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**LIBRARY OF CONGRESS**

**U.S. Copyright Office**

**37 CFR Part 210**

**[Docket No. 2020-6]**

# Reporting and Distribution of Royalties to Copyright Owners by the Mechanical Licensing Collective

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

**ACTION:** Notice of proposed rulemaking.

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**SUMMARY:** The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding the obligations of the mechanical licensing collective to report and distribute royalties paid by digital music providers under the blanket license to musical work copyright owners under title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act. After soliciting public comments through a notification of inquiry, the Office is now proposing regulations establishing the timing, form, delivery, and certification of statements accompanying royalty distributions to musical work copyright owners. The Office solicits additional public comments on the proposed rule. This notice concerns only royalty statements and distributions regarding matched uses of musical works embodied in sound recordings and does not address issues related to the distribution of unclaimed, accrued royalties.

**DATES:** Written comments must be received no later than 11:59 Eastern Time on [INSERT DATE 30 DAYS AFTER 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 website at *https://www.copyright.gov/rulemaking/mma-royalty-statements*. 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 or Terry Hart, Assistant General Counsel, by email at tehart@copyright.gov. Each can be contacted by telephone by calling (202) 707–8350.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Title I of the Music Modernization Act ("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, and required a licensee 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.[1]

[1] *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).

The MMA amends this regime in multiple ways, most significantly by establishing a new blanket compulsory license that digital music providers ("DMPs") may obtain to make digital phonorecord deliveries ("DPDs") of musical works, including in the form of permanent downloads, limited downloads, or interactive streams.[2] 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 mechanical licensing collective ("MLC"), which has been designated by the Register of Copyrights.[3] Under the MMA, compulsory licensing of phonorecords that are not DPDs (*e.g.*, CDs, vinyl, tapes, and other types of physical phonorecords) (the "non-blanket license") continues to operate on a per-work, song-by-song basis, the same as before.[4]

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").[5] As permitted under the MMA, the Office designated a digital licensee coordinator ("DLC") to represent licensees in proceedings before the CRJs and the Copyright Office, to serve as a non-voting member of the MLC, and to carry out other functions.[6]

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[2] 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).

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

[4] 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/* (last visited Apr. 2, 2020).

[5] 17 U.S.C. 115(d)(7)(D).

[6] *Id.* at 115(d)(5)(B); 84 FR at 32274; *see also* 17 U.S.C.115(d)(3)(D)(i)(IV), (d)(5)(C).

### A. Reporting and Payment Obligations Under Non-blanket License

The proposed rule is informed by the preexisting section 115 regulations that still apply to non-blanket licenses. Under a non-blanket license, copyright owners receive royalties and statements of account directly from compulsory licensees. Timely payment and statements of account are a condition of the non-blanket compulsory license, and failure to comply with the requirements could lead to default.[7] Default can subject a licensee to the remedies provided by sections 502 through 506 for infringement.[8] The statute requires licensees to make monthly and annual statements of account, along with payment of royalties, in compliance with regulations promulgated by the Office.[9] Regulations covering monthly and annual statements of account prescribe, among other things, requirements regarding the content such statements must contain along with timing, delivery, and certification obligations.[10]

The regulations for monthly and annual statements of account for the non-blanket license were most recently amended in 2014, in response to legal and marketplace developments, "including the Copyright Royalty Board's adoption of newer percentage-of-revenue royalty rate structures for certain digital music services, and changes in accounting and industry practice in the years since the rules were last substantially amended."[11] Among the changes made to payment and reporting of royalties relevant to this proceeding, the rule was amended "to allow copyright owners and licensees to independently agree to alternative payment methods, including electronic payment";

[7] 17 U.S.C. 115(c)(2)(J).

[8] *Id.*

[9] *Id.* at 115(c)(2)(I). *See generally* 37 CFR 210.11.

[10] Regulations for monthly statements of account appear in 37 CFR 210.16 and annual statements of account appear in 37 CFR 210.17.

[11] 79 FR 56190 (Sept. 18, 2014).

allow a copyright owner to "notify a licensee of its willingness to accept statements by means of electronic transmission"; permit "copyright owners to elect the format (paper or electronic) in which they receive statements"; set a "default minimum payment threshold of up to $5 for payments to any copyright owner"; require "reporting of ISRCs ["International Standard Recording Code"] when that information is known"; permit "the reporting of other unique identifiers, such as the International Standard Name Identifier ("ISNI") of the writer, or the International Standard Musical Work Code ("ISWC") for the musical work"; and revise the existing certification regulations.

**B. Blanket License**

In creating a blanket license administered by the MLC, the MMA establishes a different legal framework for the payment and accounting of royalties. Under the MMA, when the blanket license becomes available on January 1, 2021, DMPs taking advantage of the blanket license will report usage of musical works and pay royalties to the MLC—instead of directly to copyright owners—on a monthly basis.[12] The data contained in the DMP's reports of usage is governed by both the statute[13] and regulations currently being promulgated by the Office in a separate proceeding.[14] The MLC will, in turn, "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."[15]

[12] 17 U.S.C. 115(d)(4)(A)(i).

[13] *Id.* at 115(d)(4).

[14] U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

[15] 17 U.S.C. 115(d)(3)(G)(i)(II).

