

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re:

Determination and Allocation of Initial
Administrative Assessment to Fund
Mechanical Licensing Collective

Docket No. 19-CRB-0009-AA

**JOINT MOTION TO MODIFY THE TERMS OF IMPLEMENTATION
OF THE INITIAL ADMINISTRATIVE ASSESSMENT**

Pursuant to the Copyright Royalty Judges’ ongoing authority to amend a determination of an administrative assessment for good cause,¹ the Digital Licensee Coordinator (“the DLC”) and the Mechanical Licensing Collective (“the MLC”) (collectively, the “Parties”), hereby move the Copyright Royalty Board to modify the terms of implementation of the initial administrative assessment (the “administrative assessment”) established in 37 C.F.R. Part 390 (the “Proposed Amended Regulations”). The Proposed Amended Regulations do not alter the overall amount of the administrative assessment; they simply alter the method of allocation of the administrative assessment among digital music providers and significant nonblanket licensees, along with some discrete clarifications and technical changes. The Amended Regulations are attached hereto as Exhibit A, with the revisions in bold. The Parties respectfully request that the Judges adopt the Amended Regulations in full.

Pursuant to Section 115(d)(7)(D)(vi), the Judges “retain continuing jurisdiction to amend a determination of an administrative assessment to correct technical or clerical errors, *or to modify*

¹ See 17 U.S.C. § 115(d)(7)(D)(vi).

the terms of implementation, for good cause, with any such amendment to be published in the Federal Register.” Also relevant here is the direction to the Judges to “approve and adopt a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by the mechanical licensing collective and the digital licensee coordinator.” 17 U.S.C. § 115(d)(7)(D)(v); *see also* 37 C.F.R. § 355.6(e).

In light of the impending due date for the annual minimum fees and the need for services and the MLC to engage in business planning, we respectfully request that the Judges expeditiously adopt the negotiated amendments to the administrative assessment allocation method, and other technical amendments, as reflected in Exhibit A.

I. There is “Good Cause” to Modify The Terms of the Administrative Assessment

A. *Adjustment of Annual Minimum Fees and Allocation Thresholds*

Under the existing methodology for allocating the annual administrative assessment, two tiers of annual minimum fees exist, based upon the monthly average of unique sound recordings used and reported in section 115 covered activities (“unique sound recording count” or “USRC”): (1) Licensees with a USRC of less than 5,000 pay a minimum fee of \$5,000 per year; (2) Licensees with a USRC of 5,000 or more pay a minimum fee of \$60,000 per year. 37 C.F.R. § 390.3(a). All Licensees are also required to pay an allocation of the total administrative assessment, based on their pro rata share of the aggregate USRC for all Licensees, to the extent that it exceeds their annual minimum fee. 37 C.F.R. § 390.4(a).

Current Annual Minimum Fees and Allocation for All Licensees

| <u>USR Range</u> | <u>Minimum Fee</u> | <u>Additional allocation</u> |
|-------------------------|---------------------------|-------------------------------------|
| < 5,000 | \$5,000 | Yes |
| ≥ 5,000 | \$60,000 | Yes |

Since the Judges adopted the initial administrative assessment regulations, the Parties have gained a better understanding of the overall usage of sound recordings within the digital audio service industry, as well as the relative usage of various categories of services. This information has led the Parties to conclude that the allocation methodology could have significant impacts on smaller Licensees, and that the allocation methodology should be modified to better accommodate these Licensees, and that such is reasonable and appropriate. This is particularly the case as these Licensees transition to the new mechanical licensing system set forth in the Music Modernization Act (“MMA”) and navigate new reporting requirements, and further as the country continues to generally struggle through the economic and health effects of the ongoing COVID-19 pandemic. While the cost, reporting requirements, and impacts of the pandemic are experienced by all Licensees, the Parties believe that it is reasonable and appropriate to modify the administrative assessment to better address the situations of smaller Licensees.

