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

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

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I. INTRODUCTION

Digital Licensee Coordinator, Inc. ("DLC") appreciates the opportunity to submit these reply comments in the above-captioned rulemaking proceeding,[1] to implement the Hatch-Goodlatte Music Modernization Act ("MMA").[2] These comments reflect further refinement of DLC's views and the results of preliminary discussions with the Mechanical Licensing Collective ("MLC").

In the addendum to these comments, DLC has provided a complete set of proposed regulations that reflect our current understanding of the operation of the blanket license and the MLC administration of that license.[3] DLC reserves the right to revisit the views expressed herein in response to the notices of proposed rulemaking.

II. PRIORITIZING REGULATORY ACTIONS

The MLC asks the Office to prioritize regulations governing the notices of license and usage and reporting requirements, arguing that this is necessary "to build the database structures upon which the MLC will rely to execute its statutory tasks."[4]

DLC agrees that, given their complexity, the Office should endeavor to commence those rulemakings—along with the rulemaking regarding the transfer and reporting of unclaimed royalties—first before turning to the others. The issues regarding the usability and interoperability of the MLC's database are also important, and we expect the MLC will not commit to particular technological expenses without first determining whether it will be necessary under the Office's regulations.

III. SPECIFIC TOPICS OF INQUIRY

A. Notices of Blanket License and Nonblanket Activity

Although there is some overlap between the elements of the notice of blanket license[5] and notice of nonblanket activity proposed by the MLC and DLC (*e.g.*, basic name and contact information), the two proposals diverge significantly in several respects. In its initial comments, DLC proposed

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

[2] Public Law 115–264, 132 Stat. 3676 (2018).

[3] Following the filing of the initial comments, DLC and MLC have engaged in a concerted effort to reach compromise on regulatory language. While the complexity of the issues has made it difficult to reach compromise, the DLC and MLC plan to continue discussions and will revert back to the Office with any areas of compromise.

[4] MLC Initial Comments at 2.

[5] Although the statute refers to the notices needed to obtain a blanket license simply as a "notice of license," 17 U.S.C. § 115(d)(2), for the sake of clarity, in these comments DLC refers to them as "notices of blanket license."

specific regulatory language, which is reproduced, with some additional noncontroversial features proposed by the MLC, in the Addendum (§ 210.2).

Level of detail regarding each service offering. With respect to each kind of offering, the MLC has urged the Office to require licensees[6] to supply highly detailed information about (1) each offering; (2) the type of device (computer, mobile, home speaker) to which each offering is delivered; (3) all content delivered by the provider regardless of whether it is subject to section 115; (4) all discounted plans (***e.g.***, family plans, student plans, and other discounted plans); (5) bundled offerings; (6) all categories of revenue to be received from the offering; and (7) anticipated forms of free trial and promotional use.[7] In apparent recognition of the fact that this information might change over time, the MLC's proposal would also require digital music providers to make amendments to the notice of blanket license within 45 days of any such change.[8]

The MLC's proposal is inconsistent with the MMA, contrary to the evident purpose of those notices, and impractical as a matter of regulatory design. For covered activities, the notice of blanket license and notice of nonblanket activity are meant to take the place of the individual "notice of intent" that section 115 previously required for those activities.[9] The MMA explicitly states that the notices are to simply "specif[y] the particular covered activities in which the digital music provider *seeks to* engage."[10] The notices of license, like the notices of intention before them, are thus meant to be an expression of the licensee's *intention*, rather than a comprehensive, ongoing catalogue of all of the particular covered activities in which a licensee seeks to engage.

In addition, the MMA does not contemplate any update or amendment of these notices after they are first submitted to and accepted by the MLC. For blanket licenses, it instead provides that "the blanket license *shall* be effective *as of the date on which the notice of license was sent by the digital music provider*," with no mechanism for invalidation or withdrawal of the blanket license if the information on such notice later changes.[11] The MMA similarly specifies that the notice of nonblanket activity is meant to be filed within "45 calendar days after the end of the first full calendar month in which an entity *initially* qualifies as a significant nonblanket licensee."[12] Again there is no requirement to update the MLC with a new notice after that.

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[6] Throughout these comments, the term "licensee" is used to refer collectively to digital music providers and significant nonblanket licensees, where the relevant discussion applies to both.

[7] MLC Initial Comments at 3-10, App. A at 2-3.

[8] MLC Initial Comments, App. A at 3-6.

[9] *See generally* S. Rep. No. 115-339, at 3-4 (2018).

[10] 17 U.S.C. § 115(d)(2)(A) (emphasis added).

[11] 17 U.S.C. § 115(d)(2)(A)(ii) (emphases added).

[12] 17 U.S.C. § 115(d)(6)(A)(i) (emphasis added). Indeed, the statute specifies that if a licensee "cease[s] to qualify as a significant nonblanket licensee," it "*may* so notify the collective in writing." *Id.* § 115(d)(6)(A)(iii) (emphasis added). This further underscores that Congress did not contemplate mandatory updates to these initial notices.

The MLC's proposal is the latest in a long string of failed efforts by parties representing music publishers to obtain broad swaths of information via these initial notices. For instance, the Office concluded in 1977 that there is "no obligation that [a notice of intention] be kept up-to-date."[13] Similarly, in 2004, the Office rejected an effort by the National Music Publishers' Association to require licensees to provide new notices of intention every time they provided phonorecords in a new digital format.[14] In doing so, the Office emphasized that the purpose of the notice of intention was "merely to give notice to the copyright owner of a licensee's intention to use the copyright owner's musical work to make and distribute phonorecords subject to the terms of the section 115 compulsory license," and that "additional notices to update information that was correct at the time of service are not part of the statutory scheme."[15] There is no indication in the MMA that Congress had a different view of the purposes of the notices of license or nonblanket activity.

Indeed, when Congress has wanted to enact a requirement under a statutory license to provide updated notices, it has done so explicitly. For instance, section 111 (as originally enacted) required cable operators to provide the Office with an initial notice specifying "the identity and address of the person who owns or operates the secondary transmission service" *and* to provide an updated notice "within thirty days after each occasion on which the ownership or control . . . of the cable system changes."[16] The absence of such an explicit provision here is powerful evidence that Congress did not intend the notices of license and notice of nonblanket activity to be continually updated.[17]

For these reasons, the only available reading of the statute is that the notices of license and nonblanket activity are meant to be filed once, with general information about the types of covered activities a service intends to engage in at the time the notice is filed. DLC's proposed regulations are consistent with that understanding of the MMA. The MLC's proposed regulations are inconsistent with congressional intent.

Moreover, the MLC's proposal would impose a significant regulatory burden on licensees, with no clear benefit. As DLC explained in its initial comments, licensees could add or drop offerings after the initial notices are filed—even on a short-term or trial basis. The MLC's proposal would thus create a trap for the unwary. The categories of service offerings themselves could change

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[13] 69 Fed. Reg. 34,578, 34,580-81 (June 22, 2004).

[14] 69 Fed. Reg. 34,578, 34,581 (June 22, 2004).

[15] 69 Fed. Reg. 34,578, 34,581 (June 22, 2004).

[16] Pub. L. No. 94–553, § 111, 90 Stat. 2541, 2553 (1976). Congress eliminated the section 111 notice requirements in 1986. Pub. L. No. 99-397, § 111, 100 Stat. 848 (1986).

[17] *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (explaining that when "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" (internal quotation omitted)).

with each new CRB ratesetting proceeding.[18] Indeed, the MLC's proposal is tied closely to the particular features of the current rate structure adopted by the Copyright Royalty Judges at the conclusion of their *Phonorecords III* proceeding, such as the current categorization of service offerings, the accommodation of certain discounts, and the types of devices to which the offering is delivered.[19] If any of those elements change in the next ratesetting proceeding, or as a result of the ongoing appeal of the *Phonorecords III* proceeding, then the Office will be forced to revisit these regulations.

The MLC attempts to justify these burdens on both licensees and the Office by observing that the MLC needs to "understand[] the appropriate rates and terms applicable to each offering."[20] That is true, but any legitimate need should be satisfied by the *monthly reports of usage*, which will provide the MLC with the information about the categories of service offerings actually made available by a given licensee in a given month, along with the information needed to calculate the appropriate royalty.[21] It is thus entirely unnecessary for the MLC to gather this same information through initial and updated notices of license and nonblanket activity.[22] The sounder regulatory approach would be to simply allow a licensee to identify in general terms the kinds of covered activities in which it seeks to engage, as contemplated by DLC's proposed rules.[23] (To be clear, however, DLC vehemently disagrees with certain categories of information that the MLC attempts to collect both in the notices of license and in the monthly reports of usage—*e.g.*, information

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[18] *See, e.g., Determination of Royalty Rates and Terms for Making and Distributing Phonorecords*, 84 Fed. Reg. 1918, 1919 (Feb. 5, 2019) (describing additions to governing regulations "to cover several newly created service offering categories, *viz.*, limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services.").

[19] MLC Initial Comments at 3-4.

[20] MLC Initial Comments at 4.

[21] MLC Initial Comments, App. C at 9-12. A similar situation led Congress—at the request of the Copyright Office—to eliminate the section 111 notice requirements. As Congress explained, eliminating the requirement "relieve[d] the Copyright Office and cable system operators of the administrative burden of filing and processing duplicative information," in light of the fact that the statements of account filed by cable company licensees "contain all the information required in the . . . notices as well as detailed information about the signal carriage complement and revenues of each cable system." 132 Cong. Rec. 20397 (Aug. 9, 1986) (statement of Sen. Mathias).

[22] *Cf.* 69 Fed. Reg. 34,578, 34,581 (June 22, 2004) ("The licensee is . . . obligated to provide specific information about the types and numbers of phonorecords made and distributed as part of the monthly and annual statements of account, making it unnecessary to file follow-up notices for this purpose.").

[23] If the Copyright Office were inclined to require some specification of the kinds of covered activities a service expects to engage in, the most it should require is a designation at the level of specificity suggested by the statutory definition of "covered activity," *i.e.*, "permanent download, limited download, or interactive stream." 17 U.S.C. § 115(e)(7). It should make clear, however, that this would not obligate the digital music providers or significant nonblanket licensees to update this disclosure if the categories were changed, if services stopped being offered, etc.

related to content not subject to the statutory license. DLC's positions with respect to those categories of information are addressed in the section below discussing monthly reports of usage.)

Requirement to identify specific works licensed under voluntary licenses. The MLC proposes that notices of blanket license and notices of nonblanket activity include "information sufficient to identify works under voluntary licenses and excluded from the blanket license, as well as identifying the parties to such voluntary licenses."[24]

There are two problems with this proposal. First, it is unclear if the MLC expects licensees to specify the individual *works* that are subject to a voluntary license. If so, it is not what the MMA requires. Instead, the statute specifies that as part of monthly reports of usage, a licensee is required only to "identify and provide *contact information* for all musical work copyright owners for works embodied in sound recordings as to which a voluntary license, rather than the blanket license, is in effect with respect to the uses being reported."[25] We believe, based on our conversations with the MLC, that they share this understanding of the MMA. There is no authority to require licensees to do more.

