



Copyright Office

37 CFR Part 210

[Docket No. 2023-2]

Fees for Late Royalty Payments Under the Music Modernization Act

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

ACTION: Interpretive rule; termination of notification of inquiry

SUMMARY: The U.S. Copyright Office adopts the following interpretive rule regarding fees for late royalty payments under the Music Modernization Act’s statutory mechanical blanket license and terminates its notification of inquiry on this subject that was published on February 23, 2023.

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

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SUPPLEMENTARY INFORMATION:

I. Background

On February 23, 2023, the Copyright Office (“Office”) published a notification of inquiry (“NOI”) in the *Federal Register* seeking public comments regarding when fees for late royalty payments should be assessed in connection with reporting by digital music providers (“DMPs”) under the Orrin G. Hatch-Bob Goodlatte Music Modernization Act’s (“MMA’s”) statutory mechanical blanket license (the “blanket

license”).¹ The Office opened the February NOI based on interested parties’ requests for guidance on this matter.

Having carefully considered the comments and thoroughly examined the statute and legislative history, the Office is terminating the inquiry without issuing any regulations on this subject. Rather, the Office is issuing an interpretive rule to provide the mechanical licensing collective (“MLC”), DMPs, and other parties with its conclusion that the statute’s due date provisions are unambiguous. Interpretive rules “advise the public of the agency’s construction of the statutes and rules which it administers.”² Under the Administrative Procedure Act, interpretive rules are not subject to notice and comment procedures and can be published with an immediate effective date.³ Consequently, the publication of this document concludes this proceeding.⁴

A. Statutory Background

The MMA substantially modified the statutory “mechanical” license for reproducing and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115, including by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the “license availability date”), administered by the MLC designated by the Office.⁵ The Office also designated a digital licensee coordinator (the “DLC”) to represent DMPs in proceedings before the Copyright Royalty Judges (“CRJs,” also sometimes referred to as the “Copyright Royalty Board” or “CRB”). The DLC also serves as a non-voting member of the MLC and carries out other functions.⁶ Under the MMA, DMPs are able to obtain the blanket license to

¹ 88 FR 11398 (Feb. 23, 2023).

² *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)).

³ See 5 U.S.C. 553(b)(A), (d)(2).

⁴ The Office may issue a notice of proposed rulemaking regarding outstanding issues relating to adjustments (*e.g.*, regarding the timing of royalty payments, invoices, and response files) at a later date. See 88 FR 6630 (Feb. 1, 2023).

⁵ Pub. L. 115-264, 132 Stat. 3676 (2018).

⁶ 84 FR 32274 (July 8, 2019).

make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams, subject to various requirements, including payment and reporting obligations.⁷

As relevant to this proceeding, the MMA states that with respect to DMPs' payment and reporting obligations under the blanket license, "monthly reporting shall be due on the date that is 45 calendar days . . . after the end of the monthly reporting period."⁸ The MMA also states that "[l]ate fees for past due royalty payments shall accrue from the due date for payment until payment is received by the [MLC]."⁹ Other reporting and payment deadlines, including regulations governing estimates and adjustments, are regulatory in nature. These provisions are further discussed below.

1. Statutory Division of Responsibility

The Copyright Act, as amended by the MMA, assigns different responsibilities to the CRJs and Office with respect to the blanket license. Congress granted the CRJs the responsibility to set the blanket license's royalty rates and terms.¹⁰ As part of this ratesetting authority, the CRJs' determinations "may include terms with respect to late payment[s]."¹¹ These "late fees" are a consequence of late royalty payments. While the CRJs' authority to set such late fees predated the MMA, the MMA added a provision stating that, with respect to the blanket license, "[l]ate fees for past due royalty payments shall accrue from the due date for payment until payment is received by the [MLC]."¹²

The Office's responsibilities under the MMA include overseeing the administration of the blanket license, including by promulgating various regulations specifically required by Congress, such as those governing reporting and payment

⁷ 17 U.S.C. 115(d). Alternatively, DMPs have the option to engage in these activities, in whole or in part, through voluntary licenses with copyright owners.

