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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

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

ACTION: Final rule.

SUMMARY: Pursuant to title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, and following extensive solicitation of public comments, the U.S. Copyright Office is issuing a final rule addressing digital music providers' obligations to transfer and report accrued royalties for the use of unmatched musical works (or shares thereof) to the mechanical licensing collective for purposes of eligibility for the Act's limitation on liability for prior unlicensed uses.

DATES: The rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act ("MMA") which, among other things, substantially modifies the compulsory "mechanical" license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.[1] It does so by switching from a song-by-song licensing system to a blanket licensing regime administered by a mechanical licensing collective ("MLC") that becomes available on January 1, 2021 (the "license availability date"). In July 2019, the Copyright Office (the "Office") designated an entity to serve as the MLC, as required by the MMA.[2] Digital music providers ("DMPs") can obtain the new blanket license to make digital phonorecord deliveries ("DPDs") of musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as "covered activity," where such activity qualifies for a compulsory license), subject to compliance with various requirements.[3] As was true before the MMA, DMPs may enter into privately negotiated voluntary licenses with copyright owners in lieu of using the compulsory license.

Prior to the MMA, DMPs obtained a section 115 compulsory license on a per-work, song-by-song basis, by serving a notice of intention to obtain a compulsory license ("NOI") on the copyright owner (or filing it with the Office if the Office's public records did not identify the copyright owner) and then paying applicable royalties accompanied by accounting statements.[4] The MMA includes a "transition period" covering the period following its October 2018 enactment and before the blanket license becomes available in January 2021.[5] During this transition period, anyone seeking to obtain a compulsory license to make DPDs must continue to do so on a song-by-song basis by serving NOIs on copyright owners "if the identity and location of the musical work copyright owner is

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[1] Public Law 115-264, 132 Stat. 3676 (2018).

[2] 84 FR 32274 (July 8, 2019).

[3] As permitted under the MMA, the Office designated a digital licensee coordinator ("DLC") to represent licensees in proceedings before the Copyright Royalty Judges ("CRJs") and the Office, to serve as a non-voting member of the MLC, and to carry out other functions. 17 U.S.C. 115(d)(5)(B); 84 FR 32274 (July 8, 2019); *see also* 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(C).

[4] *See* 17 U.S.C. 115(b)(1), (c)(5) (2017).

[5] H.R. Rep. No. 115-651, at 10 (2018); S. Rep. No. 115-339, at 10 (2018).

known," and paying them applicable royalties accompanied by statements of account.[6] If the musical work copyright owner is unknown, a DMP can no longer file an NOI with the Office, but instead may rely on a limitation on liability that requires the DMP to, among other things, "continue[] to search for the musical work copyright owner" using good-faith, commercially reasonable efforts and bulk electronic matching processes.[7] The DMP must either account for and pay accrued royalties to the relevant musical work copyright owner(s) when found or, if they are not found before the end of the transition period, account for and transfer accrued royalties to the MLC at that time.[8] Congress believed that the liability limitation, which limits recovery in lawsuits commenced on or after January 1, 2018 to the statutory royalty that would be due, would "ensure that more artist royalties will be paid than otherwise would be the case through continual litigation,"[9] and also viewed this provision as a "key component that was necessary" to ensure support for legislative change.[10]

With respect to reporting and payment requirements for eligibility for the limitation on liability, the statute details three scenarios. First, if the DMP is successful in identifying and locating a copyright owner of a musical work (or share) by the end of the calendar month in which the DMP first makes use of the work, it must provide statements of account and pay royalties to that copyright owner in accordance with section 115 and applicable regulations.[11] The second and third scenarios apply if the copyright owner is

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[6] 17 U.S.C. 115(b)(2)(A), (c)(2)(I); *see* H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 3.

[7] 17 U.S.C. 115(b)(2)(A), (d)(9)(D)(i), (d)(10)(A)–(B); *see* H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10, 22.

[8] 17 U.S.C. 115(d)(10)(B); *see* H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10.

[9] H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 14–15; Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 12 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf ("Conf. Rep.").

[10] H.R. Rep. No. 115-651, at 13; S. Rep. No. 115-339, at 14; Conf. Rep. at 12.

[11] 17 U.S.C. 115(d)(10)(B)(iii).

not identified or located by that date.[12] In such cases, the DMP must accrue and hold applicable statutory royalties in accordance with usage of the work, from the initial use of the work until the royalties can be paid to the copyright owner or are required to be transferred to the MLC at the end of the transition period.[13] If a copyright owner of an unmatched musical work (or share) is identified and located before the license availability date, the DMP must pay the copyright owner all accrued royalties accompanied by a cumulative statement of account that includes the information that would have been provided had the DMP been providing monthly statements of account to the copyright owner from its initial use of the work in accordance with section 115 and applicable regulations.[14] If a copyright owner of an unmatched musical work (or share) is not identified and located by the license availability date, the DMP must, among other things, transfer, no later than 45 calendar days after the license availability date, "all accrued royalties" to the MLC "accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the [DMP] been serving monthly statements of account on the copyright owner from initial use of the work in accordance with [section 115] and applicable regulations," including the certification that would have been provided to an identified copyright owner[15] as well as an additional certification attesting to the DMP's matching efforts during the transition period.[16]

In December 2018, the Office published an interim rule and requested comments to address payment and reporting obligations during the transition period.[17] That interim

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[12] *Id*. at 115(d)(10)(B)(iv).

[13] *Id*.

[14] *Id*. at 115(d)(10)(B)(iv)(II).

[15] *See* 37 CFR 210.6(f)(1)(v).

[16] 17 U.S.C. 115(d)(10)(B)(iv)(III).

[17] 83 FR 63061 (Dec. 7, 2018).

rule specified that DMPs must pay royalties and provide cumulative statements of account to copyright owners and the MLC in compliance with the Office's preexisting regulations regarding monthly statements of account.[18] The Office received no comments in response to this public rulemaking and finalized the rule in March 2019.[19] In September 2019, the Office issued a notification of inquiry regarding various topics related to MMA implementation.[20] Observing the "persistent concern about the 'black box' of unclaimed royalties, including its amount and treatment by digital music providers and the MLC," this notice provided additional opportunity for public comment on, among other things, "any issues that should be considered relating to the transfer and reporting of unclaimed royalties by digital music providers to the MLC."[21] Both the MLC and DLC provided comments in response to this later inquiry, as discussed further below. The MLC generally sought to expand the reporting and formatting requirements in a manner that approximated its requests for monthly reporting by blanket licensees on a prospective basis, to better facilitate its matching activities (which the DLC opposed).[22] The DLC specifically sought regulatory certainty to ensure that monies previously paid by DMPs to copyright owners pursuant to privately negotiated, pre-MMA agreements need not also be paid a second time to the MLC to maintain DMP eligibility for the limitation on liability (which the MLC opposed).[23]

In July 2020, the Office issued a notice of proposed rulemaking ("NPRM") to address these comments.[24] It proposed expanding the reporting requirements to

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[18] *See* 37 CFR 210.10.

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

[20] 84 FR 49966 (Sept. 24, 2019).

[21] *Id*. at 49971.

[22] *See* MLC Initial NOI Comment at 22–23; MLC Reply NOI Comment at 27–30, App. D at 19; MLC *Ex Parte* Letter at 2–4 (June 17, 2020).

[23] *See* DLC Initial NOI Comment at 18–19; DLC Reply NOI Comment at 24–25, Add. A-24.

[24] 85 FR 43517 (July 17, 2020) ("NPRM"). All rulemaking activity, including public comments, as well as educational material regarding the MMA, can currently be accessed via navigation from https://www.copyright.gov/music-modernization.Comments received in response to the

accommodate the MLC's request for additional information. The NPRM also offered initial guidance regarding the potential relationship of pre-MMA agreements to the cumulative statement reporting obligations, but did not propose specific regulatory language concerning the issue of potential "double payments" in connection with such agreements; the Office invited further comment on the issue. The MLC's comments to the NPRM were largely supportive of the NPRM's proposed approach.[25] The DLC supported some aspects of the proposed rule, but expressed concern with some of the proposed reporting requirements and urged the Office to promulgate regulations addressing privately negotiated pre-MMA agreements and their interaction with the limitation on liability requirements.[26] Through the Office's permitted *ex parte* meeting option, those parties, as well as individual DMPs, music publishers, and songwriter groups provided additional views regarding these issues, as summarized on the Office's *ex parte* communications webpage.[27]

September 2019 notification of inquiry are available at https://www.regulations.gov/docket?D=COLC-2019-0002, comments received in response to the NPRM and supplemental notice of proposed rulemaking ("SNPRM") are available at https://www.regulations.gov/docket?D=COLC-2020-0011. 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. References to these comments are by party name (abbreviated where appropriate), followed by "Initial NOI Comment," "Reply NOI Comment," "NPRM Comment," "SNPRM Comment," or "*Ex Parte* Letter," as appropriate.

[25] *See* MLC NPRM Comment at 1 ("The Proposed Regulation considers the aims and goals of the MMA in creating the new mechanical licensing system, and works to empower the MLC to improve the matching of DMP usage to musical works and the owners thereof and thereby reduce unmatched and unclaimed royalties. The MLC agrees with the bulk of the language in the Proposed Regulation.").

[26] *See* DLC NPRM Comment at 2–3.

[27] *See, e.g.*, Artist Rights Alliance ("ARA"), Music Artists Coal. ("MAC"), Nashville Songwriters Ass'n Int'l ("NSAI"), Google *Ex Parte* Letter (Oct. 23, 2020); MediaNet *Ex Parte* Letter (Oct. 28, 2020); MLC *Ex Parte* Letter (Oct. 16, 2020); Nat'l Music Publishers' Ass'n ("NMPA") *Ex Parte* Letter (Nov. 3, 2020); Recording Acad. & Songwriters of N. Am. ("SONA") *Ex Parte* Letter (Sept. 22, 2020); DLC *Ex Parte* Letter (Oct. 14, 2020); Songwriters Guild of Am. ("SGA"), Soc'y of Composers & Lyricists ("SCL"), All. for Women Film Composers ("AWFC") & Music Creators N. Am. ("MCNA") *Ex Parte* Letter (Sept. 15, 2020); SATV Music Publ'g ("SATV") *Ex Parte* Letter (Oct. 28, 2020); Spotify *Ex Parte* Letter (Oct. 9, 2020); Universal Music Publ'g Grp. ("UMPG") *Ex Parte* Letter (Oct. 30, 2020); Warner Music Grp. ("WMG") *Ex Parte* Letter (Oct. 21, 2020).

In November 2020, the Office issued an SNPRM after determining that the public process would benefit from soliciting comments on alternative regulatory language to ensure that further views could be duly considered on the issues raised in the proceeding.[28] The Office noted that the SNPRM resulted from then-received public comments, a letter from Senate Judiciary Committee Chairman Lindsey O. Graham specifically raising the issue of pre-MMA agreements between DMPs and music publishers and the payment of unclaimed accrued royalties, and the D.C. Circuit's partial vacatur and remand of the Copyright Royalty Judges' ("CRJs") *Phonorecords III* determination.[29] The Office explained that although it had not reached any final conclusions, it was issuing the SNPRM to provide interested parties with adequate notice and opportunity to comment in advance of the February 2021 deadline for DMPs to be able to submit cumulative statements of account to the MLC.

The SNPRM presented two main potential modifications to the NPRM. First, to address the DLC's comments, the requirements governing reporting of sound recording and musical work information would more closely track existing regulations, with an added requirement that DMPs report certain additional information if requested by the MLC.[30] Second, the circumstances under which a DMP may estimate and adjust the computation of its accrued royalties would be expanded where such computation depends upon an input that is unable to be finally determined at the time the cumulative statement of account is due.[31] In response to the SNPRM, the MLC and DLC largely reached consensus on the data reporting issue, except with respect to partially matched works.[32]

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[28] 85 FR 70544, 70546 (Nov. 5, 2020) ("SNPRM").

[29] *Id*. at 70545–46; Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020); *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020).

[30] SNPRM at 70547.

[31] *Id*. at 70546–47.

[32] *See* DLC SNPRM Comment at 12–13; MLC SNPRM Comment at 15–17; DLC & MLC *Ex Parte* Letter (Dec. 9, 2020).

On the second issue, the MLC and DLC both supported the SNPRM's approach to more closely track the December 2018 interim rule on estimates and adjustments adopted for reports of usage under the blanket license.[33] They disagreed, however, on the SNPRM's proposed approach to address reporting with respect to any applicable pre-MMA agreements. The DLC supported the SNPRM's approach[34] while the MLC did not,[35] and songwriter groups were split.[36]

At Chairman Graham's request, the Office also convened a joint meeting to discuss their views on the treatment of certain pre-MMA agreements in connection with the limitation on liability requirements. Although it became clear that no significant consensus had emerged, the Office found it helpful for the parties to engage with each other directly, and believes that the record has benefited from the input of a variety of perspectives, each of which the Office has carefully considered in moving forward with a rule regarding cumulative statements consistent with the MMA's statutory deadline.[37]

Having reviewed and considered all relevant comments received in response to the notification of inquiry, NPRM, and SNPRM, including through a number of permitted *ex parte* communications as detailed under the Office's procedures, the Office has weighed the legal, business, and practical implications and equities that have been raised. Pursuant to its authority under 17 U.S.C. 115 and 702, it is adopting final regulations with respect to DMP obligations to transfer and report accrued royalties for unmatched musical works (or shares) to the MLC for purposes of eligibility for the

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[33] *See* DLC SNPRM Comment at 2; MLC SNPRM Comment at 13–14, App. A at v, ix–x.

[34] *See* DLC SNPRM Comment at 1–12.

[35] *See* MLC SNPRM Comment at 2–13.

[36] *See* ARA, Future of Music Coal. ("FMC") & MusicAnswers SNPRM Comment at 2–4 (supporting); MAC, Recording Acad. & SONA SNPRM Comment at 2–3 (opposing); SGA, SCL & MCNA SNPRM Comment at 5–6 (declining "to speak directly in these Comments regarding the USCO's proposed Supplemental USCO Rules" due to underlying concerns with DMP and publisher transparency surrounding pre-MMA agreements).

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

MMA's limitation on liability for prior unlicensed uses, which it believes best reflect the statutory language and its animating goals in light of the rulemaking's record.[38] In doing so, the Office has exercised its "broad regulatory authority" and "use[d] its best judgement in determining the appropriate steps" as Congress directed.[39]

II. Final Rule

Several aspects of the proposed rule were not opposed. Where parties objected to other aspects of the proposed rule, the Office has considered those comments and resolved the issues as discussed below. If not otherwise discussed, the Office has concluded that the relevant proposed provision should be adopted as final for the reasons stated in the NPRM (though in some such cases, the adopted language reflects minor technical edits). In promulgating this rule, the Office has endeavored to ensure that the MLC receives the information and royalties it needs to fulfill its statutory duties, that copyright owners and songwriters are accurately paid any royalties they are owed, and that DMPs can realistically and practicably obtain the limitation on liability by complying with the statutory requirements.

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[38] *See* H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15; Conf. Rep. at 12 ("The Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation."); 17 U.S.C. 115(d)(12)(A) ("The Register of Copyrights may conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection."); *Alliance of Artists & Recording Cos. v. DENSO Int'l Am., Inc.*, 947 F.3d 849, 863 (D.C. Cir. 2020) ("[T]he best evidence of a law's purpose is the statutory text, and most certainly when that text is the result of carefully negotiated compromise among the stakeholders who will be directly affected by the legislation.") (internal quotation marks, brackets, and citations omitted); 84 FR at 49967–68.

[39] H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12 (acknowledging that "it is to be expected that situations will arise that were not contemplated by the legislation," and that "[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations"); *see* 17 U.S.C. 115(d)(12)(A); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in the statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.") (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

A. Cumulative Statements of Account Content and Format

This section of the preamble discusses the final rule's content and format requirements for cumulative statements of account delivered to the MLC, except with respect to requirements connected to the reliance upon estimates, adjustments, and reconciliation of statements, which are addressed below.

1. Sound Recording and Musical Work Information

The NPRM proposed requiring DMPs to provide additional information concerning sound recording and musical work metadata beyond what is required by existing regulations governing cumulative statements of account.[40] The proposed requirements largely mirrored the content requirements the Office had proposed in a parallel rulemaking (and has recently adopted) for monthly reports of usage under the blanket license.[41] This general approach was recommended by the MLC but disfavored by the DLC, which called it "impractical" and explained that "digital music providers have maintained usage information . . . with the *existing* statement of account regulations in mind."[42]

The Office sought to address the DLC's concerns by including a practicability standard: DMPs would only be required to report information that would not have been reported to copyright owners in monthly statements of account, "to the extent practicable."[43] In response, the DLC "emphatically opposed" the NPRM, and described the requirement to report additional information as "impossible," explaining that some of the information had not been collected by DMPs in the past and could not be collected in time to include in cumulative statements of account.[44] The DLC further stated that the

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[40] NPRM at 43519; *see* 37 CFR 210.20.

[41] NPRM at 43519; the interim rule regarding monthly reports of usage was published in 85 FR 58114 (Sept. 17, 2020).

[42] NPRM at 43519 (quoting DLC NPRM Reply at 24).

[43] *Id*. at 43525.

[44] DLC NPRM Comment at Add. 21; DLC *Ex Parte* Letter at 2 (Aug. 11, 2020).

addition of a "practicability" standard did not alleviate its concerns, and implied that the reporting requirement as proposed might cause DMPs to forgo taking advantage of the limitation on liability.[45]

The SNPRM sought additional comments on this issue, stating the Office was considering adopting alternative language "to reflect the DLC's comments and incentivize optional participation in th[e] transition period reporting for cumulative statements of account."[46] The Office proposed a baseline reporting requirement for sound recording and musical work information that was closer to the existing requirements for transition period cumulative statements of account, but added a requirement that DMPs additionally "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 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."[47] It sought comment on the feasibility and adequacy of this proposal or whether, as an alternative to DMPs providing such information upon the MLC's request, the regulations should require submission of such supplementary information by a set date.[48] The Office encouraged "continued dialogue between the

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[45] DLC NPRM Comment at 8 ("This uncertainty and ambiguity undermines the central bargain of the statute by eroding DMPs' confidence in their ability to rely on the limitation on liability, thus decreasing their incentive to pay accrued royalties to the MLC if they cannot provide certain data included in the new rules."); *see also* DiMA NPRM Comment at 6–7 (saying the NPRM's reporting amendments would create "massive operational hurdles" and would "jeopardize[] every [DMP's] eligibility for the limitation on liability").

[46] SNPRM at 70547.

[47] *Id.*; *see also* 17 U.S.C. 115(d)(10)(B)(i)(I)(aa) ("Sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works they embody."); *id.* at 115(d)(10)(B)(i)(I)(bb) ("Any available musical work ownership information, including each songwriter and publisher name, percentage ownership share, and international standard musical work code.").

[48] SNPRM at 70547.

MLC and DLC as to this aspect of the reporting regulations, as well as submission of any joint proposals that may result from discussions."[49]

The MLC and DLC did engage in continued discussions on this issue, which proved fruitful. In a December 2020 *ex parte* meeting, the organizations reported that they had reached agreement "on an operational framework that ensures the MLC obtains all reasonably available metadata for unmatched works via a simplified format that DLC members are well-prepared to operationalize," along with proposed regulatory language.[50] Their proposal would require DMPs to provide to the MLC by February 2021 a cumulative statement of account "containing all metadata information that would have been delivered to copyright owners under the pre-MMA monthly statements of account," similar to the present transition period requirement for cumulative statement of account.[51] DMPs would also be required to submit a supplemental metadata report to the MLC by June 15, 2021 containing "(1) available and up-to-date track-level metadata that has been obtained by the services and (2) in the event copyright owners of partial shares of particular works were identified and paid, information regarding those paid parties and the amounts that were paid."[52] The cumulative statement of account would also contain both a DMP-provided track identifier and a unique identifier for each individual "usage" line that the MLC will use to index to the later-delivered supplemental metadata report.[53]

The Office appreciates the cooperative efforts of the MLC and DLC in crafting this joint proposal and generally agrees with their approach and list of information to be

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[49] *Id*.

[50] DLC & MLC *Ex Parte* Letter at 1 (Dec. 9, 2020).

[51] *Id*.

[52] *Id*. at 2. The MLC and DLC's proposed regulations do not require reporting of publisher or copyright owner information in the supplemental metadata report. This absence makes sense given that the data applies to unmatched royalties. Reporting requirements for partially matched tracks are discussed below.

[53] *Id*. The Office presumes that the DLC's support of this joint proposal moots any concerns it voiced regarding the NPRM.

reported. The Office believes the proposal constitutes a reasonable approach that provides legal certainty and effectuates the intent of the MMA in light of the operational realities DMPs face at this time.[54] The supplemental metadata provided by DMPs beyond what they are required to report under existing cumulative statement of account regulations should benefit the MLC in executing its matching duties, and the inclusion of a unique identifier will further enable the MLC to link data received through usage reports and the supplemental metadata report with sound recording and musical work information it receives in cumulative statements of account. At the same time, this pragmatic approach mitigates the risk that DMPs would forgo the statutory limitation on liability, which would ultimately harm songwriters, copyright owners, and DMPs by incentivizing continued litigation.

The joint proposal provides that "failure to deliver the supplemental metadata report would not result in the loss of limitation of liability or the blanket license."[55] The MLC and DLC additionally propose that the MLC could enforce the supplemental metadata report delivery requirement by bringing an action in federal court against a DMP for "injunctive relief requiring delivery of that report, plus costs and attorney's fees and, potentially, a penalty on the amount of accrued royalties paid to the MLC."[56] During

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[54] In an *ex parte* meeting subsequent to the publication of the DLC & MLC joint proposal, Music Reports (a vendor of various DMPs) raised concerns regarding the introduction of new reporting requirements for cumulative statements of account so close to the required delivery date. Music Reports *Ex Parte* Letter at 2 (Dec. 15, 2020). While the Office does not discount the validity of these concerns, it notes that it is the DMPs, not Music Reports, who bear the risk, since they are subject to this requirement to maintain the statutory limitation on liability. Given that the DLC, which represents DMP interests, believes the reporting requirements are appropriate, the Office declines to deviate from the proposal.

[55] DLC & MLC *Ex Parte* Letter at 2 (Dec. 9, 2020).

[56] *Id*. The proposed language states, *inter alia*, that in the event injunctive relief is granted, "the court shall award, notwithstanding anything to the contrary in section 505, reasonable attorney's fees and costs, as well as such other relief as the court determines appropriate," or, in the event the court finds that the DMP acted unreasonably or in bad faith, "damages in the amount of 1.5% per month on the amount of royalties transferred pursuant to subsection (b)(3)(i), or the highest lawful rate, whichever is lower, for the period from June 15, 2021 until the supplemental metadata report is provided to the mechanical licensing collective." *Id.* at 10.

the *ex parte* meeting, the Office asked the MLC and DLC about the Office's authority to adopt language prescribing these enforcement remedies.[57] The MLC and DLC responded that they believed the Office's general regulatory authority under section 115(d) was broad enough to cover this enforcement mechanism.[58] They explained that the proposal "is intended to fill a gap in the statutory scheme," saying that while the statute requires collection of such metadata by DMPs, it does not explicitly require delivery of the metadata to the MLC.[59]

The Office agrees with the MLC and DLC that failure to provide the additional metadata should not result in loss of the limitation on liability or default of the blanket license.[60] This result is consistent with the statute, which premises the limitation on liability on a requirement to report only "all of the information that would have been provided to the copyright owner had the digital music provider been providing monthly statements of account to the copyright owner from initial use of the work in accordance with this section and applicable regulations."[61]

The Office declines, however, to adopt the enforcement mechanism provisions proposed by the MLC and DLC. The Office has accommodated concerns regarding a gap in the statute by requiring, via regulation, that DMPs report the requested supplemental metadata. Multiple reasons compel the Office not to prescribe penalties for noncompliance to a federal court (which would also construct an entirely new monetary damages scheme for the MLC to administer). First, the timing of the proposal came too late in the rulemaking process to provide adequate notice to other potentially interested

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[57] *Id*. at 3.

[58] *Id*.

[59] *Id*.

[60] *Id*. at 2–3 ("As an initial matter, DLC and MLC agree that loss of the limitation of liability or the blanket license would be an inappropriate means of enforcing the format and supplemental metadata report requirements proposed herein.").

