U.S. COPYRIGHT OFFICE
WASHINGTON, D.C.

Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective	)	Docket No. 2019–5

INITIAL COMMENTS OF DIGITAL LICENSEE COORDINATOR, INC. IN RESPONSE TO SEPTEMBER 24, 2019 NOTICE OF INQUIRY

Sarang Vijay Damle
LATHAM & WATKINS LLP

Allison Stillman
MAYER BROWN LLP

Counsel for Digital Licensee Coordinator, Inc.

I. INTRODUCTION

Digital Licensee Coordinator, Inc. ("DLC") submits these initial comments in response to the U.S. Copyright Office's (the "Office's") Notice of Inquiry in the above-captioned rulemaking proceeding.[1] DLC and its members appreciate the Office's continued focus on the crucial work of implementing the Hatch-Goodlatte Music Modernization Act ("MMA"). The rules it issues over the coming months will be central to fulfilling the core promise of the MMA: ensuring that songwriters, composers, lyricists, and copyright owners are efficiently paid the royalties they are owed for their music, and that digital services deliver music to Americans in ever-more innovative ways.

The NOI is "the first step in promulgating the regulations required by the MMA to govern the blanket license regime" and the Office plans to "publish multiple notices of proposed rulemaking."[2] When drafting proposed rules, the Office should recognize that the MMA represents a fundamental transformation of the statutory license for mechanical uses. The creation of a blanket license for digital uses, and a new copyright-owner-controlled collective to administer that license, is such a stark departure from the pre-MMA regime that the Office cannot simply borrow the existing regulatory regime under section 115 and tweak it around the edges. Instead, the regulatory structure will have to be built from the ground up.

DLC provides our preliminary views in these comments, which we are working to refine.[3] We encourage the Office to continue to engage with stakeholders as it works through the rulemaking process, and appreciate the Office's consideration of "informal meetings to gather additional information on discrete issues prior to publishing notices of proposed rulemaking."[4]

II. PRIORITIZING REGULATORY ACTIONS

The Office has encouraged commenters "to indicate whether any of the . . . categories [of rules] should be prioritized over the others with respect to the order in which the Office addresses them."[5]

The Office should prioritize the following regulations:

---

[1] *See* Notice of Inquiry, 84 Fed. Reg. 49966 (Sept. 24, 2019) ("NOI").

[2] *Id.* at 49968.

[3] While the MLC and DLC have not collaborated on the submission of initial comments in this proceeding, collaboration has been discussed and is anticipated in connection with reply comments, with the intent to provide supplemental information in reply comments as to any areas of common agreement.

[4] NOI at 49968.

[5] *Id.*

- Usability and interoperability of the musical works database: These requirements must be in place as early as possible, to ensure that the design and development of the database can account for those requirements.

- Confidentiality of MLC and DLC records: These rules are important to have in place at an early stage, to ensure that any of the highly confidential and commercially sensitive information that licensees provide to the MLC is not disseminated more broadly, and to provide the ground rules for the relationship between DLC, the MLC, and its respective members.

- Transfer and reporting of unclaimed royalties to the MLC: Some digital music providers have preexisting licensing deals with music publishers that require liquidation of a portion of unmatched royalties to those publishers. These deals were entered into prior to the MMA, but have continued in force after the MMA's enactment. Rulemaking will be necessary to clarify the relationship between these preexisting deals and the MMA's provisions regarding accrual of unmatched royalties during the transition period leading to the license availability date.

Another critical rulemaking will be that related to usage and reporting requirements. These rules will define the day-to-day operational relationship between digital music providers and significant nonblanket licensees,[6] on the one hand, and the MLC, on the other. There are a number of complex operational issues that need to be worked through, including with respect to voluntary licenses. DLC is continuing to work on those issues, and will revert to the Copyright Office with further information.

The rulemakings related to additional MLC oversight, notices of blanket license and nonblanket activity, MLC payments and statements of account to songwriters/publishers, music data collection efforts by musical works copyright owners, and the content of the musical works database, are relatively less pressing in terms of timing, but will be critically important to the functioning of the MLC.

Finally, we do not believe any rulemaking is necessary or appropriate with respect to data collection efforts by licensees. The MMA already has specific requirements that do not need to be supplemented by regulation.

III. SPECIFIC TOPICS OF INQUIRY

A. Notices of Blanket License and Nonblanket Activities

DLC believes that a single regulation can cover both the notice of license required by section 115(d)(2)(A), and the notice of nonblanket activity required by section 115(d)(6)(A), since most of the relevant requirements will overlap. DLC proposes the following regulation:

[6] For ease of reference, these comments refer to digital music providers and significant nonblanket licensees collectively as "licensees."

Proposed Regulations

§ 210.2. Notices of blanket license and nonblanket activity.

(a) General. This section prescribes rules under which a digital music provider submits a notice of license to the mechanical licensing collective pursuant to section 115(d)(2)(A) of title 17, United States Code, or a significant nonblanket licensee submits a notice of nonblanket activity to the mechanical licensing collective pursuant to section 115(d)(6)(A) of title 17, United States Code.

(b) Forms and content. A notice must include all of the following information:

(1) The full legal name of the digital music provider or significant nonblanket licensee.

(2) Whether the submitter is a digital music provider seeking a blanket license or is a significant nonblanket licensee.

(3) In the case of a significant nonblanket licensee, whether the licensee is operating under one or more individual download licenses.

(4) The full address (including a specific number and street name or rural route, of the place of business) and website of the digital music provider or significant nonblanket licensee.

(5) An email address at which the mechanical licensing collective can contact the digital music provider or significant nonblanket licensee regarding the submission of the notice.

(6) A general description of the covered activities in which the digital music provider or significant nonblanket licensee seeks to engage, provided that the digital music provider need not provide an additional notice should it change the scope of the covered activities in which it engages.

(7) If the digital music provider or significant nonblanket licensee has not yet begun service, the date that covered activities are anticipated to begin.

(c) Signature. The notice shall include the signature of the appropriate officer or representative of the digital music provider or significant nonblanket licensee. The signature shall be accompanied by the name and the title of the person signing the notice and the date of the signature.

(d) Submission and acceptance. The mechanical licensing collective shall provide an email address at which notices may be sent, and shall provide automatic responses confirming the receipt of notice submissions. The mechanical licensing collective shall send any rejection of the notice to the email address provided on the notice.

> **(e) Harmless errors.** Errors in the filing or content of a notice that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. § 115(d) shall not render the notice invalid.