In addition, the Parties have in recent weeks heard from a number of permanent download services that engage in covered activities exclusively under the authority of mechanical licenses that are passed through to them by sound recording licensors (“pass-through download stores”). These Licensees are required to generate usage reporting for the MLC, while still having to administer their pass-through licenses and provide reporting to their sound recording licensor partners. The Parties believe that the administrative assessment should also be modified to reduce the obligations of these pass-through download store Licensees to better accommodate their situation, and that such is also reasonable and appropriate.

As a result of these concerns, and based on consultations with a wide range of Licensees, the Parties propose the attached amendments to the terms of the initial administrative assessment (including the startup assessment), to create special tiers of flat annual fees for both smaller

Licensees (defined as those Licensees with a USRC of less than 100,000), and for pass-through download store Licensees regardless of size. A service eligible for such a flat annual fee would not be required to pay any additional allocation of the total administrative assessment.

These circumstances present precisely the kind of “good cause” that permits the Judges to “modify the terms of implementation” of the administrative assessment. The MLC consents to the proposed amended allocation methodology, having concluded that it is administrable. The DLC, whose members include Licensees ranging from the largest services in the world to small or niche services, supports these amendments.² Moreover, the DLC represents that a wide range of smaller Licensees that are not yet members of the DLC have communicated their support for this amended allocation methodology.³

Under the Proposed Amended Regulations, pass-through download store Licensees will be required to pay a single annual fee based on their respective USRC, with no additional obligation to pay an allocation of the total administrative assessment. The USRC tiers and corresponding annual fees are as follows:

Revised Allocation for Pass-Through Download Stores

| <u>USRC</u> | <u>Annual Minimum Fee</u> | <u>Additional allocation</u> |
|--------------------|----------------------------------|-------------------------------------|
| <50,000 | \$2,500 | No |
| 50,001-100,000 | \$5,000 | No |
| 100,001-250,000 | \$10,000 | No |

² DLC represents 15 digital music services, from large full-catalog services to smaller, niche ones: Amazon, Apple, Beatport, Giddy, Google, iHeart Media, MediaNet, Napster, Pandora, Qobuz, SoundCloud, Spotify, Tidal, Traxsource, and Wolfgang’s.

³ The following services have authorized us to represent that they support the proposed amendment to the allocation methodology: Power Music; HDtracks; Classical Archives, LLC; Da Capo Music; MonkingMe.

| | | |
|-----------------|----------|----|
| 250,001-500,000 | \$20,000 | No |
| >500,000 | \$60,000 | No |

With respect to all other Licensees, the Proposed Amended Regulations create tiers with lower annual minimum fees and higher USRCs. Further, the lower tiers also call for only the single annual minimum fee, with no additional obligation to pay an allocation of the total administrative assessment. Specifically, the amendments: (1) increase the ceiling for USRCs covered by the lowest annual minimum fee to 10,000 and reduce the fee to \$2,500; (2) create three middle tiers based on USRCs of (a) 10,001-25,000 (assessed an annual fee of \$5,000); (b) 25,001-50,000 (assessed an annual fee of \$10,000); and (c) 50,001-100,000 (assessed an annual fee of \$20,000); and (3) raise the minimum USRC to 100,001 for the \$60,000 fee. All of these tiers except the highest tier would exempt the Licensee from additional allocation of the assessment. For the highest tier, no additional allocation would be payable until additional allocations exceed the \$60,000 annual minimum fee that was paid. As in the current regulations, the \$60,000 annual minimum fee in the highest tier acts essentially as a deposit on further obligations to pay an allocation of the total administrative assessment.

Revised Allocation for All Other Licensees

| <u>USRC</u> | <u>Annual Minimum Fee</u> | <u>Additional allocation</u> |
|--------------------|----------------------------------|-------------------------------------|
| < 10,000 | \$2,500 | No |
| 10,001-25,000 | \$5,000 | No |
| 25,001-50,000 | \$10,000 | No |
| 50,001-100,000 | \$20,000 | No |
| > 100,000 | \$60,000 | Yes |

In recognition that the transition period to the new licensing system will end, and that Parties will gain a better understanding of the application of the allocation over the next few years, the third and fourth tiers will sunset after the 2024 Annual Assessment, so that in subsequent years, Licensees with a USRC of more than 25,000 will be responsible for the \$60,000 annual minimum fee and also the additional obligation to pay an allocation of the total administrative assessment.

