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WASHINGTON, D.C.

Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective	)	Docket No. 2020-12

COMMENTS OF DIGITAL LICENSEE COORDINATOR, INC.
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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Digital Licensee Coordinator, Inc. ("DLC"), appreciates the efforts that the Copyright Office has made to date as part of the regulatory implementation of the Hatch-Goodlatte Music Modernization Act (the "MMA"),[1] and its continued engagement on the complex issues that have been raised.

The Office's most recent NPRM covers topics related to the transfer and reporting of accrued royalties to the Mechanical Licensing Collective ("MLC") pursuant to the limitation on liability provision in 17 U.S.C. § 115(d)(10). There are two parts to the Office's NPRM: (1) revised rules related to the cumulative statements of account that must be served with accrued royalties; and (2) the treatment of payments made pursuant to agreements that required the distribution of unmatched royalties that predate the MMA's enactment.

With respect to the first topic, the DLC supports many of the changes in the proposed rule, to the degree they essentially copy the relevant provisions of the existing Monthly Statement of Account rules in § 210.16 and incorporate them into the regulation relating to the cumulative statement of account in § 210.20. DLC also welcomes the Office's clarifications related to (1) the provision regarding reconciliation, and (2) the specific text for the required certification. DLC also supports the Office's approach to refunds for overpayment of royalties, but proposes the adoption of a more general cure provision for any necessary adjustments. We also support providing information regarding partially matched works to ensure that the appropriate copyright owners are paid, as long as digital music providers ("DMPs") that do not have that information because of confidentiality restrictions in contracts with third-party vendors are not required to provide it in order to claim the benefits of the MMA's limitation on liability.

The DLC emphatically opposes the Office's proposal to retroactively expand the required reporting of sound recording and musical work information beyond that which is required by the existing regulations in 37 C.F.R. § 210.20. Those regulations were issued in interim form in December 2018, and finalized in March 2019, and unambiguously required collection of reporting information under the existing monthly statement of account regulations in 37 C.F.R. § 210.16. The Office has now proposed, in paragraph (e) of the proposed rule, to change the required reporting elements for the individual tracks, nearly two years after the MMA's enactment and months before cumulative statements of account are due to be served. Complying with these rule changes *now* would be practically impossible: digital music providers (and their vendors) have been operating under the existing rules since they were promulgated, and have collected data to deliver to the MLC in the cumulative statement of account based on those rules. It is simply too late to change the rules now, mere months before license availability date. Nor are these changes likely to meaningfully advance the MLC's matching efforts, especially compared to the other tools with which the MLC is now equipped. Instead, the introduction of a "practicability" standard regarding collection of historical unmatched data will create legal uncertainty around the limitation on liability, and associated litigation risk, that is both inconsistent with the statute's clear requirements and a threat to the purpose for which it was enacted.

[1] 85 Fed. Reg. at 22569.

Moreover, as DLC has previously explained,[2] the Office lacks legal authority to adopt this proposal—the statute is clear that DMPs are only required to report the information that "would have been provided" to copyright owners under the existing statement of account rules.[3] That specific, past-tense formulation was chosen by Congress on purpose, to ensure that services with accrued royalties could provide reporting.

With respect to the second topic, the Office "tentatively" declined to offer regulatory language regarding the interaction of preexisting agreements that required distribution of unclaimed royalties to copyright owners and cumulative reporting obligations, noting that the specific terms of the agreements would be highly relevant to resolving the issue, but that the Office had not yet seen the agreements. The Office invited further dialogue around this issue. DLC welcomes the opportunity to provide additional background regarding the agreements at issue—and to further explain why regulation is needed.[4]

This issue is extremely important to DMPs. It is well-known that—prior to enactment of the MMA—a number of DMPs entered into industry-wide royalty distribution agreements under the auspices of the NMPA, structured to allow all unmatched works to be claimed by their owners and all accrued royalties to be paid out, in what became the model for the MMA. These agreements were designed to, and did, put tens of millions of dollars in statutory royalties in the hands of copyright owners—money that they had been unable to access due to the broken pre-MMA statutory royalty system.

Ignoring that fact—and potentially forcing DMPs to pay to the MLC statutory royalty amounts covering the same unmatched usage—would not only unfairly double each digital music provider's liability for the periods covered by the NMPA agreements, but also would inevitably result in unfair double payments to many copyright owners.

Moreover, Congress in the MMA's limitation on liability provision enacted a compromise among stakeholders' interests: elimination of the uncertainty of litigation facing DMPs in exchange for the transfer of accrued royalties to the MLC.[5] Without clarity about what the MMA requires, services could in the future face significant litigation burdens from infringement claims premised on an asserted lack of compliance with the MMA's prerequisites—and therefore unavailability of the liability safe harbor—with uncertainties about compliance resolved by the

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[2] *See* DLC's Reply Comments in Docket No. 2019–5 at 24.

[3] 17 U.S.C. § 115(d)(10)(B)(iv)(II)(aa), (d)(10)(B)(iv)(III)(aa).

[4] *See* DLC's *Ex Parte* Letter of August 11, 2020 at 1.

[5] Specifically, Congress explained (in a section of the relevant committee and conference reports entitled "termination of prior litigation") that "a key component that was necessary to bring the various parties together in an effort to reach common ground" was "limiting liability for digital music providers after January 1, 2018, so long as they undertake certain payment and matching obligations." S. Rep. 115-339, at 14 (2018). Congress further explained that it intended to terminate this prior litigation because "continued litigation generates unnecessary administrative costs, diverting royalties from artists." *Id.*; *see also* H.R. Rep. No. 115–651, at 13-14; 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).

various district courts hearing such infringement claims. Faced with that risk, DMPs may be forced to *retain* accrued royalties to fund that litigation. That is precisely what the MMA was supposed to prevent—and a clarifying regulation is therefore essential to ensure that the MMA functions as Congress intended.

As set forth in the relevant statutory provision, in exchange for payment of accrued royalties from "unmatched" usage prior to license availability date (and related reporting), DMPs are protected from the full brunt of copyright damages in any infringement lawsuits based on alleged failures to comply with the requirements of the prior mechanical licensing regime.[6] The provision provides a clean slate for any past failures under the prior licensing regime for those DMPs who pay those back royalties and provide associated reporting. It provides requirements for DMPs that seek to take advantage of the limitation on liability, ensuring that DMPs that pay accrued royalties to the MLC can do so without having to second-guess whether the payment was worth it—that is, whether they qualify for the limitation.