The reason why the MMA imposes only that limited obligation is because licensees may generally be unable to specifically identify those musical works that are subject to a voluntary license.[26] Instead, a licensee may only know the copyright owners with whom it has voluntary licenses, but with respect to specific musical works, will have only whatever basic sound recording information it obtains from its record label partners. One of the foundational mandates of the MMA is to have the MLC match those sound recordings to the underlying musical works, as needed. (Indeed, in circumstances where a licensee has an agreement with a publishing *administrator*, the licensee may not even know the *actual* copyright owners of the works being administered. For this reason, DLC has proposed a clarifying regulation to specify that the contact information of an administrator or other representative who has entered into a voluntary license on behalf of one or more musical work copyright owners can be provided instead.)

Second, there is no legal basis to require licensees to provide voluntary license information in the notice of blanket license or notice of nonblanket activity, especially since the MMA does not contemplate updates to such notices after they are initially filed. If there is some operational need to have certain voluntary license information provided during the on-boarding process, prior to the filing of the first report of usage, the MLC can certainly request that of the licensee. But this should not be imposed as a legal requirement in the notice regulations themselves. Instead, the better approach would be to do what the MMA itself contemplates, which is have the contact information specified by the statute provided at the same time as the monthly report of usage

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[24] MLC Initial Comments at 9.

[25] 17 U.S.C. § 115(d)(4)(A)(ii)(II) (emphasis added).

[26] As DLC noted in its initial comments, some digital music providers have or are required by contract to themselves identify those specific musical works subject to a voluntary license, based on data received directly from a music publisher.

(although, as DLC's proposed regulations provide, separately from the reports of usage themselves).

Delegation of authority to the MLC to demand any additional information. The MLC's proposal provides itself free-standing authority to demand "[a]ny further information that the mechanical licensing collective may reasonably request, from time to time, provided such information is requested by the mechanical licensing collective from all other existing and potential Section 115 blanket licensees, and reasonable advance notice of such request is provided to all such licensees."[27] DLC disagrees with this proposal, particularly given the MLC's initial explicit attempts to demand information with little relevance to the section 115 license. The MLC's request for broad authority would be legally improper in any event. The statute gives the Register of Copyrights the authority to legally bind licensees; it would be entirely improper (and potentially unconstitutional) to delegate that authority to the MLC.[28]

Reporting All Available Sound Recordings. Music Reports, Inc. ("MRI") urges that digital music providers be made to provide "descriptive information . . . about the individual sound recordings it intends to make available to the public."[29] The precise rationale for imposing this significant upfront burden is unclear. MRI says that "[t]he highly fragmented nature of ownership rights in musical works . . . requires that the MLC collect as much information as possible about which sound recordings *are actually in use*."[30] But a listing of all sound recordings that are *available* on a service does not tell you what recordings are *in use*. Information about "which sound recordings are actually in use" is the very information that will be available in the monthly reports of usage. Moreover, this proposal is technically infeasible, given that digital music providers have new releases that they obtain from the labels only shortly before making them available, and where some of the metadata is provided only after the content goes live. The Office should therefore reject this proposal.

B. Data Collection and Delivery Efforts

1. Collection Efforts By Licensees

The MLC's proposal seeks to place the principal regulatory burden of gathering metadata on the digital music providers.[31] As exhaustively explained in DLC's opening comment, this is contrary

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[27] MLC Initial Comments, App. A at 3.

[28] *See Ass'n of Am. RR v. U.S. Dep't of Transportation*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("Federal lawmakers cannot delegate regulatory authority to a private entity."), *vacated and remanded on other grounds sub nom Dep't of Transportation v. Ass'n of Am. RR*, 575 U.S. 43 (2015).

[29] MRI Initial Comments at 3.

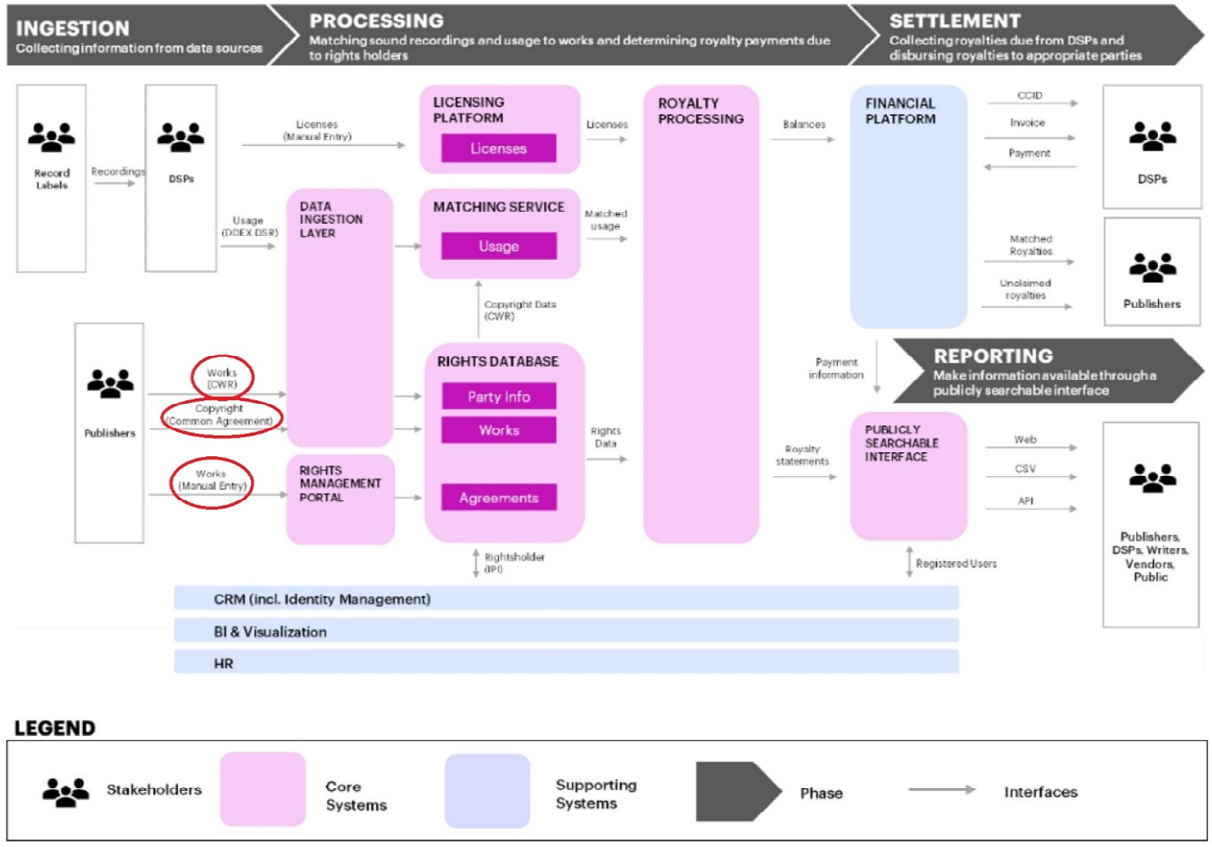
[30] MRI Initial Comments at 3 (emphasis added).

[31] MLC Initial Comments at 12-13.

to the entire structure of the MMA.[32] The relevant point is simple and straightforward: copyright *owners* should be responsible for providing copyright *data* to the MLC.

The MLC itself, in other filings to the Office, has recognized the necessity of relying on copyright owners to provide ownership data. Specifically, in its designation proposal to the Copyright Office, the MLC provided a "conceptual solution architecture" for its planned systems, developed as part of its vendor RFP process, showing that the MLC planned for copyright data to come from the music publishers, while licensees simply receive "recordings" from the record labels.[33]

Figure 1: Conceptual Solution Architecture and Integrations



The "detailed functional requirements" included in the RFP explained that "medium to large sized rights owners" will provide "rights information" to the MLC in "CWR format," while "smaller sized rights owners" will provide "rights information in a simple electronic format" such as Excel.[34] The MLC explained in its Copyright Office submission that it developed these functional requirements after speaking with several "leading vendors" including Harry Fox Agency and

[32] DLC Initial Comments at 5-7.

[33] MLC Designation Proposal, Ex. 4 at 7-8.

[34] MLC Designation Proposal, Ex. 4, App. A at 1-2.

Music Reports, Inc., and that those requirements describe "the many components that the vendor(s) must be able to fulfill."[35]

After designation, the MLC submitted an updated chart to the Copyright Royalty Board as part of the administrative assessment proceeding.[36] In that chart as well, the MLC indicated that "[w]orks" information would come from "[r]ightsholders," not from digital music providers.

DLC expects that the actual technology being developed by the MLC is hewing closely to the operational model the MLC itself described during the RFP and administrative assessment process, given that this model formed the basis of the MLC's designation proposal, its funding request to the Copyright Royalty Board, and the agreement on funding reached between DLC and the MLC. The Copyright Office's regulations should map onto that model as well, by allowing ordinary commercial arrangements to dictate the kind of information obtained by licensees from record labels at the time the sound recordings are delivered. (At the same time, as discussed below, the model above suggests that it will be important to provide more specific direction to *copyright owners* about the kinds of data they need to provide directly to the MLC.)

In addition to being inconsistent with the MLC's planned operational design, the MLC's regulatory proposal is impracticable and inefficient in several respects. First, it would impose on digital music providers a specific legal obligation to extract from record labels and distributors all metadata those entities have "through contract or otherwise."[37] This would improperly interject the Office into established commercial relationships between digital music providers and their label partners, which already involve the transfer of substantial amounts of metadata to digital music providers. The MMA only requires digital music providers' actions to be "commercially reasonable," and that standard should be defined by actual commercial practices in the marketplace.[38] In any event, the digital music providers have no ability to force labels to provide anything to them as part of these negotiations. This is especially so because, as the Copyright Royalty Board has recognized, the major labels possess market power in these transactions.[39]

Second, the MLC incorrectly suggests that the MMA requires digital music providers to supply metadata through a work stream that is independent of the monthly reports of usage. For instance, the MLC proposes that digital music providers "update the metadata and identifying information

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[35] MLC Designation Proposal at 55-56.

[36] *See* Written Testimony of Richard Thompson ¶ 13, *available at* https://app.crb.gov/case/viewDocument/7865.

[37] MLC Initial Comments at 13.

[38] The MLC relies on case law arising in Delaware courts interpreting the phrase "commercially reasonable" in various corporate law contexts. MLC Initial Comments at 13 n.5. But that case law sheds no light on whether it is appropriate for the Office to attempt to delineate commercially reasonable practices in this marketplace via regulation.

[39] *See* 81 Fed. Reg. 26,316, 26,368 (May 2, 2016) (noting "the Judges' holding regarding the anticompetitive effects of the complementary oligopoly that exists among the Majors").

with the MLC whenever it receives updates from the labels."[40] Similarly, the MLC seeks to require digital music providers to supply whatever sound recording information they happen to possess "promptly" after filing a notice of blanket license or notice of nonblanket activity, before any report of usage has been sent.[41] To be clear, the MMA does not require digital music providers to hand over metadata to the MLC through any process other than the report of usage. While section 115(d)(4)(B) defines digital music providers' obligation to "obtain" data, the only provision that requires those providers to *report* that data to MLC is section 115(d)(4)(A), which relates to monthly usage reporting.[42]

Third, the MLC proposes to "require that the [digital music providers] provide . . . data in the manner it was delivered to them by the record label or other entity."[43] As the MLC acknowledges, the metadata received from record labels is often "re-titled or re-formatted by the [digital music providers]."[44] The Recording Industry Association of America ("RIAA") explains why: digital music providers "have different rules for how they ingest, store and display Sound Recording Metadata (including fields such as sound recording name or track title and featured artist)."[45] For instance, a digital music provider "may alter the featured artist metadata so that an artist, such as Sean Combs, who over the course of his career has changed his stage name (*i.e.*, Puff Daddy, P. Diddy, Puffy or Diddy), will always appear under the same name (*i.e.*, Diddy on Spotify, Puff Daddy on Tidal) in the on-screen text display that listeners see."[46]

As the MLC sees it, the solution is to have all of the various record labels send their data to various digital music providers and significant nonblanket licensees. Then, those licensees would each have to maintain the record label data in its original form, even if they reformat or otherwise edit it for operational purposes. Finally, those licensees would each separately deliver that preserved data to the MLC at the appropriate time.