[61] 17 U.S.C. 115(d)(10)(B)(iv)(II)(aa).

parties. Second, the establishment of such a penalty provision via regulations would be a significant departure from historical practice: the Office is not aware of analogous provisions elsewhere in its regulations. Finally, the Office notes that multiple provisions in the MMA provide that a "district court shall determine the matter de novo."[62] The statute provides the MLC with the authority to enforce rights and obligations, including regulatory obligations, through the courts, which are well-positioned to determine appropriate remedies. The MLC and DLC also requested that, "if the Office is disinclined to adopt the particular enforcement mechanisms proposed herein, . . . [it] revert to the MLC and DLC for discussion of potential alternatives."[63] In light of the advanced stage of this process and fast-approaching statutory deadline, however, the Office declines further discussion.[64]

2. Partially Matched and Paid Works

Next, the Office addresses conflicting proposals from the MLC and DLC regarding the level of information that must be provided with respect to partially matched musical works. As discussed in the NPRM, the MLC initially requested that cumulative statements of account include information about matched shares of a musical work where unmatched shares for the work are reported, it expressed the concern that if a DMP paid one copyright owner its royalty share and held accrued royalties for any remaining unmatched share(s), then upon transfer of such unmatched royalties, if the paid share is not properly identified, the a paid co-owner might be able to collect a portion of an unpaid co-owner's share.[65]

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[62] *E.g.*, *id*. at 115(d)(2)(A)(v) (improper rejection of notice of license); *id*. at 115(d)(4)(E)(iv) (improper termination of blanket license).

[63] *Id*. at 115(d)(3)(C)(i)(VIII); DLC & MLC *Ex Parte* Letter at 3 (Dec. 9, 2020).

[64] The SNPRM itself was the latest formal call for public comment on an issue that has been open to public comment through various mechanisms since December 2018. *See* 83 FR 63061 (interim rule); *see also* 84 FR 49966 (notification of inquiry); NPRM; SNPRM.

[65] NPRM at 43521; *see* MLC Reply NOI Comment App. D at 19; MLC *Ex Parte* Letter at 3 (June 17, 2020) (giving the example of an identified 50% co-owner being paid their 50% share by a DMP, and then subsequently being paid half of the remaining share by the MLC due to lack of

The NPRM noted that the DLC did not appear to disagree with the MLC's description of the issue, but had suggested that DMPs' third-party vendors, who it said are subject to "strict contractual confidentiality restrictions," may have this information and not the DMPs themselves.[66] The DLC asked that the Office "account for these [confidentiality] restrictions and protect digital music providers from any liability related to their breach."[67] In response, the MLC offered to amend its proposal to limit share reporting "to the share percentage and the owner of the share that was paid, [and] omit[] the precise amount of royalties paid under the voluntary license terms," presuming that the DLC's confidentiality concern "relates to the amounts of royalties paid under voluntary licenses."[68]

The NPRM largely adopted the MLC's amended proposal, stating that for each track for which a share of a musical work has been matched and for which accrued royalties for that share have been paid, but for which one or more shares remains unmatched and unpaid, the DMP must provide a clear identification of the share(s) that have been matched, the owner(s) of such matched shares, and, for shares other than those paid pursuant to a voluntary license, the amount of the accrued royalties paid.[69] The Office tentatively concluded that the MLC's proposal was reasonable in light of the statutory function of cumulative statements of account, noting that the situation the MLC anticipated seems likely to occur and that having the matched share information will be important.[70]

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record of the first payment; stating that "reporting on partially-matched works and the respective shares that the DMP already paid is essential to allow the MLC to properly credit share owners who have been paid and avoid double payments").

[66] NPRM at 43521; *see* DLC Reply NOI Comment at 25.

[67] DLC Reply NOI Comment at 25.

[68] MLC *Ex Parte* Letter at 4 (June 17, 2020).

[69] NPRM at 43525.

[70] *Id*. at 43521.

In response, the MLC generally agreed with the NPRM's proposal but asked for two clarifications:[71] first, that the identification of the matched share(s) explicitly be of the "percentage" share(s);[72] and second, that unique party identifiers known by the DMP be provided for the owner(s) of the matched shares being reported, as they "are very valuable for efficiency and accuracy."[73] The Office agreed that having these identifiers will be helpful to the MLC in processing cumulative statements and proposed these clarifications as part of the SNPRM.[74] Having received no comments in opposition, the Office incorporates these changes into the final rule.

The DLC's response to the NPRM confirmed its agreement that the treatment of partially matched works is "a legitimate issue that needs to be resolved."[75] It noted that it "support[s] providing information regarding partially matched works to ensure that the appropriate copyright owners are paid," but only "as long as [DMPs] that do not have that information because of confidentiality restrictions in contracts with third-party vendors are not required to provide it in order to claim the benefits of the MMA's limitation on liability."[76] The DLC expanded on its vendor-related concerns, claiming that one such vendor, Music Reports, "has notified its client DMPs that it is unwilling to share any musical work ownership share information with the MLC or the DMPs, as it regards that information to be proprietary."[77] The DLC expressed concern that other vendors could take a similar position.[78] The DLC additionally stated that "there is also an issue related to voluntary licenses, in that the information that publishers provide about their share

[71] MLC NPRM Comment at 6.

[72] *Id*. at 6, App. A at v.

[73] *Id*. at 6–7, App. A at v–vi.

[74] *See* SNPRM at 70550.

[75] DLC NPRM Comment at 6.

[76] *Id*. at 2.

[77] *Id*. at 6.

[78] *Id*.

splits are subject to their own confidentiality restrictions."[79] The DLC ultimately proposed that DMPs provide, on a per-track basis, a clear identification of the total aggregate percentage share that has been matched and the owner(s) of that share, without identifying the specific shares owned by each owner or the actual amount paid (which, the DLC argued, would be unnecessary and potentially problematic). It proposed that this requirement would be further subject to the limitation that if the information is maintained by a third-party vendor that the information is made available to the DMP on commercially reasonable and non-discriminatory terms.[80]

In response to the DLC's assertions, Music Reports informed the Office that it "has never said it will not release information about partially matched works—only that such data has independent commercial value given the twenty-five years of effort the company has invested in curating that data."[81] Despite initial speculation, the DLC has not informed the Office of any other vendors who have expressed an unwillingness to provide share information.

The MLC objected to the DLC's proposal, stating that it "would not provide the MLC with adequate information to ensure proper payment allocation."[82] The MLC disputed that copyright owner splits are subject to publisher confidentiality restrictions, noting that "[c]opyright owners will be providing their claimed splits to the MLC to receive royalty distributions and the MMA directs that such splits be included in the MLC's public database."[83] The MLC further stated that "the logical conclusion of the

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[79] *Id*. at 7 n.15.

[80] DLC *Ex Parte* Letter at 5, 14–15 (Oct. 14, 2020); *see* DLC NPRM Comment at 7.

[81] Music Reports *Ex Parte* Letter at 2 (Sept. 29, 2020) ("We are currently working with our clients to understand and support their needs, on commercially reasonable terms, with respect to these needs . . . ."); *see* DLC *Ex Parte* Letter at 5 (Oct. 14, 2020) ("Music Reports, Inc., has recently expressed willingness to provide this information to the MLC on behalf of its clients, although the commercial terms are still being discussed, and any regulatory provision here should ensure that vendors are not given undue bargaining power.").

[82] MLC *Ex Parte* Letter at 6 (Oct. 5, 2020).

[83] *Id*.

DLC's argument is that it could not report any partially-paid royalty information where there was only one partially-paid copyright owner, since the aggregate percentage paid would of course reveal the percentage of the single copyright owner that was paid."[84]

The DLC countered that, with respect to the issue of "some copyright owners regard[ing] the splits of musical works they control as confidential," "the MLC is not a party to these agreements, and does not purport to represent any parties to these agreements," and that "there is no reason that the MLC would need detailed *matched* share information in order to find the owners of *unmatched* shares."[85] As with requirements to report certain sound recording and musical work information discussed above, the DLC also asserted that split information should be included in a supplemental report provided to the MLC at some point in time after the cumulative statement of account and that such reporting should not be tied to eligibility for the limitation on liability.[86]

To obtain additional public input, the SNPRM noticed an alternative approach that more closely resembled the DLC's proposal than the MLC's proposal, which had been largely embodied in the NPRM. The SNPRM proposed that DMPs 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 known owner(s)), so long as, 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."[87] The SNPRM was informed by the DLC's explanation that the MLC did not necessarily need payment amounts and non-

[84] *Id*.

[85] DLC *Ex Parte* Letter at 5 n.9 (Oct. 14, 2020).

[86] DLC *Ex Parte* Letter at 2 (Nov. 10, 2020) ("[T]here are significant operational and commercial obstacles to producing and submitting the reports by February 15.").

[87] SNPRM at 70550.

aggregated splits to perform its duties, and concern about DMPs potentially losing eligibility for the limitation on liability in the event of a legitimate inability to provide this information. The SNPRM did not include the DLC's proposal about third-party vendor terms needing to be "non-discriminatory," as a vendor may well have commercially reasonable reasons for not treating differently situated DMPs the same.

The DLC fully supported the SNPRM's proposed provision,[88] as did Music Reports, which said it "nicely draws a difficult line."[89] The MLC, however, expressed concern, stating that "the reporting of only aggregate share information would make it impossible for the MLC to determine with confidence what partial payments have been made, where multiple shares have been paid."[90] The MLC provided an example to illustrate:

> [I]f a DMP reports on a partial match only that Publishers A and B were paid an aggregate 75%, and the MLC's records show Publisher A owning 50% and Publisher B owning 50%, how can the MLC possibly determine how to fairly allocate the remaining 25% between Publisher A and B? The MLC needs the breakdown that Publisher A received 50% and Publisher B received 25%, instead of merely the aggregated 75% payment, in order to properly allocate the remaining royalties.[91]

The MLC also reiterated its previous argument that the DLC's position on confidentiality restrictions is "illogical" because "[t]he DLC has no objection to reporting 'aggregate' shares paid *when there has been only one share paid*, which is of course equivalent to reporting the individual share paid."[92]

With respect to the SNPRM's proposal to excuse reporting where the information is maintained by a third-party vendor and not made available to the DMP on commercially reasonable terms, the MLC agreed that "[i]f there truly was a situation

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[88] DLC SNPRM Comment at 13 n.35.

[89] Music Reports SNPRM Comment at 1.

[90] MLC SNPRM Comment at 16.

[91] *Id*.

[92] *Id*. at 15–16 ("[I]t is not conceivable that there exists a reasonable restriction on disclosing individual shares that only applies when multiple shares are being disclosed together.").

where a digital music provider was somehow legally and commercially unable to obtain its own historical royalty payment information, then the rule could accommodate this," but contended that because the information is "so critical to ensuring that royalties are paid to the correct parties," the exception should be stricter.[93] The MLC proposed the following conditions: (1) the information is maintained only by a third-party vendor; (2) the DMP does not have any contractual or other rights to access the information; (3) the DMP is unable to compile the information from records in its possession; and (4) the vendor refuses to make the information available to the DMP on commercially reasonable terms.[94] The MLC further proposed that a DMP relying on the exception must provide the MLC with a certification, under penalty of perjury, that the conditions apply, and include a description of any terms on which the vendor offered to provide access to the information.[95]

Although the MLC and DLC continued to disagree about what should be reported, they agreed that the reporting itself should be contained in a supplemental report separate from the cumulative statement of account and delivered to the MLC by June 15, 2021, rather than by February 2021; they also agreed, as discussed above, that the supplemental report should not be a condition of the limitation on liability or the blanket license.[96]

Having considered this issue, the Office agrees with aspects of both the MLC's and DLC's respective positions and has adopted a final rule that is essentially a hybrid approach. The Office is persuaded by the MLC's new example that there are at least some plausible situations where non-aggregated share information will need to be

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[93] *Id*. at 16.

[94] *Id*. App. A at xiii.

[95] *Id*.

[96] DLC SNPRM Comment at 12–13, 13 n.35; MLC SNPRM Comment at 15; DLC & MLC *Ex Parte* Letter at 2, Add. A (Dec. 9, 2020).

known.[97] At the same time, while the Office is not in a position to opine on the legitimacy of asserted confidentiality concerns, it declines to issue a rule that may interfere with alleged confidentiality restrictions that may exist. And as the MLC agrees, to the extent there is a legitimate inability to report the information, the rule should accommodate it.[98]

Consequently, the adopted rule requires a DMP to provide a clear identification of the percentage share(s) that have been matched and paid and the owner(s) of such matched and paid share(s). If this information cannot be reported for a particular track because it is subject to a contractual confidentiality restriction, the DMP, for each such track, must certify to the confidentiality restriction and instead 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. Both scenarios are subject to the SNPRM's proposed exception for vendor-held information, which the Office agrees should be made stricter, along the lines of the MLC's proposal. Subject to a slight modification, the MLC's four proposed conditions are reasonably focused to ensure that the exception only applies where there is a legitimate issue without foreclosing practical reliance on the exception. The final rule adjusts the proposed third condition to limit it to where the DMP cannot compile the information using commercially reasonable efforts within the required reporting timeframe. A DMP relying on the exception must certify that the conditions apply, but the Office disagrees that it is necessary to provide the MLC with a description of any terms on which the vendor offered to provide access to the information. The certification is adequate.

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[97] While the DLC asserted that this scenario "is not one that tends to occur in reality," it did not dispute the possibility that it could arise or that the MLC would need non-aggregated information in such cases, even if they are relatively rare. DLC *Ex Parte* Letter at 3 (Dec. 11, 2020).

[98] *See* MLC SNPRM Comment at 16.

The Office also agrees with the MLC and DLC that it is sufficient for partially matched work information to be delivered to the MLC in a subsequent supplemental report by June 15, 2021, and that delivery of this supplemental report should not be a condition of the limitation on liability. This is reflected in the final rule.

3. Format

The final rule includes adjusted language regarding the formatting of cumulative statements that may be submitted to the MLC. To facilitate efficient and accurate reporting and processing of cumulative statements of account, as supported by the MLC, the NPRM proposed carrying over the existing provision reports of usage format, which requires delivery to the MLC in a machine-readable format that is compatible with its information technology systems, as reasonably determined by the MLC and taking into consideration relevant industry standards.[99]

The DLC expressed concern with this provision, asserting that "the records at issue are very old in many instances, and therefore reflect the formats of their time," and that, for at least some DMPs, "it would be impossible to produce historical records in the DDEX standard that the MLC has indicated it will use for these purposes."[100] (Elsewhere in the record, this DDEX standard is disclosed as DSRF.)[101] The DLC further stated that "the alternative to a DDEX report—a so-called 'flat file' spreadsheet—is smaller and more manageable," is something "DMPs generally use," and "can be converted by the MLC into a uniform format with some simple computer programming."[102] The DLC also

[99] NPRM at 43520; *see* MLC NPRM Comment at 2 (supporting the proposed format provision).

[100] DLC *Ex Parte* Letter at 3 (Aug. 27, 2020); *see also* DiMA NPRM Comment at 6; DLC NPRM Comment at 10. Music Reports takes issue with the DLC's further assertion that "[t]he vendors who maintain [historical records of use] are also unlikely to be familiar with DDEX," stating that, at least with respect to Music Reports, this is "inaccurate." Music Reports *Ex Parte* Letter at 2 (Sept. 29, 2020) (alterations in original) (quoting DLC *Ex Parte* Letter at 3 n.6 (Aug. 27, 2020)).

[101] *See, e.g.*, MLC *Ex Parte* Letter at 3 (June 17, 2020) (noting the MLC will employ the DDEX DSRF format for reports of usage); *see generally* DDEX, *DSRF Royalty Reporting Profile*, https://kb.ddex.net/display/3mil/DSRF+Royalty+Reporting+Profile (last visited Dec. 20, 2020).

[102] DLC *Ex Parte* Letter at 3 (Aug. 27, 2020).

said that "while there are many DMPs, there are not many different formats (even within flat files)," so the MLC "will not be significantly burdened by the DMPs' use of formats that are not 100% consistent."[103] The DLC also proposed including a qualification that compliance with format requirements be conditioned "[t]o the extent practicable" to "allow some flexibility to [DMPs], which is particularly necessary given the relatively short amount of time left to produce the required report."[104]

While noting the DLC's concerns, Music Reports, a major DMP vendor, said that using the MLC's initially intended DDEX format will not be a problem and "all of Music Reports' current clients are certainly capable of reporting to the MLC in DDEX format, because Music Reports has stored their historical records of use and is capable of transcoding these into the MLC's required DSRF format when necessary."[105]

In December 2020, the MLC and DLC reported that they had reached agreement on format requirements.[106] The negotiated proposal would require the MLC to accept both the cumulative statement of account and supplemental metadata report in a simplified format, which the MLC and DLC refer to as the "simplified usage reporting format" ("SURF"), a format developed by the MLC in consultation with the DLC and its members.[107] They proposed regulations that would permit the MLC to accept reports from DMPs in alternative formats, but require a DMP to pay to the MLC costs incurred for accepting the alternative format.[108] Music Reports subsequently expressed concern

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[103] *Id.*

[104] DLC NPRM Comment at 10, Add. 23.

[105] Music Reports *Ex Parte* Letter at 2 (Sept. 29, 2020) ("[W]e are in communication with the MLC at senior levels and are already working with them on the DDEX integration and testing process to ensure both sides are ready to exchange the necessary files. It appears to Music Reports that the time available for this task is adequate, and that commencement of operations on (or, where applicable, before) the License Availability Date is reasonably on track to occur.").

[106] DLC & MLC *Ex Parte* Letter at 2 (Dec. 9, 2020).

[107] *Id.*; s*ee also* Music Reports *Ex Parte* Letter at 2 (Sept. 29, 2020)

[108] DLC & MLC *Ex Parte* Letter at 2, Add. A-8 (Dec. 9, 2020); s*ee also* Music Reports *Ex Parte* Letter at 2 (Sept. 29, 2020)

that the announcement of this “simplified framework” “fails to take into account the development lead times necessary to process and present billions of rows of data (per service) in a new format.”[109]

The Office adopts the format requirements proposed by the MLC and DLC with two modifications. First, although the Office understands the preference for most parties to accept a simplified usage reporting format, it wishes to avoid discouraging submission of reports in alternate, but still acceptable formats, where this may be necessary for a DMP to comply with the statutory timeframe for reporting and transfer of royalties to the MLC, to the ultimate benefit of copyright owners.[110] Thus, the Office has modified the proposed language to require submission of cumulative statements of account in SURF to the extent practicable, but otherwise allow submission of an alternative format by agreement. As a part of this proceeding, the Office is adopting provisions that permit voluntary agreements to alter particular reporting procedures, similar to the one adopted for reports of usage.[111] The Office does not anticipate that the MLC will generally rebuff requests to report in alternative formats—indeed, there appears to be little authority for it to reject a cumulative statement of account and accompanying transfer of royalties in different formats. Nevertheless, the rule provides that the MLC’s consent to such requests should not be unreasonably withheld. For example, given the MLC’s previous signaling of the intention to require reporting in the more complex DSRF format, which apparently generated some reliance interests, the Office assumes that it would be reasonable for the MLC to accept a report submitted in that format.

Although the Office appreciates the joint proposal’s intention behind requiring DMPs to incur incremental costs of submitting reports in alternative formats, thereby

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[109] Music Reports *Ex Parte* Letter at 2 (Dec. 15, 2020)

[110] *See also, e.g.*, 37 CFR 210.27(h)(1) (requiring the MLC to offer at least two formatting methods for submitting reports of usage).

[111] *See id*. at 210.27(n).

encouraging standard reporting formats and reducing the potential MLC burden, the Office declines to require this by regulation. Funding of the total costs of the MLC is already provided for in the statute, including covering any unanticipated shortfalls.[112] The Office is reluctant to establish a precedent whereby the MLC can directly charge individual DMPs; such a proposal may be more appropriately considered under the aegis of the Copyright Royalty Judges in connection with their establishment of the administrative assessment.[113] The Office notes, however, that the statute permits voluntary contributions from DMPs to fund the collective total costs of the MLC.[114] The parties could consider whether this provision, along with the ability to enter into voluntary agreements to alter process, might accomplish the same goal as their proposal to require payment of incremental costs.

B. *Estimates, Adjustments, and Reconciliation of Cumulative Statements*

This section of the preamble discusses requirements connected to the reliance upon estimates, adjustments, and reconciliation of statements, with respect to royalty calculation inputs as well as the relationship between voluntary agreements and the obligation to transfer accrued royalties to the MLC.

1. Estimates and Adjustments Relating to Royalty Pool Calculation Inputs

The Office is adopting a rule that establishes a mechanism for DMPs to employ necessary estimates and adjustments, including to account for unknown royalty pool calculation inputs, in a manner similar to the recently adopted rule governing submission of reports of usage under the blanket license. Under the cumulative statement of account

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[112] 17 U.S.C. 115(d)(7).

[113] In December 2020, the DLC and MLC jointly petitioned the CRJs to modify the terms of implementation of the initial administrative assessment. *See* Joint Motion to Modify the Terms of Implementation of the Initial Administrative Assessment, Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective (No. 19-CRB-0009-AA) (filed Dec. 18, 2020), https://app.crb.gov/document/download/23405.

[114] 17 U.S.C. 115(d)(7)(A)(ii).

regulations initially adopted in December 2018, DMPs could make estimates to the extent permitted by 37 CFR 210.6(d)(3)(i) (where the final public performance royalty has not yet been determined), and there would be no adjustment mechanism.[115] The NPRM proposed to retain this status quo, except to allow any overpayment (whether resulting from an estimate or otherwise) to be credited to a DMP's account, or refunded upon request.[116] The Office tentatively declined to conform the proposed provision to the estimates and adjustments provisions for reports of usage given the one-time nature of the cumulative statements as compared to the regulatory structure designed for the ongoing reporting of reports of usage.[117]

Both the MLC and DLC sought modification to this aspect of the rule. While they gave different reasons and offered different proposed modifications in their comments to the NPRM,[118] more recent submissions revealed concurrence that the most prudent approach is for the Office to adopt a final rule that more closely tracks the estimates and adjustments provisions adopted for reports of usage under the blanket license.[119] The Office agrees and, following notice in the SNPRM and due consideration of the public comments, has revised the rule accordingly. On reflection, the Office acknowledges that while cumulative statements of account are a one-time filing, the need to estimate inputs that cannot be finally determined at the time reporting is due, and to make adjustments in the future, is no less critical here than in the context of reports of usage. Although the NPRM would have narrowly allowed estimates where the final public performance royalty is unknown, the Office has concluded that broadening this provision and allowing DMPs to make estimates and adjustments more generally as necessary, such as based on

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115 NPRM at 43520.

116 *Id*.

117 *Id*.

118 DLC NPRM Comment at 5–6, Add. 24; MLC NPRM Comment at 4–5, App. A at vi.

119 DLC SNPRM Comment at 2; MLC SNPRM Comment at 13–14, App. A at v, ix–x; DLC *Ex Parte* Letter at 3–4, 12–14 (Oct. 14, 2020); MLC *Ex Parte* Letter at 2 (Oct. 5, 2020).

the discovery of fraudulent streams after algorithms are applied, and also accounting for the possibility of both underpayments and overpayments, best fulfills the statutory objectives of facilitating accurate royalty payment.[120]

The recent remand of the CRJs' *Phonorecords III* determination by the D.C. Circuit further illustrates why this provision should be expanded.[121] The CRJs' *Phonorecords III* determination was intended to set rates and terms for the section 115 mechanical license for the period from January 1, 2018 through December 31, 2022, but the D.C. Circuit's decision means that ultimate rates for this time period have not yet been finalized. As a result, when DMPs are required to deliver their cumulative statements of account to the MLC in February they will not know what the final operative royalty rate is for the compulsory license for the period going back to 2018. Without changes to the NPRM's proposal, there would be no mechanism for DMPs to make adjustments after the CRJs eventually establish final rates and terms, meaning that a DMP acting in good faith could, through no fault of its own, end up with an incurable underpayment and be rendered ineligible for the limitation on liability.[122] The Office does not believe Congress could have intended for a DMP's limitation on liability to depend on how well it predicts what the CRJs may do on remand.

The statutory language requiring that "*all* accrued royalties" be transferred 45 days after the license availability date does not restrict the Office's authority or discretion to adopt the rule's system of estimates and adjustments.[123] Estimates and adjustments

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[120] *See* DLC NPRM Comment at 5–6 (supporting approach); DLC *Ex Parte* Letter at 2–3 (Nov. 10, 2020) (providing examples of various estimates and adjustments).

[121] *See Johnson v. Copyright Royalty Bd.*, 969 F.3d 363.

[122] *See* DLC NPRM Comment at 6 ("[A]s a result, the cumulative statements will undoubtedly need to be adjusted to account for the new rates when they come into force."); DLC *Ex Parte* Letter at 3 (Oct. 14, 2020) ("[D]igital music providers may require significant retroactive adjustments to the amount of accrued royalties during the relevant time period depending on the resolution of that proceeding.").