This was the heart of the deal struck by the stakeholders in crafting the MMA: to provide legal certainty for DMPs, through a limitation on liability, in exchange for the transfer of accrued royalties. That is a crucial point for the Office to keep in mind as it crafts rules in this space. If the regulations make it less likely that a DMP will be able to rely on that liability protection when it needs it—*i.e.,* if it increases the risk that a court would deem a DMP to not have complied with the requirements in section 115(d)(10)—a DMP could make the rational choice to forego the payment of accrued royalties entirely, and save that money to use in defending itself against any infringement suits.

That is not a result intended by Congress or one that any DLC member wants or bargained for. DMPs supported enactment of the MMA fully intending to pay over any accrued royalties still on their books, with the assurance that the limitation on liability the MMA establishes in exchange will protect them from ruinous litigation. The Office's rulemaking in this area should, first and foremost, preserve that key bargain.

I. PROPOSED RULE ON CUMULATIVE STATEMENT OF ACCOUNT CONTENT AND FORMAT

A. The Office's proposals requiring explanation of differences between amounts reflected in the cumulative statement and the amount transferred, and providing more specific certification language, are reasonable and appropriate.

The Copyright Office has proposed a regulation that requires DMPs to provide a "clear and detailed explanation" of any difference between "the total royalty payable" as reported on the cumulative statement of account (which reflects the royalties for all unmatched usage) and the "royalties actually transferred to the mechanical licensing collective."[7] We agree with this proposal, with one minor modification: we would suggest changing the phrase "total royalty *payable*" to "total royalty *reported*," to avoid any suggestion that the amount reflected on the

[6] *See generally* 17 U.S.C. § 115(d)(10).

[7] Proposed Rule § 210.20(c)(6).

cumulative statement of account is necessarily "payable" to the MLC. DLC otherwise agrees with the Office that the MLC is entitled to such an explanation when there are such discrepancies.

The Copyright Office has also proposed "a technical change" to the existing certification provision "to include the actual language for clarity (with appropriate conforming edits), rather than merely referring to the 'certification required by § 210.16.'"[8] DLC supports this technical change, since (as the Office has explained) no substantive change is intended. *Id.* (As noted below, DLC members have interpreted the reference to using "processes and internal controls that were subject to an examination, *during the past year*, by a licensed certified public accountant," to refer to the CPA examination that has happened for the 2019 annual statements of account, which were distributed to publishers earlier this calendar year, rather than to a *new* CPA certification related to the cumulative statement of account.)

B. The Office should generalize its proposal regarding overpayments, and adopt a more general cure provision permitting upward and downward adjustments.

The Copyright Office has proposed a provision that allows any overpayments of royalties to be credited to the DMP's account, or refunded upon request.[9] The DLC agrees that this mechanism for refund is critically important, but proposes making the adjustment scheme more general, to allow DMPs to adjust or cure the accrued royalties paid or the cumulative statement of account if an inaccuracy is discovered.

This ability to adjust and correct monthly (and annual) reporting based on later-understood facts has long existed under the preexisting reporting regime,[10] and is part of the Office's proposed blanket license reporting regulations as well.[11] There are a number of reasons such a mechanism is necessary. For instance, the "accrued royalties" that must be paid to the MLC will include royalties from calendar year 2020. The final amount of royalties owed for this year, however, will depend on, among other things, the amount of payments made to labels and performing rights organizations during 2020, which amounts will more than likely not be finally determined by the time accrued royalties are required to be paid to the MLC. (Under the existing regulations, DMPs have six months following either the end of the relevant fiscal year, or following the determination of performing rights costs for a fiscal year, to determine such adjustments before filing annual statements of account, or amended annual statements of account, respectively.) It is possible those adjustments could require additional payments to the MLC, instead of a refund. Such a correction mechanism is similarly necessary for prior accounting periods. Unlike the statutory license for webcasting in section 114, which features relatively simple per-play royalty calculations, royalties under section 115 are a function of multiple complex inputs including record label and performing rights organization compensation, calculation of various per-subscriber floors, overtime adjustments, and more. Given these complexities, it is easy to imagine that a DMP discovers a mistake after the fact or receives revised inputs that would require an adjustment to the statement or to the amount of the accrued royalties paid. This need for ongoing adjustment has only been

[8] 85 Fed. Reg. at 43520; *see* Proposed Rule § 210.20(j)(5)(ii).

[9] 85 Fed. Reg. at 43520; see Proposed Rule § 210.20(i)(3).

[10] *See, e.g.*, 37 C.F.R. § 210.16(d)(3)(i); *id.* § 210.27(d)(2)(i)(B)(iii).

[11] *E.g.*, 85 Fed. Reg. at 22527-28, 22530; Proposed Rule § 210.27(d)(2).

highlighted by the D.C. Circuit's recent decision to vacate the Copyright Royalty Board's *Phonorecords III* rate determination; as a result, the cumulative statements will undoubtedly need to be adjusted to account for the new rates when they come into force.

Including a provision allowing a service to cure these kinds of foreseeable and unforeseeable scenarios is necessary to preserve the core bargain struck in the MMA, and to preserve the longstanding ability of all parties to provide, or receive, as applicable, reporting and payment based on the most accurate information available. Again, DLC members intend to ensure that correct amounts of accrued royalties and the necessary reporting are delivered to the MLC, so that royalties can be paid to copyright owners. But if updated information regarding royalty calculation inputs, or an omission, error or change in reporting, or otherwise, is deemed to eliminate the limitation on liability, then the DMPs will have paid over a huge sum in accrued royalties without gaining the key benefit—the limitation on liability—in return.[12] The risk of such a draconian result would counsel against paying over such accrued royalties and, instead, holding them to cover inevitable litigation expenses.

C. DLC understands the need to provide information relating to partially matched works, but certain DMPs face substantial barriers to complying with such a regulatory requirement.