Because some percentage of musical works reported by blanket licensees will not be initially matched to their respective copyright owners, the MLC will also engage in ongoing matching efforts to identify copyright owners of musical works where the identity of the copyright owner is unknown and provide a mechanism for copyright owners to claim unmatched works.[16] When a copyright owner who is owed unmatched royalties becomes identified and located, the statute directs the MLC to pay applicable accrued royalties to the copyright owner, "accompanied by a cumulative statement of account reflecting usage of such work and accrued royalties based on information provided by digital music providers to the mechanical licensing collective."[17] As noted below, the Office is separately addressing the issue of unclaimed accrued royalties, including through an ongoing policy study, and this proceeding does not address distribution procedures for those royalties that remain unmatched after the prescribed holding period.

Finally, as reflected in the separate rulemaking regarding reporting by DMPs, blanket licensees may at times need to make adjustments to royalties paid in prior reporting periods since it is not unusual for the exact amount of royalties owed for a particular month to be known until after the close of the month.[18] Ultimately, those

[16] The statute authorizes a number of functions related to matching works, including "[e]ngage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works); [m]aintain the musical works database and other information relevant to the administration of licensing activities under this section[, and a]dminister a process by which copyright owners can claim ownership of musical works (and shares of such works), and a process by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners." *Id.* at 115 (d)(3)(C)(i)(III)–(V).

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

[18] *See* DLC Initial at 15–16; 17 U.S.C. 115(d)(4)(A)(iv)(II) (contemplating adjustments for overpayment or underpayment).

adjustments will be reported to copyright owners by the MLC, along with any applicable credits or deductions to royalty distributions.

Although the MLC is obligated to collect and distribute royalties, the statute does not, as it does for the non-blanket license, prescribe specific obligations for royalty distributions or statements of account, such as form, timing, delivery, or certification requirements by the MLC. Nor does it delegate specific rulemaking authority to the Office for prescribing distribution or statement requirements specific to the MLC. Separately, though, in a general provision largely retained from the pre-MMA section 115 related to license terms and conditions, the Register is directed to prescribe regulations related to monthly payments, and that provision states that "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."[19]

There appears to be no dispute regarding the propriety or authority of the Office to promulgate regulations related to royalty statements issued by the MLC; indeed, the MLC itself has proposed regulatory language encompassing this activity.[20] But as background and to aid commenters, the Office believes it may be helpful to situate this specific proposed rule within the broader regulatory framework set out in the MMA.

The statute creates a general legal framework that supports rules regarding distribution and reporting of royalties under the blanket license. In order to establish

[19] 17 U.S.C. 115(c)(2)(I). While applicability of this provision excepts requirements for reports of use and payments by blanket licensees, which are addressed separately by statute, it does not address either way whether these requirements extend to statements of account provided by the MLC.

[20] MLC Initial at 27–29.

sufficient oversight and accountability, Congress obligated the MLC to "ensure that the policies and practices of the collective are transparent and accountable."[21] In furtherance of that goal, Congress vested the Register of Copyrights with the authority to periodically review the designation of the entity serving as the MLC and designate a new entity if needed.[22] The MLC is required by statute to be a nonprofit entity that "is endorsed by, and enjoys substantial support from, musical work copyright owners"[23] and "is able to demonstrate to the Register of Copyrights that the entity has. . . the administrative and technological capabilities to perform the required functions of the mechanical licensing collective."[24]

Additionally, Congress provided general authority to the Register of Copyrights to "conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection."[25] The legislative history states,

> the Register is expected to promulgate the necessary regulations required by the legislation in a manner that balances the need to protect the public's interest with the need to let the new collective operate without over-regulation. The Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee during the drafting of this legislation. Although 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. The Office is expected to use its best judgement in determining the appropriate steps in those situations.[26]

It is the Office's judgment that it is consistent with the larger goals of the MMA to prescribe specific royalty reporting and distribution requirements through regulation,

[21] 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

[22] *Id.* at 115(d)(3)(B)(ii).

[23] *Id.* at 115(d)(3)(A)(ii).

[24] *Id.* at 115(d)(3)(A)(iii).

[25] *Id.* at 115(d)(12).

[26] S. Rep. No. 115-339, at 15.

that the Register of Copyrights has the authority to promulgate these rules under the general rulemaking authority in the MMA, and it can take into consideration how well the MLC carried out those obligations when reviewing the designation.[27] Regulations establish a baseline for transparency and accountability, and the rulemaking process allows all stakeholders—particularly musical work copyright owners and songwriters—to communicate the specific transparency and accountability obligations they expect of the MLC.[28]

### C. Transitional Period

The MMA created a transitional period between its date of enactment and January 1, 2021, the date when the blanket license first becomes available (the "license availability date").[29] On December 7, 2018, the Office issued interim regulations, directed at that transition period, that amended existing regulations pertaining to the compulsory license to conform to the new law, including with respect to the operation of notices of intention and statements of account.[30] Of relevance here, the interim rule detailed the requirements for DMPs 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

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[27] The legislative history states that when determining whether to redesignate an entity to serve as the collective, "the failure to follow the relevant regulations adopted by the Copyright Office[] over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective." S. Rep. No. 115-339, at 5; *see also* H.R. Rep. No. 115-651, at 6 (same).

[28] *See* Future of Music Coalition ("FMC") Reply at 3 ("[W]e urge the Office to balance this concern for pragmatism and flexibility against the need to provide as much clear guidance and oversight as possible to encourage trust. A good question to ask of any potential rule: 'would including this item help music creators have confidence in the new system and trust that they will successfully get the money they are owed?' If the answer is yes, it should be included.").

[29] H.R. Rep. No. 115-651, at 10; S. Rep. No. 115-339, at 10.