B. *New Licensee provisions*

In addition, the proposed amendments establish detailed rules for addressing Licensees that begin engaging in covered activities after the license availability date. In particular, the amended rules provide that a new Licensee will initially “enter” at the lowest tier, paying the lowest applicable annual minimum fee as set forth above along with its notice, and having no obligation to pay an additional allocation of the total administrative assessment. However, as soon as the new Licensee has reported usage to the MLC that can be used to determine its USRC, the MLC will reassess the new Licensee for the next Quarterly Allocation, at which point the new Licensee will be recharacterized based on its actual usage. If the new Licensee is not a pass-through download store and its actual USRC exceeds the threshold, it will be responsible to pay the additional allocation of the total administrative assessment. This ensures that a large Licensee that begins operations after the license availability date will be appropriately allocated its pro rata share of the total administrative assessment without additional delay.

C. *Clarifications and Technical Changes*

The proposed amendments also include some small but important clarifications and technical changes to reflect a better accommodation of operational needs. These changes come from improvements in the understanding of the MLC and DLC about operational needs since they proposed the initial administrative assessment regulations. The changes are:

- USRC definition: The definition of USRC is modified: (i) to clarify that the USRC is based on reported usage by a Licensee; (ii) to explain how to calculate the USRC when a Licensee is in operation for only a portion of an calculation period; and (iii) to clarify that sound recordings of musical works in the public domain and designated as such in monthly reports of usage do not count towards the USRC. Each of these small changes is reasonable and will assist Licensees and the MLC in properly interpreting and carrying out the directives in these regulations.
- Timing for 2021 annual minimum fee: The timing for existing Licensees to provide the 2021 annual minimum fee to the MLC is clarified to be no later than February 15, 2021, rather than to accompany the notice of license of notice or nonblanket activity. The MLC and DLC are encouraging Licensees to submit notices early to avoid last-minute issues, and now understand that separating the fee payment requirement from notice submission will help encourage earlier notice submission, which will help avoid problems in this transition period.
- Threshold Licensee Assessment Pool clarification: The amendments also address what would occur in the event that no Licensee qualifies to be a Threshold Licensee (*i.e.*, a Licensee that reports at least 7.5% of the Aggregate Sound Recordings Count). The current regulations do not address such a scenario, although it is possible. The amendments clarify that, in such a situation, the Threshold Licensee Assessment Pool would assessed across all Allocated Licensees, which the Parties submit is the reasonable and equitable result if such a scenario was to arise.
- Timing for Licensee payment of MLC invoices: The timing for Licensees to pay the quarterly invoices from the MLC for the allocated portion of the administrative

assessment is modified to be 45 days from receipt of the invoice. This change addresses a situation that is now apparent in which the current provision (which calls for invoices to be received by Licensees at least 30 days before the quarter begins or else the payment deadline is pushed back by an entire calendar quarter) provides only a short window for processing Licensee usage reporting from the last month of each quarter calculation period in order to generate invoices in time to avoid payment deadlines being extended by a full calendar quarter. The revised timing is reasonable and suitable for both the MLC and DLC, and will further the goals of implementing the assessment effectively.

- Clarification on 2021 annual minimum fee. The amendments clarify that only a single annual minimum fee is to be assessed for the 2021 assessment, and no additional annual minimum fee is assessed for the Startup Assessment, which is also collected in 2021. Both the MLC and DLC believe that this is the appropriate reading of the current regulations. However, since concerns have been raised that the language in 37 C.F.R. 390.4(h) might cause confusion on this point, this change is proposed to provide clarity.

II. The Proposed Amended Allocation Methodology Is Consistent With The Law

The proposed amendments, like the initial administrative assessment, is the product of a voluntary agreement between the DLC and MLC. As a result, the requirements set forth in the statute for an administrative assessment determined by the Judges after a full proceeding do not directly apply.⁴ Nevertheless, the fact that the amended allocation methodology is consistent with those statutory requirements provides further good cause for its adoption.