Two specific features of the proposed regulation above are worth discussion.

Description of covered activities. While the statute requires the notice of license to identify the "particular covered activities in which the digital music provider seeks to engage,"[7] that language does not require specific identification of a service's "offerings." The distinctions between various categories of service offerings are a function of the ratemaking regulations, rather than the statute itself, and those categories can change with each ratesetting proceeding.[8] Moreover, Congress clearly contemplated that the notice will be filed once, so at best the notice would give only a snapshot of covered activities a particular digital music provider is engaged in at the time of filing. The Office should thus require only a general description of the covered activities, rather than asking the digital music provider to specify in any detail the categories of service offerings it plans to provide.

Harmless errors. Consistent with the existing notice of intention regulations,[9] the notice of license regulations should include a harmless error provision that makes clear that errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of the statute do not render the notice invalid.

B. Data Collection and Delivery Efforts

1. Collection Efforts By Licensees

The MMA requires digital music providers to engage in "good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service of such digital music provider" certain information about those sound recordings.[10] The Office has asked whether it is necessary and appropriate to add a regulatory overlay to the statutory requirements in section 115(d)(4)(B), including what constitutes "good-faith, commercially reasonable efforts."[11] The answer is "no."

---

[7] 17 U.S.C. § 115(d)(2)(A).

[8] *See* 37 C.F.R. § 385.2 (defining various categories of "Offerings"). This is in contrast to the sections 112 and 114 statutory licenses, which define in the statute various categories of services, such as "preexisting subscription service," "preexisting satellite digital audio radio service," "nonsubscription" transmissions, or "new subscription service." It is therefore appropriate that the notice of use regulations under sections 112 and 114 codify these categories. *See* 37 C.F.R. § 370.2.

[9] *See* 37 C.F.R. § 201.18(h).

[10] 17 U.S.C. § 115(d)(4)(B).

[11] NOI at 49969.

Digital music providers have existing mechanisms in place to receive content from record label partners electronically, in accordance with detailed content preparation and delivery specifications that are part of the privately negotiated deals for the necessary sound recording rights. There is no reason to define "commercially reasonable" through government regulation. Digital music providers will continue to work with their sound recording partners to obtain the information contemplated in the MMA through existing mechanisms, and will pass that information on to the MLC via the monthly usage reporting.

Indeed, imposing additional burdens on the digital music providers would be inconsistent with the fundamental design of the MMA. To appreciate that design, it is useful to first understand the history of digital music providers' role with respect to music metadata leading up to the MMA's enactment.

In the early days of digital distribution of music, record labels—rather than download stores—cleared the necessary mechanical rights, and provided a "pass-through" license to the digital platforms. Under this system, the record labels and publishers only needed to work out between themselves how payments were made to the proper parties.

With the advent of streaming services, however, the record labels were unwilling to provide a pass-through license, which pushed the burden of clearing mechanical rights downstream to the digital music providers. And when record labels released sound recordings to digital music providers, they often did not pass through the underlying publishing information needed to clear the mechanical rights. It thus became the digital music providers' responsibility to use the sound recording information received from the record labels to discern what the underlying musical compositions were, in order to make appropriate payments for the mechanical rights. As a result, the digital music providers became the inadvertent clearinghouse of music metadata—not because they were in the best position to gather this information, but simply because they had no choice.

For a limited time during the transition period, the MMA carries forward the current system, by making digital music providers responsible for "engag[ing] in good-faith, commercially reasonable efforts to *identify and locate each copyright owner* of [each] musical work (or share thereof)," including both obtaining available information from the record label *and* the use of bulk electronic matching processes.[12]

After the license availability date, the MMA trims back on the digital music provider's responsibilities significantly, requiring it to only collect what can be reasonably obtained from record labels and distributors:

> (B) COLLECTION OF SOUND RECORDING INFORMATION.—A digital music provider shall engage in good-faith, commercially reasonable efforts ***to obtain from sound recording copyright owners and other licensors of sound recordings*** made available through the service of such digital music provider information concerning—

[12] 17 U.S.C. § 115(d)(10)(B) (emphasis added).

> (i) sound recording copyright owners, producers, international standard recording codes, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody; and
>
> (ii) the authorship and ownership of musical works, including songwriters, publisher names, ownership shares, and international standard musical work codes.[13]

The limited scope of the obligation placed on digital music providers is reinforced elsewhere in the MMA. For instance, the MMA requires digital music providers to report to the MLC "information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording" *only* "to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings."[14] These provisions—which were heavily negotiated during the legislative process—unambiguously contemplate that the digital music providers' obligations are strictly limited to reporting whatever information can be obtained from record labels and distributors, and passing that information through to the MLC.[15]

There is no need for the Office to further define the responsibilities of digital music providers with respect to music metadata. Should the Office nevertheless decide to regulate, it is critical that the Office make clear that the digital music providers' obligations go no further than collecting whatever metadata the sound recording copyright owners provide as part of the digital delivery of sound recording files. Fundamentally, the digital music providers have no ability to force record labels or distributors to provide any more information than they have or are willing to provide. If it chooses to regulate, the Office should also make clear that any alleged failure by a digital music provider to satisfy this requirement is not a basis for issuing a notice of default or terminating the license. This is compelled by the statute, which permits the exercise of such remedies only in specific circumstances that do not include the failure to comply with the obligation in section 115(d)(4)(B).[16]

---

[13] 17 U.S.C. § 115(d)(4)(B) (emphasis added).

[14] 17 U.S.C. § 115(d)(4)(A)(ii)(I)(bb); *see also id.* § 115(d)(4)(A)(ii)(I)(aa) (requiring reporting of certain sound recording information only "to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works").

[15] For context, this understanding was carefully negotiated between digital music providers and music publishers during the legislative process that led to the MMA's enactment. Accordingly, the Office's observation that "a digital music provider making use of the blanket license must engage in efforts to collect information to assist in matching copyright owners to musical works," NOI at 49970, overstates the role that digital music providers are supposed to play in the data ecosystem under the MMA.

[16] *See* 17 U.S.C. § 115(d)(4)(E).