The MLC's solution is unworkable. The situation is far more nuanced than the MLC comments let on. For instance, it is often the case that the digital music provider edits the data received from record labels to correct obvious misspellings or remove special characters that cannot be handled

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[40] MLC Initial Comments at 14.

[41] MLC Initial Comments at 15.

[42] 17 U.S.C. § 115(d)(4)(B); *see also id.* § 115(d)(4)(A)(ii)(I)(aa) (referencing data obtained "pursuant to subparagraph (B)"). The statute imposes no obligations on significant nonblanket licensees to engage in data collection efforts. *See generally id.* § 115(d)(6).

[43] MLC Initial Comments at 14.

[44] MLC Initial Comments at 14.

[45] RIAA Initial Comments at 3.

[46] RIAA Initial Comments at 3.

by the digital music provider's systems or the reporting standards.[47] In some cases, for major new releases, the data provided by the label is purposefully incomplete until the release, to prevent leaks, and then later updated. For these reasons, the precise content of the data flow from the label through the licensee to the MLC is not amenable to regulation, and should be left to the market participants to work through on their own.

In any event, the better solution to the problem identified by the MLC is for the MLC to get the relevant data from the record labels *directly*. This is the point made by several other commenters, including RIAA. RIAA notes that one could "arrange for the MLC to receive a restricted feed . . . of aggregated, unaltered, verified Sound Recording Metadata sourced directly from sound recording copyright owners and other exclusive licensors of sound recordings from a single, authoritative source, such as SoundExchange."[48] That solution carries multiple advantages: "[n]ot only would a single data source avoid redundant work for the DMPs (and prevent the MLC from having to process the redundant feeds), it would also avoid the possibility that different DMPs submit disparate and possibly contradictory sound recording data to the MLC that would then need to be resolved somehow."[49] With record labels acting as the primary and authoritative source for their own sound recording metadata, the MLC could then rely on only a single (or limited number of) metadata field(s) from licensees' monthly reports of usage to look up the sound recordings in the MLC database (*e.g.*, an ISRC or digital music provider's unique sound recording identifier that would remain constant across all usage reporting).

We agree with RIAA that a commercially reasonable solution here would be for the MLC to obtain a feed of sound recording data from SoundExchange. Accordingly, DLC proposes in the Addendum (§ 210.3) specific language to make clear that the digital music providers can fully satisfy their statutory obligation to engage in "good-faith, commercially reasonable" data collection efforts by collectively arranging for the MLC to obtain the necessary sound recording information from a central location like SoundExchange. Such a solution will likely be far more cost-effective for the MLC than combining and reconciling disparate data from licensees. DLC, however, disagrees with the RIAA's proposal to go further, and specifically *mandate* this arrangement by regulation.[50] There may be other solutions worth exploring as well, so there is no reason for the Copyright Office to ossify a particular arrangement in its regulations.

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[47] For example, some characters, like ampersands, cannot be directly expressed in XML and so cannot be delivered using the DDEX messaging standard. *See* Digital Data Exchange, *Special XML Characters, available at* https://kb.ddex.net/pages/viewpage.action?pageId=4882803.

[48] RIAA Initial Comments at 5.

[49] RIAA Initial Comments at 5; *see also* Jessop Initial Comments at 3 ("The MLC should obtain sound recording information from as close to the source as possible. In practice this means from the record label or someone directly or indirectly authorized to manage this information for them.").

[50] RIAA Initial Comments at 4-5 (urging the Office to "promulgate regulations . . . to *require* the [digital music providers] to collectively arrange for the MLC to receive a restricted feed" (emphasis added)).

The RIAA raises an additional point regarding licensees' data collection obligations. The RIAA proposes that the digital music providers "take all commercially reasonable steps to determine and verify the ISRC for each track included in a report of usage," suggesting it can do so by using SoundExchange's web-based ISRC lookup service.[51] This gets the obligations exactly backwards. The MMA only imposes on licensees the obligation to engage in commercially reasonable efforts to collect data "*from sound recording copyright owners and other licensors of sound recordings* made available through the service."[52] If the RIAA wants to ensure that ISRCs are reported to the MLC, it would make a lot more sense for the *labels* to ensure that ISRCs are included in the metadata of recordings at the time they are delivered to digital music providers, especially because the labels are the ones assigning ISRCs in the first place.[53] And if the labels are not providing this information, it makes far more sense for the MLC, as a single central organization responsible for the ultimate matching, to do this work, rather than each and every licensee.

The Japanese Society for Rights of Authors, Composers and Publishers floats an idea to incentivize digital music providers to collect copyright data by requiring them to pay a higher rate if the MLC does not meet some minimum match rate.[54] This proposal makes no sense (the MLC's match rate is more a function of its own efforts at gathering data) and is contrary to the statute (royalty rates and the administrative assessment are the domain of the Copyright Royalty Board not the Copyright Office).

2. Collection Efforts By Copyright Owners

The MLC urges that copyright owners of musical works should have essentially *no* specific obligations to collect and provide information to the MLC, requiring only that they engage in "commercially reasonable efforts, to the extent practicable."[55] That is wholly inconsistent with the MLC's "conceptual solution architecture" and functional requirements, as described in its RFP, which were designed with the expectation that copyright owner data will come in specific formats from publishers themselves.[56]

The MLC justifies this light burden on copyright owners for two reasons. First, it states that "there is no viable way to define specific activities that must be taken by all copyright owners" because "the spectrum of musical works copyright owners is so broad, from sophisticated multinational publishing companies to do-it-yourself singer-songwriters to composers in remote countries who

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[51] RIAA Comment at 4.

[52] 17 U.S.C. § 115(d)(4)(B) (emphasis added).

[53] *See generally* ISRC, *Obtaining Code*, *available at* https://www.usisrc.org/about/obtaining_code.html (noting that "recording rights owners" are generally responsible for assigning ISRCs).

[54] JASRAC Initial Comments.

[55] MLC Initial Comments, App. B at 8.

[56] MLC Designation Proposal, Ex. 4 at 7-8 & App. A at 1-2.

may communicate in rare languages and have limited or no access to the Internet."[57] But the MLC's RFP anticipated this concern, by providing specific, reasonable standards for small copyright owners—that "smaller sized rights owners" can provide "rights information in a simple electronic format" such as Excel.[58]

The MLC also argues that "many copyright owners do not have any relationship with the creators or owners of sound recordings in which their works are embodied."[59] This is a considerable overstatement. For new musical works, as the RIAA points out, the "first use[]" must generally be cleared by a record label,[60] at which time the musical works copyright owner is in a position to insist on being given information about the sound recording. And even as to new recordings of existing works, copyright owners will directly be receiving statements of account for physical sales and distributions under individual download licenses from the labels—not through the MLC. Publishers also receive reports from the PROs, which have matching mechanisms to identify performances of compositions on radio and digital music services. In other words, it should be fairly rare for a musical work copyright owner to have *no way to know* what recordings exist of their works.

In any event, DLC recognizes that there are open questions here about the manner in which the copyright owners' obligations can be satisfied, and has proposed language that, like the regulations for digital music providers, provides general guidance without being overly prescriptive. *See* Addendum (§ 210.3).

C. Usage and Reporting Requirements

1. Reports of Usage and Payment—Digital Music Providers

Unlike DLC, the MLC took the approach in its initial comments of copying over large swaths of the existing monthly statement of account regulations, and adding to them various additional requirements. The result is something that does not fit into the statutory scheme. For instance, the MLC's proposed regulations copied over a reference to the digital music provider "calculating the per-work royalty allocation for each work."[61] That provision does not make sense in the context of this blanket license. Under the blanket license, the digital music provider provides the inputs required for the royalty calculation, including usage reporting, and pays over the total royalties owed in the month. It is the *MLC's* job to perform the relevant per-work allocations. Similarly, the MLC's proposed regulations copy over the whole section from the pre-MMA regulations on "[s]ervice" of monthly reports of usage, including provisions stating that royalties are not payable

[57] MLC Initial Comments at 15.

[58] MLC Designation Proposal, Ex. 4, App. A at 2.

[59] MLC Initial Comments at 16.

[60] RIAA Initial Comments at 9.

[61] MLC Initial Comments, App. C at 13.

until they equal at least one cent, and requiring backup withholding of royalties.[62] These provisions are irrelevant in the context of the MMA, under which monthly reports of usage are delivered to a single collective, rather than numerous individual copyright owners.

In the following sections, we discuss in depth each feature of DLC's proposed regulations, and respond to the MLC's competing proposals.

a. Reporting and Payment Process

DLC's proposed regulations are designed to accommodate two aspects of the expected operational role of the MLC in the reporting and payment process—both of which DLC believes should be uncontroversial. First, DLC believes it is common ground that the MLC will be ultimately responsible for calculating and confirming the total royalties owed by each digital music provider based on inputs (*e.g.*, service revenue, subscriber counts, total cost of content) supplied by the provider. Second, with respect to those digital music providers that have voluntary licenses, DLC believes it is common ground that the MLC will need to engage in matching efforts to determine which works are subject to voluntary licenses and which are subject to the blanket license, because the MLC will have a complete (and hopefully authoritative) database of musical work ownership.[63]

What this means, fundamentally, is that under the blanket license, a monthly report of usage and the associated royalty payment in many cases, *cannot* be delivered to the MLC at the same time, but will require some back-and-forth with the MLC before payment can be made. For instance, a digital music provider with one or more voluntary licenses may have to report usage first, and rely on the MLC to tell it how much it owes under the blanket license (and, if applicable, under each voluntary license), before any payment to the MLC is possible. Even a service that operates exclusively under the blanket license may be required to report usage first, because (for internal financial control purposes) it needs an invoice back from the MLC with the amounts owed under the blanket license (and, if applicable, under any voluntary licenses) before it can make a payment. There are also likely to be services that choose to prepay royalties and follow up later with a monthly report of usage, after which the MLC will need to confirm the correct payment amounts, and provide an appropriate credit if needed.