[30] 83 FR 63061, 63065 (Dec. 7, 2018); 37 CFR 210.20.

available. The interim regulations largely restated the statutory requirements, specifying that the DMP must pay royalties and provide cumulative statements as if they were a compulsory licensee under the non-blanket license. The interim rule also required DMPs to identify the total period covered by the cumulative statement and the total royalty payable for the period. Finally, the interim rule also required that such cumulative statements be certified in the same manner as monthly statements of account under existing Office regulations for the non-blanket license.[31] The Office welcomed "public comment on these amendments and any other specific technical amendments that stakeholders would like the Office to consider."[32] It received no comments.

### D. Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective Notification of inquiry

On September 24, 2019, the Copyright Office issued a notification of inquiry to initiate this current proceeding regarding implementing regulations for the blanket license.[33] The Office invited public comment on regulations that the MMA directs it to adopt, as well as additional regulations to promulgate under its general authority as may be necessary or appropriate to effectuate the new blanket licensing structure.

The notification of inquiry sought comment on areas where the MMA explicitly directs the Register of Copyright to adopt regulations, including: form and substance of notices of license that digital music providers are required to submit to the mechanical licensing collective;[34] form and substance of notices of non-blanket activity;[35]

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[31] *See id*.; 17 U.S.C. 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)").

[32] 83 FR at 63062.

[33] 84 FR 49966 (Sept. 24, 2019).

[34] 17 U.S.C. 115(d)(2)(A)(i).

information to be reported on usage reports,[36] format and maintenance of reports,[37] and mechanisms to account for adjustments;[38] information to be included in the mechanical licensing collective's database;[39] database usability, interoperability, and usage restrictions;[40] and the handling of confidential information.[41]

The Office also solicited comments regarding the following issues not mentioned explicitly in the statute: "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."[42]

Specifically, the Office asked for input on "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."[43] It also solicited 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

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[35] *Id.* at 115(d)(6)(A)(i).
[36] *Id.* at 115(d)(4)(A)(ii)(III).
[37] *Id.* at 115(d)(4)(A)(iii).
[38] *Id.* at 115(d)(4)(A)(iv).
[39] *Id.* at 115(d)(3)(E)(ii)(V).
[40] *Id.* at 115(d)(3)(E)(vi).
[41] *Id.* at 115(d)(12)(C).
[42] 84 FR at 49972.
[43] *Id.* at 49973.

material, if any, may be required in these statements as compared to routine periodic distributions for already matched works."[44]

In response to the notification of inquiry, the Office received fifteen initial comments and twenty-nine reply comments.[45] Of those, seven addressed the MLC's reporting and payment obligations. In its initial comments, the MLC, provided proposed regulatory language for reporting and payment obligations. Several commenters responded to specific aspects of the MLC's proposal, as discussed in respective sections below.

The accurate distribution of royalties under the blanket license to copyright owners is a core objective of the MLC.[46] The payment of royalties, and the statements that accompany those payments, serve as the most visible and tangible connection many copyright owners will have with the MLC and the blanket license created by the MMA. Copyright owners of musical works have experience with the preexisting mechanical license and have built up certain expectations regarding how they receive royalties and

[44] *Id.* at 49972–73.

[45] All rulemaking activity, including public comments, as well as educational material regarding the Music Modernization Act, can currently be accessed via navigation from *https://www.copyright.gov/music-modernization/*. Comments received in response to the September 2019 notification of inquiry are available at *https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001*. References to these comments and letters are by party name (abbreviated where appropriate), followed by either "Initial," "Reply," or "*Ex Parte* Letter," as appropriate. Guidelines for *ex parte* communications, along with records of such communications, are available at *https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html*. The Office encourages parties to refrain from requesting *ex parte* meetings on this proposed rule until they have submitted written comments. As stated in the guidelines, *ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters.

[46] *See* Letter from Lindsey Graham, U.S. Senator, South Carolina, to Karyn Temple, Register of Copyrights, U.S. Copyright Office (Nov. 1, 2019).

statements under that license, on either a compulsory or voluntary licensing basis.[47] The goal of the MMA is to address significant shortcomings that arose in licensing mechanical reproductions by DMPs and improve the functioning of the licensing regime in the digital ecosystem. So musical work copyright owners should reasonably anticipate royalty distributions and statements that look and operate materially the same or better than status quo mechanical licensing practices.

## II. Proposed Rule

### A. General

Having reviewed and carefully considered all relevant comments in response to the September 2019 notification of inquiry, the Office now issues a proposed rule and invites further public comment. This proposed rule concerns the reporting and royalty distribution obligations of the MLC for the blanket license. The regulatory language is intended to ensure that copyright owners receive the royalties they are entitled to in a timely fashion with statements that provide them with accurate data regarding how their works are being used under the blanket license. The existing requirements for reporting under the non-blanket license provide a useful starting point.

At the same time, the Office recognizes that the MLC is responsible for implementing an unprecedented licensing regime from scratch, and the MMA is intended

[47] Prior to the MMA, the Office studied the section 115 license and noted: "Although the use of the section 115 statutory license has increased in recent years with the advent of digital providers seeking to clear large quantities of licenses, mechanical licensing is still largely accomplished through voluntary licenses that are issued through a mechanical licensing agency such as HFA or by the publisher directly." U.S. Copyright Office, Copyright and the Music Marketplace 30–31 (2015), *https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf*. Including because the MLC has selected HFA as a core vendor and because of the potential that services may prefer to make use of the blanket compulsory license over voluntary arrangements, the Office believes that identifying common industry expectations with regard to direct licensing will be relevant to the proposed rule.

to address problems that accumulated under the non-blanket licensing regime. Certain features of the non-blanket licensing regime may be inappropriate to use as benchmarks. Where appropriate, then, the Office is striving to retain flexibility in the regulations for the MLC, particularly when it is in its early stages of operations, while ensuring high standards of accuracy and service to copyright owners.[48] The Office is also considering promulgating this rule on an interim basis, to facilitate adjustment on topics noticed in this rulemaking if necessary once the MLC begins issuing royalty statements to copyright owners.