[123] *See* 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa) (emphasis added).

have long been a part of the section 115 reporting and payment structure,[124] and Congress was surely aware of that when it adopted the further statutory language requiring related reporting to include "information . . . provided . . . in accordance with . . . applicable regulations."[125] The tension between these two phrases in the same statutory provision creates an ambiguity that the Office concludes to be properly within its authority to resolve in its reasonable discretion.[126] Moreover, given the degree of importance Congress placed upon the limitation on liability,[127] it would be unreasonable to believe Congress intended that, where the precise royalty owed cannot be ascertained at the time it is due to the MLC, the DMP must guess and hope that subsequent events outside of its control do not render that amount too low.[128]

Accordingly, the Office is adopting language that allows DMPs to use certain estimates where the computation of attributable royalties depends on an input that cannot be finally determined at the time the cumulative statement of account is due, and the reason is outside of the DMP's control.[129] The rule also permits DMPs to subsequently

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[124] *See* 37 CFR 210.6, 210.7.

[125] 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

[126] *See, e.g.*, *id*. at 115(d)(12)(A); *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *Brand X Internet Servs.*, 545 U.S. at 980, 982.

[127] *See* H.R. Rep. No. 115-651, at 13–14; S. Rep. No. 115-339, at 14–15; Conf. Rep. at 12–13 ("[C]ontinued litigation generates unnecessary administrative costs, diverting royalties from artists. . . . The imposition of detailed statutory requirements for obtaining [the] limitation of liability ensure that more artist royalties will be paid than otherwise would be the case through continual litigation."; provision is a "key component that was necessary to bring the various parties together in an effort to reach common ground"); Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020) (stating that "the intent of the MMA was to provide legal certainty for past, present, and future usage").

[128] *See, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("If the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, the intention of the drafters, rather than the strict language, controls. The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the unambiguously expressed intent of Congress, and thus to overcome the first step of the *Chevron* analysis." (internal citations omitted)).

[129] *See* SNPRM at 70549.

adjust cumulative statements in five situations:[130] first, where a previously estimated input becomes finally determined, such as a determination of the final public performance royalty; second, where an audit of a DMP reveals a need to adjust a payment; third, in response to a change in applicable rates or terms by the CRJs; fourth, where the DMP discovers or is notified of 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 DMP despite its good-faith efforts; and finally, as the DLC requested in response to the SNPRM,[131] to ensure consistency with any adjustments made in an annual statement of account generated under 37 CFR 210.7 for the most recent fiscal year. The Office finds this additional scenario to reasonably further the aims of accuracy and consistency. To ensure promptness, the final rule provides that where more than one scenario necessitates the same adjustment, the six-month period to make the adjustment begins to run from the occurrence of the earliest triggering event.

The MLC and DLC both signaled support for the SNPRM's approach, and the Office received no comments opposing it.[132] The MLC maintained that this provision should be limited to information outside a given DMP's control and expressed concern that the use of the word "attributable" before "royalties" may be read to allow a DMP to report "something less" than total royalties.[133] The Office does not intend the use of the word "attributable" to allow a casual approach to royalty calculations; the royalty calculation requirements of paragraph (d), including the estimate provision in paragraph (d)(2), are tied to the requirement in paragraph (c)(4) to report on all unmatched usage,

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[130] *Id*. at 70550–51.

[131] *See* DLC SNPRM Comment at 14–15.

[132] *Id*. at 2; MLC SNPRM Comment at 14, App. A at v, ix–x; *see also* MLC *Ex Parte* Letter at 2 (Oct. 5, 2020); DLC *Ex Parte* Letter at 3–4, 12–14 (Oct. 14, 2020).

[133] MLC SNPRM Comment at 14 n.7. As noted above, it is separately possible that computation errors could be corrected under the adjustment provisions, for example, following an audit. *See* DLC NPRM Comment at 5; DLC SNPRM Comment at 2 (supporting the Office's approach).

meaning these provisions require reporting of the total potential royalties, calculated at the applicable rate under 37 CFR part 385, that could be owed for all such usage.

2. Estimates and Adjustments Relating to Private Agreements

Relatedly, the Office is resolving requests by DMPs that the rule address the treatment of payments made pursuant to agreements that required the distribution of unmatched royalties that predate the MMA's enactment, to avoid a scenario that DMPs contend could result in "double payment" of royalties to musical work copyright owners for uses covered under these agreements. As explained below, the rule resolves this request by establishing conditions under which a DMP may in good faith employ estimates in calculating total accrued royalties, subject to subsequent adjustments, to reflect the effect of these agreements upon the DMP's cumulative reporting obligations. A relevant copyright owner may notify the MLC of a dispute in good faith over a DMP's reliance on such an agreement. If so, once the MLC would otherwise be ready to distribute the disputed royalties, the MLC will invoice the DMP for the disputed royalty amounts and hold those amounts until the dispute is resolved.

i. Factual Background

Although the Office received no comments in 2018 when it solicited public input on the transition rule that is currently in place, the DLC and individual DMPs subsequently requested that the Office update its rule to address the interrelationship between statutory obligations and certain private agreements.[134] The DLC initially proposed that the Office adopt a provision stating:

> Notwithstanding anything in this section to the contrary, digital music providers are not required to accrue any royalties that are required to be paid to copyright owners of musical works pursuant to any agreements entered into prior to the effective date of the Music Modernization Act,

[134] *See* 84 FR 10685, 10686 (noting the Office received no comments in Dkt. 2018-10); *see also, e.g.*, DLC Initial NOI Comment at 3 ("Rulemaking will be necessary to clarify the relationship between these preexisting deals and the MMA's provisions regarding accrual of unmatched royalties during the transition period leading to the license availability date.").

and such royalties shall not be treated as "accrued royalties" for purposes of this section or 17 U.S.C. 115(d)(10).[135]

The Office declined to adopt this initial proposal, in part over concerns that it was overbroad, noting that the Office "must be careful to avoid speaking over either the statute or private transactions."[136] The Office noted that if these agreements were, as the DLC suggested, in "conflict" with "the MMA's directions in section 115(d)(10) regarding the accrual of unmatched royalties,'"[137] the statute "could not yield to such agreements."[138] To address the DLC's concerns, however, the Office provided preliminary guidance regarding the statutory obligations to report all accrued royalties while preserving the effectiveness of existing voluntary agreements, noting that the proposed rule included a provision that would require the MLC to credit or refund any overpayment back to the DMP, and offered to have a further dialogue.[139]

A number of parties took the Office up on this offer, and the record now benefits from this enriched dialogue. While the Office reiterates its view that matters regarding the specific interpretation of various private contracts should be resolved by the relevant parties rather than a blanket rule, additional information has been provided that narrows the focus of the DLC's request.[140] The DLC, NMPA, and individual DMPs and publishers disclosed details regarding agreements that certain DMPs apparently entered into with the NMPA and the "vast majority" of the U.S. music publishing industry.[141]

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[135] DLC Initial NOI Comment at 18–19.

[136] NPRM at 43522–23.

[137] DLC Initial NOI Comment at 18.

[138] NPRM at 43523 (citing DLC Initial NOI Comment at 19).

[139] *Id*.

[140] *See id*.

[141] The DLC quotes an NMPA statement claiming that one agreement covered "virtually the entire commercially relevant publishing community." DLC NPRM Comment at 15 (quoting Tim Ingham, *Hunt for US Streaming Publishing Settlements Won't Stop at Spotify*, Music Business Worldwide (Mar. 20, 2016), https://www.musicbusinessworldwide.com/hunt-for-us-streaming-publishing-settlements-wont-stop-at-spotify); *see also* Ed Christman, *Vast Majority Join Royalties Settlement Between Spotify and Publishing Group*, Billboard (July 11, 2016),

These agreements have been referred to using various terms by the parties, including as liquidation agreements, pending and unmatched agreements, or NMPA settlement agreements, but it has become clear that the issue centers on sets of agreements with four signatory services.[142] The DLC represented that these services are Spotify,[143] YouTube,[144] MediaNet, and Rhapsody; the first three met with the Office individually, generally corroborating the DLC's position and providing specifics as to their individual circumstances.[145] The Office also met with the NMPA and certain individual publishers.[146] From the information provided, the Office has gleaned a general sense of the shared understandings between the interested parties, as well as areas of disagreement.

It appears undisputed that these agreements were generally structured through an umbrella agreement between the NMPA and the relevant service, where publishers were subsequently able to, and did, enter into individual agreements with such DSPs.[147] The

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https://www.billboard.com/articles/business/7431272/nmpa-spotify-settlement-most-members-join.

[142] To inform its background analysis, and by the consent of the contracting parties, the Office has received three of the agreements between the NMPA and individual services on a confidential basis, which has been duly noted in this rulemaking docket. *See* DLC NPRM Comment at 13 ("We urge the Office to request copies of these NMPA agreements, subject to appropriate confidentiality protections."); Google *Ex Parte* Letter at 1 (Oct. 23, 2020); MediaNet *Ex Parte* Letter at 1–2 (Oct. 28, 2020); NMPA *Ex Parte* Letter at 1 (Aug. 25, 2020); Spotify *Ex Parte* Letter at 1–3 (Oct. 9, 2020); *see also* 5 U.S.C. 552(b)(4).

[143] *NMPA and Spotify Announce Landmark Industry Agreement for Unmatched U.S. Publishing and Songwriting Royalties* (Mar. 17, 2016), http://nmpa.org/press_release/nmpa-and-spotify-announce-landmark-industry-agreement-for-unmatched-u-s-publishing-and-songwriting-royalties.

[144] *NMPA and YouTube Reach Agreement to Distribute Unclaimed Royalties* (Dec. 8, 2016), http://nmpa.org/press_release/nmpa-and-youtube-reach-agreement-to-distribute-unclaimed-royalties.

[145] DLC *Ex Parte* Letter at 1–2 (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 2 (Oct. 9, 2020).

[146] NMPA *Ex Parte* Letter at 1–2 (Aug. 24, 2020); SATV *Ex Parte* Letter at 1–2 (Oct. 28, 2020); UMPG *Ex Parte* Letter at 1–2 (Oct. 30, 2020); WMG *Ex Parte* Letter at 1 (Oct. 21, 2020). The Office also offered to meet with additional publishers.

[147] *See, e.g.*, DLC Initial NOI Comment at 17; MediaNet *Ex Parte* Letter at 2 (Oct. 28, 2020); Spotify *Ex Parte* Letter at 1 (Sept. 1, 2020); *see also* Ed Christman, *Vast Majority Join Royalties Settlement Between Spotify and Publishing Group*, Billboard (July 11, 2016), https://www.billboard.com/articles/business/7431272/nmpa-spotify-settlement-most-members-

DLC characterizes these agreements as forming the framework for the idea of the MMA, and factual reports of the time support this characterization.[148] As reported with respect to two of these agreements, publishers released claims against the relevant service for a relevant period of time of usage in exchange for payments, including (i) for works that were claimed and (ii) for a market-share based distribution of unclaimed royalties after a subsequent period of time.[149] For example, under its agreement, Spotify agreed to hold back amounts required to pay non-participating publishers, which was represented to the Office as calculated conservatively to account for the risk that the participating parties had undercounted the royalties accrued for non-participating copyright owners.[150]

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join ("The vast majority of our members have opted into our settlement," NMPA president and CEO David Israelite tells *Billboard*, saying the agreement has "one of our highest opt-in rates ever.").

[148] DLC NPRM Comment at 13 ("[A]t issue are specific industry-wide accrued royalty liquidation agreements that the NMPA . . . structured with DMPs with the specific purpose of distributing accrued royalties to copyright owners, based on a claiming and market-share distribution model that was later essentially codified in the MMA. These landmark agreements were aimed at solving the exact same problem that the MMA address: ensuring that accrued royalties for unmatched works are paid out promptly to copyright owners."); DLC *Ex Parte* Letter at 1 (Aug. 11, 2020) ("We discussed industry-wide agreements between certain digital services (Spotify, Google, MediaNet, and Napster/Rhapsody) and the [NMPA] that predated the enactment of the [MMA] and facilitated distribution of historic accrued royalties to copyright owners. As we explained, those agreements were the model for the MMA.").

[149] Ed Christman, *Spotify and Publishing Group Reach $30 Million Settlement Agreement Over Unpaid Royalties*, Billboard (Mar. 17, 2016), https://www.billboard.com/articles/business/7263747/spotify-nmpa-publishing-30-million-settlement-unpaid-royalties ("In exchange for participating in the settlement, publishers release Spotify from any claims related to the identified pool of pending and unmatched works."); Ed Christman, *YouTube Strikes Settlement Deal Over Unpaid Royalties with National Music Publishers Assoc.*, Billboard (Dec. 8, 2016) https://www.billboard.com/articles/business/7616409/youtube-settlement-unpaid-royalties-national-music-publishers-association.

[150] *NMPA and Spotify Announce Landmark Industry Agreement for Unmatched U.S. Publishing and Songwriting Royalties* (Mar. 17, 2016), http://nmpa.org/press_release/nmpa-and-spotify-announce-landmark-industry-agreement-for-unmatched-u-s-publishing-and-songwriting-royalties ("the agreement will not affect the royalties owed to any publisher or writer who does not choose to participate"); Spotify *Ex Parte* Letter at 2 (Oct. 9, 2020) ("Spotify confirmed that this 'holdback' reflects the portion of the market that NMPA and Spotify estimated as a conservative amount designed to cover the market share of non-participating publishers—and that Spotify's data reflected that the non-covered streaming during the relevant usage periods is likely even smaller than that.").

As described by NMPA at the time of agreement in 2016, the NMPA-Spotify agreement established "a large bonus compensation fund that is a substantial percentage of *what is currently being held by Spotify for unmatched royalties*, and creates a better path forward for finding the owners of publishing rights who should receive streaming royalties."[151] As a result, the NMPA and Spotify announced that:

> The deal will allow copyright owners to identify their works and receive the money Spotify has set aside for the past usage of unmatched works. It will allow the entire industry to benefit by filling in the gaps in ownership information, which help to ensure that royalties are promptly paid to their rightful owners in the future. Any royalties associated with works that remain unmatched after each claiming period will be distributed to publishers and songwriters who participate in the settlement, but the agreement will not affect the royalties owed to any publisher or writer who does not choose to participate. The agreement is a key step in improving transparency in the music community and ensuring that music's creators receive royalties when their music is used.[152]

NMPA's President and CEO further explained, "we have found a way for Spotify to quickly get royalties to the right people."[153] Spotify represented that as it turned out, the transaction costs associated with claiming musical works, coupled with the assurance of a market-share based distribution for unclaimed works, resulted in a low level of publisher participation in claiming ownership of musical works.[154] As a result, most payments were made pursuant to the unmatched liquidation provision of the agreement.[155]

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[151] *NMPA and Spotify Announce Landmark Industry Agreement for Unmatched U.S. Publishing and Songwriting Royalties* (Mar. 17, 2016), http://nmpa.org/press_release/nmpa-and-spotify-announce-landmark-industry-agreement-for-unmatched-u-s-publishing-and-songwriting-royalties (emphasis added).

[152] *Id.*

[153] *Id.*

[154] Spotify *Ex Parte* Letter at 2–3 (Oct. 9, 2020) ("The effect of this was that publishers did not need to claim unmatched works—and, for the most part, did not do so—in order to participate in the market share distribution of unclaimed royalties at the conclusion of each claiming period."); *id*. at 2 n.2 (noting "[the] tremendous difficulty in identifying works embodied in particular tracks").

[155] Google *Ex Parte* Letter at 2 (Oct. 23, 2020); Spotify *Ex Parte* Letter at 2–3 (Oct. 9, 2020).

Contemporary statements surrounding the NMPA-Google/YouTube agreement made similar claims that the agreement structure would represent a breakthrough path "to help pay out millions of dollars in previously unclaimed royalties to publishers and songwriters."[156] The Google/YouTube agreement was reported to be structured slightly differently, with an initial four-month claiming period, followed by three-month claiming periods that were open for respective twelve-month usage periods.[157] The Office was also informed that it covered more than just uses eligible for the section 115 license, *e.g.*, broader access to YouTube's Content ID claiming platform.[158] Similar to the MMA structure, payment for unmatched uses based on market share occurred only after an additional holdback period, two years for the Google/YouTube program.[159] Like Spotify, Google disclosed that participation in claiming activities was relatively low, with "about 18% to 20%" of unmatched works "eventually claimed, with the remainder distributed on a market share basis."[160]

Participation by publishers in these agreements for the relevant time periods was apparently extremely high.[161] For example, NMPA reported that 96% of its members

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[156] *NMPA and YouTube Reach Agreement to Distribute Unclaimed Royalties* (Dec. 8, 2016), http://nmpa.org/press_release/nmpa-and-youtube-reach-agreement-to-distribute-unclaimed-royalties.

[157] *Id.*; Google *Ex Parte* Letter at 1–2 (Oct. 23, 2020).

[158] *See* Google *Ex Parte* Letter at 2–3, 2 n.2 (Oct. 23, 2020) (noting that the agreement "encompasses more than section-115-eligible uses; rather, it covers usage on YouTube more generally").

[159] *See id*. at 2.

[160] *Id.*

[161] DLC NPRM Comment at 13 (quoting *Lowery et al. v. Rhapsody Int'l Inc*., No. 4:16-cv-01135-JSW (N.D. Cal. filed Mar. 7, 2016), Dkt. No. 175 at 3) ("Rhapsody has been advised by the NMPA that the aggregate market share of the NMPA members who opted-in to the NMPA[-Rhapsody] agreement is approximately 97.13%."); Spotify *Ex Parte* Letter at 5 (Oct. 9, 2020) (projecting that "an estimated 5–10% of the market of non-participating publishers" were not part of Spotify's agreement); *see* DLC NPRM Comment at 14 ("These agreements have all operated in essentially the same way. . . . [F]or each period covered by the agreement, the vast majority of the pool of accrued unmatched royalties (*e.g*., 90%) was distributed to participating copyright owners based on their respective market shares" and "[t]he remaining, smaller share of royalties (*e.g*., 10%) was left in the accrued pool as reserve funds.").

participated in the Spotify agreement.[162] As a result, for the time periods these agreements were respectively in effect, the services in question paid "tens of millions of dollars" to copyright owners that the DLC describes as payments to release claims for accrued royalties based on usage that was unmatched to a particular musical work.[163] In describing the landscape, the Office also credits NMPA's assertion that the "pending and unmatched agreements" varied with respect to material provisions and market coverage, as well as with respect to performance by the relevant services.[164] The Office does not, however, understand any party to dispute the general contours of these agreement structures as described herein.

The relevant parties agree that these agreements, to the extent they are valid, performed, and relevant, do not address the entire obligations for the participating services. First, as noted, they do not account for royalties accrued by DSPs for uses owed to non-participating music publishers or other copyright owners (*e.g.*, self-administered songwriters). The Office does not understand any party, including the DLC, to contend that these agreements may be used to alleviate a DMP's obligation under the limitation on liability to transfer royalties for usages of musical works that are not subject to a valid agreement. Second, these agreements only cover a portion of the period DMPs need to report on to obtain the statutory limitation on liability, meaning that the DMP would need to transfer unclaimed accrued royalties for any uncovered periods.[165] After conducting "a

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

[163] DLC *Ex Parte* Letter at 2 (Nov. 17, 2020). The Office understands that this amount does not encompass the smaller subset of royalties paid pursuant to "claimed" uses of works. Google *Ex Parte* Letter at 2 (Oct. 23, 2020); Spotify *Ex Parte* Letter at 2–3 (Oct. 9, 2020)

[164] NMPA *Ex Parte* Letter at 1–2 (Aug. 24, 2020).

[165] *See, e.g.*, *NMPA and YouTube Reach Agreement to Distribute Unclaimed Royalties* (Dec. 8, 2016), http://nmpa.org/press_release/nmpa-and-youtube-reach-agreement-to-distribute-unclaimed-royalties (noting initial claiming period covering uses from "August 1, 2012 through December 31, 2015" and that the claiming process "will be repeated for future twelve-month usage periods beginning on January 1, 2016 and ending on December 31, 2019"); MediaNet *Ex*

limited survey of a subset of DLC members," the DLC estimates "that several hundred million dollars were available to be transferred to the MLC as accrued royalties" by the relevant services, not including amounts that those DMPs maintain do not constitute accrued royalties as a result of the operation of pending and unmatched agreements.[166]

DMPs repeatedly reminded the Office that submission of cumulative statements and payment of accrued royalties is a condition for DMPs to make use of the optional limitation on liability, and not a condition of the ongoing blanket license.[167] From their perspective, an obtainable limitation on liability was a critical piece of the MMA's core compromise, intended to short-circuit an inefficient and costly pattern of litigation so long as a DMP complied with the relevant provisions.[168] The DLC thus sought clarity surrounding this reporting obligation, suggesting that absent regulatory certainty, "DMPs may be forced to *retain* accrued royalties to fund" ensuing infringement litigation, "precisely what the MMA was supposed to prevent."[169] It further suggested that if regulations "increase[] the risk that a court would deem a DMP to not have complied with the requirements in section 115(d)(10), a DMP could make the rational choice to forego the payment of accrued royalties entirely, and save that money to use in defending itself against any infringement suits."[170]

Given the DLC's statement that "several hundred million" dollars are otherwise "available to be transferred to the MLC as accrued royalties," a DMP's election to retain

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Parte Letter at 2 (Oct. 28, 2020) (noting performance periods for MediaNet agreements); Spotify *Ex Parte* Letter at 5 (Oct. 9, 2020) (noting that Spotify terminated its agreement).

[166] DLC *Ex Parte* Letter at 2 (Nov. 17, 2020) ("DLC also explained that the accruals that were derecognized because copyright owners were paid and provided releases were a fraction of that amount [of several hundred million dollars]—on the order of tens of millions of dollars.").

[167] *See, e.g.*, DiMA NPRM Comment at 3; DLC *Ex Parte* Letter at 4 (Oct. 14, 2020); DLC & MLC *Ex Parte* Letter at 2 (Dec. 9, 2020).

[168] DiMA NPRM Comment at 3; *see also* H.R. Rep. No. 115–651, at 13; S. Rep. No. 115– 339, at 14; Conf. Rep. at 12.

[169] DLC NPRM Comment at 3–4.

[170] *Id.* at 4; *see also* MediaNet *Ex Parte* Comment at 3 (Oct. 28, 2020).

accrued royalties for litigation expenses would have the troubling result of withholding from copyright owners—those who did *not* participate in the agreements at issue (or for time periods outside such valid agreements)—compensation that all agree they are otherwise entitled to receive.[171] Accordingly, the Office concludes that regulations, to the extent appropriate and permissible under the statute, should maintain the calibration intended by Congress to incentivize DMPs to participate in transferring over accrued royalties, without prejudicing the entitlements of music publishers or songwriters to receive compensation for past usages of their works. As Chairman Graham explained in a letter to the Register:

> The legislative history makes clear that . . . "continued litigation generates unnecessary administrative costs, diverting royalties from artists." . . . 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.[172]

In response, the Office convened a multi-stakeholder call to address the substance of this rulemaking, and this rule reflects the comments from that discussion.[173]

The crux of the dispute concerns the statutory requirement to accrue and hold royalties, and to maintain them in accordance with GAAP principles. While there is agreement that the statute requires "all accrued royalties"[174] to be reported and paid over to the MLC, there is disagreement regarding the meaning of this requirement in light of

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[171] DLC *Ex Parte* Letter at 2 (Nov. 17, 2020).

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

[173] Summaries of that October 30, 2020 discussion are available here: https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html. The Office invited every party who had submitted comments on this issue in this rulemaking docket to participate in the discussion.

[174] 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

these industry-wide agreements and surrounding statutory language. The DLC and individual DMPs contend that the requirement to maintain accrued royalties in accordance with GAAP has resulted in the derecognition of obligations extinguished by these agreements, such that these previous liabilities are not part of what must be transferred to the MLC to be eligible for the limitation on liability.[175] Participating DMPs also suggest that an alternate reading would penalize those companies that entered into voluntary agreements to ensure royalties were paid to publishers and songwriters, in comparison to DMPs who did not enter into such agreements to settle pre-MMA disputes.[176] As the DLC put it, "these agreements were designed to, and did, put tens of millions of dollars in statutory royalties in the hands of copyright owners—money that they had been unable to access due to the broken pre-MMA statutory royalty system."[177] The DLC also noted that "some DMPs simply do not have the financial resources to make duplicate payments" under both their agreements and the limitation on liability, which would force them to forgo the benefit of the limitation on liability.[178]

In contrast, the MLC stated that "[w]hile prior to the enactment of the MMA, certain DMPs entered into settlement agreements with certain music publishers in

[175] DLC SNPRM Comment at 9–10 (stating "the statute specifically incorporates [GAAP], which specifically contemplate de-recognition of liabilities when they have been extinguished" and "it is the incorporation of [GAAP] that, when given meaning (as they must be), provide that once a liability has been extinguished, it is not accrued"); *see also* ARA, FMC & MusicAnswers SNPRM Comment at 3 ("GAAP clearly allows for 'derecognition' of liabilities if certain conditions are met—conditions that these agreements and the releases they include apparently satisfy."); DLC NPRM Comment at 17 n.45; DLC *Ex Parte* Letter at 2 (Nov. 10, 2020); Spotify *Ex Parte* Letter at 2 (Oct. 9, 2020) (noting that "the [Spotify] Agreement extinguished such [copyright owner] rights for the periods of time covered by the Agreement—not only because the copyright owner had already received unmatched royalties for those periods, but because the copyright owner had released any and all claims to such royalties").