Indeed, *the MLC itself* described exactly such a "back-and-forth" process in the "conceptual solution architecture" it provided to the Office during the designation process. That architecture, reproduced again below, shows a process by which a digital music provider gives "usage" information to the MLC, receives back an "invoice" and "CCID" like information and finally makes a "payment." (CCID refers to the "Claim Confirmation and Invoice Details" standard that

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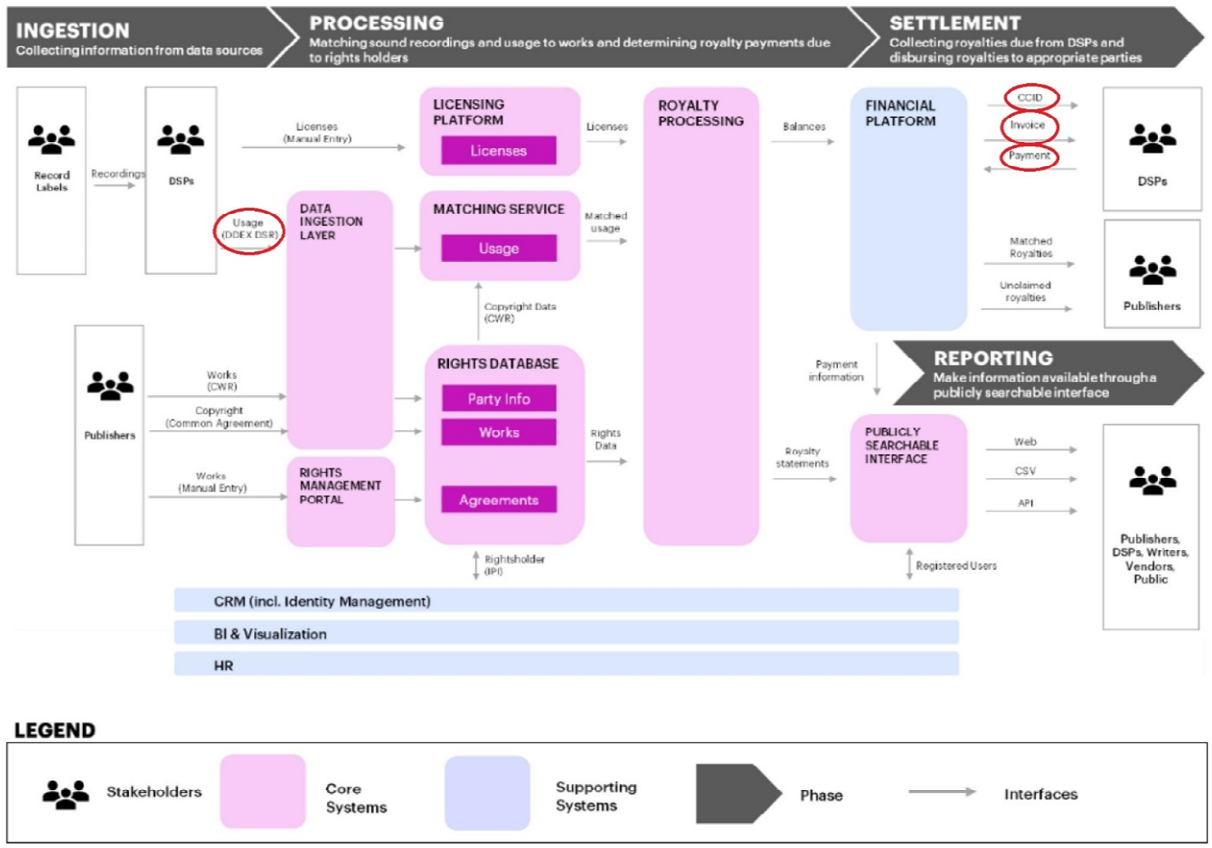
[62] MLC Initial Comments, App. C at 15-16.

[63] *See* 17 U.S.C. § 115(d)(3)(G)(i) ("Upon receiving reports of usage and payments of royalties from digital music providers for covered activities, the mechanical licensing collective shall . . . engage in efforts to . . . confirm uses of musical works subject to voluntary licenses and individual download licenses, and the corresponding pro rata amounts to be deducted from royalties that would otherwise be due under the blanket license.").

is commonly used to deliver what we refer to as the "response file" information to digital music providers.[64])

Figure 1: Conceptual Solution Architecture and Integrations



As noted above, the MLC submitted an updated chart to the Copyright Royalty Board as part of the administrative assessment proceeding. Although that chart does not specifically call out the CCID-like data flow, it does separate the usage reporting from payment, and refer to the delivery of an "Invoice for Matched Usage."[65] And it is standard practice for HFA, which is the primary vendor that MLC has selected, to provide invoices and detailed backup data to digital music providers.

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[64] *See* CCID (Claim Confirmation & Invoice Details) Standard Format Version CCID.14.1.4, *available at* https://www.suisa.ch/fileadmin/user_upload/kunden/Online/CCID_v14.1.4_10th_APR_2017.pdf .

[65] *See* Written Testimony of Richard Thompson ¶ 13, *available at* https://app.crb.gov/case/viewDocument/7865.

The MLC's proposed regulations, however, are not designed to actually accommodate its own proposed process. Among other things, the MLC's proposed regulations require usage reporting and payment to be delivered simultaneously, and do not provide any process for a digital music provider to receive an invoice or response files.

DLC understands that the MLC may believe that regulations accommodating the above "back-and-forth" process would be *contrary to the statute*—which raises the very real question of why it would have proposed the above process in the first place. In any event, the MLC's view is incorrect. Section 115(d)(4)(A)(i), which governs royalty reporting and payment, specifies only the outer deadline for usage reporting and payment—45 days—but does not expressly state that both need to be submitted at the same time.[66] Indeed, the usage reporting and payment provisions of the MMA should be read in a manner that is consistent with the provision that requires voluntary licenses to be "given effect."[67] As the above discussion makes clear, the only way to "give effect" to voluntary licenses is to provide for some back-and-forth process with the MLC. (DLC nevertheless acknowledges that different digital music providers may have distinct capabilities and/or reporting processes that neither the MLC or DLC are able to anticipate. The proposed regulations accordingly provide express authority to digital music providers and the MLC to enter into agreements that vary the procedures set forth in the regulations, provided that those arrangements are consistent with the requirements of the statute itself.)

In contrast to the MLC's proposed regulations, DLC's proposed regulations are intended to accommodate a back-and-forth process. At a high level, those regulations contemplate digital music providers sending monthly reports of usage to the MLC, with the necessary information for the MLC to calculate the applicable top-line royalty amount, as defined in the relevant CRB rate regulations. The proposed regulations do not "hard code" the particular elements that need to be reported for such calculation purposes, as those could change with each rate-setting proceeding before the CRB. Instead, they simply include a general reference to the relevant rates, with the understanding that the MLC will receive the necessary information from the digital music providers in order to perform the calculations.

The regulations provide that after receiving the monthly report of usage the MLC will engage in the matching process described above. In addition, they guarantee delivery of an invoice to the digital music provider with the amount of royalty owed for uses covered by the blanket license and, where applicable, the amount owed under any voluntary licenses. This information is, of course, necessary in light of the fact that the MLC is ultimately responsible for calculating royalties owed. Indeed, as noted, in some cases such an invoice will be necessary for the digital music provider to be able to make a royalty payment at all. (For that reason, DLC's proposed regulations accordingly place a 15-calendar-day time limit for the MLC to supply an invoice.) In cases where the royalty has been prepaid by the digital music provider prior to delivering a monthly report of usage the invoice will serve the function of confirming the amount of royalties calculated by the MLC, and the amount of any credit.

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[66] *See* 17 U.S.C. § 115(d)(4)(A)(i).

[67] 17 U.S.C. § 115(d)(1)(C).

DLC's proposed regulations also require the MLC to provide a "response file" with the results of the matching process. This is a standard feature of the current market—in fact, HFA (which has now been selected as the primary vendor for the MLC) provides the information that would be contained in these response files as a matter of course. The response files essentially serve as the "backup" to the invoice, confirming where royalties are being paid. This is especially important for digital music providers that have voluntary licenses, and do not maintain their own proprietary rights database, so they can understand what works are covered by such voluntary licenses.

Again, to be clear, the steps here do not necessarily need to occur in any particular order. Crucially, however, this process is subject to the ultimate requirement that all usage reporting and royalty payment must be made within 45 calendar days after the end of the monthly reporting period. A service provider must accordingly submit usage reports to the MLC keeping that ultimate deadline in mind.

This overarching structure of the regulations is generally consistent with how section 115 licenses have been administered prior to the MMA—the difference being that the MLC is now fulfilling the key matching and calculation role that the services and their vendors fulfilled in the pre-MMA world. This process also makes sense, as the matching exercise is necessary in any event to ensure that proper payments are made to copyright owners.

b. Estimated Inputs

DLC's proposed regulations also provide that, to the extent the royalty depends on an input that is unable to be finally determined at the time of the monthly report of usage, the digital music provider can report to the MLC a reasonable estimation of such input, subject to the requirement to adjust the report once the actual amount has been determined. This proposal is similar to longstanding regulations related to public performance royalties.[68] As DLC explained in its initial comments, today there are inputs to the royalty calculation in addition to public performance royalties (such as applicable consideration expensed for sound recording rights) that may not be established by the time a monthly report is filed and for which the digital music provider may not control the timing or ultimate outcome that drives the data input.[69] DLC's proposed regulation is designed to accommodate these scenarios.

DLC's proposed regulations also make clear that adjustments of such estimates—which are a necessary and ordinary part of the royalty payment process—are not a basis for charging late fees, terminating a license, or requiring the payment of audit fees. Indeed, under the current regulations, when a digital music provider today adjusts its royalty payment in its annual statement of account, it does not tack on a late fee. Instead, the regulations clearly provide that the digital music provider is only required to pay "the difference between" the "total royalty payable" as reported in the annual statement of account and "the total sum paid"—there is no mention whatsoever of any late

[68] *See* 37 C.F.R. § 210.16(d)(3)(i); *see also id.* § 210.17(d)(2)(iii) (providing that a licensee "shall serve an Amended Annual Statement of Account within six months from the date such public performance royalties have been established").

[69] DLC Initial Comments at 15-16.

fee.[70] This makes good sense: the late fee is meant to ensure that digital music providers are following the regulations. If a service is following the regulations by making a reasonable estimate of an input it does not know the value of, it should not be penalized with a late fee even if it so happens that the estimate is too low. Indeed, if the rule were otherwise, PROs could delay finalizing agreements (while still being paid interim royalties) with the purpose of causing digital service providers to have to pay late fees to publishers as a result. Similarly, the cost-shifting aspect of the audit provision[71] is not meant to punish digital music providers for adjusting estimated values in the ordinary course of business.

c. Content of Reports of Usage

With respect to the elements of data related to individual sound recordings, DLC's proposed regulations specify, consistent with the statute, that certain information must be provided—the sound recording name, featured artists, and number of digital phonorecord deliveries of the sound recordings. Beyond that, the proposed regulations specify that two additional categories of data specified by the statute—specifically, the additional metadata related to (1) the sound recording and (2) the underlying musical work—are to be reported "only to the extent acquired by the digital music provider." For those categories, the proposed regulations allow the information to be delivered separately from the other information required by the monthly report of usage. That allows some measure of flexibility in how this information is delivered to MLC. A licensee, for example, may want to arrange for the catalog information to be delivered to the MLC at one time, and then reference that catalog using the ISRC or other unique identifier.

For its part, the MLC proposes to substantially expand the categories and volume of information that digital music providers must report under the statutory license. The MLC makes virtually no attempt to justify these added burdens. Moreover, many of the requests are tied to the specific rates and terms for the statutory license, which undoubtedly will change over time. And adopting the MLC's suggestions would be inappropriate given the short period of time before the license availability date, and the number of operational changes that digital music providers already will need to make to accommodate the transition to the blanket license. Accordingly, as a general matter, the Office should reject any reporting requirements that go beyond what is strictly necessary for the MLC to perform the required calculations or implement the blanket license. (To the extent the MLC's requests are rooted in a concern about the accuracy of the reporting it will receive, the MMA provides the MLC with a new audit right to assuage that concern.[72])

DLC offers the following comments on each specific proposed addition to the usage reporting requirement:

- Link to an audio file. This is a technologically impracticable proposal. For services that are behind paywalls, either such links would not work, or the digital music provider would have to provide special access to the service for the MLC. This kind of data would be

[70] 37 C.F.R. 210.17(g)(4).

