



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 210

[Docket No. 2020-12]

Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective: Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This supplemental notice of proposed rulemaking (“SNPRM”) updates the Copyright Office’s July 17, 2020 proposed rule concerning the Music Modernization Act transition period transfer and reporting of royalties to the mechanical licensing collective. Specifically, this SNPRM provides an alternate approach to requirements concerning the content of cumulative statements of account to be submitted by digital music providers to the mechanical licensing collective at the conclusion of the statutory transition period and proposes estimate and adjustment provisions with respect to payment of accrued royalties to the mechanical licensing collective in connection with this reporting.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 20 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the

Copyright Office’s website at <https://www.copyright.gov/rulemaking/mma-transition-reporting>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov, John R. Riley, Assistant General Counsel, by email at jril@copyright.gov, or Jason E. Sloan, Assistant General Counsel, by email at jslo@copyright.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

This SNPRM is issued subsequent to a notification of inquiry published in the Federal Register on September 24, 2019 and a notice of proposed rulemaking (“NPRM”) published on July 17, 2020 relating to implementation of the Music Modernization Act (“MMA”).¹ In its NPRM, the Office proposed regulations pertaining to cumulative statements of account, which digital music providers (“DMPs”) are required to provide to

¹ 85 FR 43517 (July 17, 2020); 84 FR 49966 (Sept. 24, 2019). All rulemaking activity, including public comments, as well as legislative history and educational material regarding the Music Modernization Act, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization/>. Comments received in response to the September 2019 notification of inquiry are available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001>. Comments received in response to the July 2020 notice of proposed rulemaking are available at <https://beta.regulations.gov/document/COLC-2020-0011-0001/comment>. Related *ex parte* letters are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. References to these comments and letters are by party name (abbreviated where appropriate), followed by “Initial Comment,” “Reply Comment,” “NPRM Comment,” or “*Ex Parte* Letter” as appropriate.

the mechanical licensing collective (“MLC”) for such DMPs to be eligible for the statutory limitation on liability for unlicensed uses of musical works prior to the license availability date.² This SNPRM generally assumes familiarity with the prior NPRM and notification of inquiry, as well as the public comments and summaries of *ex parte* meetings received in response to those documents, all of which are publicly accessible from the Copyright Office’s website.³

As relevant here, the NPRM considered whether to propose regulations with respect to the ability of DMPs to rely upon estimates and subsequently adjust their cumulative statements of account. The NPRM tentatively declined to propose broad language given the “one-time nature” of cumulative statements of account, but did propose that DMPs could estimate applicable performance royalties, and that “any overpayment (whether resulting from an estimate or otherwise) should be credited to the DMP’s account, or refunded upon request.”⁴

The NPRM also considered comments from the Digital Licensee Coordinator (“DLC”) asking for regulatory language to clarify the relationship between this reporting obligation and pre-existing private agreements between a large number of music publishers and certain digital services that the DLC characterized as providing for the liquidation of accrued royalties for unmatched works through payments based on market

² See 17 U.S.C. 115(d)(10).

³ Guidelines for *ex parte* communications, along with records of such communications, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. As stated in the guidelines, *ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters.

⁴ 85 FR at 43520.

share to publishers signing releases.⁵ At the time, the Office tentatively declined to propose regulatory language. Instead, the Office provided initial guidance regarding the statutory obligation to transfer and report information related to accrued royalties for unlicensed uses under the MMA and noted that it remained available to dialogue further.⁶

In response to a request from the MLC, the NPRM also proposed expanding the present cumulative statement of account regulations, which require providing “all of the information that would have been provided to the copyright owner had the digital music provider been serving Monthly Statements of Account,”⁷ to requirements for reporting information that would “largely mirror the requirements proposed for reports of usage.”⁸ While the DLC initially contended that such a proposal was “impractical,”⁹ it now describes such a requirement as “impossible” given the business practicalities of how this information was or was not compiled and stored over time.¹⁰ Similarly, the Digital Media Association (“DiMA”) stated that the NPRM’s expanded reporting requirements would

⁵ *Id.* at 43522–23; *see also* DLC *Ex Parte* Letter at 1 (Aug. 11, 2020); NMPA *Ex Parte* Letter at 5 (Aug. 25, 2020).

⁶ 85 FR at 43523 (noting that because “voluntary licenses” “remain in effect” by law, “by implication, DMPs would not retain accrued royalties (as defined in the MMA) for works licensed under private agreements”).

⁷ 37 CFR 210.10(b)(3)(i); *see also* 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

⁸ 85 FR at 43519.

⁹ DLC Reply Comment at 24.