The proposed rule requires specific reporting related to partially matched and paid shares. Specifically, with respect to "a share of a musical work [that] has been matched and for which accrued royalties for such share have been paid, but for which one or more shares of the musical work remains unmatched and unpaid," a DMP must provide "a clear identification of the share(s) that have been matched, the owner(s) of such matched shares, and, for shares other than those paid pursuant to a voluntary license, the amount of such accrued royalties paid."[13] As the Office describes the issue, "if the paid share is not properly identified, there is a risk that a paid co-owner would be able to collect a portion of an unpaid co-owner's share."[14]

The DLC does not deny that there is a legitimate issue that needs to be resolved here; the DLC's members have every interest in ensuring that the correct copyright owners are paid for the use of their works. But it is not possible to resolve that issue through regulation of the DMPs. As DLC noted in its comments on the issue, many major services have used third-party vendors to process payments. One of those vendors, Music Reports Inc., has notified its client DMPs that it is unwilling to share any musical work ownership share information with the MLC or the DMPs, as it regards that information to be proprietary. Other vendors may take a similar position. In

[12] Indeed, if the only provision for adjustments is a refund and not correction of an overpayment, then a DMP who loses the coverage of the limitation on liability would certainly seek a refund of the entire amount paid. This is a far worse result for the MLC and for copyright owners—and surely not what Congress intended—than allowing the DMP to instead make an additional payment when one would be warranted.

[13] Proposed Rule § 210.20(e)(6).

[14] 85 Fed. Reg. at 43521.

addition, there is also an issue related to voluntary licenses, in that the information that publishers provide about their share splits are subject to their own confidentiality restrictions.[15]

Accordingly, an adjustment to the proposed rule is necessary to account for these restrictions. For each work, to the extent a DMP has ownership share information at all, the DMP should be required to report the aggregate amount paid to partial owners, and provide a list of those partial owners, without identifying the *specific* share each owner controls. That provides the MLC with exactly what it needs—information about who has already been paid—without breaching confidentiality restrictions. The proposed rule should specify that the partial share information, to the extent the DMP has access to it, "may be provided in aggregate form."

D. The Office's proposal to expand the required reporting of sound recording and musical work information in the cumulative statement of account is unnecessary, and would be arbitrary and capricious, and contrary to the statute.

Although the proposed rule generally tracks the existing monthly statement of account rules, and simply incorporates the relevant provisions into section 210.20, there is one area where the Office has substantially departed from those existing rules and from the statute. Specifically, in paragraph (e) of the proposed rule, the Office has proposed to substantially expand the scope of the sound recording and musical work data beyond what the existing monthly statement of account rules in 37 C.F.R. § 210.16 already provide. The Office notes that "more effectively" identifying and locating the copyright owners of unmatched works is a "core task" of the MLC, and that "updating certain requirements related to the content and delivery of cumulative statements," may help the MLC in this task.[16]

While DLC agrees that identifying and locating the copyright owners of unmatched works is a core task of the MLC, DLC expects that the MLC will be able to do this "more effectively" than has been done in the past, without relying on additional historical data that the statute does not require and may be unreasonably burdensome to gather. Indeed, the MLC will be equipped with a first-of-its-kind authoritative database of musical works information that will be used to match sound recordings to musical works. That database will feature information directly provided by *copyright owners*—the best source of ownership information—at a scale never before achieved for statutory licensing. And the MLC has *millions of dollars* to invest in bringing into the system long-tail creators that have not previously been in the fold, and in developing best-in-class claiming portals for them to identify their previously unmatched works. These tools must be developed precisely because historical data has not been effective in matching copyright owners to musical works.

Because the expanded data requirements are likely to be of such limited utility, the benefits of the proposed rule will be far outweighed by the litigation risk, even if the Office adopts a rule requiring DMPs to provide certain data only when "practicable." Given the late date of this proposed rule change, there will almost certainly be a lack of practicability with respect to one or

[15] This concern, accordingly, cannot be resolved merely by withholding the amounts paid under voluntary license, as the MLC has suggested.

[16] 85 Fed. Reg. 43519.

more categories of newly-required information, setting the stage for potential disputes right out of the gate. Indeed, rather than helping *end* litigation, as Congress intended, the proposed rule will do nothing more than open up a new front in any litigation—a debate about whether or not it was "practicable" for the DMP to provide certain metadata to the MLC as part of the cumulative statement of account. This uncertainty and ambiguity undermines the central bargain of the statute by eroding DMPs' confidence in their ability to rely on the limitation on liability, thus decreasing their incentive to pay accrued royalties to the MLC if they cannot provide certain data included in the new rules.

DLC also opposes this proposed rule because it would violate the Administrative Procedure Act's prohibition on agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17] The rule violates the APA for two separate and independent reasons.

First, the proposed rule change would be arbitrary and capricious given the late date. The Office recognized the importance of providing clear and early guidance regarding data to be reported in the cumulative statement of account, by quickly issuing interim rules in December of 2018 that closely tracked the requirements of the statute (*i.e.*, requiring reporting of that information that would have been reported on monthly statements of account under the existing rules).[18] Rather than leaving that rulemaking open, the Office finalized the rules in March 2019.[19]

Digital music providers relied on those final rules as part of their MMA implementation plans. In the ordinary course of DMP operations, track-level reporting data is captured and stored based on the reporting regulations that are in place at the time the usage is made. To take an illustrative example, one of the major DMPs uses a vendor to process mechanical royalties. Each month, it delivers to that vendor only the sound recording and musical work data that is required to be reported on monthly statements of account, under the regulations then in effect. The vendor then uses that data to generate monthly statements of account for matched usage, and otherwise stores the data for any unmatched usage. It is *that* data, being held by the vendor, that the DMP is planning to deliver to the MLC as part of the cumulative statement of account—entirely consistently with both the statute and the current regulation in 37 C.F.R. § 210.20.

It would be an impossible undertaking to now collect additional data for all prior usage, and deliver it to the vendor, so that the information can be compiled into the cumulative statement of account.[20] In the *absolute* best case scenario, the Office will issue a final rule in late August, which allows approximately four months to reengineer royalty reporting processes to pull the necessary data. Even to the extent that a DMP theoretically had the resources to do that—and many of them do not—it would be unfair and unjust to impose this burden now, and some DMPs

[17] 5 U.S.C. § 706(2)(A). This rulemaking is governed by the APA. *See* 17 U.S.C. § 701(e); *see Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

[18] 83 FR 63061 (Dec. 7, 2018).

[19] 84 FR 10685 (Mar. 22, 2019).

[20] This is especially so if, as the MLC has urged, the accrual and reporting obligation extends back to the initial launch of the service.

may choose not to make the large additional investments that would be required at this point in time.