⁴ See 17 U.S.C. § 115(d)(7)(D)(ii).

Section 115(d)(7)(D)(ii)(III) requires that any administrative assessment determined by the Judges “be assessed based on usage of musical works by digital music providers and significant nonblanket licensees in covered activities under both compulsory and nonblanket licenses.” Section 115(d)(7)(D)(ii)(IV), in turn, requires that any allocation determined by the Judges must “include as a component a minimum fee for all digital music providers and significant nonblanket licensees” and that the allocation take the form of a “usage-based metric reasonably calculated to equitably allocate the collective total costs across digital music providers and significant nonblanket licensees engaged in covered activities.”

The proposed amended allocation methodology meets each of these conditions. It is “based on usage of musical works” in that the level of allocation is still based on the number of unique sound recordings actually used by the Licensee during the relevant time period—the particular tier a service falls in depends on the volume of usage. Even as a flat fee, the annual minimum fee is “a minimum fee,” and there is nothing in the statute (or logically) that prevents a minimum fee from also being the only fee for particular classes of services. The requirement that the allocation be “reasonably calculated to equitably allocate the collective total costs across digital music providers and significant nonblanket licenses,” is also met here. As discussed above, this allocation methodology is specifically calculated to address market participation by smaller Licensees and pass-through download stores in an equitable manner, and has support from a diverse cross-section of the Licensee industry, and as such the Parties submit that it represents an improvement in the fulfillment of this requirement.

* * * *

For the foregoing reasons, the Parties respectfully request that the Judges grant this motion and adopt the Proposed Amended Regulations in full.

Dated: December 18, 2020

Respectfully submitted,

/s/ Allison L. Stillman
Allison L. Stillman (N.Y. Bar No. 4451381)
LATHAM & WATKINS LLP
885 Third Avenue
New York, New York 10022-4834
(212) 906-1747
alli.stillman@lw.com

Sarang Damle (D.C. Bar No. 1619619)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3332
sy.damle@lw.com

*Counsel for Digital Licensee Coordinator,
Inc.*

Dated: December 18, 2020

/s/ Benjamin K. Semel
Benjamin K. Semel (N.Y. Bar No. 2963445)
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036-6569
(212) 421-4100
bsemel@pryorcashman.com

*Counsel for the Mechanical Licensing
Collective*

EXHIBIT A

Proposed Amendments to 37 C.F.R. Part 390 (in bold)

§390.1 Definitions.

Administrative assessment has the meaning set forth in 17 U.S.C. 115(e)(3).

Aggregate Sound Recordings Count means the sum of the Unique Sound Recordings Counts of each and every **Allocated** Licensee, calculated over the respective Quarterly Allocation calculation period.

Allocated Licensees mean licensees as set forth as set forth in §390.3(a), who are allocated an additional share of assessments beyond the annual minimum fee.

~~At~~ **Allocated** *Licensee Assessment Pool* means an amount equaling 50% of each Annual Assessment and Quarterly Allocation.

Annual Assessment means the administrative assessment for each calendar year beginning with the calendar year 2021.

Annual Calculation Period means the calculation period for annual minimum fees, as set forth in §390.3(b).

Annual minimum fee means the minimum amount each Licensee shall pay for each Annual Assessment period, as set forth in §390.3.

Blanket Licensee means a digital music provider that is engaged, in all or in part, in covered activities pursuant to a compulsory blanket license described in 17 U.S.C. 115(d).

Certified Minimum Fee Disclosure means a Licensee's certified statement setting forth its Unique Sound Recordings Count for the respective calculation period.

Covered activity has the meaning set forth in 17 U.S.C. 115(e)(7).

Digital licensee coordinator or *DLC* has the meaning set forth in 17 U.S.C. 115(e)(9).