⁸ *Id.* at 115(d)(4)(A)(i).

⁹ *Id.* at 115(d)(8)(B)(i).

¹⁰ *Id.* at 115(c)(E)–(F), (d)(8)(B)–(D); *id.* at 801(b)(1).

¹¹ *Id.* at 803(c)(7); *see also id.* at 115(d)(8)(B).

¹² *Id.* at 115(d)(8)(B)(i).

requirements for DMPs.¹³ Relevant to this proceeding, Congress directed the 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.”¹⁴ Additionally, Congress granted the Office “broad regulatory authority”¹⁵ to “conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license].”¹⁶

B. Regulatory Background

On September 17, 2020, the Office issued an interim rule adopting regulations concerning reporting and payment requirements under the blanket license (the “September 2020 Rule”).¹⁷ The September 2020 Rule addressed the ability of DMPs to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated royalty calculation inputs (*e.g.*, the amount of applicable public performance royalties) with finally determined figures.¹⁸ The interim regulations permit DMPs to make adjustments in other situations as well, such as in exceptional circumstances, following an audit, or in response to a change in the applicable statutory rates or terms adopted by the CRJs.¹⁹

¹³ *Id.* at 115(d)(4)(A)(ii)(III), (iii), (iv).

¹⁴ *Id.* at 115(d)(4)(A)(iv)(II).

¹⁵ H.R. Rep. No. 115-651, at 5–6 (2018); S. Rep. No. 115-339, at 5 (2018); Staff of S. and H. Comms. On the Judiciary, 115th Cong., Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 4 (Comm. Print 2018), https://www.copyright.gov/legislation/mma_conference_report.pdf.

¹⁶ 17 U.S.C. 115(d)(12)(A).

¹⁷ 85 FR 58114 (Sept. 17, 2020). That proceeding involved multiple rounds of public comments through a notification of inquiry, 84 FR 49966 (Sept. 24, 2019), a notice of proposed rulemaking (“NPRM”), 85 FR 22518 (Apr. 22, 2020), and an *ex parte* communications process. Guidelines for *ex parte* communications, along with records of such communications, including those referenced herein, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. All Office 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>. References to public comments in the Office’s proceedings are either cited in full or are by party name (abbreviated where appropriate), followed by “NPRM Comments,” “Initial Comments,” “Reply Comments,” or “*Ex Parte* Letter,” as appropriate.

¹⁸ 37 CFR 210.27(d)(2)(i), (f), (g)(3)–(4).

¹⁹ *Id.* at 210.27(k).

During the rulemaking proceeding that culminated in the September 2020 Rule, the MLC and DLC raised differing views about when a payment should be considered “late,” thus triggering the obligation to pay a late fee, in the context of the MMA, the Office’s adjustments to reports of usage regulations, and the CRJs’ late fee regulations. The MLC’s view was that the MMA requires a DMP’s payment to be considered “late” if not received by the 45th calendar day after the end of the monthly reporting period.²⁰ The DLC took an opposing view and contended that late fees should not be due for any timely adjustments to good faith estimates made pursuant to the Office’s regulations or in response to a change in rates and terms made by the CRJs.²¹ At the time of the September 2020 Rule, the Office declined to address the interplay between the statute, the CRJs’ late fee regulation, and the Office’s provisions for adjustments, in part, because it believed that “the CRJs may wish themselves to . . . update their operative regulation in light of the [September 2020 Rule].”²²

Since the Office issued the September 2020 Rule, the CRJs published two ratesetting determinations applicable to the blanket license: the *Phonorecords III Remand* determination (covering the 2018–2022 rate period)²³ and the *Phonorecords IV* determination (covering the 2023–2027 rate period).²⁴ Neither determination addressed the competing views within the industry on when the CRJ’s late fee provisions are triggered.