Furthermore, with respect to some of the requirements of the Proposed Rule, the requested data simply does not exist in the DMPs' systems. For example, this is the case with respect to the requirement to report whether sound recording metadata has been altered or not. No DMP has tracked whether or not metadata was altered for its back catalog of tracks, and DMPs do not have an existing mechanism to recreate history with respect to the back catalog; this is a point that DLC has made in response to the MLC's demand for unaltered metadata.[21] For instance, as DLC explained in a letter to the Office last month, "record labels sometimes send blank or zero-value 'playing time' metadata to DMPs. While some DMPs leave that metadata as is, others occasionally take a blank playing time field and 'update it to actual' based on transcoding the actual length of a specific track."[22] DMPs have not tracked whether the playing time field has been updated, and do not have in their possession the "unaltered" playing time for all tracks. Similarly, in some cases, data for partially matched works is also unavailable, because the DMP's third-party vendor regards the data about such partial matches to be confidential; as a result, the DMP does not have access to the relevant data and cannot provide it to the MLC as part of the cumulative statement of account.

In addition, even if it were technically feasible to build new processes to provide additional data in the cumulative statement of account (which it is not), it would be impossible to provide the required certification for those new processes. The regulations require a certification that the "cumulative statement of account was prepared . . . using processes and internal controls that were subject to an examination, *during the past year*, by a licensed certified public accountant." That CPA examination of processes and controls would have already happened earlier this year, as part of the process of preparing the annual statements of account covering royalties paid in 2019. DLC members have reasonably assumed that the CPA examination conducted as part of the annual statement of account process is what is being referred to in the certification in 37 C.F.R. § 210.20, and there is not sufficient time to engage CPAs to examine whole new processes for generating cumulative annual statements of account, whenever those are in place.

As noted above, it is cold comfort to point to the limitation on providing certain data only "to the extent practicable."[23] To begin with, that limitation does not apply to many of the fields that the Office's NPRM would require DMPs to provide, such as the information about whether metadata has been altered.[24] Moreover, as discussed above, the Office's rule will create more, not less, litigation. Second, as DLC previously explained, the Office's proposal to expand reporting requirements would contradict clear congressional direction in the MMA.[25] Section 115(d)(10) provides detailed and reticulated requirements for satisfying the limitation on liability. With respect to the "cumulative statement of account" that must be delivered to the mechanical licensing

[21] *See* DLC's *Ex Parte* Letter of July 24, 2020 at 2.

[22] DLC's Letter of July 13, 2020 at 7.

[23] 85 Fed. Reg. at 43521; Proposed Rule § 210.20(e)(1)(i)(A), (e)(1)(i)(E), (e)(1)(ii), (e)(4).

[24] 85 Fed. Reg. at 43521.

[25] 17 U.S.C. § 701(e).

collective after license availability date, the statute provides that the statement must include "all of the information that *would have been provided to the copyright owner* from initial use of the work in accordance with this section and applicable regulations."[26] Congress's use of the past conditional tense makes the meaning of this language clear: a DMP's obligation is to report the information that "would have been" reported to an identified copyright owner, under the "applicable regulations" in force during the pre-MMA era, not based on regulations issued years after the statute was enacted and mere months before the statement is due.

Contrary to the MLC's suggestion,[27] the structure of the statute in fact *does* indicate that the Office cannot supplement or otherwise change these reporting requirements. The statute expressly adds only one item to the reporting that would have been required under the preexisting statement of account regulations: "an additional certification" that the DMP has fulfilled its requirement to engage in good-faith, commercially reasonable efforts to identify and locate copyright owners.[28] At the same time, there is no specific authority permitting the Copyright Office to further supplement the categories of information required to be reported. This stands in contrast to the blanket license reporting provisions of the MMA, which give the Office express authority to require additional information.[29] In other words, when Congress wanted to give the Copyright Office authority to supplement reporting requirements, it knew exactly how to do that, and Congress's decision not to do that with respect to the cumulative statement of account reporting proves that Congress intended to withhold that authority from the Office.[30] Moreover, given the clear congressional direction from the text and structure of the statute, the Office's catch-all authority to "adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection"[31] cannot serve to supply the authority that Congress unambiguously withheld from the Office.

Finally, DLC understands some of the MLC's concerns with respect to the cumulative statement of account reporting to relate principally to the *format* in which the information will be provided. DLC is willing to compromise with the MLC with respect to that proper format. It has proposed a modest revision to the proposed rule to allow some flexibility to digital music providers, which is particularly necessary given the relatively short amount of time left to produce the required report.

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[26] 17 U.S.C. § 115(d)(10)(B)(iv)(II)(aa).

[27] MLC's *Ex Parte* Letter of June 17, 2020 at 2 n.1.

[28] 17 U.S.C. § 115(d)(10)(B)(iv)(II)(aa).

[29] *See* 17 U.S.C. § 115(d)(4)(A)(ii)(II) (requiring reporting of "such other information as the Register of Copyrights shall require by regulation" in monthly usage reporting); *see also id.* § 1401(f)(5)(A)(i)(I) (requiring inclusion of "such other information, as practicable, as the Register of Copyrights prescribes by regulation" in pre-1972 sound recording filings).

[30] *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[31] 17 U.S.C. § 115(d)(12)(A).

II. TREATMENT OF NMPA ACCRUED ROYALTY DISTRIBUTION AGREEMENTS

Regulatory action is essential to eliminate any doubt that the royalty amounts liquidated pursuant to the NMPA agreements need not be paid twice, and therefore are not included in the accrued royalties for unmatched works to be paid to the MLC in order to obtain the limitation on liability protection. The MLC's prior comments indicate that there is a significant disagreement regarding this issue. Leaving that uncertainty in place is unjustifiable for two basic reasons:

- The fundamental unfairness of imposing duplicate liability on the DMPs that entered into these agreements.

- The significant threat to the MMA implementation process, because DMPs may be forced to retain their accrued royalties due to uncertainty about whether paying them to the MLC will in fact result in the liability limitation, or lead only to litigation over that issue in connection with future infringement claims. Indeed, some DMPs simply do not have the financial resources to make duplicate payments. Without regulatory clarification they will be forced to forgo the limitation on liability, which could leave them vulnerable to costly infringement litigation—precisely what the MMA was intended to prevent.

A. Background

In its initial comments regarding whether additional regulatory guidance was needed with respect to the accrued royalties for unmatched works, DLC explained that some DMPs had, prior to enactment of the MMA, entered into royalty distribution agreements with the NMPA, pursuant to which these DMPs had already distributed or were continuing to distribute accrued royalties for unmatched works. DLC noted that regulatory guidance is needed to clarify that in no event should digital music providers be made to double-pay amounts that had previously been paid to copyright owners.[32]

DLC's initial comments focused on the ongoing nature of some of these agreements, "continuing in force after the MMA's enactment," creating a "conflict between the terms of those preexisting agreements and the MMA's directions in section 115(d)(10) regarding the accrual of unmatched royalties."[33] That focus on the continuing royalty distribution agreements was based on an expectation that accrued royalties that had already been paid out *prior* to the enactment of the statute will necessarily and obviously not be "accrued royalties" available for transfer to the MLC pursuant to section 115(d)(10).

