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Copyright Royalty Board

37 CFR Part 390

[Docket No. 19-CRB-0009 AA]

Determination and Allocation of Initial Administrative Assessment to Fund

Mechanical Licensing Collective

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule; amended determination.

SUMMARY: The Copyright Royalty Judges are amending regulations to revise the allocation of the initial administrative assessment to fund the mechanical licensing collective.

DATES: *Effective:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: *Docket:* For access to the docket to read submitted documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system at <https://app.crb.gov/> and search for docket number 19-CRB-0009 AA.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program

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SUPPLEMENTARY INFORMATION: On July 8, 2019, the Copyright Royalty Board initiated the *Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective* proceeding by notice published in the **Federal Register** at 84 FR 32475, pursuant to the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Public Law 115–264, 132 Stat. 3676 (Oct. 11, 2018), 17 U.S.C. 115(d)(7)(D)(vi) and 801(b)(8) (2018). The purpose of this proceeding was to determine the initial administrative assessment that digital music providers and any significant nonblanket

licensees must pay to fund the collective total costs of the mechanical licensing collective. Pursuant to a settlement of that proceeding, the Copyright Royalty Judges (“Judges”) adopted a negotiated agreement that had been agreed to by the mechanical licensing collective (MLC) and the digital licensee coordinator (DLC) as to both the amount of the assessment and the method of allocation of that assessment among digital music providers and significant nonblanket licensees and published final regulations implementing that settlement. *See* 85 FR 832 (Jan. 8, 2020); *see also* 37 CFR 390.

On December 18, 2020, the DLC and the MLC jointly filed a motion with the Judges to modify the terms of implementation of the initial administrative assessment, invoking the Judges’ authority under 17 U.S.C. 115(d)(7)(D)(vi) which gives the Judges “continuing authority to amend a determination of an administrative assessment...to modify the terms of implementation, for good cause.” In particular, the motion sought modification of the existing regulations to provide a revised method of allocation of the administrative assessment to provide flat fee rates for smaller licensees and services that exclusively operate download stores under pass-through licenses received from record labels. The motion also sought certain clarifications and technical changes in terms based upon the DLC and MLC’s improved understanding of operational needs gained since the initial administrative assessment was adopted. The proposed amendments do not affect the amount of the assessments.

Based on the representations that the current allocation methodology could have “significant impacts on smaller Licensees”, that the revised allocation methodology “is specifically calculated to address market participation by smaller Licensees and pass-through download stores in an equitable manner, and has support from a diverse cross-section of the Licensee industry”, and that the MLC also supports the amendments and has determined that they are administrable, the Judges find good cause to amend the regulations pursuant to their authority under 17 U.S.C. 115(d)(7)(D)(vi).

List of Subjects in 37 CFR Part 390

Copyright, Licensing and registration, Music, Phonorecords, Recordings, Royalties.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR part 390 as follows:

PART 390—AMOUNTS AND TERMS FOR ADMINISTRATIVE ASSESSMENTS TO FUND MECHANICAL LICENSING COLLECTIVE

1. The authority citation for part 390 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b).

2. Revise §390.1 to read as follows:

§ 390.1 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Startup Assessment means the one-time administrative assessment for the startup phase of the MLC.

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

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

Unique Sound Recordings Count means, for each Licensee, the number of unique sound recordings used and reported per month by such Licensee in Section 115 covered activities, such as would be reflected in the information required to be reported under 17 U.S.C. 115(d), calculated as a monthly average over the respective calculation period, except that a sound recording of a musical work that is in the public domain and designated as such in a monthly report of use shall not count towards the Licensee's Unique Sound Recordings Count. For example, a Licensee's Unique Sound Recordings Count for a Quarterly Allocation calculation period will be calculated by adding together the counts of unique sound recordings reported by such Licensee to the MLC during each month of that quarter and dividing that sum by three. A Licensee's Unique Sound Recordings Count for an Annual Calculation Period will be calculated by adding together the counts of unique sound recordings reported by such Licensee to the MLC during each month of that twelve-month period and dividing that sum by twelve. In the case of a Licensee that was engaged in covered activities only for part of a Quarterly Allocation calculation period or Annual Calculation Period, the monthly average shall be calculated using only the calendar months that the Licensee was engaged in covered activities. In the case of a Licensee that was not engaged in covered activities during any part of a Quarterly Allocation calculation period or Annual Calculation Period, the monthly average shall be zero. Within each month's usage reports from a particular Licensee, a sound recording reported multiple times with the same metadata would be counted as a

single sound recording, and a sound recording reported multiple times each with different metadata would be counted multiple times, once for each reporting with new or different metadata.