²⁰ MLC NPRM Comments at 36–37, App. C at xiv; MLC *Ex Parte* Letter at 7–8 (Feb. 26, 2020); *see also* AIMP NPRM Comments at 4–5 (“[L]ate royalty payments have been a significant problem for copyright owners, and the implementation of a late fee for any royalty amounts paid late was a significant step forward. The regulations as proposed, should remove any doubt that might interfere with those late fee payments.”); Peermusic NPRM Comments at 5 (“[W]e appreciate the Copyright Office’s rejection of the DLC request that underpayments, when tied to ‘estimates,’ should not be subject to the late fee provision of the CRJ regulations governing royalties payable under Section 115, and we would request that the regulations be clear on this point.” (citation omitted)).

²¹ DLC NPRM Comments at 14.

²² 85 FR 58114, 58137; *see also* 85 FR 22518, 22530 (“Any applicable late fees are governed by the CRJs, and any clarification should come from them.”).

²³ 88 FR 54406 (Aug. 10, 2023).

²⁴ 87 FR 80448 (Dec. 30, 2022).

The *Phonorecords IV* determination, which adopted the terms of the participants' settlement,²⁵ contains the current late fee regulation, which states that, "[a] Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I)²⁶ or 17 U.S.C. 115(d)(4)(A)(i),²⁷ as applicable and detailed in part 210 of [the Office's regulations governing reporting and payments under the statutory mechanical license]."²⁸ It further provides that "[l]ate fees shall accrue from the due date until the Copyright Owner receives payment."²⁹ In approving the parties' settlement, the CRJs found that the late fee provision was "not unreasonable."³⁰

Both the *Phonorecords III Remand* and *Phonorecords IV* determinations resulted in rate calculations that use multiple steps to ultimately determine royalties due under the blanket license.³¹ These calculations require inputs that may not be known at the time a DMP's reporting is due under the MMA, including the amounts expensed by DMPs for

²⁵ Before participants settled the *Phonorecords IV* proceeding, DMPs Spotify and Amazon each proposed a version of what the DLC proposes here—that late fees would not be owed for most types of permitted adjustments to monthly or annual reports of usage. Corrected Written Direct Statement of Spotify USA Inc. at Tab B, 10–11, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords IV*), No. 21-CRB-0001-PR (2023–2027) (CRB Oct. 29, 2021), <https://app.crb.gov/document/download/25899>; Amazon's Am. Written Direct Statement, Ex. A.1 at 10, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords IV*), No. 21-CRB-0001-PR (2023–2027) (CRB Mar. 8, 2022), <https://app.crb.gov/document/download/26286>. These proposals were not included in the final settlement, as approved by the CRJs.

²⁶ This provision states that, except as provided in section 115(d)(4)(A)(i), "royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding."

17 U.S.C. 115(c)(2)(I).

²⁷ This provision states that "[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license on a monthly basis in accordance with . . . subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period." *Id.* at 115(d)(4)(A)(i).

²⁸ 37 CFR 385.3.

²⁹ *Id.* Parties in the most recent section 115 ratesetting proceeding recognized that this language "does not acknowledge that the [MLC] has responsibility for collecting payment under the blanket license for digital uses" and moved to add the following language to the end of the quoted language: "except that where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment." Mot. to Req. Issuance of Amendment to Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords IV*) Pursuant to 17 U.S.C. [sec.] 803(C)(4) at 1–2, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords IV*), No. 21-CRB-0001-PR (2023–2027) (CRB Jan. 10, 2023), <https://app.crb.gov/document/download/27417>.

³⁰ 87 FR 80448, 80452 n.20.

³¹ 37 CFR 385.21 (covering the *Phonorecords IV* period); *id.* at pt. 385, App. A, 385.21 (covering the *Phonorecords III* period).

sound recording licenses and for musical works’ public performance licenses as a factor in the calculation to determine mechanical royalties due under the blanket license.