2. Collection Efforts By Copyright Owners

The MMA requires music publishers to "engage in commercially reasonable efforts to deliver to the mechanical licensing collective . . . information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied."[17] The Office has asked whether it is "necessary and appropriate for the Office to promulgate any regulations concerning this provision."[18]

The obligation placed on publishers to share data with the MLC will ultimately be far more crucial to the success of the public musical works database than the efforts of digital music providers to obtain metadata from labels and pass it through to the MLC. After the license availability date, the MMA places the primary responsibility for gathering and publishing copyright owner data squarely on the copyright owners and the MLC. The MLC is required to "[e]ngage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works)."[19] Musical work copyright owners, in turn, are required to "engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, to the extent such information is not then available in the database, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent practicable."[20] In exchange for placing this data burden on the MLC and the copyright owners it represents, licensees agreed to an unprecedented arrangement in the world of collective rights management—to themselves fund the reasonable costs of the operations of the MLC.[21]

Indeed, putting responsibility on the MLC to gather ownership data directly from copyright owners will remove unnecessary intermediaries from data collection efforts, which will in turn increase the reliability of the data received by the MLC and prevent the MLC from having to unnecessarily reconcile multiple versions of the same data set.

Nonetheless, the statute provides no guidance on the kind of data that publishers must provide to the MLC, other than the "names of the sound recordings," which standing alone would be inadequate. The statute also does not provide any requirements on when or how often publishers are required to provide catalog updates to the MLC. Nor does the statute provide any way for the MLC to enforce these statutory obligations.

---

[17] 17 U.S.C. § 115(d)(3)(E)(iv).

[18] NOI at 49970.

[19] 17 U.S.C. § 115(d)(3)(C)(i)(III); *see also id.* § 115(d)(3)(D)(vii)(I)(hh) (requiring the MLC to report on "the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works)").

[20] 17 U.S.C. § 115(d)(3)(E)(iv).

[21] *See* 17 U.S.C. § 115(d)(7).

The Office should fill these gaps in the statute by putting in place minimum standards regarding the categories of data that publishers must provide to the MLC and how often that data should be provided. Specifically, the Office should adopt regulations to require copyright owners of musical works to provide all identifying information for both musical works and sound recordings, including all of the information listed in section 115(d)(4)(A)(ii)(I), including: information concerning authorship and ownership of rights (including each songwriter, publisher name, and respective ownership share); ISWCs and any other industry-accepted musical work identifier for their works; and ISRCs and any other industry-accepted sound recording identifier for recordings of their works.

In addition, the Office should require copyright owners of musical works to provide catalog updates to the MLC as often as possible, but on at least a quarterly basis. As part of this process, DLC recommends that the Office include a requirement that catalog submissions to the MLC be accompanied by a representation and warranty from the copyright owner that the data submitted about their catalog is accurate and complete.

The Office should also issue regulations that will incentivize publishers to provide data to the MLC. For instance, one option is to allow (or require) the MLC to withhold royalty payment and/or ownership credit in the public-facing database for musical works where copyright owners have not directly provided their ownership data to the MLC with a representation of accuracy. In other words, the MLC could differentiate between ownership data received directly from a copyright owner about their own catalog and ownership data received from an entity that does not own or control the work and cannot vouch for its accuracy. Encouraging publishers to come forward with their own data will bring benefits to the entire ecosystem, as first-hand data is more likely to be accurate—or, at least, more likely to surface ownership conflicts—than relying on secondhand sources.

C. Usage and Reporting Requirements

1. Reports of Usage and Payment—Digital Music Providers

The Office will have to put in place an entirely new regulatory scheme governing the reporting of usage and payment of royalties to the MLC. The Office asked whether "there may be existing provisions in the current regulations in part 210 that would also be relevant to the blanket license."[22] There are simply too many differences between the pre-MMA and post-MMA regimes; the Office will instead need to build these regulations from scratch, accounting for the particular features of the MMA's blanket-licensing scheme.

One threshold legal question that needs to be resolved is whether digital music providers operating under the blanket license must provide the MLC with a "cumulative annual statement[] of account" certified by a certified public accountant.[23]

---

[22] NOI at 49970.

[23] *See* 17 U.S.C. § 115(c)(2)(I).

a. The applicability of the annual statements of account provisions in section 115(c)(2)(I) to blanket licensees.

The Copyright Office indicated in the NOI that, in its view, the provisions of section 115(c)(2)(I) referencing the cumulative statements of account apply to blanket licensees operating under subsection (d).[24] DLC believes the statute is ambiguous on this point, and that the Office should resolve that ambiguity by issuing a regulation clarifying that digital music providers are not required to provide CPA-certified annual statements of account. Specifically, while grounds for notice of default and termination of the nonblanket statutory license include the failure to provide "monthly and annual statements of account when due,"[25] the separate provisions governing default under the blanket license do not include *any* reference to the failure to provide annual statements of account.[26] Instead that provision only refers to failures to properly provide "*monthly* reports of usage to the mechanical licensing collective."[27] In other words, while one part of the statute (section 115(c)(2)(I)) seems to contemplate filing of CPA-certified annual statements of account by digital music providers operating under the blanket license, another (section 115(d)(4)(E)) seems to contemplate the opposite. Given this conflict in statutory directions, it is appropriate for the Office to issue a clarifying rule, based on sound policy.[28]

It is important for the Office to consider the history as it decides the correct policy. Although the section 115 statutory license has been in place since 1909, prior to the enactment of the Copyright Act of 1976 there was no audit or certification requirement included with the statutory license. As part of the legislative process leading to the adoption of the 1976 Act, the Office explained to Congress that "[o]ne of the principal complaints of copyright owners with respect to the operation of the present compulsory licensing provisions has been . . . the impossibility of assuring the accuracy of these statements."[29] To address that concern, Congress could have created an audit right that copyright owners could exercise themselves. Instead, per the terms of an NMPA-RIAA agreement, Congress added in a requirement for certification of an annual statement of account by a CPA.[30]

---

[24] NOI at 49970.

[25] *See* 17 U.S.C. § 115(c)(2)(J).

[26] *See* 17 U.S.C. § 115(d)(4)(E).

[27] 17 U.S.C. § 115(d)(4)(E)(i) (emphasis added).

[28] *See, e.g., Perez-Guzman v. Lynch*, 835 F.3d 1066, 1076 (9th Cir. 2016) (finding statutory ambiguity when two provisions "appear to establish broad and conflicting rules").

[29] ABRAHAM L. KAMINSTEIN, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 58 (Comm. Print. 1965).

[30] Pub. L. No. 94-553, § 115(c)(3), 90 Stat. 2541, 2562 (1976); BARBARA RINGER, SECOND SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 256 (Comm. Print 1975).