To be clear, this rulemaking only addresses the reporting and distribution of royalties that are matched by the MLC either as it processes reports of usage received from blanket licensees or through its ongoing matching efforts. It does not address the distribution of unclaimed accrued royalties after the expiration of the prescribed holding period.[49] The Office is currently engaged in a study to determine the best practices that the MLC may implement to effectively identify copyright owners and unclaimed royalties of musical works while encouraging copyright owners to claim royalties and

[48] *See* S. Rep. No. 115-339, at 15 ("Pursuant to paragraph (12) of subsection (d), the Register is expected to promulgate the necessary regulations required by the legislation in a manner that balances the need to protect the public's interest with the need to let the new collective operate without over-regulation."); SoundExchange Initial at 15 ("SoundExchange urges the Office to be cautious in regulating the MLC and avoid the temptation to write into regulations every good idea that comes out of this proceeding. Through SoundExchange's history there have been numerous instances where well-intentioned regulations have not worked out quite as intended, and the inflexible nature of the rulemaking process has caused obsolete rules to persist."); DLC Reply at 26–27 ("Although these regulations largely affect the relationship between the MLC and individual copyright owners, licensees will be funding the operations of the MLC through the administrative assessment. DLC therefore has a strong interest in ensuring appropriate regulations are in place to encourage a cost-effective approach to MLC's payments and statements of account to rights owners.").

[49] 17 U.S.C. 115(d)(3)(J).

ultimately reduce the occurrence of unclaimed royalties.[50] The Office may in the future separately consider promulgating regulations regarding the ultimate distribution of unclaimed royalties.[51]

### B. Terminology: "Royalty statement" instead of "statement of account"

Although the proposed rule regarding statements issued by the MLC to copyright owners under the blanket license is based upon the existing regulations pertaining to "statements of account" required under the non-blanket compulsory license, the proposed rule uses an alternate term "royalty statements."

This is not intended to indicate any substantive change, but rather to avoid potential ambiguity with other references to "statements of account" pertaining to the non-blanket license. For example, the terms "Monthly Statement of Account" and "Annual Statement of Account" are defined elsewhere in current regulations for the non-blanket compulsory license and expressly apply only to the statements required under the non-blanket license.[52] The MMA itself does not use the term "statement of account" when outlining the MLC's general royalty and reporting obligations,[53] though it does use the term "cumulative statement of account" when prescribing obligations for distributing

[50] U.S. Copyright Office, Unclaimed Royalties Study, *https://www.copyright.gov/policy/unclaimed-royalties/* (last visited Apr. 2, 2020). The study was initiated by an all-day educational symposium held by the Office on December 6, 2019. Materials related to the symposium, including a transcript and video of the proceedings can be found at the aforementioned web page.

[51] 84 FR at 49974 ("the Office is tentatively inclined to wait until after the policy study is underway to finalize rules with respect to this important duty of the MLC.").

[52] 37 CFR 210.12(a), (b). *See* 17 U.S.C. 115(c)(2)(I), (J).

[53] *See* 17 U.S.C. 115(d)(3)(C)(i)(II), (G).

accrued royalties for previously unmatched works.[54] To avoid confusion, the Office will use the generic term "royalty statement" in the regulations for those reporting obligations.

### C. Reporting and Payment Obligations

#### *1. Scope of Periodic Reports*

The MLC must distribute two sets of royalty payments. The first set includes royalties for works that it matches upon receipt of monthly reports of usage from DMPs.[55] The second set includes accrued royalties for works that were unmatched when they were reported by blanket licensees and where the copyright owner is subsequently identified and located.[56] Blanket licensees may also need to adjust prior reports of usage, which may result in overpayment or underpayment of royalties from those prior periods, and the results of those adjustments must similarly be passed through to copyright owners.[57]

The rule proposes that the MLC report these three items—(1) royalties for regularly matched works, (2) cumulative statements of account for accrued royalties of previously unmatched works, and (3) any adjustments to royalties from prior periods—to copyright owners simultaneously, if each category is applicable to a given owner. The reporting for each should be clearly delineated in the statements themselves, but the intent is to minimize and simplify administration for both the MLC and copyright owners.

i. Periodic matched works

As stated above, DMPs taking advantage of the blanket license will report usage of musical works and pay royalties to the MLC on a monthly basis. It is anticipated that

[54] *Id.* at 115(d)(3)(I)(ii).
[55] *Id.* at 115(d)(3)(G)(i).
[56] *Id.* at 115(d)(3)(I)(ii).
[57] *Id.* at 115(d)(4)(A)(iv)(II).

the MLC will be able to match the majority of works reported to the copyright owners who are entitled to receive their respective royalties upon processing these reports of usage, based on the information reported and the information the MLC has in its own records. As such, the reporting of these regularly matched works will be the primary subject of royalty statements from the MLC to copyright owners. These statements will be in a format familiar to copyright owners who currently receive statements for mechanical reproductions of musical works either under the non-blanket compulsory license or voluntary licenses. The specific content that will be reported in the statements, along with the timing of statements, is discussed below.

ii. Cumulative statements of account

For cumulative statements of account that report previously accrued royalties for newly matched musical works, the proposed rule asks the MLC to provide a statement substantially similar to the statement for royalties matched in the ordinary course. This information would be sent to copyright owners at the same time as the regular monthly royalty statements, in a segregated manner. Like royalty statement information relating to works matched in the ordinary course, the cumulative reporting would indicate the monthly reporting period that royalties originally accrued in. Cumulative royalty statements would also report the amount of interest accrued and a clear identification of the total period covered.[58]

iii. Adjustments

In initial comments to the September 2019 notification of inquiry, the DLC notes several reasons why "it is often (if not usually) the case that the exact amounts of royalty

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

payments owed to the MLC for a given month cannot be known with precision until well after the close of the month—and sometimes not for months afterwards."[59] Thus, DMPs may need to adjust the amount of royalties paid in prior periods, and the MMA provides authority to the Register of Copyrights to adopt regulations "regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods."[60] The Office is currently promulgating such regulations in a separate proceeding.[61] Such adjustments, and the original reporting period being adjusted, will ultimately be reported by the MLC to copyright owners in a separate and clearly identified section of their monthly statements. As noted below, this proposal is a change from the non-blanket license processes, where copyright owners receive adjustments on an annual basis. The Office is proposing this change in light of the DLC's comments related to the frequency of necessary adjustments.

[59] DLC Initial at 15. The DLC cites at least two reasons this occurs. First, "the royalty rate can . . . be a function of a variety of variables, including certain service revenues, royalties paid for performance rights, consideration paid to record labels, and the number of subscribers, where applicable." *Id.* at 15–16. Some of these variables may not be known until the end of a particular year and may retroactively affect section 115 royalty calculations. Second, "many licensees have voluntary licenses with publishers, and the MMA continues to accommodate such direct deals. But in some circumstances—for instance, new releases—neither the digital music provider nor the MLC may know at the time the payment and report of usage is initially due whether a particular track is associated with a direct deal publisher or is licensed under the blanket license or is licensed across some combination of a direct deal and the blanket license. As a result, a digital music provider that is administering its own voluntary agreements (or using a non-MLC vendor) may inadvertently make a payment to the MLC that should have been made directly to a publisher under the terms of a voluntary agreement." *Id*. at 16.

[60] 17 U.S.C. 115(d)(4)(A)(iv)(II).

[61] U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

*2. Monthly Reporting and Timing Considerations*

The proposed rule would require reporting and distribution of royalties by the MLC on a monthly basis. This approach, supported by the MLC,[62] is also consistent with the regulations for the non-blanket license, which requires monthly statements that "include all royalties for the month next preceding."[63]

Some commenters raised concerns that the MMA increases the amount of time for when a blanket licensee has to report usage at the end of a monthly reporting period. As Music Reports, Inc. ("Music Reports") noted "[t]he MMA's requirement that DMPs report and pay royalties to the MLC 'not later than 45 calendar days after the end of the calendar month being reported' inserts a substantial delay into the royalty reporting and payment process required under Section 115 prior to the MMA, which required that such payments occur 'on or before the twentieth day of each month.'"[64] Music Reports explained that prior to the MMA, it regularly was able to issue "monthly statements of account and royalty payments no more than ten days following" receipt of usage and royalty accounting data from DMPs, and it believed that "through the use of modern accounting systems managed by a professional staff, the MLC should be able to render monthly statements and royalty payments to copyright owners no more than 10 days after it receives usage and other supporting data from DMPs."[65] It noted that even assuming the MLC could accomplish this within 10 days, copyright owners would still have to "wait 35 days *longer* to receive payment from the MLC than they were accustomed to

[62] MLC Initial at 28.

[63] 17 U.S.C. 115(c)(2)(I). The non-blanket license also imposes a deadline on reporting, requiring monthly statements of account and payments to be made within 20 calendar days of the end of the reporting period. The proposed rule does not propose a date certain for reporting by the MLC.

[64] Music Reports Initial at 7 (quoting 17 U.S.C. 115(d)(4)(A)(i) and 17 U.S.C. 115(c)(2)(I)).

[65] Music Reports Initial at 7.

waiting prior to the license availability date," given the statutory 45-day period for digital music provider reporting.[66]

MLC opposed Music Report's proposal, calling it an "unreasonably tight timeline," and stating:[67]

> [A] 10-day turnaround from the time the MLC receives monthly usage reports from DMPs is not realistic given the sheer volume of transactions that the MLC will be reporting. While Music Reports argues that it generally issued monthly statements and royalty payment within 10 days of receipt of DMPs usage reporting, this comparison does not take into account the difference in the volume of data it was processing (from a limited number of DMPs), versus the exponentially larger volume of data being processed by the MLC. Nor does it take into account the MLC's obligations to carve out voluntary licenses and individual download licenses from blanket license usage. Nor does it consider that, unlike the pre-blanket license process, the blanket license process does not include pre-matching of individual sound recordings as licenses are requested, and therefore, the MLC will be matching many transactions for the very first time when it processes usage. Nor does it consider that the MLC was created precisely to fix the serious problems that arose from prior practices in royalty processing, and those problematic practices are not the appropriate benchmarks for determining what should be best practices for the nationwide blanket license administered by the MLC under the new MMA regime.[68]

MLC therefore reiterated support for the proposal it offered in its initial comments, which is silent on a reporting deadline.[69]

The Office appreciates the points made by both Music Reports and the MLC, and tentatively concludes that the better regulatory approach is to ensure the MLC has sufficient flexibility to maximize its matching efforts before distributing royalties, subject to the commitment to report royalties on a monthly basis. Put another way, the proposed rule allows the MLC to determine the pace at which it will process monthly reports of use

[66] *Id. See also* Monica Corton Consulting Reply at 2 ("Having the DSP's account 45 days after each month is totally changing the time frame for final payments from the MLC to the publishers and will create a huge lag time in mechanical payments from the publishers to the songwriters.").

[67] MLC Reply at 40.

[68] *Id.* at 40–41.

[69] *Id.* at 41.

received from DMPs (*e.g.*, whether it takes the MLC 10 days or 30 days for its routine matching efforts), but not the frequency—once processing and distribution starts, the proposed rule requires the MLC to report and pay matched royalties to copyright owners every month so that copyright owners can rely on the expectation that they will receive regularly-scheduled payments. Given the unprecedented project of the blanket license and associated transactional challenges, the Office declines at this time to impose a further timing requirement for distribution of royalties, and credits MLC's description of the material differences between its project and pre-blanket processing of matched royalties. The MLC faces both known and unknown challenges when it begins administering the blanket license, and a strict timing requirement for reporting and distributing royalties may compound those challenges.

The proposed rule takes the same approach for reporting of cumulative royalties. The Office notes that, beginning on the license availability date, the MLC will receive cumulative usage reports of unmatched accrued royalties from DMPs covering as much as two years of usage at the same time it must begin processing royalties in the ordinary course. As with the regularly matched portion of monthly royalty statements, it is expected that the MLC will make timely payments of accrued royalties for newly matched musical works, but the proposed rule does not otherwise include a timing requirement with respect to reporting and paying cumulative royalties after they have been identified.

For both revenue streams, significant nonregulatory incentives are also in place to ensure timely distribution of royalties. For one, the MLC represented in its designation proposal that it "intends to provide 'prompt, complete, and accurate payments to all

copyright owners.'"[70] In addition, because the MLC is governed by the very copyright owners that it will be serving,[71] and because it must maintain the support of copyright owners,[72] it shares their interest in prompt reporting and distribution. The Office reserves the right to revisit a potential timing obligation in the future, and solicits comment on this aspect of the proposed rule.

*3. Method of Delivery*

The Office proposes that royalty statements be delivered to copyright owners electronically by default, with the option to receive them by mail by request. Copyright owners benefit from electronic statements in several ways, including faster delivery and more robust and useable data—data provided in electronic statements can, for example, be filtered and analyzed by copyright owners in ways that is much more difficult with paper statements. Electronic statements are also less costly to generate and distribute then paper statements. The Office understands that in some cases, the only reason paper statements are still used under current licenses is because of existing contractual conditions which are not applicable here. Nevertheless, the Office appreciates that a small number of copyright owners may prefer paper statements, so the regulations allow that option by request.

Additionally, as suggested by the DLC, the regulations would allow for a copyright owner to request a separate, simplified report or to access their statements

[70] 84 FR at 32291.

[71] 17 U.S.C. 115(d)(3)(D).

[72] *Id.* at 115(d)(3)(A)(ii).

through an online password-protected portal.[73] These options may be more attractive to some copyright owners and would likely reduce printing and postage costs. The Office invites comment on these issues.

*4. Content*

The proposed rule specifies the content the MLC is required, at a minimum, to provide to copyright owners when reporting royalties. In general, the statement will allow copyright owners to see royalties accrued for each blanket licensee's offerings for every musical work owned by the copyright owner embodied in a sound recording. The statement will clearly indicate the usage period when the royalties being distributed accrued.[74] Identifying information for musical works and the sound recordings in which they are embodied, if available to the MLC, will also be included in the statement.

The list proposed by the Office provides for every musical work identified as owned by a copyright owner for which there has been reported usage, a line-by-line statement of royalties earned by service offering and sound recording that embodies the musical work. The content is a combination of what the regulations for statements of account under the non-blanket license require and a list proposed by MLC, and is intended to provide reporting information consistent with industry standards.[75] Where the language of the Office's proposed rule departs from the MLC, the departure is not

[73] DLC Reply at 27 ("The MLC should also be permitted to satisfy the requirement for electronic delivery of statements by providing an online password protected portal, accompanied by email notification of the availability of the statement in the portal.").

[74] *See* Lowery Reply at 6 ("If the MLC reports do not designate which period the payment corresponds to, there will be no way for songwriters to know what they are being paid for. This boils down to receiving a statement that says, here's some money, or worse, no money for you. If there is no explanation of when the royalties were earned or last paid on a service-by-service basis, there is no way for songwriters to know if any service is current.").

[75] The content required to be included in statements of account under the non-blanket compulsory license is prescribed in 37 CFR 210.16(b)–(c).

intended to be substantive, but rather to conform with existing language in title 17 and associated regulatory provisions, as well as terminology used in other pending rulemakings regarding content to be provided by the DMPs as well as information included in the MLC's database.

The initial source of much information reported in statements will come from the blanket licensees themselves in the reports of usage that they will provide to the MLC every month.[76] The MMA lists a number of types of information required to be included in reports of usage and also provides the Register of Copyrights with the authority to require additional information by regulation, which the Office is promulgating under a separate rulemaking proceeding.[77] Under the statute, information will also be obtained by the MLC through additional sources. The MLC itself has an obligation to "engage in efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works (and shares thereof), and update such data as appropriate."[78] The MLC will also ingest information related to musical works copyright ownership, including by "[a]dminister[ing] a process by which copyright owners can claim ownership of musical works (and shares of such works)."[79] And musical work copyright owners have an obligation to "engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, to the extent such information is not then available in the database, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent

[76] 17 U.S.C. 115(d)(4)(A)(ii).
[77] *Id.* at 115(d)(4)(A)(ii)(III).
[78] *Id.* at 115(d)(3)(E)(i).
[79] *Id.* at 115(d)(3)(C)(i)(V).

practicable."[80] This combination of information will be used by the MLC to ensure that royalties generated by covered activities under the blanket license will be matched to their correct copyright owners. The statements that accompany the distribution of royalties to copyright owners will communicate this information to copyright owners. As reflected in the MLC's proposal and incorporated into the proposed rule, it will include identifying information for the copyright owner, including any standard identifiers associated with the owner, such as an Interested Parties Identification ("IPI") number.[81] The statement will include information identifying the musical work for which royalties are being distributed, including any alternative or parenthetical titles for the work known to the MLC. It will also include identification of the composers and songwriters of the musical work, which one commenter noted was essential to ensuring songwriters are properly paid under common publishing agreements.[82]

In addition, the statement will include information about the individual sound recordings embodying the musical works, including such information as the sound recording name (including, as with musical works, any alternative and parenthetical titles), the names of the featured artists, and the record label. The proposed rule would also require the statement to identify the sound recording copyright owner, an item the

[80] *Id.* at 115(d)(3)(E)(iv).

[81] The regulations make clear that certain types of information—which are not required by the statute for copyright owners to receive royalties they are entitled to under the blanket license, such as IPI numbers or International Standard Name Identifiers ("ISNI")—will be reported if provided by a copyright owner, but they are not a prerequisite to receiving royalties. Some commenters raised concerns about such standard identifiers, which independent or self-represented songwriters may not necessarily have, becoming de facto requirements for receiving royalties from the MLC. *See, e.g.*, North Music Group Reply at 1.

[82] North Music Group *Ex Parte* Letter at 1 ("Major publisher deals often include language that allows the publisher to not pay the writer if the data within the royalty statement delivered to the publisher does not include the writer's name. The MLC must deliver the writer's name in statements in order to provide the writer the best chance of receiving his/her royalties from the publisher.").

statute directs DMPs to include in the usage reports sent to the MLC[83] and directs the MLC to include in its musical works database.[84] The Office is separately considering the meaning of the term "sound recording copyright owner" in rulemakings addressing usage reports and the musical works database, and the term will carry the same meaning here.[85] At the same time, the Recording Industry Association of America, Inc. ("RIAA") identified a potential source of confusion with the term, given that the legal owner of a sound recording copyright is not always the same as the party identified as the sound recording copyright owner in royalty metadata currently used in the digital music marketplace.[86] At a minimum, the Office recognizes that for musical work copyright owners receiving royalty statements, "sound recording copyright owner" may not be as important to know for recordkeeping purposes as other fields identifying the sound recording, such as record label, and the Office seeks comment on whether it is necessary to require reporting of sound recording copyright owner on royalty statements.

[83] 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa).

[84] *Id.* at 115(d)(3)(E)(ii).

[85] *See* U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*; U.S. Copyright Office, Notification of Inquiry, *Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information*, Dkt. No. 2020-8, published elsewhere in this issue of the *Federal Register*.

[86] RIAA Initial at 2 ("In the digital music space, DMPs are required to pay royalties in exchange for access to valuable sound recordings. DMPs are instructed to whom to send those royalties via a specialized DDEX message known as the ERN (or Electronic Release Notification), which includes a field labeled sound recording copyright owner ('SRCO'). Importantly, as a matter of business custom and practice, the SRCO field is typically populated with information about the party that is entitled to receive royalties (who may or may not be the actual legal copyright owner), because that is the information that is relevant to the business relationship between record labels and DMPs. The SRCO data in the ERN message is not meant to be used to make legal determinations of ownership."); *see also* Sony Music & RIAA *Ex Parte* Letter at 1–2; Universal Music Group & RIAA *Ex Parte* Letter at 2–3.

The proposed rule is not intended to be an exhaustive list of everything the MLC will report to copyright owners, but rather set a baseline of fields that, at a minimum, will be included in royalty statements. The MLC will likely report additional information to copyright owners based on standard industry practices or customer expectations.[87] For example, the proposed rule would encourage, but not require, the MLC to report additional identifying information for sound recordings, including playing time, album title, album artist (which may be different than the featured artist of the individual sound recording, particularly in the case of compilations or soundtracks), record label, distributor, a Universal Product Code (UPC) for albums, version number, release date, producer(s), catalog number, and any other standard identifiers in the MLC's records. It is the Office's understanding that the MLC does intend to report additional information, and so the proposed rule would provide it some flexibility to be responsive to copyright owner needs. If, however, it becomes appropriate for regulations to require the reporting of additional fields, either through the initial adoption of regulations or through adjustment of an interim rule if practical experience demonstrates such an additional need, this proposed language could be adjusted.

Finally, for each separate service, activity, or offering that is reported by blanket licensees to the MLC, royalty information regarding the identification of the blanket licensee, the particular service where the musical work was used under the blanket license, the royalty rate, total usage, and total amount of royalties to be distributed, will be provided to copyright owners. In some cases, the actual blanket licensee may be an infrastructure provider or "white label" service that provides all the necessary elements of

[87] *See* MLC *Ex Parte* Letter Mar. 24, 2020 ("MLC *Ex Parte* Letter #3") at 2.

a digital music provider to a consumer-facing service. Such white label services may in fact serve multiple consumer-facing services. In such cases, the name of the customer-facing service is just as useful (if not more useful) to copyright owners, who are likely to be more familiar with those services than the underlying licensees.[88] Thus, the regulations would require identification of any trade or consumer-facing brand names of such services if they are different from the name of the blanket licensee.