[176] DLC Initial NOI Comment at 19; Spotify *Ex Parte* Letter at 1 (Sept. 1, 2020) ("Congress certainly did not intend for double payment of royalties paid to publishers who released claims under those [pre-MMA] agreements"); Google *Ex Parte* Letter at 3 (Oct. 23, 2020) (Google asserts that its YouTube agreement "was not established to resolve any pending or even threatened litigation. Rather, it was born out of a joint effort by Google and NMPA to ensure that royalties flowed to copyright owners.").

[177] DLC NPRM Comment at 3.

[178] *Id*. at 11.

connection with disputes arising from their failure to license, match and/or pay royalties due, such settlement payments were definitively not the proper payment of royalties to copyright owners of unmatched uses," and were "more likely consideration for releases from liability for copyright infringement or covenants not to sue."[179] As discussed below, the MLC contends that the clear directive of the statute precludes the DLC's interpretation and that services must transfer over all royalties (calculated at the statutory rate) for all unmatched uses without regard for these agreements.

The MLC and various music publishers acknowledge, however, that there may be a need for some resolution with respect to the effect of past payments related to usage of unmatched works. Strikingly, despite much discussion on this matter, the administrative record contains no statement by any music publisher or other copyright owner professing entitlement to royalty payments related to usages for which they have entered into a valid liquidation agreement. Warner Music Group, for example, explained, "[f]or those DSPs with which we have already settled claims for the distribution of royalties owed before the enactment of the MMA, we consider these claims closed."[180] Universal Music Publishing Group ("UMPG") "believes that any issues relating to payments under private settlements can and should be dealt with between the contracting parties" and "intends to assist and facilitate voluntary procedures for doing so with the digital services, to the extent applicable."[181] And Sony/ATV Publishing ("SATV") "is open to discussing letters of direction and other potential solutions that would ensure that the requirements of the MMA are satisfied and also address the concerns raised by the digital services regarding payments made pursuant to private settlements."[182] SATV prefers "that any potential

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[179] MLC Reply NOI Comment at 29.

[180] WMG *Ex Parte* Letter at 1 (Oct. 21, 2020).

[181] UMPG *Ex Parte* Letter at 1 (Oct. 30, 2020).

[182] SATV *Ex Parte* Letter at 1–2 (Oct. 28, 2020).

reimbursements to digital services be made by the MLC rather than music publishers."[183] Representing the marketplace at large, NMPA indicated a preference that the issue "be addressed through state contract law and discussions between the contracting parties."[184]

The MLC and others suggested that one potential solution could be to rely upon letters of direction. Although this approach was not entirely fleshed out, as the Office understands it, the idea is that disputes could be resolved by letters of direction sent by a copyright owner directing the MLC to return royalties that would otherwise go to the copyright owner to the DMP with whom the copyright owner had contracted.[185] The MLC opined that DMPs participating in these agreements would be able to "sit in the position of an entity that has acquired rights through a license or sale" and that "payments can be redirected to the new owner pursuant to the explicit or implicit terms of the private contract."[186] Apart from its proffered statutory interpretation addressed below, the MLC did not address how a scheme requiring a DMP to transfer funds to the MLC with an expectation by both the DMP and copyright owner that those funds will ultimately just be returned to that DMP would effectuate Congress's intention that the MLC operate efficiently and fairly.[187]

DMPs disagreed that reliance upon letters of direction to the MLC would be workable, with Google explaining that a DMP would be unlikely to get complete coverage via letters of direction and, to address any gaps, would "need to file a significant number of separate declaratory judgment actions in courts around the

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[183] *Id*.

[184] NMPA *Ex Parte* Letter at 2 (August 24, 2020).

[185] MLC *Ex Parte* Letter at 5 (Oct. 16, 2020) (reflecting NSAI's comments); MLC *Ex Parte* Letter at 5 (Oct. 5, 2020); NMPA *Ex Parte* Letter at 2 (Nov. 3, 2020).

[186] MLC SNPRM Comment at 10.

[187] *See* Conf. Rep. at 4 (noting that the MLC should engage in an "efficient and fair administration of the collective in a manner that respects varying interests and concerns").

country."[188] The DLC strongly objected to the MLC's suggestion that DMPs should first pay the contested amounts, then seek redress for "double payments" by "proving the existence of a release" or "clawing back" overpayments, contending that "the DMP does not get any benefit from the transfer of royalties that might be matched (or paid via market share distribution) by the MLC to those same owners pursuant to the limitation on liability provision in the MMA; *it already has a limitation on liability pursuant to the release*."[189]

Separately, the MLC clarified that in the event of a relevant dispute between a DMP and a copyright owner, it intended to "hold such unmatched royalties pending the resolution of the dispute," accruing interest until the dispute was resolved.[190] The MLC reasoned that "Congress intended for the MLC to be that trusted party to receive unmatched royalties and ensure that they are paid to the right parties."[191] Spotify objected to this position, stating that the MLC's proposal to require all funds at issue under these agreements to be immediately paid to the MLC would create a dispute "in the first instance," as they are not aware of any participating copyright owner who claims they are entitled to additional funds.[192]

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[188] Google *Ex Parte* Letter at 3 (Oct. 23, 2020); *see also* DLC SNPRM Comment at 11 ("the MLC's invitation for DMPs to rely on self-help and battle it out in court later is contrary to the spirit of the statute . . . and may lead some DMPs to simply withhold all the royalties in order to fund such litigation"); SGA SNPRM Comment at 8.

[189] DLC SNPRM Comment at 5; *see also* Spotify *Ex Parte* Letter at 4–5 (Oct. 9, 2020) ("[W]e are aware of *no* copyright owner who has released their claims to the royalties covered by the Agreement that is now demanding, or at any time since the Agreement has demanded, a double payment of those royalties.").

[190] MLC *Ex Parte* Letter at 5 (Oct. 5, 2020). The MLC's proposal would not fall under the MLC's Dispute Resolution Committee and related provisions, as the dispute is not between copyright owners. *See* 17 U.S.C. 115(d)(3)(G)(i)(III)(bb), (K); *see also* DLC *Ex Parte* Letter at 2, n.2 (Oct. 14, 2020) ("The dispute resolution process required by the MMA is aimed at resolving disagreements among copyright owners. . . . Thus, even the solution that the MLC has proposed would require regulatory action by the Office.").

[191] MLC *Ex Parte* Letter at 5 (Oct. 5, 2020).

[192] Spotify *Ex Parte* Letter at 4–5 (Oct. 9, 2020).

In light of this additional information, the SNPRM proposed a solution that would allow for participating DMPs to pay their accrued royalties in accordance with GAAP, permitting reliance on certain temporary estimations and subject to detailed adjustment provisions. And the SNPRM explained that, "[u]nder no circumstances could this [noticed] provision be used to shortchange payment of accrued royalties for musical work copyright owners who did not participate in such agreements."[193]

The Office received many comments opining on Congress's intent and the statutory payment and reporting requirements for the limitation on liability contained in 17 U.S.C. 115(d)(10)(B)(iv). Some commenters, including the Artists Rights Alliance, the Future of Music Coalition, and MusicAnswers, opined that the statute was ambiguous on this point.[194] Others, including the DLC, DiMA, individual DMPs, the MLC, and representatives of copyright owners and songwriters, suggested that the applicable statutory language is unambiguous,[195] although they offered conflicting interpretations of the relevant requirements. Because of these disparate views, the DLC suggested that parties would benefit from a "regulatory clarification."[196] As discussed below, there was considerable disagreement regarding the meaning of section 115(d)(10)(B)(iv)'s requirement that "[a]ccrued royalties shall be maintained by the digital music provider in accordance with [GAAP]," whether this provision would benefit from a regulatory

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[193] SNPRM at 70546–47.

[194] ARA, FMC & MusicAnswers SNPRM Comment at 2; ARA *Ex Parte* Letter at 1 (Nov. 17, 2020); *see also* DLC NPRM Comment at 16 (noting that Office "regulation is plainly necessary to provide unambiguous guidance to DMPs and the MLC").

[195] *See, e.g.*, DiMA NPRM Comment at 5–6; MLC SNPRM Comment at 3; SGA & SCL SNPRM Comment at 2; NSAI *Ex Parte* Letter at 1 (Nov. 17, 2020); Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020).

[196] DLC Initial NOI Comment at 18; DLC Reply NOI Comment at 24 (requesting that the Office "clarify that agreements under which accrued royalties for unmatched musical works were paid to rightsowners, are not 'accrued royalties' subject to transfer to the MLC"); DLC SNPRM Comment at 3 ("the proposed rule provides the clarity needed to preserve the core bargain struck in the MMA").

clarification, and whether the Office had authority to promulgate the rule proposed in the SNPRM (or alternate proposals suggested by the DLC).[197]

In brief, the MLC believes that section 115(d)(10)(B)(iv) "sets out a statutory accrual and payment obligation that identifies precisely what must be accrued, the time frame for holding and the two accepted ways the accrued royalties can be paid," that is, to a matched copyright owner or the MLC.[198]

DMPs contend that the aforementioned agreements extinguished their statutory duties to transfer royalties to the MLC, "not only because the copyright owner had already received unmatched royalties for those periods, but because the copyright owner had *released* any and all claims to such royalties."[199] The DLC stated that a "regulatory clarification . . . may help music industry participants understand the proper treatment of unclaimed royalties under the MMA."[200] Beyond the liquidation agreements at issue, the services contended that the MLC's reading would prohibit reliance upon voluntary agreements generally, despite other statutory provisions guaranteeing that such agreements would remain in effect.[201]

The Artist Rights Alliance commented that the proposed rule "creates a workable, practical system that serves the foundational statutory goal of ensuring songwriters and publishers are accurately, completely, and fairly paid for all uses of their work . . . while providing business certainty needed to ensure the broadest number of digital music

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[197] MLC SNPRM Comment at 5–8, App. A at i; *see also* NMPA *Ex Parte* Letter at 1 (Nov. 17, 2020); Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020); SGA, SCL & MCNA *Ex Parte* Letter at 3 (Nov. 18, 2020).

[198] MLC *Ex Parte* Letter at 3 (Oct. 16, 2020); *see also* NSAI *Ex Parte* Letter at 1 (Nov. 17, 2020); MAC, Recording Acad. & SONA SNPRM Comment at 4; SGA, SCL & MCNA *Ex Parte* Letter at 3 (Nov. 18, 2020).

[199] Spotify *Ex Parte* Letter at 2–4 (Oct. 9, 2020).

[200] DLC Initial NOI Comment at 18; *see also* DLC Reply NOI Comment at 24; DLC SNPRM Comment at 4.

[201] *See, e.g.*, Spotify *Ex Parte* Letter at 3–4 (Oct. 9, 2020); DLC *Ex Parte* Letter at 3 (Oct. 14, 2020).

providers possible participate in the transfer of unmatched royalty funds contemplated by the MMA."[202] The DLC concurred with this assessment and "strongly supports the proposed rule noticed in the SNPRM."[203]

ii. Statutory Analysis

Having considered these comments and examined the relevant statutory text, the Office concludes that the MMA "'is silent or ambiguous with respect to the specific issue'" at hand, *i.e.*, the DMP payment and reporting requirements for the limitation on liability contained in 17 U.S.C. 115(d)(10)(B)(iv) and its subclauses (I) through (III)—particularly the treatment during the transition period of voluntary licenses and other agreements whereby copyright owners may have released certain royalty claims such that a DMP's obligation to pay royalties for related uses has been extinguished, and the related possibility that some portion of unmatched musical work uses may not have accrued royalties associated with them.[204]

First, the statute is not clear about what happens if a DMP legitimately cannot determine what accrued royalties are owed by the required date of transfer to the MLC under section 115(d)(10)(B)(iv)(III). At first glance, the statute presumes this amount will be a final and ascertainable figure by the deadline, directing that DMPs "not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective."[205] But, as discussed above, both the MLC and DLC acknowledge that this may not be possible, particularly in light of the *Phonorecords III* remand, and agree that a regulatory scheme of estimates and adjustments is necessary in at least some instances, such as where the computation of accrued royalties depends upon

[202] ARA *Ex Parte* Letter at 1 (Nov. 17, 2020).

[203] DLC SNPRM Comment at 1–3 (quoting ARA *Ex Parte* Letter at 1 (Nov. 17, 2020)).

[204] *See City of Arlington*, 569 U.S. at 296 (quoting *Chevron*, 467 U.S. at 843); *see also* ARA, FMC & MusicAnswers SNPRM Comment at 2–3 (opining that the statute is ambiguous); ARA *Ex Parte* Letter at 1 (Nov. 17, 2020).

[205] *See* 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

one or more then-unknown royalty pool inputs outside the DMP's control (such as applicable performance royalties), or where the applicable statutory royalty rates or terms change retroactively after the cumulative statement of account has been delivered to the MLC.[206] Commenters disagree, however, as to whether an estimate and adjustment mechanism should also be applied where certain usage of certain unmatched works may be subject to a voluntary license or other agreement containing an appropriate release of royalty claims. Under such a scenario, because the specific works are unmatched and cannot be identified as being subject to the agreement at the time of delivery of the cumulative statement, the amount of accrued royalties is predicated upon estimating certain usages for which royalties have already been paid or otherwise are not considered accrued.[207]

The statute is no less unclear in the contested scenario (where a voluntary agreement may affect accrued royalties) than the agreed-upon scenario (where an unknown royalty pool input may affect accrued royalties); both involve the statutory reference to "all accrued royalties," which, as discussed above, is ambiguous.[208] Under both scenarios, the purported need to estimate and adjust stems from a DMP's need to

[206] *See* DLC NPRM Comment at 5–6; DLC SNPRM Comment at 2; MLC SNPRM Comment at 13–14, App. A at v, ix–x; DLC *Ex Parte* Letter at 3–4, 12–14 (Oct. 14, 2020); MLC *Ex Parte* Letter at 2 (Oct. 5, 2020). In addition, the DLC has suggested that an adjustment scheme is appropriate to address subsequent discoveries of fraudulent stream counts.

[207] *See, e.g.*, ARA, FMC & MusicAnswers SNPRM Comment at 2–4; DLC NPRM Comment at 3–4, 11–18; DLC SNPRM Comment at 1–12; MAC, Recording Acad. & SONA SNPRM Comment at 2–3; MLC NPRM Comment at 8; MLC SNPRM Comment at 2–13; SGA, SCL & MCNA SNPRM Comment at 9; ARA *Ex Parte* Letter at 1 (Nov. 17, 2020); DLC *Ex Parte* Letter at 2 (Oct. 14, 2020); Google *Ex Parte* Letter at 2 (Oct. 23, 2020); MLC *Ex Parte* Letter at 2–3 (Oct. 16, 2020); MLC *Ex Parte* Letter at 2–5 (Oct. 5, 2020); MLC *Ex Parte* Letter at 2–7 (Nov. 17, 2020); NMPA *Ex Parte* Letter at 1 (Nov. 17, 2020); NSAI *Ex Parte* Letter at 1 (Nov. 17, 2020); Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020); SATV *Ex Parte* Letter at 1 (Oct. 28, 2020); Spotify *Ex Parte* Letter at 2–5 (Oct. 9, 2020); UMPG *Ex Parte* Letter at 1 (Oct. 30, 2020); WMG *Ex Parte* Letter at 1 (Oct. 21, 2020).

[208] 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa); *see supra* section II(B)(1).

pay all accrued royalties by the statutory payment due date when the precise accrued royalties is not yet calculable.[209]

Second, the limitation on liability provision does not address the application of voluntary licenses, making no explicit acknowledgement of their existence. The MLC argues that for "works initially unmatched that are later matched to voluntary licenses, . . . for periods prior to the license availability date, the MMA provides for payments of matched royalties to be made to copyright owners, and does not provide for the MLC to carve out voluntary agreements," further contending that "the distinction between blanket license coverage and voluntary license coverage only exists after the license availability date."[210] The MLC also argues that for a DMP to be eligible for the limitation on liability, after royalties have been accrued in accordance with section 115(d)(10)(B)(iv), they must "be held through the date when the royalties are either (a) matched and distributed to the proper copyright owner pursuant to subsection II or (b) transferred to the MLC pursuant to subsection III."[211] Given that neither section 115(d)(10)(B)(iv)(II) nor (III) references voluntary licenses, this interpretation would seem to result in such licenses not being given effect, whether entered into before the MMA or after. Taken literally, this would seem to mean, for example, that if a DMP uses

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[209] The Office finds the MLC's assertion that "[a] DMP does not *estimate* its total accrued royalties" unpersuasive, as it begs the question of how a DMP can know its accrued royalties with certainty and finality if, as the MLC agrees, a DMP can estimate its royalty pool inputs where unknown, or where, as is the case presently, no ultimate royalty rates have even been set. MLC SNPRM Comment at 8–10. *Compare id. with* DLC SNPRM Comment at 12 n.33 (referring to "the necessary estimates that GAAP requires—not just to account for the release of claims prior to the MMA, but for other estimates, including royalty rates and inputs," and noting that "[a]s a result of the D.C. Circuit's vacatur and remand of the Copyright Royalty Board's determination of the relevant statutory royalty rates, it is a given that all DSPs will need to use estimates when calculating accrued royalties pursuant to this provision"). The rule discussed herein simply clarifies that certain good-faith estimates, subject to adjustments, are permitted for purposes of the payment and reporting requirements of the limitation on liability.

[210] MLC *Ex Parte* Letter at 5 (Oct. 5, 2020) (citing 17 U.S.C. 115(d)(3)(I)).

[211] MLC *Ex Parte* Letter at 2–4 (Oct. 16, 2020); *see* MLC SNPRM Comment at 3; MLC *Ex Parte* Letter at 2–3 (Nov. 17, 2020); *see also* MAC, Recording Acad. & SONA SNPRM Comment at 2; Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020).

a work that is not matched by the end of the calendar month of first usage, even if its efforts later result in a match subject to an existing voluntary license (such as delayed matching of new releases), the DMP must pay the copyright owner pursuant to the statutory payment and reporting requirements instead of the terms of the existing agreement in order to retain eligibility for the limitation on liability.[212] The MLC tries to avoid this conclusion by arguing that "Section 115(d)(10)(B)(iv)(II) is fully consistent on its face with the payment of royalties under voluntary license terms" because "[t]he subsection provides that, when a DMP matches an unmatched work, it shall pay all respective accrued royalties to the identified copyright owner 'in accordance with this section and applicable regulations.'"[213] But, as the DLC observes, this is a misreading of the statute.[214] The language quoted by the MLC concerns "the information" that must be "include[d]" in the required cumulative statement of account; it does not relate to the payment of royalties or other aspects of the reporting.[215]

The DMPs contend that section 115(d)(10)(B)(iv)(I) speaks to this issue by requiring that "[a]ccrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles."[216] They argue that this provision covers how accrued liabilities can be extinguished, asserting that GAAP permits this in ways not provided for in section 115(d)(10)(B)(iv)(II) or (III), such as pursuant to agreement.[217] They argue that "this is how Subclause (I) *has* to work, in order to account for voluntary licenses" because subclause (II) "does not address voluntary

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[212] *See* 17 U.S.C. 115(d)(10)(B)(iv)(II).

[213] MLC *Ex Parte* Letter at 7 (Nov. 17, 2020) (quoting 17 U.S.C. 115(d)(10)(B)(iv)(II)(aa)).

[214] *See* DLC SNPRM Comment at 10.

[215] *See* 17 U.S.C. 115(d)(10)(B)(iv)(II)(aa).

[216] *See id*. at 115(d)(10)(B)(iv)(I).

[217] *See* DLC NPRM Comment at 17 ("[U]nder GAAP, accrued royalties that were paid to participating publishers, who released all entitlement to royalties for such usage, would cease being 'maintained' in accordance with GAAP; only those royalties expected to be due to third parties who had not released such royalty claims would be accrued."); DLC SNPRM Comment at 10; DLC *Ex Parte* Letter at 2 (Oct. 14, 2020); Spotify *Ex Parte* Letter at 3–4 (Oct. 9, 2020).

licenses at all" and instead "requires—regardless of the terms of any contrary agreement—payment of 'all accrued royalties' on a specific timetable, accompanied by a statutorily mandated 'cumulative statement of account.'"[218]

The Office concludes that the limitation on liability provision is not clear about the treatment of voluntary licenses. The MLC's formulation assumes that any amount transferred to the MLC must necessarily be "accrued," failing to recognize that some portion of what is transferred may instead constitute an overpayment subject to credit or refund.[219] Additionally, neither the MLC's nor the DMPs' interpretations resolve conflicts between section 115(d)(10)(B)(iv) and at least two other related provisions in section 115 intended to preserve the effect of existing voluntary transactions.[220] The first provision states that "[l]icense agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license . . . shall be given effect in lieu of any determination by the Copyright Royalty Judges."[221] The second provides that "[a] voluntary license for a covered activity in effect on the license availability date will remain in effect unless and until the voluntary license expires according to the terms of

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[218] Spotify *Ex Parte* Letter at 4 (Oct. 9, 2020); *see* DLC SNPRM Comment at 10; DLC *Ex Parte* Letter at 2 (Oct. 14, 2020) ("[T]he MLC's proffered statutory argument . . . would improperly read the GAAP requirement out of the law, and fail to account for voluntary licenses.").

[219] *See* 17 U.S.C. 115(d)(3)(I)(ii), (d)(10)(B)(iv)(II)–(III) (all referring to the payment of "accrued royalties"). For example, where a DMP transferred over royalties for an unmatched work that, when later matched by the MLC, turns out to be subject to a catalog-based voluntary license where payment for the relevant usage was already made to the copyright owner under the terms of that agreement.

[220] *See, e.g.*, *R-S-C v. Sessions*, 869 F.3d 1176, 1183–85 (10th Cir. 2017) (finding statute ambiguous where it was "apparent" that statutory provisions were "at odds with one another," such that the "intra-statutory conflict obscure[d] any clear command from Congress" on the subject at issue).

[221] 17 U.S.C. 115(c)(2)(A)(i); *see also id.* at 801(b)(7)(A), (C); H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 4; Conf. Rep. at 3 ("Consistent with the current 115 compulsory license, subsection (c)(2)(A) makes clear that voluntary licenses entered into between musical work copyright owners and digital music providers are given effect in lieu of the rates established for the blanket license.").

the voluntary license, or the parties agree to amend or terminate the voluntary license."[222] Both in essence require that voluntary licenses be given effect in lieu of compulsory licenses, and yet by the MLC's read (despite its attempts to suggest otherwise), section 115(d)(10)(B)(iv)(II) and (III) would require the opposite.[223]

It seems highly unlikely that Congress, without being explicit about what it was doing, would have adopted a statutory scheme that broadly encourages and gives effect to the common practice of voluntary licenses (including by preserving existing agreements), only to override them and risk marketplace confusion for purposes of the limitation on liability requirements. It is possible that Congress may have assumed that an unmatched work would not be subject to a voluntary license, but that appears to be factually untrue, as it has been represented to the Office that many voluntary licenses operate on a participating-party or musical work catalog or library basis, rather than a per-matched-work (or "title-bound") basis.[224]

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[222] 17 U.S.C. 115(d)(9)(C); *see also id.* at 115(d)(1)(C); H.R. Rep. No. 115-651, at 10; S. Rep. No. 115-339, at 10–11; Conf. Rep. at 8–9 ("[A]ny voluntary license agreement between a digital music provider and a musical work copyright owner continues to be effective and takes precedence over the blanket license until such license expires according to its own terms.").

[223] *See* U.S. Copyright Office, *Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works*, at 20 (Jan. 2016), https://www.copyright.gov/policy/pro-licensing.pdf ("Congress established [compulsory licenses] to address specific market conditions, and they are narrowly construed in their application.") (citing *Fame Publ'g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) and *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 281 (2d Cir. 2012)); *see also* DLC SNPRM Comment at 10 (observing that "other references to voluntary agreements in the statute say nothing about how those agreements should be applied to the issues posed by accrued unmatched royalties").