[71] 17 U.S.C. § 115(d)(4)(D)(i)(VI).

[72] 17 U.S.C. § 115(d)(4)(D).

cumbersome to track and report to the MLC, and a substantial overhaul of existing reporting systems would be necessary. The MLC has offered no reason why such a requirement is necessary to implement the blanket license.

- Musical work information "to the extent . . . known by the digital music provider." Although in general the MLC's proposal regarding the musical work information to be included in the reporting tracks the MMA, it adds a requirement to report such information "to the extent . . . known by the digital music provider."[73] This is contrary to the statute, which only requires reporting such information "to the extent *acquired by the digital music provider in the metadata* provided by sound recording copyright owners or other licensors of sound recordings,"[74] and reflects another attempt on MLC's part to relitigate an issue that was settled in the legislative process. Read literally, it would require the digital music provider to scour its documents and other records for information about musical work ownership information, which may or may not be accurate or complete, and which may be subject to confidentiality restrictions. Again, imposing this obligation will stand as a barrier to the implementation of the blanket license. The only requirement on a licensee should be to send the metadata they receive from the record label, no matter how comprehensive it is.

- Recording-level voluntary licensing information. The MLC proposes that *for each sound recording*, the digital music provider supply "information sufficient to identify whether a musical work embodied in a sound recording is being licensed pursuant to a voluntary license or an individual download license."[75] This would be inconsistent with the statute, which requires *only* that digital music providers need to "identify and *provide contact information for* all musical work copyright owners for works embodied in sound recordings as to which a voluntary license . . . is in effect."[76] Congress's decision to exclude from the statute any requirement to identify the particular *works* licensed under a voluntary license was purposeful: it will fundamentally be the MLC's job to identify which musical works are owned by which publishers and it would be largely impossible for many of the digital music providers to perform this function.

- Information about digital phonorecord deliveries for which the digital music provider is not paying royalties. The MLC urges that digital music providers should be made to report any streams that fall outside the definition of "Play" under the current section 115 rates and terms.[77] Again, those rates and terms could change in the future, and it does not make sense to hard code requirements related to them in these more general regulations. In any event, the MLC's suggestion does not make sense. The current rates and terms define a

[73] MLC Initial Comments, App. C at 11.

[74] 17 U.S.C. § 115(d)(4)(A)(ii)(I)(bb) (emphasis added).

[75] MLC Initial Comments, App. C at 11.

[76] 17 U.S.C. § 115(d)(4)(A)(ii)(II) (emphasis added).

[77] MLC Initial Comments at 19.

"Play" as "lasting 30 seconds or more" and exclude plays that were "not . . . initiated or requested by a human user."[78] It is therefore entirely unclear why the MLC would need to know about streams that fall outside the definition of "Play" and therefore do not implicate a payment obligation to the MLC.

- Information regarding discounts. The MLC asks the Office to require digital music providers to provide detailed information regarding "any discounts offered . . . during the relevant month and that the digital music provider is relying on to reduce any payable mechanical royalties during that month, including any family plan discount, student plan discount, or other type of discount with respect to such offering."[79] This request is incoherent. The current rates for the section 115 license establish certain royalty floors based on the number of subscribers to a service offering. For purposes of counting the number of subscribers, digital music providers are required to treat a subscriber to a "family plan" as 1.5 subscribers per month, and a subscriber to a "student plan" as 0.5 subscribers per month, for purposes of counting the number of subscribers to the service, which helps determine certain royalty floors.[80] So, the discounts referenced by the MLC in its proposal do not "reduce . . . payable mechanical royalties"[81] but simply affect the way that subscribers are counted under the current rates. Digital music providers will already be required to report *total* subscriber counts to the MLC, which is all that is necessary to engage in the applicable royalty calculations. The detailed information requested by the MLC as part of the monthly reports of usage is not necessary, and should not be required.

- Information regarding bundled offerings. The MLC proposes that digital music providers be made to provide detailed information about bundled offerings, including how the standalone prices for the music components of those bundles have been calculated. Again, this is a proposal that is closely tied to the current rates and terms of the section 115 license. For instance, the current rates provide that the revenue recognized by the digital music provider for a bundled product "shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities."[82] Moreover, certain aspects of the definition of service revenue related to bundled products are currently on appeal to the D.C. Circuit.[83] And, in any event, the MLC will be receiving service provider revenues related to bundled offerings as part of the monthly reports of usage, because it is a necessary input to the royalty calculation. There is no reason to make digital music providers supply the additional detailed information that the MLC proposes. To the extent

[78] 37 C.F.R. § 385.2.

[79] MLC Initial Comments, App. C at 11.

[80] 37 C.F.R. § 385.22(b).

[81] MLC Initial Comments, App. C at 11.

[82] 37 C.F.R. § 385.2.

[83] *See* Public Initial Brief for Appellants/Intervenors 57-63, *Johnson v. Copyright Royalty Bd.*, No. 19-1028 (D.C. Cir. Aug. 14, 2019).

the MLC has concerns about how a particular digital music provider has calculated service revenue, it has recourse to the newly created audit right.

- Information regarding promotional offerings. The MLC proposal would require digital music providers to give detailed information about "free trial or promotional offerings as to which a zero mechanical royalty rate" applies, including the number of DPDs that are subject to such a zero-rate.[84] With respect to these uses, the Copyright Royalty Board, as part of the current section 115 rates and terms, already has put in place detailed recordkeeping requirements for "promotional or free trial non-royalty-bearing uses," which are available on request.[85] There is no reason for the Copyright Office to impose a separate and independent burden on digital music providers here.

- Non-section-115 eligible content. The MLC makes a proposition, both in the proposed notice of blanket license regulation and the reports of usage regulation, that would require digital music providers to report their delivery of non-section-115-eligible content as part of their service offerings. Their justification for gathering data completely unrelated to covered activities is paper-thin: that "[s]ome DMPs, particularly nascent ones, may not immediately recognize the difference between section 115 offerings and purportedly non-section 115 offerings."[86] To the extent the MLC has such concerns about a particular digital music provider, it has recourse to the audit right. Those concerns are no reason to impose a burdensome reporting obligation for activities that do not fall within the scope of the statutory license at all.

- Musical works owned by the digital music provider. The MLC proposes, as part of the monthly report of usage, "identification of all musical works owned, directly or indirectly, by the digital music provider."[87] It is difficult to respond to this proposal because the MLC nowhere explains why it is seeking this information. Absent an explanation of why this information is necessary, the Office should decline to impose this requirement on digital music providers.

- "Catch all" authority. The MLC's proposal also would vest itself with discretion to demand "any other information" from the digital music provider "to confirm the accuracy of [the] calculation."[88] Again, this would represent an improper delegation of the Register's authority to the MLC and must be rejected. [89]

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[84] MLC Initial Comments, App. C at 12.

[85] 37 C.F.R § 385.4.

[86] MLC Initial Comments at 5.

[87] MLC Initial Comments, App. C at 12.

[88] MLC Initial Comments, App. C at 10.

[89] *See Ass'n of Am. RR v. U.S. Dep't of Transportation*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("Federal lawmakers cannot delegate regulatory authority to a private entity."), *vacated and*

d. Format of Report of Usage

The MLC correctly notes the importance of efficient ingestion and processing of reports of usage. In general, DLC agrees with the MLC's proposal to require licensees to submit reports of usage to the MLC "in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective."[90] The MLC, however, appears to suggest that it plans to only accept a single "universal data format."[91] But, as the MLC acknowledges, licensees currently use "varying data formats" and have "varying resources," and the data standards organization DDEX has not yet established the appropriate data standards for the MLC.[92] The regulations should therefore require the MLC to accept reports in industry standard formats, to ensure that the full range of licensees will be able to report their usage to the MLC without substantial upfront burdens.

e. Adjustments to Reports of Usage

The MMA requires the Copyright Office to adopt regulations "regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods."[93] The MLC has proposed a regulation allowing adjustments within a one-year period after service of the report of usage.

DLC proposes increasing that limit to 18 months. The reason is to accommodate the submission of adjusted reporting on the same timetable as under the pre-MMA regulations. Under those pre-MMA regulations, digital music providers used the annual statement of account to make adjustments to their royalty statements.[94] Those regulations provided that an annual statement of account would be due "on or before the 20th day of the sixth month following the end of the fiscal year."[95]

As DLC explained in its initial comments, the MMA does not require digital music providers to file "annual statements of account," and such a requirement is unnecessary given the MMA's creation of an audit right for the MLC and a specific provision for adjustments of reports of usage. But many services will need to continue to make adjustments to monthly reporting on the same timetable as they did before. To avoid disruption, the Office's regulations related to adjustment of monthly reports of usage should accommodate the continuation of this practice. For instance, a service should be able to adjust all of a fiscal year's monthly reports within six months of the

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remanded on other grounds sub nom Dep't of Transportation v. Ass'n of Am. RR, 575 U.S. 43 (2015).

[90] MLC Initial Comments, App. C at 14.

[91] MLC Initial Comments at 20.

[92] MLC Initial Comments at 20.

[93] 17 U.S.C. § 115(d)(4)(A)(iv).

[94] 37 C.F.R. § 210.17(g)(4) (addressing overpayments and underpayments).

[95] 37 C.F.R. § 210.17(g)(1).

end of that fiscal year. But that requires an extension of the overall deadline to 18 months, so that the adjusted monthly report of usage from the first month of the fiscal year can be timely submitted. DLC's proposed regulations make clear that digital music providers are not *required* to submit adjusted reports each month. Instead, the regulations specify that digital music providers may choose to "batch" their adjusted reports, and adjust all of their respective monthly reports of usage from any given fiscal year, at one time.

The proposed adjustment regulations, like those the MLC proposed, include specific exceptions to the 18-month time limit. DLC's proposal differs from MLC's only in that it clarifies that the time limit does not apply to an adjustment of a report of usage based on the final determination of an input that was estimated in the original monthly report of usage. The reason this is necessary is because in some cases those inputs may not be finally determined for a long time. For instance, in the case of the royalty rate for public performance rights with ASCAP or BMI, which is one of the inputs to the royalty calculation under section 115, it is not unusual for a rate to be in interim status for years, during the pendency of rate court litigation and associated appeals.

f. Cumulative Annual Report of Usage

The MLC says that each digital music provider (but not significant nonblanket licensees) should—separate and apart from any obligation to submit adjusted monthly statements of account—serve a "cumulative annual report of usage containing certain topline information" for each offering on a per month basis.[96] DLC explained in its initial comments why the statute should not be read as requiring such annual reporting.[97] The MLC's proposal reinforces that conclusion—the MLC's proposal would effectively require digital music providers to re-deliver the exact same information as had been submitted in the monthly reports for that year (including a duplication of any adjusted monthly reports). The MLC's proposed annual reporting requirement would not even require reporting of annual totals—the information would have to be provided "broken down by month."[98] There is no reason for the Office to impose this pointless exercise on digital music providers, especially given the ability to serve adjusted statements of account.

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[96] MLC Initial Comments at 21.

