include a statement establishing that such processes and internal controls 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 so suitably designed.

(h) *Reporting threshold.* (1) Subject to paragraph (h)(2) of this section, a separate royalty statement shall be provided for each month during which there is any activity relevant to the distribution of royalties under the blanket license.

(2) Royalties under the blanket license shall not be considered payable, and no royalty statement shall be required, until the cumulative unpaid royalties collected for the copyright owner equal at least one cent. Moreover, in any case in which the cumulative unpaid royalties under the blanket license that would otherwise be distributed by the mechanical licensing collective to the copyright owner are less than \$5 if the copyright owner receives payment by direct deposit, \$100 if the copyright owner receives payment by physical check, or \$250 if the copyright owner receives payment by wire transfer, the mechanical licensing collective may choose to defer the payment date for such royalties and provide no royalty statements until the earlier of the time for rendering the royalty statement for the month in which the unpaid royalties under the blanket license for the copyright owner exceed the threshold, at which time the mechanical licensing collective may provide one statement and payment covering the entire period for which royalty payments were deferred.

(3) Where the mechanical licensing collective elects to defer the royalty payment and statement to a copyright owner pursuant to paragraph (h)(2) of this section because the accrued royalties did not exceed the applicable threshold, and if a copyright owner submits a written request, the mechanical licensing collective shall make available to that copyright owner information detailing the accrued unpaid royalties processed as of the date of the request.

(4) If the mechanical licensing collective is required, under applicable tax law and regulations, to make backup withholding from its payments required hereunder, the mechanical licensing collective shall indicate the amount of such withholding on the royalty statement or on or with the distribution.

(i) *Annual statement.* The mechanical license collective shall provide an annual statement by electronic means to

any copyright owner who has received at least one royalty statement under paragraph (h)(1) of this section in the calendar year preceding. The annual statement shall include a cumulative statement of the information reported in the monthly royalty statements in the year preceding, as well as a statement of any adjustments to royalty distributions reported in the year preceding.

Dated: September 3, 2020.

Maria Strong,

Acting Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

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