The lack of an audit right, and the need to rely on a certification by a statutory licensee's own CPA, was a significant source of consternation for publishers in the decades thereafter.[31] As the National Music Publishers' Association, The Harry Fox Agency, Inc., the Songwriters Guild of America, and the Nashville Songwriters Association International explained in joint comments to the Office during a prior rulemaking:

> [T]he compulsory license provisions of Section 115 of the Copyright Act create an honor system for licensing in which compulsory licensees self-license, self-report and self-assess. As a result, the information reported on the Statements of Account is the only mechanism for copyright owners to adequately understand the usage and payment for their works, and to ultimately assess the adequacy and viability of each third party service's business model incorporating their works.[32]

Given this concern, songwriter and publisher representatives proposed, and in 2014 the Copyright Office adopted, relatively stringent CPA certification requirements for digital licensees.[33] Much of that rulemaking focused on the fact that large-scale licensees relied on third-party vendors to enable the use of the statutory license; the CPA certification rules required a nested set of certifications, requiring examination of both the vendor and the licensee, covering the full process through to royalty payment.[34] Whatever the value of that system, it represented an added burden on licensees that was explicitly justified by the lack of an audit right.

During the legislative process leading to the MMA, the Copyright Office recommended adoption of an "express audit right covering the full range of uses under section 115."[35] Congress adopted the Office's recommendation, and in doing so fundamentally changed the regime around verification of payments. Specifically, the MMA provides the MLC with a right to audit digital music providers, subject to explicit limitations[36] and, in turn, provides copyright owners with a

---

[31] *See, e.g.*, U.S. Copyright Office, *Copyright and the Music Marketplace* 108-110 (2015) (describing comments received urging creation of an audit right).

[32] NMPA, HFA, SGA, and NSAI, Reply Comment Letter on Proposed Rule on Mechanical and Digital Phonorecord Delivery Compulsory License 2 (Nov. 26, 2012), https://www.copyright.gov/rulemaking/docket2012-7/comments/reply/nmpa_fox.pdf.

[33] *See id.* at 3; *see also* Mechanical and Digital Phonorecord Delivery Compulsory License, 79 Fed. Reg. 56190, 56204 (Sept. 18, 2014) (to be codified at 37 C.F.R. pts. 201 and 210) (adopting CPA certification standards that "provide[] a high level of assurance that compulsory licensees were complying [with] Section 115 and the attendant regulations").

[34] 79 Fed. Reg. at 56204.

[35] *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, U.S. Copyright Office, 173-74 (Feb. 2015).

[36] 17 U.S.C. § 115(d)(4)(D). The Office may need to consider additional regulatory limitations on this audit right, such as limiting the scope of any MLC audit to the information needed to validate the inputs from digital music providers (e.g., revenue and usage). DLC members are continuing to discuss this issue internally.

right to audit the MLC.[37] For MLC audits of licensees, the statute requires individual licensees to cover the cost of the audit where there is an underpayment of 10 percent or more; the overall audit costs are otherwise covered through administrative assessments paid by licensees.[38] It would thus be unreasonable and inappropriate to read the statute to require digital music providers to both pay for MLC audits of their royalty operations, *and* to continue to take on the burden and expense of annual CPA audits and certification of the same.

Moreover, importing the CPA certification process to the post-MMA world would make no sense. In the pre-MMA regime, the certification attached to the annual statement covered the end-to-end process of payment of statutory royalties, because it encompassed both the digital music provider's processes as well as those of any vendor.[39] (Even then, the CPA certification process was not enough to stop the copyright owners' vociferous complaints about its supposed inadequacy.) Under the MMA, however, payments made to copyright owners depend on both the efforts of digital music providers *and the MLC*. Digital music providers will supply basic sound recording usage information, and the revenue and other figures needed to calculate royalties. The MLC will thus have all necessary information on a monthly basis to develop an accurate and complete accounting of a given licensee's usage and payments. The MLC will carry the laboring oar in determining the amounts to be paid to each copyright owner, through its matching efforts and its calculation of each copyright owner's share. Given that fact, it would be of exceedingly limited utility for digital music providers to undergo annual CPA audits for their portion of this process, particularly in light of the burden associated with such an undertaking.

Now that the MMA has provided an audit right for the mechanical licensing collective, it makes little sense to require digital music providers to *also* engage CPAs to conduct audits and certifications of annual statements of account, especially since (1) the failure to provide such an annual statement is not a basis for terminating the license in any event and (2) such an annual statement would be of limited utility since it would only cover data that digital music providers already provide to the MLC.

To be clear, however, the digital music providers represented by DLC are not in any respect resisting the need to provide the necessary usage and royalty information to the MLC. Indeed, as discussed below, DLC acknowledges that digital providers should be required to provide that information.

b. Monthly report of usage regulations

Section 115 specifies that "[e]ach monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation."[40] In addition, the

---

[37] 17 U.S.C. § 115(d)(3)(L).

[38] *See* 17 U.S.C. § 115(d)(4)(D)(i)(VI).

[39] 79 Fed. Reg. at 56204.

[40] 17 U.S.C. § 115(c)(2)(I). With respect to monthly statements of account, the statute itself does not require CPA certification, only that the monthly payment be made "under oath." *Id.*

statute requires that a digital music provider make "monthly reporting" of usage.[41] The Copyright Office also has been given authority to issue regulations regarding different aspects of the reports of usage, including: (1) any additional information, beyond that set forth in the statute, that should be included in the report of use;[42] (2) format requirements;[43] and (3) adjustment to reports of usage, including to account for overpayment and underpayment of royalties in prior periods.[44]

In developing these regulations, the Copyright Office should not rely on the regulations that currently govern monthly statements of account.[45] Instead, it will need to create new regulations that are designed to account for the specific operation of the blanket license. Although DLC is not prepared to provide a specific regulatory proposal at this point in time, it is continuing to coordinate internally and plans to coordinate with the MLC on the relevant operational details. We will revert to the Office with a more specific proposal in due course. In the meantime, DLC offers some high-level thoughts regarding the regulatory structure.

(1) Overall timing and process

There are a number of open issues related to the basic relationship between the digital music providers and the MLC that will need to be worked out before specific regulatory language can be recommended.