[97] DLC Initial Comments at 9-10. Even if some manner of annual report is required, it should not be subject to burdensome independent CPA certification. As DLC explained in its opening brief, such CPA certification is unnecessary in light of the newly created audit right. Certification of each monthly report of usage and any adjusted reports of usage by a duly authorized officer of the licensee should be more than sufficient. Indeed, the MLC's proposed regulations also did not specifically provide rules for CPA certification of its proposed annual reports of usage. In copying and pasting certification requirements from the existing monthly statement of account regulations, the MLC included an oblique reference to CPA certification in one of the options. MLC Initial Comments, App. C at 15. But the MLC did not include any of the detailed requirements from the existing regulations. *See* 37 C.F.R. § 210.17(f)(2).

[98] MLC Initial Comments, App. C at 13.

g. Certification

The MLC has proposed a specific certification requirement for "free trial, promotional offering or purchased content locker offering[s]."[99] The MLC has provided no justification for this additional certification, and it is unnecessary in light of the requirement adopted by the CRB to keep "complete and accurate contemporaneous written records" of promotional and free trial uses.[100]

2. Reports of Usage and Payment—Significant Nonblanket Licensees

The MLC "sees no reason why the reports of usage [for significant nonblanket licensees] should differ substantially in form or content from the reports of usage" that digital music providers must file.[101] It has failed to provide specific guidance as to which parts of the usage reporting regulations do not apply to significant nonblanket licensees. DLC has proposed a specific regulation for such licensees.

3. Records of Use Maintenance and Access

The MLC proposes a five-year retention period for "all records and documents necessary and appropriate to support fully the information set forth in such report of usage."[102] DLC proposed a three-year retention period, which is more consistent with the MMA, which provides that an audit may only cover "a verification period of not more than the 3 full calendar years preceding the date of commencement of the audit."[103] Any additional requirement to retain such records for a longer period is unsupportable and unduly burdensome.

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

The MMA requires digital music providers to transfer accrued royalties for unmatched musical works to the MLC after the license availability date, together with a cumulative statement of account, reflecting usage of such work.[104] The Copyright Office adopted regulations to govern this process.[105]

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[99] MLC Initial Comments, App. C at 15.

[100] 37 C.F.R. § 385.4. The recordkeeping requirements do not extend to purchased content locker offerings. It would be inappropriate for the Office to effectively impose such requirements when the CRB did not see fit to do so.

[101] MLC Initial Comments at 20.

[102] MLC Initial Comments, App. C at 16.

[103] 17 U.S.C. § 115(d)(4)(D)(i)(I).

[104] 17 U.S.C. § 115(d)(10)(B)(iv).

[105] 37 C.F.R. § 210.20.

As reflected in our initial comments, we believe these regulations need to be updated to clarify that agreements under which accrued royalties for unmatched musical works were paid to rightsowners, are not "accrued royalties" subject to transfer to the MLC under 17 U.S.C. § 115(d)(10) and 37 C.F.R. § 210.20.

The MLC, in its initial comments, seeks to make several changes to the regulations in § 210.20:

- *Format of Cumulative Statement of Account*. The existing regulations provide that the cumulative statement of account is to be provided in the same format and with the same information as would be required under the pre-MMA monthly statement of account regulations.[106] The MLC proposes to instead impose the *new* requirements for monthly reports of usage under the blanket license on these cumulative statements of account.[107] This is contrary to the MMA, which requires the digital music provider to only provide "the information that *would have been provided* to the copyright owner had the digital music provider been serving *monthly statements of account* on the copyright owner."[108] It is also impractical, as the digital music providers have maintained usage information for such with the *existing* statement of account regulations in mind.

- *Interest*. The MLC seeks to require the digital music provider to report the "applicable interest earned."[109] This is a backdoor attempt to impose a requirement that was purposefully *not* included in the statute—a requirement for digital music providers to accrue and pay over interest to the MLC on accrued royalties. Indeed, this was something that was specifically negotiated out of the draft legislation. For that reason, section 115(d)(10)(B) does not include any provision requiring accrual of interest on accrued royalties held by digital music providers before the license availability date. In contrast, section 115(d)(3)(H) specifies that the accrued royalties held by the MLC after the license availability date *will* accrue interest.[110] In other words, when Congress wanted to include a provision requiring accrual of interest, it did so explicitly; its failure to do so in section 115(d)(10)(B) means that Congress did not intend to require digital music providers to accrue interest on royalties related to unmatched works.[111] There is no basis for the MLC's proposal to include interest in the cumulative reporting.

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[106] 37 C.F.R. § 210.20(b)(3)(i).

[107] MLC Initial Comments, App. D at 18.

[108] 17 U.S.C. § 115(d)(10)(B)(iv)(III)(aa) (emphases added).

[109] MLC Initial Comments at 22.

[110] 17 U.S.C. § 115(d)(3)(H) ("[a]ccrued royalties for unmatched works (and shares thereof) shall be maintained by the mechanical licensing collective in an interest-bearing account").

[111] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where 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." (internal quotation marks and brackets omitted)).

- *Partially matched works.* MLC proposes requiring the digital music provider, in the case of a musical work that has been partially matched, to provide a clear identification of the share that remains unmatched, and which share was matched, and the amount of accrued royalties already paid. This sort of operational detail should be worked out between the MLC and individual digital music providers. In some cases, the information the MLC seeks is not in the possession of the digital music provider at all, but is held by third-party vendors and subject to strict contractual confidentiality restrictions. If the Office is inclined to adopt the MLC's proposal, it should account for these restrictions and protect digital music providers from any liability related to their breach.

- *Deductions from accrued royalties.* The MLC proposes that digital music providers "identify and describe any deductions or adjustments from unmatched or unclaimed accrued royalties."[112] DLC is not aware of any deductions or adjustments that would be made to accrued royalties. For that reason alone we would object to the imposition of this requirement.

E. Musical Works Database Information

According to the MLC, "the MMA's statutory language provides a sufficient baseline requirement for the data to be made available through the database, and allows the MLC to provide such other information as may be necessary or useful while protecting against over-disclosure of private information of its members."[113]

In its initial comments, DLC recommended additional categories of information that should be specifically included as well, including information about all entities involved in the licensing, ownership, or administration of each work.[114] With respect to performing rights organization affiliation information, which DLC believes should be part of the database, concerns about the burden of that effort are overstated—the publishers themselves undoubtedly maintain this information, and can deliver it to the MLC along with the other data they will provide, at essentially no additional cost.[115] And, if for some reason collecting and incorporating this information would involve significant additional cost beyond the substantial sums that the MLC has already budgeted

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[112] MLC Initial Comments at 22.

[113] MLC Initial Comments at 24-25.

[114] *See also* Barker Initial Comments at 3 (proposing that the MLC should prescribe by regulation that the MLC database include separate data fields for administrators or controlling entities, with corresponding percentages of control).

[115] Another option would be to obtain this data from the PROs themselves. Indeed, ASCAP and BMI have been working on a joint musical ownership database with aggregated data from both organizations, which would be a ready source for this information. *ASCAP & BMI Announce Creation Of A New Comprehensive Musical Works Database To Increase Ownership Transparency In Performing Rights Licensing* (July 26, 2017), *available at* https://www.ascap.com/press/2017/07-26-ascap-bmi-database.

for development of the database, there are mechanisms for ensuring that cost will be covered, including those relating to the administrative assessment.

In addition, DLC agrees with several commenters that songwriter and composer information should be collected and included in the database.[116]

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

The MLC's proposal with respect to database usability, interoperability, and usage restrictions has several shortcomings that are easily corrected. First, the MLC includes as part of those regulations a provision that gives itself discretion to establish policies regarding the data format for all data provided to the mechanical licensing collective, with a minimum six-month window for digital music providers and copyright owners to implement any changes. This regulation is misplaced—it has nothing to do with database usability, interoperability, and usage, but it is instead about data collection and delivery *to the MLC*. With respect to licensees, there are separate regulations governing the formats of monthly reports of usage delivered to the MLC, and those should govern instead.

The MLC has also failed to provide any regulations regarding the formats in which they are planning to provide data to the public (*e.g.*, flat file, API, etc.). The RIAA, however, urges the Office to "require the MLC to offer free API access to registered users of the database who request bulk access."[117] The RIAA explains that record labels—who are not funding the MLC—will be "making frequent use of the MLC database."[118] As DLC explained in its initial comment, this level of functionality is not needed by digital music providers and significant nonblanket licensees.[119] To the extent labels or others wish to obtain API access, or any other functionality beyond that needed by the MLC and licensees, they should be made to provide the necessary funding.

The MLC has also proposed regulations requiring it to maintain historical records of the database. DLC is concerned that the expense involved in such an effort be borne by those who might make use of that historical data, and proposed a regulation to allow the MLC to charge for such uses.

G. MLC Payments and Statements of Account

The MLC's proposed regulation requires, as a default matter, the MLC to provide an "electronically generated" report, with 31 different data elements, while giving copyright owners the option to obtain a simplified report upon request.[120] Although these regulations largely affect the relationship between the MLC and individual copyright owners, licensees will be funding the

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[116] *See* Barker Initial Comments at 2; SGA Initial Comments at 2-3.

[117] RIAA Initial Comments at 11.

[118] RIAA Initial Comments at 11.

[119] DLC Initial Comments at 21.

[120] MLC Initial Comments, App. G at 22-23.

operations of the MLC through the administrative assessment. DLC therefore has a strong interest in ensuring appropriate regulations are in place to encourage a cost-effective approach to MLC's payments and statements of account to rights owners.

DLC has two suggestions based on the experiences of its members that will ensure efficient operation of the MLC and more transparency for copyright owners:

- The Office may want to ensure that statements of account be delivered to copyright owners electronically by default, with the option to request paper statements. We assume that this is the rule that the MLC also proposes, though DLC would clarify the language by referring to "electronic delivery" of the report rather than "electronic *generation*," which is vague. One possibility is for MLC to provide access to statements in Counterpoint and other commonly used accounting software applications for publishers who request it. The MLC should also be permitted to satisfy the requirement for electronic delivery of statements by providing an online password protected portal, accompanied by email notification of the availability of the statement in the portal. This avoids significant printing and postage costs and ensures that copyright owners have a lasting record of their statements in a centralized location.

- The Office may want to consider setting the default royalty payment thresholds higher, for example to $25 for monthly payments and $5 for annual (*i.e.*, adjustment) payments, while maintaining the option for copyright owners to adjust such thresholds upon request. Sending tens of thousands of penny checks (that often are not cashed) wastes paper and postage and is often not appreciated by publishers who must incur additional overhead to administer the same amount of royalties. But, unlike under the current regulations, which allow an administrator to withhold statements until a copyright owner meets their payment threshold, it should not present a significant burden for the MLC to release electronic statements (that they will have to generate anyway) to all copyright owners, who are below the threshold, so that they have full transparency into their earnings while their royalties accrue.

H. Treatment of Confidential and Other Sensitive Information

The MLC has proposed a regulation that effectively gives it (and DLC) broad discretion to adopt confidentiality restrictions, to safeguard various categories of confidential information.[121] But the MMA vests *the Register* with the authority 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."[122] The MLC's proposal would inappropriately redelegate that authority to itself and DLC.

[121] MLC Initial Comments at 29-30.

[122] 17 U.S.C. § 115(d)(12)(C).

The Office should follow the approach taken under the sections 112 and 114 statutory licenses, which set forth specific and detailed confidentiality restrictions.[123] To assist the Office, DLC has proposed regulations in the Addendum (§ 210.6). These regulations, among other things, make clear that confidential information provided to the MLC and DLC (including by licensees in reports of usage) are maintained in the strictest of confidence and cannot generally be shared with Board members of those respective organizations.

