



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 210

[Docket No. 2019-5]

Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective

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

ACTION: Notification of inquiry.

SUMMARY: The U.S. Copyright Office is issuing a notification of inquiry regarding the Musical Works Modernization Act, title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. Title I establishes a blanket compulsory license, which digital music providers may obtain to make and deliver digital phonorecords of musical works. The blanket license, which will be administered by a mechanical licensing collective, will become available on January 1, 2021. The MMA specifically directs the Copyright Office to adopt a number of regulations to govern the new blanket licensing regime, including regulations regarding notices of license, notices of nonblanket activity, usage reports and adjustments, information to be included in the mechanical licensing collective’s database, database usability, interoperability, and usage restrictions, and the handling of confidential information. The statute also vests the Office with general authority to adopt such regulations as may be necessary or appropriate to effectuate this new blanket licensing structure. To promulgate these regulations, the Office seeks public comment regarding the subjects of inquiry discussed in this notification.

DATES: Initial 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**]. Written reply comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 75 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-implementation/>. 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, Anna Chauvet, Associate General Counsel, by email at achau@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

A. *The Music Modernization Act and the Copyright Office’s Regulatory Authority*

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”).¹ 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 under 17 U.S.C. 115.² Prior to the MMA, licensees obtained a section 115 compulsory license on a per-work, song-by-song basis, by serving a notice of intention to obtain a compulsory license (“NOI”) on the relevant copyright owner (or filing it with the Copyright Office if the Office’s public records did not identify the copyright owner) and then paying applicable royalties accompanied by accounting statements.³

The MMA amends this regime 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 (referred to in the statute as “covered activity,” where such activity qualifies for a compulsory license).⁴ Instead of licensing one song at a time by serving NOIs on individual copyright owners, the blanket license will cover all

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

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://www.copyright.gov/legislation/mma_conference_report.pdf (“Conf. Rep.”); see also H.R. Rep. No. 115-651, at 2 (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 mechanical licensing collective); S. Rep. No. 115-339, at 3–6 (same).

musical works available for compulsory licensing and will be centrally administered by a mechanical licensing collective (“MLC”), which has recently been designated by the Register of Copyrights.⁵ The blanket licensing structure is designed to reduce the transaction costs associated with song-by-song licensing by commercial services striving to offer “as much music as possible,” while “ensuring fair and timely payment to all creators” of the musical works used on these digital services.⁶ Under the MMA, the statutory 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.⁷

The new blanket license will become available upon the statutory license availability date (*i.e.*, January 1, 2021).⁸ Before then, the MMA “creates a transition period in order to move from the current work-by-work license to the new blanket license.”⁹ On and after the license availability date, a compulsory license to make and distribute DPDs will generally only be available through the new blanket license, apart from a limited exception for record companies to continue using the song-by-song

⁵ 17 U.S.C. 115(d)(1), (3); 84 FR 32274 (July 8, 2019).

⁶ S. Rep. No. 115-339, at 4, 8.

⁷ 17 U.S.C. 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); *see also* U.S. Copyright Office, Orrin G. Hatch–Bob Goodlatte Music Modernization Act, <https://www.copyright.gov/music-modernization/>.

⁸ 17 U.S.C. 115(d)(2)(B), (e)(15).

⁹ H.R. Rep. No. 115-651, at 10; S. Rep. No. 115-339, at 10; *see* 17 U.S.C. 115(b)(2)(A), (d)(9), (d)(10). The Copyright Office has separately issued regulatory updates related to digital music providers’ obligations during this transition period before the blanket license is available. *See* 84 FR 10685 (Mar. 22, 2019); 83 FR 63061 (Dec. 7, 2018).

licensing process to make and distribute permanent downloads embodying a specific individual musical work (called an “individual download license”).¹⁰

As previously detailed by the Office,¹¹ the MLC, through its board of directors and task-specific committees,¹² is responsible for a variety of duties under the blanket license, including receiving usage reports from digital music providers, collecting and distributing royalties associated with those uses, identifying musical works embodied in particular sound recordings, administering a process by which copyright owners can claim ownership of musical works (and shares of such works), and establishing a musical works database relevant to these activities.¹³ By statute, digital music providers will bear the reasonable costs of establishing and operating the MLC through an administrative assessment, to be determined, if necessary, by the Copyright Royalty Judges (“CRJs”).¹⁴ The MMA also permits the Register to designate a digital licensee coordinator (“DLC”)

¹⁰ 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. 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.” H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 4.

¹¹ *See generally* 84 FR 32274; 83 FR 65747 (Dec. 21, 2018).

¹² By statute, the MLC board must establish three committees. First, an operations advisory committee will make recommendations concerning the operations of the MLC, “including the efficient investment in and deployment of information technology and data resources.” 17 U.S.C. 115(d)(3)(D)(iv). Second, an unclaimed royalties oversight committee will establish policies and procedures necessary to undertake a fair distribution of unclaimed royalties. *Id.* at 115(d)(3)(D)(v), (d)(3)(J)(ii). Third, a dispute resolution committee will establish policies and procedures for copyright owners to address disputes relating to ownership interests in musical works, including a mechanism to hold disputed funds pending the resolution of the dispute. *Id.* at 115(d)(3)(D)(vi), (d)(3)(H)(ii), (d)(3)(K).

¹³ *Id.* at 115(d)(3)(C).

¹⁴ *Id.* at 115(d)(7)(D).

to represent licensees in the assessment proceeding, to serve as a non-voting member of the MLC, and to carry out other functions.¹⁵

Effective July 8, 2019, following a comprehensive public process, the Register, with the approval of the Librarian of Congress, selected and designated entities and their individual board members as the MLC and DLC, respectively.¹⁶ The Office also adopted technical amendments to its relevant pre-MMA regulations, including those pertaining to NOIs and statements of account, to harmonize them with the MMA's requirements.¹⁷ Those amendments were generally directed at the present transition period before the blanket license becomes available. They did not speak to compulsory licensing of DPDs under the new blanket license, which is addressed through this notification of inquiry.

The MMA enumerates several regulations that the Copyright Office is specifically directed to promulgate to govern the new blanket licensing regime, including with respect to notices of license, notices of nonblanket activity, reports of usage, database information, database usability, interoperability, and usage restrictions, and the handling of confidential information. Additionally, Congress invested the Copyright Office with "broad regulatory authority"¹⁸ to "conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license]."¹⁹ The legislative history contemplates that the Office will "thoroughly review[]" policies and procedures established by the MLC and its three committees, and promulgate regulations that "balance[] the need to protect the public's

¹⁵ *Id.* at 115(d)(5)(B); *see also id.* at 115(d)(3)(D)(i)(IV), (d)(5)(C).

¹⁶ 84 FR at 32295.

¹⁷ 84 FR 10685; 83 FR 63061.

¹⁸ H.R. Rep. No. 115-651, at 5–6; S. Rep. No. 115-339, at 5; Conf. Rep. at 4.

¹⁹ 17 U.S.C. 115(d)(12)(A).

interest with the need to let the new collective operate without over-regulation.”²⁰ It further states that “[t]he Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation.”²¹ Together, the statute and legislative history make clear that Congress intended for the Office to oversee and regulate the MLC as necessary and appropriate,²² as well as periodically review that designation.²³ Indeed, Congress acknowledged that “[a]lthough the legislation provides specific criteria for the collective to operate, it is to be expected that situations will arise that were not contemplated by the legislation,” and that “[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations.”²⁴

The Office has recently addressed adjacent matters in two proceedings, concerning updating of the relevant section 115 regulations to account for the current interim period and the Register’s designation of the MLC and DLC.²⁵ The designation of the MLC received multiple public comments, some with respect to issues such as the MLC’s prospective governance practices and performance of its duty to eventually distribute unclaimed accrued royalties following a proscribed holding period, that the Office noted at the time were also able to be addressed in additional ways by the statute,

²⁰ H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12. The Conference Report further contemplates that the Office’s review will be important because the MLC must operate in a manner that can gain the trust of the entire music community, but can only be held liable under a standard of gross negligence when carrying out certain of the policies and procedures adopted by its board. Conf. Rep. at 4.

²¹ H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15; Conf. Rep. at 12.

²² The Office notes that in the MLC designation proceeding many commenters supported the Office performing a meaningful oversight role to the extent permissible under the statute. 84 FR at 32280 n.120.

²³ 17 U.S.C. 115(d)(3)(B)(ii).

²⁴ H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15; Conf. Rep. at 12.

²⁵ See 84 FR 32274; 84 FR 10685; 83 FR 63061.

including this delegation of regulatory authority.²⁶ Taking seriously Congress’s instructions to exercise its regulatory authority “to ensure the fair treatment of interested parties” by the MLC,²⁷ in designating the MLC and DLC, the Office stated that it “intends to conduct its oversight role in a fair and impartial manner; songwriters are encouraged to participate in these future rulemakings.”²⁸

B. Overview of the Rulemaking Process

To establish necessary and appropriate regulations to govern the new blanket licensing system, the Office now seeks public comment on the subjects discussed below. The Copyright Office is issuing this notification of inquiry as the first step in promulgating the regulations required by the MMA to govern the blanket license regime. After reviewing the comments received in response, the Office plans to publish multiple notices of proposed rulemaking, each focusing on one or more of the regulatory categories discussed below. The Office has concluded that this phasing is the best way for it to efficiently and thoughtfully conduct the relevant regulatory proceedings in light of the upcoming license availability date and the Office’s available resources. To aid the Office’s review, it is requested that where a submission responds to more than one of the below categories, it be divided into discrete sections that have clear headings to indicate the category being discussed in each section. Comments addressing a single category should also have a clear heading to indicate which category it discusses.

In responding to this notification, commenters are encouraged to indicate whether any of the below categories should be prioritized over others with respect to the order in

²⁶ 84 FR at 32283.

²⁷ H.R. Rep. No. 115-651, at 6; S. Rep. No. 115-339, at 5; Conf. Rep. at 4.

²⁸ 84 FR at 32283.

which the Office addresses them. For example, it may be beneficial to establish rules governing the musical works database and reports of usage early on to aid the MLC in building its database infrastructure and developing related IT systems. As another example, establishing confidentiality rules sooner rather than later may help the MLC and DLC share information as effectively and efficiently as possible as they both get ready for the license availability date.

On the other hand, for example, while any relevant regulatory activity regarding the MLC's obligation to distribute unclaimed accrued royalties (*e.g.*, engaging in good-faith efforts to publicize notice relating to pending distributions at least ninety days in advance²⁹) would relate to important, core responsibilities of the MLC, it appears logical to prioritize other regulatory provisions directed at more imminent MLC functions. Unlike most of the other subjects discussed below, which must be addressed before the January 1, 2021 license availability date, no unclaimed accrued royalties may be distributed until January 1, 2023, at the earliest.³⁰ Further, the Office is separately required by the MMA to undertake a study, to be concluded by July 2021, that recommends best practices for the MLC to identify and locate copyright owners with unclaimed royalties, encourage copyright owners to claim their royalties, and reduce the incidence of unclaimed royalties.³¹ The Office plans to commence that study this winter and looks forward to having broad industry participation, including by interested songwriters, regarding this important issue.

²⁹ See 17 U.S.C. 115(d)(3)(J)(iii)(II)(dd).

³⁰ *Id.* at 115(d)(3)(H)(i), (J)(i)(I); see 84 FR at 32291 (noting the Office's and the designated MLC's agreement on this issue).

³¹ Pub. L. 115-264, sec. 102(f), 132 Stat. 3676, 3722–23.

The Office welcomes parties to file joint comments on issues of common agreement and consensus.³² The Office will also consider how to utilize informal meetings to gather additional information on discrete issues prior to publishing notices of proposed rulemaking by establishing guidelines for *ex parte* communications. Relevant guidelines will be issued at a later date on <https://www.copyright.gov/rulemaking/mma-implementation/>, and will be similar to those imposed in other proceedings.³³ Any such communications will be on the record to ensure the greatest possible transparency, but would only supplement, not substitute for, the written record.

While all public comments are welcome, as applicable, the Office encourages parties to provide specific proposed regulatory language for the Office to consider and for others to comment upon. Similarly, commenters replying to proposed language may want to offer alternate language for consideration.

Commenters are reminded that while the Office’s regulatory authority is relatively broad,³⁴ it is obviously constrained by the law Congress enacted; the Office can fill statutory gaps, but will not entertain proposals that conflict with the statute.³⁵

³² See, e.g., Joint Comments of Nat’l Music Publishers’ Ass’n & Dig. Media Ass’n Submitted in Response to Copyright Royalty Board’s November 5, 2018, Notification of Inquiry (Dec. 10, 2018) (regarding regulations relating to enactment of the MMA); Joint Comments of Dig. Media Ass’n, Nat’l Music Publishers’ Ass’n, Recording Indus. Ass’n of Am., Harry Fox Agency, Inc., & Music Reports, Inc. Submitted in Response to U.S. Copyright Office’s July 27, 2012, Notice of Proposed Rulemaking (Oct. 25, 2012) (regarding section 115 statement of account regulations).

³³ See, e.g., 83 FR at 65753–54 (identifying guidelines for *ex parte* communications in MLC and DLC designation proceeding); 82 FR 49550, 49563 (Oct. 26, 2017) (identifying guidelines for *ex parte* communications in section 1201 rulemaking); 82 FR 58153, 58154 (Dec. 11, 2017) (identifying guidelines for *ex parte* communications in rulemaking regarding cable, satellite, and DART license reporting practices).

³⁴ See Conf. Rep. at 4, 12 (stating that the Office has “broad regulatory authority” to promulgate regulations that “balance[] the need to protect the public’s interest with the need to let the new collective operate without over-regulation”).

³⁵ See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of

II. Subjects of Inquiry

A. Notices of License and Nonblanket Activity

The MMA requires entities engaging in covered activities to file notice with the MLC regarding such activities; the notice will vary depending upon whether or not the entity is seeking a blanket license with respect to this activity. The Copyright Office must proscribe regulations regarding the form and content for both notices of license and notices of nonblanket activity.

1. Notices of License

To obtain a blanket license, a digital music provider must submit a notice of license (“NOL”) to the MLC “that specifies the particular covered activities in which the digital music provider seeks to engage.”³⁶ The MLC is to “receive, review, and confirm or reject notices of license from digital music providers,” and is required to “maintain a current, publicly accessible list of blanket licenses that includes contact information for the licensees and the effective dates of such licenses.”³⁷ The statute requires that NOLs “comply in form and substance with requirements that the Register of Copyrights shall establish by regulation.”³⁸ The Office seeks public input on any issues that should be considered relating to the form and substance of NOLs, including but not limited to the necessary level of detail (*e.g.*, whether NOLs should generally be similar in scope to the

authority to the agency to fill the statutory gap in reasonable fashion.”) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *see also* Conf. Rep. at 12 (acknowledging that “it is to be expected that situations will arise that were not contemplated by the legislation,” and that “[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations”).

³⁶ 17 U.S.C. 115(d)(2)(A), (e)(22).

³⁷ *Id.* at 115(d)(3)(F)(i); *see also id.* at (d)(2)(A)(ii)–(iv) (discussing rejection and cure of NOLs).

³⁸ *Id.* at 115(d)(2)(A)(i).

Office’s current notice of use form under sections 112 and 114,³⁹ and more specifically, whether a digital music provider should be required or encouraged to describe its interactive streaming service in additional detail, such as by providing the specific types of offerings comprising that service).

2. *Notices of Nonblanket Activity*

Under the MMA, certain entities engaging in covered activities pursuant to voluntary licenses or individual download licenses that meet certain criteria must comply with various obligations related to the blanket compulsory license even though they do not operate under a blanket license.⁴⁰ These significant nonblanket licensees (“SNBLs”) must submit to the MLC notices of nonblanket activity (“NNBAs”), reports of usage, and any required payments of the administrative assessment.⁴¹ According to the legislative history, SNBLs are required to make these filings and contribute to the administrative assessment “because they are presumed to benefit from” the new musical works database that the MLC is tasked with maintaining and “as a way to avoid parties attempting to avoid funding of the mechanical licensing collective by engaging in direct deals outside the blanket license.”⁴²

Specifically, the statute requires SNBLs to submit NNBAs to the MLC no later than forty-five days after the license availability date, or forty-five days after the end of the first full month in which an entity initially qualifies as a SNBL, whichever occurs later.⁴³ NNBAs are provided “for purposes of notifying the mechanical licensing

³⁹ The notice of use form is available at <https://www.copyright.gov/forms/form112-114nou.pdf>.

⁴⁰ 17 U.S.C. 115(d)(1)(C)(ii), (d)(6), (e)(31).

⁴¹ *Id.* at 115(d)(6)(A).

⁴² H.R. Rep. No. 115-651, at 12; S. Rep. No. 115-339, at 12; Conf. Rep. at 10.

⁴³ 17 U.S.C. 115(d)(6)(A)(i).

collective that the licensee has been engaging in covered activities.”⁴⁴ The MLC will “receive notices of nonblanket activity from significant nonblanket licensees,” and is required to “maintain a current, publicly accessible list of notices of nonblanket activity that includes contact information for significant nonblanket licensees and the dates of receipt of such notices.”⁴⁵ The statute also requires that NNBAAs “comply in form and substance with requirements that the Register of Copyrights shall establish by regulation.”⁴⁶ The Office seeks public input on any issues that should be considered relating to the form and substance of NNBAAs, including, for example, whether an NNBA should be required to be updated or renewed, and the level of description of activity it should contain.

B. Data Collection and Delivery Efforts

While the MLC is ultimately tasked with the core project of matching musical works to sound recordings embodying those works, and identifying and locating the copyright owners of those works (and shares thereof), the MMA also outlines roles for certain digital music providers and copyright owners to facilitate this task by collecting and providing related data to the MLC.

1. Collection Efforts by Digital Music Providers

Digital music providers using the blanket license must “engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service of such digital music provider information concerning”: (1) sound recording copyright owners,

⁴⁴ *Id.* at 115(e)(23); *see also id.* at 115(d)(6)(A)(i) (requiring a copy to be made available to the DLC).

⁴⁵ *Id.* at 115(d)(3)(F)(ii).

⁴⁶ *Id.* at 115(d)(6)(A)(i).

producers, International Standard Recording Codes (“ISRCs”), and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody; and (2) the authorship and ownership of musical works, including songwriters, publisher names, ownership shares, and International Standard Musical Work Codes (“ISWCs”).⁴⁷

This obligation is directly connected to the reports of usage discussed below, for which much of the statutorily enumerated information is only required “to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to [this obligation].”⁴⁸ Thus, it is important that digital music providers genuinely engage in appropriate efforts to obtain this information both from record labels and other licensors of sound recordings (e.g., other distributors of sound recordings such as TuneCore, CD Baby, or DistroKid). The Office seeks public input as to whether it is necessary and appropriate for the Office to promulgate any regulations concerning this provision, including but not limited to what constitutes “good-faith, commercially reasonable efforts.”

2. *Collection Efforts by Copyright Owners*

Relatedly, the MMA also obligates musical work copyright owners with works that are listed in the MLC’s database to “engage in commercially reasonable efforts” to provide to the MLC for the database, if not already listed, “information regarding the names of the sound recordings in which that copyright owner’s musical works (or shares thereof) are embodied, to the extent practicable.”⁴⁹ The Office seeks public input as to

⁴⁷ *Id.* at 115(d)(4)(B).

⁴⁸ *Id.* at 115(d)(4)(A)(ii).

⁴⁹ *Id.* at 115(d)(3)(E)(iv).

whether it is necessary and appropriate for the Office to promulgate any regulations concerning this provision, including but not limited to what types of efforts would be “commercially reasonable efforts.”

C. Usage and Reporting Requirements

As noted, following the filing of a notice of license, a digital music provider making use of the blanket license must engage in efforts to collect information to assist in matching copyright owners to musical works made available through its service, and report usage of such works to the MLC. The digital music provider must also pay appropriate royalties to the MLC under the blanket license. Because the usage reports will convey a large quantity of data central to the MLC’s core administrative duties of matching musical works to sound recordings, and copyright owners to musical works, as well as collecting and distributing accrued royalties for uses of these works under the blanket license, these usage reports may play a key role in the MMA’s overall legal framework to provide for the matching of songs played on digital music services to copyright owners, locating the owners, and ensuring they are paid their earned royalties.

1. Reports of Usage and Payment—Digital Music Providers

Among other things, the blanket compulsory license is conditioned upon the digital music provider reporting and paying royalties to the MLC on a monthly basis, due forty-five calendar days after the end of the monthly reporting period.⁵⁰ The MMA requires that reporting and payment be done in accordance with both sections 115(c)(2)(I) and 115(d)(4)(A)(ii), which are discussed below.⁵¹

⁵⁰ *Id.* at 115(d)(4)(A)(i).

⁵¹ *Id.* at 115(d)(4)(A)(i).

First, section 115(c)(2)(I) is the generally applicable reporting and payment provision for the compulsory license, augmented by section 115(d)(4)(A) with respect to the blanket compulsory license specifically. The former section predates the MMA and applies to both blanket and non-blanket compulsory licenses, except that statements are due within twenty days for non-blanket compulsory licenses rather than forty-five days.⁵² “Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation.”⁵³ In addition, the Office must also “prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license.”⁵⁴ Section 115(c)(2)(I) further provides that “[t]he regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.”⁵⁵

The Office’s current statement of account regulations promulgated under section 115(c)(2)(I) are located in 37 CFR part 210, subpart B. After passage of the MMA, the Office made technical amendments to those regulations to conform them to the MMA with respect to non-blanket compulsory licenses.⁵⁶ The amendments made clear that those regulations will not apply to the blanket license.⁵⁷ While the Office plans to now establish separate regulations governing the blanket license, there may be existing

⁵² *See id.* at 115(c)(2)(I), (d)(4)(A)(i).

⁵³ *Id.* at 115(c)(2)(I).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 84 FR 10685; 83 FR 63061.

⁵⁷ 37 CFR 210.11 (“[T]his 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).”).

provisions in the current regulations in part 210 that would also be relevant to the blanket license that commenters may wish to evaluate and identify for the Office to consider carrying over.

Second, section 115(d)(4)(A)(ii) addresses submissions made to the MLC by digital music providers under the blanket license, calling them “reports of usage” rather than “statements of account.” This provision contains additional requirements not listed in section 115(c)(2)(I). Reports of usage “shall provide usage data for musical works used under the blanket license and usage data for musical works used in covered activities under voluntary licenses and individual download licenses.”⁵⁸ Reports must contain the following information: (1) identifying information for the sound recording embodying a musical work, including sound recording name, featured artist, and, to the extent acquired by the digital music provider in connection with its engagement in covered activities, sound recording copyright owner, producer, ISRC, and other information commonly used to identify sound recordings and match them to musical works; (2) to the extent acquired by the digital music provider in the metadata provided by licensors of sound recordings in connection with its engagement in covered activities, information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the ISWC; and (3) the number of DPDs of the sound recording, including limited downloads and interactive streams.⁵⁹ Legislative history contemplates that reports “should be consistent with then-current industry practices regarding how such limited

⁵⁸ 17 U.S.C. 115(d)(4)(A)(ii).

⁵⁹ *Id.* at 115(d)(4)(A)(ii)(I).

downloads and interactive streams are tracked and reported.”⁶⁰ In addition, reports of usage must also identify and provide contact information for all musical work copyright owners for works embodied in sound recordings as to which a voluntary, rather than a blanket, license is in effect with respect to the uses being reported.⁶¹

In addition to the statutorily-prescribed categories, reports of usage must also contain “such other information as the Register of Copyrights shall require by regulation.”⁶² These reports of usage must be “in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective and meets the requirements of regulations adopted by the Register of Copyrights.”⁶³

The new blanket licensing framework was adopted against the widespread practice of voluntary or “direct” licensing of mechanical rights through an intermediary agency such as Harry Fox Agency or by the music publisher directly.⁶⁴ In responding to this notification, the Office welcomes information regarding how industry customs regarding voluntary licensing practices that vary from the prior compulsory licensing regulations may be relevant to establishing future rules for reports of usage, including suggestions regarding any additional data, beyond the statutorily required data discussed above, the Office should proscribe to be included in usage reports.⁶⁵

⁶⁰ H.R. Rep. No. 115-651, at 12; S. Rep. No. 115-339, at 13; Conf. Rep. at 10.

⁶¹ 17 U.S.C. 115(d)(4)(A)(ii)(II).

⁶² *Id.* at 115(d)(4)(A)(ii)(III).

⁶³ *Id.* at 115(d)(4)(A)(iii).

⁶⁴ U.S. Copyright Office, *Copyright and the Music Marketplace* 30–31.

⁶⁵ *See, e.g., id.* (noting common practice for direct licenses to be reported on a quarterly rather than monthly basis).

Finally, the Office shall also adopt regulations “regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.”⁶⁶

The Office seeks public input on any issues that should be considered relating to reports of usage and payment to be provided to the MLC by digital music providers under the blanket license, including specifically adjustments to these reports. These issues include specific information technology requirements for these reports, as well as any additional requirements relating to cumulative annual statements of account.⁶⁷

2. *Reports of Usage—SNBLs*

SNBLs are also required to “provide monthly reports of usage” to the MLC within forty-five days after the end of the month being reported, “contain[ing] the information described in [section 115(d)](4)(A)(ii)” and “accompanied by any required payment of the administrative assessment.”⁶⁸ The Office seeks public input on any issues that should be considered relating to reports of usage to be provided to the MLC by SNBLs, including but not limited to how such reports may differ from the reports filed by digital music providers under the blanket license.

3. *Records of Use Maintenance and Access*

Relatedly, the MMA directs the Copyright Office to adopt regulations “setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered

⁶⁶ 17 U.S.C. 115(d)(4)(A)(iv)(II).

⁶⁷ See S. Rep. No. 115-339, at 24–25 (“The Register shall specify information technology requirements of such reports along with the maintenance of the records of use.”).

⁶⁸ 17 U.S.C. 115(d)(6)(A)(ii).

activities under a blanket license.”⁶⁹ The Office seeks public input on any issues that should be considered relating to the maintenance and access of such records of use, which presumably could be used to substantiate and interpret the data included on usage reports.

D. Transfer and Reporting of Unclaimed Accrued Royalties to the MLC at the End of the Transition Period

A related topic concerns the historical reporting that digital music providers will provide to the MLC when transferring and reporting to the MLC any unclaimed accrued royalties remaining with digital music providers at the end of the transition period. As noted above, the Office previously engaged in a rulemaking to address the current transition period before the blanket license becomes available.⁷⁰ The MMA requires that within forty-five days after the license availability date, a digital music provider seeking to avail itself of the MMA’s limitation on liability must transfer all accrued royalties for any unmatched musical works (or shares) to the MLC “accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been serving monthly statements of account on the copyright owner from initial use of the work in accordance with [section 115] and applicable regulations.”⁷¹ The Office adopted regulations that follow the statute, specifying that digital music providers must pay royalties and provide cumulative statements of account to the MLC in compliance with the Office’s preexisting monthly

⁶⁹ *Id.* at 115(d)(4)(A)(iii), (iv)(I).

⁷⁰ 84 FR 10685; 83 FR 63061.

⁷¹ 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa).

statement of account regulations in 37 CFR 210.16.⁷² The Office further required that these statements include “a clear identification of the total period covered by the cumulative statement and the total royalty payable for the period.”⁷³

While the Office enacted the rule pursuant to a public process, the Office did not receive any comments.⁷⁴ Throughout the transition period, including during the MLC designation proceeding, there has been persistent concern about the “black box” of unclaimed royalties, including its amount and treatment by digital music providers and the MLC. Consequently, the Office is providing another opportunity for the public to comment on whether there should be any adjustment to the current regulations governing the cumulative statements of account required by the statute to accompany unclaimed royalties that are to be transferred from digital music providers to the MLC within forty-five days of the license availability date. The Office seeks public input on any issues that should be considered relating to the transfer and reporting of unclaimed royalties by digital music providers to the MLC.

E. Musical Works Database Information

A core aspect of the MLC’s responsibilities includes identifying musical works and copyright owners, matching them to sound recordings (and addressing disputes), and ensuring that songwriters and other copyright owners get paid the royalties they are due. To that end, the MLC will establish and maintain a free public database of musical work

⁷² 37 CFR 210.20(b)(3)(i).

⁷³ *Id.*

⁷⁴ *See* 84 FR 10685; 83 FR 63061.

ownership information that also identifies the sound recordings in which the musical works are embodied.⁷⁵ As the legislative history explains:

For far too long, it has been difficult to identify the copyright owner of most copyrighted works, especially in the music industry where works are routinely commercialized before all of the rights have been cleared and documented. This has led to significant challenges in ensuring fair and timely payment to all creators even when the licensee can identify the proper individuals to pay. With millions of songs now available to subscribers worldwide, technology also has a role to play through digital fingerprinting of a sound recording. However, there is no reliable, public database to link sound recordings with their underlying musical works. Unmatched works routinely occur as a result of different spellings of artist names and song titles. Even differing punctuation in the name of a work has been enough to create unmatched works. . . . Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on. . . . This situation must end so that all artists are paid for their creations and that so-called “black box” revenue is not a drain on the success of the entire industry.⁷⁶

With respect to musical works that have been matched to copyright owners,⁷⁷ by statute, the MLC’s database must include: (1) the title of the musical work; (2) the copyright owner of the work (or share thereof), and the ownership percentage of that owner; (3) contact information for such copyright owner; and (4) to the extent reasonably available to the MLC, (a) the ISWC for the work, and (b) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, ISRC, and other information commonly used to assist in associating sound recordings with musical works.⁷⁸

⁷⁵ 17 U.S.C. 115(d)(3)(E), (e)(20).

⁷⁶ S. Rep. No. 115-339, at 8; Conf. Rep. at 6; *see also* H.R. Rep. No. 115-651, at 7–8.

⁷⁷ *See* 17 U.S.C. 115(e)(17).

⁷⁸ *Id.* at 115(d)(3)(E)(ii).

With respect to unmatched musical works,⁷⁹ by statute, the database must include, to the extent reasonably available to the MLC: (1) the title of the musical work; (2) the ownership percentage for which an owner has not been identified; (3) if a copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner; (4) identifying information for sound recordings in which the work is embodied, including sound recording name, featured artist, sound recording copyright owner, producer, ISRC, and other information commonly used to assist in associating sound recordings with musical works; and (5) any additional information reported to the MLC that may assist in identifying the work.⁸⁰

For both categories (matched and unmatched works), the MLC’s database must also include “such other information” “as the Register of Copyrights may prescribe by regulation.”⁸¹ The legislative history provides that the Office “shall use its judgement to determine what is an appropriate expansion of the required fields, but shall not adopt new fields that have not become reasonably accessible and used within the industry unless there is widespread support for the inclusion of such fields.”⁸² The legislative history also notes specifically that the Office “may at some point wish to consider . . . whether standardized identifiers for individuals would be appropriate, or even audio fingerprints.”⁸³

Issues related to the information in the musical works database are closely connected, and equally important, to questions regarding the data collection efforts and

⁷⁹ *See id.* at 115(e)(35).

⁸⁰ *Id.* at 115(d)(3)(E)(iii).

⁸¹ *Id.* at 115(d)(3)(E)(ii)(V), (iii)(II).

⁸² H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 8; Conf. Rep. at 7.

⁸³ H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 8; Conf. Rep. at 7.

reporting by digital music providers that will help populate the database. Much of the required data will likely come from, or at least be able to cohere with, the reports of usage submitted to the MLC by digital music providers, and so similar issues may be addressed in the promulgation of these related regulations, such as those concerning what information is considered standard or reasonably available. The Office seeks public input on any issues that should be considered relating to information to be included in the MLC’s musical works database, including what, if any, specific additional categories of information might be appropriate to proscribe under these standards, keeping in mind the interrelationship between this information and the above-discussed data collection efforts and usage reporting.

F. Musical Works Database Usability, Interoperability, and Usage Restrictions

The MMA also directs the Copyright Office to “establish requirements by regulations to ensure the usability, interoperability, and usage restrictions of the [MLC’s] musical works database.”⁸⁴ The statute provides that the database must “be made available to members of the public in a searchable, online format, free of charge.”⁸⁵ The MLC must make the data available “in a bulk, machine-readable format, through a widely available software application,” to digital music providers operating under valid NOLs, compliant SNBLs, authorized vendors of such digital music providers or SNBLs, and the Copyright Office, free of charge, and to “[a]ny other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.”⁸⁶ The legislative history adds that “[i]ndividual

⁸⁴ 17 U.S.C. 115(d)(3)(E)(vi).

⁸⁵ *Id.* at 115(d)(3)(E)(v).

⁸⁶ *Id.* at 115(d)(3)(E)(v).

lookups of works shall be free although the collective may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are attempting to download the database in bulk through repeated queries.”⁸⁷ The legislative history also states that “there shall be no requirement that a database user must register or otherwise turn over personal information in order to obtain the free access required by the legislation.”⁸⁸

During the MLC designation proceeding, Mechanical Licensing Collective, Inc. (“MLCI”), the entity designated as the MLC, noted the importance of compatibility with existing music industry standards, including communicating information in accordance with the Common Works Registration (“CWR”) format and DDEX standards, and a willingness to explore other relevant existing or emerging standards or open protocols.⁸⁹ MLCI stated that it “strongly support[s] the adoption of standards, formats, and frameworks that allow information to be easily and accurately shared throughout the industry,” and that “good systems functioning and architectural practices instruct that components should have proper APIs.”⁹⁰ MLCI also committed to establishing an information security management system that is certified with ISO/IEC 27001 and meets the EU General Data Protection Regulation requirements, and other applicable laws.⁹¹

The Office seeks public input on any issues that should be considered relating to the usability, interoperability, and usage restrictions of the MLC’s musical works

⁸⁷ H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 8–9; Conf. Rep. at 7.

⁸⁸ H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 9; Conf. Rep. at 7.

⁸⁹ 84 FR at 32287 (citing Proposal of Mechanical Licensing Collective, Inc. Submitted in Response to U.S. Copyright Office’s December 21, 2018, Notice of Inquiry, at 35, 38, 57–58 (Mar. 21, 2019) (“MLCI Proposal”).

⁹⁰ MLCI Proposal at 46–47.

⁹¹ 84 FR at 32290 (citing MLCI Proposal at 50).

database, including but not limited to any technical or other specific language that might be helpful to consider in promulgating these regulations, discussion of the pros and cons of applicable standards, and whether historical snapshots of the database should be maintained to track ownership changes over time.

G. MLC Payments and Statements of Account

Next, the Office seeks comment regarding the MLC's payment and reporting obligations with respect to royalties that have been matched to copyright owners, both for works that are matched at the time the MLC receives payment from digital music providers and works that are matched later during the statutorily prescribed holding period for unmatched works. Historically, under the song-by-song statutory license, copyright owners or their authorized agents received royalty payments accompanied by statements of account from the licensee.⁹² Under the MMA, digital music providers with blanket licenses will instead report and pay royalties to the MLC. The statute provides that “[u]pon receiving reports of usage and payments of royalties from digital music providers for covered activities, the mechanical licensing collective shall” “distribute royalties to copyright owners in accordance with the usage and other information contained in such reports, as well as the ownership and other information contained in the records of the collective.”⁹³ When a copyright owner who is owed unmatched royalties becomes identified and located, the MLC must pay applicable accrued royalties to the copyright owner, “accompanied by a cumulative statement of account reflecting usage of

⁹² See 37 CFR 210.16(g)(1), 210.17(g)(1) (2017); 17 U.S.C. 115(c)(6) (2017) (“If the *copyright owner* does not receive the monthly payment and the monthly and annual statements of account when due”) (emphasis added).

⁹³ 17 U.S.C. 115(d)(3)(G)(i)(II).

such work and accrued royalties based on information provided by digital music providers to the mechanical licensing collective.”⁹⁴

The Office seeks public input as to potential regulations regarding what reporting should be required of the MLC when distributing royalties to matched copyright owners in the ordinary course under section 115(d)(3)(G)(i)(II), as well as input concerning the timing of such regular distributions. The Office also welcomes input on any issues that should be considered relating to the cumulative statements of account to be provided under section 115(d)(3)(I)(ii), relating to payments due to copyright owners of a previously unmatched work (or share thereof) who is later identified and located by the MLC, including what additional material, if any, may be required in these statements as compared to routine periodic distributions for already matched works.

H. Treatment of Confidential and Other Sensitive Information

The MMA broadly directs the Copyright Office to “adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used, including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective.”⁹⁵

The MMA additionally makes several explicit references to the Office’s regulations governing the treatment of confidential and other sensitive information in various circumstances, including with respect to: (1) “all material records of the

⁹⁴ *Id.* at 115(d)(3)(I)(ii).

⁹⁵ *Id.* at 115(d)(12)(C).

operations of the mechanical licensing collective”⁹⁶; (2) steps the MLC must take to “safeguard the confidentiality and security of usage, financial, and other sensitive data used to compute market shares” when distributing unclaimed accrued royalties⁹⁷; (3) steps the MLC and DLC must take to “safeguard the confidentiality and security of financial and other sensitive data shared” by the MLC to the DLC about SNBLs⁹⁸; (4) voluntary licenses administered by the MLC⁹⁹; (5) examination of the MLC’s “books, records, and data” pursuant to audits by copyright owners¹⁰⁰; and (6) examination of digital music providers’ “books, records, and data” pursuant to audits by the MLC.¹⁰¹

The Office seeks public input on any issues that should be considered relating to the treatment of confidential and other sensitive information as it relates to the blanket license regime, including but not limited to the interplay between the Office’s regulations and the use of nondisclosure agreements, confidential information relating to SNBLs, disclosure of information through the MLC’s unclaimed royalties oversight committee and dispute resolution committee, and what information can be shared by and among board and committee members or with the general public.

⁹⁶ *Id.* at 115(d)(3)(M)(i) (“The mechanical licensing collective shall ensure that all material records of the operations of the mechanical licensing collective, including those relating to notices of license, the administration of the claims process of the mechanical licensing collective, reports of usage, royalty payments, receipt and maintenance of accrued royalties, royalty distribution processes, and legal matters, are preserved and maintained in a secure and reliable manner, with appropriate commercially reasonable safeguards against unauthorized access, copying, and disclosure, and subject to the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C) for a period of not less than 7 years after the date of creation or receipt, whichever occurs later.”).

⁹⁷ *Id.* at 115(d)(3)(J)(i)(II)(bb); *see* H.R. Rep. No. 115-651, at 27 (“Unclaimed royalties are to be distributed based upon market share data that is confidentially provided to the collective by copyright owners.”); S. Rep. No. 115-339, at 24 (same); Conf. Rep. at 20 (same).

⁹⁸ 17 U.S.C. 115(d)(6)(B)(ii).

⁹⁹ *Id.* at 115(d)(11)(C)(iii).

¹⁰⁰ *Id.* at 115(d)(3)(L)(i)(II).

¹⁰¹ *Id.* at 115(d)(4)(D)(i)(II).

I. Additional MLC Oversight

As discussed above, the statute and legislative history make plain that Congress expects the Copyright Office to oversee and regulate the MLC as necessary and appropriate. For example, the legislative history contemplates that the Office will exercise its authority to both “thoroughly review[]” policies and procedures established by the MLC and promulgate regulations that “balance[] the need to protect the public’s interest with the need to let the new collective operate without over-regulation.”¹⁰² Moreover, the statute requires the MLC to “ensure that [its] policies and practices . . . are transparent and accountable.”¹⁰³

In the MLC designation proceeding, some concerns raised by commenters with respect to oversight related to conflicts of interest, representation, and diversity. The Office observed that the designated MLC has “pledged to operate under bylaws that will address conflicts of interest and appropriate disclosures in accordance with applicable state laws and professional duties of care.”¹⁰⁴ The Office stated that it “expects ongoing regulatory and other implementation efforts to . . . extenuate the risk of self-interest,” and that “the Register intends to exercise her oversight role as it pertains to matters of governance.”¹⁰⁵ Additionally, the Office stated that it “intends to work with the MLC to help it achieve the[] goals” of “engagement with a broad spectrum of musical work copyright owners, including from those communities” and musical genres that some commenters in the designation proceeding asserted are underrepresented.¹⁰⁶

¹⁰² H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12.

¹⁰³ 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

¹⁰⁴ 84 FR at 32280.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 32279.

The Office seeks public input on any issues that should be considered relating to the oversight of the MLC, including but not limited to conflicts of interest, representation of the entire musical works community, ensuring that board and committee member service complies with all relevant legal requirements, and the appropriate scope and manner for the Office’s review of MLC policies and procedures (including its bylaws) and any subsequent modifications to such policies and procedures.

J. Public Notice and Distribution of Unclaimed Accrued Royalties

As discussed above, the Office is specifically required by the MMA to undertake a separate study and to provide a report by July 2021 recommending best practices for the MLC to identify and locate copyright owners with unclaimed royalties, encourage copyright owners to claim their royalties, and reduce the incidence of unclaimed royalties.¹⁰⁷ The Office plans to commence that study this winter and looks forward to having broad industry participation, including by interested songwriters, regarding this important issue. Unlike most of the other subjects discussed above, which must be addressed before the January 1, 2021 license availability date, no unclaimed accrued royalties may be distributed until January 1, 2023, at the earliest.¹⁰⁸

Accordingly, while the Office will accept information regarding whether and how to promulgate regulations regarding the MLC’s obligation to distribute unclaimed accrued royalties (*e.g.*, rules pertaining to the requirement that the MLC engage in good-faith efforts to publicize notice relating to pending distributions at least ninety days in advance),¹⁰⁹ commenters should be aware that the Office is tentatively inclined to wait

¹⁰⁷ Pub. L. 115-264, sec. 102(f), 132 Stat. 3676, 3722–23.

¹⁰⁸ 84 FR at 32291 (citing 17 U.S.C. 115(d)(3)(H)(i), (J)(i)(I)).

¹⁰⁹ 17 U.S.C. 115(d)(3)(J).

until after the policy study is underway to finalize rules with respect to this important duty of the MLC. The Office anticipates that those seeking to comment on this issue will have ample opportunity to do so through the study and other future activities.

K. Other Subjects

The Copyright Office invites public comment on any other issues relevant to the blanket compulsory license regime that commenters believe are within and appropriate for the Office's regulatory authority.

Dated: September 16, 2019.

Regan A. Smith,
General Counsel and
Associate Register of Copyrights.

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