In late 2022, before the CRJs’ *Phonorecords III Remand* and *Phonorecords IV* determinations were finalized, the MLC and DLC submitted comments to the Office following a May 2022 amendment³² to the September 2020 Rule and again raised the issue of late fees, confirming their continued disagreement on the subject.³³ Both the MLC and DLC requested the Office provide guidance and regulatory amendments.³⁴ The DLC requested that the Office “specify that when both the initial estimated payments and the later adjustment of such payments to account for the updated and finalized information are made according to the timelines established in the regulations, such payments are proper and have been made by the ‘due date for payment’ as set forth in 17 U.S.C. [sec.] 115(d)(8)(B)(i).”³⁵ The MLC opposed the DLC’s position³⁶ and instead proposed regulatory language providing that nothing in the adjustment provisions “shall change a blanket licensee’s liability for late fees, where applicable.”³⁷

II. Discussion

The Office’s February NOI sought public comments on this disagreement and explained that, while it “typically does not offer interpretations of the CRJs’ regulations,” the Office is squarely within its authority to advise the public on the construction of the Copyright Act.³⁸ Interested parties, including the MLC, National Music Publishers’

³² 87 FR 31422 (May 24, 2022).

³³ MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); Comments of DLC to Suppl. Interim Rule Concerning Reports of Adjustment and Annual Reports of Usage at 3, MMA Notice of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, Reports of Usage and Payment, No. 2020-5 (U.S. Copyright Office July 8, 2022) (“DLC July 2022 Comments”), <https://www.regulations.gov/comment/COLC-2020-0005-0029>.

³⁴ See 85 FR at 58136–37; MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC July 2022 Comments at 3.

³⁵ DLC July 2022 Comments at 3.

³⁶ MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022).

³⁷ MLC *Ex Parte* Letter at 8 (Oct. 17, 2022).

³⁸ See 17 U.S.C. 115(d)(8)(B)(i) (“Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.”).

Association (“NMPA”), DLC, publishers, groups representing songwriters, and others submitted comments responding to the Office’s NOI.³⁹

A. Responsive Comments

1. Commenters Supporting the MLC’s Interpretation

The Copyright Alliance, Dina LaPolt, NMPA, Nashville Songwriters Association International (“NSAI”), Songwriters of North America (“SONA”), Songwriters Guild of America, Society of Composers & Lyricists, and Music Creators North America supported the MLC’s position that the MMA’s plain language indicates that the due date for payment is 45 calendar days after the end of a monthly reporting period and that late fees begin accruing after that point in time or that equitable policy considerations dictate the same result.⁴⁰

These parties generally argued that the MMA’s plain language is conclusive with respect to the blanket license’s “due date for payment.” The NMPA reasoned that “Congress was clear and unambiguous in establishing precisely when late fees shall begin to accrue,” as “the date that is 45 calendar days . . . after the end of the monthly reporting period.”⁴¹ The Copyright Alliance echoed this reasoning, adding that there is language in the MMA’s legislative history stating that a DMP must provide the MLC certain data

³⁹ The Office also received letters from members of Congress reflecting their views that any late fees for underpayments begin to accrue starting 45 days after the end of a monthly reporting period. Letter from Ted W. Lieu, Ben Cline, Jerrold Nadler, Henry C. “Hank” Johnson, Laurel M. Lee, Adam B. Schiff & Harriet M. Hageman, Members of Congress to Shira Perlmutter, Register of Copyrights (May 9, 2023), <https://www.copyright.gov/rulemaking/mma-late-fees/mma-late-fee-letter-house.pdf>; Letter from Thom Tillis, Chris Coons, Marsha Blackburn, Bill Hagerty & Mazie Hirono, Members of Congress to Shira Perlmutter, Register of Copyrights (May 9, 2023), <https://www.copyright.gov/rulemaking/mma-late-fees/mma-late-fee-letter-senate.pdf>.