DLC's proposed regulations also include special provisions to handle the specific issues that arise with respect to DLC representatives to MLC boards and committees, as discussed in DLC's initial comments: ensuring that the confidentiality obligation operates at an organization-to-organization level, rather than binding the individuals in their personal capacity or as representatives of their employers; expressly allowing individual board and committee members to share information obtained with people with a need to know within DLC membership and within their companies; and providing that the statute and the Register's regulations thereunder should be the ceiling on any confidentiality requirements.

I. Additional MLC Oversight

The MLC suggests that oversight regulations are premature "given that the MLC's policies and procedures are still being developed with the LAD still over one year away."[124] DLC has no specific proposal for regulatory oversight. It notes, however, that, as part of the settlement of the administrative assessment proceeding, the MLC agreed to a number of transparency requirements that will require them to include certain information in their annual reporting. This kind of transparency will be critical to ensuring that the MLC fulfills its duties in a fair and efficient manner, and DLC encourages the Copyright Office to vigilantly exercise its ongoing authority under the MMA to ensure the success of this enterprise. Further, as noted with respect to several specific issues addressed in these comments, it will be important for the Office to clearly cabin the matters on which the MLC may seek to exercise sole discretion and/or make unilateral determinations—especially where the only potential recourse for those entities affected by such determinations is costly litigation.

December 20, 2019

Respectfully submitted,

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[123] *See* 37 C.F.R. § 380.5.

[124] MLC Initial Comments at 31.

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ADDENDUM

PROPOSED REGULATIONS

§ 210.1 General

(a) ***Purpose.*** This subpart prescribes rules related to the compulsory blanket license to make and distribute digital phonorecord deliveries of musical works through one or more covered activities, pursuant to 17 U.S.C. § 115(d).

(b) ***Definitions.*** For purposes of this section unless otherwise specified, the terms used have the meanings set forth in 17 U.S.C. § 115(e).

§ 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, and, if different from the legal name, the consumer-facing brand names of the relevant services or offerings.

(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 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) The website of the licensee or, if the licensee does not have a website, the online location(s) where the licensee's service is made available.

(7) 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 or significant nonblanket licensee need not provide an additional notice should it change the scope of the covered activities in which it engages.

(8) The expected date of initial use of musical works pursuant to covered activities.

(c) ***Signature.*** The notice shall include the signature of the appropriate duly authorized 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 duly authorized 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 no later than 30 calendar days after the date on which it receives 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.

§ 210.3 Collection and delivery efforts by digital music providers and copyright owners.

(a) ***General.*** This section prescribes rules under which digital music providers and copyright owners shall engage in efforts to collect and provide information to the mechanical licensing collective that may assist the mechanical licensing collective in matching musical works to sound recordings embodying those works and identifying and locating the copyright owners of those works.

(b) ***Digital Music Providers.***

(1) 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 the information referenced in 17 U.S.C. § 115(d)(4)(B).

(2) Digital music providers may satisfy paragraph (1) by collectively arranging for the mechanical licensing collective to obtain such information from the collective selected to administer the statutory licenses under 17 U.S.C. §§ 112 and 114, which shall provide this information at reasonable or no cost to the mechanical licensing collective.

(3) The failure to comply with this paragraph (b) shall not constitute a basis for issuing a notice of default or terminating the license under 17 U.S.C. § 115(d)(4)(E).

(c) ***Copyright Owners.***

(1) Copyright owners of musical works shall engage in commercially reasonable efforts to collect all available information about the sound recordings that have been made of their works, including at minimum the title of the sound recording, the featured artist, and, if available, the ISRC.

(2) When otherwise providing musical works information to the mechanical licensing collective, copyright owners of musical works (or their representatives) shall deliver to the mechanical licensing collective all available information related to the performing rights society(ies) through which performance rights in each work are licensed.

(2) Copyright owners may satisfy this obligation, for example, by obtaining the necessary information from record labels at the time of negotiation of the first use of a musical work, from information obtained from monthly statements of account received for physical phonorecord deliveries and pursuant to individual download licenses, or from reporting received from performing rights organization, and delivering that information to the MLC.

§ 210.4 Payment and reports of usage for blanket licensees.

(a) ***In general.*** This section prescribes the rules for the preparation and delivery of monthly reports of usage, and payment of royalties, for the making and distribution of phonorecords of nondramatic musical works to the mechanical licensing collective by a digital music provider operating under the blanket license established by 17 U.S.C. § 115(d).

(b) ***Timing of Monthly Reports of Usage.*** A digital music provider shall report to the mechanical licensing collective on a monthly basis in accordance with 17 U.S.C. § 115(d)(4)(A).

(c) ***Content of Monthly Report of Usage.*** The monthly report of usage shall include the following information with respect to covered activity ("Monthly Report of Usage"):

(1) The period (month and year) covered by the Monthly Report of Usage.

(2) The full legal name of the digital music provider, and, if different from the legal name, the consumer-facing brand names of the relevant services or offerings.

(3) An identification of the offering type under part 385 of this title (or a general description of the offering if not set out in part 385), presented in such a manner as to allow the mechanical licensing collective to separate such usage data for each different offering type that the digital music provider has made during the relevant month.

(4) The information necessary for the mechanical licensing collective to calculate the royalty, as specified in part 385 of this title, including, where applicable, service revenues, performance deduction, subscriber counts, and total cost of content, subject to paragraph (d).

(5) With respect to each sound recording embodying a musical work, the following information:

(i) the sound recording name and featured artist;

(ii) the number of digital phonorecord deliveries of the sound recording made or distributed during the applicable month, including limited downloads and interactive streams (before the application of any overtime adjustment);

(iii) only to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to the good-faith commercially reasonable efforts referenced in 17 U.S.C. § 115(d)(4)(B), sound recording copyright owner, producer, distributor (if any), international standard recording code, duration of the sound recording, version title, release year, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody, *provided that* this information may be provided to the mechanical licensing collective separately from the other information required in this paragraph (c); and

(iv) 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 in connection with the use of sound recordings of musical works to engage in covered activities, including pursuant to the good-faith commercially reasonable efforts referenced in 17 U.S.C. § 115(d)(4)(B), information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the international standard musical work code, *provided that* this information may be provided to the mechanical licensing collective separately from the other information required in this paragraph (c).

(6) The identity and contact information for all musical work copyright owners for works embodied in sound recordings as to which a voluntary license, rather than the blanket license,

is in effect, *provided that* this information may be provided to the mechanical licensing collective separately from the other information required in this paragraph (c). For purposes of this paragraph, it shall be sufficient to submit the contact information of an administrator or other representative who has entered into a voluntary license on behalf of one or more musical work copyright owners.

(7) A certification by a duly authorized officer of the digital music provider that the Monthly Report of Usage is true, complete, and correct to the best of the officer's knowledge, information, and belief as of the date of submission of the Monthly Report of Usage to the mechanical licensing collective.

(d) ***Estimates in Monthly Reports of Usage.*** Where the amount of royalty owed to the mechanical licensing collective depends on an input that is unable to be finally determined at the time of the Monthly Report of Usage (*e.g.*, the amount of applicable public performance royalties; the amount of applicable consideration for sound recording copyright rights), a reasonable estimation of such input may be used. Royalty payments based on such estimates shall be adjusted pursuant to paragraph (g), and any such adjustment shall not be a basis for assessing late fees under part 385 of this title, for terminating a license under 17 U.S.C. § 115(d)(4)(E), or for requiring the payment of audit fees by the digital music provider under 17 U.S.C. § 115(d)(4)(D).

(e) ***Format and delivery of Monthly Reports of Usage.*** Monthly Reports of Usage shall be delivered to the mechanical licensing collective in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective as set forth on the website of the mechanical licensing collective, provided that the mechanical licensing collective shall accept industry-standard formats.

(f) ***Processing of Monthly Reports of Usage and payment of royalty.***

(1) After receiving a Monthly Report of Usage, the mechanical licensing collective shall—

(i) identify the musical works embodied in sound recordings reflected in such reports, and the copyright owners of such musical works (and shares thereof);

(ii) confirm uses of musical works subject to voluntary licenses and individual download licenses, and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license;

(iii) calculate the royalties owed under the blanket license after accounting for amounts to be deducted under paragraph (ii), if applicable;

(iv) within 15 calendar days of receiving the Monthly Report of Usage, deliver to the digital music provider an invoice setting forth the royalties owed by such provider for uses subject to the blanket license in that month and, if applicable, the royalties owed by such provider for voluntary licenses; and

(v) deliver to the digital music provider a response file with the results of the process described in paragraph (i) through (iii), on a track-by-track and ownership-share basis, with updates to reflect any new matching results from previous months.

(2) In all events, the digital music provider must deliver the required Monthly Report of Usage and royalty payment to the mechanical licensing collective within 45 calendar days after the end of the monthly reporting period. If the digital music provider elects to make a pre-payment of royalties, prior to the receipt of an invoice from the mechanical licensing collective pursuant to paragraph (f)(1)(iv), the mechanical licensing collective shall appropriately credit or offset any excess amount of payment after calculating the royalties due.

(3) After receiving payments of royalties, the MLC shall confirm proper payment of royalties due.

(g) ***Adjustment of Monthly Reports of Usage and royalty payments.***

(1) A digital music provider may adjust a previously delivered Monthly Report of Usage, and/or the associated royalty payments, by delivering to the mechanical licensing collective a report of adjustment to a monthly report of usage (the "Adjusted Monthly Report of Usage"), identifying with particularity—

(i) the previously served Monthly Report of Usage to which the adjustment applies;

(ii) the specific changes to the previously delivered Monthly Report of Usage, including any changes to the inputs to the royalty calculation; and

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

(2) The Adjusted Monthly Report of Usage shall be accompanied by a certification of a duly authorized officer of the digital music provider that such report is true, complete, and correct to the best of the officer's knowledge, information, and belief, as of the date of submission of such report to the mechanical licensing collective.

(3) In the case of an underpayment of royalties, the digital music provider shall pay the difference to the mechanical licensing collective at the same time as delivering adjusted reports of usage. In the case of an overpayment, the mechanical licensing collective shall apply any credits or offsets to that digital music provider's account.

(4) A Monthly Report of Usage and/or associated royalty payments may be adjusted, at the digital music provider's sole option, at any time on or before the date that is 18 months from the date of service of such report of usage. The digital music provider may adjust the Monthly

Report of Usage after expiration of the time limit in exceptional circumstances, when making an adjustment pursuant to paragraph (d), following an audit of a digital music provider under 17 U.S.C. § 115(d)(4)(D), or in response to a change in applicable rates or terms under part 385. For clarity, and notwithstanding anything to the contrary set forth above, this provision allows digital music providers to choose to adjust all of their respective Monthly Reports of Usage from any given fiscal year within 6 months following the end of such fiscal year.

(h) ***Maintenance of records of use.*** Subject to applicable laws, and a digital music provider's generally applicable privacy and data retention policies, a digital music provider will maintain all data included in the Monthly Report of Usage sent 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 due to the mechanical licensing collective.

(i) ***Voluntary agreements with mechanical licensing collective to alter process.*** Subject to the provisions of 17 U.S.C. § 115, a digital music provider and the mechanical licensing collective may agree to vary or supplement the procedure described in this section, including pursuant to an agreement to administer a voluntary license.

§ 210.5 Monthly reports of usage for significant nonblanket licensees.