Royalty calculations: Many digital music providers currently rely on third-party vendors to engage in detailed royalty calculations regarding the amounts owed under the statutory license. It may be that the administrative tasks that were once done by those vendors will now be performed by the MLC. Under that assumption, the digital music providers will provide the sound recording usage data, and any revenue and other information necessary to calculate the royalties under the applicable statutory rate. The MLC will perform the calculations and then invoice the respective digital music providers for the royalties owed.

Response file: As part of the process with existing vendors, many digital music providers also obtain a "response file" that details the results of matching of sound recordings to musical works. Those response files are used by some digital services to facilitate direct licensing. Particularly in light of the central role in the new system of the MLC's musical works database, it is critical for the services to be able to receive the same information from the MLC.

Voluntary license administration: Another significant issue relates to the MLC's accommodation of voluntary licenses between digital music providers and music publishers. Those voluntary licenses are often "blanket" deals for all of the songs in a publisher's catalog, rather than deals that

---

[41] 17 U.S.C. § 115(d)(4)(A).

[42] 17 U.S.C. § 115(d)(4)(A)(ii)(III).

[43] 17 U.S.C. § 115(d)(4)(A)(iii).

[44] 17 U.S.C. § 115(d)(4)(A)(iv)(II).

[45] *See* 37 C.F.R. § 210.16.

list the specific songs licensed as part of the deal. They also sometimes involve payment terms that depart from the rate established by the CRB.

Prior to the MMA (as discussed above), digital music providers were required to identify the underlying musical works for purposes of clearing mechanical rights. Accordingly, they either used their own internal resources or a third-party vendor to determine which musical works were owned by publishers with whom they had direct licenses, and which had to be licensed under the statutory license.

The particular details of how this process will work with the MLC are still an open question. Some services may want to treat the MLC as the authoritative source for determining which musical works are subject to voluntary license. In that scenario, the MLC would determine which works are licensed via direct deal partners and which are licensed through the blanket license, based on the track usage reporting provided by the digital music provider. That process may be straightforward for services that have direct deals administered by the MLC, and where the direct-deal publishers are paid at the rate established by the Copyright Royalty Board. In other cases, there will need to be some back-and-forth exchange of information between the digital music provider and the MLC. Other providers may want (or be required by contract) to administer their voluntary licenses outside of the MLC using their preexisting databases or a non-MLC vendor.[46] In that scenario, the MLC would still use its database to determine ownership for statutory blanket-licensed musical works. Since voluntary and statutory blanket-licensed works are paid from the same revenue pool, there may be need for a reconciliation process if the MLC and digital music provider data regarding which works are licensed on a voluntary basis (and therefore should be carved out of the statutory blanket license) do not align. Copyright Office regulations will have to account for and accommodate these various options (and perhaps others) for voluntary license administration.

Dispute resolution. Another open issue relates to ownership dispute resolution in the context of voluntary licenses. For instance, in some cases such disputes will involve a copyright owner with whom a particular digital music provider has a voluntary license, and a copyright owner that is covered by the blanket license. In those cases, the dispute resolution process could affect the digital music provider's ability to make payments under the voluntary license, and the MLC's ability to make payments under the blanket license. Again, DLC is not yet prepared to propose regulatory language to accommodate this situation, and is continuing work on potential solutions.

(2) Content of monthly reports of usage

The Office has asked whether the monthly reports of usage should include additional information beyond that required by the statute. Although the answer to that question could depend on the resolution of the issues highlighted above, DLC can say now that it would be inappropriate to include additional requirements to report track-level information, other than what is already

[46] Some voluntary licenses require the digital music provider to use ownership data provided by publishers to pay those publishers. Of course, the MMA obligates publishers to also provide ownership data to the MLC, and those publishers should be providing identical data to both their direct deal partners and the MLC, which should reduce the need for any reconciliation of data.

required by the statute. The statute specifies "with respect to each sound recording embodying a musical work" that the digital music provider must provide identifying information for the sound recording and musical work where received from the record label or distributor and the number of digital phonorecord deliveries.[47] In other words, the statute already specifies all the track- or sound-recording-level information that would be available to the digital music provider. Requiring licensees to provide more information than they have would be contrary to the statute.[48]

(3) Format and delivery

The Office has indicated that it intends to adopt regulations that govern the technical format of the reports of usage.[49] DLC believes that a minimalist approach is appropriate here. Although digital music providers have established mechanisms for reporting usage to copyright owners (including record labels, music publishers, and collective rights organizations), using existing standards like DDEX, the Office should not dictate any particular standards now, before the MLC has had the opportunity to work with the licensee community to develop best practices. If it turns out that more specific guidance is required, the MLC and DLC can approach the Office later for further rulemaking.

(4) Adjustment of payment and usage information

As noted, the MMA requires the Copyright Office to issue regulations "regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods."[50] These regulations will be critical for the sound operation of the blanket license. The reason is that it is often (if not usually) the case that the exact amounts of royalty payments owed to the MLC for a given month cannot be known with precision until well after the close of the month—and sometimes not for months afterwards. This is so for at least two reasons.

First, the royalty rates for service offerings such as interactive streaming or limited downloads are not a simple matter of counting the number of phonorecord deliveries and multiplying by a set rate. The royalty rate instead can be a function of a variety of variables, including certain service revenues, royalties paid for performance rights, consideration paid to record labels, and the number

---

[47] 17 U.S.C. § 115(d)(4)(A)(ii)(I).

[48] *See* S. Rep. No. 115-339, at 13 (2018) (noting that usage reports from digital music providers "should be consistent with then-current industry practices regarding how such limited downloads and interactive streams are tracked and reported").

[49] NOI at 49971 (seeking "specific information technology requirements" for reports of usage); *see also* 17 U.S.C. § 115(d)(4)(A)(iii) (requiring reports of usage be "in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective and meets the requirements of regulations adopted by the Register of Copyrights").

[50] 17 U.S.C. § 115(d)(4)(A)(iv)(II).

of subscribers, where applicable.[51] These royalty calculations are highly complex, with a number of interrelated variables. To give one of many examples, under certain private agreements between digital music providers and record labels, the services may make year-end "true up" payments if the service does not hit certain minimum thresholds, which could lead to an increase in the consideration paid to the record labels. Those increases would have to retroactively be taken into account in the section 115 royalty calculations, resulting in a change to the royalty amounts owed to the MLC. The calculations become even more complex for services that calculate the amount of performance royalties owed to performing rights organizations ("PROs") as a certain percentage of royalties paid for sound recording rights. In this way, one annual adjustment pursuant to a private contract can have ripple effects on the royalty calculation under the statutory license.