¹⁰ DLC NPRM Comment at 2, 8–9 (explaining that some of the additional information was not collected by DMPs in the past and cannot be collected in time to include in cumulative statements of account); DLC *Ex Parte* Letter at 2 (Aug. 11, 2020) (“[S]ervices have been compiling reporting under the regulatory regime that the Office put in place shortly after the enactment of the MMA. We explained the impossibility—mere months before license availability date—of completely revamping royalty accounting systems to accommodate the Office’s new proposed rules.”).

create “massive operational hurdles” and would “jeopardize[] every [DMP’s] eligibility for the limitation on liability.”¹¹

II. Supplemental Proposed Regulatory Provisions

As discussed further below, while the Copyright Office continues to consider the proposed rule described in the NPRM, it is now also providing alternative regulatory language for public comment. As with other MMA rulemakings to date, the Office has received robust engagement from interested parties in this proceeding, as reflected in the administrative record.¹² Since issuing its NPRM, the Office has reviewed many written comments and conducted several *ex parte* meetings with various parties on these matters, which have further informed its thinking.¹³ In addition, the D.C. Circuit partially vacated and remanded the Copyright Royalty Judges’ “Phonorecords III” determination, which was intended to set rates and terms for the section 115 mechanical license for the period from January 1, 2018 through December 31, 2022,¹⁴ which provides an additional ground for the Office to establish a mechanism for DMPs to estimate the amount of royalties due

¹¹ DiMA NPRM Comment at 6–7 (“digital music providers have maintained usage information . . . with the *existing* statement of account regulations in mind”).

¹² *See* 85 FR at 43523 (“The Office . . . remains available to dialogue further, in accordance with the public process for written comments and/or *ex parte* meetings.”); 84 FR at 49968 (noting that the Office is willing to “utilize informal meetings to gather additional information . . . [and would] establish[] guidelines for *ex parte* communications” to be issued on its website).

¹³ *See, e.g.*, DiMA NPRM Comment at 2–5; DLC NPRM Comment at 3–6, 11–18; MLC NPRM Comment at 8–9; Songwriters Guild of America & Society of Composers and Lyricists NPRM Comment at 3–8; Artist Rights Alliance *Ex Parte* Letter at 2–3 (Sept. 22, 2020); DLC *Ex Parte* Letter at 1 (Aug. 11, 2020); DLC *Ex Parte* Letter at 1–3 (Oct. 14, 2020); NMPA *Ex Parte* Letter at 1–2 (Aug. 25, 2020); MediaNet *Ex Parte* Letter at 2 (Oct. 28, 2020); MLC *Ex Parte* Letter at 2–6 (Oct. 5, 2020); MLC *Ex Parte* Letter at 2–5 (Oct. 16, 2020); Songwriters Guild of America et al. *Ex Parte* Letter at 1–2 (Sept. 14, 2020); Sony/ATV Music Pub. *Ex Parte* Letter at 1–2 (Oct. 28, 2020); Spotify *Ex Parte* Letter at 1 (Sept. 1, 2020); Spotify *Ex Parte* Letter at 1–5 (Oct. 9, 2020); Warner Music Grp. *Ex Parte* Letter at 1 (Oct. 21, 2020).

¹⁴ *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 381 (D.C. Cir. 2020).

and subsequently adjust payments (since the ultimate rates for this time period have not yet been finalized).

The Office also received guidance from Senate Judiciary Chairman Graham regarding the issue of certain industry agreements between publishers and DMPs that predate the MMA's enactment and required the payment of unmatched accrued royalties to copyright owners by market share, stating:

Since the intent of the MMA was to provide legal certainty for past, present, and future usage, it is critical that this issue be resolved in a manner that protects copyright owner interests while ensuring that songwriters are paid their splits and services are not burdened with double payments. . . . If the parties are unable to address this current dispute on their own in the immediate future, I urge the Copyright Office to bring them together in order to prevent a return to the inefficient litigation that featured prominently in the prior licensing regime.¹⁵

Since receiving the letter, the Office understands that the parties have continued to communicate on other aspects of the proposed rule, but have not on their own resolved their disagreement over the proper interpretation of the relevant statutory provisions.

Indeed, subsequent information provided to the Office in this proceeding confirms that the underlying dispute remains. Specifically, the DLC has clarified that its reference to prior negotiated agreements centers around agreements between four specific DMPs and the National Music Publishers' Association ("NMPA") (and subsequent agreements with participating publishers), and both the DLC and individual DMPs have provided additional views regarding those agreements.¹⁶ The Office also heard from multiple

¹⁵ Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020).

¹⁶ DLC NPRM Comment at 12–14; DLC Initial Comment at 3–4 n.11, U.S. Copyright Office Dkt. No. 2019-6, <https://beta.regulations.gov/comment/COLC-2020-0007-0012> (citing Paul Resnikoff, *Exclusive: This Is the Contract Songwriters Are Signing With Spotify*, Digital Music News (Apr. 27, 2016), <https://www.digitalmusicnews.com/2016/04/27/exclusive-spotify-establishing-direct-publisher-contracts-to-solve-mechanicals-issues/>); DLC *Ex Parte* Letter at 1–

songwriter groups, all of which stressed the importance of royalties for uses of works being paid over by DMPs in a manner that results in payments to songwriters, and expressed uncertainty over whether payments under such agreements had indeed been passed through to songwriters.¹⁷ The MLC confirmed that it believes its role to be a “trusted party to receive unmatched royalties and ensure that they are paid to the right parties, with interest (for the period that the MLC held such royalties).”¹⁸ The MLC also offered its view that the proper statutory read would require DMPs to transfer payment for all unmatched uses, regardless of whether a valid agreement previously resulted in the liquidation of a portion of associated royalties or whether there have been related voluntary releases.¹⁹ The Office has also heard from the NMPA as well as individual publishers on this issue, with the NMPA urging the Office to avoid a regulation that might interfere with private agreements.²⁰ While publisher perspectives varied, significantly, some noted that they consider claims settled pursuant to these agreements to be closed, and to date, all publishers the Office has heard from confirmed that their associated songwriters have already participated in unclaimed royalties received by those publishers pursuant to the agreements at issue.²¹ Overall, the comments, in particular as