(a) ***In general.*** This section prescribes the rules for the preparation and delivery of monthly reports of usage for the making and distribution of phonorecords of nondramatic musical works to the mechanical licensing collective by a significant nonblanket licensee, pursuant to 17 U.S.C. § 115(d)(6).

(b) ***Timing of Monthly Reports of Usage.*** A significant nonblanket licensee shall report to the mechanical licensing collective on a monthly basis not later than 45 calendar days after the end of the calendar month being reported.

(c) ***Content of monthly report of usage.*** The monthly report of usage shall include the following information ("Monthly Report of Usage"):

(1) The period (month and year) covered by the Monthly Report of Usage.

(2) The full legal name of the significant nonblanket licensee, and, if different from the legal name, the consumer-facing brand names of the relevant services or offerings.

(3) An identification of the offering type under part 385 of this title (or a general description of the offering if not set out in part 385), presented in such a manner as to allow the mechanical licensing collective to separate such usage data for each different offering type that the digital music provider has made during the relevant month.

(4) With respect to each sound recording embodying a musical work, the following information:

(i) the sound recording name and featured artist;

(ii) the number of digital phonorecord deliveries of the sound recording made or distributed during the applicable month, including limited downloads and interactive streams (before the application of any overtime adjustment);

(iii) only to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to the good-faith commercially reasonable efforts referenced in 17 U.S.C. § 115(d)(4)(B), sound recording copyright owner, producer, distributor (if any), international standard recording code, duration of the sound recording, version title, release year, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody, *provided that* this information may be provided to the mechanical licensing collective separately from the other information required in this paragraph (c); and

(iv) 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 in connection with the use of sound recordings of musical works to engage in covered activities, including pursuant to the good-faith commercially reasonable efforts referenced in 17 U.S.C. § 115(d)(4)(B), information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the international standard musical work code, *provided that* this information may be provided to the mechanical licensing collective separately from the other information required in this paragraph (c).

(5) The identity and contact information for all musical work copyright owners for works embodied in sound recordings as to which a voluntary license, rather than the blanket license, is in effect, *provided that* this information may be provided to the mechanical licensing collective separately from the other information required in this paragraph (c). For purposes of this paragraph, it shall be sufficient to submit the contact information of an administrator or

other representative who has entered into a voluntary license on behalf of one or more musical work copyright owners.

(6) A certification by a duly authorized officer of the significant nonblanket licensee that the Monthly Report of Usage is true, complete, and correct to the best of the officer's knowledge, information, and belief as of the date of submission of the Monthly Report of Usage to the mechanical licensing collective..

(e) ***Format and delivery of Monthly Reports of Usage.*** Monthly Reports of Usage shall be delivered to the mechanical licensing collective in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective as set forth on the website of the mechanical licensing collective, provided that the mechanical licensing collective shall accept industry-standard formats.

(f) ***Voluntary agreements with mechanical licensing collective to alter process.*** Subject to the provisions of 17 U.S.C. § 115, a digital music provider and the mechanical licensing collective may agree to vary or supplement the procedure described in this section, including pursuant to an agreement to administer a voluntary license.

§ 210.6 Musical Works Database.

(a) ***General.*** This section prescribes rules under which the mechanical licensing collective shall provide required information relating to musical works (and shares of such works) and, to the extent known, sound recordings in which the musical works are embodied, in its musical works database, prescribed by section 115(d)(3)(E) of title 17, United States Code, and shall ensure the usability, interoperability, and proper usage of the musical works database it is required to maintain pursuant to section 115(d)(3)(E) of that title.

(b) ***Information required.***

(1) *Matched works.* With respect to musical works (and shares thereof) that have been matched to copyright owners, the musical works database shall include, at a minimum:

(i) the title of the musical work;

(ii) the copyright owner of the musical work (or share thereof), and the ownership percentage of that owner, including an indication whether the ownership information was received directly from the copyright owner or from a third party;

(iii) the songwriter(s) and composer(s) of the musical work;

(iv) the performing rights society or societies (as that term is defined in 17 U.S.C. § 101), if any, through which the performance rights in the work may be licensed, and the share of the work licensed through each performing rights society;

(v) to the extent reasonably available to the mechanical licensing collective:

(A) the international standard musical work code for the work;

(B) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, international standard recording code, and other

information commonly used to assist in associating sound recordings with musical works;

(C) all additional entities involved with the licensing or ownership of the musical work, including publishing administrators and aggregators, publishers and sub-publishers, and any entities designated to receive license notices, reporting, and/or royalty payment on the copyright owners' behalf; and

(D) any standard identifiers (*e.g.*, IPI or ISNI) used by artists or copyright owners.

(2) *Unmatched works.* With respect to unmatched musical works (and unmatched shares of works) in the database, the musical works database shall include, at a minimum:

(i) To the extent reasonably available to the mechanical licensing collective:

(A) the title of the musical work;

(B) the ownership percentage for which an owner has not been identified;

(C) if a copyright owner has been identified but not located, the identify of such owner and the ownership percentage of that owner, including an indication whether the ownership information was received directly from the copyright owner or from a third party;

(D) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works;

(E) any standard identifiers (*e.g.*, IPI or ISNI) used to identify authors and copyright owners;

(ii) such other non-confidential or non-private information reported to the mechanical licensing collective as may be useful for the identification of musical works that the mechanical licensing collective deems appropriate to publicly disclose.

(c) ***Database Access.***

(1) The mechanical licensing collective shall comply with its obligation under 17 U.S.C. § 115(d)(3)(E)(v) to make the musical works database available to members of the public in a searchable, online format, free of charge, and shall make such database available in a bulk, machine-readable format; through a widely available software application to the following:

(A) digital music providers, free of charge;

(B) significant nonblanket licensees, free of charge;

(C) authorized vendors of the entities described in subclauses (A) and (B), free of charge;

(D) the Register of Copyrights, free of charge; and

(E) any other person or entity, for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.

(2) In the case of any entity entitled to access to the database in a bulk, machine-readable format free of charge, the MLC shall provide any information necessary to make use of the data, including access to relevant technology staff.

(3) Notwithstanding subsection (a)(1) above, the mechanical licensing collective may establish appropriate terms of use or other policies governing use of its database that allows the mechanical licensing collective to suspend access to any individual or entity that appears, in the mechanical licensing collective's reasonable determination, to be attempting to bypass the mechanical licensing collective's right to charge a fee to recover its marginal costs for bulk access outlined in 17 U.S.C. § 115(d)(3)(E)(v)(V) through repeated queries, or to otherwise be

engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database).

(d) ***Data formats and standards.***

(1) The MLC shall make its database available pursuant to paragraph (c)(1) in the following formats:

(i) 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. Licensees may use this data for any legal purpose.

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

(2) Upon request, the MLC may make the musical works database available through additional formats (*e.g.*, an application programming interface), or with more frequency, only after making commercially reasonable efforts to collect from the requester the funds necessary to fully defray the expense (including for personnel, technology, and development time) of delivery of that data in such format or with such frequency.

(e) ***Historical Data.*** The mechanical licensing collective shall maintain at regular intervals (but in no event less than monthly) historical records of the information contained in the database, dating back to license availability date, including a record of changes to such database information, in order to allow tracking of changes to the ownership of musical works in the database over time. The mechanical licensing collective shall determine, in its reasonable discretion, the most appropriate method for archiving and maintaining such historical data to track ownership and other information changes in its database. The MLC shall maintain such historical data for its own uses

(including for purposes of dispute resolution), and shall make such historical data available to any third party only for a reasonable fee necessary to defray the costs of providing such access.

§ 210.7 Confidential Information.

(a) ***Definition*****.** "Confidential Information" means the reports of usage and any information contained therein, including the amount of royalty payments and calculations thereunder, and any other information submitted by a third party (including a vendor, digital music provider, significant nonblanket licensee, or copyright owner) to the mechanical licensing collective or digital licensee coordinator. Confidential Information does not include documents or information that may be made public by law (including any other section of this Part or any applicable provision of Chapter III of this title) or that at the time of delivery to the mechanical licensing collective or digital licensee coordinator is public knowledge. The party seeking information from the mechanical licensing collective or digital licensee coordinator based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.

(b) ***Use of Confidential Information*****.**

(1) The mechanical licensing collective may not use any Confidential Information for any purpose other than royalty calculation, collection, matching and distribution and activities related directly thereto. The mechanical licensing collective may not share Confidential Information with members of the Board of Directors or any committee, including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective, or any publishers or songwriters.

(2) The digital licensee coordinator may not use any Confidential Information for any purpose other than the purpose for which such information was provided to the digital licensee coordinator.

(c) ***Disclosure of Confidential Information*****.** The mechanical licensing collective and the digital licensee coordinator shall limit access to Confidential Information to:

(1) Those employees, agents, consultants, and independent contractors of the mechanical licensing collective or digital licensee coordinator, subject to an appropriate written confidentiality agreement, who are engaged in the calculation, collection, matching and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information, and only to the extent necessary for the purpose of performing their duties during the ordinary course of their work, *provided that* no employee or officer of any music publisher shall have access to Confidential Information;

(2) A Qualified Auditor or outside counsel who is authorized to act on behalf of the mechanical licensing collective with respect to verification of a digital music provider's statement of account pursuant to 17 U.S.C. § 115(d)(4)(D);

(3) Copyright owners, including their designated agents, whose works a licensee used under the statutory license set forth in 17 U.S.C. § 115 by the licensee whose Confidential Information is being supplied, solely to the extent necessary to receive royalty payments, and subject to an appropriate written confidentiality agreement with the mechanical licensing collective, and including those employees, agents, consultants, and independent contractors of such copyright owners and their designated agents, subject to an appropriate written confidentiality agreement, who require access to the Confidential Information to perform duties related to the receipt of royalty payments during the ordinary course of their work;

(3) Attorneys and other authorized agents of parties to proceedings before the Copyright Royalty Board, acting under an appropriate protective order.

(d) ***Safeguarding Confidential Information*****.** The mechanical licensing collective, digital licensee coordinator, and any person authorized to receive Confidential Information from either of those entities, must implement procedures to safeguard against unauthorized access to or dissemination

of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.

(e) ***Special Confidentiality Restrictions Related to Confidential Information of the Mechanical Licensing Collective.***

(1) For purposes of this paragraph (e), "MLC Confidential Information" means any non-public financial or business information created by the mechanical licensing collective. MLC Confidential Information does not include documents or information that is public or may be made public by law (including any other section of this Part or any applicable provision of Chapter III of this title).

(2) Representatives of the digital licensee coordinator who serve on the boards or committees of the mechanical licensing collective may receive any MLC Confidential Information from the mechanical licensing collective.

(3) Whereas the representatives of the digital licensee coordinator who serve on the boards or committees of the mechanical licensing collective do so as representatives of digital licensees as a whole, not in their individual capacities or as representatives of their individual employers, MLC Confidential Information received by such representatives may be shared with the following persons:

(i) Individuals serving on boards and committees of the digital licensee coordinator.

(ii) Persons otherwise employed by members of the digital licensee coordinator, only to the extent that such persons have a need to know such information.

(iii) Persons who are otherwise authorized by the mechanical licensing collective.

(4) The mechanical licensing collective may not impose additional restrictions on representatives of the digital licensee coordinator relating to the disclosure of MLC Confidential Information, beyond those imposed by paragraph (e)(2), as a condition for participation on a board or committee. Any confidentiality agreement relating to the participation of representatives of the digital licensee coordinator on boards or committees of the mechanical licensing collective shall be between the digital licensee coordinator and the mechanical licensing collective.

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

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(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).