But the MLC has taken the contrary position, arguing that the limitation on liability provision requires a DMP to accrue royalties for usage of all unmatched works going *back to the first launch of the service*—no matter how many years ago that might have been (and no matter what records remain regarding the statutory royalty formula for each month going back, in some cases, around 10 or even almost 20 years). Most surprisingly, the MLC's position is that, in imposing that requirement, the MMA somehow overrides prior agreements that required—and

[32] *See* DLC's Initial Comments in Docket No. 2019–5 at 17-19.

[33] *Id.* at 18.

provided releases for—payment of such royalties, and requires services to re-accrue any royalties that were already paid for the same usage and pay them over to the MLC.

The MLC's position has the bizarre and grossly unfair result of penalizing DMPs for taking steps to get tens of millions of dollars to songwriters under the flawed pre-MMA system. DMPs that entered into agreements for payments of royalties—notwithstanding the universally-recognized inability to match those royalties to specific tracks under the pre-MMA system—would be required to pay those royalties again, this time to the MLC, effectively doubling their financial burden. Congress surely did not intend to impose double liability on DMPs that tried to comply with pre-MMA obligations, notwithstanding the significant flaws in that system, recognized by Congress's enactment of the limitation on liability "bargain" discussed above. The MLC's position would also produce a windfall for many publishers, who would receive double payments—either as a result of matching previously-unmatched tracks or as a result of payments based on market share.

Moreover, the MLC's position is contrary to the clear text of the statute. The MMA expressly states that "accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.[34] Those principles provide that an accrual may not be maintained when an obligation is paid—and therefore require the elimination of paid-out royalties from the accrued amount.

Finally, the MLC's view of the retroactivity of the obligations in section 115(d)(10) has created a serious issue for some digital services. Such an interpretation of the obligations in section 115(d)(10) would make it impossible for services to fulfill the obligations of that section because they have already distributed this money and do not have the financial assets to do so again. Those services would instead be compelled to defend against any litigation. This is a lose-lose result that no one should want.

B. NMPA Accrued Royalty Distribution Agreements

With that background in mind, we turn to describing the type of agreement that DLC addresses in its regulatory proposal. In the proposed rulemaking, the Office characterizes DLC's concerns here "to center around whether payments made pursuant to various private settlement agreements can extinguish the obligation to deliver accrued royalties to the MLC," and, based on that characterization, suggests that these questions "may be best resolved by determining whether a given agreement constitutes a valid license to the work(s) at issue (and if so, the scope of the license)."[35]

DLC respectfully submits that the issue is somewhat different. DMPs have, over the years, entered into various private settlement agreements with copyright owners resolving claims of copyright infringement; after all, the problems of the prior NOI-based licensing regime are well-known, and were the impetus for the MMA's overhaul of the prior licensing system in favor of a blanket license. The payments made pursuant to such settlement agreements necessarily encompassed, at the minimum, accrued royalties for unmatched tracks embodying the settling

[34] 17 U.S.C. § 115(d)(10)(B)(iv)(I).

[35] 85 Fed. Reg. at 43523.

copyright owners' works, and releases of claims for royalties for past usage periods. But, notwithstanding that fact, the DLC's proposal here does not encompass those private settlement agreements—DLC is not seeking a regulation that would allow DMPs to exclude royalties distributed under such settlements from the accrued royalties paid to the MLC.[36]

Rather, what is at issue are specific industry-wide accrued royalty liquidation agreements that the NMPA, on behalf of the music publishing industry, structured with DMPs with the specific purpose of distributing accrued royalties to copyright owners, based on a claiming and market-share distribution model that was later essentially codified in the MMA. These landmark agreements were aimed at solving the exact same problem that the MMA addresses: ensuring that accrued royalties for unmatched works are paid out promptly to copyright owners.

As NMPA's CEO noted with respect to the Pending and Unmatched Usage Agreement with Spotify, "through this agreement both independent and major publishers and songwriters will be able to get what is owed to them,"[37] and "[t]he vast majority of our members" have opted in.[38] Rhapsody has explained with respect to its NMPA agreement that: "[b]efore Congress solved the problem . . . Rhapsody was in discussions with the NMPA to find a solution to the industry-wide problem of 'unmatched works.' . . . Rhapsody has been advised by the NMPA that the aggregate market share of the NMPA members who opted-in to the NMPA agreement is approximately 97.13%."[39] As a result of these agreements, royalties that might have otherwise continued to accrue on these services' books were fully distributed to copyright owners, years before the MMA was drafted.

We urge the Office to request copies of these NMPA agreements, subject to appropriate confidentiality protections. DLC members stand ready to waive any restriction that would preclude submission of these agreements to the Office, and we urge the NMPA and its members to agree to provide the agreements to the Office. In this comment, we generally describe those agreements' terms.

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[36] Although this means that DMPs who have received releases from settling copyright owners with respect to royalties for past usage periods will necessarily be overpaying the MLC, DLC recognizes that a regulatory solution to this category of overpayment raises more complex issues than the NMPA agreements that are the focus of the DLC's proposal.

[37] Micah Singleton, *Spotify Reaches An Agreement With Publishers Over Missing Royalties*, The Verge (Mar. 17, 2016), https://www.theverge.com/2016/3/17/11255914/spotify-reaches-agreement-with-publishersmissing-royalties (quoting David Israelite, CEO of the NMPA: "I am thrilled that through this agreement both independent and major songwriters will be able to get what is owed to them. . . . [W]e have found a way for Spotify to quickly get royalties to the right people.").

[38] Ed Christman, *Vast Majority Join Royalties Settlement Between Spotify and Publishing Group*, Billboard (July 11, 2016), https://www.billboard.com/articles/business/7431272/nmpa-spotify-settlement-most-members-join.

[39] *Lowery et al. v. Rhapsody Int'l Inc*., No. 4:16-cv-01135-JSW (N.D. Cal. filed Mar. 7, 2016), Dkt. No. 175 at 3.