⁴⁰ See Copyright Alliance Reply Comments at 2; Dina LaPolt Initial Comments at 3–4; MLC Initial Comments at 2–3; NMPA Initial Comments at 2; NSAI Reply Comments at 2; SONA Initial Comments at 2; Songwriters Guild of Am., Inc., Soc’y of Composers & Lyricists, and Music Creators N. Am. Initial Comments at 3.

⁴¹ NMPA Initial Comments at 2; *see also* MLC Initial Comments at 10–11 (calling the provisions at issue “unambiguous” and “detailed” and identifying that “[f]or the blanket license, the MMA specifically changes the due date from 20 days to 45 days after the end of the month”), 11–12 (“Neither the ability to use estimates, nor the requirement to follow up to correct those estimates, changes the fact that DSPs are responsible for the payment of ‘all royalties’ by the statutory due date, and that late fees ‘shall accrue’ from that mandated due date.”); NSAI Reply Comments at 1–2 (noting that Congress’s intention was “clear” when it passed the late fee provisions).

“along with its royalty payments due 45 calendar days after the end of a monthly reporting period.”⁴²

The NMPA added that the statute does not contain any exceptions for underpayments, including for those “caused by an error, a misestimate, or any other reason,” including “where the DMP later corrects its underpayment through an adjustment.”⁴³ It noted that Congress could have created an exemption to when late fees accrue, as it did for royalty payments under the optional statutory limitation on liability for certain unlicensed uses prior to the license availability date, but it did not do so.⁴⁴

These parties also made policy arguments supporting their view that late fees should begin to accrue starting after 45 calendar days after the end of a monthly reporting period. For example, they argued that their approach would incentivize DMPs to pay the MLC—and, in turn, songwriters and publishers—accurately and on time and that the DLC’s opposing interpretation, discussed below, would disincentivize accurate and timely royalty payments.⁴⁵ Some argued that the harm to songwriters under the DLC’s position would be significant, while the MLC’s position would not cause significant harm to DMPs.⁴⁶ As NSAI explained, “[a]n underpayment of even a few hundred dollars for a few months can mean meaningful life decisions for a songwriter. The gravity of that must

⁴² Copyright Alliance Reply Comments at 2, n.2 (citing H.R. Rep. No. 115–651, at 27 (2018)).

⁴³ NMPA Initial Comments at 4.

⁴⁴ *Id.* (citing 17 U.S.C. 115(d)(10)(B)(v)).

⁴⁵ *See, e.g.*, Copyright Alliance Reply Comments at 2; NSAI Reply Comments at 2 (“Because DMPs are permitted to make good-faith estimates when reporting and paying royalties, there must be a safeguard in place to hold them accountable.”); SONA Initial Comments at 2 (“If late fees were to apply only after the adjustment due date, DMPs will have latitude to underestimate amounts due and make more gains at the expense of songwriters and copyright holders by continuing to have those additional funds in their possession for as long as possible without incentive to change their royalty reporting practices.”); Songwriters Guild of Am., the Soc’y of Composers & Lyricists, and Music Creators N. Am. Initial Comments at 3 (adding that the “Congressional resort to late fees as a motivator was necessary in light of the fact that the MMA limits the ability of music creators and copyright owners to utilize copyright infringement litigation as an alternative means to compel accurate and timely royalty compliance”).

⁴⁶ *See, e.g.*, Copyright Alliance Reply Comments at 3; Dina LaPolt Initial Comments at 7 (“[B]y the valuation and market capitalization of the DMPs noted, they could conceivably make an overestimation on their monthly royalty payments to avoid paying a late fee and would not be burdened, whereas making an underestimation severely impacts the daily lives of songwriters forcing them to wait for their adjusted income.”); SONA Initial Comments at 5 (“[P]aying late fees or otherwise making an *overestimation* on the DMPs’ monthly royalty payments is not a severe burden to these companies, whereas making an underestimation significantly and negatively impacts the daily lives of songwriters.”).

be considered against the inconsequential burden a minimal late fee imposes on a DMP.”⁴⁷

2. The DLC’s Interpretation

The DLC contends that “the clear text of the statute and relevant regulations, unbroken historical precedent, and interests of efficiency and equity” support its position that late fees are not due for payments that are compliant with the Office’s estimate and adjustment reporting regulations.⁴⁸ The DLC explained that because the MMA states that monthly payments must “comply with requirements that the Register of Copyrights shall prescribe by regulation” and because the CRJs referenced the Office’s section 115 regulations in their late fee provision,⁴⁹ “[t]aken together, these provisions compel the conclusion that when a payment is made on or before the due date, and is made in compliance with the regulatory requirements, it is not ‘late’ or otherwise legally deficient, even if it is based on estimated inputs, or is an adjustment to a payment made earlier.”⁵⁰ It asserts that “estimates and adjustments are a necessary consequence of the CRB’s . . . rate structure” because the required inputs under the rate structure (*e.g.*, royalties for sound recordings or the public performance of musical works) may not be final or known when reporting is due to the MLC, therefore DMPs must be allowed to rely on estimates and adjustments and not incur late fees when doing so.⁵¹

The DLC also offered policy-based reasons in support of its position. For example, it claimed that “[i]f DMPs are threatened with late fees for every routine royalty payment, one can reasonably expect that at least some [DMPs] will systematically *over pay* royalties” and subsequent “clawback[s]” would cause operational challenges for the MLC and harm to songwriters and publishers.⁵² Finally, the DLC claimed that “[i]t defies

⁴⁷ NSAI Reply Comments at 2.

⁴⁸ DLC Initial Comments at 1.

⁴⁹ *I.e.*, the Office’s “reporting regulations in part 210 of title 37 of the CFR.” DLC Reply Comments at 7.

⁵⁰ DLC Initial Comments at 4–5.

⁵¹ *Id.* at 2–3.

⁵² DLC Reply Comments at 8–9.

common sense that failing to guess at and pay royalties at not-yet-determined rates would trigger late fees,”⁵³ and suggested that Congress would not have intended such a “facially illogical result.”⁵⁴

B. Statutory Analysis

1. Monthly Royalty Payments Made to the MLC More Than 45 Days After the End of the Applicable Monthly Reporting Period are Late Under the Statute

The Office has reviewed the MMA’s text, context, and statutory scheme along with canons of statutory construction in its consideration of whether the statute is ambiguous.⁵⁵ It concludes that the statute’s (i) due date provisions, (ii) direction to the Office to adopt regulations governing adjustments, and (iii) delegation of authority to the CRJs to promulgate late fee provisions are compatible and unambiguous. The Office, therefore, declines to issue any associated regulations.

Starting with the statute’s text, section 115(d)(8)(B)(i) states that CRJ-adopted “[l]ate fees for past due royalty payments [under blanket licenses] shall accrue from the due date for payment until payment is received by the mechanical licensing collective.”⁵⁶ The phrase “due date for payment” is undefined and, therefore, these words must “be interpreted as taking their ordinary, contemporary, common meaning.”⁵⁷ Black’s Law Dictionary defines “due date” as “[t]he date on which something is supposed to happen, esp. as a matter of requirement.”⁵⁸

In the Office’s view, “due date for payment” unambiguously refers to the “date on which” monthly royalty payments are required to be delivered to the MLC. Section

⁵³ DLC Initial Comments at 5.

⁵⁴ DLC Reply Comments at 6.

⁵⁵ Courts commonly review a statute’s text, context, statutory scheme, and canons of statutory construction when considering whether a statute is ambiguous. *See, e.g., Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239–42 (2004); *Zuni Pub. School Dist. No. 89 v. Dept. of Ed.*, 550 U.S. 81, 98–99 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990).

⁵⁶ 17 U.S.C. 115(d)(8)(B)(i).

⁵⁷ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

⁵⁸ *Date*, Black’s L. Dictionary (11th ed. 2019) (defining “due date” in the definition of “date”).

115(d)(4)(A)(i) provides that “[a] digital music provider shall report and pay royalties to the mechanical licensing collective under the blanket license on a monthly basis in accordance with . . . subsection (c)(2)(I), except that the monthly reporting *shall be due on the date* that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.”⁵⁹ Section (c)(2)(I), in turn, states that monthly “royalty payments . . . *shall include all royalties* for the month next preceding.”⁶⁰ Taken together, the plain and natural meaning of the statute is that “all royalties” for a given monthly reporting period are “due” no later than 45 days after the end of the monthly reporting period. Thus, any royalties received by the MLC for such reporting period after this “due date for payment” are late. They are “past due royalty payments” that are subject to such “late fees” as the CRJs may adopt.

The DLC argues that this construction of the statute yields an absurd result.⁶¹ While a statutory ambiguity can be found if clear statutory text would produce an absurd result,⁶² that is not the case here. Rather, the Office understands that the DLC’s concerns are really aimed at the potential effect of the CRJs’ regulations, not the statute itself.

The fact that the final amount due on the statutory due date may not be known to a DMP on that date is a product of the rate structure adopted by the CRJs, which involves calculating royalties using inputs that may not be finally determined at the time the royalty is due, necessitating the use of estimates and adjustments.⁶³

⁵⁹ 17 U.S.C. 115(d)(4)(A)(i) (emphasis added).

⁶⁰ *Id.* at 115(c)(2)(I) (emphasis added). The Office previously addressed the interaction between sections 115(c)(2)(I) and 115(d)(4)(A)(i), concluding that “both provisions must be read as referring to both reporting and payment.” 85 FR 22518, 22527.

⁶¹ DLC Reply Comments at 6.

⁶² *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 454 (1989) (quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989)) (“Where the literal reading of a statutory term would ‘compel an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.”).

⁶³ For example, one such input is the amount paid for the public performance of musical works. It is common for those public performance rates to be set on an interim basis, with final rates set later and applying retroactively. U.S. Copyright Office, *Copyright and the Music Marketplace* 41–42 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

To the extent Congress disapproved of this result, and instead intended the result advocated for by the DLC, Congress either would not have adopted the version of section 115(d)(8)(B)(i) that it did or it would have made other changes to the statute. A version of the CRJs' current rate structure has been in place since the *Phonorecords I* settlement,⁶⁴ which predated the MMA's enactment by nine years. Congress would have been aware of the CRJs' longstanding rate structure in passing the MMA, including with respect to the operation of estimates and adjustments, therefore the decision to enact section 115(d)(8)(B)(i) and the rest of the MMA against that backdrop must be understood as intentional.

This understanding is not incompatible with the MMA's direction, in section 115(d)(4)(A)(iv)(II), for the Office to adopt regulations regarding adjustments. First, while the MMA requires the Office to establish regulations regarding adjustments, it does not *require* the CRJs to set royalty rates and terms using inputs that are not final at the time the royalties are due. For example, the CRJs could have set a per-stream rate that did not use any such inputs.⁶⁵ Second, while DMPs who take advantage of the Office's estimate and adjustment regulations⁶⁶ may have to pay late fees under the CRJs' regulations for any underpayments, that has no bearing on whether the statutory text is ambiguous. As the MLC points out, the estimate and adjustment regulations adopted by the Office pursuant to that provision allow DMPs "to use estimates where appropriate without violating the law[,] . . . but not the ability to pay royalties later than the statutory due date."⁶⁷

⁶⁴ See 37 CFR 385.12(b)(1), (b)(2) (2009) (using both percentage of service revenue and royalties for the public performance of musical works as inputs to determine a DMPs' mechanical royalty rate); 74 FR 4510, 4531 (Jan. 26, 2009).

⁶⁵ A group representing copyright owners proposed "a unitary rate structure for all interactive streaming and limited downloads" in the *Phonorecords III* proceeding. *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 371 (D.C. Cir. 2020) (citing 84 FR 1918, 1924, 1930–1931 (Feb. 5, 2019)).

⁶⁶ It appears that not all DMPs use the adjustment provisions. MLC *Ex Parte* Letter at 4 (Dec. 21, 2022) (noting that "over half of the blanket licensees submitted annual reports of usage for 2021 *without* any concurrent adjustment").

⁶⁷ MLC Initial Comments at 8.

Further, as the NMPA noted, Congress knows how to exempt certain types of royalty payments from incurring late fees, as it did with the optional statutory limitation on liability for certain unlicensed uses prior to the license availability date.⁶⁸ Under the negative-implication canon of statutory construction, “[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning,”⁶⁹ *i.e.*, that textual difference is presumed to be intentional.

2. Distinguishing the *Phonorecords III Remand* Determination

Commenters appear to be in agreement that late fees do not apply to adjustments resulting from the change in rates and terms following the CRJs’ *Phonorecords III Remand* determination. For example, the MLC reasoned that where applicable royalty rates are changed, as with the *Phonorecords III Remand* proceeding, there would be no underpayment to trigger late fees, as the “rates were not in effect at those times.”⁷⁰ Similarly, the NMPA states that “where rates have not yet been determined, payment under the not-yet determined rates are not ‘due’” and “[payment] only become[s] ‘due’ when [the rates] are determined.”⁷¹ The DLC believes that it would be illogical and inconsistent for DMPs’ “true-up” payments made after the *Phonorecords III Remand* determination to be considered “late.”⁷²

The Office concurs that no late fees are owed in connection with any *Phonorecords III Remand* adjustments. Under section 115(c)(1)(C), for digital phonorecord deliveries (including uses under the blanket license), “the royalty payable shall be the royalty prescribed under subparagraphs (D) through (F), paragraph (2)(A),

⁶⁸ NMPA Initial Comments at 4 (citing 17 U.S.C. 115(d)(10)(B)(v)).

⁶⁹ *Bittner v. United States*, 598 U.S. 85, 94 (2023).

⁷⁰ MLC Initial Comments at 6 n.1.

⁷¹ NMPA Initial Comments at 8.

⁷² DLC Initial Comments at 6; DLC Reply Comments at 6 (“It is entirely unclear why that is true for interim section 115 rates but not true for interim rates or payments to PROs or labels.”).

and chapter 8.”⁷³ Therefore, what constitutes “all royalties”⁷⁴ that are “due” for any given monthly reporting period⁷⁵ are the royalties “prescribed” under the rates and terms that are in effect at that time.⁷⁶ By definition, the newer rates and terms, despite having retroactive effect, were not “the royalty prescribed” at the time the previous payment was due, and therefore did not constitute “the royalty payable” at that time.⁷⁷ Previously timely payments cannot subsequently be rendered late because of a retroactive change in the rates and terms adopted by the CRJs.

C. The CRJs’ Authority to Set Late Fees

As noted above, the Copyright Office concludes that the MMA’s provisions are not ambiguous or silent on the issue of when royalty payments are due; therefore our inquiry ends here. To the extent that interested parties have competing policy concerns about when or how late fees should be incurred, such concerns must be addressed either to Congress or the CRJs, as Congress delegated authority over the substance of late fees to the CRJs and not the Office.

While we offer no views regarding what late fee regulations should be adopted by the CRJs, if any, the Office does take the position that the CRJs have broad and flexible authority under section 803(c)(7) to adopt late fee terms, including by adopting differentiated or variable late fees (*e.g.*, where the amounts can change over time), if the CRJs see fit to do so and such regulations are otherwise consistent with title 17 and based on an appropriate record. Nothing in title 17 suggests that the CRJs cannot adopt different late fees (whether with respect to their amount(s) or how they operate) based on competing policy concerns.

Dated: August 23, 2023.

⁷³ 17 U.S.C. 115(c)(1)(C).

⁷⁴ *See id.* at 115(c)(2)(I).

⁷⁵ *See id.* at 115(d)(4)(A)(i).

⁷⁶ *See id.* at 115(c)(1)(C).

⁷⁷ *See id.*

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