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U.S. Copyright Office

37 CFR Parts 201, 203, and 210

[Docket No. 2018-10]

Notices of Intention and Statements of Account under Compulsory License to Make and Distribute Phonorecords of Musical Works

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

ACTION: Interim rule with request for comments.

SUMMARY: The U.S. Copyright Office is issuing interim regulations pursuant to the Musical Works Modernization Act, title I of the recently enacted Orrin G. Hatch–Bob Goodlatte Music Modernization Act. This interim rule amends the Office's existing regulations pertaining to the compulsory license to make and distribute phonorecords of musical works so as to conform the existing regulations to the new law, including with respect to the operation of notices of intention and statements of account, and to make other minor technical updates. To be clear, this interim rule is generally directed at the present transition period before a blanket license is offered by a mechanical licensing collective and does not include regulatory updates that may be required in connection with the future offering of that blanket license; such updates will be the subject of future rulemakings. These regulations are issued on an interim basis with opportunity for public comment to avoid delay in making these necessary updates and clarifications and because they are technical in nature. The Office welcomes comment on these interim regulations.

DATES: The effective date of the interim regulations is [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Written 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 government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at *https://www.copyright.gov/rulemaking/mma-115-techamend/*. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

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

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act ("MMA").[1] This bipartisan and unanimously enacted legislation represents the realization of years of effort by a wide array of

[1] Pub. L. 115-264, 132 Stat. 3676 (2018).

policymakers and stakeholders, as well as the U.S. Copyright Office, to update the music licensing landscape to better facilitate legal licensing of music by digital services.[2]

Title I of the MMA, the Musical Works Modernization Act, substantially modifies the compulsory "mechanical" license for making and distributing phonorecords of nondramatic musical works available under 17 U.S.C. 115. Prior to the MMA, a compulsory license was obtained by licensees on a per-work, song-by-song basis, whereby a licensee was required to serve a notice of intention to obtain a compulsory license ("NOI") on the relevant copyright owner (or file the NOI with the Copyright Office if the Office's public records did not identify the copyright owner and include an address at which notice could be served) and then pay applicable royalties accompanied by accounting statements.[3]

The MMA amends this regime in multiple ways, most significantly by establishing a new blanket compulsory license that digital music providers may obtain to make digital phonorecord deliveries ("DPDs") of musical works, including in the form of permanent downloads, limited downloads, or interactive streams.[4] Instead of licensing one song at a time by serving NOIs on individual copyright owners, the blanket license will cover all musical works available for compulsory licensing and will be centrally administered by a new entity called the mechanical licensing collective ("MLC"), to be

[2] *See* S. Rep. No. 115-339, at 1–2 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 1 (2018), https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf; *see also* H.R. Rep. No. 115-651, at 2–3 (2018) (detailing the House Judiciary Committee's efforts to review music copyright laws).

[3] *See* 17 U.S.C. 115(b)(1), (c)(5) (2017); U.S. Copyright Office, Copyright and the Music Marketplace 28–31 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (describing operation of prior section 115 license).

[4] 17 U.S.C. 115(d)(1), (e)(7); *see* H.R. Rep. No. 115-651, at 4–6 (describing operation of the blanket license and the new mechanical licensing collective); S. Rep. No. 115-339, at 3–6 (same).

designated by the Register of Copyrights.[5] Under the MMA, compulsory licensing of phonorecords that are not DPDs (*e.g.*, CDs, vinyl, tapes, and other types of physical phonorecords) continues to operate on a per-work, song-by-song basis, the same as before.[6]

The new blanket license created by the MMA will not become available until the license availability date, which is January 1 following the expiration of the 2-year period after the enactment date, or January 1, 2021.[7] Until that time, the MMA "creates a transition period in order to move from the current work-by-work license to the new blanket license."[8] During this current transition period, anyone seeking to obtain a compulsory license to make DPDs must continue to do so on a song-by-song basis by serving NOIs on copyright owners "if the identity and location of the musical work copyright owner is known," and paying them applicable royalties accompanied by statements of account.[9] If the musical work copyright owner is unknown, a digital music provider may no longer file a NOI with the Copyright Office, but must "continue[] to search for the musical work copyright owner" using good-faith, commercially reasonable efforts.[10] The digital music provider must eventually either account for and pay accrued royalties to the relevant musical work copyright owner(s) when found or, if they are not found before the end of the transition period, account for and transfer the royalties to the