These agreements have all operated in essentially the same way. Each month, the digital service would calculate the full amount of mechanical royalties it owes for usage, and allocate it to each track based on the number of plays of that track. The service (or its vendor) would then attempt to match each of the tracks to an underlying musical work, and to identify the owner of that musical work, using a catalog service. Any matched usage would be paid to the appropriate copyright owners. The remaining unmatched royalties for that month would then be accrued on the service's books. Although services or their vendors continued (and have continued to today) to try to match the remaining tracks, the NMPA agreements provided that metadata regarding the unmatched works would also be posted on a claiming portal, where copyright owners that were participating in the NMPA-sponsored agreement could search the works and make claims. If a copyright owner made a claim to unmatched usage, it would be paid for that usage at the statutory rate. (The data provided by the copyright owner is fed back into the matching process, so that further usage of that work would be matched at the first step.) This payment of royalties for such claimed usage would reduce the amount of accrued royalties.

After some period of time, however, there would remain some amount of royalties that could not be matched and had not been claimed. This pool of ***unmatched, unclaimed royalties*** is what is at issue here. Absent the agreement to the contrary, that amount would have *remained* accrued and available to transfer to the MLC after license availability date. But the NMPA agreements have required the bulk of those accrued royalties to be distributed to participating publishers—who have released all claims to royalties and other compensation for the usage periods covered by the agreements. Specifically, for each period covered by the agreement, the vast majority of the pool of accrued unmatched royalties (*e.g.*, 90%) was distributed to participating copyright owners based on their respective market shares of matched and claimed usage (as a proportion of the usage of works controlled by all participating copyright owners) during the relevant period of time. This is essentially the same mechanism used under the MMA.

The remaining, smaller share of royalties (*e.g.*, 10%) was left in the accrued pool as reserve funds, based on the NMPA's representation of the potential portion of the entire market of copyright owners who had *not* released their royalty claims through participation in the NMPA-sponsored agreement. And if any non-participating copyright owners came forward to claim usage, they would receive the appropriate royalties out of the remaining accrued royalties. Under these agreements, these reserve funds would be held for three years—related to the statute of limitation period for copyright claims. After that point, any remaining accrued funds would be distributed on the same market share basis. Again, that distribution is consistent with the operation of the MMA.

C. Regulatory Solution

As the discussion above illustrates, copyright owners who participated in the NMPA-sponsored agreements have already received *at least* the amount of royalties they would be paid under the MMA absent those agreements, and have provided full releases to any such royalties. It appears that the NMPA and MLC do not dispute the basic principle that services that entered into the NMPA-sponsored royalty distribution agreements should not have to double pay the publishers

that participated in those agreements. (Indeed, it is impossible to imagine how anyone could argue in favor of double payments.)

And the DLC and its members agree that copyright owners that did *not* participate in such an agreement should receive the full amount of royalties they may be owed.

With that foundation, the regulatory task is a relatively narrow one: how to protect DMPs against the risk of having to make massive (and unfair) double payments, while ensuring that the MLC has sufficient funds to pay out the relatively small amount of royalties to nonparticipating copyright owners. We discuss here a proposed regulatory approach that does just that.

1. DLC's Proposed Regulation

In the NPRM, the Office notes that the regulatory language previously proposed by the DLC in its initial comments "lack[s] precision with respect to scenarios where a payment does not extinguish royalty entitlements for all copyright owners for the relevant works; that is, where usage remains fully or partially 'unmatched' within the meaning of the statute."[40]

DLC welcomes the opportunity to make a clear proposal with respect to that scenario—*i.e.*, where a copyright owner who did *not* extinguish entitlement to royalties for past usage and whose works (or shares of works) will be matched by the MLC. The intention is that those copyright owners will be paid those matched royalties.

Of course, this should be a very small category, because—according to the NMPA itself—the NMPA liquidation agreements covered "*virtually the entire commercially relevant publishing community.*"[41] But the DLC and its DMP members are committed to ensuring that any copyright owner who has not already been paid for the use of their works will be paid what they are owed.

Given the very small percentage of payable royalties not covered by these agreements, it would make no sense to require DMPs who have already paid out accrued royalties under the NMPA agreements to re-accrue and double-pay the entirety of those royalties in order to ensure payment of the small percentage of unmatched royalties to non-participating copyright owners. The NMPA has represented that 90%-plus of all usage was covered by the NMPA agreements: it would be absurd to require DMPs to make an acknowledged duplicate payment of tens of millions of dollars to cover payments that are merely around 10%, or less, of that amount.

Indeed, it is likely that some DMPs that paid out all of their accrued royalties pursuant to an NMPA distribution agreement would not be able to now double-pay these accrued royalties to the MLC; they simply don't have the money. Such an approach would plainly penalize DMPs who worked collaboratively with the NMPA to get unmatched accrued royalties into the hands of the copyright owners, at a time when there was no better way to do so.

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[40] 85 Fed. Reg. at 43523.

[41] *Hunt for US Streaming Publishing Settlements Won't Stop at Spotify*, Music Business Worldwide (Mar. 20, 2016) , https://www.musicbusinessworldwide.com/hunt-for-us-streaming-publishing-settlements-wont-stop-at-spotify/ (statement of David Israelite, emphasis added).

The only fair approach, therefore, is to recognize that DMPs are not required to pay out amounts that were properly de-accrued under GAAP because they represented the market share that was covered by the prior payments, but that that the DMP must pay to the MLC the royalties that the DMP estimates would still be owed, corresponding with the market share of copyright owners that were not covered by the NMPA-sponsored distribution agreement. DLC has proposed a regulation reflecting this approach, below.

This approach to estimating the remaining unmatched, unreleased royalty claims is based squarely on the GAAP standard that the MMA specifies. The NMPA agreements specifically contemplated that some portion of the publishing market might not be covered, and required that the DMP hold back a certain percentage of the unmatched royalties to cover any non-participating copyright owners who might come forward. Thus, the NMPA itself had already *specifically estimated the royalties that might be owed to copyright owners who did not participate in these agreements*—and that is the maximum amount that GAAP requires the DMP to include in its accrual. (To be clear, this amount would be paid to the MLC *even if* those reserve funds had been distributed to copyright owners after expiration of the statute of limitations period. In this respect, DMPs that entered into these NMPA-sponsored agreements will end up paying *more* overall than they otherwise would have paid; they are willing to do so, however, to ensure that non-participating copyright owners receive what they may be owed.)