[224] *See* 85 FR 22518, 22528 (Apr. 22, 2020) ("The DLC is specifically concerned with the handling of voluntary licenses, explaining that because such licenses are often procured through blanket deals covering all musical works in a publisher's catalog, the DMP usually does not know which specific musical works are covered, and will be reliant on the MLC to make that determination based on its statutorily directed matching efforts; this in turn affects the amount of royalties the DMP owes under the blanket license."); DLC SNPRM Comment at 9 ("[I]t is common in the industry, if not standard, for full-catalog licenses not to identify each work covered, and for the list of covered works to change from time to time. . . . [I]t is precisely for this reason that the MLC must provide a response file identifying the works covered by a voluntary license, in order to allow the licensee to calculate the royalties owed pursuant to the blanket license for the remaining works."); *see also, e.g.*, Steven Winogradsky & David Lowery, *Music Publishing: The Complete Guide* 267 (2nd ed. 2019) (discussing production music library licenses on a non-title basis).

The DMPs' reliance on the GAAP provision in subclause (I) does not resolve the matter, however. Even if the provision encompassed derecognition of liabilities, including by agreement, in certain contexts, it would still be in conflict with subclause (II). For example, where a previously unmatched work becomes matched prior to the license availability date, if the work is matched to a copyright owner with whom the DMP has a voluntary license, then under subclause (I), that license could be given effect, or, if there is no such license, the DMP and copyright owner could agree to one at that time to extinguish the liability. But under subclause (II), in the exact same situation, the DMP is told to undertake certain acts that could be contrary to any such agreement.[225] Even if a voluntary license was structured so that no further accrued royalties would be due, to the extent further reporting is still required under the agreement, there could be a conflict with the reporting requirements of subclause (II). Congress has given no indication as to whether subclause (I) or (II) should control in these types of situations.

Third, the Office finds section 115(d)(10)(B)(iv) to be ambiguous on its face. The MLC argues that the provision is clear and requires that "on enactment of the MMA, DMPs must accrue and hold royalties for all of their historical and ongoing unmatched uses, with such accrued royalties to be calculated at the statutory rate and to cover all uses from initial use of the work, with such accrued royalties to be held through the date when the royalties are either (a) matched and distributed to the proper copyright owner pursuant to subsection II or (b) transferred to the MLC pursuant to subsection III."[226] The MLC contends that the "first clause" of section 115(d)(10)(B)(iv)[227] "serves to identify what is being addressed by the provision, namely all unmatched works and associated

[225] *See* 17 U.S.C. 115(d)(10)(B)(iv)(II).

[226] MLC *Ex Parte* Letter at 2–3 (Oct. 16, 2020); *see* MLC SNPRM Comment at 3.

[227] The first clause reads, "[i]f 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." 17 U.S.C. 115(d)(10)(B)(iv).

royalties;" the "second clause"[228] "sets forth the unambiguous obligation to accrue and hold royalties at the statutory rate," with "[t]he statutory obligation to accrue and hold these royalties begin[ning] on the enactment date;" and the "third clause"[229] "details the scope of the accrual to be made, the time frame for holding, and the ultimate payment obligation."[230] Based on this analysis, the MLC disagrees with the DMPs' position on the meaning of the GAAP provision in section 115(d)(10)(B)(iv)(I), asserting that "[r]eading the generic direction to 'maintain' royalties in accordance with GAAP as overriding the detailed statutory instructions and producing a result where the DMP in fact does *not* maintain the accrued royalties and does *not* transfer them under either subsection II or III—the exact opposite of the explicit statutory directive—does not appear reasonable."[231]

The DMPs disagree, arguing that "the MLC's proffered statutory argument . . . would improperly read the GAAP requirement out of the law, and fail to account for voluntary licenses."[232] Instead, they contend that the phrase "as follows" at the end of clause (iv) must mean that "the subsequent Subclauses (I)-(III) describe how and when the royalties are accrued, paid to copyright owners, or transferred to the MLC."[233] They

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[228] The second clause reads, "the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work." *Id*.

[229] The third clause reads, "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." *Id*.

[230] MLC *Ex Parte* Letter at 3 (Oct. 16, 2020).

[231] *Id*. at 3–4; *see* MLC SNPRM Comment at 5–10; MLC *Ex Parte* Letter at 2–4 (Nov. 17, 2020); *see also, e.g.*, Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020) ("[The GAAP provision] is meant to safeguard the royalties until they can be successfully matched to the owner or transferred to the MLC. It is not intended to provide a trap door through which accrued royalties can be disposed of in a way not prescribed in the statute."); NMPA *Ex Parte* Letter at 1 (Nov. 17, 2020); SGA, SCL & MCNA *Ex Parte* Letter at 3 (Nov. 17, 2020).

[232] DLC *Ex Parte* Letter at 2 (Oct. 14, 2020); *see also, e.g.*, ARA, FMC & MusicAnswers SNPRM Comment at 3 (non-DMP organizations agreeing that "Congress clearly intended the . . . [relevant] provisions to cover usages of musical works for which rightsholders had not yet received payment at all—not usages for which a corresponding payment had been negotiated and made," and that "[t]he financial structures and allowances of GAAP are incorporated in their entirety by a plain reading of the statute"); DLC SNPRM Comment at 9; Spotify *Ex Parte* Letter at 3–4 (Oct. 9, 2020).

[233] Spotify *Ex Parte* Letter at 3 (Oct. 9, 2020); *see also* DLC *Ex Parte* Letter at 2 (Oct. 14, 2020).

further explain that "Subclause (I) provides a general instruction that the royalties 'shall be maintained' in accordance with GAAP—which means that GAAP standards apply to the initial calculation of the accrual as well as to any adjustment of that initial calculation in light of new facts. That is made clear by the fact that Clause (iv) ends with the phrase 'as follows,' which links the initial accrual determination described in Clause (iv) to the application of GAAP standards specified in Subclause (I)."[234]

The Office finds that neither of these interpretations eliminates the ambiguities in clause (iv). A key uncertainty lies in what the MLC refers to as the "third clause" of clause (iv): "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."[235] It is not clear what that phrase is referencing. Looking at the immediately preceding phrase ("the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work"), it seems that two possibilities are most likely.

First, the "third clause" of clause (iv) could be referencing "accrue and hold royalties calculated under the applicable statutory rate." Under that reading, it would direct when the DMP must accrue statutory royalties for an unmatched usage of the work and for how long it must hold them. For example, if first use of a work occurred in May 2015 and that work remained unmatched at the license availability date, the DMP must have started accruing statutory royalties in May 2015 and must be holding all such royalties until they are transferred to the MLC in early 2021. Second, the "third clause" could be referencing "in accordance with usage of the work." Under that reading, it would define the lookback period for the unmatched usage of the work that may be

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[234] Spotify *Ex Parte* Letter at 3–4 (Oct. 9, 2020); *see also* DLC *Ex Parte* Letter at 2 (Oct. 14, 2020).

[235] *See* 17 U.S.C. 115(d)(10)(B)(iv).

subject to accrual and holding of statutory royalties, but would not speak to when royalties must actually be accrued by the DMP or for how long they must be held. For example, if first use of a work occurred in May 2015 and that work remained unmatched at the license availability date, those uses occurring between May 2015 and the date of transfer to the MLC in early 2021 would be subject to royalty accrual requirements for purposes of cumulative reporting and transfer to the MLC (but this clause would not speak to what those requirements are, including when or for how long royalties must be accrued and held; *e.g.*, following enactment in October 2018, a DMP could first accrue royalties for the period of use stretching back to May 2015). The "third clause" could perhaps also be referring to both the royalty accrual and holding period and usage lookback period, but that formulation would not resolve the issues identified below.

The first construction, which would construe this phrase as a set holding period for accrued royalties, mostly aligning with the MLC's interpretation, is problematic in multiple ways. One obvious issue is that it causes significant friction with the structure of the overall provision. Clause (iv) ends with the phrase "as follows:" after which detailed requirements are provided under subclauses (I) through (III). Thus, the most natural reading is that DMPs "shall accrue and hold royalties" as specified in subclauses (I) through (III). But if the "third clause" of clause (iv) is construed as speaking to the accrual and holding of royalties in absolute terms, it would essentially act as an exception to the operation of subclauses (I) through (III). There is no indication that the "third clause" is meant to function this way, to undercut the subclauses in the very same provision. As the DMPs argue, treating it in such a manner would significantly diminish the scope and application of the GAAP provision in subclause (I). If Congress had meant to further delineate the requirements of subclauses (I) through (III), it would likely have done so within that framework of subclauses, or by at least using verbiage indicative of an exception. Further, subclauses (II) and (III) do not merely dictate the initial bulk historical payment and cumulative statement of account requirements,[236] but also the ongoing payment and reporting obligations for subsequent reporting periods,[237] making it even less likely that the "third clause" is meant as an overarching exception to the whole of subclauses (I) through (III).

Another problem is that to read the "third clause" as referring to the royalty holding period, it would have to define both the beginning and end points of that period—*i.e.*, starting with the "initial use of the work" and ending when "the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective."[238] If understood this way, to qualify for the limitation on liability, a DMP would have needed to "accrue and hold royalties . . . from initial use of the work," no matter how many years ago that may have been and regardless of whether the DMP addresses any historic bookkeeping or accounting issues by reporting on and paying all properly accrued royalties as required under subclauses (II) and (III).[239] It seems unlikely that Congress would have intended something so sweepingly retroactive and incurable given its clear intent to encourage participation in the limitation on liability and concerns about imposing potentially retroactive obligations on DMPs to qualify for this limitation.

Even the MLC does not go this far, instead stating that "[t]he statutory obligation to accrue and hold these royalties begins on the [MMA's] enactment date."[240] It is not clear why the MLC believes this to be the case, since it contends that the "third clause" details "the time frame for holding."[241] The MLC's view would only give effect to the

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[236] *Id*. at 115(d)(10)(B)(iv)(II)(aa), (III)(aa).

[237] *Id*. at 115(d)(10)(B)(iv)(II)(bb)–(cc), (III)(bb).

[238] *See id*. at 115(d)(10)(B)(iv).

[239] *See id*.

[240] MLC *Ex Parte* Letter at 3 (Oct. 16, 2020).

[241] *Id*.

half of the provision purportedly detailing the end date. To the extent the MLC qualifies its reading by the overall direction that the requirements for the limitation on liability "shall apply on the enactment date and through the end of the period that expires 90 days after the license availability date," the Office finds that provision to be yet another reason why the "third clause" of clause (iv)—with its conflicting reference to the starting point of "initial use of the work" (at least where initial use predates the MMA's enactment)—cannot be construed as the royalty holding period, or at minimum adds a layer of ambiguity.[242]

The second construction, which would construe this phrase as defining the applicable usage lookback period, despite avoiding most of the problems plaguing the first construction is also problematic. As noted above, the details of subclauses (II) and (III) do not merely dictate the initial bulk historical payment and cumulative statement of account requirements,[243] but also the ongoing payment and reporting obligations for subsequent reporting periods.[244] Understanding the "third clause" of clause (iv) to be defining the usage lookback period does not resolve that tension.

The main issue, though, concerns the end points of the usage lookback period. Defining the end of the period as the dates when "the accrued royalties can be paid to the copyright owner [under subclause (II)(aa)] or are required to be transferred to the mechanical licensing collective [under subclause (III)(aa)]"[245] creates tension with the usage periods defined in those subclauses, which in both cases end 45 calendar days earlier.[246] This discrepancy means that the "third clause" of clause (iv) does not refer to an unambiguous usage lookback period.

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[242] *See* 17 U.S.C. 115(d)(10)(B).
[243] *Id*. at 115(d)(10)(B)(iv)(II)(aa), (III)(aa).
[244] *Id*. at 115(d)(10)(B)(iv)(II)(bb)–(cc), (III)(bb).
[245] *See id*. at 115(d)(10)(B)(iv).
[246] *See id*. at 115(d)(10)(B)(iv)(II)(aa)–(bb), (III)(aa)–(bb).

The foregoing demonstrates that Congress's intent cannot be clearly divined, and "'Congress has [not] directly spoken to the precise question at issue'"[247] or prescribed a "precise course of conduct."[248] Therefore, the Office may proceed to fill the statutory gap in a reasonable fashion.[249] Specifically with respect to the MMA, Congress "expected that situations will arise that were not contemplated by the legislation" and imbued the Office with "broad regulatory authority" to act, directing that "[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations."[250]

iii. Appropriateness of Regulatory Action

In light of the statutory ambiguities identified above in the limitation on liability provision, including those raised when reading it in connection with the provisions preserving voluntary licensing, the Office concludes that the most reasonable interpretation is one that does not disrupt the existing marketplace for licensing on a participating-party or musical work catalog or library basis, as opposed to a title-bound basis. An alternative conclusion that disfavors transactions not based on song-by-song

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[247] *See City of Arlington*, 569 U.S. at 296 (quoting C*hevron*, 467 U.S. at 842–43).

[248] *See Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011).

[249] *See Brand X Internet Servs.*, 545 U.S. at 980 ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.").

[250] H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12; *see* 17 U.S.C. 115(d)(12)(A); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."); *Brand X Internet Servs.*, 545 U.S. at 982. The Office is not persuaded by the MLC's invocation of *expressio unius est exclusio alterius* to argue that because there is a provision in the MMA relating to private agreements in the context of pre-1972 sound recordings, weight should be given to the assertion that with respect to the limitation on liability requirements, "the MMA could have easily included language providing for the deduction of moneys paid in private settlements, but it did not." MLC SNPRM Comment at 4–5 (discussing 17 U.S.C. 1401(d)). The provision about pre-1972 sound recordings is in a separate section of title 17, was enacted in a separate title of the MMA that originated from a completely different bill, and is unrelated to the section 115 compulsory license. It is difficult to see how in such circumstances silence can be construed as dispositive of Congress's intent, especially in light of the other ambiguities identified above and Congress's express cautioning to the Office with respect to the portions of the MMA relating to section 115 that uncontemplated issues will arise and need to be addressed. *See* H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12.

licenses would be at odds with animating legislative desires to facilitate large scale licensed uses of musical works and avoid disrupting the marketplace that has arisen around the compulsory license.[251] Accordingly, the Office finds that it is necessary and appropriate to promulgate a rule that accounts for voluntary agreements (whether considered licenses, settlements, liquidations, releases, or otherwise) during the transition period, and the corresponding possibility that the royalties a DMP has accrued may not associate with all unmatched musical work usages because some of those usages may be subject to relevant agreements.[252] Beyond the broad statutory grant of authority bestowed upon the Office as part of the MMA and the authority delegated to the Office by virtue of the ambiguities identified above, it has long been recognized to be well within the ambit of the Office's authority to promulgate rules governing processes for reporting and paying royalties, including reliance upon estimates and adjustments.[253] Indeed, the Office's longstanding pre-MMA statement of account regulations, and the more-recently enacted reports of usage regulations under the blanket license, employ a system of estimates and adjustments.[254]

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[251] *See* U.S. Copyright Office, *Copyright & the Music Marketplace* 30–31 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (noting that pre-MMA, the statutory license served as a "ghost in the attic" while voluntary licensing facilitated the majority of licensed uses).

[252] *See* 17 U.S.C. 115(d)(12)(A) ("The Register of Copyrights may conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection."); *see also* ARA, FMC & MusicAnswers SNPRM Comment at 2–4; ARA *Ex Parte* Letter at 1 (Nov. 17, 2020) (noting ambiguity and asserting that "[a]s a consequence of this ambiguity, we believe the Copyright Office has discretion to interpret the MMA's terms and the authority to promulgate a rule that creates a workable, practical system"); SGA, SCL & MCNA *Ex Parte* Letter at 1 (Nov. 17, 2020) ("[R]eject[ing] the assertion by some music publisher representatives (backed by at least one of their affiliated songwriter groups) that the USCO's oversight and rulemaking authority concerning matters related to 2020-12 should be viewed as being narrowly limited.").

[253] *See* 17 U.S.C. 115(d)(4)(A)(iv) (directing Office to adopt regulations "regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods").

[254] *See* 37 CFR 210.6, 210.7, 210.27.

Concluding otherwise would be at odds with Congress's intent to create certainty and discourage litigation over historical usage.[255] The Office did give thought to remaining silent on the issue, as some commenters urged. In particular, the MLC and others contended that a regulation is unnecessary, essentially opining that since the DMPs believe the statute is clear, they should simply rely on their asserted interpretation.[256] in contrast, the DLC and DMPs asserted that "[t]he need for [a] rule is critical" because "the MLC's very insistence that the statute doesn't square with the interpretation advanced by the DLC confirms that clarifying regulation is imperative, and that a lack of such clarification is likely to provoke litigation—which will be a burden not just for DMPs, but also for the copyright owners who would have to bring those infringement suits."[257]

The Office concludes that the better approach is to provide regulatory guidance to address what most parties seem to agree will be inevitable situations where usage that certain DMPs could not match is subsequently determined by the MLC to be owned by copyright owners who may be party to a valid agreement covering the relevant period. Contrary to the MLC's and others' statements, the rule's approach is in many ways aligned with the original NPRM, as it seeks to give effect to voluntary agreements, where appropriate, without opining on any particular individual agreements.[258] At its heart, the

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[255] *See* H.R. Rep. No. 115-651, at 13–14; S. Rep. No. 115-339, at 14–15; Conf. Rep. at 12; Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020).

[256] *See, e.g.*, MAC, Recording Acad. & SONA SNPRM Comment at 2–3 ("The original NPRM, which remained silent on how the Agreements should be treated, is the better approach. If the DMP interpretation of GAAP is correct and can be justified, the Office does not need to explicitly ratify it in the regulations. The DMPs can simply comply with the statute and transfer their accrued royalties as they understand them along with the usage data.")MLC SNPRM Comment at 2, 10–11.

[257] DLC SNPRM Comment at 11; *see* DLC NPRM Comment at 16–17 ("[R]egulation is plainly necessary to provide unambiguous guidance to DMPs and the MLC. . . . [L]eaving this provision open ended will undoubtedly invite litigation that second-guesses DMPs' accounting determinations and render the limitation on liability illusory. . . . Regulatory clarification to guard against that result is warranted."); DLC *Ex Parte* Letter at 2 (Oct. 14, 2020); Spotify *Ex Parte* Letter at 4 n.5 (Oct. 9, 2020).

[258] *See* NPRM at 43523.

rule detailed below simply creates a mechanism through which the MMA's limitation on liability requirements can accommodate voluntary agreements (including those adopted on a non-title-bound basis) to the extent they may be appropriately relied upon in computing accrued royalties. Moreover, in the event that a court found the statute unambiguously to require the DLC's and DMPs' interpretation, a rule would still be necessary to prescribe conditions under which their interpretation could be given effect, including by articulating how estimates and adjustments as well as underpayments and overpayments should operate.[259] In this respect, the Office believes regulatory guidance will help guide DMP compliance, and provide a mechanism for additional royalty monies to be payable to copyright owners entitled to such payment, in the event obligations have been underestimated. Without the uniformity in application that a regulatory scheme brings, it could negatively impact the MLC's ability to process cumulative statements of account.

Importantly, the Office also concludes that regulatory action will best limit the risk of DMPs choosing to forego the limitation on liability by providing added certainty, helping to ensure that accrued royalties owed to copyright owners and songwriters are transferred to the MLC and eventually matched and distributed accurately without resorting to litigation, as Congress intended.[260] The transfer of cumulative statements and royalties is an optional condition to the limitation on liability and not otherwise required for DMPs to use the blanket license. As explained below, the adopted rule acknowledges,

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[259] *See* DLC SNPRM Comment at 12 ("[E]ven if the DMPs are to employ the self-help invited by the MLC with respect to the GAAP treatment of pre-MMA releases, the Office would still need to issue regulations clarifying the manner in which DMPs reconcile the cumulative statement of account with the necessary estimates that GAAP requires—not just to account for the release of claims prior to the MMA, but for other estimates, including royalty rates and inputs.").

[260] *See* H.R. Rep. No. 115-651, at 13–14; S. Rep. No. 115-339, at 14; Conf. Rep. at 12 (noting concerns over continued litigation, including how it diverts royalties from artists); Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020) (noting that the MMA was intended to provide legal certainty and that it is "critical" to resolve the issue, considering copyright owner, songwriter, and DMP interests).

without endorsing, the DMPs' proffered interpretation of relevant agreements by establishing a process that leaves room for such issues to be litigated if necessary.[261] DMP participation is particularly important for smaller publishers and self-published songwriters who may not have the means to engage in the litigation that could otherwise be necessary to obtain royalty payments.[262] That loss could be significant; as noted, the DLC "estimated that several hundred million dollars were available to be transferred to the MLC as accrued royalties, even after accounting for the derecognition of accruals based on preexisting agreements containing releases to claims for accrued royalties."[263] Indeed, regulatory action seems particularly appropriate to ensure that those copyright owners who did *not* participate in voluntary agreements will see the money to which they are entitled for uses of their works transferred to the MLC and ultimately paid without needing to resort to litigation. The adopted final rule is a practical solution to a complex issue. It is a permissible construction of the statute that best effectuates Congress's intent and is within the Office's authority to adopt.

Other practical considerations weigh in favor of adopting the rule. Most notably, it would be a waste of resources to require DMPs to transfer "tens of millions of dollars"[264] to the MLC, which the MLC and music publishers seem to agree, may have to circuitously make their way back to the DMPs in cases where valid releases apply.[265] The

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[261] *See* ARA, FMC & MusicAnswers SNPRM Comment at 3–4 (agreeing that the "structure seems to accomplish exactly what Congress intended" and "resolves the current controversy in a way that best serves the interest of independent and working songwriters who have a strong interest in bringing as much money as possible into the MLC matching and payment process for pre-MMA uses").

[262] *See* Am. Intellectual Prop. Law Ass'n, *2019 Report of the Economic Survey* 54 (2019) (median cost in 2019 for a party to litigate a copyright infringement lawsuit with less than $1 million at risk through to appeal was $550,000; median cost to reach the close of discovery was $150,000).

[263] DLC *Ex Parte* Letter at 2 (Nov. 17, 2020); *see* ARA, FMC & MusicAnswers SNPRM Comment at 4 (stating that "potentially hundreds of millions of dollars for songwriters and publishers are at stake" because the risk of DMPs foregoing the limitation on liability "is real").

[264] DLC *Ex Parte* Letter at 2 (Nov. 17, 2020).

[265] *See, e.g.*, NMPA *Ex Parte* Letter at 2 (Nov. 3, 2020) (discussing the ability of DMPs to get letters of direction from relevant publishers and potential litigation to enforce contract rights); MLC *Ex Parte* Letter at 5 (Oct. 5, 2020) (noting that "in the event of any such legal dispute

Office is mindful that Congress expects the MLC to operate in an "efficient and fair" manner without engaging in "waste" or the "unreasonable use of funds."[266] Unnecessary reimbursement would be an inefficiency and waste to be avoided. Music publishers may also not want to incur their own administrative costs if funds distributed to them by the MLC are ultimately returnable to DMPs, such as those relating to legal review and accounting processes.[267] There is no practical purpose to this exercise, especially if it is correct, as appears uncontested, that a large portion of the music publishing industry (in terms of market share) is subject to relevant releases for relevant reporting periods.[268]

iv. Regulatory Approach

The Office declines to adopt the DLC's initial proposal, made in response to the NPRM, which would have the Office establish a blanket rule that draws conclusions about private contracts.[269] Instead, the Office concludes that a reasonable and appropriate

between a DMP and a copyright owner concerning the right to receive unmatched royalties that the DMP had turned over under the MMA, the MLC would hold such unmatched royalties pending the resolution of the dispute," and that the MLC would "follow[] the direction of the parties or appropriate courts as to how royalties should be distributed pursuant to private agreements"); SATV *Ex Parte* Letter at 2 (Oct. 28, 2020) ("SATV is open to discussing letters of direction and other potential solutions that would ensure that the requirements of the MMA are satisfied and also address the concerns raised by the digital services regarding payments made pursuant to private settlements."); UMPG *Ex Parte* Letter at 1 (Oct. 30, 2020) ("UMPG believes that any issues relating to payments under private settlements can and should be dealt with between the contracting parties. UMPG intends to assist and facilitate voluntary procedures for doing so with the digital services, to the extent applicable."); WMG *Ex Parte* Letter at 1 (Oct. 21, 2020) ("For those DSPs with which we have already settled claims for the distribution of royalties owed before the enactment of the MMA, we consider these claims closed.").

[266] H.R. Rep. No. 115–651, at 6; S. Rep. No. 115– 339, at 5; Conf. Rep. at 4, 6.