[5] 17 U.S.C. 115(d)(1), (3).
[6] *Id*. 115(b)(1); *see* H.R. Rep. No. 115-651, at 3 (noting "[t]his is the historical method by which record labels have obtained compulsory licenses"); S. Rep. No. 115-339, at 3 (same); s*ee also* U.S. Copyright Office, Orrin G. Hatch–Bob Goodlatte Music Modernization Act, https://www.copyright.gov/music-modernization/.
[7] 17 U.S.C. 115(d)(2)(B), (e)(15).
[8] H.R. Rep. No. 115-651, at 10; S. Rep. No. 115-339, at 10.
[9] 17 U.S.C. 115(b)(2)(A), (c)(2)(I); H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 3.
[10] 17 U.S.C. 115(b)(2)(A), (d)(9)(D)(i), (d)(10)(A)–(B); H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10, 22.

MLC at that time.[11] A digital music provider complying with these requirements can avail itself of a limitation on liability for making an unauthorized DPD to the royalties that would be due under the compulsory license.[12]

On and after the license availability date, a compulsory license to make DPDs will generally only be available through the new blanket license, subject to a limited exception for record companies to continue using the song-by-song licensing process to make and distribute, or authorize the making and distribution of, permanent downloads embodying a specific individual musical work (called an "individual download license").[13] As the legislative history notes, the MMA "maintains the 'pass-through' license for record labels to obtain and pass through mechanical license rights for individual permanent downloads," but eliminates the pass-through license for digital music providers "to engage in activities related to interactive streams or limited downloads."[14]

II. Interim Rule

The Office promulgates the following interim rule to make technical amendments to its existing section 115-related regulations to harmonize them with the MMA's requirements, and to make other minor technical updates. These amendments largely fall into two categories: those affecting NOIs and those affecting statements of account.[15] The

[11] 17 U.S.C. 115(d)(10)(B); *see* H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10.
[12] 17 U.S.C. 115(d)(10)(A)–(B); *see* H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10.
[13] 17 U.S.C. 115(b)(2)(B), (b)(3), (e)(12); *see* H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 3–4.
[14] H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 4.
[15] This interim rule also makes minor technical changes to other provisions relating to section 115, such as updating the description of the Office's Licensing Division in its FOIA-related

Office declines at this time to substantively amend the existing regulations beyond the statutorily required updates. The intent of the legislation does not signal to the Office that it should be overhauling its existing regulations during the transition period before the blanket license becomes available; such changes could alter private companies' long-established business practices and expectations with respect to NOIs and royalty statements during the transition period beyond what the statute requires. Having said that, the Office welcomes public comment on these amendments and any other specific technical amendments that stakeholders would like the Office to consider.

A. Notices of Intention

Under the interim rule, 37 CFR 201.18 is primarily updated to implement 17 U.S.C. 115(b), as amended by the MMA. As outlined above, as of enactment of the MMA on October 11, 2018: (1) NOIs pertaining to phonorecords that are not DPDs (*i.e.*, physical phonorecords such as CDs, vinyl, or tapes) may still be served on copyright owners or, if the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which the NOI can be served, filed with the Copyright Office, the same as before enactment of the MMA; (2) NOIs pertaining to DPDs (*e.g.*, permanent downloads, limited downloads, or interactive streams) may still be served on copyright owners until the license availability date, but not afterward, except in the case of a record company seeking an individual download license; and (3) NOIs pertaining to DPDs can no longer be filed with the Copyright

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regulations. The Office is also taking this opportunity to make an additional technical update to its FOIA-related regulations to reflect the Office's current organizational structure.

Office under any circumstances.[16] The definition of "digital phonorecord delivery" is also updated in the regulation to match the amended definition in the MMA.