ECI means the Employment Cost Index for Total Compensation (not seasonally adjusted), all civilian workers, as published on the website of the United States Department of Labor, Bureau of Labor Statistics, for the most recent 12-month period for which data are available on the date that is 60 days prior to the start of the calendar year.

Flat Fee Licensees mean licensees as set forth in §390.3(a), who are not allocated an additional share of assessments beyond the annual minimum fee.

License availability date has the meaning set forth in 17 U.S.C. 115(e)(15).

Licensee means either **a Blanket Licensee or a Significant Nonblanket Licensee.**

~~(1) A digital music provider that is engaged, in all or in part, in covered activities pursuant to a blanket license; or~~

~~(2) A significant nonblanket licensee, as those terms are defined under 17 U.S.C. 115(e).~~

Mechanical licensing collective or *MLC* has the meaning set forth in 17 U.S.C. 115(e)(18).

New Licensee means a Licensee that begins engaging in covered activities on or after the license availability date.

Notice of license has the meaning set forth in 17 U.S.C. 115(e)(22).

Notice of nonblanket activity has the meaning set forth in 17 U.S.C. 115(e)(23).

Quarterly Allocation means each of four equal parts of each Annual Assessment, to be paid on a calendar quarterly basis.

Significant Nonblanket Licensee has the meaning set forth in 17 U.S.C. 115(e)(31).

Startup Assessment means the one-time administrative assessment for the startup phase of the Mechanical licensing collective.

Threshold Licensee means **an Allocated** Licensee that reports at least 7.5% of the Aggregate Sound Recordings Count of all **Allocated** Licensees.

Threshold Licensee Assessment Pool means an amount equaling 50% of each Annual Assessment and Quarterly Allocation.

Unique Sound Recordings Count means, for each Licensee, the number of unique ~~and royalty-bearing~~ sound recordings used **and reported** per month by such Licensee in Section 115 covered activities, such as would be reflected in the information required to be reported under Section 115(d), calculated as a monthly average over the respective calculation period, **except that a sound recording of a musical work that is in the public domain and designated as such in a monthly report of use shall not count towards the Licensee's Unique Sound Recordings Count.** For example, a Licensee's Unique Sound Recordings Count for a Quarterly Allocation calculation period will be calculated by adding together the counts of unique ~~and royalty-bearing~~ sound recordings reported by such Licensee to the MLC during each month of that quarter, and dividing that sum by three. A Licensee's Unique Sound Recordings Count for an Annual Calculation Period will be calculated by adding together the counts of unique ~~and royalty-bearing~~ sound recordings reported by such Licensee to the MLC during each month of that twelve-month period, and dividing that sum by twelve. **In the case of a Licensee that was engaged in covered activities only for part of a Quarterly Allocation calculation period or**

Annual Calculation Period, the monthly average shall be calculated using only the calendar months that the Licensee was engaged in covered activities. In the case of a Licensee that was not engaged in covered activities during any part of a Quarterly Allocation calculation period or Annual Calculation Period, the monthly average shall be zero. Within each month's usage reports from a particular Licensee, a sound recording reported multiple times with the same metadata would be counted as a single sound recording, and a sound recording reported multiple times each with different metadata would be counted multiple times, once for each reporting with new or different metadata.

§390.2 Amount of assessments.

(a) *Startup Assessment.* The Startup Assessment shall be in the amount of \$33,500,000.

(b) *2021 Annual Assessment.* The Annual Assessment for the calendar year 2021 shall be in the amount of \$28,500,000.

(c) *Other Annual Assessments.* (1) For the calendar year 2022 and all subsequent years, the amount of the Annual Assessment will be automatically adjusted by increasing the amount of the Annual Assessment of the preceding calendar year by the lesser of:

(i) 3 percent; and

(ii) The percentage change in the ECI.

(2) The MLC shall publish notice on its website of each year's automatic adjustment to the Annual Assessment. The Annual Assessment shall continue from year to year unless and until the Copyright Royalty Judges cause to be published an adjusted administrative assessment pursuant to 17 U.S.C. 115(d)(7)(D)(iv) or (v).

§390.3 Annual minimum fees.

~~(a) *Amount.* All Licensees shall pay the following annual minimum fee for each Annual Assessment period:~~

~~(1) For Licensees that have a Unique Sound Recordings Count of less than 5,000 during the relevant Annual Calculation Period, the annual minimum fee shall be \$5,000.~~

~~(2) For Licensees that have a Unique Sound Recordings Count of 5,000 or more during the relevant Annual Calculation Period, the annual minimum fee shall be \$60,000.~~

(a) *Amounts.* Subject to paragraph (e), Licensees shall pay annual minimum fees as follows—

(1) *In general.* Except as provided in paragraph (a)(2)—

(i) Licensees that have a Unique Sound Recordings Count of 10,000 or less during the relevant Annual Calculation Period shall pay \$2,500 and shall be Flat Fee Licensees for the respective Annual Assessment;

(ii) Licensees that have a Unique Sound Recordings Count of between 10,001 and 25,000 during the relevant Annual Calculation Period shall pay \$5,000 and shall be Flat Fee Licensees for the respective Annual Assessment;

(iii) Licensees that have a Unique Sound Recordings Count of between 25,001 and 50,000 during the relevant Annual Calculation Period shall pay \$10,000 and shall be Flat Fee Licensees for the respective Annual Assessment, where such Annual Calculation Period is for the Annual Assessment for the calendar year 2024 or earlier; otherwise such Licensees shall pay \$60,000 and shall be Allocated Licensees for the respective Annual Assessment;

(iv) Licensees that have a Unique Sound Recordings Count of between 50,001 and 100,000 during the relevant Annual Calculation Period shall pay \$20,000 and shall be Flat Fee Licensees for the respective Annual Assessment, where such Annual Calculation Period is for the Annual Assessment for the calendar year 2024 or earlier; otherwise such Licensees shall pay \$60,000 and shall be Allocated Licensees; and

(v) Licensees that have Unique Sound Recordings Count greater than 100,000 during the relevant Annual Calculation Period shall pay an annual minimum fee of \$60,000 and shall be Allocated Licensees for the respective Annual Assessment.

(2) Download store annual fee. Licensees that engage in covered activities exclusively under authority obtained from licensors of sound recordings to make and distribute permanent downloads of musical works embodied in such sound recordings pursuant to individual download licenses or voluntary licenses shall be Flat Fee Licensees and pay the following amounts:

(i) \$2,500 if the Licensee has a Unique Sound Recordings Count of 50,000 or less during the relevant Annual Calculation Period.

(ii) \$5,000 if the Licensee has a Unique Sound Recordings Count of between 50,001 to 100,000 during the prior Annual Calculation Period.

(iii) \$10,000 if the Licensee has a Unique Sound Recordings Count of between 100,001 to 250,000 during the prior Annual Calculation Period.

(iv) \$20,000 if the Licensee has a Unique Sound Recordings Count of between 250,001 to 500,000 during the prior Annual Calculation Period.

(v) \$60,000 if the Licensee has a Unique Sound Recordings Count of greater than 500,000 during the prior Annual Calculation Period.

(b) *Annual Calculation Period.* The calculation period for annual minimum fees shall be the 12-month period that ends on the September 30th immediately preceding the start of the assessment period (e.g., the annual minimum fee calculation period for the 2021 Annual Assessment shall be October 1, 2019 to September 30, 2020).

(c) *Calculation by Licensee certification (2021 and 2022)*—(1) *2021.* Each Licensee in operation on or before the license availability date shall submit to the MLC, ~~accompanying its notice of license under Section 115(d)(2)(A) or its notice of nonblanket activity under Section 115(d)(6)(A), and~~ no later than February 15, 2021, its Certified Minimum Fee Disclosure for the 2021 annual minimum fee (i.e., for the period from October 1, 2019 to September 30, 2020). Each Licensee shall submit the appropriate **annual** minimum fee **as calculated under paragraph (a) (i.e., \$5,000 or \$60,000)** for the 2021 Assessment simultaneously with its Certified Minimum Fee Disclosure.

(2) *2022.* Each Licensee shall submit to the MLC by November 1, 2021, a Certified Minimum Fee Disclosure for the 2022 Assessment, and shall pay the appropriate annual minimum fee by January 15, 2022.

(d) *Calculation by the MLC (2023 and subsequent years).* ~~(1)~~ Beginning with the 2023 Assessment and continuing in subsequent years, the MLC will calculate each Licensee's annual minimum fee based on usage reporting received from Licensees pursuant to Section 115(d)(4). The MLC shall send invoices for the appropriate annual minimum fee to each Licensee. Licensees shall pay the annual minimum fee invoices from the MLC by the later of:

~~(i)~~ 30 days from receipt of the invoice from the MLC; or

~~(ii)~~ January 15th of the respective Annual Assessment year.

~~(2) Each Licensee in operation during any portion of an annual minimum fee calculation period shall pay the full amount of the respective annual minimum fee.~~

(e) New licensees.

(1) Any Licensee that begins engaging in covered activities on or after the license availability date (“New Licensee”), shall remit the lowest annual fee set forth in paragraph (a)(1) or paragraph (a)(2), as applicable, along with its notice of license or notice of nonblanket activity to be attributable to the calendar year in which such Licensee begins engaging in covered activities.

(2) A New Licensee shall initially be deemed a Flat Fee Licensee. When the mechanical licensing collective calculates the Quarterly Allocation with the first calculation period pursuant to section 390.4(b) during which the New Licensee was engaged in covered activities, whether such activities were for all or part of the calculation period, the

mechanical licensing collective shall calculate the New Licensee's Unique Sound Recording Count for that calculation period. In the event that such New Licensee has not provided timely reporting, the MLC may instead, in its discretion, use the most recent reporting from that New Licensee for such calculation. If such New Licensee is calculated to have a Unique Sound Recordings Count that exceeds the amount that would qualify it to be a Flat Fee Licensee under section 390.3(a)(1), it shall be deemed an Allocated Licensee for that Quarterly Allocation and the remainder of the calendar year and shall be invoiced and pay the assessment as calculated in section 390.4 for the respective quarters, with such New Licensee's Unique Sound Recordings Count to be included in the Aggregate Sound Recording Count for such quarters.

(3) A New Licensee shall be subject to the provisions of paragraphs (a) through (d), as applicable, to determine the amount and timing of the annual minimum fees owed, for the calendar year following the year when the Licensee begins engaging in covered activities, and for such purposes a New Licensee shall be treated as having a Unique Sound Recordings Count of zero for the Annual Calculation Period if it began engaging in covered activities after the end of the Annual Calculation Period. A New Licensee that has been deemed an Allocated Licensee pursuant to paragraph (2) shall be subject to the provisions of paragraphs (a) through (d), as applicable, to determine its status as a Flat Fee Licensee or Allocated Licensee, for calendar years following the calendar year in which it is first deemed an Allocated Licensee.

§390.4 Annual Assessment allocation and payment.

(a) *Allocation formula.* Each Annual Assessment shall be divided into four equal Quarterly Allocations, after first subtracting annual fees payable by Flat Fee Licensees. The MLC may adjust Quarterly Allocations to compensate for any adjustments to the Flat Fee Licensee annual fees that occur after the initial division of the Annual Assessment. Each Quarterly Allocation, ~~each of which~~ shall be allocated and paid on a calendar quarterly basis. Each Quarterly Allocation shall be divided into two equal parts, allocated among Licensees according to the following formula:

(1) ~~All~~ Allocated *Licensee Assessment Pool.* The ~~All~~ Allocated Licensee Assessment Pool shall be allocated on a pro rata basis across all Allocated Licensees, based on each Licensee's share of the Aggregate Sound Recordings Count.

(2) *Threshold Licensee Assessment Pool.* The Threshold Licensee Assessment Pool shall be allocated on a pro rata basis across Threshold Licensees based on each Threshold Licensee's share of the aggregate Unique Sound Recordings Counts of all Threshold Licensees. In the event that no Threshold Licensees exist for a Quarterly Allocation, the Threshold Licensee Assessment Pool shall become payable by all Allocated Licensees in the same manner as the Allocated Licensee Assessment Pool.