[267] *See* SATV *Ex Parte* Letter at 2 (Oct. 28, 2020) (noting, in the context of market-based solutions, a preference for "any potential reimbursements to digital services be made by the MLC rather than music publishers").

[268] *See, e.g.*, DLC NPRM Comment at 14–15 ("The NMPA has represented that 90%-plus of all usage was covered by the NMPA agreements: it would be absurd to require DMPs to make an acknowledged duplicate payment of tens of millions of dollars to cover payments that are merely around 10%, or less, of that amount."); *id*. at 13 (quoting Ed Christman, *Vast Majority Join Royalties Settlement Between Spotify and Publishing Group*, Billboard (July 11, 2016), https://www.billboard.com/articles/business/7431272/nmpa-spotify-settlement-most-members-join (stating that participation was "96% of [NMPA's] market share")); *id*. (quoting *Lowery et al. v. Rhapsody Int'l Inc*., No. 4:16-cv-01135-JSW (N.D. Cal. filed Mar. 7, 2016), Dkt. No. 175 at 3) (noting opt in market share of 97.13%).

[269] *Id*. Add. at 22; *see also* NPRM at 43523; NMPA *Ex Parte* Letter at 2 (Aug. 25, 2020) ("[R]esolution of issues and disputes concerning privately negotiated agreements such as the

approach is to promulgate a rule that: (1) incorporates the statutory reference to GAAP in section 115(d)(10)(B)(iv)(I) and confirms this includes principles with respect to derecognition of liabilities where appropriate; (2) clarifies that the requirements of section 115(d)(10)(B)(iv)(II) do not supersede a relevant voluntary agreement to the contrary; and (3) with respect to section 115(d)(10)(B)(iv)(III), adopts an estimate and adjustment mechanism for cases where certain usage of certain unmatched works is believed to be subject to a voluntary agreement, but because the specific works are unmatched, the DMP's accrued royalties do not fully identify which works are subject to such an agreement at the time of delivery of the cumulative statement to the MLC and the amount of accrued royalties may need to be adjusted in response to matching.

GAAP treatment. To address, in part, the discussed ambiguities in section 115(d)(10)(B)(iv) and to clarify the operation of subclause (I), the SNPRM proposed language stating that "[a]ccrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles, including those concerning derecognition of liabilities."[270] The SNPRM also stated that "[a]ccrued 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."[271]

The MLC and other commenters object, contending that this language conflicts with the statute and blesses an incorrect interpretation of GAAP.[272] On the first point, as

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pending and unmatched settlement agreements . . . is to be addressed through state contract law and discussions between the contracting parties."); MLC NPRM Comment at 8–9 (accord).

[270] SNPRM at 70548; *see id.* at 70546 (citing Fed. Acct. Standards Bd. ("FASB") Acct. Standards Codification ("ASC"), titled "Derecognition").

[271] *Id*. at 70548.

[272] *See, e.g.*, MAC, Recording Acad., & SONA SNPRM Comment at 2–3; MLC SNPRM Comment at 2–10; NMPA *Ex Parte* Letter at 1–2 (Nov. 17, 2020); MLC *Ex Parte* Letter at 2–5 (Nov. 17, 2020); SGA, SCL & MCNA *Ex Parte* Letter at 3 (Nov. 17, 2020).

discussed, the Office has concluded that the regulatory clarification to address an area of ambiguity is appropriate. On the second, the Office is unconvinced that incorporating the statutory directive to maintain accrued royalties in accordance with GAAP can be read as blessing a specific interpretation of GAAP.[273] To the extent the proposed language expressly acknowledges a GAAP provision that DMPs indicate is relevant to their reporting, and to the extent that copyright owners disagree that this provision is, in fact, relevant, copyright owners may contest whether a DMP has appropriately applied GAAP, but the Office will not presume that DMPs may *not* rely upon this provision.[274]

Nor is the Office convinced by the MLC's contention that "since the copyright owners of unmatched works are by definition not known or located, there cannot be private agreements that dispose of these unmatched royalties prior to the required transfer to the MLC."[275] The MLC does not adequately support this assertion or point to relevant principles of contract law. While the DLC does not cite clear authority either, its reasoning is more persuasive:

> [These assertions are] patently wrong: it is common in the industry, if not standard, for full-catalog licenses not to identify each work covered, and for the list of covered works to change from time to time. . . . [I]t is precisely for this reason that the MLC must provide a response file identifying the works covered by a voluntary license, in order to allow the licensee to calculate the royalties owed pursuant to the blanket license for the remaining works. To suggest that the license simply does not exist or is ineffective until that matching takes place is contrary to the law and is inconsistent with long-standing industry practice. Moreover, the notion that derecognizing liability for unmatched royalties can never be appropriate unless and until *all* royalties are matched ignores the reality of

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[273] *See* 17 U.S.C. 115(d)(10)(B)(iv)(I) ("Accrued royalties shall be maintained by the digital musical provider in accordance with generally accepted accounting principles.").

[274] *See* MLC SNPRM Comment at 2–10. The MLC's approach seems to assume that the principle that derecognition is only appropriate if there is payment to the creditor or a release "judicially or by the creditor" cannot be used to reflect payments to, and/or releases by, creditors that are made on a creditor basis as opposed to a title-bound basis. *See id.* at 7. The MLC does not fully explain the basis for its assumption, which the DLC does not share. *See* DLC NPRM Comment at 17. Neither party submitted statements from any accounting authority in support of their respective contentions.

[275] *See* MLC *Ex Parte* Letter at 2–3 (Nov. 17, 2020); *see also* MLC SNPRM Comment at 6–8; MLC *Ex Parte* Letter at 3–4 (Oct. 16, 2020); Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020).

> the market. If the owners of the works that generated over 90% of the royalties have released their claims, there is no need to know exactly which owner released which royalties to know that there is not an outstanding liability of 100% of the royalties.[276]

Indeed, a public version of an agreement purporting to be one of the agreements referenced by the DMPs includes a broadly worded release provision that would apply to claims "whether disclosed or undisclosed, whether known or unknown, whether asserted or unasserted, whether determined, determinable or otherwise, whether strict, absolute or continent, whether accrued or unaccrued, whether liquidated or unliquidated, whether in law, in equity, or otherwise, whether incurred or consequential, whether due or to become due, and of any kind or nature whatsoever."[277] If a relevant voluntary agreement were worded appropriately, it would be difficult to see how a work would not be subject to the agreement just because it is not matched at a particular point in time by a particular DMP; a work belonging to a copyright owner under the relevant period of agreement still belongs to that owner regardless of whether the DMP knows it. Moreover, if the DMPs' assertions about GAAP are correct, the MLC's position seems to read the word "accrued" out of subclause (III).[278] Only "*accrued* royalties" for uses of unmatched works must be transferred to the MLC, and these may not necessarily be the same as the royalties that would otherwise be attributable to such usage under the statutory rate in the absence of any voluntary agreements that may extinguish or alter such royalty obligations for certain uses of certain works.[279]

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[276] *See* DLC SNPRM Comment at 9.

[277] *See Participating Publisher Pending and Unmatched Usage Agreement* 15 (2016) (embedded in 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/exclusivespotify-establishing-direct-publisher-contracts-to-solve-mechanicals-issues (document is embedded in article)). The Office again emphasizes that it is not in any way opining on the meaning of this or any other relevant private agreement, but noting the language used as a potential example. No party disputes the DLC's suggestion that this public version of the agreement is authentic, although the MLC and others note that there exist supplemental agreements and other documentation concerning negotiation or performance. *See, e.g.*, MLC SNPRM Comment at 9.

[278] *See* DLC SNPRM Comment at 10.

[279] *See* MLC SNPRM Comment at 8–9.

The Office also disagrees that the requirement for accrued royalties to be "maintained" in accordance with GAAP must be read to prohibit royalties from ceasing to be maintained.[280] It is far more logical that relevant principles governing maintenance of such royalties may dictate how and under what circumstances or conditions such maintenance may conclude prior to the events of subclauses (II) and (III). In light of the foregoing, the Office is adopting as final the proposed language clarifying that GAAP treatment can include its derecognition principles where appropriate, to make clear that "[t]he financial structures and allowances of GAAP are incorporated in their entirety."[281]

With respect to the MLC's assertion that the SNPRM blesses an incorrect interpretation of GAAP, the Office does not concur. The Office agrees, however, that it can clarify that it is not opining on what GAAP may or may not allow. Accordingly, the final rule omits the second sentence of the proposed provision, relating to the interaction between GAAP and the statute. The Office intends for this deletion to make clear that *to the extent* something (*e.g.*, the potential extinguishment of a DMP's payment obligation pursuant to a voluntary license or other agreement whereby the DMP is legally released from the liability by the relevant creditor copyright owner) is permitted under GAAP, it is also permitted under the statute and regulations. While the rule does not opine on *whether* royalty payment liabilities were appropriately extinguished and derecognized by DMPs pursuant to GAAP, the final rule accommodates that possibility within the MMA's transitional cumulative reporting and payment structure *if* DMPs are correct in their assertions about GAAP with respect to their relevant agreements. The Office believes this

[280] *See id*. at 5–6, 8 ("Maintaining an accrued liability under GAAP means maintaining accounting records and financial statements that reflect the details of the accrual."); MLC *Ex Parte* Letter at 3–4 (Oct. 16, 2020) (arguing it "does not appear reasonable" if "producing a result where the DMP in fact does *not* maintain the accrued royalties"); Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020) ("The provision to 'maintain' accrued royalties in accordance with GAAP is meant to safeguard the royalties until they can be successfully matched to the owner or transferred to the MLC.").

[281] ARA, FMC, & MusicAnswers SNPRM Comment at 3; *see* DLC SNPRM Comment at 9.

approach is reasonable particularly in light of the asserted purpose of certain voluntary agreements at issue.[282]

Voluntary agreements and works matched during the transition period. As noted, the limitation on liability provision makes no explicit acknowledgement of the existence of voluntary licenses or other agreements, while Congress has elsewhere broadly encouraged and given effect to voluntary licenses (including by preserving existing licenses). In the absence of clear congressional intent otherwise, to harmonize these provisions and ensure that such agreements are given effect in the context of the limitation on liability as well, the SNPRM proposed to limit the application of the requirements in section 115(d)(10)(B)(iv)(II) where a voluntary license or other relevant agreement, entered into before the statutory reporting and payment deadline, applies to the relevant musical work (or share) that the DMP has matched during the transition period.[283] That way, the DMP can pay and report, and the copyright owner can receive royalties and reporting, in accordance with their preexisting or a newly-entered-into mutual agreement. Notably, even the MLC seems to concur that voluntary agreements should apply in lieu of the requirements detailed in section 115(d)(10)(B)(iv)(II).[284] This aspect of the proposed rule is being adopted as final, as a necessary and appropriate clarification.

Estimating and adjusting accrued royalties reported and transferred to the MLC. All agree that, at a minimum, the total accrued royalties owed by a DMP at the end of the transition period may not be a finally calculable figure because of the need to estimate

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[282] *See NMPA and Spotify Announce Landmark Industry Agreement for Unmatched U.S. Publishing and Songwriting Royalties* (Mar. 17, 2016), http://nmpa.org/press_release/nmpa-and-spotify-announce-landmark-industry-agreement-for-unmatched-u-s-publishing-and-songwriting-royalties (noting "the agreement establishes a large bonus compensation fund that is a substantial percentage of what is currently being held by Spotify for unmatched royalties").

[283] *See* SNPRM at 70548.

[284] *See* MLC *Ex Parte* Letter at 7 (Nov. 17, 2020) ("Section 115(d)(10)(B)(iv)(II) is fully consistent on its face with the payment of royalties under voluntary license terms.").

certain royalty pool inputs that are unknown at that point in time. At present, because of the *Phonorecords III* remand, no final operative rates have been set; not even a rate structure has been finally established. This means that, even in the absence of any other need to estimate and adjust, whatever amount is transferred to the MLC in February is unlikely to align with what a DMP will ultimate owe under the finally determined rates and terms. Because of this need to make estimates and adjustments, the Office concluded, as discussed above, that the statutory reference in section 115(d)(10)(B)(iv)(III)(aa) to "*all* accrued royalties" cannot be read to prohibit a regulatory structure permitting DMPs to make estimates and subsequent adjustments. Anticipating this conclusion, the SNPRM omitted the word "all" from the proposed regulatory language to alleviate any ambiguity.[285]

The MLC opposed the deletion, stating that "the SNPRM's provisions for less than all accrued royalties to be transferred conflicts with the MMA," which seems inconsistent with its agreement that royalty pool inputs should be subject to estimation and adjustment, including regulations specifically addressing the "underpayment of royalties" (*i.e.*, some amount less than "all").[286] The MLC appears to believe that allowing for potential underpayment is appropriate where the reason is due to an unknown royalty pool input, but not where the reason is due to the unknown applicability of a voluntary agreement; it does not adequately explain its basis for this distinction.[287] Nevertheless, to address the MLC's comment, the final rule restores the word "all" and

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[285] *See* SNPRM at 70548.

[286] *See* MLC SNPRM Comment at 3–4, 13–14, App. A at v, ix–x.

[287] This distinction is striking given that the MLC did not oppose the inclusion of a provision in regulations governing reports of usage under the MMA's blanket license that permits DMPs in similar circumstances to, subject to later adjustment, "compute the royalties payable by the blanket licensee under the blanket license using a reasonable estimation of the amount of payment for [usage subject to applicable voluntary licenses and individual download licenses] to be deducted from royalties that would otherwise be due under the blanket license, determined in accordance with GAAP." *See* 37 CFR 210.27(d)(2)(ii); MLC NPRM Comment at 34–35, U.S. Copyright Office Dkt. No. 2020–5, https://www.regulations.gov/document?D=COLC-2020-0005-0014 (acknowledging the need for estimates in this context).

resolves any ambiguity by adding clarifying language that it is subject to the ability to estimate and adjust pursuant to other regulatory provisions.

In addition to identifying the possibility of needing to estimate and adjust royalty pool inputs, the SNPRM recognized another type of unknown variable that could affect the calculation of accrued royalties: whether an unmatched work is subject to a voluntary agreement whereby the DMP's payment obligations have been extinguished, whether by blanket or advance payment, release of claims, or otherwise (to the extent permitted by GAAP and thereby the statute). The SNPRM proposed an estimate and adjustment mechanism to cover this scenario as well, as follows:[288]

- Under paragraph (c)(4), a DMP would have to report on all unmatched usage, meaning that the royalty calculation provisions in paragraph (d), which are tied to paragraph (c)(4), would require reporting of the total potential royalties, calculated at the applicable rate under 37 CFR part 385, that could be owed for all such usage. Such calculations would be subject to potential estimation of royalty pool inputs under paragraph (d)(2).
- Under paragraph (c)(5)(i), a DMP would be permitted to report total accrued royalties that employ reasonable estimations if it has a reasonable good-faith belief that the total accrued royalties are less than the total potential royalties calculated under paragraph (c)(4), and the unmatched status of relevant musical works at the end of the transition period requires reliance upon estimations in calculation of such accrued royalties.
- Under paragraph (c)(5)(ii), DMPs reporting and transferring accrued royalties that employ estimations would have to provide detailed information about any voluntary agreement being relied on in making a (c)(5)(i) estimation so that the

[288] *See* SNPRM at 70548–49.

MLC is able to confirm uses of musical works subject to such an agreement. The required information largely tracks information about voluntary licenses required to be reported to the MLC under the blanket license for similar purposes.[289]

- Under paragraph (c)(5)(iii), the MLC would have to engage in efforts to confirm uses of musical works that are subject to any identified agreement, and may notify relevant copyright owners about the DMP's reliance. Where the MLC confirms that a reported use of a musical work is subject to an identified agreement, the MLC would be required to presume that the DMP appropriately relied on the agreement, and during the pendency of any dispute between a DMP and copyright owner over the DMP's reliance, the MLC would not be permitted to make a corresponding distribution to the copyright owner or treat the amount at issue as an overpayment unless directed to do so by agreement of the parties or by order.
- Under paragraph (c)(5)(iv), if a DMP's estimate turns out to be insufficient to cover a required distribution to a copyright owner, the MLC would deliver an invoice and/or response file to the DMP for the additional amount outstanding (including interest) along with the basis for the MLC's conclusion that such amount is due. The DMP would have 14 business days to pay the invoiced amount or dispute the bill. If the bill were disputed, the MLC would notify the relevant copyright owner. If a DMP were ultimately found by an appropriate adjudicative body to have erroneously withheld any accrued royalties—whether as part of its estimate or in response to an MLC bill—it would be able to potentially remain in compliance with the regulations for purposes of retaining its limitation on liability if the other requirements for the limitation have been

[289] *See* 37 CFR 210.24(b)(8).

satisfied, the additional amount due is paid, and the DMP did not withhold the royalties unreasonably or in bad faith.

- Under paragraph (c)(5)(v), an overpayment based on a (c)(5)(i) estimate would be subject to credit or refund like any other overpayment.
- Under paragraph (c)(5)(vi), any underpayment of royalties would have to be remedied by a DMP without regard for the relevant statute of limitations, and by using an estimate—whether under (c)(5)(i) or (d)(2)—the DMP would be deemed to have agreed to waive any statute-of-limitations-based defenses with respect to any asserted underpayment of royalties connected to the use of the estimate.

To provide a workable estimate and adjustment mechanism that is consistent with the statute and congressional aims, and that appropriately balances the flexibility DMPs need to help ensure they participate in the limitation on liability against the right of copyright owners to receive complete and prompt payment of accrued royalties (to the extent a DMP participates), the Office is adopting many core aspects of the proposed rule as final, while making significant modifications in response to various stakeholder concerns, as discussed below.

The MLC and others oppose the SNPRM's proposed rule primarily on the grounds that it would allow DMPs to improperly deduct accrued royalties, that it would improperly shift burdens from DMPs to copyright owners and otherwise prejudice copyright owners, and that it will lead to the increased litigation the proposed rule sought to avoid.[290] The Office addresses each in turn.

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[290] *See, e.g.*, MLC SNPRM Comment at 11–13; SGA, SCL & MCNA SNPRM Comment at 9; MAC, Recording Acad., & SONA SNPRM Comment at 2; MLC *Ex Parte* Letter at 5–6 (Nov. 17, 2020); NMPA *Ex Parte* Letter at 1–2 (Nov. 17, 2020); NSAI *Ex Parte* Letter at 1 (Nov. 17, 2020).

With respect to deductions, commenters seem to misunderstand the SNPRM's proposal, and therefore no changes are being made in the final rule with respect to this concern. To be clear, the final rule does not permit deductions of accrued royalties; all accrued royalties must be transferred to the MLC. The rule merely allows DMPs, in transferring such accrued royalties by the statutory deadline, to rely upon temporary estimates, subject to later adjustment, where that precise figure of all accrued royalties is not otherwise ascertainable at that time.

For example, if the total potential royalties (calculated at the statutory rate) attributable to all of a DMP's unmatched usage is $20 million, the rule does not permit the DMP to deduct $5 million because that is what it previously paid out under certain pre-MMA agreements. Instead, the rule acknowledges that DMPs may be correct that because of such agreements—whether due to previous payment, claim release, or otherwise—some portion of the $20 million may not constitute *accrued* royalties at the time of required transfer to the MLC in February.[291] In other words, certain unmatched usage may no longer have outstanding accrued royalties associated with it at the time of transfer because, to the extent permitted under GAAP, those liabilities may have been appropriately derecognized by the DMP. The rule allows the DMP to employ reasonable estimations, subject to adjustment, where the unmatched status of the work prevents the DMP from definitively confirming whether or not it is subject to a relevant voluntary

[291] It may not matter how much was paid or whether the payment constituted royalties under relevant voluntary agreements. *See* MLC NOI Reply Comment at 29 ("Simply paying lump sums of money to publishers who threaten to sue for copyright infringement is in no sense the equivalent of paying unclaimed accrued royalties . . . . Rather, settlement payments are more likely consideration for releases from liability for copyright infringement or covenants not to sue."); MAC, Recording Acad., & SONA SNPRM Comment at 3; MLC *Ex Parte* Letter at 3 (Oct. 5, 2020). As a legal principle, it is not clear why the amount of consideration or how the consideration is classified should be material if the result is still an appropriately worded full and complete release of relevant royalty claims for a given period. Moreover, a voluntary license could theoretically, for example, be structured as a blanket license for all of an owner's works (without listing them) for which a one-time flat fee was paid for a covered period. Regardless of how common such an arrangement may be, the possibility of its existence highlights flaws in commenters' argument on this point.

agreement.[292] If the DMP appropriately calculates that $15 million are accrued royalties, then that is what it must transfer in February. If, after the MLC later engages in its matching activities,[293] it is discovered that the DMP's estimate was off because it mistakenly, but in good faith, believed certain usage of works to be subject to certain agreements when in fact the opposite turns out to be true once they have been identified, the DMP will either need to make a true-up payment for any shortfall or may be entitled to credit or refund for any surplus.

Thus, this is not a question of *whether* copyright owners will or will not see the money owed to them. It is only a question of *when*, and even then, that question only becomes relevant to the extent the DMP's February 2021 payment—which must be reasonable, determined in accordance with GAAP, made in good faith and on the basis of the best knowledge, information, and belief of the DMP at the time—ends up being an inadvertent underpayment. While some commenters raised statute of limitations concerns,[294] as noted, the rule anticipates and accounts for this explicitly, so it should not impede the recovery of any underpaid royalties.[295] To the extent some commenters also raise concerns about possible delayed payments to copyright owners, these are

[292] *See, e.g.*, DLC SNPRM Comment at 9 ("If the owners of the works that generated over 90% of the royalties have released their claims, there is no need to know exactly which owner released which royalties to know that there is not an outstanding liability of 100% of the royalties.").

[293] The MLC has "confirmed that its goal is to match all unmatched uses, including all historical unmatched uses for which accrued royalties are transferred to the MLC, and to minimize the incidence of unclaimed accrued royalties. The MLC's position has always been, and remains, that it can and will hold unmatched royalties for longer than the required minimum statutory period where appropriate in service of this goal." MLC *Ex Parte* Letter at 2 (Nov. 17, 2020).

[294] *See* SGA, SCL & MCNA SNPRM Comment at 10.

[295] While the DLC "agrees with the aspect of the proposed rule that builds in protection for copyright owners by preserving their legal claims in the event that a DMP fails to remedy an underpayment of royalties," it proposes certain modifications "to clarify that the defense is waived where the underpayment is one that is determined pursuant to the procedures in the rule, and is not remedied." DLC SNPRM Comment at 16; *see* DLC *Ex Parte* Letter at 2 n.7 (Dec. 11, 2020). The Office declines this request. The waiver provision is meant to be broad and not limited merely to the MLC invoice process provided for in the rule. On the contrary, this provision must also cover litigation surrounding an alleged underpayment where it is connected to the DMP's use of an estimate.

unfounded.[296] Copyright owners receive royalty distributions from the MLC either when the MLC matches usage to the owner or when the MLC makes a distribution of unclaimed accrued royalties to identified owners after a prescribed holding period. No money can be distributed until one of these events occurs, and a potential distribution of unclaimed accrued royalties cannot occur until 2023 at the earliest, and may well be later.[297] If there is a shortfall due to a DMP's estimate, the rule requires DMPs to pay the difference (with interest) within 14 business days after being billed by the MLC. That is hardly an undue delay when weighed against the reasons for permitting estimates.

With respect to burden shifting and prejudice to copyright owners, the Office finds commenter concerns to be largely overstated, but has made some adjustments to the final rule. As background, the proposed rule would not "improperly shift the burden of proving compliance with the statutory requirements for the limitation on liability from the DMPs, who are seeking the limitation, to copyright owners."[298] In an infringement action, the limitation on liability would be an affirmative defense, and, as such, the DMP would bear the burden of proving compliance with its requirements.[299] The rule does not change this. Second, the proposed rule would not, as the MLC suggested, "allow[] DMPs to unilaterally withhold unmatched royalties in their discretion."[300] Rather, it would have allowed a DMP to dispute a bill from the MLC on a reasonable, good-faith basis, not merely because it hoped to avoid paying by forcing a copyright owner to sue for the money—which would clearly be bad faith. Third, although the Office has calibrated this

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[296] *See, e.g.*, MAC, Recording Acad., & SONA SNPRM Comment at 4; MAC *Ex Parte* Letter at 1 (Nov. 17, 2020).

[297] *See* 17 U.S.C. 115(d)(3)(J)(i)(I); MLC *Ex Parte* Letter at 2 (Nov. 17, 2020).

[298] *See* NMPA *Ex Parte* Letter at 2 (Nov. 17, 2020).