To the extent this up-front estimation might not, in practice, entirely cover all royalties that are eventually matched by the MLC to nonparticipating copyright owners (or any market share distribution those nonparticipating copyright owners would have been entitled to had the full amount of accrued royalties been paid over), under DLC's proposed regulation, the DMPs will cover any deficit through prompt payment of an invoice issued by the MLC. There is thus no risk to the MLC or to copyright owners whose works are matched by the MLC and may be owed accrued royalties.

2. The Office's Authority To Adopt The Regulatory Proposal

The DLC's proposed regulatory solution is fully consistent with the MMA, and readily falls within the scope of the Office's regulatory authority. As an overarching matter, as the separate comments of the Digital Media Association explain, the MMA's drafters and all stakeholders were well aware of the existence of these NMPA-sponsored distribution agreements. Had Congress truly intended to impose the harsh result of requiring DMPs to re-accrue and double pay royalties based on past unclaimed usage, it would have been explicit.

Moreover, regulation is plainly necessary to provide unambiguous guidance to DMPs and the MLC. First, section 115(d)(10)(B) by its terms imposes an obligation on a going-forward basis in order to qualify for a limitation on liability for past events. Specifically, it sets out requirements that "shall apply on the enactment date and through the end of the period that expires 90 days after the license availability date," including certain matching efforts to be commenced within 30 days after the enactment date.[42] Similarly, the statutory directive in subsection (B)(iv) ("If . . . shall accrue") refers to a future action. The MLC disputes that reading, apparently relying on the reference to accruing royalties "from initial use of the work." That reading has significant flaws.

[42] 17 U.S.C. §115(d)(10)(B)(i).

But whatever the merits of this legal debate, its mere existence has created significant uncertainty about the scope of accruals that must be paid to the MLC—thereby jeopardizing the limitation on liability for DSPs, a linchpin element of the MMA.

Second, the MMA's limitation on liability provision in section 115(d)(10) requires that DMPs maintain accrued royalties "in accordance with generally accepted accounting principles."[43] All DMPs, including (but not limited to) those that have already distributed accrued royalties pursuant to an NMPA agreement, will be guided by those accounting principles in determining what amounts are required to be transferred to the MLC pursuant to this statutory provision. Under the relevant GAAP accrual principles, unpaid royalties due to third parties would be accounted for as an "accrued contingent liability."[44] But such liabilities can be extinguished by agreement.[45] Thus, under GAAP, accrued royalties that were paid to participating publishers, who released all entitlement to royalties for such usage, would cease being "maintained" in accordance with GAAP; only those royalties expected to be due to third parties who had not released such royalty claims would be accrued. Thus, a rule that is based on these principles would be entirely consistent with the statute. By contrast, leaving this provision open ended will undoubtedly invite litigation that second-guesses DMPs' accounting determinations and render the limitation on liability illusory. The MMA was not meant to set up a game of "gotcha" and foster a new breed of litigation based on this transition period in the run up to license availability date. Regulatory clarification to guard against that result is warranted.

Third, section 115(d)(10) does not foreclose what are effectively arrangements to pre-pay accrued royalties to known copyright owners through ongoing release agreements. To the contrary, the statute specifically provides that "[l]icense agreements voluntarily negotiated *at any time*" are to be given effect.[46] The NMPA agreements are effectively voluntary license agreements, as they provide for payment of royalties in exchange for an ongoing release of potential claims for accrued royalties. The agreements included releases of royalty claims for future usage periods, subsequent to the opt-in to the agreements, as well as covenants not to sue so that longer-term license agreements could be established.

Fourth, DLC's proposed regulatory approach fits comfortably with the existing proposed regulatory structure in several respects. For example, the Office's proposed regulation includes a provision for detailing discrepancies between the cumulative statement of account and the royalties

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[43] 17 U.S.C. § 115(d)(10)(B)(iv)(I).

[44] Accounting Standards Codification 450-10-20 (defining "loss contingency" as "an existing condition, situation, or set of circumstances involving uncertainty as to possible loss to an entity that will ultimately be resolved when one or more future events occur or fail to occur").

[45] Accounting Standards Codification 405-20-40-1 ("[A] debtor shall derecognize a liability if and only if it has been extinguished. A liability has been extinguished if either of the following conditions is met: a. The debtor pays the creditor and is relieved of its obligation for the liability. . . . b. The debtor is legally released from being the primary obligor under the liability, either judicially or by the creditor.").

[46] 17 U.S.C. § 115(c)(2)(A)(i).

payable to the MLC.[47] This proposal recognizes that there may be circumstances in which a DMP, consistent with GAAP accounting rules with respect to accrued royalties, would transfer to the MLC an amount of royalties that is different from the total statutory royalties that would otherwise be associated with historical usage of a particular track. In addition, the proposed rule retains the accommodation of estimates with respect to the cumulative statement,[48] and adds a mechanism for a credit or refund to the DMP in the case of an "overpayment" of royalties.[49]

Finally, to the extent there is any residual doubt, the Office can and should invoke its general authority to "adopt such regulations as may be necessary and appropriate to effectuate the provisions of this subsection."[50] As established above, regulatory action here is necessary to preserve this key provision of the MMA.

In sum, the potential for double payment is unfair, penalizing DMPs who acted in good faith to get royalties to copyright owners, and without regulatory action it would undermine a key provision of the MMA. The Office should exercise its clear authority here to fulfill Congress's intent that the industry turn the page on the litigious past, and focus on ensuring that copyright owners are paid what they are owed.

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Respectfully submitted,

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[47] *See* Proposed Rule § 210.20(c)(6) ("If the total royalty payable under paragraph (c)(5) of this section does not reconcile with the royalties actually transferred to the mechanical licensing, a clear and detailed explanation of the difference and the basis for it.").

[48] 85 Fed. Reg. at 43520; Proposed Rule § 210.20(d)(2).

[49] 85 Fed. Reg. at 43520; Proposed Rule § 210.20(i)(3).

[50] 17 U.S.C. § 115(d)(12)(A).

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ADDENDUM

DLC Revisions to Proposed 37 C.F.R. § 210.20 (in bold)

§ 210.20 Statements required for limitation on liability for digital music providers for the transition period prior to the license availability date.

This section specifies the requirements for a digital music provider to report and pay royalties for purposes of being eligible for the limitation on liability described in 17 U.S.C. 115(d)(10). Terms used in this section that are defined in 17 U.S.C. 115(e) shall have the meaning given those terms in 17 U.S.C. 115(e).

(a) If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall provide statements of account and pay royalties to such copyright owner as a compulsory licensee in accordance with this subpart.