2 (Oct. 14, 2020); Google *Ex Parte* Letter at 1–3 (Oct. 23, 2020); MediaNet *Ex Parte* Letter at 2 (Oct. 28, 2020); Spotify *Ex Parte* Letter at 1–3, 5 (Oct. 9, 2020); *see also* NMPA *Ex Parte* Letter at 1–2 (Aug. 25, 2020).

¹⁷ *See* Artist Rights Alliance et al. *Ex Parte* Letter (Sept. 22, 2020); Songwriters Guild of America et al. *Ex Parte* Letter (Sept. 15, 2020).

¹⁸ MLC *Ex Parte* Letter at 5 (Oct. 5, 2020).

¹⁹ MLC NPRM Comment at 8; MLC *Ex Parte* Letter at 5 (Oct. 5, 2020); MLC *Ex Parte* Letter at 2–4 (Oct. 16, 2020).

²⁰ *See* NMPA *Ex Parte* Letter (Aug. 25, 2020).

²¹ Sony/ATV Music Pub. *Ex Parte* Letter at 1–2 (Oct. 28, 2020) (noting that “distribution of unmatched funds, whether title bound or not, are always paid through to [Sony/ATV’s] songwriters”); Warner Music Grp. *Ex Parte* Letter at 1 (Oct. 21, 2020) (noting that songwriters

between the MLC on the one hand, and the DLC or individual services, on the other, reveal competing statutory interpretations regarding the provision requiring DMPs to transfer over accrued royalties that have been maintained in accordance with generally accepted accounting principles.²²

For its part, the Office is carefully analyzing the statutory text and will give appropriate weight to the legislative history and consideration of these public comments when promulgating a final rule. At this point, however, the Office has determined that the public process would benefit from providing supplemental, alternative regulatory language, to ensure that further stakeholder views can be duly considered as the Office evaluates these important issues. Although the Office has not made any final conclusions on these matters, this SNPRM is being issued so that interested parties have adequate notice and an opportunity to comment specifically on these potential alternatives sufficiently in advance of the February 2021 deadline to submit cumulative statements of account to the MLC.

While the NPRM outlined in detail several considerations with respect to these and other issues, and while the Office continues to seriously consider the insightful comments it has received to date, in light of those comments, Chairman Graham's letter, and the Phonorecords III remand, the Office now provides regulatory language regarding the following topics.²³ This regulatory language is largely additive to the language

were paid portions of royalties received by publishers pursuant to pre-enactment agreements with certain DMPs that liquidated unclaimed royalties).

²² See DLC NPRM Comment at 16–18; MLC Reply Comment at 28–30; Spotify *Ex Parte* Letter at 3–4 (Oct. 9, 2020); MLC *Ex Parte* Letter at 2–4 (Oct. 5, 2020); MLC *Ex Parte* Letter at 2–4 (Oct. 16, 2020); see also 17 U.S.C. 115(d)(10)(B)(iv).

²³ See 17 U.S.C. 115(d)(12)(A), 702. The Copyright Office considers this additional proposed regulatory language to be a logical outgrowth of the NPRM, including comments received from a wide variety of *ex parte* meeting participants. Nevertheless, to ensure that all interested parties

proposed in the NPRM, and also includes potential substitutes for certain provisions included in the NPRM. Interested commenters may wish to review that earlier NPRM and the public comments received to date offering varying perspectives on factual and legal issues underlying this proposal.

Estimates and adjustments, including previously released claims. The Office is providing proposed provisions that would allow DMPs to rely upon certain estimates and subsequently submit adjustments to cumulative statements of account where the computation of accrued royalties depends upon an input that is unable to be finally determined at the time the cumulative statement of account is due.

One set of estimate and adjustment provisions would address situations where a DMP cannot calculate a necessary input in a royalty calculation (*e.g.*, performance royalties, sound recording-related consideration) or needs to make a future adjustment under other specified circumstances (*e.g.*, in response to a change in the statutory royalty rates or terms). Statements of adjustment adjusting cumulative statements of account would be required to detail the changes to facilitate accurate reporting. The Office understands that both the DLC and MLC now generally support this type of rule.²⁴

Related provisions would address situations where a DMP has accrued and maintained royalties in reasonable good-faith belief as to the impact of negotiated agreements upon the computation of accrued royalties required to be transferred to the MLC and it is necessary to estimate such amount at the time the cumulative statement of

have fair notice and an opportunity to participate in the rulemaking with respect to these issues in a meaningful and informed manner, the Office is inviting further written comments on these issues. *See* 5 U.S.C. 553(b)(3); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

²⁴ DLC NPRM Comment at 5–6; MLC *Ex Parte* Letter at 2 (Oct. 5, 2020).

account is delivered to the MLC because of the unmatched status of the relevant musical works. They would clarify that the statutory obligation to maintain accrued royalties in accordance with generally accepted accounting principles includes maintenance in accordance with such principles concerning derecognition of liabilities.²⁵ They would accordingly accommodate situations where a DMP has made good-faith estimates where the DMP has used unmatched works in covered activities prior to the license availability date and the DMP has determined that accrued liability for an amount of otherwise attributable royalties has been extinguished due to negotiated agreements (whether considered a voluntary agreement, liquidation agreement, settlement, or release, etc.) executed on a catalog or participating party basis, rather than a matched-work basis.²⁶ In such a circumstance, the DMP could report based upon its good-faith estimate of accrued royalties for unmatched uses when reporting to the MLC, and would be required to make an adjustment to retain the limitation on liability if that estimate ends up being incorrect. Under no circumstances could this provision be used to shortchange payment of accrued

²⁵ See Accounting Standards Codification 405-20-40-1 (stating a debtor “shall derecognize a liability if and only if it has been extinguished. A liability has been extinguished if either of the following conditions is met: a. The debtor pays the creditor and is relieved of its obligation for the liability[, or] b. The debtor is legally released from being the primary obligor under the liability, either judicially or by the creditor.”); see also Black’s Law Dictionary (11th ed. 2019) (defining “accrued liability” as “[a] debt or obligation that is properly chargeable in a given accounting period but that is not yet paid”).

²⁶ Again, it has been represented to the Office that for certain DMPs, for certain periods of time, the overwhelming majority of the music publishing industry participated in such agreements and has settled relevant claims for those periods. This proposed mechanism is intended to allow DMPs who believe that these agreements impact the calculation of their accrued royalties to transfer over their reasonable estimation of accrued royalties remaining, including royalties accrued for non-participating publishers during the relevant periods, subject to a later true-up to maintain eligibility for the limitation on liability. In this regard and without opining on the substance of these private agreements, the proposal is intended to further congressional intent to “protect[] copyright owner interests” without burdening services with “double payments,” and avoid incentivizing inefficient litigation. Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020).

royalties for musical work copyright owners who did not participate in such agreements. A DMP relying upon such an estimate would be required to provide a list of such agreements to the MLC to use in connection with matching against musical work information provided by copyright owners and to provide an avenue for copyright owners to dispute the fact or effect of such agreements. As the DLC has requested, the proposal includes a requirement for such a DMP to cover any deficit through prompt payment of an invoice issued by the MLC.²⁷ Under the proposed rule, unreasonable or bad-faith withholding of accrued royalties by a DMP may result in loss of the limitation on liability.

Sound Recording and Musical Work Information and Format. In addition to continuing to consider the requirements proposed in the NPRM, the Copyright Office is now considering whether to instead potentially adopt language closer to existing regulations for reporting sound recording and musical work information,²⁸ to reflect the DLC's comments and incentivize optional participation in this transition period reporting for cumulative statements of account.²⁹ To ensure the MLC receives additional information potentially valuable to reduce the amount of unmatched uses, the Office, however, also proposes adding a requirement that DMPs report information referenced in 17 U.S.C. 115(d)(10)(B)(i)(I)(aa) or (bb) that was acquired by the DMP in connection

²⁷ See DLC NPRM Comment at 16. The Office understands the DMPs believe that their estimates err on the side of overpayment. Nonetheless, to ensure prompt payment, the Office notices a rule requiring "true-up" of underpayments within 14 business days of being invoiced, rather than the 45 days proposed by the DLC. Cf. 17 U.S.C. 512(g)(2)(C) (setting out 14-day deadline for copyright owners to institute court action).

²⁸ See *Long Island Care at Home, Ltd.*, 551 U.S. at 175 (suggesting that it is "reasonably foreseeable" that an agency may withdraw a proposed rule).

²⁹ See DLC NPRM Comment at 2, 7–10.

with its efforts to obtain such information under 17 U.S.C. 115(d)(10)(B)(i)(I), or a DMP-assigned identifier, if such information is requested by the MLC. The Office proposes that the requirement to provide a DMP identifier, at a separate time from the February 2021 deadline to submit a cumulative statement of account, may aid the MLC by providing a unique identifier that can easily link up with the robust usage data the MLC will be receiving on an ongoing basis in monthly reporting for blanket uses. The Office requests comments on the feasibility and adequacy of this proposal, including whether there are additional categories of information that DMPs should be required to provide, and whether establishing set time periods by which a DMP is obligated to submit such supplementary information may be preferable to the request-based format of the proposed provision. The Office further seeks comment on other methods to facilitate supplemental reporting, such as bifurcating the timing required for reporting each of the fields proposed in the July NPRM but otherwise retaining that proposed structure; parties advocating an alternate approach are encouraged to submit proposed regulatory language to that effect in their comments. In providing such language to ensure ample opportunity for public input, the Office does not wish to discourage continued dialogue between the MLC and DLC as to this aspect of the reporting regulations, as well as submission of any joint proposals that may result from discussions.

Additionally, MediaNet recently voiced its concern with being able to report its pre-2013 royalty and usage data in cumulative statements of account, stating that such data is not in its possession and may not have been maintained by its former vendors.³⁰ Noting that it is one of the oldest digital services, it asked for a regulatory exemption to

³⁰ MediaNet *Ex Parte* Letter at 2–3 (Oct. 28, 2020).

address these concerns.³¹ Given the timing of MediaNet’s request, the Office is not proposing its own regulatory language, but requests comments on MediaNet’s proposal.

The SNPRM also proposes imposing a records of use provision on DMPs, and allowing the MLC and a DMP flexibility to agree to alter non-substantive procedures, for example reporting formats, provided that any such alteration does not materially prejudice copyright owners owed royalties required to be transferred to the MLC or for the DMP’s eligibility for the 17 U.S.C. 115(d)(10) limitation on liability. The SNPRM further proposes a modified version of the provision concerning partially matched works.

In addition, at the DLC’s request, the SNPRM proposes that if a DMP is unable to report cumulative statements of account in the MLC’s preferred formats, a DMP may report in an alternative format, but must always report in a flat-file or other machine-readable format (*e.g.*, Excel, comma-separated values (CSV)) if the data exists in such format.³² The Office invites comments on this subject, including joint comments as appropriate. Finally, the Office invites comments on whether to adopt a harmless error provision, similar to the provision adopted for reporting by significant nonblanket licensees.³³

³¹ *Id.* MediaNet proposes a new 37 CFR 210.20(c)(4)(iii) of the proposed rule: “The digital music provider shall be excused from providing the information set forth in paragraphs (i) and (ii) where the usage is from a period of time more than five years prior to license availability date, and the digital music provider certifies the following: that the information was solely held by a vendor with whom the digital music provider no longer has a business relationship, the digital music provider has requested that information from such vendor, and the vendor has informed the digital music provider that it cannot or will not provide that information.” *Id.* at 3 (Oct. 28, 2020).

³² *Id.* at 10, 23; DLC *Ex Parte* Letter at 3 (Aug. 27, 2020).

³³ *See* 37 CFR 210.28(k); *see also id.* at §210.9 (pre-MMA harmless error rule pertaining to Monthly and Annual Statements of Account). No harmless error provision was adopted for blanket licensee reports of usage in light of the statutory default provision, which requires reporting to be “materially deficient.” *See* 17 U.S.C. 115(d)(4)(E)(i)(III).

III. Additional Comments and Timing

While the Copyright Office is interested in comments regarding the above issues, it welcomes public comment on all aspects of the NPRM and submitted comments, including comments contained in *ex parte* meeting summary letters. In light of the statutory deadline related to the submission of cumulative statements of account, the Office is providing twenty days' notice for comment on this issue, and will continue to be available for *ex parte* meetings with attendant disclosures concurrently with the comment submission period.

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes amending 37 CFR part 210 as follows:

PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL WORKS

1. The authority citation for part 210 continues to read as follows:

Authority: 17 U.S.C. 115, 702.

2. Amend § 210.2 by revising paragraph (k) and removing paragraphs (l) through (o) to read as follows:

§ 210.2 Definitions.

* * * * *

(k) Any terms not otherwise defined in this section shall have the meanings set forth in 17 U.S.C. 115(e).

3. Amend § 210.10 by revising paragraphs (b) introductory text, (b)(1), (b)(2) introductory text, and (b)(3)(i) and adding paragraphs (c) through (m) to read as follows:

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

* * * * *

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

(1) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles, including those concerning derecognition of liabilities. Accrued royalties can cease being accrued royalties within the meaning of 17 U.S.C. 115(e)(2) if the digital music provider's payment obligation is extinguished, such as pursuant to a voluntary license or other agreement whereby the digital music provider is legally released from the liability by the relevant creditor copyright owner.

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

entered into prior to the time period specified in paragraph (b)(2)(i) of this section applies to such musical work (or share thereof)—

* * * * *

(3) * * *

(i) Not later than 45 calendar days after the license availability date, transfer accrued royalties to the mechanical licensing collective (as required by paragraph (i)(2) of this section), such payment to be accompanied by a cumulative statement of account that:

(A) Includes all of the information required by paragraphs (c) through (e) of this section covering the period starting from initial use of the work;

(B) Is delivered to the mechanical licensing collective as required by paragraph (i)(1) of this section; and

(C) Is certified as required by paragraph (j) of this section; and

* * * * *

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

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

(2) The full legal name of the digital music provider and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the digital music provider engages, or has engaged at any time during the period identified in paragraph (c)(1) of this section, in covered activities. If the digital music provider has a unique DDEX identifier number, it must also be provided.

(3) The full address, including a specific number and street name or rural route, of the place of business of the digital music provider. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(4) For each sound recording embodying a musical work that is used by the digital music provider in covered activities during the period identified in paragraph (c)(1) of this section and for which a copyright owner of such musical work (or share thereof) is not identified and located by the license availability date, a detailed cumulative statement, from which the mechanical licensing collective may separate reported information for each month and year for each applicable activity or offering including as may be defined in part 385 of this title, of all of:

(i) The royalty payment and accounting information required by paragraph (d) of this section; and

(ii) The sound recording and musical work information required by paragraph (e) of this section.

(5) The total accrued royalty payable by the digital music provider for the period identified in paragraph (c)(1) of this section, computed in accordance with the requirements of this section and part 385 of this title, and including detailed information regarding how the royalty was computed, with such total accrued royalty payable broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title.

(i) Where a digital music provider has a reasonable good-faith belief that the total accrued royalties payable are less than the total of the amounts reported under paragraph (c)(4)(i)

of this section, and the precise amount of such accrued royalties cannot be calculated at the time the cumulative statement of account is delivered to the mechanical licensing collective because of the unmatched status of relevant musical works embodied in sound recordings reported under paragraph (c)(4)(ii) of this section, a reasonable estimation of the total accrued royalties may be reported and transferred, determined in accordance with GAAP and broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title. Any such estimate shall be made in good faith and on the basis of the best knowledge, information, and belief of the digital music provider at the time the cumulative statement of account is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section. In no case shall the failure to match a musical work by the license availability date be construed as prohibiting or limiting a digital music provider's entitlement to use such an estimate if the digital music provider has satisfied its obligations under 17 U.S.C. 115(d)(10)(B) to engage in required matching efforts.

(ii) A digital music provider reporting and transferring estimated accrued royalties must provide a description of any voluntary license or other agreement containing an appropriate release of royalty claims relied upon by the digital music provider in making its estimation that is sufficient for the mechanical licensing collective to engage in efforts to confirm uses of musical works subject to any such agreement. Such description shall be sufficient if it includes at least the following information:

(A) An identification of each of the digital music provider's services, including by reference to any applicable types of activities or offerings that may be defined in part 385

of this title, relevant to any such agreement. If such an agreement pertains to all of the digital music provider's applicable services, it may state so without identifying each service.

(B) The start and end dates of each covered period of time.

(C) Each applicable musical work copyright owner, identified by name and any known and appropriate unique identifiers, and appropriate contact information for each such musical work copyright owner or for an administrator or other representative who has entered into an applicable agreement on behalf of the relevant copyright owner.

(D) A satisfactory identification of any applicable catalog exclusions.

(E) At the digital music provider's option, and in lieu of providing the information listed in paragraph (c)(5)(ii)(D) of this section, a list of all covered musical works, identified by appropriate unique identifiers.

(F) A unique identifier for each such agreement.

(iii) After receiving the information required by paragraph (c)(5)(ii) of this section, the mechanical licensing collective shall, among any other actions required of it, engage in efforts to confirm uses of musical works embodied in sound recordings reported under paragraph (c)(4)(ii) of this section that are subject to any identified agreement, and may notify relevant copyright owners of the digital music provider's reliance on such identified agreement(s). Where the mechanical licensing collective confirms a reported use of a musical work to be subject to an identified agreement, the mechanical licensing collective shall presume that the digital music provider has appropriately relied upon the agreement, including during the pendency of a dispute between a digital music provider and copyright owner over the digital music provider's reliance on an identified

agreement. During the pendency of such a dispute, the mechanical licensing collective shall not make a corresponding distribution to the relevant copyright owner(s) or treat the amount at issue as an overpayment unless it is directed to do so pursuant to the mutual agreement of the relevant parties or by order of an adjudicative body with appropriate authority.

(iv) Subject to paragraph (c)(5)(iii) of this section, if the amount transferred to the mechanical licensing collective is insufficient to cover any required distributions to copyright owners, the mechanical licensing collective shall deliver an invoice and/or response file to the digital music provider consistent with paragraph (h) of this section that includes the amount outstanding (which shall include the interest that would have accrued on such amount had it been held by the mechanical licensing collective pursuant to 17 U.S.C. 115(d)(3)(H)(ii) from the original date of transfer) and the basis for the mechanical licensing collective's conclusion that such amount is due. No later than 14 business days after receipt of such notice, the digital music provider must either pay the invoiced amount or notify the mechanical licensing collective that it is disputing that additional amounts are owed (whether in whole or in part). If disputed, the mechanical licensing collective shall notify the relevant copyright owner(s) and shall act in accordance with paragraph (c)(5)(iii) of this section. In the event a digital music provider is found by an adjudicative body with appropriate authority to have erroneously, but not unreasonably or in bad faith, withheld accrued royalties, the digital music provider may remain in compliance with this section for purposes of retaining its limitation on liability if the digital music provider has otherwise satisfied the requirements for the limitation on

liability described in 17 U.S.C. 115(d)(10) and if the additional amount due is paid in accordance with a relevant order.

(v) Any overpayment of royalties based upon an estimate permitted by paragraph (c)(5)(i) of this section shall be handled in accordance with paragraph (k)(5) of this section.

(vi) Any underpayment of royalties shall be remedied by a digital music provider without regard for the adjusted statute of limitations described in 17 U.S.C. 115(d)(10)(C). By using an estimate permitted by either paragraph (c)(5)(i) or (d)(2) of this section, a digital music provider agrees to waive any statute-of-limitations-based defenses with respect to any asserted underpayment of royalties connected to the use of such an estimate.

(6) If the total accrued royalty reported under paragraph (c)(5) of this section does not reconcile with the royalties actually transferred to the mechanical licensing collective, or if the royalties reported include use of an estimate as permitted under paragraph (c)(5)(i) of this section, a clear and detailed explanation of the difference and the basis for it.

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

(1) A detailed and step-by-step accounting of the calculation of attributable royalties under applicable provisions of this section and part 385 of this title, sufficient to allow the mechanical licensing collective to assess the manner in which the digital music provider determined the royalty and the accuracy of the royalty calculations, including but not limited to the number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording.

(2) Where computation of the attributable royalties depends on an input that is unable to be finally determined at the time the cumulative statement of account is delivered to the

mechanical licensing collective and where the reason the input cannot be finally determined is outside of the digital music provider's control (*e.g.*, the amount of applicable public performance royalties and the amount of applicable consideration for sound recording copyright rights), a reasonable estimation of such input, determined in accordance with GAAP, may be used or provided by the digital music provider. Royalty payments based on such estimates shall be adjusted pursuant to paragraph (k) of this section after being finally determined. A cumulative statement of account containing an estimate permitted by this paragraph (d)(2) should identify each input that has been estimated, and provide the reason(s) why such input(s) needed to be estimated and an explanation as to the basis for the estimate(s).

(3) All information and calculations provided pursuant to paragraph (d) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief of the digital music provider at the time the cumulative statement of account is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section.

(e)(1) The following information must be provided for each sound recording embodying a musical work required to be reported under paragraph (c)(4)(ii) of this section:

(i) The information referenced in § 210.6(c)(3) that would have been provided to the copyright owner had the digital music provider been serving Monthly Statements of Account as a compulsory licensee in accordance with this subpart on the copyright owner from initial use of the work.

(ii) Any additional information requested in writing by the mechanical licensing collective that either is referenced in 17 U.S.C. 115(d)(10)(B)(i)(I)(aa) or (bb) and that

was acquired by the digital music provider in connection with its efforts to obtain such information under 17 U.S.C. 115(d)(10)(B)(i)(I), or, if available, is a unique identifier assigned by the digital music provider to a reported sound recording. The digital music provider must respond to such a request within a reasonable period of time and may deliver any such requested supplemental information to the mechanical licensing collective outside of its cumulative statement of account in a commercially reasonable manner of the digital music provider's choosing. Providing such supplemental information shall not be construed as an adjustment to a cumulative statement of account under paragraph (k) of this section.

(2) For each track for which a share of a musical work has been matched and for which accrued royalties for such share have been paid, but for which one or more shares of the musical work remains unmatched and unpaid, the digital music provider must provide a clear identification of the total aggregate percentage share that has been matched and paid and the owner(s) of the aggregate matched and paid share (including any unique party identifiers for such owner(s) that are known by the digital music provider), provided that, in the event such information is maintained by a third-party vendor, that information is made available to the digital music provider on commercially reasonable terms.

(f) The information required by paragraphs (c), (d), (e), and (k) of this section requires intelligible, legible, and unambiguous statements in the cumulative statements of account, without incorporation of facts or information contained in other documents or records.

(g) References to part 385 of this title, as used in paragraphs (c), (d), and (k) of this section, refer to the rates and terms of royalty payments as in effect as to each particular reported use based on when the use occurred.

(h) If requested by a digital music provider, the mechanical licensing collective shall deliver an invoice and/or a response file to the digital music provider within a reasonable period of time after the cumulative statement of account and related royalties are received. The response file shall contain such information as is common in the industry to be reported in response files, backup files, and any other similar such files provided to digital music providers by applicable third-party administrators.

(i)(1) To the extent practicable, each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be delivered in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective as reasonably determined by the mechanical licensing collective and set forth on its website, taking into consideration relevant industry standards and the potential for different degrees of sophistication among digital music providers. The mechanical licensing collective must offer at least two options, where one is dedicated to smaller digital music providers that may not be reasonably capable of complying with the requirements of a reporting or data standard or format that the mechanical licensing collective may see fit to adopt for larger digital music providers with more sophisticated operations. Nothing in this section shall be construed as prohibiting the mechanical licensing collective from adopting more than two reporting or data standards or formats. If it is not practicable for a digital music provider to deliver its cumulative statement of account in the manner specified by the mechanical licensing collective, such digital music provider must deliver its cumulative statement of account in a flat-file or other machine-readable format (*e.g.*, Excel, comma-separated

values (CSV)) to the extent such digital music provider's applicable data exists in such a format.

(2) To the extent practicable, royalty payments shall be delivered to the mechanical licensing collective in such manner and form as the mechanical licensing collective may reasonably determine and set forth on its website. A cumulative statement of account and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the cumulative statement of account to the payment.

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

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

(2) A signature, which in the case of a digital music provider that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(3) The date of signature and certification.

(4) If the digital music provider is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the cumulative statement of account.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider, (2) I have examined this cumulative statement of account, and

(3) all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(ii) Statement two:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider, (2) I have prepared or supervised the preparation of the data used by the digital music provider and/or its agent to generate this cumulative statement of account, (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this cumulative statement of account was prepared by the digital music provider and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly statements that accurately reflect, in all material respects, the digital music provider's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(6) A certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner.

(k)(1) A digital music provider may adjust its previously delivered cumulative statement of account, including related royalty payments, by delivering to the mechanical licensing collective a statement of adjustment.

(2) A statement of adjustment shall be clearly and prominently identified as a "Statement of Adjustment of a Cumulative Statement of Account."

(3) A statement of adjustment shall include a clear statement of the following information:

(i) The previously delivered cumulative statement of account, including related royalty payments, to which the adjustment applies.

(ii) The specific change(s) to the previously delivered cumulative statement of account, including a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the digital music provider depends. Such description shall include the adjusted royalties payable and all information used to compute the adjusted royalties payable, in accordance with the requirements of this section and part 385 of this title, such that the mechanical licensing collective can provide a detailed and step-by-step accounting of the calculation of the adjustment under applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the digital music provider determined the adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2) of this section.

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

(iv) A description of the reason(s) for the adjustment.

(4) In the case of an underpayment of royalties, the digital music provider shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the statement of adjustment or promptly after being notified by the mechanical licensing collective of the amount due. A statement of adjustment and its related royalty payment

may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the statement of adjustment to the payment.

(5) In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the digital music provider's account, or upon request, issue a refund within a reasonable period of time.

(6)(i) A statement of adjustment must be delivered to the mechanical licensing collective no later than 6 months after the occurrence of any of the scenarios specified by paragraph (k)(6)(ii) of this section, where such an event necessitates an adjustment. Where more than one scenario applies to the same cumulative statement of account at different points in time, a separate 6-month period runs for each such triggering event.

(ii) A statement of adjustment may only be made:

(A) Except as otherwise provided for by paragraph (c)(5) of this section, where the digital music provider discovers, or is notified of by the mechanical licensing collective or a copyright owner, licensor, or author (or their respective representatives, including by an administrator or a collective management organization) of a relevant sound recording or musical work that is embodied in such a sound recording, an inaccuracy in the cumulative statement of account, or in the amounts of royalties owed, based on information that was not previously known to the digital music provider despite its good-faith efforts;

(B) When making an adjustment to a previously estimated input under paragraph (d)(2) of this section;

(C) Following an audit of a digital music provider that concludes after the cumulative statement of account is delivered and that has the result of affecting the computation of the royalties payable by the digital music provider (*e.g.*, as applicable, an audit by a sound recording copyright owner concerning the amount of applicable consideration paid for sound recording copyright rights); or

(D) In response to a change in applicable rates or terms under part 385 of this title.

(7) A statement of adjustment must be certified in the same manner as a cumulative statement of account under paragraph (j) of this section.

(l)(1) Subject to the provisions of 17 U.S.C. 115, a digital music provider and the mechanical licensing collective may agree in writing to vary or supplement the procedures described in this section, including but not limited to pursuant to an agreement to administer a voluntary license, provided that any such change does not materially prejudice copyright owners owed royalties required to be transferred to the mechanical licensing collective for the digital music provider to be eligible for the limitation on liability described in 17 U.S.C. 115(d)(10). The procedures surrounding the certification requirements of paragraph (j) of this section may not be altered by agreement. This paragraph (l)(1) does not empower the mechanical licensing collective to agree to alter any substantive requirements described in this section, including but not limited to the required royalty payment and accounting information and sound recording and musical work information.

(2) The mechanical licensing collective shall maintain a current, free, and publicly accessible online list of all agreements made pursuant to paragraph (l)(1) of this section that includes the name of the digital music provider (and, if different, the trade or

consumer-facing brand name(s) of the services(s), including any specific offering(s), through which the digital music provider engages, or has engaged at any time during the period identified in paragraph (c)(1) of this section, in covered activities) and the start and end dates of the agreement. Any such agreement shall be considered a record that a copyright owner may access in accordance with 17 U.S.C. 115(d)(3)(M)(ii). Where an agreement made pursuant to paragraph (l)(1) of this section is made pursuant to an agreement to administer a voluntary license or any other agreement, only those portions that vary or supplement the procedures described in this section and that pertain to the administration of a requesting copyright owner's musical works must be made available to that copyright owner.

(m) Each digital music provider shall, for a period of at least seven years from the date of delivery of a cumulative statement of account or statement of adjustment to the mechanical licensing collective, keep and retain in its possession all records and documents necessary and appropriate to support fully the information set forth in such statement (except that such records and documents that relate to an estimated input permitted under paragraph (d)(2) of this section must be kept and retained for a period of at least seven years from the date of delivery of the statement containing the final adjustment of such input).

Dated: October 30, 2020.

Regan A. Smith,

General Counsel and

Associate Register of Copyrights.

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