Second, many licensees have voluntary licenses with publishers, and the MMA continues to accommodate such direct deals. But in some circumstances—for instance, new releases—neither the digital music provider nor the MLC may know at the time the payment and report of usage is initially due whether a particular track is associated with a direct deal publisher or is licensed under the blanket license or is licensed across some combination of a direct deal and the blanket license. As a result, a digital music provider that is administering its own voluntary agreements (or using a non-MLC vendor) may inadvertently make a payment to the MLC that should have been made directly to a publisher under the terms of a voluntary agreement. (A similar issue could theoretically also arise where the MLC is administering a digital music provider's voluntary agreements, and the royalties under those agreements are at some rate other than the rate established by the Copyright Royalty Board.)

Accordingly, the Copyright Office regulations, and the MLC's own processes, will need to accommodate some amount of reconciliation with the MLC. Again, the details of this adjustment process are still being worked through.

2. Reports of Usage and Payment—Significant Nonblanket Licensees

Under the MMA, significant nonblanket licensees are required to provide a "report of usage."[52] Although there is not a specific regulatory mandate with respect to reports of usage filed by significant nonblanket licensees, the Office will necessarily have to provide different rules for such licensees, as they do not need to provide information related to calculation or payment of royalties. DLC will be prepared to offer proposed language for regulations specific to significant nonblanket licensees once it works through the issues related to the usage reporting and payment regulations for blanket licensees.

3. Records of Use Maintenance and Access

The MMA requires the Office to adopt regulations "setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital

---

[51] *See generally* 37 C.F.R. § 385.21; *see also* 37 C.F.R. § 385.2 (defining "Total Cost of Content or TCC" in terms of consideration paid to a "Sound Recording Company").

[52] 17 U.S.C. § 115(d)(6)(A)(ii).

music providers engaged in covered activities under a blanket license."[53] At the outset, it is important to realize that the Copyright Royalty Board already has issued parallel recordkeeping regulations for a certain category of uses—promotional and free uses—and the Office should not adopt regulations that are inconsistent with those.[54]

The regulations DLC has proposed below are consistent with the existing CRB recordkeeping regulations, while providing flexibility to digital music providers, who may be subject to various data retention or privacy laws. In addition, with respect to making records of use "available" to the MLC, the proposed regulation makes clear that while the MLC can seek copies of the reports of usage, the audit process set forth in the statute otherwise governs access to the digital music provider's underlying books, records, and data. Allowing the MLC to use this provision to itself seek unfettered access to such information would undermine the carefully calibrated and circumscribed audit procedure.[55]

Proposed Regulations

[§ 210.3]. Payment and reports of usage for blanket licensees.

*** * ***

(f) Maintenance and availability of records of use.

(1) *Retention of records.* Subject to applicable laws, and a digital music provider's generally applicable privacy and data retention policies, a digital music provider will maintain all books, records, and data customarily maintained in the digital music industry in connection with the digital music provider's payment obligations to the mechanical licensing collective for covered activity, for a period of time no shorter than three years from the end of the calendar year in which the report of usage was delivered to the MLC.

(2) *Availability of records.* If the mechanical licensing collective requests copies of reports of use, the digital music provider shall respond to the request within an agreed, reasonable time. The verification process in 17 U.S.C. § 115(d)(4)(D) shall otherwise govern access to the digital music provider's books, records, and data.

D. Transfer and Reporting of Unclaimed Accrued Royalties to the MLC at the End of the Transition Period

The Office has asked whether additional regulatory guidance is required with respect to the MMA's requirement that digital music providers accrue royalties for unmatched works and pay

---

[53] 17 U.S.C. § 115(d)(4)(A)(iv)(I).

[54] 37 C.F.R. § 385.4.

[55] *See, e.g.*, 17 U.S.C. § 115(d)(4)(D)(i)(II) (requiring a "qualified auditor" to "examin[e] the books, records, and data of the digital music provider").

any royalties that remain accrued to the MLC after the license availability date, pursuant to the limitation on liability provision in section 115(d)(10). The Office points to "persistent concern about the 'black box' of unclaimed royalties."[56] We believe there is at least one regulatory clarification that may help music industry participants understand the proper treatment of unclaimed royalties under the MMA.

Prior to the enactment of the MMA, the music publishers, on their own and/or through the NMPA, negotiated agreements with several of the major digital music providers to liquidate accrued royalties for unmatched works through payments based on market share, or other mechanisms *not* based on matching to specific compositions that generated the royalties. For instance, YouTube and Spotify both struck deals with the NMPA requiring ongoing distributions of unclaimed royalties to publishers based on market share after a three-month claiming window.[57] These agreements were entered into in the face of a particular problem—how to ensure that copyright owners are paid appropriately when there was some amount of music that could not be definitively identified, and which may have been rightfully owned by those publishers. Publishers and digital music providers agreed, in this pre-MMA world, to enter into binding legal agreements that resolved that issue by liquidating unmatched royalties to those publishers on an estimated basis, typically based on market share. Simply put, under these deals, the services have paid out "unmatched" royalties to the music publishers, who have presumably paid songwriters what was owed to them out of those sums.[58]

The problem is that some of these agreements have continued in force after the MMA's enactment. This creates 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. To resolve this conflict, the Office should adopt the following provision, as part of the existing regulations regarding the limitation on liability:

Proposed Regulations

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

*** * ***

---

[56] NOI at 49971.

[57] *See, e.g.*, Nate Rau, *YouTube Strikes Deal With Music Publishers Worth Millions*, TENNESSEAN, Dec. 8, 2016, https://www.tennessean.com/story/money/2016/12/08/youtube-strikes-deal-music-publishers-worth-millions/95140304/; 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-publishers-missing-royalties.

[58] *See* Singleton, *supra* note 57 (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.").

> **(c) Transitional provision regarding direct licenses.** Notwithstanding anything in this section to the contrary, digital music providers are not required to accrue any royalties that are required to be paid to copyright owners of musical works pursuant to any agreements entered into prior to the effective date of the Music Modernization Act, and such royalties shall not be treated as "accrued royalties" for purposes of this section or 17 U.S.C. § 115(d)(10).

Importantly, this is a transitional provision, and DLC agrees that any future agreements will have to account for the MMA's treatment of accrued royalties generally. But, until any preexisting agreements expire, some digital music providers will continue to be obligated to pay some amount of accrued unmatched royalties to publishers with whom they have direct deals. As a result, the payments under those publisher agreements will not be available to transfer to the MLC at the license availability date.