(b) *Calculation periods and timing.* The calculation period for each Quarterly Allocation shall be the three-month period that ends three months prior to the start of the respective quarter, except that the calculation period for the Quarterly Allocation for the first and second quarters of 2021 shall be the same as for the annual minimum fee for the 2021 Annual Assessment, and shall be calculated based upon the information provided in the Certified Minimum-Fee Disclosures, as required by this part. The MLC shall make all calculations for each respective period based upon the reporting for such period received from Licensees as of the time of calculation by the MLC, which calculation time shall not be earlier than the legal deadline for submission of reporting by Licensees for the respective period. In the event that a Licensee has not provided timely reporting for the respective calculation period at the time the MLC calculates a Quarterly Allocation, the MLC may instead, in its discretion, use the most recent reporting from that Licensee to determine that Licensee's Unique Sound Recordings Count, for the purposes of calculating the Quarterly Allocation.

(c) *Invoicing and payment of allocation—(1) Deadline for payment.* (i) Invoices from the MLC for Quarterly Allocation shares shall be payable pursuant to the MLC invoice, ~~but no earlier than the later of:~~ **no later than 45 days after receipt of the invoice from the MLC.**

~~(A) 30 days from receipt of the invoice from the MLC; or~~

~~(B) The first day of the next calendar quarter.~~

(ii) Invoices from the MLC to Licensees shall be deemed received on the business day after electronic transmission.

(2) *Format of invoices.* (i) The quarterly invoices issued by the MLC shall include at least the following information, where applicable:

(A) Invoice issuance date;

(B) Invoice payment due date;

(C) Amount owed, by share of ~~AM~~ **Allocated** Licensee Assessment Pool and Threshold Licensee Assessment Pool;

(D) Allocation of Startup Assessment;

(E) Offset of minimum fee payment against quarterly assessment; and

(F) Amount of credit for un-recouped minimum fee.

(ii) Invoices issued as a result of an allocation adjustment shall include all of the information set forth in paragraphs (c)(2)(i)(A) through (F) of this section that may be relevant, as well as an

explanation of the change from the prior invoices that are affected, and the reason(s) for the adjustment.

(d) *Late reporting.* The MLC shall promptly notify the DLC of any known Licensees who have not timely submitted reports of usage as required each month pursuant to Section 115(d) and 37 CFR part 210.

(e) *Recalculation of Allocated Assessment invoices.* The MLC may, in its discretion, recalculate allocations and adjust prior invoices, with the written consent of the DLC, within twelve months after the initial issuance of such invoices, in circumstances including, but not limited to, where new usage reporting is received or where a correction would alter one or more of any Licensee's Quarterly Allocation shares by at least 10%.

(f) *Recoupment of minimum-fee.* Each **Allocated** Licensee's minimum fee will be offset against its Quarterly Allocation shares, **if any**, and additional payment will not be due from a Licensee unless and until its total Quarterly Allocation shares exceed its annual minimum fee payment. To the extent that **an Allocated** Licensee's minimum fee exceeds that Licensee's Quarterly Allocation shares for a given Assessment period, the excess amounts will be pooled and credited pro rata to all **Allocated** Licensees based on the Quarterly Allocation shares for the first quarter of the following year.

(g) *Reports to DLC.* The MLC shall report to the DLC no later than 75 days after the end of every quarter the Aggregate Sound Recordings Count for that quarter.

(h) *Startup Assessment allocation and payment.* The Startup Assessment shall be allocated and paid in the same manner and on the same dates as the 2021 Annual Assessment, including as to each of the applicable provisions above, and shall be separately itemized in invoices from the MLC to Licensees. **Pursuant to § 390.3, a single annual minimum fee shall be assessed for the 2021 Annual Assessment, and no additional annual minimum fee shall be assessed for the Startup Assessment.**