(b) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(1) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.

(2) If a copyright owner of an unmatched musical work (or share thereof) is identified and located by or to the digital music provider before the license availability date, the digital music provider shall—

(i) Not later than 45 calendar days after the end of the calendar month during which the copyright owner was identified and located, pay the copyright owner all accrued royalties, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been providing Monthly Statements of Account as a compulsory licensee in accordance with this subpart to the copyright owner from initial use of the work, and including, in addition to the information and certification required by §210.16, a clear identification of the total period covered by the cumulative statement and the total royalty payable for the period;

(ii) Beginning with the accounting period following the calendar month in which the copyright owner was identified and located, and for all other accounting periods prior to the license availability date, provide Monthly Statements of Account and pay royalties to the copyright owner as a compulsory licensee in accordance with this subpart; and

(iii) Beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such reporting period and reporting periods thereafter to the mechanical licensing collective, as required under 17 U.S.C. 115(d) and applicable regulations.

(3) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall—

(i) Not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective, such payment to be accompanied by a cumulative statement of account that**:**

(A) Includes all of the information required by **paragraphs (c) and (d)** of this section;

(B) Is delivered to the mechanical licensing collective as required by paragraph (**e**) of this section; and

(C) is certified as required by paragraph (**f**) of this section.

(ii) Beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such period and reporting periods thereafter to the mechanical licensing collective, as required under 17 U.S.C. 115(d) and applicable regulations.

(c) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be clearly and prominently identified as a "Cumulative Statement of Account for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(1) The period (months and years) covered by the cumulative statement of account.

(2) The full legal name of the digital music provider and, if different, the trade or consumer-facing brand name(s) of the service(s).

(3) 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.

(4) For each sound recording embodying a musical work for which accrued royalties must be transferred to the mechanical licensing collective under paragraph (b)(3)(i) of this section, a detailed cumulative statement, from which the mechanical licensing collective may seperate reported information for each month and year for each applicable activity or offering including as may be defined in part 385, for 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 referenced in § 210.16(c)(3) that would have been provided to the copyright owner had the digital music provider been serving Monthly Statements of Account as a compulsory licensee in accordance with this subpart on the copyright owner from initial use of the work.**

(5) The total royalty payable by the digital music provider for the period identified in paragraph (c)(1) of this section for the sound recordings embodying musical works identified in paragraph

(c)(4) of this section, 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 month and year and by each applicable activity or offering including as may be defined in part 385 of this title.

(6)(i) Subject to paragraph (6)(ii), in calculating the amount of accrued royalties to be maintained under paragraph (b)(1), a digital music provider need not re-accrue royalties for any period covered by an agreement between the digital music provider and the National Music Publishers' Association pursuant to which royalties were paid or are required to be paid to copyright owners of musical works, or to representatives of copyright owners of musical works, for usage of unmatched works and that—

(A) established a mechanism for copyright owners or their representatives to claim ownership or control of unmatched musical works, or shares thereof, and obtain royalties for any claimed works or shares; and

(B) required distribution of any remaining accrued royalties for usage of unmatched musical works on a market-share basis to copyright owners or their representatives; and

(C) provided a release by the participating copyright owners to claims for accrued royalties for the time periods covered by the agreement.

(ii) Any amounts of unmatched royalties that were required by such agreement to be held back in reserve for any period of time shall be included in the calculation of accrued royalties under paragraph (b)(1), and paid over to the mechanical licensing collective.

(iii) If a digital music provider has not re-accrued royalties pursuant to paragraph (c)(6)(i), the digital music provider shall, when it transfers any accrued royalties and cumulative statement to the mechanical licensing collective pursuant to paragraph (b)(3), provide to the mechanical licensing collective (or, if that information is held by a third party, authorize that third party to provide to the mechanical licensing collective) the identity of and contact information for copyright owners or their representatives to whom such royalties have been paid, and the usage periods covered by the associated release.

(iv) Any copyright owner who received payment and released royalty claims pursuant to an agreement identified in paragraph (6)(i) shall not receive any portion of the accrued royalties transferred to the mechanical licensing collective from the released digital music provider for those usage periods covered by the release.

(v) If a digital music provider has not re-accrued royalties pursuant to paragraph (c)(6)(i), and if the mechanical licensing collective has received insufficient funds from such digital music provider to pay royalties that are owed to a copyright owner who has not previously released claims to such royalties pursuant to an agreement referenced in paragraph (c)(6)(i), the mechanical licensing collective shall issue an invoice and/or response file consistent with paragraph (h), and the digital music provider shall pay the additional royalties to the MLC within 45 days of receipt of such invoice.

(7) If the total royalty payable under paragraph (c)(5) of this section does not reconcile with the royalties actually transferred to the mechanical licensing collective, **due to the GAAP treatment of previously-distributed royalties or for any other reason**, a clear and detailed explanation of the difference and the basis for it.

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

(1) A detailed and step-by-step accounting of the calculation of royalties payable by the digital music provider 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 digital music provider 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.

(2) A digital music provider may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim public performance royalty rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid in accordance with GAAP.

(3) 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 digital music provider at the time the cumulative statement of account 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)(1) **To the extent practicable, e**ach cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be delivered 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 digital music providers. ~~**The mechanical licensing collective must offer at least two options, where one is dedicated to smaller digital music providers 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 digital music providers 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) **To the extent practicable, r**oyalty 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 cumulative statement of account 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 cumulative statement of account to the payment, **including any explanation of discrepancy pursuant to subparagraph (c)(7).**

(3) **In any case where the digital music provider finds that the content of the cumulative statement of account, or the amount of accrued royalties paid to the mechanical licensing committee, is inaccurate, the digital music provider shall cure such inaccuracy by promptly delivering a corrected cumulative statement of account and/or any additional royalties to the mechanical licensing committee.** 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 digital music provider's account. As an alternative to a credit, a digital music provider may request a refund for an overpayment of royalties, which the mechanical licensing collective shall pay within 45 days.

(f) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be accompanied by:

(1) The name of the person who is signing and certifying the cumulative statement of account.

(2) A signature, which in the case of a digital music provider 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 digital music provider 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 cumulative statement of account.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider; (2) I have examined this cumulative statement of account; 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 cumulative statement of account on behalf of the digital music provider, (2) I have prepared or supervised the preparation of the data used by the digital music provider and/or its agent to generate this cumulative statement of account, and (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 cumulative statement of account was prepared by the digital music provider 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 digital music provider'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 by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner.