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Copyright Office

37 CFR Part 210

[Docket No. 2022-5]

Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act

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

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a supplemental notice of proposed rulemaking to update its October 25, 2022 proposed rule regarding the applicability of the derivative works exception to termination rights under the Copyright Act to the new statutory mechanical blanket license established by the Music Modernization Act. This supplemental notice modifies the proposed rule and expands its scope in light of comments received in response to the previous notice. In addition to addressing the applicability of the derivative works exception, the supplemental proposed rule addresses other matters relevant to identifying the proper payee to whom the mechanical licensing collective must distribute royalties. Among other things, the Office proposes adopting regulations addressing the mechanical licensing collective's distribution of matched historical royalties and administration of ownership transfers, requests to designate alternative royalty payees, and related disputes. The Office invites public comments on the supplemental proposed rule.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written reply comments must be received no later than 11:59 p.m. Eastern

Time on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of governmental efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at *https://copyright.gov/rulemaking/mma-termination*. If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Copyright Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Office ("Office") issues this supplemental notice of proposed rulemaking ("SNPRM") subsequent to a notice of proposed rulemaking ("NPRM") published in the *Federal Register* on October 25, 2022, pursuant to the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA").[1] In the NPRM, the Office proposed regulations regarding the applicability of the derivative works exception ("Exception") to termination rights under the Copyright Act to the statutory mechanical blanket license established by the MMA ("blanket license").[2] This SNPRM assumes familiarity with the prior NPRM and the public comments received in response to the NPRM.[3]

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[1] 87 FR 64405 (Oct. 25, 2022).

[2] *Id.*

[3] The NPRM stemmed from a previous rulemaking proceeding, discussed in detail in the NPRM, that involved multiple rounds of public comments through a notification of inquiry, 84 FR 49966 (Sept. 24, 2019), a notice of proposed rulemaking, 85 FR 22518 (Apr. 22, 2020), and an *ex parte* communications process. Guidelines for *ex parte* communications, along with records of such

A. The Notice of Proposed Rulemaking

The Office commenced this proceeding in response to the adoption by he Mechanical Licensing Collective ("MLC") of a termination dispute policy that conflicted with prior guidance given by the Office and that embodied an erroneous application of the Exception.[4] As a result of the MLC's adoption of this policy, the Office concluded it was necessary to revisit the termination issue more directly and to squarely resolve the question of how termination law intersects with the blanket license.[5] The NPRM explained that the Office "seeks to provide clarity concerning the application of the Exception to the blanket license," as "[d]oing so would provide much needed business certainty to music publishers and songwriters" and "would enable the MLC to appropriately operationalize the distribution of post-termination royalties in accordance with existing law."[6] The NPRM contained a detailed discussion of the procedural background leading to this rulemaking,[7] the Office's regulatory authority,[8] and legal background about the Copyright Act's termination provisions and the Exception.[9]

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communications, including those referenced herein, are available at *https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html*. 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 NPRM are available at *https://copyright.gov/rulemaking/mma-termination/*. References to those public comments are by party name (abbreviated where appropriate), followed by "Initial Comments," "Reply Comments," or "*Ex Parte* Letter," as appropriate.

[4] 87 FR 64405, 64407. The Office disagrees with the MLC's suggestions to the contrary. *See, e.g.*, MLC Initial Comments at 2–3; MLC Reply Comments at 1–2. As explained more fully in the NPRM, the Office's ultimate conclusion in the prior proceeding was that "it seems reasonable for the MLC to act in accordance with letters of direction received from the relevant parties, or else hold applicable royalties pending direction or resolution of any dispute by the parties." 87 FR 64405, 64407 (quoting 85 FR 58114, 58132 (Sept. 17, 2020)).

[5] 87 FR 64405, 64407.

[6] *Id.* ("Moreover, without the uniformity in application that a regulatory approach brings, the Office is concerned that the MLC's ability to distribute post-termination royalties efficiently would be negatively impacted.").

[7] *Id.* at 64406–07.

[8] *Id.* at 64407–08.

[9] *Id.* at 64408–10.

The Office then analyzed the application of the Exception in the context of the blanket license and preliminarily concluded "that the MLC's termination dispute policy is inconsistent with the law."[10] It explained that "[w]hether or not the Exception applies to a [digital music provider's ("DMP's")] blanket license (and the Office concludes that the Exception does not), the statute entitles the current copyright owner to the royalties under the blanket license, whether pre- or post-termination."[11] This means that "the post-termination copyright owner (*i.e.*, the author, the author's heirs, or their successors, such as a subsequent publisher grantee) is due the post-termination royalties paid by the DMP to the MLC."[12]

Consequently, the Office proposed a rule to clarify the appropriate payee under the blanket license to whom the MLC must distribute royalties following a statutory termination.[13] Because the Office concluded that the MLC's termination dispute policy is contrary to law, it also proposed to require the MLC to immediately repeal its policy in full.[14] The Office further proposed to require the MLC to adjust any royalties distributed under the policy within 90 days to make copyright owners whole for any distributions the MLC made based on "an erroneous understanding and application of current law."[15]

After publication of the NPRM, the MLC said that it voluntarily "suspended its [termination dispute policy] pending the outcome of the [Office's] rulemaking proceeding" and "will hold all royalties for uses of musical works that are subject to statutory termination claims beginning with the October [2022] usage period, which

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[10] *Id.* at 64410–11.

[11] *Id.* at 64411.

[12] *Id.*

[13] *Id.* at 64411–12.

[14] *Id.* at 64412.

[15] *Id.*

would have been distributed in January 2023."[16] To the Office's knowledge, the MLC continues to hold such royalties at present.

B. The NPRM Comments

The Office received over 40 public comments in response to the NPRM. These comments reflect the views of hundreds of interested parties, including songwriters, music publishers and administrators, record labels, public interest groups, academics, and practitioners. Most commenters, including multiple music publishers and administrators, generally supported the proposed rule.[17] While some commenters raised concerns with certain aspects of the NPRM,[18] the National Music Publishers' Association ("NMPA") was the only commenter to oppose the proposed rule more broadly.[19]

NMPA explained that it "has serious concerns regarding (i) the impermissible retroactive effect of the NPRM, (ii) the statutory authority underlying the broad legal analysis contained in the NPRM that would appear to have effect beyond the limited issue of whether the Exception applies to the Blanket License, and (iii) whether the Proposed Rule may constitute an unconstitutional taking in violation of the Fifth

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[16] The MLC, *Policies*, *https://www.themlc.com/dispute-policy* (last visited Sept. 20, 2023).

[17] *See, e.g.*, Authors All. et al. Initial Comments at 1–3; BMG Rights Mgmt. Initial Comments at 1–2; BMG Rights Mgmt. Reply Comments at 1; ClearBox Rights Initial Comments at 2, 6–8; Fishman & Garcia Initial Comments at 1–4; Gates Reply Comments at 1; Howard Initial Comments at 1–2; Howard Reply Comments at 2–3; King, Holmes, Paterno & Soriano LLP Initial Comments at 1; Landmann Initial Comments at 1; Miller Initial Comments at 1; North Music Grp. Reply Comments at 2–3; NSAI Initial Comments at 3; Promopub Initial Comments at 1–2; Promopub Reply Comments at 1–2; Recording Academy Reply Comments at 2–3; Rights Recapture Initial Comments at 1; SGA et al. Initial Comments at 1–2, 5; SONA et al. Initial Comments at 2–3; SONA et al. Reply Comments at 3; Songwriters Reply Comments at 1; Wixen Music Publ'g Initial Comments at 1–2.

[18] *See, e.g.*, CMPA Initial Comments at 1–2 (requesting that the rule not affect previously distributed royalties); A2IM & RIAA Reply Comments at 1–2 (agreeing with parts of the Office's termination analysis, but requesting that the Office limit its analysis to those parts to ensure that the analysis and rule are strictly limited to the context of the blanket license); MPA Reply Comments at 2–5 (taking no position on the proposed rule, but expressing "significant concerns with portions of the NPRM supporting the proposed rule to the extent they could be read to limit the application of the [Exception] beyond the Section 115 blanket license").

[19] *See generally* NMPA Initial Comments; NMPA *Ex Parte* Letter (Feb. 6, 2023).

Amendment."[20] Notwithstanding these concerns, NMPA stated that it "supports what it believes to be the ultimate goal of the Proposed Rule: to provide that the post-termination copyright owner of a musical composition shall receive post-termination royalties under the Blanket License for any sound recordings created pre- or post-termination."[21]

Several commenters, including the MLC, sought additional guidance from the Office on various related issues not directly addressed by the NPRM. Examples include the following:

- Application of the Exception to other types of statutory mechanical licenses;[22]
- Application of the Exception to voluntary licenses;[23]
- Procedures for carrying out the proposed corrective royalty adjustment to remedy prior distributions by the MLC based on an erroneous understanding and application of the Exception.[24]
- Procedures concerning notice, documentation, timing, and other matters relating to the MLC's implementation of a termination notification;[25] and
- Procedures concerning termination disputes and related confidential information.[26]

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[20] NMPA Initial Comments at 2; *see also* NMPA *Ex Parte* Letter at 2 (Feb. 6, 2023).

[21] NMPA Initial Comments at 1; *see also* NMPA *Ex Parte* Letter at 2 (Feb. 6, 2023); CMPA Initial Comments at 1 ("CMPA concurs with what it believes the USCO's intent is, under the Proposed Rule.").

[22] *See, e.g.*, MLC Initial Comments at 6; MLC Reply Comments at 2; ClearBox Rights Initial Comments at 6; ClearBox Rights Reply Comments at 2; Howard Initial Comments at 5; King, Holmes, Paterno & Soriano LLP Initial Comments.

[23] *See, e.g.*, MLC Initial Comments at 4–6; MLC Reply Comments at 2; ClearBox Rights Initial Comments at 6; ClearBox Rights Reply Comments at 2; Howard Initial Comments at 5; Rights Recapture Initial Comments.

[24] *See, e.g.*, MLC Initial Comments at 6–8; ClearBox Rights Reply Comments at 3–4; ClearBox Rights *Ex Parte* Letter at 2–4 (June 28, 2023); Howard Initial Comments at 6; Promopub Initial Comments at 2; Promopub Reply Comments at 3; North Music Grp. Reply Comments at 2.

[25] *See, e.g.*, MLC Initial Comments at 10–11; ClearBox Rights Initial Comments at 8; ClearBox Rights Reply Comments at 5–6; Howard Initial Comments at 3–5; Howard Reply Comments at 2–3; SGA et al. Initial Comments at 2, 6–8.

[26] *See, e.g.*, MLC Initial Comments at 11–14; ClearBox Rights Reply Comments at 6.

The MLC emphasized the importance of the Office providing guidance on these topics, explaining that it is "essential to processing royalties in connection with statutory termination claims" and "would provide important guidance to parties involved in termination claims."[27]

II. Supplemental Proposed Rule

While the Office is still considering the comments submitted in response to the NPRM, in light of the requests for further guidance and other comments received, the Office is issuing this SNPRM modifying the proposed rule, providing additional detail, and expanding its scope. The Office seeks public comments on the revised proposal and will consider all comments received in response to both the NPRM and SNPRM when issuing its final rule.

As discussed below, in addition to the Exception, the supplemental proposed rule addresses other matters germane to identifying the proper payee to whom the MLC must distribute royalties. These matters include issues related to the distribution of matched historical royalties, the MLC's administration of terminations and related disputes, other types of ownership transfers, and requests to designate alternative royalty payees. While commenters' requests for additional guidance largely pertain to termination-related issues, the requests and other comments lead the Office to believe that a more comprehensive set of regulations would be beneficial to the MLC, publishers, songwriters, and the wider music industry. The accurate distribution of royalties is a core objective of the MLC. Adopting the supplemental proposed rule would establish standards and settle expectations for all parties with respect to such distributions. This SNPRM is, thus, a natural extension of the NPRM and continues to "ultimately reflect[]

[27] MLC Initial Comments at 9–10; *see also* MLC Reply Comments at 2.

the Office's oversight and governance of the MLC's reporting and payment obligations to copyright owners."[28]

The Office begins with two introductory notes about some of the terminology used below. First, under the MMA, the MLC must hold, for a designated minimum time period, royalties associated with reported uses of sound recordings embodying musical works for which the copyright owners of such musical works (or shares of such works) have not been identified or located.[29] Such works (or shares) are "unmatched."[30] At the end of the statutory minimum holding period, accrued royalties for musical works (and shares) that remain unmatched become eligible for distribution by relative market share to copyright owners identified in the MLC's records, at which point they become "unclaimed royalties."[31]

Second, the MMA contains an optional limitation on liability for unlicensed uses of musical works made by DMPs prior to January 1, 2021 (the "license availability date").[32] To be eligible for this limitation on liability, DMPs had to engage in good-faith, commercially reasonable efforts to identify, locate, and pay musical work copyright owners for covered uses of their works and had to accrue and hold royalties for uses of any unmatched musical works.[33] If a musical work remained unmatched as of January 1,

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[28] *See* 87 FR 64405, 64408.

[29] 17 U.S.C. 115(d)(3)(H)(i).

[30] *Id.* at 115(e)(35).

[31] *Id.* at 115(d)(3)(J)(i), (e)(34). The MLC has publicly confirmed that it does not have "any such [market-share] distribution planned in the coming year," as it "is focused on matching uses and identified rightsholders, and . . . has not yet turned to the evaluation of what remaining royalties might be appropriate for a market share distribution, let alone begun the process to effectuate such a distribution, which will occur with significant public notice and transparency as Congress intended." *Five Years Later – The Music Modernization Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, Responses to Questions for the Record, 118 Cong. 2–3 (2023) (statement of Kris Ahrend, CEO, Mechanical Licensing Collective), *https://docs.house.gov/meetings/JU/JU03/20230627/116155/HHRG-118-JU03-20230627-SD013.pdf*.

[32] 17 U.S.C. 115(d)(10)(A).

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

2021, the DMP had to transfer all accrued royalties to the MLC along with a cumulative statement of account.[34] Such royalties are "historical unmatched royalties." When the MLC matches the musical work (or share) to which historical unmatched royalties are attributable, they become "matched historical royalties."

A. Rulemaking Authority

The Office relies on the same authority for the supplemental proposed rule as it did for the original proposed rule, which is discussed in detail in the NPRM.[35] The Office is continuing to evaluate comments submitted on this topic[36] and welcomes further comments on its authority to adopt the supplemental proposed rule, including with respect to the proposed corrective royalty adjustment discussed in Part II.H below.

B. Termination and the Exception

1. Analysis Regarding Blanket Licenses

While many commenters agree with the Office's legal analysis in the NPRM regarding the application of the Exception to blanket licenses,[37] other commenters raise some concerns.[38] The Office is continuing to evaluate these comments, but for purposes of this SNPRM, the Office continues to propose a rule that relies on the preliminary analysis and conclusions regarding the Exception, as detailed in the NPRM. Therefore, the Office does not propose to revise the portion of the proposed rule that would make clear (1) that the Exception is inapplicable to blanket licenses, and (2) that the Exception

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[34] *Id.*

[35] 87 FR 64405, 64407–08.

[36] *See* NMPA Initial Comments at 4–10, 12–13; NMPA *Ex Parte* Letter at 2–4 (Feb. 6, 2023).

[37] *See, e.g.*, A2IM & RIAA Reply Comments at 2; Authors All. et al. Initial Comments at 2–3; BMG Rights Mgmt. Initial Comments at 2; ClearBox Rights Initial Comments at 6–7; Fishman & Garcia Initial Comments at 1–4; King, Holmes, Paterno & Soriano LLP Initial Comments at 1; North Music Grp. Reply Comments at 2; Recording Academy Reply Comments at 2; SGA et al. Initial Comments at 2, 5; SONA et al. Initial Comments at 2–3.

[38] *See* NMPA Initial Comments at 2–3; NMPA *Ex Parte* Letter at 2–3 (Feb. 6, 2023); MPA Reply Comments at 2–5; *see also* A2IM & RIAA Reply Comments at 2; Fishman & Garcia Initial Comments at 4.

does not affect copyright ownership.[39] The Office, however, proposes to further clarify that because the Exception is inapplicable to blanket licenses, the Exception does not affect the identity of the applicable royalty payee either.[40] The Office proposes this clarification in light of the distinction that can exist between the copyright owner and the royalty payee.[41]

2. Requests for Additional Guidance

Various commenters, including the MLC, request guidance from the Office regarding the application of the Exception to voluntary licenses[42] and other types of statutory mechanical licenses beyond the blanket license,[43] which the Office did not directly address in the NPRM. With respect to non-blanket statutory mechanical licenses, the MLC says that guidance is necessary to enable it to accurately match works (and shares) associated with historical unmatched royalties.[44] Regarding voluntary licenses, the MLC explains that guidance is necessary because it must match and identify ownership for works used under voluntary licenses so that royalties for uses of such

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[39] The Office does not mean to suggest that someone could theoretically be construed as the copyright owner based on the Exception. *See* Howard Initial Comments at 5. Rather, the point of the proposed language is to make that impossibility clear.

[40] The Office makes this proposal based on Linda Edell Howard's suggestion to change the proposed rule to refer to "any claim to any rights or revenue." *Id.*

[41] Termination causes copyright ownership to revert to the author (or heirs). After termination, the Exception only permits a pre-termination derivative work to "continue to be utilized under the terms of the [terminated] grant." 17 U.S.C. 203(b)(1), 304(c)(6)(A); *see* H.R. Rep. No. 94-1476, at 127 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5742–43 (explaining that "termination means that ownership of the rights covered by the terminated grant reverts" to the author or heirs, and describing the Exception as a "limitation on the rights of a *copyright owner* under a *terminated grant*") (emphasis added); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 173 (1985) (stating that "[t]he purpose of the Exception was to preserve the right of the owner of a derivative work to exploit it, *notwithstanding the reversion*") (emphasis added) (internal citations and quotation marks omitted).

[42] *See, e.g.*, MLC Initial Comments at 4–6; MLC Reply Comments at 2; ClearBox Rights Initial Comments at 6; ClearBox Rights Reply Comments at 2; Howard Initial Comments at 5; Rights Recapture Initial Comments at 1.

[43] *See, e.g.*, MLC Initial Comments at 6; MLC Reply Comments at 2; ClearBox Rights Initial Comments at 6; ClearBox Rights Reply Comments at 2; Howard Initial Comments at 5; King, Holmes, Paterno & Soriano LLP Initial Comments at 1.

[44] MLC Initial Comments at 6.

works can be deducted from DMP blanket license royalties.[45] The Office notes that the MLC must also do the same for uses under individual download licenses.[46]

The Office agrees that further official guidance on these issues is required. While some commenters express concern with the Office opining on issues beyond the blanket license,[47] the Office is persuaded that doing so is necessary to enable the MLC to accurately carry out its core statutory function to match and distribute royalties to copyright owners.

i. Matched historical royalties[48]

The Office is inclined to conclude that the Exception does not apply to any matched historical royalties. Historical unmatched royalties were paid to the MLC by DMPs as one of the requirements for the statutory limitation on liability for pre-2021 unlicensed uses and not pursuant to the terms of any pre-2021 voluntary or statutory license.[49] Instead, where a DMP could not identify and locate an applicable copyright owner, the statute directed the DMP to accrue and hold royalties at the statutory license rate and ultimately transfer such accrued royalties to the MLC if they remained unmatched as of January 1, 2021.[50] Likewise, the MLC's distribution of historical unmatched royalties is governed by the statute. Historical unmatched royalties that remain unmatched long enough to become unclaimed royalties are eligible to be

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[45] *Id.* at 4–6 (citing 17 U.S.C. 115(d)(3)(G)).

[46] 17 U.S.C. 115(d)(3)(G)(i)(I)(bb). An "individual download license" is "a compulsory license obtained by a record company to make and distribute, or authorize the making and distribution of, permanent downloads embodying a specific individual musical work." *Id.* at 115(e)(12).

[47] *See* A2IM & RIAA Reply Comments at 2; MPA Reply Comments at 2–5; NMPA *Ex Parte* Letter at 2–3 (Feb. 6, 2023).

[48] As discussed below in Parts II.D and E, the MLC's market-share-based distributions of unclaimed royalties, including historical unmatched royalties that may become unclaimed royalties, are beyond the scope of this rulemaking.

[49] 17 U.S.C. 115(d)(10); 37 CFR 210.10; *see generally* 86 FR 2176 (Jan. 11, 2021).

[50] 17 U.S.C. 115(d)(10)(B)(iv); *see* 37 CFR 210.10.

distributed by relative market share,[51] and historical unmatched royalties that become matched historical royalties are to be distributed to the "copyright owner."[52]

Terms of any pre-2021 license, including as those terms might otherwise apply through the Exception, appear to have no bearing on how the MLC must distribute matched historical royalties.[53] This is because the accrual and transfer of historical unmatched royalties to the MLC and distribution of any such royalties by the MLC are governed by statute and the Office's regulations. Even if the Exception applied to a pre-2021 license, it would not affect the statutory directive that the MLC must distribute matched historical royalties to the "copyright owner."[54] The Office tentatively believes that, based on these facts, the Exception does not apply to matched historical royalties.

ii. Pre-2021 statutory mechanical licenses

Under the MMA's provisions governing the transition to the new blanket licensing regime, most pre-2021 statutory mechanical licenses do not appear to have continued in effect after the license availability date.[55] Section 115(d)(9)(A) provides that "[o]n the license availability date, a blanket license shall, without any interruption in license authority enjoyed by such [DMP], be automatically substituted for and supersede any existing compulsory license previously obtained under [section 115] by the

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[51] 17 U.S.C. 115(d)(3)(J).

[52] *Id.* at 115(d)(3)(I)(ii).

[53] To be clear, as the Office previously explained, a pre-2021 agreement can, however, affect the calculation of the accrued royalties required to be transferred to the MLC to be eligible for the limitation on liability. *See* 86 FR 2176, 2195 ("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."); *see also* 37 CFR 210.10(c)(5)(i). The Office further notes that it expresses no opinion at this time as to whether the Exception may have any bearing on the calculation of relative market share for distributions of historical unmatched royalties that become unclaimed royalties. The distribution of unclaimed royalties is beyond the scope of this proceeding.

[54] 17 U.S.C. 115(d)(3)(I)(ii); *see id.* at 203(b)(1), 304(c)(6)(A). This result would not necessarily bar a party from seeking to recover unpaid royalties, at the statutory rate, for pre-2021 unlicensed uses from a relevant DMP, even if the DMP is shielded by the limitation on liability. *Id.* at 115(d)(10)(A).

[55] *Id.* at 115(d)(9)(A)–(B).

[DMP]."[56] That provision then has an exception, where the substitution does not apply "to any authority obtained from a record company pursuant to a compulsory license to make and distribute permanent downloads."[57] Section 115(d)(9)(B) adds that, except as provided in section 115(d)(9)(A), "on and after the license availability date, licenses other than individual download licenses obtained under [section 115] for covered activities prior to the license availability date shall no longer continue in effect."[58] Read together, with respect to covered activities, it appears that only record companies' pre-2021 individual download licenses and the authority obtained from them by DMPs survived the license availability date.[59] Because all other pre-2021 statutory mechanical licenses to engage in covered activities are no longer in effect pursuant to their own terms (*i.e.*, the statutory text), any application the Exception may or may not have had while they were in force seems to have no bearing on the MLC's distribution of royalties for post-2021 usage.[60] The application of the Exception to both pre- and post-2021 individual download licenses is discussed in the next section.

iii. Individual download licenses

The Office tentatively believes that its legal analysis in the NPRM for blanket licenses applies similarly to individual download licenses. First, as a type of statutory mechanical license, the analysis contained in Parts V.A.1 (discussing that the blanket

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[56] *Id.* at 115(d)(9)(A).

[57] *Id.*

[58] *Id.* at 115(d)(9)(B). "Covered activity" means "the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under [section 115]." *Id.* at 115(e)(7).

[59] *See* H.R. Rep. No. 115-651, at 10 (2018) ("Because the new blanket license replaces the previous work-by-work compulsory license, the compulsory licenses obtained under notices of intent served on musical work copyright owners prior to the availability of the blanket license will no longer be valid."); S. Rep. No. 115-339, at 10 (2018) (same); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees 8 (2018) ("Conf. Rep."), *https://www.copyright.gov/legislation/mma_conference_report.pdf* (same).

[60] *See* 17 U.S.C. 203(b)(1), 304(c)(6)(A).

license cannot be terminated) and V.A.3 (discussing that applying the Exception to the blanket license would lead to an extreme result) of the NPRM fully applies to individual download licenses for the same reasons as for blanket licenses.[61] Second, the analysis under Part V.A.2 of the NPRM (discussing that derivative works generally are not prepared pursuant to the blanket license) also applies to the extent no sound recording derivative is actually prepared pursuant to the individual download license.[62] In such cases, for the same reasons discussed in Part V.A.2 of the NPRM, the individual download license "is not part of any preserved grants that make the Exception applicable."[63] If sound recording derivatives are prepared pursuant to an individual download license, then the Exception still would not apply.[64] As explained in Part V.A.1 of the NPRM, a self-executing statutory license, like an individual download license, cannot be terminated in the first place.[65] Third, the analysis contained in Part V.B of the NPRM is essentially the same for individual download licenses as for blanket licenses.[66] The only difference is that the relevant terms of the individual download license providing for payment to the "copyright owner" is in a different location from the relevant provisions about blanket licenses.[67]

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[61] *See* 87 FR 64405, 64410–11.

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.* at 64411.

[67] Under the statute, a notice must be served on the "copyright owner" to obtain an individual download license and payments must be made in accordance with section 115(c)(2)(I). 17 U.S.C. 115(b)(2)(A), (3). Under section 115(c)(2)(I), royalties must be paid in accordance with the Office's regulations. *Id.* at 115(c)(2)(I). Under the Office's regulations, individual download licenses are subject to the same payment regulations as other non-blanket statutory mechanical licenses. 37 CFR 210.11. Under those regulations, payment is to be made to the "copyright owner." *Id.* at 210.6(g).

Based on the foregoing, the supplemental proposed rule provides that the Exception would not apply to individual download licenses for purposes of the MLC's efforts under section 115(d)(3)(G)(i)(I)(bb) and 37 CFR 210.27(g)(2)(ii).

iv. Voluntary licenses

The application of the Exception to voluntary licenses requires consideration of additional questions in light of the variety of licenses that may exist. Because DMP voluntary licenses are not statutory mechanical licenses, parts of the Office's analysis in the NPRM specific to the nature of the blanket license as self-executing and to the particular text of section 115 (*i.e.*, Parts V.A.1, V.A.3, and V.B) do not apply to them.[68] The analysis contained in Part V.A.2 of the NPRM, however, would generally apply "where no sound recording derivative is prepared pursuant to a DMP's [voluntary] license."[69] In many cases, for the reasons discussed in the NPRM, "that [voluntary] license is not part of any preserved grants that make the Exception applicable."[70]

There may, however, be some situations where the result is different, such as where a DMP's voluntary license is a "pass-through" license.[71] In such cases, even if no

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[68] *See* 87 FR 64405, 64410–11.

[69] *See id.* The Office emphasizes that, as noted above, even though it is relying on the preliminary analysis and conclusions detailed in the NPRM for purposes of this SNPRM, it is continuing to evaluate the comments concerning its legal analysis of the Exception. The Office welcomes further comments and legal discussion and, in particular, invites comments on the jurisprudence of the Second Circuit, including the decisions in *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995) and *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17 (2d Cir. 1998).

[70] *See id.* (referring generically to any DMP "musical work licenses" throughout the analysis).

[71] When the copyright owner of a musical work authorizes a record company (or someone else) to prepare a sound recording derivative of the musical work, the musical work copyright owner can also provide the record company with authority to engage in what is often referred to as "pass-through" licensing. *See* U.S. Copyright Office, *Copyright and the Music Marketplace* 131–32 (2015), *https://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf* (discussing pass-through licensing and describing it as "mimic[king] the traditional physical model, where record labels ship product to stores and report sales back to publishers"); 86 FR 12822 (Mar. 5, 2021) (discussing prior rulemaking activity involving pass-through licenses). Such authority would allow the record company, to the extent permitted by its license with the musical work copyright owner, to license the rights it possesses in the underlying musical work to a third party, *e.g.*, a DMP, as a part of utilizing the sound recording embodying that musical work. Thus, a DMP could potentially enter into a voluntary license with the record company instead of the musical work copyright owner for uses of the musical work. This is

sound recording derivative is prepared pursuant to the DMP's voluntary license, the pre-termination copyright owner may still be entitled to post-termination royalties for uses made pursuant to such a license. The contractual payment terms between a DMP and a record company pursuant to a voluntary pass-through license could be preserved by the Exception along with other terms that are part of the same direct chain of successive grants providing authority to utilize the relevant sound recording derivatives (*e.g.*, those among the songwriter, music publisher, and record company).[72]

Additionally, and in contrast to blanket and other statutory mechanical licenses that cannot be terminated, if sound recording derivatives are in fact prepared by a DMP pursuant to a voluntary license before its termination, the Exception might apply to the extent of the voluntary license's terms. The Exception could allow the DMP's sound recording derivatives to "continue to be utilized under the terms of the [voluntary license] after its termination."[73]

In sum, unlike statutory mechanical licenses, there are an innumerable variety of voluntary licenses and related underlying agreements that either currently exist or that could exist in the future. Consequently, the Office is inclined to conclude that it would not be prudent to attempt to craft a rule trying to account for how the Exception may or may not apply in every possible situation. Even if the Office could craft such a rule, it would be challenging, if not impossible, for the MLC to evaluate each and every voluntary license to determine the Exception's applicability based on whatever regulatory criteria the Office might adopt. Accordingly, the Office believes that the MLC should not

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similar to how individual download licenses operate, whereby "record labels [can] obtain and pass through [section 115] mechanical license rights [to DMPs] for individual permanent downloads." H.R. Rep. No. 115-651 at 4; S. Rep. No. 115-339 at 4; Conf. Rep. at 3; *see* 17 U.S.C. 115(b)(3).

[72] *See* 17 U.S.C. 203(b)(1), 304(c)(6)(A); *Mills Music, Inc.*, 469 U.S. at 163–69.

[73] *See* 17 U.S.C. 203(b)(1), 304(c)(6)(A).

exercise independent judgment regarding the application of the Exception to a voluntary license or its underlying grant of authority.[74]

Instead of tasking the MLC with making such an evaluation, the Office proposes that the MLC only act as directed pursuant to either: (1) a notice from the copyright owner entitled to receive royalties from the MLC under the Office's regulations that designates an alternative royalty payee (such notices are discussed in Part II.F.1.iv below); or (2) the resolution of a dispute with respect to the applicability of the Exception to the relevant voluntary license or its underlying grant of authority. Under the supplemental proposed rule, the MLC's implementation of the Exception through its efforts under section 115(d)(3)(G)(i)(I)(bb) and 37 CFR 210.27(g)(2)(ii), to confirm uses of musical works subject to voluntary licenses and deduct corresponding amounts from royalties that would otherwise be due under the blanket license, would therefore depend on how the MLC is directed to act. In the absence of any such direction, the Office proposes that the Exception would not apply to the MLC's aforementioned efforts.

The first type of direction the MLC may receive, from the copyright owner, is intended to accommodate situations where that owner may have contractually agreed to an alternative payment arrangement such that the MLC should act as if the Exception applies. The second type of direction the MLC may receive, pursuant to the resolution of a dispute, follows legal precedent holding that the pre-termination copyright owner has the burden of proving that the Exception applies.[75] This approach would place the burden

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[74] *See* The MLC, *Dispute Policy: Musical Work Ownership*, sec. 1.2 (Feb. 2021) ("The Collective does not judge or resolve Conflicts or Disputes, or participate in the substantive resolution of Conflicts or Disputes.").

[75] *Woods*, 60 F.3d at 993–94; *see Mills Music, Inc. v. Snyder*, 469 U.S. at 188 & n.20 (White, J., dissenting) ("In attempting to claim for itself the benefits of the [Exception], [the pre-termination copyright owner] bears the burden of proof."); *see also* Norman J. Singer & Shambie Singer, *Sutherland Statutes & Statutory Construction* sec. 47.11 (7th ed. 2014 & Supp. 2022) (explaining that "all courts do agree that those who claim the benefit of an exception have the burden of proving that they come within the limited class for whose benefit the exception was established," and collecting cases).

on the pre-termination copyright owner to initiate a dispute regarding the application of the Exception. As discussed below, after initiating a dispute, the MLC would hold relevant royalties and interest pending its resolution. If the resolution of the dispute—whether through settlement or adjudication—requires the MLC to apply the Exception, then the MLC would be required to act as directed (see Part II.G.4 below discussing the resolution of disputes).

C. The Copyright Owner at the Time of the Use Versus the Copyright Owner at the Time of the Payment

To codify its preliminary conclusion that the statute entitles the "current copyright owner" to the royalties under the blanket license, the Office proposed in the NPRM that the copyright owner of the musical work as of the end of the monthly reporting period is the one who is entitled to the royalties and any other related amounts (*e.g.*, interest), including any subsequent adjustments, for the uses of the work during that period.[76] The NPRM explained the Office's reasoning for its proposal and sought comments on it, including whether some other point in time might be appropriate.[77] The Office refers to the approach proposed in the NPRM as distributing royalties to "the owner at the time of the use."

Commenters largely agree with the proposed approach.[78] NMPA and the Church Music Publishers Association ("CMPA") propose a different approach. Instead of distributing royalties to the owner at the time of the use, they suggest that royalties should be distributed to the copyright owner as of the date of the MLC's relevant distribution—

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[76] 87 FR 64405, 64411–12. The Office further explained that by "uses," the Office means the covered activities engaged in by DMPs under blanket licenses as reported to the MLC. *Id.* at 64412.

[77] *Id.* at 64412 (citing to sections 115(c)(1)(C) and 501(b)).

[78] *See, e.g.*, ClearBox Rights Initial Comments at 8 ("Attempting to identify, calculate and pay royalties by a specific day of the month in which the musical work was streamed based on the actual termination date would be administratively cumbersome and ripe for disputes."); Howard Initial Comments at 3; King, Holmes, Paterno & Soriano LLP Initial Comments at 1; Miller Initial Comments at 1; NSAI Initial Comments at 3; SGA et al. Initial Comments at 2, 5.

regardless of when the related use occurred.[79] The Office refers to this approach as distributing royalties to "the owner at the time of the payment." NMPA and CMPA state that this approach is better for terminating songwriters because they would be the owner at the time of the payment for any post-termination adjustments to pre-termination periods.[80] NMPA and CMPA refer to distributing royalties to the owner at the time of the payment as "industry practice,"[81] though NMPA later commented that "under current industry practice, once an ownership transfer occurs, the party receiving subsequent adjustment payments for usage of a musical work that occurred prior to the transfer is typically handled pursuant to the agreement between the previous owner and the new owner of the work."[82] The MLC adds that, "as is standard in the industry, royalties from general reprocessing are normally paid to the current copyright owner, regardless of the usage month at issue."[83]

Regardless of whatever the industry norm may be under voluntary agreements, the Office remains inclined to believe that the owner at the time of the use is the more appropriate payee under the blanket license, absent an agreement to the contrary. While the right to royalties can be assigned via contract independently of ownership in the copyright,[84] that has no bearing on who the proper payee is where no such agreement exists. In response to the claim that distributing royalties to the owner at the time of the payment benefits terminating songwriters, the Office notes that it is not seeking to adopt

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[79] NMPA Initial Comments at 5–6; CMPA Initial Comments at 2.

[80] NMPA Initial Comments at 6; CMPA Initial Comments at 2.

[81] NMPA Initial Comments at 6 (explaining that "any adjustments or other payments made after an ownership transfer are paid to the *new* owner of the composition, including for usage that occurred prior to the transfer"); CMPA Initial Comments at 2.

[82] NMPA *Ex Parte* Letter at 3 (Feb. 6, 2023); *see also id.* at 4 ("NMPA's draft legislation would have required the copyright owner at the time of the usage to be paid for subsequent adjustments.").

[83] MLC Initial Comments at 9 n.9.

[84] *See, e.g.*, William F. Patry, 6 Patry on Copyright, sec. 21:19 (2023) ("An agreement to share royalties, or even assigning all rights to royalties is not a 'transfer of copyright'; instead, it is merely a right to proceeds flowing from exploitation of an exclusive right.").

a rule that is limited to the termination context. The Office is proposing a rule to govern all MLC distributions under the blanket license, including in contexts where ownership may be transferred by means other than statutory termination.[85]

While the statute does not explicitly address whether the proper payee is the owner at the time of the use or the owner at the time of the payment, various statutory provisions support the Office's view. Under section 115(c)(1)(C), the payable royalties under the blanket license are for "every digital phonorecord delivery of a musical work made under [the blanket] license."[86] Thus, where the statute refers to distributing royalties to the "copyright owner," it most logically means the copyright owner at the time that the applicable digital phonorecord delivery is made.[87] This understanding is supported by sections 115(d)(4)(E)(ii)(II) and 501(b). Under section 115(d)(4)(E)(ii)(II), where a DMP's blanket license is terminated by the MLC, "[s]uch termination renders the making of all digital phonorecord deliveries of all musical works (and shares thereof) covered by the blanket license for which the royalty . . . has not been paid actionable as acts of infringement under section 501."[88] Section 501(b) provides that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it."[89] Read together, it appears that, absent an agreement to the contrary,[90] the

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[85] *See* ClearBox Rights *Ex Parte* Letter at 4 (June 28, 2023) (stating that "the same rules should apply for songs which have ownership transferred in methods other than through terminations" and that "if a song is sold from one person to another, the person who owns the work at the end of the reporting period should be entitled to the royalties").

[86] 17 U.S.C. 115(c)(1)(C).

[87] *See, e.g.*, *id.* at 115(d)(3)(G)(i)(I)–(III), (d)(3)(I).

[88] *Id.* at 115(d)(4)(E)(ii)(II).

[89] *Id.* at 501(b).

[90] Courts have held that a "'copyright owner can assign its copyright but, if the accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them.' . . . In the event that accrued claims are not expressly included in the assignment, 'the assignor retains the right to bring actions accruing during its ownership of the right, even if the actions are brought subsequent to the assignment.'" *John Wiley & Sons, Inc. v. DRK Photo*, 882

copyright owner who can sue a DMP for infringement due to non-payment of royalties under the blanket license is the copyright owner at the time the infringement was committed—*i.e.*, at the time of the use. It, therefore, seems reasonable to the Office for that owner to be the one to whom such royalties are paid by the MLC.[91]

The Office's conclusion that the owner at the time of the use is the more appropriate payee under the statutory mechanical license is not a new one. It reached the same conclusion under the pre-MMA version of the statute almost a decade ago.[92] There, the Office determined that while "[t]he transactions transferring copyright ownership may provide for a different result as a matter of private contract," "absent such an arrangement, any underpayment or overpayment stemming from the reconciliation of final performance royalty payments may properly be attributable to the copyright owner at the time of the relevant use of the statutory license."[93]

With respect to private agreements, the Office is inclined to agree with NMPA that it is important "to allow parties to agree by contract to a different payment arrangement and provide letters of direction to the MLC pursuant to those agreements."[94] Therefore, the supplemental proposed rule would only establish the owner at the time of the use as the *default* payee—*i.e.*, the proper payee to whom the MLC must distribute

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F.3d 394, 404 (2d Cir. 2018) (quoting *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991)); *see also* NMPA *Ex Parte* Letter at 5 (Feb. 6, 2023) (explaining that "who has the right to sue for infringement for activity occurring prior to the ownership change" would "be addressed by private contract").

[91] The Office declines to propose the changes suggested by ClearBox Rights to (1) omit the word "monthly" before "reporting period" in case DMPs report semi-monthly, and (2) to clarify that the relevant reporting period is the "period of the [DMP's] actual activity, and not the . . . period in which the MLC received and/or distributed the royalties." ClearBox Rights *Ex Parte* Letter at 4–5 (June 28, 2023). Regarding the first suggestion, the statute does not contemplate semi-monthly reporting. 17 U.S.C. 115(c)(2)(I), (d)(4)(A)(i). On the second suggestion, the Office believes the supplemental proposed rule is sufficiently clear, as it refers to the period "in which such musical work is used."

[92] 79 FR 56190, 56193 (Sept. 18, 2014).

[93] 79 FR 56190, 56193.

[94] NMPA *Ex Parte* Letter at 4. (Feb. 6, 2023).

royalties and any other related amounts under the blanket license in the absence of an agreement to the contrary. As discussed below in Part II.F, the supplemental proposed rule is designed to accommodate and give effect to contractual payment arrangements that deviate from this default rule.

D. Unclaimed Royalties

Commenters raise various questions about the MLC's distribution of unclaimed royalties.[95] With respect to the market-share-based distributions of unclaimed royalties, the Office proposes to clarify that the reporting and payment regulations in § 210.29 do not apply, as that section governs MLC distributions of royalties for *matched* works.[96] Beyond this clarification, the Office views the market-share-based distributions of unclaimed royalties as beyond the scope of this proceeding.

E. Matched Historical Royalties

Similarly, commenters raise questions about the proposed rule and matched historical royalties.[97] Here, the Office proposes to clarify that § 210.29 *does* apply and the MLC must report and distribute matched historical royalties in the same manner and subject to the same requirements that apply to the reporting and distribution of blanket license royalties. To avoid any confusion, the Office proposes to further clarify that matched historical royalties should be treated as accrued royalties distributable under § 210.29(b)(1)(ii). They would need to be included in applicable royalty statements and separately identified and broken out from blanket license royalties so copyright owners can easily ascertain the nature and source of the payment made to them by the MLC. The Office proposes this approach because, at least based on the current record, it generally

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[95] *See, e.g.*, ClearBox Rights Reply Comments at 4–5; ClearBox Rights *Ex Parte* Letter at 5 (June 28, 2023); NMPA Initial Comments at 6 n.10; North Music Grp. Reply Comments at 2; McAnally & North *Ex Parte* Letter at 6–7 (Mar. 14, 2023).

[96] With this clarification, the supplemental proposed rule removes as redundant the reference to section 115(d)(3)(J) proposed in § 210.29(b)(4)(i) of the NPRM.

[97] *See, e.g.*, NMPA *Ex Parte* Letter at 4 (Feb. 6, 2023); CMPA Initial Comments at 2.

sees no reason to treat the reporting and distributing of matched historical royalties and blanket license royalties differently.

This would include the payee proposal discussed in Part II.C above, whereby the MLC would distribute royalties to the copyright owner at the time of the use, as opposed to the owner at the time of the payment. Despite this proposal, the Office is inclined to agree with NMPA that, given the age of some of the historical usage, there likely will be greater difficulty in identifying and locating historical copyright owners, and that requiring the MLC to pay the owner at the time of the use "may result in lower match rates and lower payouts of historic unmatched royalties, even where the current copyright owner is known, because the MLC may have possibly incomplete or unreliable historical ownership data."[98] The Office also recognizes Congress's clear interest in generally "reduc[ing] the incidence of unclaimed royalties."[99] Therefore, it seeks comments regarding whether it should consider drawing a distinction between matched historical royalties and blanket license royalties when it comes to the royalty payee. For example, the MLC could be permitted to distribute matched historical royalties to the copyright owner at the time of the payment when the owner at the time of the use cannot be located and identified. The Office further seeks comments on whether it has the authority to adopt such a distinction or any other approach commenters may wish to propose. For example, would it be appropriate to consider works matched to the owner at the time of the payment, rather than the owner at the time of the use, as being "matched" within the meaning of the statute, or does the statute require that such works be considered "unmatched" and subject to eventual market-share-based distributions?

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[98] *See* NMPA *Ex Parte* Letter at 4 (Feb. 6, 2023).

[99] *See* Pub. L. No. 115-264, tit. I, sec. 102(f)(1), 132 Stat. at 3722; 17 U.S.C. 115(d)(3)(H)(i).

F. Ownership Transfers and Other Changes to the Royalty Payee

Several commenters, including the MLC, seek additional guidance from the Office on procedures concerning notice, documentation, timing, and other matters relating to the MLC's implementation of a termination notification.[100] Having considered these comments, the Office agrees that further guidance would be helpful to stakeholders. Specifically, the Office proposes to adopt regulations governing the MLC's administration of all transfers of copyright ownership and other changes to the royalty payee entitled to distributions from the MLC. The Office believes such a rule will help establish standards and settle expectations for all parties with respect to such distributions.

Under the supplemental proposed rule, current § 210.30—addressing a temporary exception to certain DMP reporting requirements with a deadline that passed over two years ago—would be repealed and replaced with an entirely new § 210.30. Under paragraph (b) of the newly proposed § 210.30, the MLC would be prohibited from taking any action to implement or give effect to a change in the royalty payee unless it receives a notice about the change that complies with the requirements of proposed paragraph (c) or is acting in connection with the resolution of a dispute under proposed paragraph (f).[101] Where the requirements of proposed paragraph (c) are satisfied, the MLC would be required to implement and give effect to the change in payee in accordance with the provisions of proposed paragraph (d).

1. Notice of a Change to the MLC

Under proposed paragraph (c), the MLC would need to be appropriately notified in writing about any change in the royalty payee. The supplemental proposed rule would

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[100] *See, e.g.*, MLC Initial Comments at 10–11; ClearBox Rights Initial Comments at 8; ClearBox Rights Reply Comments at 5–6; Howard Initial Comments at 3–5; Howard Reply Comments at 2–3; SGA et al. Initial Comments at 2, 6–8.

[101] Proposed paragraph (f) is discussed below in Part II.G.4.

establish detailed and tailored notice requirements based on the type of payee change. Several of the proposed requirements—such as those about submission and receipt, certification and signature, and the identification of the relevant parties and musical works—are similar to the regulations governing the notices of license that DMPs must submit to the MLC to obtain a blanket license.[102] Those requirements seem to be working in the DMP context and there are sufficient parallels between the two types of notices that the Office proposes to adopt them here. The Office encourages the MLC to develop an electronic form to assist submitters in completing notices about a change in payee.

i. Transfers of copyright ownership other than by will or operation of law

Proposed paragraph (c)(1) addresses the requirements for a change in payee due to a transfer of copyright ownership other than by will or operation of law. Accordingly, these requirements would apply to a contractual assignment of the copyright in the relevant musical work, but not a reversion of the copyright resulting from the statutory termination of a prior grant concerning the work. The Office proposes that notices for the transfers covered by paragraph (c)(1) must include: (1) all relevant dates required for the MLC to properly implement and give effect to the transfer; (2) information identifying the transferor (*i.e.*, the prior musical work copyright owner); (3) information identifying the transferee (*i.e.*, the new musical work copyright owner); and (4) either (i) an identification satisfactory to the MLC of any applicable catalog exclusions from the transfer (which may state that there are no such exclusions, and that, therefore, the whole catalog is subject to the transfer) or (ii) a list of all transferred musical works identified by appropriate unique identifiers.

The Office further proposes that the required notice must be submitted and signed by the transferor or its representative certifying the accuracy of the information provided.

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[102] *See* 37 CFR 210.24(b), (b)(8), (c), (d). The Office's rationale for originally adopting those requirements can be found in the record of that proceeding. 85 FR 22518, 22519–21; 85 FR 58114, 58116–18.

This proposal is intended to reduce both the possibility of fraudulent notices and the effort required by the MLC to verify transfer claims where notice of the transfer is provided solely by a purported transferee.

Where there are multiple transferors or transferees, the notice would also need to identify any applicable ownership shares for the transferred works. Where there are multiple transferors, the notice would be effective only as to those transferors whose information is provided in the notice and whom have signed and certified the notice. Where there are multiple transferees, the notice would be effective only as to those transferees whose information is provided in the notice.

ii. Transfers of copyright ownership by statutory termination

Proposed paragraph (c)(2) addresses the requirements for a change in payee due to a transfer of copyright ownership resulting from an effective termination under section 203 or 304. The Office proposes that the required notice for this type of payee change must include the following requirements: (1) a copy of the statutorily required notice of termination submitted to the Office for recordation;[103] (2) a copy of the statement of service submitted to the Office for recordation, if one was submitted;[104] (3) either (i) proof that the notice of termination was recorded in the Office before the effective date of termination, or (ii) if the Office has not yet recorded the notice, proof that the notice was submitted to the Office for recordation, so long as proof of timely recordation is delivered to the MLC at a later date;[105] and (4) information identifying the terminating party (*i.e.*, the new musical work copyright owner).

With respect to the first three items, the supplemental proposed rule would make clear that it is not necessary to provide the MLC with official Copyright Office

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[103] *See* 37 CFR 201.10(f)(1)(i)(A).

[104] *See id.* at 201.10(f)(1)(i)(B).

[105] *See* 17 U.S.C. 203(a)(4)(A), 304(c)(4)(A) ("A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.").

certifications for this information. If the MLC has good reason to doubt the authenticity of the information provided, it should seek verification from the Office. Where the supplemental proposed rule refers to providing proof of recordation or proof of submission for recordation, the Office means more than a declaration by the terminating party or its representative. Adequate proof of timely recordation could be demonstrated by either providing the MLC with a copy of the certificate of recordation or the record as reflected in the Office's online public catalog. Adequate proof of submission to the Office for recordation could take the form of courier tracking or a delivery confirmation, a return receipt from the Office,[106] or some other communication from the Office confirming receipt.[107]

The MLC requests the inclusion of additional information and documentation.[108] The Office declines to propose these additional requirements. It agrees with other commenters that the MLC's requests exceed what is necessary to effectuate a statutory termination under the law.[109] The Office also shares commenters' concerns about the ability of terminating parties to provide some of what the MLC requests.[110] The Office continues to "remain convinced that the required contents of the notice [of termination] must not become unduly burdensome to grantors, authors, or their successors, and must

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[106] *See* 37 CFR 201.10(f)(2)(iii).

[107] Proof of submission would not need to include proof of proper fee payment to the Office because an incorrect fee can be remedied without affecting the relevant date of recordation. *Id.* at 201.10(f)(3).

[108] MLC Initial Comments at 11 (proposing, among other things, documents sufficient to "identify the grants that the post-termination claimant claims have been terminated by the relevant termination notice" and to "show that the post-termination claimant or its assignor owns the termination interest").

[109] ClearBox Rights Reply Comments at 5–6; Howard Reply Comments at 2–3; *see* 17 U.S.C. 203, 304(c); 37 CFR 201.10; U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, sec. 2310.3(D)(1)(c) (3d ed. 2021) ("In most cases, the party issuing the notice of termination may not have a copy of the grant that is being terminated or may not have access to a copy. For these reasons, the terminating party does not need to identify the location of the grant, offer to produce a copy of the grant, or attach a copy of the grant to the notice.").

[110] Howard Reply Comments at 2–3 (describing the MLC's proposal as "a list of documents that will be impossible for an author or his/her statutory heirs to provide"); *see* ClearBox Rights Reply Comments at 5–6.

recognize that entirely legitimate reasons may exist for gaps in their knowledge and certainty."[111] The intent of the Office's proposal is to generally provide the MLC with the necessary information to process the termination without unduly burdening terminating parties.[112]

The Office appreciates that part of the MLC's proposal is geared at "maintaining basic fraud protection and avoiding unnecessary disputes."[113] While the Office supports those aims, it is concerned that the MLC's proposed measures could result in legitimate terminating parties being unable to exercise their rights because they are unable to provide the information the MLC seeks. Instead, the Office proposes a notice and dispute process as an alternative means of achieving the MLC's stated goals in this context.

Evaluating and potentially disputing a termination on the merits is the duty of the pre-termination copyright owner, not the MLC. The proposed notice and dispute process (discussed in more detail below) would provide the pre-termination copyright owner with an opportunity to dispute a termination before the MLC would be required to implement it, thereby reducing the likelihood of the MLC acting on a fraudulent notice.[114]

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[111] 42 FR 45916, 45918 (Sept. 13, 1977); *see id.* at 45917 ("[T]he preparation of notice of termination will be occurring at a time far removed from the original creation and publication of a work and, in many cases, will involve successors of original authors having little, if any, knowledge of the details of original creation or publication."); *id.* at 45918 (recognizing that "it will commonly be the case that the terminating author, or [other terminating party], will not have a copy of the grant or ready access to a copy").

[112] For example, the Office's regulations governing the content of statutory notices of termination already provide for an identification of each: (1) grant, 37 CFR 201.10(b)(1)(iv), (b)(2)(v); (2) pre-termination copyright owner, 37 CFR 201.10(b)(1)(ii), (b)(2)(ii), (d)(2); (3) terminating party, 37 CFR 201.10(b)(1)(vii), (b)(2)(vii), (c)(2)–(3); (4) work, 37 CFR 201.10(b)(1)(iii), (b)(2)(iv); and (5) effective date of termination, 37 CFR 201.10(b)(1)(v), (b)(2)(vi).

[113] MLC Initial Comments at 11.

[114] The Office also notes that with respect to fraud, federal law prohibits (and may punish with fine or imprisonment), "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," the making of any "knowingly and willfully" "materially false, fictitious, or fraudulent statement or representation" or the provision of "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." 18 U.S.C. 1001(a)(3). This provision applies to submissions to the Office, including where a notice of termination is submitted for recordation.

Nevertheless, the Office recognizes that a valid notice of termination might not provide the MLC with sufficient information to process and implement the ownership change. In those cases, the Office proposes that the MLC should engage in best efforts to identify the minimum necessary information, including through correspondence with both the terminating party and pre-termination copyright owner (or their respective representatives). This may be a better approach than requiring terminating parties to provide additional information to the MLC at the outset that they may not readily have and which may not be needed to implement the change.

Similar to other transfers, the Office proposes that the required notice must be submitted and signed by either the terminating party or the pre-termination copyright owner (or their respective representatives) certifying the accuracy of the information provided.[115] The Office agrees with ClearBox Rights that a terminating party should not be "held hostage" by needing to wait for a pre-termination copyright owner's acknowledgement that the termination is valid and effective before the MLC can act on the notice.[116] At the same time, however, the Office believes that pre-termination copyright owners must have a fair opportunity to dispute the validity of a termination where the MLC is notified of the payee change unilaterally by the terminating party.

Therefore, if the notice to the MLC is submitted by the terminating party, the Office proposes additional requirements similar to those suggested by ClearBox Rights.[117] First, the MLC would be required to inform the pre-termination copyright

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[115] The Office declines to propose Linda Edell Howard's suggestion to require the pre-termination copyright owner to be the one to notify the MLC of the termination. Howard Initial Comments at 4. While the supplemental proposed rule would *permit* the pre-termination owner to provide the notice, the Office does not propose to require that they be the one to provide it, in part, because it is not clear what the remedy for noncompliance would be.

[116] ClearBox Rights Initial Comments at 8; *see also* ClearBox Rights Reply Comments at 6; Howard Reply Comment at 3 ("[T]he default should be reversion of rights and royalties to the termination owners and the burden placed on the publisher to bring suit to challenge a Notice before the MLC could ignore one.").

[117] *See* ClearBox Rights Reply Comments at 6.

owner about the notice within 15 days of receiving either the notice or the last piece of information necessary for the MLC to implement the change, whichever is later. Second, after being so notified, a pre-termination copyright owner who disputes the termination would have 30 days to initiate its dispute with the MLC. Third, if the pre-termination copyright owner does not initiate a dispute within the allotted time, then the MLC would be required to implement and give effect to the ownership transfer resulting from the termination in accordance with the proposed implementation requirements discussed in Part II.F.2 below. The supplemental proposed rule would make clear that even if the pre-termination copyright owner misses the regulatory deadline and the MLC implements the change, nothing prevents that owner from disputing the termination with the MLC at a later date or challenging the termination in court. The purpose of the proposal is not to limit a pre-termination copyright owner's right or ability to oppose a purported termination, but rather to help ensure that the implementation of a terminating party's notification to the MLC is not unduly delayed by a pre-termination copyright owner's inaction.[118]

Where there are multiple terminating parties or pre-termination copyright owners, the notice would need to identify any applicable ownership shares for the works subject to the termination. Where there are multiple terminating parties, the notice would be effective only as to those terminating parties whose information is provided in the notice. Also, the Office proposes that where there are multiple terminating parties, a notice that is signed and certified by any one of them would be sufficient as to all terminating parties. The Office invites comments on this proposal.

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[118] *See* ClearBox Rights Initial Comments at 8 ("There is very little incentive for the pre-termination owner to send an acknowledgement, and even if they don't have an issue with doing so, administratively it could take them weeks, months, or in some cases, years.").

iii. Other transfers of copyright ownership

Proposed paragraph (c)(3) addresses changes in payees due to any other type of ownership transfer, such as a transfer by will or through intestate succession. For these types of changes, the Office declines to propose any specific requirements at this time, but welcomes comments on whether it should adopt any. Under the supplemental proposed rule, such changes would be subject to any additional reasonable notice requirements established by the MLC.

iv. Designating an alternative royalty payee

The last type of payee change covered under proposed paragraph (c) involves the circumstance where the copyright owner entitled to receive royalties from the MLC under the Office's regulations[119] designates an alternative royalty payee to whom the MLC must distribute the royalties instead. This part of the supplemental proposed rule would apply where there is no transfer of copyright ownership. Instead, it addresses the situation where the regulatorily entitled copyright owner might voluntarily elect or be compelled by private agreement to request that the MLC distribute the royalties to someone else—*e.g.*, a party contractually entitled to such royalties. The Office proposes this process as the means by which the supplemental proposed rule would accommodate and give effect to contractual payment arrangements that deviate from the proposed default payee rules discussed above.[120]

The proposed notice requirements for this type of payee change are similar to the requirements for contractual ownership transfers discussed above. The Office proposes that the required notice must include: (1) all relevant dates required for the MLC to properly implement and give effect to the request; (2) information identifying the

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[119] This would include regulations governing both blanket license royalties and matched historical royalties.

[120] *See* NMPA *Ex Parte* Letter at 4 (Feb. 6, 2023) (requesting that the rule "allow parties to agree by contract to a different payment arrangement and provide letters of direction to the MLC pursuant to those agreements").

copyright owner entitled to receive royalties from the MLC under the Office's regulations; (3) information identifying the current royalty payee if different from such copyright owner (*i.e.*, the previously designated royalty payee who is being superseded by a new designated payee); (4) information identifying the designated royalty payee (*i.e.*, the new payee designated by the relevant copyright owner to receive royalty distributions from the MLC that would otherwise be paid to such owner under the Office's regulations); and (5) either (i) an identification satisfactory to the MLC of any applicable catalog exclusions from the request (which may state that there are no such exclusions, and that, therefore, the whole catalog is subject to the request) or (ii) a list of all musical works subject to the request identified by appropriate unique identifiers.

The Office proposes that the required notice must be submitted and signed by the copyright owner entitled to receive royalties from the MLC or its representative certifying the accuracy of the information provided. Where there are multiple copyright owners or designated royalty payees, the notice would also need to identify any applicable ownership shares for the relevant works. Where there are multiple copyright owners, the notice would be effective only as to those owners whose information is provided in the notice and whom have signed and certified the notice. Where there are multiple designated royalty payees, the notice would be effective only as to those payees whose information is provided in the notice.

In addition to the foregoing, the Office proposes to adopt the Songwriters Guild of America et al.'s ("SGA et al.'s") proposal for the scenario where the MLC is asked by the terminating party to implement an agreement directing the MLC to pay post-termination royalties to the pre-termination copyright owner.[121] SGA et al. states that, without additional safeguards, it "will inadvertently open the door to . . . acts of contractual

[121] SGA et al. Initial Comments at 2, 6–8.

overreaching by publishers," and that the "execution of 'anticipatory [letters of direction]' as part of publishing agreements has become common practice."[122] Based on the current record, the proposal seems to be a reasonable safeguard, even if there is no such overreach at present.

Consequently, the Office proposes that where the relevant copyright owner is the terminating party and the designated royalty payee is the pre-termination copyright owner, the following additional notice requirements should apply: (1) the notice must be signed after the effective date of termination; (2) the notice must acknowledge the deviation from the standard royalty payee under the Office's regulations; and (3) the notice must provide that neither the notice nor the distribution of royalties by the MLC in accordance with the notice prejudices the legal rights of either party.

v. Multiple changes

The Office proposes that where multiple ownership transfers occur prior to providing notice of the change to the MLC, a compliant notice for each transfer in the chain must be delivered to the MLC. For example, where there is a termination followed by an assignment of the copyright in the musical work, both a notice for the termination and a notice for the subsequent assignment would need to be provided. Similarly, the Office proposes that where an ownership transfer and a request to designate or change an alternative royalty payee are related, a compliant notice for both the transfer and request must be delivered to the MLC. For example, where there is an assignment of the copyright in the musical work that includes a contractual right for the new owner to also be entitled to future royalty distributions for periods predating the transfer, both a notice

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[122] *Id.* at 2, 7–8 ("[T]he coerced signing by an author of such [a letter of direction] concerning the disposition by the MLC of post-termination royalties—as a pre-condition set by the publisher for execution of the underlying publishing agreement with such author—is easily within the future scope of imaginable, attempted publisher overreach should the Proposed Rulemaking be adopted without amendment."); *see also* Howard Reply Comments at 2 (agreeing with SGA et al.'s proposal and the reasons behind it).

for the assignment and a notice for the designation of the alternative royalty payee would need to be provided.

The Office proposes these requirements to assist the MLC in verifying claimed changes in payees and to further the MLC's duty to maintain an accurate public database of musical works and their owners. This includes tracking historical changes in ownership.[123]

2. Implementation of a Change by the MLC

Proposed paragraph (d) sets out how the MLC would need to implement and give effect to a change in payee.

i. Timing

The Office agrees with the MLC that some amount of processing time must be given between the time when the MLC receives the notice and the time by which the change must be implemented.[124] As the MLC requests,[125] and based on the Office's current rules governing its processing of DMP voluntary licenses,[126] the Office proposes to give the MLC at least 30 days to operationalize a payee change.

The supplemental proposed rule contains two scenarios of general applicability. The first covers where the MLC receives a compliant notice before the start of the first monthly reporting period to begin after the relevant change is effective. In such cases, the

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[123] 37 CFR 210.31(f).

[124] MLC Initial Comments at 10–11.

[125] *Id.*; *see also* ClearBox Rights Reply Comments at 5 (agreeing "that a minimum 30-day notice of a termination be required before the MLC has to implement the requested actions").

[126] 37 CFR 210.24(f) ("[T]he mechanical licensing collective shall not be required to undertake any obligations otherwise imposed on it by this subpart with respect to any voluntary license for which the collective has not received the description required by paragraph (b)(8) of this section at least 30 calendar days prior to the delivery of a report of usage for such period, but such obligations attach and are ongoing with respect to such license for subsequent periods.").

MLC would need to implement and give effect to the change beginning with the first distribution of royalties for that reporting period.[127]

The second scenario covers where the MLC receives the notice on or after the start of that reporting period. In those cases, the MLC would need to implement and give effect to the change beginning no later than the first distribution of royalties based on the first "payee snapshot" taken by the MLC at least 30 days after it receives the notice.[128] By "payee snapshot," the Office means the royalty payee information contained in the MLC's records as of a particular date that it will use for a particular monthly royalty distribution. According to the MLC, it currently takes the payee snapshot 10 days after the end of the monthly reporting period, and it is this information that it uses to make the royalty distribution for that reporting period, which occurs about 65 days later.[129]

The supplemental proposal rule also contains a variant of both of these scenarios to accommodate the additional 45 days needed for the notice and dispute mechanism discussed above regarding a pre-termination copyright owner's ability to initiate a dispute with the MLC.

ii. Additional provisions for termination-related changes

The supplemental proposed rule contains two additional MLC implementation provisions concerning termination-related changes. First, the Office proposes that where

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[127] For example, if the MLC receives a notice of a contractual ownership transfer on September 20, 2023, for a transfer that, under the terms of the agreement, is effective on September 1, 2023, then the MLC would need to implement the change starting with the January 2024 royalty distribution (because the first monthly reporting period to commence after the effective date of the transfer would be the October 2023 reporting period, and the first distribution of royalties for that period would occur in January 2024).

[128] For example, if the MLC receives a notice of a contractual ownership transfer on October 15, 2023, for a transfer that, under the terms of the agreement, is effective on September 1, 2023, then the MLC would need to implement the change no later than the February 2024 royalty distribution (because the first payee snapshot to occur at least 30 days after the MLC's receipt of the notice would be the December 2023 snapshot, which would be for the November 2023 reporting period, and the first distribution of royalties for that period would occur in February 2024).

[129] The MLC, *Blanket Royalty Distributions*, *https://www.themlc.com/blanket-payments* (last visited Sept. 20, 2023).

the MLC needs additional information to implement the change and such information is received after the notice, the timing requirements discussed above would apply based on the date that the MLC receives the last piece of necessary information.

The second provision relates to where a compliant notice is accompanied by proof that the statutory notice of termination was submitted to the Office for recordation, but not proof that it was timely recorded. The supplemental proposed rule would prohibit the MLC from implementing any termination unless and until proof of timely recordation is received.[130] It would also make clear that the eventual receipt of proof that the statutory notice has been timely recorded should be treated as a type of additional information with respect to the timing of the MLC's implementation.

Even though the MLC would not implement the termination, to accommodate the fact that recordation is not an automatic process, the Office proposes that, after receiving notice that submission to the Office for recordation has been made, the MLC hold applicable royalties pending receipt of proof of timely recordation. After the MLC receives proof of timely recordation, it would need to implement the change in accordance with the above-discussed requirements, which would include distributing the held funds to the terminating party. If, on the other hand, the Office refuses to record the notice or the notice is recorded on or after the effective date of termination, and the termination is not effective, then the MLC would need to release the held funds to the pre-termination copyright owner. Under the supplemental proposed rule, if proof of timely recordation is not received within 6 months, the MLC would need to contact the Office to confirm the status of the relevant recordation submission and then act accordingly.

iii. Effect of implementation

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[130] *See* 17 U.S.C. 203(a)(4)(A), 304(c)(4)(A) ("A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.").

Multiple commenters, including the MLC, raise the issue of whether the MLC's implementation of a payee change should only be forward-looking or whether the MLC should be required to implement the change going back to the effective date of the change, regardless of when it implements it.[131] For example, Linda Edell Howard explains that in the termination context "there will be a substantial delay in notifying the MLC (sometimes years) as to the correct and legal owner(s) of the copyright," and expresses concern that, as a result, there is "little doubt the MLC will innocently misdirect royalty payments" to the pre-termination copyright owner.[132] The MLC states that implementation "on a retroactive basis would require The MLC to design, implement, and manage a new, manual process to benefit a small group of members that would divert the limited resources of The MLC from critical services and activities that benefit all copyright owners."[133]

The Office welcomes further comments on this issue, including with regard to Linda Edell Howard's termination-related concerns and what is standard in the industry. At this time, the Office is inclined to agree with the MLC that retroactive implementation may be too administratively burdensome to require for every payee change. Notably, the Office only requires prospective implementation with respect to the MLC's processing of DMP voluntary licenses.[134] The Office does not, however, wish to foreclose the possibility that there may be certain payee changes that the MLC could implement retroactively with little or no difficulty. Therefore, where a relevant change is effective

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[131] *See, e.g.*, MLC Initial Comments at 8; MLC Reply Comments at 2; Howard Initial Comments at 3–4; ClearBox Rights *Ex Parte* Letter at 5 (June 28, 2023).

[132] Howard Initial Comments at 3–4.

[133] MLC Initial Comments at 8; *see also* MLC Reply Comments at 2.

[134] 37 CFR 210.24(f) ("[T]he mechanical licensing collective shall not be required to undertake any obligations otherwise imposed on it by this subpart with respect to any voluntary license for which the collective has not received the description required by paragraph (b)(8) of this section at least 30 calendar days prior to the delivery of a report of usage for such period, but such obligations attach and are ongoing with respect to such license for subsequent periods.").

prior to the MLC's implementation of it, the Office proposes to permit, but not require, the MLC to implement the change going back to its effective date, if the notice to the MLC requests it.[135]

Relatedly, the Office proposes a savings clause to help allay Linda Edell Howard's concern that the pre-termination copyright owner "will claim they were the 'copyright owner' *of record* as of the last day of the monthly reporting period (because of the terminating party's delay) and refuse to turn over the misdirected royalties to the rightful copyright owners."[136] The proposed savings clause would make clear that even though the MLC may not be required to implement a change going back to its effective date, that fact does not affect a party's right to royalties previously distributed by the MLC to someone else or that party's ability to collect those royalties from that prior payee.[137] For example, if the MLC is not required to implement a payee change until six months after it is effective, the MLC would have made several royalty distributions to the prior payee instead of the new payee. The fact that the supplemental proposed rule would not require the MLC to recover the previously distributed royalties from the prior payee and redistribute them to the new payee does not mean that the new payee is not still legally entitled to those royalties or cannot seek to collect them from the prior payee.

G. Disputes

The MLC requests guidance from the Office on several matters relating to termination-related disputes.[138] The Office proposes to provide such guidance and to

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[135] The Office declines to propose Linda Edell Howard's suggested solution involving the Office's records. Howard Initial Comments at 4. At least based on the current record, it is not clear how the mechanics of that proposal would work in practice.

[136] *Id.* at 3.

[137] To be clear, this proposed provision does not address the situation where the MLC simply makes a mistake. Where the MLC distributes royalties to the wrong payee due to an error on the MLC's part (as opposed to where the MLC does not receive sufficiently advanced notice of a payee change to implement it before it is effective), the MLC must correct its error in a timely fashion.

[138] MLC Initial Comments at 11–14.

further elaborate on other dispute-related issues where it believes regulations would be helpful.

1. Royalty Holds

The MLC requests guidance "as to the types of disputes concerning termination claims for which The MLC should place relevant royalties on hold pending resolution."[139] It also states that its "general policy is to place royalties on hold when a legal proceeding is commenced that would impact the proper payee for those royalties," and asks the Office for clarification if it disagrees.[140]

Under section 115(d)(3)(K)(i), the MLC must "establish policies and procedures" "for copyright owners to address in a timely and equitable manner disputes relating to ownership interests in musical works licensed under this section and allocation and distribution of royalties by the mechanical licensing collective."[141] Section 115(d)(3)(K)(ii) then requires the MLC's "policies and procedures" to "include a mechanism to hold disputed funds . . . pending resolution of the dispute."[142] Therefore, if there is a bona fide dispute among purported copyright owners over the ownership of a musical work (or share), the applicable funds must be held pending resolution of the dispute.[143] Because a dispute as to the validity of a statutory termination—regardless of the grounds for the dispute—is a dispute as to the identity of the rightful copyright owner, it is an ownership dispute for which the MLC must hold applicable royalties.

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[139] *Id.* at 11–12.

[140] *Id.* at 12.

[141] 17 U.S.C. 115(d)(3)(K)(i).

[142] *Id.* at 115(d)(3)(K)(ii).

[143] In the NPRM, the Office proposed that the MLC be permitted to distribute royalties as directed "by the mutual written agreement of the parties to an ownership dispute." 87 FR 64405, 64412. The supplemental proposed rule would not allow this. On reflection, the Office is concerned about the administrative challenges that could ensue if distributed royalties need to be recovered. The Office, thus, seeks further comments on this issue, including as to whether it is permissible under the statute. *See* 17 U.S.C. 115(d)(3)(K)(ii).

In contrast, a dispute as to the application of the Exception is not a dispute over ownership, but rather over the legal effect of a concededly valid termination. The Office's final analysis and conclusions on the law in the current proceeding will govern the MLC's treatment of the Exception. As a result, a disagreement over the application of the Exception would generally not constitute grounds for the MLC to hold related royalties. There are, however, two potential exceptions.

The first is where litigation is commenced over the issue. In such cases—as with any type of dispute that is subject to a legal proceeding—the MLC should hold all applicable royalties pending the outcome of the proceeding unless the adjudicator orders otherwise. While the statute may not compel the MLC to implement legal holds in disputes unrelated to ownership, the Office believes it is prudent for the MLC to hold royalties whenever a litigation or other formal dispute procedure (*e.g.*, arbitration) is initiated that implicates the disposition of royalties.

Second, based on the Office's initial analysis, it recognizes that the Exception could potentially apply to at least some types of DMP voluntary licenses. Consequently, the Office proposes that a pre-termination copyright owner be able to initiate a dispute with the MLC over the application of the Exception to a particular voluntary license or its underlying grant of authority, and that the MLC should hold applicable royalties pending resolution of such a dispute.

2. Process and Documentation for Termination-Related Disputes

Under the supplemental proposed rule, only the pre-termination copyright owner or its representative would be permitted to initiate a termination-related dispute with the MLC. A terminating party would not need to initiate such a dispute because it would always have the ability to submit the notice of a payee change to the MLC that would obligate the MLC to implement the termination in the absence of a dispute.

The Office agrees with the MLC that a pre-termination copyright owner should provide certain information to initiate the dispute and substantiate that it is bona fide.[144] The Office proposes requirements similar to those suggested by the MLC, but with some additions.[145] It proposes that the minimum information that must be delivered to the MLC to substantiate, and trigger a royalty hold for, a dispute as to the validity of a termination consists of: (1) a detailed explanation of the grounds for the dispute; (2) documentation sufficient to support those grounds, consisting of copies of (i) each grant in dispute, (ii) any other document necessary to support the grounds for the dispute, and (iii) any other reasonable information required by the MLC's dispute policy; (3) an identification satisfactory to the MLC of each musical work in dispute; and (4) an appropriate certification regarding the accuracy of the information made by the submitter.

Where the dispute is over the application of the Exception to a voluntary license, the Office proposes to additionally require: (1) a copy of each voluntary license at issue; (2) an identification satisfactory to the MLC of each relevant sound recording that constitutes a derivative work prepared with appropriate authority; and (3) the date of preparation for each such sound recording, which must be before the effective date of termination.

The Office proposes that any and all documentation provided to the MLC in connection with a termination-related dispute be shared with all parties to the dispute. If a party to the dispute is not a party or a successor to a party to an otherwise confidential document, then the supplemental proposed rule would require the disclosure to be subject to that party's acceptance of an appropriate written confidentiality agreement. The Office believes that all parties to a dispute have a right to know the basis for the dispute and to

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[144] MLC Initial Comments at 13.

[145] *Id.* (listing proposed requirements).

see the other party's supporting evidence. The proposed approach seeks to safeguard that right while ensuring that confidential information is not made public.

3. Disclosure and Confidentiality

The MLC seeks guidance as to whether it "should be required to disclose information about the royalties being held to the parties involved," stating that it "typically does not disclose the amount of royalties on hold to the parties in a dispute pending agreement or resolution of a dispute."[146] The Office is inclined to agree with ClearBox Rights that the MLC should disclose information about such royalties to the parties to a dispute.[147] All parties to the dispute should know the amount in controversy so that they are on equal footing in developing a strategy for resolving the dispute, including the negotiation of a settlement. Therefore, the Office proposes an exception to its confidentiality regulations to clarify that such disclosures are required.

The supplemental proposed rule would further recognize that there are other circumstances, unrelated to an ownership dispute, where the MLC may put amounts on hold. In such cases, including where the MLC initiates the hold unilaterally (*e.g.*, in connection with an investigation),[148] the affected parties should have a right to know the grounds for the hold.

The supplemental proposed rule, thus, would require that where the MLC is holding royalties or other monies, it must disclose the amount being held and the reason for the hold to anyone with a bona fide legal claim to the funds. More specifically, the Office proposes that the MLC provide the equivalent of monthly royalty statements for the amounts held along with monthly updates concerning the status of the hold. The

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[146] *Id.* at 13–14.

[147] ClearBox Rights Reply Comments at 6.

[148] *See* Letter from U.S. Copyright Office to The MLC (Apr. 20, 2023), *https://copyright.gov/ai/USCO-Guidance-Letter-to-The-MLC-Letter-on-AI-Created-Works.pdf*.

Office encourages the MLC to disclose required information and provide updates through its member portal.

4. Dispute Resolution

Though not raised by the commenters, the Office proposes regulations governing the resolution of disputes among purported copyright owners or royalty payees and the associated release of held funds. The Office proposes these regulations to provide certainty to both the MLC and disputing parties about what constitutes the resolution of a dispute, how held funds should be released, and how the MLC should implement any related change in payee that results from the resolution of the dispute. The Office also believes that it may be useful to adopt a rule to prevent the MLC having to hold disputed funds indefinitely. Indeed, the statute requires disputes to be "address[ed] in a timely and equitable manner."[149]

Accordingly, the supplemental proposed rule contemplates three scenarios. The first is where the dispute is resolved through the mutual agreement of the relevant parties. In such cases, released funds would be paid in accordance with the agreement. If the agreement changes the royalty payee, then the release of the held funds would be subject to the same notice and implementation requirements discussed above in Part II.F, except that payments would need to be made for applicable reporting periods predating the MLC's implementation of the change.

The second scenario is where the dispute is resolved by order of an adjudicative body (*e.g.*, a court or arbitrator). In such cases, released funds would be paid in accordance with the order. The MLC's implementation of any associated payee change would be in accordance with the order, rather than the above-discussed notice and implementation requirements. Absent a stay issued by the adjudicatory body, the appeal

[149] 17 U.S.C. 115(d)(3)(K)(i).

or request for reconsideration of such order would not delay the distribution of the affected monies.

The last scenario is focused on preventing disputed funds from being held indefinitely. It would enforce a proposed requirement that all funds held by the MLC pursuant to a dispute among purported copyright owners or royalty payees be subject to active dispute resolution by the relevant parties.[150] It would do so by providing that if the disputed funds have been held for at least one year, and no legal proceeding has been commenced, then during every subsequent 6-month period the parties to the dispute would need to submit a jointly signed notice to the MLC stating that they are continuing to engage in active dispute resolution. If the MLC does not receive such notice, it would be required to release the funds to the party who would have received them if the funds had not been placed on hold. This would put the onus on the party who initiates the dispute to eventually commence a legal proceeding to maintain the hold. The Office proposes this approach because the initiating party is the one seeking to change the status quo. It welcomes comments on this proposal, including whether there are any industry analogues to consider.

H. Corrective Royalty Adjustment

In the NPRM, the Office proposed to require the MLC to adjust any royalties distributed under its (now-suspended) termination dispute policy within 90 days.[151] The Office explained that the purpose of this proposal is to make copyright owners whole for any distributions the MLC made based on an erroneous understanding and application of the Exception.[152]

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[150] To be clear, this proposal would not cover other types of potential disputes that may arise in connection with the MLC's administration of the blanket license, such as a dispute involving a DMP or the MLC itself.

[151] 87 FR 64405, 64412.

[152] *Id.*

In response, several commenters, including the MLC, seek further guidance from the Office as to how the proposed corrective royalty adjustment should work.[153] For example, Promopub states that the adjustment process "may take an unacceptably long time if the MLC must recoup sums from publishers whose other mechanical royalties are insufficient for full and prompt recoupment. In such instances, it may be appropriate to require such publishers to return the royalties received in error from their own funds rather than extending the adjustment period."[154] ClearBox Rights says that the MLC "should be responsible to recoup all payments known to have been incorrectly made to original publishers for effectively terminated works, and should not wait until recoupment of the sums incorrectly paid before paying the correct royalties to the terminated owners."[155] ClearBox Rights explains that this "is standard operating procedure for many if not most of the publishers in the industry when incorrect payments are made."[156] ClearBox Rights further states that "it is fair that any party that was ultimately overpaid in error, including publishers, writers, and other third party recipients, should be eligible to have their overpaid royalties recouped from future funds in order to correct the issue."[157]

The MLC requests that the Office make clear that the MLC "is not required to pay [previously distributed] royalties to a new payee until The MLC is able to fully recover those royalties from the previously-paid payee."[158] The MLC further asks the Office to confirm that it "may recover those royalties at any time from *any* funds payable to the

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[153] *See, e.g.*, MLC Initial Comments at 6–8; ClearBox Rights Reply Comments at 3–4; ClearBox Rights *Ex Parte* Letter at 2–4 (June 28, 2023); Howard Initial Comments at 6; Promopub Initial Comments at 2; Promopub Reply Comments at 3; North Music Grp. Reply Comments at 2.

[154] Promopub Initial Comments at 2.

[155] ClearBox Rights *Ex Parte* Letter at 4 (June 28, 2023) (proposing that the MLC "'borrow' from the unallocated, unidentified funds pool").

[156] *Id.*

[157] *Id.*

[158] MLC Initial Comments at 7.

previously-paid payee, since there may not be any additional royalties payable to that payee for the works in question given that such payee's rights to those works have now been terminated."[159] The MLC, as well as other commenters, also raise questions about the recovery of royalties from publishers who have already distributed a portion of those royalties to songwriters.[160] Additionally, commenters disagree over how complicated and burdensome it might be to administer the corrective royalty adjustment, with some opposing the proposed adjustment on this basis.[161]

Based on its review of these comments to date, the Office proposes to replace its original proposed rule with a more detailed one that would lay out the operational procedures for the corrective royalty adjustment. In making this proposal, the Office reiterates that it is continuing to evaluate comments regarding its authority to adopt regulations concerning a corrective royalty adjustment and welcomes further comments on the subject. By seeking comments on the revised proposal, the Office does not mean

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[159] *Id.* at 7–8.

[160] *See, e.g.*, MLC Initial Comments at 7–8; ClearBox Rights Reply Comments at 3–4; ClearBox Rights *Ex Parte* Letter at 3–4 (June 28, 2023); Promopub Reply Comments at 3; NMPA Initial Comments at 5; CMPA Initial Comments at 2; McAnally & North *Ex Parte* Letter at 5–6, 9 (Mar. 14, 2023).

[161] *See, e.g.*, ClearBox Rights Reply Comments at 3–4; ClearBox Rights *Ex Parte* Letter at 2–4 (June 28, 2023) (stating that "[c]ompanies like ClearBox Rights . . . do these types of calculations all the time" and that it "is laughable" to suggest the process would be burdensome for the MLC); SONA et al. Reply Comments at 3 ("It is not 'undue hardship' to request a government-mandated body undertake a retroactive accounting – not where such an outcome could and should have been avoided by the very body that would undertake such an accounting."); Promopub Reply Comments at 3 ("We are confident that most, if not all, of the publishers who have benefitted from the Policy . . . have the means to promptly refund *all* royalties paid them in error[.]"); McAnally & North *Ex Parte* Letter at 3–4 (Mar. 14, 2023) ("Any suggestion that publishers cannot render retroactive payments or that doing so would be so difficult the process should require a change in the law is inconsistent with our lived experience."); Howard Reply Comments at 2; NMPA Initial Comments at 5 ("This would create a significant administrative and financial burden on the MLC, as well as on publishers or other recipients of these royalty payments who likely already distributed some portion of those amounts pursuant to their contractual obligations with their songwriters."); CMPA Initial Comments at 2 ("[T]he likelihood of recovering what was previously paid out to the songwriter(s) in order to create an accounting to the post-termination owner, whether or not that be the songwriter(s) themselves, would be both unlikely, and an onerous obligation to place on the pre-termination publisher.").

to suggest that it has reached any final conclusions about its authority to adopt the proposal.

While the Office welcomes comments on the *relative* burdens associated with its proposal versus some alternative adjustment process, it is inclined to disagree with commenters suggesting that there should not be *any* corrective adjustment because of the potential burdens involved. Corrective royalty adjustments are common in the music industry[162] and explicitly contemplated by the statute and the Office's existing regulations.[163] Nothing in the current record suggests that this adjustment would be any more or less burdensome than others, whether for the MLC, publishers, or songwriters. Indeed, the MLC's own guidelines provide that adjustments, including "a correction of an overpayment," "may be made by The MLC retroactively to January 1, 2021 (i.e., the License Availability Date)."[164]

For similar reasons, the Office declines to propose any specific procedures at this time regarding where a publisher has already distributed a portion of the applicable royalties to its songwriters. That is a possibility with any type of adjustment for an overpayment. For example, at least one commenter asserts that "many of the standard songwriter agreements allow the publishers to recoup any overpayment made by the publishers to the writers."[165] The Office welcomes further comments on this issue,

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[162] *See, e.g.*, Promopub Reply Comments at 2 ("[T]he concept of retroactive royalty adjustments is one with which the NMPA's members should be familiar because other collecting organizations regularly employ retroactive royalty adjustments when music publishing royalties have been paid erroneously."); McAnally & North *Ex Parte* Letter at 3–5 (Mar. 14, 2023) (explaining that "it is of the essence of the role of publishers large and small, including collectives like The MLC, to be able to make allocation corrections involving adjusting debits and credits," that "[t]hese adjustments necessarily require retroactive payments," and that "these bread-and-butter adjustments [are] a matter of routine practice").

[163] 17 U.S.C. 115(d)(4)(A)(iv)(II); 37 CFR 210.10(k), 210.27(k).

[164] The MLC, *Guidelines for Adjustments* secs. 2.1, 3.4 (Jan. 2022), *https://f.hubspotusercontent40.net/hubfs/8718396/files/2022-02/MLC%20Guidelines%20for%20Adjustments.pdf*.

[165] ClearBox Rights *Ex Parte* Letter at 4 (June 28, 2023).

including on the feasibility of ClearBox Rights' proposal that the MLC only recoup the publisher's share.[166]

The Office's proposal reflects its preliminary conclusions about the Exception discussed above in Part II.B. Under the supplemental proposed rule, the corrective adjustment would apply where the MLC's prior erroneous application of the Exception, whether or not through its termination dispute policy, affected: (1) the distribution of blanket license royalties or matched historical royalties; (2) the holding of such royalties;[167] or (3) the deduction from a DMP's payable blanket license royalties made by matching usage to voluntary licenses or individual download licenses.

With respect to previous distributions, the MLC would be required to recover any overpayment from the prior payee and distribute it to the proper payee (*i.e.*, the payee legally entitled to the royalties under the correct interpretation of the Exception under current law). The MLC would have thirty days from publication of the final rule to notify the prior payee of the overpayment, and then the prior payee would have thirty days to return it. If the prior payee fails to do so, then the MLC would be required to debit its future royalties, for all works (and shares), until the full amount of the overpayment is recovered. The Office proposes that the debit be limited to 50% of payable amounts to the prior payee each month.

While the Office is sympathetic to commenters calling for the corrective adjustment to be made quickly, it is also concerned that smaller publishers, who may no longer be in possession of the applicable funds, may be unable to repay the full overpayment all at once or financially withstand the debiting of most of their mechanical royalties each month. Additionally, the Office does not propose that the MLC should

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[166] *See id.* at 3–4; ClearBox Rights Reply Comments at 3–4.

[167] The Office proposes to include held royalties to reflect the fact that the MLC states that it is presently holding applicable royalties pending the outcome of the current rulemaking proceeding. *See* The MLC, *Policies*, *https://www.themlc.com/dispute-policy* (last visited Sept. 20, 2023).

borrow against the pool of unclaimed royalties.[168] Assuming, without deciding, that the statute would even allow it,[169] the Office does not believe it would be prudent for the MLC to do so at this time. The total sum of such royalties is not yet known because of the adjustments DMPs will be making in connection with the recent final determination in the Copyright Royalty Judges' *Phonorecords III Remand* proceeding.

With respect to deducted royalties related to voluntary licenses or individual download licenses, the Office proposes that the same recovery procedures apply as for previously distributed royalties. For such purposes, the prior payee from whom the MLC would need to recover the royalties would be the copyright owner to whom the relevant usage was originally (and erroneously) matched. As for royalties the MLC is already holding, the supplemental proposed rule would give it thirty days after the effective date of the final rule to distribute them to the proper payee.

Lastly, the supplemental proposed rule would clarify that the Office's adoption of the corrective adjustment mechanism would not prejudice the proper payee's right or ability to otherwise recover the overpayment from the prior payee outside of the above-described process. If the overpayment, however, is recovered directly or a legal proceeding is commenced, the MLC would need to be notified by the parties. The MLC would then be required to discontinue the above-described recovery efforts.[170]

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

Proposed Regulations

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[168] *See, e.g.*, ClearBox Rights *Ex Parte* Letter at 4 (June 28, 2023) (proposing that the MLC "'borrow' from the unallocated, unidentified funds pool").

[169] *See* 17 U.S.C. 115(d)(7)(C).

[170] The Office proposes that the same rule also apply if there is a bona fide dispute regarding the application of the Exception to a relevant voluntary license or its underlying grant of authority.

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

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

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

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

2. Amend § 210.22 as follows:

a. Redesignate paragraphs (d), (e), (f), (g), (h), (i), and (j) as paragraphs (e), (g), (h), (i), (j), (m), and (n), respectively.

b. Add paragraphs (d), (f), (k), and (l).

The additions read as follows:

§ 210.22 Definitions.

* * * * *

(d) The term *derivative works exception* means the limitations contained in 17 U.S.C. 203(b)(1) and 304(c)(6)(A).

* * * * *

(f) The term *historical unmatched royalties* means the accrued royalties transferred to the mechanical licensing collective by digital music providers pursuant to 17 U.S.C. 115(d)(10) and § 210.10.

* * * * *

(k) The term *matched historical royalties* means historical unmatched royalties attributable to a musical work (or share thereof) matched after being transferred to the mechanical licensing collective.

(l) The term *pre-termination copyright owner* means the owner of the relevant copyright immediately prior to:

(1) The effective date of termination for an effective termination under 17 U.S.C. 203 or 304; or

(2) The purported effective date of termination for a claimed, disputed, or invalid termination under 17 U.S.C. 203 or 304.

* * * * *

3. Amend § 210.27 as follows:

a. Redesignate paragraph (g)(2)(ii) as paragraph (g)(2)(ii)(A).

b. Add paragraph (g)(2)(ii)(B).

The addition reads as follows:

§ 210.27 Reports of usage and payment for blanket licensees.

* * * * *

(g) * * *

(2) * * *

(ii)(A) * * *

(B) To the extent applicable to the mechanical licensing collective's efforts under paragraph (g)(2)(ii)(A) of this section:

(*1*) The derivative works exception does not apply to any individual download license and no individual or entity may be construed as the copyright owner or royalty payee of a musical work (or share thereof) used pursuant to any such license based on the derivative works exception.

(*2*) The derivative works exception does not apply to any voluntary license and no individual or entity may be construed as the copyright owner or royalty payee of a musical work (or share thereof) used pursuant to any such license based on the derivative works exception, unless and only to the extent that the mechanical licensing collective is directed otherwise pursuant to:

(*i*) The resolution of a dispute under § 210.30(f) regarding the application of the derivative works exception to a particular voluntary license or its underlying grant of authority; or

(*ii*) A notice submitted under § 210.30(c)(4) designating or changing an alternative royalty payee.

* * * * *

4. Amend § 210.29 as follows:

a. In paragraph (a):

i. Remove "reporting obligations" and add in its place "reporting and payment obligations".

ii. Add two sentences at the end of the paragraph.

b. Add paragraphs (b)(4), (j), and (k).

The additions read as follows:

§ 210.29 Reporting and distribution of royalties to copyright owners by the mechanical licensing collective.

(a) * * * This section also prescribes reporting and payment obligations of the mechanical licensing collective to copyright owners for the distribution of matched historical royalties. This section does not apply to distributions of unclaimed accrued royalties under 17 U.S.C. 115(d)(3)(J).

(b) * * *

(4)(i)(A) The copyright owner of a musical work (or share thereof) as of the last day of a monthly reporting period in which such musical work is used pursuant to a blanket license is entitled to all royalty payments and other distributable amounts (*e.g.*, accrued interest), including any subsequent adjustments, for the uses of that musical work occurring during that monthly reporting period. As used in the previous sentence, the

term *uses* means all covered activities engaged in under blanket licenses as reported by blanket licensees to the mechanical licensing collective.

(B) The derivative works exception does not apply to any blanket license and no individual or entity may be construed as the copyright owner or royalty payee of a musical work (or share thereof) used pursuant to a blanket license based on the derivative works exception.

(ii) Subject to the requirements of and except to the extent permitted by § 210.30, the mechanical licensing collective shall not distribute royalties in a manner inconsistent with paragraph (b)(4)(i) of this section.

* * * * *

(j) *Matched historical royalties*. The mechanical licensing collective shall report and distribute matched historical royalties and related accrued interest and adjustments in the same manner and subject to the same requirements as apply to the reporting and distribution of royalties for musical works licensed under the blanket license, as if such matched historical royalties were royalties payable for musical works licensed under the blanket license, but subject to the following clarifications:

(1) Matched historical royalties shall be treated as accrued royalties distributable under paragraph (b)(1)(ii) of this section and shall be separately identified in applicable royalty statements.

(2) With respect to the requirements of paragraph (b)(2) of this section, royalty distributions based on adjustments to matched historical royalties reflected in cumulative statements of account delivered to the mechanical licensing collective by digital music providers pursuant to § 210.10(b)(3)(i) shall be made by the mechanical licensing collective at least once annually, upon submission of one or more statements of adjustment delivered to the mechanical licensing collective by digital music providers

pursuant to § 210.10(k), to the extent any such statement of adjustment is delivered to the mechanical licensing collective during such annual period.

(k) *Corrective royalty adjustment*. Any distribution under paragraph (b) of this section (including any distribution of matched historical royalties, including related accrued interest or adjustments) or deduction under § 210.27(g)(2)(ii) made by the mechanical licensing collective before [EFFECTIVE DATE OF FINAL RULE] and based on an application of the derivative works exception that is inconsistent with paragraph (b)(4)(i) of this section (including as such paragraph applies to matched historical royalties through paragraph (j) of this section) or § 210.27(g)(2)(ii), as each of those provisions exist on [EFFECTIVE DATE OF FINAL RULE], shall be adjusted by the mechanical licensing collective. Such adjustment shall also apply to any amounts held by the mechanical licensing collective in connection with such application of the derivative works exception as of [EFFECTIVE DATE OF FINAL RULE]. The adjustment shall be made as follows:

(1) To the extent required by this paragraph (k), where a royalty payee (the *prior payee*) received amounts from the mechanical licensing collective that such prior payee would not have received had the distribution been made in a manner consistent with the application of the derivative works exception embodied in paragraph (b)(4)(i) of this section, the mechanical licensing collective shall recover such overpayment from such prior payee and shall distribute it to the royalty payee (the *proper payee*) who is entitled to such funds under the application of the derivative works exception embodied in paragraph (b)(4)(i) of this section. The following requirements shall apply to the recovery and distribution of any such overpayment:

(i) The mechanical licensing collective shall notify the prior payee of such overpayment no later than [EFFECTIVE DATE OF FINAL RULE], and request that the prior payee return such overpayment no later than 30 calendar days after receipt of the notice. Any

returned amounts shall be distributed to the proper payee with the next regular monthly royalty distribution.

(ii) If such overpayment is not returned in full in accordance with paragraph (k)(1)(i) of this section, then beginning with the first distribution of royalties to occur after the deadline specified in that paragraph, 50 percent of any and all accrued royalties and other distributable amounts (*e.g.*, accrued interest) that would otherwise be payable to the prior payee from the mechanical licensing collective each month, regardless of the associated work (or share), shall instead be distributed to the proper payee until such time as the full amount of the overpayment is recovered. Where more than one proper payee is entitled to a corrective royalty adjustment from the same prior payee for different musical works, any amounts recovered and distributed under this paragraph (k)(1)(ii) shall be apportioned equally among such proper payees.

(2) Where, as of [EFFECTIVE DATE OF FINAL RULE], the mechanical licensing collective is holding amounts that would constitute an overpayment under paragraph (k)(1) of this section if such amounts had been distributed to the prior payee, such amounts shall be distributed to the proper payee no later than [DATE 30 DAYS AFTER EFFECTIVE DATE OF FINAL RULE].

(3) The recovery and distribution processes described in paragraphs (k)(1) and (2) of this section shall also apply, as applicable, to amounts deducted, or held pending deduction, by the mechanical licensing collective under § 210.27(g)(2)(ii) where the proper payee is not the copyright owner to whom the relevant usage was originally matched. For purposes of this paragraph (k)(3), the copyright owner to whom the relevant usage was originally matched shall constitute the *prior payee* as that term is used in paragraphs (k)(1), (2), and (4) of this section. Where this paragraph (k)(3) applies, the mechanical licensing collective shall flag the change in payee, including by specifying the affected

reporting periods, in the next response file delivered to the relevant digital music provider after [EFFECTIVE DATE OF FINAL RULE].

(4) Nothing in this paragraph (k) shall be construed as prejudicing the proper payee's right or ability to otherwise recover such overpayment from the prior payee outside of the adjustment process detailed in this paragraph (k). Where the overpayment is recovered outside of such adjustment process, a legal proceeding is commenced seeking recovery of the overpayment, or, with respect to paragraph (k)(3) of this section, a dispute is initiated with the mechanical licensing collective pursuant to § 210.30(e) regarding the application of the derivative works exception to a particular voluntary license or its underlying grant of authority, the mechanical licensing collective must be notified. Upon receipt of such notice, the mechanical licensing collective shall discontinue any recovery efforts engaged in under this paragraph (k).

5. Revise § 210.30 to read as follows:

§ 210.30 Transfers of copyright ownership, designating or changing an alternative royalty payee, and related disputes.

(a) *General*. This section prescribes rules governing the mechanical licensing collective's administration of transfers of copyright ownership, the designating or changing of an alternative royalty payee, and related disputes.

(b) *Requirements for the mechanical licensing collective to implement a change*. The mechanical licensing collective shall not take any action to implement or give effect to any transfer of copyright ownership (including a transfer resulting from an effective termination under 17 U.S.C. 203 or 304) or request to distribute royalties to a payee other than the copyright owner identified in § 210.29(b)(4)(i) (or request to change such alternative royalty payee), unless the requirements of paragraph (c) of this section are satisfied or the mechanical licensing collective is acting in connection with the resolution of a dispute pursuant to paragraph (f) of this section. Where the requirements of

paragraph (c) of this section are satisfied, the mechanical licensing collective shall implement and give effect to such transfer or request in accordance with paragraph (d) of this section.

(c) *Notices of change*. The mechanical licensing collective must be appropriately notified in writing with respect to any transfer or request described in paragraph (b) of this section. Subject to the further requirements of this paragraph (c), such notice must comply with any reasonable formatting and submission requirements established by the mechanical licensing collective and made publicly available on its website. No fee may be charged for submitting such a notice. Upon submitting such a notice, or any additional information related to such notice, the submitter shall be provided with a prompt response from the mechanical licensing collective confirming receipt of the notice, or additional information, and the date of receipt.

(1) Specific requirements for notices about transfers of copyright ownership, other than transfers by will or operation of law, are as follows:

(i) The required notice shall include all of the following information:

(A) All relevant dates required for the mechanical licensing collective to properly implement and give effect to the transfer.

(B) The transferor (*i.e.*, the prior musical work copyright owner), identified by name and any known and appropriate unique identifiers, and appropriate contact information for the transferor or their administrator or other representative.

(C) The transferee (*i.e.*, the new musical work copyright owner), identified by name and any known and appropriate unique identifiers, appropriate contact information for the transferee or their administrator or other representative, and, if the transferee is not already receiving royalty distributions from the mechanical licensing collective, any additional information that is necessary for the transferee to receive royalty distributions from the mechanical licensing collective.

(D) A satisfactory identification of any applicable catalog exclusions from the transfer or a list of all transferred musical works identified by appropriate unique identifiers.

(ii) The required notice shall be submitted and signed by the transferor (or its duly authorized representative). Such signature shall be accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that they have appropriate authority to submit the notice to the mechanical licensing collective and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith.

(iii) Where there is more than one transferor or transferee, the required notice shall include a satisfactory identification of any applicable ownership shares for the transferred musical works. Where there is more than one transferor, the notice shall be effective only as to those transferors whose information is provided in accordance with paragraph (c)(1)(i)(B) of this section and whom have signed and certified the notice in accordance with paragraph (c)(1)(ii) of this section. Where there is more than one transferee, the notice shall be effective only as to those transferees whose information is provided in accordance with paragraph (c)(1)(i)(C) of this section.

(2) Specific requirements for notices about transfers of copyright ownership resulting from an effective termination under 17 U.S.C. 203 or 304 are as follows:

(i) The required notice shall include all of the following information:

(A) A true, correct, complete, and legible copy of the signed and as-served notice of termination submitted to the Copyright Office for recordation pursuant to § 201.10.

(B) A true, correct, complete, and legible copy of the statement of service submitted to the Copyright Office for recordation pursuant to § 201.10, if one was submitted.

(C) Either:

(*1*) Proof that the notice of termination was recorded in the Copyright Office before the effective date of termination; or

(*2*) If the Copyright Office has not yet recorded the notice of termination, proof that the notice of termination was submitted to the Copyright Office for recordation, provided that proof that the notice of termination was recorded in the Copyright Office before the effective date of termination is delivered to the mechanical licensing collective at a later date.

(D) The terminating party (*i.e.*, the new musical work copyright owner), identified by name and any known and appropriate unique identifiers, appropriate contact information for the terminating party or their administrator or other representative, and, if the terminating party is not already receiving royalty distributions from the mechanical licensing collective, any additional information that is necessary for the terminating party to receive royalty distributions from the mechanical licensing collective.

(ii) With respect to the information required by paragraphs (c)(2)(i)(A) through (C) of this section, providing an official Copyright Office certification for any such information shall not be required. If the mechanical licensing collective has good cause to doubt the authenticity of any such information, the mechanical licensing collective shall seek verification from the Copyright Office.

(iii) Where the information required by paragraph (c)(2)(i) of this section is insufficient to enable the mechanical licensing collective to implement and give effect to the termination, the mechanical licensing collective shall engage in best efforts to identify the relevant musical works or other necessary information. To the extent necessary, the mechanical licensing collective shall correspond with the terminating party and the pre-termination copyright owner (or their respective representatives) to attempt to obtain the minimum necessary information.

(iv) The required notice shall be submitted and signed by either the terminating party or the pre-termination copyright owner (or their respective duly authorized representatives). Such signature shall be accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that they have appropriate authority to submit the notice to the mechanical licensing collective and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith. If the notice is submitted by the terminating party, the following additional requirements shall apply:

(A) The mechanical licensing collective shall notify the pre-termination copyright owner about the terminating party's notice within 15 calendar days of receiving either the notice or the last piece of information necessary for the mechanical licensing collective to implement the change, whichever is later.

(B) If the pre-termination copyright owner does not initiate a dispute with the mechanical licensing collective regarding the termination, in accordance with paragraph (e) of this section, within 30 calendar days of receiving such notice, the mechanical licensing collective shall implement and give effect to the transfer of copyright ownership resulting from the termination, in accordance with paragraph (d) of this section. Nothing in this paragraph (c)(2)(iv)(B) shall prevent the pre-termination copyright owner from disputing the termination with the mechanical licensing collective at a later date or challenging the termination in a legal proceeding.

(v) Where there is more than one terminating party or pre-termination copyright owner, the required notice shall include a satisfactory identification of any applicable ownership shares for the musical works that are subject to the termination. Where there is more than one terminating party, the notice shall be effective only as to those terminating parties whose information is provided in accordance with paragraph (c)(2)(i)(D) of this section.

Where there is more than one terminating party, a notice that is signed and certified by any one terminating party in accordance with paragraph (c)(2)(iv) of this section is sufficient as to all terminating parties.

(3) Any transfer of copyright ownership that is not covered by paragraphs (c)(1) or (2) of this section (*e.g.*, transfers by will or intestate succession) shall be subject to any reasonable notice requirements established by the mechanical licensing collective and made publicly available on its website.

(4) Specific requirements for notices requesting that the mechanical licensing collective distribute royalties to a payee other than the copyright owner identified in § 210.29(b)(4)(i) and notices requesting to change such alternative royalty payee are as follows:

(i) The required notice shall include all of the following information:

(A) All relevant dates required for the mechanical licensing collective to properly implement and give effect to the request.

(B) The copyright owner identified in § 210.29(b)(4)(i), identified by name and any known and appropriate unique identifiers, and appropriate contact information for the copyright owner or their administrator or other representative.

(C) If the copyright owner identified in paragraph (c)(4)(i)(B) of this section is not also the current royalty payee, the current royalty payee (*i.e.*, the previously designated royalty payee who is being superseded by the payee identified in paragraph (c)(4)(i)(D) of this section), identified by name and any known and appropriate unique identifiers, and appropriate contact information for the payee or their administrator or other representative.

(D) The designated royalty payee (*i.e.*, the new payee designated by the copyright owner identified in § 210.29(b)(4)(i) to receive royalty distributions from the mechanical licensing collective that would otherwise be paid to such owner under § 210.29(b)(4)(i)),

identified by name and any known and appropriate unique identifiers, appropriate contact information for the payee or their administrator or other representative, and, if the payee is not already receiving royalty distributions from the mechanical licensing collective, any additional information that is necessary for the payee to receive royalty distributions from the mechanical licensing collective.

(E) A satisfactory identification of any applicable catalog exclusions from the request or a list of all musical works subject to the request identified by appropriate unique identifiers.

(ii) The required notice shall be submitted and signed by the copyright owner identified in paragraph (c)(4)(i)(B) of this section (or its duly authorized representative). Such signature shall be accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that they have appropriate authority to submit the notice to the mechanical licensing collective and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith.

(iii) Where the required notice is made in connection with a notice about a transfer of copyright ownership resulting from an effective termination under 17 U.S.C. 203 or 304 submitted under paragraph (c)(2) of this section, and the copyright owner identified in paragraph (c)(4)(i)(B) of this section is the terminating party and the designated royalty payee identified in paragraph (c)(4)(i)(D) of this section is the pre-termination copyright owner, the following additional requirements shall apply:

(A) The notice must be signed after the effective date of termination.

(B) The notice must set forth in plain language an acknowledgement that the requested action alters the royalty payee from the standard royalty payee established by § 210.29(b)(4)(i).

(C) The notice must include a clear statement stipulating that neither the notice nor the distribution of royalties by the mechanical licensing collective in accordance with the notice prejudices the rights of either party.

(iv) Where there is more than one copyright owner or designated royalty payee, the required notice shall include a satisfactory identification of any applicable ownership shares for the musical works subject to the request. Where there is more than one copyright owner, the notice shall be effective only as to those copyright owners whose information is provided in accordance with paragraph (c)(4)(i)(B) of this section and, subject to paragraph (c)(4)(iii) of this section to the extent it applies, whom have signed and certified the notice in accordance with paragraph (c)(4)(ii) of this section. Where there is more than one designated royalty payee, the notice shall be effective only as to those payees whose information is provided in accordance with paragraph (c)(4)(i)(D) of this section.

(v) The references to § 210.29(b)(4)(i) in paragraphs (b) and (c)(4) of this section shall, as applicable, be read to incorporate § 210.29(j).

(5) Where multiple transfers of copyright ownership occur prior to providing notice of the change to the mechanical licensing collective, a compliant notice for each transfer must be provided to the mechanical licensing collective. For example, where there is a termination followed by an assignment of the copyright in the musical work, notice of the termination under paragraph (c)(2) of this section and notice of the subsequent assignment under paragraph (c)(1) of this section must both be provided to the mechanical licensing collective.

(6) Where a transfer of copyright ownership and a request to designate or change an alternative royalty payee are related, a compliant notice for both the transfer and request must be provided to the mechanical licensing collective. For example, where there is an assignment of the copyright in the musical work that includes a contractual right for the

assignee to also be entitled to future royalty distributions for periods predating the transfer, notice of the assignment under paragraph (c)(1) of this section and notice of the designation of an alternative royalty payee under paragraph (c)(4) of this section must both be provided to the mechanical licensing collective.

(d) *Implementation of a change*. Upon receiving a notice that complies with the requirements of paragraph (c) of this section, the mechanical licensing collective shall implement and give effect to the identified transfer or request as follows:

(1)(i) Except as provided by paragraph (d)(1)(ii) of this section, where the mechanical licensing collective receives the notice before the first day of the first monthly reporting period to commence after the change is effective, the mechanical licensing collective shall implement and give effect to the change, on a prospective basis, beginning with the first distribution of royalties for such reporting period.

(ii) Where the notice concerns a transfer of copyright ownership resulting from an effective termination under 17 U.S.C. 203 or 304 submitted by the terminating party under paragraph (c)(2) of this section, and the pre-termination copyright owner does not initiate a dispute as described in paragraph (c)(2)(iv)(B) of this section, then the mechanical licensing collective shall implement and give effect to the change as follows: Where the mechanical licensing collective receives the notice at least 45 calendar days before the first day of the first monthly reporting period to commence after the change is effective, the mechanical licensing collective shall implement and give effect to the change, on a prospective basis, beginning with the first distribution of royalties for such reporting period.

(2)(i) Except as provided by paragraph (d)(2)(ii) of this section, where the mechanical licensing collective receives the notice on or after the first day of the first monthly reporting period to commence after the change is effective, the mechanical licensing collective shall implement and give effect to the change, on a prospective basis,

beginning no later than the first distribution of royalties based on the first payee snapshot taken by the mechanical licensing collective at least 30 calendar days after the mechanical licensing collective receives the notice. As used in the previous sentence and in paragraph (d)(2)(ii) of this section, the term *payee snapshot* means the royalty payee information in the mechanical licensing collective's records as of a particular date that will be used for a particular monthly royalty distribution.

(ii) Where the notice concerns a transfer of copyright ownership resulting from an effective termination under 17 U.S.C. 203 or 304 submitted by the terminating party under paragraph (c)(2) of this section, and the pre-termination copyright owner does not initiate a dispute as described in paragraph (c)(2)(iv)(B) of this section, then the mechanical licensing collective shall implement and give effect to the change as follows: Where the mechanical licensing collective receives the notice less than 45 calendar days before the first day of the first monthly reporting period to commence after the change is effective, the mechanical licensing collective shall implement and give effect to the change, on a prospective basis, beginning no later than the first distribution of royalties based on the first payee snapshot taken by the mechanical licensing collective at least 30 calendar days after the pre-termination copyright owner's deadline to dispute under paragraph (c)(2)(iv)(B) of this section.

(3) Where additional information related to the notice is required to enable the mechanical licensing collective to implement and give effect to the change, and such information is received after receipt of the notice, the timing requirements described in paragraphs (d)(1) and (2) of this section shall be based on the date that the last piece of necessary information is received by the mechanical licensing collective.

(4) Where the change is effective as to one or more monthly reporting periods for which the mechanical licensing collective distributed royalties before implementing and giving

effect to the change, the mechanical licensing collective may, but is not required to, make a corrective royalty adjustment if the notice requests one.

(5) Where the notice concerns a transfer of copyright ownership resulting from an effective termination under 17 U.S.C. 203 or 304 submitted under paragraph (c)(2) of this section, and the notice is accompanied by proof that the notice of termination was submitted to the Copyright Office for recordation, but not that it was recorded in the Copyright Office before the effective date of termination, the mechanical licensing collective shall act as follows:

(i) The receipt of proof that the notice of termination was recorded in the Copyright Office before the effective date of termination shall be treated as a type of additional information under paragraph (d)(3) of this section. The mechanical licensing collective shall not implement or give effect to any such termination unless and until such proof is received.

(ii) Notwithstanding paragraph (d)(5)(i) of this section, the mechanical licensing collective shall hold applicable accrued royalties and accrued interest pending receipt of proof that the notice of termination was recorded in the Copyright Office before the effective date of termination as follows:

(A) The mechanical licensing collective shall commence holding such amount no later than the implementation deadline that would apply under paragraphs (d)(1) through (3) of this section, as applicable, if proof of recordation had been provided with the notice.

(B) After proof that the notice of termination was recorded in the Copyright Office before the effective date of termination is received, the mechanical licensing collective shall implement and give effect to the termination as provided by paragraphs (d)(1) through (4) and (5)(i) of this section, as applicable.

(C) Where the Copyright Office refuses to record the notice of termination or the notice of termination is recorded on or after the effective date of termination, such that the

termination is not effective, the mechanical licensing collective shall release the held funds to the pre-termination copyright owner.

(D) If proof that the notice of termination was recorded in the Copyright Office before the effective date of termination is not received by the mechanical licensing collective within 6 months after the mechanical licensing collective commences holding applicable accrued royalties and accrued interest, the mechanical licensing collective shall contact the Copyright Office to confirm the status of the relevant recordation submission. If the submission remains pending at that time, the mechanical licensing collective shall continue to check its status monthly. Upon confirmation from the Copyright Office regarding whether the applicable notice of termination has been timely recorded or not, the mechanical licensing collective shall act in accordance with paragraph (d)(5)(ii)(B) or (C) of this section, as the case may be, except that no further proof shall be required to be submitted to the mechanical licensing collective for it to act.

(6) No action or inaction by the mechanical licensing collective with respect to implementing and giving effect to a payee change shall affect any party's right to royalties pursuant to such change or such party's ability to collect such royalties from someone other than the mechanical licensing collective if such royalties were not distributed to such party by the mechanical licensing collective.

(e) *Termination disputes*. The following requirements shall apply to any dispute initiated with the mechanical licensing collective regarding a termination under 17 U.S.C. 203 or 304:

(1) Such a dispute must be with regard to the validity of the termination or the application of the derivative works exception to a particular voluntary license or its underlying grant of authority.

(2) Only the pre-termination copyright owner (or its representative) may initiate such a dispute.

(3) If the pre-termination copyright owner (or its representative) initiates such a dispute and delivers the information required to substantiate the dispute to the mechanical licensing collective under paragraph (e)(4) of this section, the mechanical licensing collective shall hold applicable accrued royalties and accrued interest pending resolution of the dispute.

(4) The minimum information that must be delivered to the mechanical licensing collective to substantiate a termination-related dispute shall consist of the following:

(i) A cognizable explanation of the grounds for the dispute, articulated with specificity.

(ii) Documentation sufficient to support the grounds for the dispute, which shall consist of the following:

(A) A true, correct, complete, and legible copy of each grant in dispute.

(B) A true, correct, complete, and legible copy of any other agreement or document necessary to support the grounds for the dispute.

(C) Such other documentation or substantiating information as the mechanical licensing collective may reasonably require pursuant to a dispute policy adopted under 17 U.S.C. 115(d)(3)(K).

(iii) A satisfactory identification of each musical work in dispute.

(iv) A certification that the submitter has appropriate authority to initiate the dispute with the mechanical licensing collective and that all information submitted in connection with the dispute is true, accurate, and complete to the best of the submitter's knowledge, information, and belief, and is provided in good faith.

(v) If the dispute concerns the application of the derivative works exception to a particular voluntary license or its underlying grant of authority:

(A) A true, correct, complete, and legible copy of each voluntary license at issue.

(B) A satisfactory identification of each relevant sound recording that constitutes a derivative work within the meaning of 17 U.S.C. 101 that was prepared pursuant to appropriate authority.

(C) The date of preparation for each such sound recording, which must be before the effective date of termination.

(5) Notwithstanding anything to the contrary that may be contained in § 210.34, any and all documentation provided to the mechanical licensing collective pursuant to paragraph (e)(4) of this section shall be disclosed to all parties to the dispute. If a party to the dispute is not a party or successor to a party to an otherwise confidential document, such disclosure shall be subject to an appropriate written confidentiality agreement.

(f) *Resolution of a dispute and release of disputed funds*. All disputed funds held by the mechanical licensing collective pursuant to a dispute among purported copyright owners or royalty payees must be subject to active dispute resolution by the relevant parties. Such funds shall no longer be considered to be in dispute and the mechanical licensing collective shall release such funds under the following circumstances, which shall constitute the resolution of the dispute as to such funds:

(1) Where the mechanical licensing collective is directed to do so by mutual agreement of the relevant parties. Funds released under this paragraph (f)(1) shall be paid in accordance with such agreement, subject to the relevant requirements of paragraphs (c) and (d) of this section if the agreement changes the royalty payee, except that, notwithstanding paragraph (d)(4) of this section, payments of released funds shall be made for applicable monthly reporting periods predating the mechanical licensing collective's implementation of the change.

(2) Where the mechanical licensing collective is directed to do so by order of an adjudicative body with appropriate authority. Funds released under this paragraph (f)(2) shall be paid in accordance with such order.

(3) Except where a legal proceeding is commenced, where, during any 6-month period starting one year after the disputed funds are placed on hold, the mechanical licensing collective does not receive a joint notice signed by all relevant parties that they are continuing to engage in active dispute resolution. Such notice must comply with any reasonable formatting and submission requirements established by the mechanical licensing collective and made publicly available on its website. Funds released under this paragraph (f)(3) shall be paid to the party who would have received such funds if the funds were not placed on hold pursuant to a dispute.

6. Amend § 210.34 as follows:

a. Add paragraph (c)(6).

b. In paragraph (c)(5), remove "to paragraph (c)(4) of" and add in its place "to paragraph (c)(4) or (c)(6) of".

The addition reads as follows:

§ 210.34 Treatment of confidential and other sensitive information.

* * * * *

(c) * * *

(6)(i) Notwithstanding paragraph (c)(1) of this section, where the mechanical licensing collective has placed any accrued royalties, accrued interest, or other monies on hold with respect to particular reported usage or a particular work (or share thereof) (*e.g.*, where there is an ownership dispute or a legal proceeding has been commenced), the mechanical licensing collective shall disclose the amount being held and reason for the hold to any individual or entity with a bona fide legal claim to such funds or a portion thereof.

(ii) Such disclosure shall be made to each such claimant no later than 10 business days after placing the amount on hold, where the mechanical licensing collective is aware of the claimant's claim at that time. Where the mechanical licensing collective is not aware of a claimant's claim when the amount is placed on hold, such disclosure shall be made

to that claimant no later than 10 business days after becoming aware. For any amounts placed on hold before [EFFECTIVE DATE OF FINAL RULE], where the mechanical licensing collective is aware of a claimant's claim at that time, such disclosure shall be made to such claimant no later than [DATE 10 BUSINESS DAYS AFTER EFFECTIVE DATE OF FINAL RULE]. Where the mechanical licensing collective is not aware of a claimant's claim as of [EFFECTIVE DATE OF FINAL RULE], such disclosure shall be made to that claimant no later than 10 business days after becoming aware.

(iii) Disclosure of the amount being held with respect to particular reported usage or a particular work (or share thereof) shall be accompanied by a statement that complies with the requirements of § 210.29 as if such held amount were to instead be distributed pursuant to § 210.29. Disclosure of the reason for the hold shall be made with specificity. The mechanical licensing collective shall provide all claimants with monthly updates concerning the status of the hold and the amount being held. The mechanical licensing collective shall respond to any inquiry from a claimant about the hold within 10 business days and shall provide any reasonably requested additional information about the hold within a reasonable period of time commensurate with the request.

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Dated: September 21, 2023.

Suzanne V. Wilson,

General Counsel and

Associate Register of Copyrights.

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