[299] *See* Fed. R. Civ. P. 8(c)(1); *cf. Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016) (describing the section 512 safe harbor as "an affirmative defense" that the "defendant undoubtedly bears the burden of raising entitlement to" and showing that it "has taken the steps necessary for eligibility").

[300] *See* MLC *Ex Parte* Letter at 6 (Nov. 17, 2020); *see also* NSAI *Ex Parte* Letter at 1 (Nov. 17, 2020).

rulemaking to discouraging litigation within relevant statutory parameters, copyright owners are inherently in the position of potentially needing to bring an infringement suit to obtain royalties if a DMP does not transfer accrued royalties to the MLC. the Office also disagrees that allowing a DMP to potentially retain its limitation on liability if it is adjudged to have erroneously in good faith withheld accrued royalties would necessarily significantly "impede[] the ability of copyright owners to enforce their rights"[301] or otherwise deprive them of a "just remedy."[302] The Office also notes the proposed rule limited the effect to compliance with the Office's regulations, not all statutory requirements. Finally, the record provides no basis for asserted fears of DMP insolvency.[303]

Nevertheless, to alleviate some of these concerns, the final rule has been adjusted to reach a better balance between copyright owners and DMPs. A significant change is how the final rule handles a dispute between a DMP and a copyright owner over the DMP's reliance on an agreement in connection with its estimation and adjustment of accrued royalties. Although, as noted, the available record suggests such disputes may be uncommon,[304] the final rule establishes a better- dispute mechanism for this eventuality, whereby the MLC will hold disputed funds, as the MLC and others argue it should.[305]

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301 *See* NSAI *Ex Parte* Letter at 1 (Nov. 17, 2020); *see also* NMPA *Ex Parte* Letter at 2 (Nov. 17, 2020) (citing 17 U.S.C. 115(d)(10)(D)).

302 *See* MLC *Ex Parte* Letter at 6 (Nov. 17, 2020).

303 *Compare id*. at 5–6 *and* MLC SNPRM Comment at 12 n. 4 *with* DLC SNPRM Comment at 11–12 n.32 ("Just because a DMP cannot re-pay millions of dollars of accrued royalties for nearly the entire market of usage for certain time periods does not suggest it would not be able to pay a potential shortfall to one or more copyright owners if it were to have incorrectly estimated the accrued royalties . . . .").

304 *See, e.g.*, DLC SNPRM Comment at 5 ("[T]here is nothing in the record to assume or even suggest that any DMP is likely to rely on a release improperly."); SATV *Ex Parte* Letter at 2 (Oct. 28, 2020); Spotify *Ex Parte* Letter at 4–5 (Oct. 9, 2020); WMG *Ex Parte* Letter at 1 (Oct. 21, 2020); UMPG *Ex Parte* Letter at 1 (Oct. 30, 2020).

305 *See* MAC, Recording Acad., & SONA SNPRM Comment at 4 ("[T]he MLC should be viewed as a trusted party to hold the disputed funds for the benefit of both copyright owners and digital services."); MLC *Ex Parte* Letter at 5 (Oct. 5, 2020) ("[I]n the event of any such legal dispute between a DMP and a copyright owner concerning the right to receive unmatched royalties that the DMP had turned over under the MMA, the MLC would hold such unmatched royalties

After receiving the detailed information about any voluntary agreement being relied upon by the DMP in making its estimation, the MLC will be required to promptly notify relevant copyright owners of such reliance. A notified copyright owner may then dispute the appropriateness of the DMP's reliance by notifying the MLC within one year.[306] The copyright owner's notification must describe its basis with particularity and must be certified as being made in reasonable good faith. The notice must also specify whether the owner is disputing reliance with respect to potential distributions based on matched usage or of unclaimed accrued royalties under section 115(d)(3)(J), or both. The MLC must then promptly provide the DMP with any such notification it receives.

If the MLC has received a notice of dispute from a copyright owner, then at or around the point in time that the MLC would otherwise make a particular distribution to that copyright owner but for the DMP's reliance on the disputed agreement, the MLC must send an invoice and/or response file to the DMP for the amount that would otherwise be distributed at that time (including interest), accompanied by an appropriate explanation. Depending on the scope of the notice of dispute, this may include distributions based on matched usage and/or distributions of unclaimed accrued royalties under section 115(d)(3)(J).[307] In the case of the latter, the relevant approximate date to bill the DMP is the date the MLC provides the notice required under section

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pending the resolution of the dispute."); MLC *Ex Parte* Letter at 6 (Nov. 17, 2020) (suggesting the MLC would hold funds in dispute); MLC SNPRM Comment at 11, 13 (same).

[306] This time limit is only for the administrative process described in the rule involving the MLC holding disputed funds and is without prejudice to a copyright owner's rights to otherwise dispute a DMP's reliance outside of this process, such as in court.

[307] The Office declines at this time to opine on statutory requirements surrounding distributions of unclaimed accrued royalties under section 115(d)(3)(J); that issue is not within the scope of this proceeding. *See* ARA, FMC, & MusicAnswers SNPRM Comment at 4–5 (addressing this issue); MAC, Recording Acad., & SONA SNPRM Comment at 4–5 (same). The statute provides that the MLC's unclaimed royalties oversight committee will establish relevant policies and procedures, 17 U.S.C. 115(d)(3)(J)(ii), and Congress has made clear that "it is expected that such policies and procedures will be thoroughly reviewed by the Register to ensure the fair treatment of interested parties," S. Rep. No. 115-339, at 5. As there will be no such distribution until 2023 at the earliest, there is ample time for the Office to provide guidance if necessary.

115(d)(3)(J)(iii)(II)(dd). To be clear, this means that the MLC may be in a position to invoice the DMP for usages that it has matched to a disputing copyright owner, while not yet able to invoice for unmatched remaining usages. Where a copyright owner delivers a notice of dispute after the relevant point in time has passed for a particular distribution, the MLC should bill the DMP promptly after receiving the notification. Upon receiving the bill, the DMP has 14 business days to pay the invoiced amount, which is then held by the MLC pending resolution of the dispute.

Because the holding of such funds would not be pursuant to policies and procedures that the MLC's dispute resolution committee is empowered to adopt to govern ownership disputes,[308] the final rule dictates how the MLC must hold the disputed funds. The MLC must hold the newly transferred funds in accordance with section 115(d)(3)(H)(ii) (*e.g.*, with interest) without regard for whether or not the funds are in fact accrued royalties. The MLC must not make a distribution of the funds or treat them as an overpayment unless directed to do so pursuant to the agreement of the relevant parties or by order of an appropriate adjudicative body. If the MLC has not been so directed within one year after the DMP transfers the disputed funds, and if there is no active dispute resolution occurring at that time (*e.g.*, litigation, arbitration, mediation, private settlement discussions), then the MLC shall credit or refund the disputed funds back to the DMP. Any resolution of the dispute should be reflected in the MLC's ongoing administration activities.

The Office believes these changes are a reasonable accommodation to help allay concerns about DMP insolvency and ensure that disputed funds are held somewhere that copyright owners trust and that is subject to public disclosure and oversight. At the same time, several features built into this dispute framework (*e.g.*, that it has to be triggered by

[308] *See* 17 U.S.C. 115(d)(3)(G)(i)(III)(bb), (K).

the copyright owner, the certification requirement, the timing of when a DMP may need to transfer disputed funds, the limited holding period if there are no active efforts at resolution) should quell concerns about it becoming a back door compelling DMPs to make large potential double payments up front whenever an unfounded general dispute is raised.

With respect to the MLC's presumption that the DMP has appropriately relied upon the relevant agreement, that aspect of the proposed rule is retained in the final rule, with the clarification that the presumption applies where there is no dispute raised by the relevant copyright owner. It is unclear why the MLC should object to this,[309] as it should not be exercising independent judgment or discretion with respect to a DMP's asserted reliance on a voluntary agreement.[310] That is a private matter between the parties to the agreement.

As with the proposed rule, the final rule requires that if the amount transferred to the MLC ends up being insufficient to cover any required distributions to copyright owners, the MLC must send an invoice and/or response file to the DMP for the amount outstanding (including interest) that includes an explanation of the basis for the MLC's conclusion that such amount is due. The key change to this provision is that unlike the proposed rule, the final rule does not permit a DMP to dispute such a bill. The DMP must pay the invoiced amount within 14 business days or it will not be in compliance with the rule and will risk loss of the limitation on liability. The inability to dispute such a bill cuts

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[309] *See* MLC SNPRM Comment at 11–12 ("[T]he SNPRM would place the MLC in the middle, requiring the MLC to administer the agreements, and further to 'presume' that DMPs 'appropriately relied' on agreements (which would not even be provided to the MLC). Requiring the MLC to make presumptions in favor of certain disputing parties, let alone presumptions unconnected to knowledge or accuracy, is unreasonable and inconsistent with its mandate.") (internal citation omitted).

[310] This is somewhat similar to what is required of the MLC in the context of the blanket license. There, the MLC will receive a similar level of information about voluntary licenses, see 37 CFR 210.24(b)(8), and then must use that information to "confirm uses of musical works subject to voluntary licenses . . . , and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license," 37 CFR 210.27(g)(2)(ii).

off a potential avenue for misuse of the rule's estimate and adjustment mechanism, and should help alleviate concerns with the SNPRM's proposed approach.

The Office does not believe this change should cause alarm among DMPs. The practical effect is that a DMP cannot challenge a bill with respect to amounts that bear no relation to voluntary agreements that the DMP relied upon in estimating its accrued royalties, *e.g.*, a bill that concerns time periods not covered by such an agreement or copyright owners who are not parties. This approach is consistent with the DLC's proposal made in response to the NPRM[311] and aligns with statements that "the DLC and its members agree that copyright owners that did *not* participate in such an agreement should receive the full amount of royalties they may be owed."[312] In disputes involving copyright owners who are allegedly parties to an effective agreement for relevant time periods, no such bill can be sent via this provision; either the MLC is prohibited from doing so because it is required to presume that the DMP relied appropriately, or if the copyright owner has raised a dispute, the separate above-discussed dispute mechanism would control.

The final rule retains the provision that would permit a DMP to keep its limitation on liability even if it is adjudged to have erroneously withheld accrued royalties, so long as all other requirements for the limitation are satisfied, the additional amount due is paid, and the DMP is not found to have withheld the royalties unreasonably or in bad faith. With the final rule restricting a DMP's ability to dispute a bill from the MLC in the event of shortfall, challenges should generally be limited to circumstances where a copyright

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[311] *See* DLC NPRM Comment at 16, Add. at 22 (proposing that where there are "insufficient funds . . . to pay royalties that are owed to a copyright owner who has not previously released claims to such royalties pursuant to an [identified] agreement . . . , the mechanical licensing collective shall issue an invoice and/or response file . . . , and the digital music provider shall pay the additional royalties to the MLC within 45 days of receipt of such invoice").

[312] *See, e.g.*, DLC SNPRM Comment at 3 ("Copyright owners who did not participate in any pre-MMA agreements that released royalty obligations are not impacted by this proposed rule; they will still get all the royalties to which they are entitled."); DLC NPRM Comment at 15–16; DLC *Ex Parte* Letter at 2 (Oct. 14, 2020).

owner is allegedly party to an agreement relied upon by the DMP and the owner disputes the appropriateness of the DMP's reliance (assuming the DMP is otherwise in compliance with the limitation on liability). As noted, there is no evidence in the record that participating musical work copyright owners will necessarily dispute DMP reliance on voluntary agreements with respect to accrued royalties.[313]

Lastly, the Office has added a savings clause to make plain that nothing in the final rule should be construed as prejudicing a copyright owner's ability to challenge whether a DMP has satisfied the requirements for the limitation on liability.

With respect to suggestions of potential increased litigation, the Office is not persuaded to further adjust the rule. Commenters' arguments are based on a speculative comparison between the volume and complexity of litigation they believe might ensue under the rule for copyright owners to rectify underpayments, and the litigation that DMPs might engage in without a rule to rectify overpayments and enforce their voluntary agreements.[314] That is the wrong comparison. The main litigation the rule seeks to avoid is that which may be brought if DMPs choose to forego the limitation on liability and transfer nothing to the MLC. Indeed, the limitation on liability was enacted precisely to prevent such litigation. The rule provides the certainty DMPs have told the Office is necessary for them to participate in the limitation on liability instead of holding back the money as a litigation war chest. Potential litigation over the estimated tens of millions of dollars at issue with respect to these voluntary agreements pales in comparison to

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[313] *See, e.g.*, WMG *Ex Parte* Letter at 1 (Oct. 21, 2020); SATV *Ex Parte* Letter at 2 (Oct. 28, 2020); UMPG *Ex Parte* Letter at 1 (Oct. 30, 2020); DLC SNPRM Comment at 5; Spotify *Ex Parte* Letter at 4–5 (Oct. 9, 2020).

[314] *See, e.g.*, MLC *Ex Parte* Letter at 6 (Nov. 17, 2020) ("[The proposed rule] appears likely to generate far more litigation activity than a DMP simply enforcing its claimed unambiguous contractual right to be repaid royalties that match to copyright owners with who it has private agreements."); NMPA *Ex Parte* Letter at 2 (Nov. 3, 2020) (arguing that if the regulations "permit DSPs to not pay all of the accrued unmatched royalties that songwriters and copyright owners are expecting to be paid to the MLC, that will undoubtedly result in litigation that is far broader and more fundamental than an action to simply enforce a contract right").

potential litigation over the estimated several hundred million dollars in unpaid royalties that may otherwise be withheld, including payments to those copyright owners who did not opt into the voluntary agreements at issue.

By establishing a default posture that accommodates potential private agreements but cabins reliance upon those agreements—as well as disputes about those agreements—through good-faith certifications of the very parties who allegedly entered into them, the rule should forestall further litigation and foster resolution of disagreements. Perhaps no regulation can secure against parties engaging in litigation in an area so contentious that it generated historic copyright legislation. Certainly, the rule does not curtail the ability of a copyright owner or DMP to seek judicial recourse. But to the extent there is a legitimate dispute, the rule seeks to incentivize DMPs and relevant copyright owners to privately resolve these issues.

A DMP's risk of losing its limitation on liability entirely if found to have acted unreasonably or in bad faith should be powerful motivation to try to avoid being sued, and the prospect of not being able to recover costs or statutory damages may make such a suit unappealing to a copyright owner. As noted several times, there is no evidence in the record that musical work copyright owners will necessarily dispute DMP reliance on voluntary agreements with respect to accrued royalties.[315] As the MLC points out, "there is no basis to think that copyright owners would spend time or money on frivolous litigation over their contracts with DMPs."[316] Likewise, there is no basis to think that DMPs would act differently, such as by inappropriately using voluntary agreements (including those that may have been terminated, breached, or have performance issues),

[315] *See, e.g.*, DLC SNPRM Comment at 5; Spotify *Ex Parte* Letter at 4–5 (Oct. 9, 2020); SATV *Ex Parte* Letter at 2 (Oct. 28, 2020); WMG *Ex Parte* Letter at 1 (Oct. 21, 2020); UMPG *Ex Parte* Letter at 1 (Oct. 30, 2020).

[316] MLC SNPRM Comment at 11 ("There is no history presented of copyright owners acting unreasonably with respect to private agreements with DMPs.").

to avoid paying accrued royalties, or by employing unreasonable or inaccurate GAAP interpretations to try to rationalize a spurious underpayment.

3. *Songwriter Concerns and Transparency Considerations*

Upon publication of the NPRM, the Office heard from a variety of creator groups expressing unfamiliarity with the contours of these agreements or confusion regarding whether payments had been passed through to songwriters.[317] While the record contains some factual information regarding such practices, the Office notes that payment questions with respect to the operation of private agreements between publishers and songwriters are separate from this rulemaking's required focus on DMP obligations to transfer royalties and report information to satisfy the eligibility conditions for the limitation on liability. The MMA does not regulate the terms by which publishers (or administrators) and songwriters may enter into contractual arrangements—and certainly not on a retroactive basis, insofar as these questions may implicate payments passed through (or not) to songwriters prior to enactment.[318] Further, even if DMPs were to transfer royalties for uses subject to pre-MMA agreements, it is not clear whether songwriters would be entitled to any of these funds, due to releases provided by copyright owners to whom they have assigned rights.

In any event, even if those agreements' details were widely public, it could not change the Office's analysis.[319] Even when the MLC distributes matched royalties and related statements to musical work copyright owners (*e.g.*, music publishers), the MMA

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[317] *See, e.g.*, ARA, MAC, NSAI, Recording Acad. & SONA *Ex Parte* Letter at 1–3 (Sept. 22, 2020); Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020); SGA, SCL, AWFC & MCNA *Ex Parte* Letter at 1–2 (Sept. 15, 2020).

[318] In contrast, the section 114 license, currently administered by SoundExchange, does specify the percentage of statutory royalties that are payable to sound recording copyright owners, recording artists, nonfeatured musicians, and nonfeatured vocalists, respectively. 17 U.S.C. 114(g)(2). The MMA did not amend the section 115 license to adopt a similar approach.

[319] *See* NMPA *Ex Parte* Letter at 2 (Nov. 17, 2020) ("settlements entered into prior to the enactment date of the MMA, in some cases even years before, could not be considered to be subject to the requirements of the MMA").

does not further restrict the conditions, typically spelled out by contract, for how those copyright owners subsequently pay songwriters. This is true regardless whether the MLC is matching works connected to pre-MMA usages reported and payments made for purposes of eligibility for the limitation of liability or in connection with future usages authorized under the blanket license. To be sure, for those usages that the MLC cannot reasonably match after the prescribed holding period, the MMA specifies that copyright owners receiving future distributions of unclaimed accrued royalties by the MLC must pay or credit individual songwriters in accordance with applicable contractual terms, and in no case less than 50% of the payment received by the copyright owner attributable to usage of musical works.[320] But this rulemaking is focused on the separate, predicate obligation for DMPs to report unmatched usages and transfer accrued royalties to the MLC, which in turn will match usages and pay copyright owners, who will pay songwriters (either in accordance with contract for payments connected to matched uses, or in accordance with contract subject to the 50% floor for payments for unmatched uses).

Notwithstanding this clarification, and while the Office believes that the rule offers a reasonable and workable compromise to concerns raised by the MLC, DMPs, and songwriters in a manner consistent with the statutory language and congressional intent, the Office also recognizes that multiple creator groups expressed uncertainty regarding the substance of these pre-MMA agreements. At the core of these concerns is a perceived lack of transparency concerning the existence and terms of these agreements,[321]

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[320] 17 U.S.C. 115(d)(3)(J)(iv).

[321] *See, e.g.*, ARA, MAC, NSAI, Recording Acad. & SONA *Ex Parte* Letter at 1-3 (Sept. 22, 2020); MAC *Ex Parte* Letter at 1 (Nov. 17, 2020); Recording Acad. & SONA *Ex Parte* Letter at 3 (Nov. 17, 2020); SGA, SCL, AWFC & MCNA *Ex Parte* Letter at 1 (Sept. 15, 2020).

the amount of these agreements,[322] and whether songwriters received payments under these agreements (and if so, upon what terms).[323]

The Office appreciates that the music publishers who met with the Office each confirmed individually that they followed their respective business practices in sharing payments received through these agreements with songwriters affiliated with their publishing houses. For example, SATV stated that "payments made by DSPs to SATV under private agreements, as well as any other distribution of unmatched funds, whether title bound or not, are always paid through to our songwriters" and offered "to explain to our writers who inquire how these royalties are distributed and reflected on their statements."[324] UMPG provided similar assurances, noting "UMPG does so as a matter of policy, notwithstanding the fact that applicable contracts may not require payment for non-title-bound revenues."[325] The Office does not know whether individual songwriters or creator groups have made inquiries to publishers in response to these letters.[326]

To be sure, the Office continues to support greater transparency in the music industry. In its 2015 report, the Office identified the "key principle" that "[u]sage and payment information should be transparent and accessible to rightsowners."[327] Following this report, the Office is gratified that Congress clearly intended the MLC to operate "in a

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[322] *See, e.g.*, SGA & SCL NPRM Comment at 3; *see also* Cas Martin SNPRM Comment at 3; Rayn Jackson NPRM Comment at 1; Sophie Korpics SNPRM Comment at 2.

[323] Recording Acad. & SONA *Ex Parte* Letter at 2 (Nov. 17, 2020) ("Many songwriter groups expressed continued frustration that so little is known about the agreements, including how much money was involved, how the money was accounted for, and whether songwriters benefited from it.").

[324] SATV *Ex Parte* Letter at 2 (Oct. 28, 2020); *see also* WMG *Ex Parte* Letter at 1 (Oct. 21, 2020) (accord).

[325] UMPG *Ex Parte* Letter at 2 (Oct. 30, 2020).

[326] No creator group has reported the results of reaching out to publishers on this issue. *See* SGA, SCL & MCNA *Ex Parte* Letter at 1–2 (Dec. 14, 2020) (acknowledging Office recommendation to contact publishers directly).

[327] U.S. Copyright Office, *Copyright and the Music Marketplace* 1 (2015), https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

transparent and accountable manner."[328] And it appears that this rulemaking process has resulted in the voluntary public disclosure of additional information regarding these agreements, including with respect to the aggregate monies paid under the pre-MMA agreements.[329] The Office cannot, however, compel publishers or DMPs to disclose the terms of private deals to songwriters.[330] The Office encourages the interested parties to continue to engage on this matter and can make itself available to assist in facilitating dialogue. While the MMA addresses some longstanding complaints over transparency, the Office will keep creators' concerns in mind as it continues its implementation work and advises Congress on future potential improvements to the music ecosystem. The Office also notes that creator groups will have the opportunity to offer additional views on this issue at the upcoming Unclaimed Royalties policy study roundtables.[331]

4. *Reconciliation*

Relatedly, the Office proposed language that would address situations where the total amount of royalties transferred does not match the corresponding report. Although the MLC and DLC both supported the NPRM's proposed reconciliation provision—whereby if the total royalties turned over to the MLC do not reconcile with the corresponding cumulative statement of account, the DMP should include a clear and

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[328] S. Rep. 115-339 at 17. To that end, the Office has separately conducted a rulemaking aimed at furthering appropriate transparency of the MLC. 85 FR 58170 (Sept. 17, 2020).

[329] *Compare* SGA & SCL NPRM Comment at 3 (suggesting unmatched royalties encompassing a range "from a few hundred million dollars to over $1.5 billion") (citation omitted) *with* SGA, SCL & MCNA *Ex Parte* Letter at 2 (Nov. 18, 2020) (reflecting understanding that "while there remain hundreds of millions of dollars in accrued, unmatched royalties in the possession of the Digital Music Providers, tens of millions of dollars in accrued unmatched royalties were indeed turned over directly to music publishers pursuant to the terms of the confidential, private negotiated agreements" (emphasis omitted)).

[330] ARA, FMC & MusicAnswers SNPRM Comment at 3 n.2 ("urg[ing] the [O]ffice to use all levers available to it"); SGA & SCL SNPRM Comment at 8 (stating that the Office "has sufficient authority to compel disclosure of the details of the private and confidential agreements between DSPs and music publishers").

[331] These roundtables have not been scheduled at the time of this rule's publication. For more information on the policy study, visit https://www.copyright.gov/policy/unclaimed-royalties.

detailed explanation of the deviation—the DLC sought two minor modifications.[332] First, the DLC "suggest[ed] changing the phrase 'total royalty *payable*' to 'total royalty *reported*,' to avoid any suggestion that the amount reflected on the cumulative statement of account is necessarily 'payable' to the MLC."[333] The Office incorporated this technical edit into the SNPRM, proposing the phrase "total accrued royalty reported" (inserting "accrued" for added precision), which it now adopts as final.[334]

Second, the DLC's regulatory proposal added an illustrative clause referring to discrepancies "due to the GAAP treatment of previously-distributed royalties or for any other reason."[335] Just as the Office did not include the MLC's previously proposed language about interest, deductions, and adjustments in the NPRM, the Office did not include the DLC's language in the SNPRM and declines to include it in the final rule, as any discrepancy of any kind should be explained.[336] The DLC did not oppose this in its comments to the SNPRM.

The SNPRM further proposed that a clear and detailed explanation also be required if the royalties reported include use of an estimate permitted for computing accrued royalties in paragraph (c)(5)(i).[337] This would be required whether or not there is also a discrepancy between the total accrued royalty reported and the actual amount transferred, and should describe the basis for the total accrued royalty reported including any deviation from the total potential statutory royalty attributable to all unmatched usage reported under paragraph (c)(4)(i). With the Office having concluded that it should adopt a version of this SNPRM structure as final, this corresponding proposal is being adopted

[332] *See* DLC NPRM Comment at 4–5, Add. 23; MLC NPRM Comment at 7–8; *see also* NPRM at 43522.