Under the interim rule, the Office is not making any changes to the form, content, or manner of service for NOIs. In addition to the conforming amendments necessitated by the MMA, the Office is taking this opportunity to make two minor clarifying technical updates. First, the regulations previously stated that the Office does not provide forms to use for serving or filing NOIs, but since 2016, the Office has had a required form that must be used to file NOIs electronically with the Office.[17] The interim rule acknowledges this electronic form. Second, the interim rule clarifies the Office's current practice, as detailed in a 2017 policy statement, of charging a filing fee for so-called "returned-to-sender NOIs"[18] submitted to the Office.[19] Of course, both of these updates only apply to NOIs pertaining to phonorecords that are not DPDs.

B. Statements of Account

Under the interim rule, the Office is not making any amendments to the form, content, or manner of service for monthly or annual statements of account under subpart B of part 210 of the Office's regulations. But the interim rule clarifies that on and after the license availability date, these regulations will not apply to any DPDs made under a compulsory license, unless they are made by a record company under an individual

[16] 17 U.S.C. 115(b), (d)(9)(D)(i).
[17] *See Section 115 NOIs May Now Be Filed With Office In Bulk Electronic Form*, U.S. Copyright Office NewsNet No. 618 (Apr. 13, 2016), https://www.copyright.gov/newsnet/2016/618.html.
[18] A "returned-to-sender NOI" is one that is sent to the last address for the copyright owner shown by the Office's records, but that is returned to the sender because the copyright owner is no longer located at that address or refused to accept delivery. In such cases, the original NOI can be filed with the Office. *See* 37 CFR 201.18(f)(2).
[19] *See* 82 FR 52221, 52223 (Nov. 13, 2017).

download license.[20] This means that the regulations will not apply to digital music providers reporting and paying royalties under a blanket license (such activity will be the subject of a separate, future rulemaking).[21]

The interim rule also details the requirements for digital music providers to report and pay royalties regarding previously unmatched works for purposes of eligibility for the limitation on liability for making unauthorized DPDs during the transition period before the blanket license becomes available. As noted, once a digital music provider has identified and located a musical work copyright owner, the statute requires the provider to pay the copyright owner all accrued royalties accompanied by a cumulative statement of account that includes all of the information that would have been provided in monthly statements of account from the initial use of the work, had the copyright owner been previously identified and located.[22] If the digital music provider has not located the musical work copyright owner by the license availability date, the accrued royalties and cumulative statement must be provided to the MLC.[23] The interim regulations follow the statute, specifying that the digital music provider must pay royalties and provide cumulative statements under subpart B of part 210 as if they were a compulsory licensee. In providing these cumulative statements, the interim rule also requires digital music providers to identify the total period covered by the cumulative statement and the total royalty payable for the period. This addition is meant to assist the copyright owner or the MLC, as the case may be, to quickly ascertain the sum of the contents of the cumulative statement. As mandated by the MMA, the interim rule also requires that such cumulative

[20] *See* 17 U.S.C. 115(b)(3).
[21] *See id*. 115(d)(4)(A)(i).
[22] *Id*. 115(d)(10)(B)(iv)(II)(aa).
[23] *Id*. 115(d)(10)(B)(iv)(III)(aa).

statements include the certification required for monthly statements of account under Copyright Office regulations.[24]

III. Request for Comments

These interim regulations will go into effect immediately after publication of this document in the Federal Register. Comments will be due 45 days thereafter. The Copyright Office is issuing these interim regulations after finding, for good cause, that notice and comment prior to their issuance would be contrary to the public interest.[25] The changes to section 115 made by the MMA were effective on October 11, 2018, and this interim rule conforms the regulations to the new law and clarifies for the public the operation of the Office's existing section 115-related regulations during the current transition period before the license availability date. The rule also must be issued without delay because it specifies the information to be contained in statements of account provided by digital music providers seeking to avail themselves of the limitation on liability available during this transition period. Moreover, the amendments made by this

[24] *See id*. 115(d)(10)(B)(iv)(II)(aa), (III)(aa) (cumulative statements to be provided "in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I)").

[25] In the past, the Copyright Office has similarly issued interim rules upon the enactment of legislation before soliciting public comments. *See, e.g.*, Filing of Schedules by Rights Owners and Contact Information by Transmitting Entities Relating to Pre-1972 Sound Recordings, 83 FR 52150, 52153 (Oct. 16, 2018) (issuing interim rule regarding certain new types of filings because "[t]he MMA requires swift action by the Office" and "a prompt interim rule best serves the legal interests of all relevant stakeholders as well as the general public"); Freedom of Information Act Regulations, 82 FR 9505, 9506 (Feb. 7, 2017) (issuing interim rule to implement the FOIA Improvement Act of 2016 because "allowing for notice and public procedure prior to the issuance of . . . interim regulations would be impracticable"); Designation of Agent to Receive Notification of Claimed Infringement, 63 FR 59233, 59234 (Nov. 3, 1998) (issuing interim rule regarding designation of agent after enactment of the Digital Millennium Copyright Act because "online service providers may wish immediately to designate agents to receive notification of claimed infringement").

interim rule are meant to be technical in nature, as they are largely non-discretionary and merely make statutorily mandated modifications to existing rules.

The Copyright Office notes that this is only the first of what will be a number of rulemakings required by the MMA that concern the section 115 license. Over the next few months, the Office will be issuing additional notices to address other issues presented by the MMA, including the designation of the MLC and the filing by digital music providers of notices of license and reports of usage with the MLC under the blanket license. This interim rule, in contrast, does not cover the MLC or activity under the blanket license, and comments on such matters should not be submitted in response to it. Rather, comments submitted in response to this notice should be limited to the subjects of this interim rule. The Office looks forward to hearing from all who are interested in these important issues as the process continues.

List of Subjects

37 CFR Part 201

Copyright, General provisions.

37 CFR Part 203

Freedom of information.

37 CFR Part 210

Copyright, Phonorecords, Recordings.

Interim Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR parts 201, 203, and 210 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.18 as follows:

a. Revise paragraphs (a)(1) and (2).

b. In paragraph (a)(3):

i. Remove "is each" and add in its place "means each".

ii. Remove "which results" and add in its place "that results".

iii. Remove "nondramatic".

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

c. In paragraph (a)(4) introductory text:

i. Remove "A Notice of Intention shall" and add in its place "As eligible under paragraph (a)(2) of this section, a Notice of Intention shall".

ii. Remove "(f)(3)" and add in its place "(f)(2) or (3)".

d. In paragraph (a)(6), remove "Notwithstanding paragraph (a)(2) of this section, a" and add in its place "A".

e. Revise paragraph (c).

f. In paragraph (d)(1)(iii), remove "(for example: a record company or digital music service)".

g. In paragraph (d)(1)(v)(D), remove "delivery, or" and add in its place "delivery (if eligible under paragraph (a)(2) of this section), or".

h. In paragraph (f)(1):

i. Remove "If the" and add in its place "As eligible under paragraph (a)(2) of this section, if the".

ii. Remove the second sentence.

i. In paragraph (f)(2):

i. Remove "If the Notice is" and add in its place "If a Notice of Intention seeking a compulsory license to make and distribute phonorecords of a musical work other than by means of digital phonorecord delivery is".

ii. Remove "accompanied by a" and add in its place "accompanied by the fee specified in §201.3(e) and a".

j. In paragraph (f)(3), remove "in the Notice of Intention, the" and add in its place "in a Notice of Intention seeking a compulsory license to make and distribute phonorecords of a musical work other than by means of digital phonorecord delivery, the".

k. In paragraph (f)(4), remove "section 115(b)(1) of title 17 of the United States Code" and add in its place "17 U.S.C. 115(b)".

l. In paragraph (g), add three sentences at the end of the paragraph.

m. In paragraph (h), remove "section 115(b)(1) of title 17 of the United States Code" and add in its place "17 U.S.C. 115(b)".

The revisions and additions read as follows:

§ 201.18 Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) *General.* (1) A "Notice of Intention" is a Notice identified in section 115(b) of title 17 of the United States Code. If the eligibility requirements of 17 U.S.C. 115(a) are satisfied, then, subject to 17 U.S.C. 115(b), a person may serve on a copyright owner or file with the Copyright Office, as applicable, a Notice of Intention and thereby obtain a compulsory license pursuant to 17 U.S.C. 115.

(2)(i) To obtain a compulsory license to make and distribute phonorecords of a musical work other than by means of digital phonorecord delivery, a Notice must be served on the copyright owner or, if the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which Notice can be served, filed with the Copyright Office, before, or not later than 30 calendar days after, making, and before distributing, any phonorecord of the work.

(ii) Prior to the license availability date, as defined in 17 U.S.C. 115(e), to obtain a compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord delivery, a Notice must be served on the copyright owner, before, or not later than 30 calendar days after, first making any such digital phonorecord delivery. On and after the license availability date, as defined in 17 U.S.C. 115(e), to obtain such a compulsory license, the procedure described in 17 U.S.C. 115(d)(2) must be followed. As of October 11, 2018, the Copyright Office does not accept Notices that pertain to digital phonorecord deliveries, regardless of whether such a Notice also pertains to phonorecords that are not digital phonorecord deliveries.

(iii) Notwithstanding paragraph (a)(2)(ii) of this section, a record company, as defined in 17 U.S.C. 115(e), may, on or after the license availability date, as defined in 17 U.S.C. 115(e), obtain an individual download license, as described in 17 U.S.C. 115(b)(3) and defined in 17 U.S.C. 115(e), by serving a Notice on the copyright owner, before, or not later than 30 calendar days after, first making any digital phonorecord delivery in the form of a permanent download.

(3) * * * Notwithstanding the foregoing, a permanent download, a limited download, or an interactive stream, as defined in 17 U.S.C. 115(e), is a digital phonorecord delivery. A

digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in 17 U.S.C. 101.

* * * * *

(c) *Form*. The Copyright Office does not provide physical printed forms for the use of persons serving or filing Notices of Intention, but Notices filed electronically must be submitted to the Office in the form and manner prescribed in instructions on the Office's website.

* * * * *

(g) * * * Notwithstanding the foregoing, the Copyright Office will examine Notices to ensure that they do not pertain to digital phonorecord deliveries. Any Notice submitted to the Office that does pertain to digital phonorecord deliveries, regardless of whether such a Notice also pertains to phonorecords that are not digital phonorecord deliveries, will be rejected. The Office's decision to accept or reject such a Notice is without prejudice to any party claiming that the Notice does or does not pertain to digital phonorecord deliveries, including before a court of competent jurisdiction.

* * * * *

PART 203—FREEDOM OF INFORMATION ACT: POLICIES AND PROCEDURES

3. The authority citation for part 203 continues to read as follows:

Authority: 5 U.S.C. 552.

4. Amend § 203.3 as follows:

a. Remove paragraph (b)(2).

b. Redesignate paragraph (b)(3) as paragraph (b)(2).

c. Revise paragraphs (h) and (i).

The revisions read as follows:

§ 203.3 Organization.

* * * * *

(h) The Copyright Modernization Office ("CMO") is headed by the Director, who is the Register's top advisor on Copyright Office modernization and oversees the development and implementation of technology initiatives affecting registration and recordation. This Office directs and coordinates all modernization activities on behalf of the U.S Copyright Office, including resources, communications, stakeholder engagement, and business project management. The CMO ensures that modernization activities are continuously aligned with the Office's and the Library of Congress's strategic goals, and collaborates with the Office and the Library to drive modernization efforts. The CMO provides project management, data management/analytics, and business analysis. It also serves as the primary liaison with the Library of Congress's Office and Chief Information Officer ("OCIO") and serves in a leadership function on the Office's Modernization Governance Board.

(i) The Chief Financial Officer ("CFO") is a senior staff position that serves under the Register and oversees all fiscal, financial, and budgetary activities for the Copyright Office. The CFO also oversees the Licensing Division, which administers certain statutory licenses set forth in the Copyright Act. The Division collects royalty payments and examines statements of account for the cable statutory license (17 U.S.C. 111), the satellite statutory license for retransmission of distant television broadcast stations (17 U.S.C. 119), and the statutory license for digital audio recording technology (17 U.S.C.

chapter 10). The Division also accepts and records certain documents associated with the use of the mechanical statutory license for making and distributing phonorecords of nondramatic musical works (17 U.S.C. 115) and the statutory licenses for publicly performing sound recordings by means of digital audio transmission (17 U.S.C. 112, 114).

* * * * *

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

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

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

6. Amend subpart B by revising the heading to read as follows:

Subpart B -- Royalties and Statements of Account Under Non-Blanket Compulsory License

7. Amend § 210.11 by adding a sentence at the end of the paragraph to read as follows:

§ 210.11 General.

* * * On and after the license availability date, this subpart shall not apply with respect to any digital phonorecord delivery made pursuant to the compulsory license unless such digital phonorecord delivery is made by a record company under an individual download license under 17 U.S.C. 115(b)(3), which must be reported and paid for in accordance with § 210.21; that is, this subpart shall not apply where a digital music provider reports and pays royalties under a blanket license under 17 U.S.C. 115(d)(4)(A)(i).

§ 210.12 [Amended]

8. Amend § 210.12 as follows:

a. In paragraphs (a) and (b), remove "115(c)(5)" and add in its place "115(c)(2)(I)".

b. In paragraph (c):

i. Remove "is each" and add in its place "means each".

ii. Remove "which results" and add in its place "that results".

iii. Remove "nondramatic".

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

c. Add paragraphs (k) through (o).

The additions read as follows:

§ 210.12 Definitions.

(c) * * * Notwithstanding the foregoing, a permanent download, a limited download, or an interactive stream, as defined in 17 U.S.C. 115(e), is a digital phonorecord delivery. A digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in 17 U.S.C. 101.

* * * * *

(k) The term *license availability date* shall have the meaning given in 17 U.S.C. 115(e)(15).

(l) The term *digital music provider* shall have the meaning given in 17 U.S.C. 115(e)(8).

(m) The term *blanket license* shall have the meaning given in 17 U.S.C. 115(e)(5).

(n) The term *record company* shall have the meaning given in 17 U.S.C. 115(e)(26).

(o) The term *individual download license* shall have the meaning given in 17 U.S.C. 115(e)(12).

§ 210.16 [Amended]

9. Amend § 210.16(d)(3) by removing "115(c)(5)" and adding in its place "115(c)(2)(I)".

§ 210.19 [Amended]

10. Amend § 210.19 by removing "115(c)(6)" and adding in its place "115(c)(2)(J)".

11. Add §§ 210.20 and 210.21 to read as follows:

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

This section specifies the requirements for a digital music provider to report and pay royalties for purposes of being eligible for the limitation on liability described in 17 U.S.C. 115(d)(10). Terms used in this section that are defined in 17 U.S.C. 115(e) shall have the meaning given those terms in 17 U.S.C. 115(e).

(a) If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall provide statements of account and pay royalties to such copyright owner as a compulsory licensee in accordance with this subpart.

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

(1) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.

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

(i) Not later than 45 calendar days after the end of the calendar month during which the copyright owner was identified and located, pay the copyright owner all accrued royalties, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been providing Monthly Statements of Account as a compulsory licensee in accordance with this subpart to the copyright owner from initial use of the work, and including, in addition to the information and certification required by § 210.16, a clear identification of the total period covered by the cumulative statement and the total royalty payable for the period;

(ii) Beginning with the accounting period following the calendar month in which the copyright owner was identified and located, and for all other accounting periods prior to the license availability date, provide Monthly Statements of Account and pay royalties to the copyright owner as a compulsory licensee in accordance with this subpart; and

(iii) Beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such reporting period and reporting periods thereafter to the mechanical licensing collective, as required under 17 U.S.C. 115(d) and applicable regulations.

(3) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall—

(i) Not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been serving Monthly Statements of Account as a compulsory licensee in accordance with this subpart on the copyright owner from initial use of the work, accompanied by a certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner, and further including, in addition to the information and certification required by § 210.16, a clear identification of the total period covered by the cumulative statement and the total royalty payable for the period; and

(ii) Beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such period and reporting periods thereafter to the mechanical licensing collective, as required under 17 U.S.C. 115(d) and applicable regulations.

§ 210.21 Record companies using individual download licenses.

A record company that obtains an individual download license under 17 U.S.C. 115(b)(3) shall provide statements of account and pay royalties as a compulsory licensee in accordance with this subpart.

Dated: November 30, 2018.

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Karyn A. Temple,

Acting Register of Copyrights and
Director of the U.S. Copyright Office.

Approved by:

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Carla D. Hayden,
Librarian of Congress.

[BILLING CODE 1410-30-P]

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