DLC and its members recognize the importance of ensuring that royalties are paid to the rightful copyright owner, and are committed to providing the MLC with any necessary assistance. Digital music providers are required to deliver usage reports for unmatched works covering the transitional period prior to the license availability date, and transfer any remaining accrued sums. The MLC will then attempt to identify those unmatched works. At this point, one of two things could happen.

- The MLC's matching efforts could only identify a limited number of works, representing royalties less than what had been transferred to the MLC at the license availability date. In that event, the MLC will have enough money to pay the identified copyright owners. With respect to the excess, that would be transferred to publishers on a market share basis. In this scenario, the payment of unmatched funds to publishers pursuant to direct deals during the transition period would have essentially no effect on the payment that anyone receives.

- Alternatively, the MLC's matching efforts could be more successful at identifying works, such that the associated royalties exceed the amounts that had been transferred to the MLC at the license availability date. In that event, we would hope and expect that the *publishers*, who previously received those unmatched royalties, would repay the necessary amounts to the MLC to ensure that the correct copyright owners get paid.

In no event should digital music providers be made to pay double. The MMA expresses a preference for voluntary agreements, providing in essence that the terms of voluntary agreements should control over the license terms in the MMA. Indeed, interpreting the MMA as requiring *both* payment to publishers via previously executed direct deals *and* to the MLC of the same royalties would raise serious due process concerns.[59]

---

[59] *Cf.* U.S. Const. art. I, § 10, cl. 1 (barring states from enacting laws "impairing the Obligation of Contracts"). Although the Contracts Clause of the Constitution does not directly apply to the federal government, jurisprudence under that clause may inform a constitutional due process analysis. *See United States v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996).

E. Musical Works Database Information

The MMA requires the MLC to establish a public database of musical work ownership information that also identifies the sound recordings in which the musical works are embodied.[60] The statute specifies a number of data fields that must be provided as part of that database, but provides the Copyright Office with residual authority to require the collection and inclusion of additional information in the database.[61] The Office has asked whether "additional categories of information might be appropriate" for inclusion in the MLC's database.[62] DLC has several recommendations for additional information that should be included, all of which will help fulfill the goals of the MMA.

First, DLC believes that the MLC should be required to gather and report public performance rights information (including the PRO affiliation for each share for each musical work) as well as lyric (or graphic) rights information. Collecting this information should not be a challenge for the MLC. It can readily partner with the domestic PROs or obtain that information from publishers and songwriters directly at the same time as it receives information regarding mechanical rights. Moreover, requiring the MLC to collect this information would be more consistent with the MMA: the MLC's mandate is not simply to maintain a database of "mechanical rights" but a database of "musical works."[63] Imposing this requirement will ensure that the MLC's database is fully usable, including as a resource for direct licensing activities. Many direct deals cover the full suite of mechanical rights, public performance rights, and lyric rights. On occasion each right is owned by a different set of parties or owned in different proportions by the same parties. With this added rights information, MLC's database will allow digital music providers to both value potential direct licenses, and operationalize their voluntary licenses, by providing information regarding which works are covered by those licenses, and which need to be paid for through the blanket license. Without this information, digital music providers would be required to consult separate databases for the various rights covered by their direct deals, each of which may have data about copyright ownership that conflicts with the data hosted by the MLC and creates inefficiencies that the MMA was meant to ameliorate.

Second, the Office should clarify that the MLC must collect and publish information regarding each entity in the chain of copyright owners and their agents for a particular musical work, including publishing administrators and aggregators, publishers and sub-publishers, songwriters and composers, and any entities designated to receive license notices, reporting, and/or royalty payment on the copyright owners' behalf. If third-party ownership data (i.e., not provided by the copyright owner or their agent) is included in the database, it should be labeled as such; this information will allow users of the database to assign an appropriate level of authoritativeness to that data. The database must also maintain relational connections between each of these entities for a particular musical work. The reason this is necessary is that it provides public transparency

---

[60] 17 U.S.C. § 115(d)(3)(E).

[61] 17 U.S.C. § 115(d)(3)(E)(ii)(V), (iii)(I).

[62] NOI at 49972.

[63] 17 U.S.C. § 115(d)(3)(E)(i).

into copyright ownership, will potentially reduce disputes over royalties, and will facilitate direct licensing activity.

Third, the Office should require that the database include any standard identifiers (e.g., IPI or ISNI) used for creators and copyright owners themselves (as opposed to only the musical work or sound recording identifier). This information needs to come from the copyright owners themselves. This will help more readily identify copyright owners and tie them to all of the works they control; this information would thus also facilitate direct licensing activity.

F. Musical Works Database Usability, Interoperability, and Usage Restrictions

The Office is required to "establish requirements by regulations to ensure the usability, interoperability, and usage restrictions" of the musical works database.[64]

The MLC, as part of the administrative assessment proceeding, has proposed a budget based on a particular understanding of the technical details of the database. At a minimum, the Office should ensure that the requirements it imposes do not require expenditures that exceed that budget. We believe that the Office, however, should go further, and adopt a regulation that specifies the bare minimum features that are needed by digital music providers and significant nonblanket licensees, who are funding the database in the first instance. Specifically, the Office should provide that the MLC is required to provide no more than the following:

- Bulk downloads (either of the entire database, or of some subset thereof) in a flat file format, once per week per user. This data should be exported in a manner that maintains the relational ties of data points in the database, and include all data fields without restriction. Moreover, licensees should be able use the data they receive from the MLC for any legal purpose.

- Online song-by-song searches to query the database, e.g., through a website.

The Office should also specify that the MLC must make its IT staff reasonably available to the IT staff of licensees to instruct them on how the database is constructed, how data is stored, relationally connected, and queried, and to provide any other information the paying licensees would reasonably need to make meaningful use of the data set in their own IT environment.

This is all the functionality needed by digital music providers and significant nonblanket licensees. To the extent there are other entities that want more functionality, they could pay for it, subject to commercial terms under a good-faith, arms' length commercial transaction. But it would be unreasonable for digital music providers and significant nonblanket licensees to foot the bill for database features that would only benefit entities or individuals who are not paying a fair share of the MLC's costs.

[64] 17 U.S.C. § 115(d)(3)(E)(vi).