3. Revise § 390.3 to read as follows:

§ 390.3 Annual minimum fees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Calculation by Licensee certification (2021 and 2022)*—(1) *2021.* Each Licensee in operation on or before the license availability date shall submit to the MLC, no later than February 15, 2021, its Certified Minimum Fee Disclosure for the 2021 annual minimum fee (*i.e.*, for the period from October 1, 2019, to September 30, 2020).

Each Licensee shall submit the appropriate annual minimum fee as calculated under paragraph (a) of this section for the 2021 Assessment simultaneously with its Certified Minimum Fee Disclosure.

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

(d) *Calculation by the MLC (2023 and subsequent years)*. Beginning with the 2023 Assessment and continuing in subsequent years, the MLC will calculate each Licensee's annual minimum fee based on usage reporting received from Licensees pursuant to 17 U.S.C. 115(d)(4). The MLC shall send invoices for the appropriate annual minimum fee to each Licensee. Licensees shall pay the annual minimum fee invoices from the MLC by the later of:

- (1) 30 days from receipt of the invoice from the MLC; or
- (2) January 15th of the respective Annual Assessment year.

(e) *New licensees*. (1) A New Licensee shall remit the lowest annual fee set forth in paragraph (a)(1) or (2) of this section, as applicable, along with its notice of license or notice of nonblanket activity to be attributable to the calendar year in which such Licensee begins engaging in covered activities.

(2) A New Licensee shall initially be deemed a Flat Fee Licensee. When the MLC calculates the Quarterly Allocation with the first calculation period pursuant to § 390.4(b) during which the New Licensee was engaged in covered activities, whether such activities were for all or part of the calculation period, the MLC shall calculate the New Licensee's Unique Sound Recording Count for that calculation period. In the event that such New Licensee has not provided timely reporting, the MLC may instead, in its discretion, use the most recent reporting from that New Licensee for such calculation. If such New Licensee is calculated to have a Unique Sound Recordings Count that exceeds

the amount that would qualify it to be a Flat Fee Licensee under paragraph (a)(1) of this section, it shall be deemed an Allocated Licensee for that Quarterly Allocation and the remainder of the calendar year and shall be invoiced and pay the assessment as calculated in § 390.4 for the respective quarters, with such New Licensee's Unique Sound Recordings Count to be included in the Aggregate Sound Recording Count for such quarters.

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

4. Revise § 390.4 to read as follows:

§ 390.4 Annual Assessment allocation and payment.

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

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

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

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

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

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

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

(A) Invoice issuance date;

(B) Invoice payment due date;

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

(D) Allocation of Startup Assessment;

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

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

(ii) Invoices issued as a result of an allocation adjustment shall include all of the information set forth in paragraphs (c)(2)(i)(A) through (F) of this section that may be relevant, as well as an explanation of the change from the prior invoices that are affected, and the reason(s) for the adjustment.

(d) *Late reporting.* The MLC shall promptly notify the DLC of any known Licensees who have not timely submitted reports of usage as required each month pursuant to 17 U.S.C. 115(d) and 37 CFR part 210.

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

(f) *Recoupment of minimum-fee.* Each Allocated Licensee's minimum fee will be offset against its Quarterly Allocation shares, if any, and additional payment will not be

due from a Licensee unless and until its total Quarterly Allocation shares exceed its annual minimum fee payment. To the extent that an Allocated Licensee's minimum fee exceeds that Licensee's Quarterly Allocation shares for a given Assessment period, the excess amounts will be pooled and credited pro rata to all Allocated Licensees based on the Quarterly Allocation shares for the first quarter of the following year.

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

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

Dated: December 29, 2020.

Jesse M. Feder,
Chief Copyright Royalty Judge.

Approved by:

Carla D. Hayden,
Librarian of Congress.

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