[333] DLC NPRM Comment at 4–5.

[334] SNPRM at 70549; *see* MLC SNPRM Comment App. A at v (not opposing this phrase).

[335] DLC NPRM Comment at Add. 23.

[336] *See* NPRM at 43522; SNPRM at 70549.

[337] SNPRM at 70549.

as well. It was not opposed (other than in connection with certain commenters' overall opposition to this proposed framework), and should be helpful to the MLC in processing cumulative statements of account that contain any such estimates, and will result in MLC-held records of how any such estimates were employed.

C. Period of Reporting

Next, the Office addresses an issue raised by MediaNet related to required information that may not be able to be located or recreated. The SNPRM solicited comments regarding whether the rule should include language addressing MediaNet's concern that it may be unable to provide pre-2013 usage data, as such data may be unavailable or inaccessible because it is not in the DMP's possession and may no longer be held by its former vendor.[338] In operation for nearly 20 years, MediaNet carries a potentially greater burden to report past unmatched usages than newer services.[339] MediaNet explained that it previously used vendors to maintain its royalty and usage data, but once those agreements were terminated "the relevant data was not transferred to MediaNet," and it was unsure whether those vendors with whom it has terminated its relationships continued to maintain that data.[340] MediaNet requested regulatory language requiring provision of all available data, subject to an exception addressing the circumstance when such information relates to usage that is over five years old and was held by a third-party vendor who no longer has a business relationship with the DMP, and such vendor cannot or will not provide such historic information.[341] MediaNet explained that, without such an exemption, it "may decline to take advantage of the limitation on liability, which may deprive copyright owners of additional accrued royalties."[342]

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[338] *Id*. at 70547 (citing MediaNet *Ex Parte* Letter at 2–3 (Oct. 28, 2020)).

[339] *See* MediaNet *Ex Parte* Letter at 3 (Oct. 28, 2020).

[340] *Id*. at 2–3.

[341] *Id*. at 3.

[342] *Id*.

MediaNet further suggested that such a regulation would be "consistent with the overall statutory scheme," because the statute requires reporting to be pursuant to "applicable regulations," and the relevant reporting regulations at the time required that documentation related to royalties and usages needed to be preserved for only five years.[343]

Commenter Jeff Price challenged MediaNet's assertion that royalty and usage information would not have been retained by MediaNet and also suggested that, even if this information was not retained, it could be recreated.[344] In Mr. Price's experience, DMPs who used vendors to match works and pay mechanical royalties engaged in a workflow that sent output and return files between the vendor and the DMP several times. A DMP would send sound recording data to the vendor who would try to match works, the vendor would reply by sending a file listing matched works and whether they were licensed, the DMP would then send usage and metadata inputs to the vendor, and the vendor would send back mechanical royalty calculations addressing the total time period, each publisher, and each individual work.[345] Mr. Price believes that, based on this workflow, "some or all of the original elements necessary to calculate the mechanicals still exist."[346] Mr. Price also suggested that other data presumably residing with MediaNet concerning monthly revenue, monthly subscribers, eligible streams, and total streams for sound recordings could be used with other known royalty calculation inputs to "possibly recreate the missing mechanical statements."[347]

The Office noticed this issue and requested public comment, but "[g]iven the timing of MediaNet's request" did not propose its own regulatory language and instead

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[343] *Id*. (citing 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa)).

[344] Jeff Price *Ex Parte* Letter at 1, 2, 10 (Nov. 23, 2020).

[345] *Id*. at 1–2.

[346] *Id*. at 1.

[347] *Id*. at 2–7.

requested comments on MediaNet's proposal.[348] In response, only MediaNet addressed this issue. MediaNet affirmed that it is "committed to ensuring that all creators are paid for the use of their works," but stated that it remained unclear "whether such data exists, and can be reported to the MLC."[349] MediaNet did not comment on either Mr. Price's assertion that MediaNet may still have this royalty and usage data, or the feasibility of Mr. Price's suggested alternative solution of recreating the necessary reporting information, as discussed above.

The Office understands MediaNet's concern and hopes it is able to locate or recreate such data to take advantage of the limitation on liability, but must decline to promulgate its proposed rule. As an initial matter, MediaNet has not confirmed whether this information currently exists with its former vendors or can be recreated. The Office is reluctant to promulgate MediaNet's requested exemption without a showing confirming its necessity. Further, the request appears to depart from statutory requirements. The operative statutory language contemplates that to obtain the limitation on liability a DMP will report "all of the information that would have been provided to the copyright owner" to the MLC.[350] Based on the applicable regulations, such information would have included, for example, the number of phonorecords made during a reporting period, phonorecord identification information such as titles, ISRCs, catalog numbers, ISWCs, and UPCs, and, importantly, detailed information on how per-work royalty allocations for these works were calculated.[351] MediaNet's broad proposed exemption would deprive the MLC of all of this information.

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[348] SNPRM at 70547.

[349] MediaNet SNPRM Comment at 2.

[350] 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

[351] *See* 37 CFR 210.6(c)(3), 210.10(d), (e).

The information-related reporting requirement is intended to facilitate the MLC in appropriately accounting for the previously unreported usage.[352] This information would allow the MLC to confirm that the appropriate royalties are being turned over, confirm which matched and unmatched works have been paid, pay for any matched works, and consider whether to make an eventual distribution of unclaimed accrued royalties by market share for this period.[353] Based on the above considerations, the Office declines MediaNet's proposed amendment.

D. *Other Provisions and Additional Clarifications*

In this section, the Office addresses additional matters raised in this rulemaking, including those relating to record retention requirements, harmless errors, certifications, and voluntary agreements between the MLC and a DMP to alter certain procedures.

Records of use. The SNPRM proposed to impose a "records of use" provision on DMPs for cumulative statements of account, modeled in part after the records of use provision that applies to DMPs under the reports of usage regulations.[354] A DMP would be required to "keep and retain in [their] possession all records and documents necessary and appropriate to support fully the information set forth in [cumulative statements of account and/or statements of adjustment]" for at least seven years after delivering the statement to the MLC.[355] Unlike the reports of usage records of use provision, the SNPRM did not include language allowing the MLC "reasonable access" to the DMPs' records or accompanying access limitation provisions.[356]

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[352] In response to the Office's NOI, the MLC asked for even more information to support its matching efforts. NPRM at 43518–19 (citing MLC Reply NOI Comment App. D at 19; MLC *Ex Parte* Letter at 2 n.1 (June 17, 2020)).

[353] *See* 17 U.S.C. 115(d)(3)(E), (G), (J).

[354] SNPRM at 70547; 37 CFR 210.27(m) (reports of usage records of use provision).

[355] SNPRM at 70551 ("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").

[356] 37 CFR 210.27(m)(2).

The Office received comments supporting its proposed records of use provision and no comments in opposition.[357] But the MLC asserted that "the value of the provision is largely lost without a provision for reasonable access to the records," and proposed adding the following language:

> The mechanical licensing collective or its agent shall be entitled to reasonable access to records and documents described in this section, which shall be provided promptly and arranged for no later than 30 calendar days after the mechanical licensing collective's reasonable request, subject to any confidentiality to which they may be entitled.[358]

In response, the DLC disputed the MLC's needs for these records, stating that while these records may be relevant for copyright owners bringing related legal challenges, "the MLC has no role in enforcing the accuracy of the cumulative statement of account—which is a feature of the limitation on liability, and *not* the blanket license."[359]

The Office appreciates the MLC's suggestion, but is not including its proposed access-related language. While the statute requires that the records of use provision that applies to reports of usage, contain an MLC-access provision, there is no such requirement for cumulative statement of account reporting.[360] The Office previously declined to promulgate access rules for pre-MMA mechanical license reporting, stating that "we believe that rules governing access to business records . . . are beyond our authority to establish. In any event, judicial discovery procedures—and possible other alternatives—are available to copyright owners to secure such access."[361] The Office concludes that given the lack of congressional direction and the ability for litigants to

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[357] MLC SNPRM Comment at 14 n.6; Cas Martin SNPRM Comment at 2; *see also* MLC *Ex Parte* Letter at 2 (Oct. 5, 2020).

[358] MLC SNPRM Comment at App. xi.

[359] DLC *Ex Parte* Letter at 1–2 (Dec. 11, 2020).

[360] *See* 17 U.S.C. 115(d)(4)(A)(iii), (iv)(I).

[361] 43 FR 44511, 44515 (Sept. 28, 1978).

secure access to these records via judicial order, it does not need to promulgate a "reasonable access" regulation.[362]

Activity or offering clarification. The DLC asked for a clarification to reflect that, when a DMP reports on historic activities and offerings as a part of a cumulative statement of account, such reporting "is to be of service offerings *at the time of the usage*, and that there is no expectation to map old categories of offerings onto the most recent categories of offerings."[363] The Office confirms that it shares this understanding. In light of the DLC's request, it has clarified section 210.10(g) accordingly to expressly state that reporting requirements are related to the applicable activity or offering at the time of the usage.

Voluntary agreements to alter process. In the NPRM, the Office solicited comments "regarding whether the rule should . . . permit the MLC and individual DMPs to enter into agreements to alter [the cumulative statement of account reporting] process" and noted that, at that time, it was proposing "a similar provision with respect to monthly reports of usage."[364] The Office subsequently adopted such a rule for monthly reports of usage.[365] The MLC supports including a similar provision for cumulative reporting, stating "while the reporting required under the [NPRM] should be the baseline, every circumstance cannot be anticipated, and allowing the MLC the flexibility to address specific considerations attendant to a particular DMP is appropriate."[366]

The SNPRM proposed a provision modelled after that recently adopted in connection with monthly reports of usage, including clarification that certification procedures could not be altered by agreement and that any flexibility "does not empower

[362] Similarly, the record retention requirement under the non-blanket compulsory license does not have a "reasonable access" requirement. *See* 37 CFR 210.8.

[363] DLC SNPRM Comment at 13.

[364] NPRM at 43521–22 (citing 85 FR at 22518, 22546).

[365] 37 CFR 210.27(n).

[366] MLC NPRM Comment at 7.

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."[367] Non-substantive procedures, such as reporting formats, could be altered by agreement, "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."[368]

Neither the MLC nor DLC directly addressed the SNPRM's proposal, although the MLC included this language in its proposed regulatory language and the DLC signaled general support for the Office's SNPRM.[369] An individual commenter also indicated support for this provision.[370] The Office has incorporated this aspect of the SNPRM into the final rule.

Harmless errors. In the SNPRM, the Office asked parties whether it should adopt a harmless error provision "similar to the provision adopted for reporting by significant nonblanket licensees" and noted that pre-MMA regulations did contain a harmless error rule pertaining to monthly and annual statements of account.[371] The DLC supported this provision, and proposed alternate regulatory language based upon pre-MMA regulations governing monthly and annual statements of account: "Errors in a Cumulative Statement of Account or Statement of Adjustment that do not materially prejudice the rights of the copyright owner shall be deemed harmless, and shall not render that statement of account invalid."[372] The DLC explained that cumulative, monthly, and annual statements of

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[367] SNPRM at 70551.

[368] *Id*. at 70547, 70551.

[369] DLC SNPRM Comment at 1 ("DLC strongly supports the proposed rule noticed in the SNPRM."); MLC SNPRM Comment at App. x.

[370] Cas Martin SNPRM Comment at 2–3.

[371] SNPRM at 70547 n.33; *see* 37 CFR 210.9.

[372] DLC *Ex Parte* Letter at 3 (Dec. 11, 2020).

account are "prepared using at least some of the same processes" and "include specifically the information that would have been included at the time of the use," in arguing that harmless errors should be treated in the same manner.[373] It suggested that the inclusion of an estimate and adjustment provision would not "obviate the need for a harmless error provision" as "some harmless errors might not result from the use of an estimate, and/or might not be appropriate for adjustment."[374]

The Office accepts the DLC's suggestion to promulgate a harmless error rule for cumulative statements of account, based on the current harmless error regulations governing monthly and annual statements of account. As the Office previously noted in the context of the monthly and annual statement of account harmless error rule, "[i]t would be unduly severe to treat . . . inconsequential mistakes as equal to errors that result in material prejudice to the copyright owner."[375]

Certification requirements. With respect to the proposed certification requirement for cumulative statements of account, which no party opposes, the DLC says its members "have interpreted the reference to using 'processes and internal controls that were subject to an examination, *during the past year*, by a licensed certified public accountant,' to refer to the CPA examination that has happened for the 2019 annual statements of account, which were distributed to publishers earlier this calendar year, rather than to a *new* CPA certification related to the cumulative statement of account."[376] The Office cautions DMPs to consider the scope of the relevant CPA examination, and be sure that the processes and internal controls that were examined previously are the same processes and controls relevant to preparing the cumulative statement of account. If not, a DMP may need a separate examination for the processes and controls applicable to the

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[373] *Id*. at 2.
[374] *Id*.
[375] 79 FR 56190, 56205 (Sept. 18, 2014).
[376] DLC NPRM Comment at 5, 9.

cumulative statement of account, or it can use the alternative certification option that does not involve a CPA examination.

The DLC also requested changes to the signature requirements in provisions addressing certifications in cumulative statements of account. The statute requires a DMP to submit the certification that would have been provided to an identified copyright owner (*i.e.*, the pre-existing statement of account certification) as well as "an additional certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the [statutory good-faith matching] requirements" during the transition period.[377] The NPRM proposed "a technical change to include the actual language for clarity" and moved both required certifications into the same paragraph.[378] The DLC initially "welcomed" this clarification, calling it "reasonable and appropriate."[379] Subsequently, however, the DLC proposed edits to both certification provisions.[380] It explained that the proposed regulation "may unintentionally be read to limit the corporate personnel who can sign and certify the cumulative statement of account and the facts therein," as "officer" has a specific meaning under corporate law.[381]

The Office declines to adopt the DLC's proposed edits. It is not clear that the pre-existing statement of account certification, which is mirrored in the cumulative statement of account rule and was similarly just adopted as a requirement in connection with future reports of usage, has caused DMPs any issues since it was implemented years ago.[382] Further, the cumulative statement of account certification language for good-faith matching is dictated by statute, which references "officer" and not "representative."

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[377] 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

[378] NPRM at 43520.

[379] DLC NPRM Comment at 2, 4.

[380] DLC SNPRM Comment at 15 (suggesting revision parallel requirements for submission of notices of license; quoting 37 CFR 210.24(c)).

[381] *Id*.

[382] 85 FR at 58152–53; *see* 37 CFR 210.16(f) (2015).

Finally, the Office has not received additional input from other potentially interested parties, such as the MLC, confirming they also understand this to be a technical clarification. For these reasons, the Office believes that it is better to maintain consistency for cumulative statements of account certifications and respectfully declines the DLC's proposal.

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

For the reasons set forth in the preamble, the Copyright Office amends 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). The revision reads 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.

(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 all accrued royalties to the mechanical licensing collective (as required by paragraph (i)(2) of this section and subject to paragraphs (c)(5) and (k) 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) (including as may be defined in part 385 of this title), 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, the total accrued royalties reported and transferred may make use of reasonable estimations, 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 accrued royalties that make use of reasonable estimations 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)(A) 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 shall promptly notify relevant copyright owners of the digital music provider's reliance on such identified agreement(s).

(B)(*1*) A notified copyright owner may dispute whether a digital music provider has appropriately relied upon an identified agreement by delivering a notice of dispute to the mechanical licensing collective no later than one year after being notified. A notice of dispute must describe the basis for the copyright owner's dispute with particularity and specify whether the copyright owner is disputing the digital music provider's reliance with respect to potential distributions based on matched usage or of unclaimed accrued royalties under 17 U.S.C. 115(d)(3)(J), or both. The notice must contain a certification by the copyright owner that its dispute is reasonable and made in good faith. The mechanical licensing collective shall promptly provide the digital music provider with a copy of any notice of dispute it receives. Nothing in this paragraph (c)(5)(iii)(B)(*1*) shall be construed as prejudicing a copyright owner's right or ability to otherwise dispute a digital music provider's reliance on an identified agreement outside of this process.

(*2*) If the mechanical licensing collective receives a notice of dispute from an appropriate copyright owner in compliance with paragraph (c)(5)(iii)(B)(*1*) of this section, then at or around the point in time that the mechanical licensing collective would otherwise make a particular distribution to that copyright owner but for the digital music provider's reliance on the disputed agreement, 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 that would otherwise be distributed at that time (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 an explanation of how that amount was determined. Depending on the scope of the notice of dispute, this may include distributions based on matched usage and/or distributions of unclaimed accrued royalties under 17 U.S.C. 115(d)(3)(J). In the case of the latter, the relevant approximate date to deliver the invoice and/or response file to the digital music provider shall be the date on which the mechanical licensing collective provides the notice required under 17 U.S.C. 115(d)(3)(J)(iii)(II)(dd). Where a copyright owner delivers a notice of dispute after the relevant point in time has passed for a particular distribution, the mechanical licensing collective shall deliver the invoice and/or response file to the digital music provider promptly after receiving the notice of dispute. No later than 14 business days after receipt of the invoice and/or response file, the digital music provider must pay the invoiced amount.

(*3*) All amounts delivered to the mechanical licensing collective by a digital music provider pursuant to paragraph (c)(5)(iii)(B)(*2*) of this section shall be held by the mechanical licensing collective pending resolution of the dispute, in accordance with 17 U.S.C. 115(d)(3)(H)(ii)(I) without regard for whether or not the funds are in fact accrued royalties. The mechanical licensing collective shall not make a distribution of the funds (or any part thereof), treat the funds (or any part thereof) as an overpayment, or otherwise release the funds (or any part thereof), unless directed to do so by mutual agreement of the relevant parties or by order of an adjudicative body with appropriate authority. If the mechanical licensing collective has not been so directed within one year after the funds have been received from the digital music provider, and if there is no active dispute resolution occurring at that time, the mechanical licensing collective shall treat the funds as an overpayment which shall be handled in accordance with paragraph (k)(5) of this section.

(C) The mechanical licensing collective shall presume that a digital music provider has appropriately relied upon an identified agreement, except with respect to a relevant copyright owner who has delivered a valid notice of dispute for such agreement pursuant to paragraph (c)(5)(iii)(B)(*1*) of this section. Notwithstanding the preceding sentence, any resolution of a dispute shall be reflected in the mechanical licensing collective's ongoing administration activities.

(iv)(A) Subject to paragraph (c)(5)(iii) of this section, if the amount transferred to the mechanical licensing collective by a digital music provider with its cumulative statement of account 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 pay the invoiced amount.

(B) 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 this section 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.

(vii) Nothing in this section shall be construed as prejudicing a copyright owner's ability to challenge whether a digital music provider has satisfied the requirements for the limitation on liability.

(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 employ 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) For each sound recording embodying a musical work required to be reported under paragraph (c)(4)(ii) of this section, the digital music provider shall provide 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, plus the unique identifier assigned by the digital music provider to the sound recording and a unique identifier assigned by the digital music provider to each individual usage line.

(f) The information required by paragraphs (c), (d), (e), (k), and (o) 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, including any defined activities or offerings, 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, and each supplemental metadata report delivered to the mechanical licensing collective under paragraph (o) 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 an option that is accessible to smaller digital music providers that may not be reasonably capable of complying with the requirements of a sophisticated reporting or data standard or format. Nothing in this section shall be construed as prohibiting the mechanical licensing collective from adopting more than one reporting or data standard or format. A digital music provider may use an alternative reporting or data standard or format pursuant to an agreement with the mechanical licensing collective under paragraph (l) of this section, consent to which shall not be unreasonably withheld by the mechanical licensing collective.

(2) 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. Where more than one scenario necessitates the same particular adjustment, the 6-month deadline to make the adjustment begins to run from the occurrence of the earliest 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.

(E) To ensure consistency with any adjustments made in an Annual Statement of Account generated under § 210.7 for the most recent fiscal year.

(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).

(n) Errors in a cumulative statement of account or statement of adjustment that do not materially prejudice the rights of the copyright owner shall be deemed harmless, and shall not render that statement invalid.

(o)(1) By June 15, 2021, the digital music provider must submit a supplemental metadata report that includes all of the information provided in the cumulative statement of account pursuant to paragraph (c) of this section, as well as, separately or together with such information, the following information for each sound recording embodying a musical work that was reported under paragraph (c)(4)(ii) of this section:

(i) Identifying information for the sound recording, including but not limited to:

(A) Sound recording name(s), including, to the extent practicable, all known alternative and parenthetical titles for the sound recording;

(B) Featured artist(s);

(C) Unique identifier assigned by the digital music provider, if any, including to the extent practicable, any code(s) that can be used to locate and listen to the sound recording through the digital music provider's public-facing service;

(D) Actual playing time measured from the sound recording audio file, where available; and

(E) To the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, and to the extent practicable:

(*1*) Sound recording copyright owner(s);

(*2*) Producer(s);

(*3*) International standard recording code(s) (ISRC);

(*4*) Any other unique identifier(s) for or associated with the sound recording, including any unique identifier(s) for any associated album, including but not limited to:

(*i*) Catalog number(s);

(*ii*) Universal product code(s) (UPC); and

(*iii*) Unique identifier(s) assigned by any distributor;

(*5*) Version(s);

(*6*) Release date(s);

(*7*) Album title(s);

(*8*) Label name(s); and

(*9*) Distributor(s).

(ii) Identifying information for the musical work embodied in the reported sound recording, to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, and to the extent practicable:

(A) Information concerning authorship of the applicable rights in the musical work embodied in the sound recording, including but not limited to:

(*1*) Songwriter(s); and

(*2*) International standard name identifier(s) (ISNI) and interested parties information code(s) (IPI) for each such songwriter;

(B) International standard musical work code(s) (ISWC) for the musical work embodied in the sound recording; and

(C) Musical work name(s) for the musical work embodied in the sound recording, including any alternative or parenthetical titles for the musical work.

(iii)(A) 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, for each usage line for such track, a reference to the specific unique identifier for the usage line reported under paragraph (e) of this section, and a clear identification of the percentage share(s) that have been matched and paid and the owner(s) of such matched and paid share(s) (including any unique party identifiers for such owner(s) that are known by the digital music provider).

(B) If, for a particular track, a digital music provider cannot provide a clear identification of the percentage share(s) that have been matched and paid and the owner(s) of such share(s) because this information is subject to a contractual confidentiality restriction or the conditions of paragraph (o)(1)(iii)(C) of this section apply with respect to such information, the digital music provider must provide alternate information for the track, namely, 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). If the digital music provider still cannot provide such alternate information because of the conditions of paragraph (o)(1)(iii)(C) of this section, the information required by this paragraph (o)(1)(iii)(B) may be omitted for the track from the supplemental metadata report. A digital music provider reporting under this paragraph (o)(1)(iii)(B) must deliver a certification to the mechanical licensing collective stating that the conditions of being permitted to report under this paragraph (o)(1)(iii)(B) apply with respect to the provision of alternate information or omission of percentage share(s) information entirely, as specified in the certification.

(C) The conditions referred to in paragraph (o)(1)(iii)(B) of this section are:

(*1*) The information is maintained only by a third-party vendor;

(*2*) The digital music provider does not have any contractual or other rights to access the information;

(*3*) The digital music provider is unable to compile the information from records in its possession using commercially reasonable efforts within the required reporting timeframe; and

(*4*) The vendor refuses to make the information available to the digital music provider on commercially reasonable terms.

(2) Any obligation under paragraph (o)(1) of this section concerning information about sound recording copyright owners may be satisfied by reporting the information for applicable sound recordings provided to the digital music provider by sound recording copyright owners or other licensors of sound recordings (or their representatives) contained in each of the following DDEX fields: LabelName and PLine. Where a digital music provider acquires this information in addition to other information identifying a relevant sound recording copyright owner, all such information must be reported to the extent practicable.

(3) As used in this paragraph (o), it is practicable to provide the enumerated information if:

(i) It belongs to a category of information expressly required to be reported by the enumerated list of information contained in § 210.6(c)(3);

(ii) It belongs to a category of information that has been reported, or is required to be reported, by the particular digital music provider to the mechanical licensing collective under the blanket license; or

(iii) It belongs to a category of information that is reported by the particular digital music provider to the mechanical licensing collective under a voluntary license or individual download license.

(4) The supplemental metadata report provided for in this paragraph (o) is not a condition for eligibility for the limitation on liability in 17 U.S.C. 115(d)(10), or a condition of the blanket license.

Dated: December 23, 2020.

Shira Perlmutter,

Register of Copyrights and

Director of the U.S. Copyright Office

Approved by:

Carla D. Hayden,

Librarian of Congress

[BILLING CODE 1410-30-P]

[FR Doc. 2020-29190 Filed: 1/7/2021 8:45 am; Publication Date: 1/11/2021]