G. MLC Payments and Statements of Account

The Office is required to issue regulations about the kind of reporting the MLC will be required to provide to copyright owners when distributing royalties to them.[65] These regulations will primarily affect the relationship between the MLC and copyright owners. DLC will examine the views expressed by the MLC and copyright owner representatives, and will provide views as appropriate during the reply comment phase.

H. Treatment of Confidential and Other Sensitive Information

Section 115(d)(12)(C) provides as follows:

> The Register of Copyrights shall adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used, including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective.

The confidentiality provisions that the Office issues under this provision will be critical to the sound functioning of the MMA. In fact, numerous MMA provisions are specifically linked to this rule, including those governing the maintenance of reports of usage and royalty statements by the MLC.[66] The confidentiality rules will affect the licensees' relationship with the MLC in two different respects.

First, licensees will be providing a significant amount of highly confidential information *to* the MLC, especially through the filing of reports of usage, from which highly confidential details of private licensing agreements can be gleaned. Ensuring that such information is fully protected and that the potential for misuse by the MLC is minimized should be a focus of this particular rulemaking. There is also the possibility that licensees will share confidential information with DLC, and so similar safeguards should be put in place with respect to that as well.

Second, the Office should preserve the transparency of the MLC's operations. The MMA requires the MLC to be a fundamentally open and transparent collective rights organization. Its "policies and practices" must be "transparent and accountable";[67] its bylaws must be made available to the public;[68] it is required to distribute unclaimed accrued royalties "in a transparent and equitable manner";[69] it is required to publish an annual report that sets out detailed information about its

---

[65] 17 U.S.C. § 115(d)(3)(G)(i)(I)-(II).

[66] *See* 17 U.S.C. § 115(d)(3)(M)(i).

[67] 17 U.S.C. § 115(d)(3)(D)(ix)(I)(aa).

[68] 17 U.S.C. § 115(d)(3)(D)(ii)(II).

[69] 17 U.S.C. § 115(d)(3)(J).

operations;[70] it is required to subject itself to a public audit;[71] and it is generally subject to the oversight of the Copyright Office. In short, the MLC is not a purely commercial actor like the performing rights organizations, but is, at its core, a regulated institution operated for the benefit of the music industry as a whole.

One area where this issue arises in particular is with respect to DLC representatives to MLC boards and committees. The purpose of that representation is so the broader digital licensee committee has insight into how the MLC is being run—after all, those licensees have agreed to fund it—and to advise on operational issues. DLC representatives are thus meant to represent the entire digital licensee community, and should be able to share information among DLC membership.[72] Indeed, DLC might appoint someone who is not even employed by a licensee as its representative. Accordingly, the Copyright Office should adopt regulations that do the following:

- Provide that, with respect to DLC representatives to the MLC Board and MLC Committees, the confidentiality obligation should operate at an organization-to-organization level (i.e., one umbrella agreement between DLC and the MLC), rather than binding the individuals in their personal capacity or as representatives of their employers.

- Expressly allow individual board and committee members to share information obtained with people with a need to know within DLC membership and within their companies.

- Provide that the statute and the Register's regulations thereunder should be the ceiling on any confidentiality requirements—the MLC cannot impose additional confidentiality requirements for board and committee participation.

I. Additional MLC Oversight

The MMA specifies that "Congress expects the Copyright Office to oversee and regulate the MLC as necessary and appropriate."[73] DLC applauds the Office's focus on such regulatory oversight, as that will help ensure the MLC—and the MMA in general—is serving the entire musical works community, and the broader music industry generally.

---

[70] 17 U.S.C. § 115(d)(3)(D)(vii).

[71] 17 U.S.C. § 115(d)(3)(D)(ix)(II).

[72] During the initial efforts to staff the MLC's statutorily mandated operations advisory committee, the MLC asked individual DLC representatives to sign nondisclosure agreements that would bind them in their personal capacities. This would have undermined the rationale for DLC representation on the committee. Moreover, some representatives would not have even been able to enter into these agreements, due to internal corporate policies prohibiting binding personal commitments for tasks done within the scope of employment. This episode highlights the need for guidelines from the Office.

[73] NOI at 49973.

In considering what kind of oversight is necessary, DLC wants to emphasize in particular the importance of the *transparency* of MLC operations. Although the MMA imposes a variety of general reporting obligations on the MLC, it provides little in the way of specific detail. For instance, the MMA generally specifies that the MLC's annual report must "set[] forth information regarding . . . the operational and licensing practices of the collective," "how royalties are collected and distributed," and "the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works)."[74] It will be crucial for the Office to ensure that the MLC follows not just the letter of these requirements but their spirit.[75]

DLC is continuing to study these issues, and may have more to say on this topic during the reply comment phase.

J. Public Notice and Distribution of Unclaimed Accrued Royalties

Perhaps the most important responsibility of the MLC is identifying and locating copyright owners with unclaimed royalties. The entire structure of the MMA is designed to ensure that songwriters get paid for the songs they write. The statute thus includes a number of safeguards to ensure that the MLC devotes the necessary resources to that effort. It also imposes obligations on DLC and its members to assist with educational and outreach efforts. The Copyright Office will have an important role to play here as well, both through its own educational efforts and by exercising careful oversight of the MLC's operations.

That said, DLC appreciates the Office's inclination to hold back on any rulemaking with respect to the distribution of unclaimed royalties, until the Office has undertaken the separately mandated study under the MMA. DLC will accordingly abstain from making comments here, and we look forward to participation in the Office's unclaimed royalties study.

K. Other Subjects

DLC does not believe there are other topics that require immediate rulemaking from the Office. But, as noted, we are continuing to coordinate internally and with the MLC, and so reserve our ability to return to the Office should the need for additional rulemaking arise.

(Signatures on next page)

---

[74] 17 U.S.C. § 115(d)(3)(D)(vii)(I).

[75] *See* Letter from Lindsey Graham, Chairman, U.S. S. Comm. on the Judiciary, to Karyn Temple, Register of Copyrights (Nov. 1, 2019); Nate Hertweck, *There's More Work To Be Done To Ensure All Songwriters Get Paid Their Due*, The Recording Academy, May 1, 2019, https://www.grammy.com/advocacy/news/theres-more-work-be-done-ensure-all-songwriters-get-paid-their-due.

November 8, 2019

Respectfully submitted,

SARANG V. DAMLE
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3332
sy.damle@lw.com

ALLISON L. STILLMAN
Mayer Brown LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2209
astillman@mayerbrown.com