The rule proposes that certain identifying information for musical works and sound recordings, such as Interested Parties Information ("IPI"), International Standard Work Code ("ISWC"), International Standard Recording Code ("ISRC"), and record label, are only required to the extent they are known to the MLC, since there may be copyright owners and musical works that do not have this information associated with them. This threshold—requiring reporting information only "to the extent it is known to the mechanical licensing collective"—is intended to ensure the MLC includes such information that it has determined is reliable enough to be reported as "known," but does not imply any further obligations to seek out such information beyond what is already required of it.[89] This proposed approach is similar to the standard articulated in a separate notice of inquiry regarding the MLC's public database.[90] The Office seeks comments on whether "known to the MLC" is an appropriate standard for triggering an obligation to report specific information.

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[88] *See, e.g., id.*

[89] This proceeding is not intended to create any rules regarding when a work is considered "matched" as that term is used in 17 U.S.C. 115. As noted above, the Office is currently undergoing a study on unclaimed royalties, which may provide an avenue for members of the public to comment upon that standard in greater detail.

[90] U.S. Copyright Office, Notification of Inquiry, *Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information*, Dkt. No. 2020-8, published elsewhere in this issue of the *Federal Register*.

The Office invites comments on the proposed information to be reported to copyright owners, including whether the rule should require any additional information, or conversely, whether certain fields should be excluded from the rule, with the MLC retaining discretion to include them based on its experiences and judgment.

*5. Certification*

Under the non-blanket license, licensees are required to certify to the truth of the statements made in monthly statements of account.[91] The MMA is silent on any certification requirement for blanket license royalty statements, and the MLC proposal did not require certification of royalty statements. Music Reports replied in favor of retaining a certification requirement for the MLC royalty statements, saying, "[t]he same logic, ethical obligations, and need for accounting rigor that apply to monthly, cumulative, and annual statements of account in the pre-license availability date period should also apply to such statements when they are prepared and rendered to copyright owners by the MLC."[92] Music Reports noted in particular that "[h]istorically, music rights owners and digital music providers have been in contractual privity with one another through the mechanism of the compulsory mechanical license."[93] That privity is lost with the creation of the blanket license and transfer of blanket license functions to the MLC. The MLC disagreed with Music Report's proposal, saying certification of usage reports by the DMPs, which is required under the statute,[94] "should be sufficient."[95] Certification, it said,

[91] 37 CFR 210.16(f).

[92] Music Reports Initial at 5.

[93] *Id.*

[94] 17 U.S.C. 115 (d)(4)(A)(i) provides that "[a] digital music provider shall report and pay royalties to the mechanical licensing collective under the blanket license on a monthly basis in accordance with clause (ii) and subsection (c)(2)(I)." Section 115(c)(2)(I) in turn requires that reports be made under oath and according to regulations prescribing "the manner of certification."

"is unjustified given that the underlying data is certified by the DMPs, and the nonprofit MLC has no financial interest in underpayment, and MLC accountings are subject to audit by any copyright owner."[96] Additionally, it noted that the requirement "would be unduly burdensome and costly."[97]

While the requirement that DMPs certify the statements made in their usage reports to the MLC will provide a measure of quality control for much of the information that eventually flows to copyright owners, the Office tentatively concludes that it may not provide sufficient safeguards for copyright owners. The MLC is required to engage in additional processing of the statements made in usage reports when it receives them, including "identify[ing] the musical works embodied in sound recordings reflected in such reports, and the copyright owners of such musical works (and shares thereof). . . confirm[ing] uses of musical works subject to voluntary licenses and individual download licenses, and the corresponding pro rata amounts to be deducted from royalties that would otherwise be due under the blanket license[,] and confirm[ing] proper payment of royalties due."[98] Certification by the MLC may thus help ensure the accuracy of this additional accounting done by the MLC before distributing royalties. While the MMA provides copyright owners with the right to audit the MLC to verify the accuracy of royalty payments, this new audit right does not ameliorate the value of certification.[99]

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[95] MLC Reply at 39.
[96] *Id.* at 40.
[97] *Id.*
[98] 17 U.S.C. 115(d)(3)(G)(i)(I).
[99] *Id.* at 115(d)(3)(L).

As one commenter noted, audits are limited to no more than one a year for any individual copyright owner and may be costly and lengthy.[100]

The proposed rule would require the MLC to certify monthly royalty statements under the blanket license the same way monthly statements of account must be currently certified by non-blanket licensees using the compulsory license. This requirement would provide copyright owners with the same level of certification by the processor of their royalties that they enjoy under the existing non-blanket license. The Office recognizes this will add an additional process step upon the MLC. To address that concern, the Office is proposing a minimum threshold of royalties due that triggers the certification requirement. Under the proposed rule, only statements where the total royalties to be distributed during the period covered by the statement exceed $100 are required to be certified by the MLC. The Office seeks comment on this proposal.

*6. Payment Thresholds*

Under the proposed rule, the MLC will be required to provide copyright owners with a statement for every period in which there is activity relevant to the distribution of royalties under the blanket license. To promote efficiency, royalties will not be considered payable to copyright owners until the total royalties collected equal at least one cent.

Separately, the DLC commented that it would be inefficient to send "tens of thousands of penny checks" and suggested setting a default royalty payment threshold of $25.[101] The current regulations for monthly statements of account under the non-blanket

[100] *See, e.g.*, Lowery Reply at 7 ("Auditing years after the fact is not going to get it done. . . . The audit language is simply not fit for purpose in a world of trillions of individual transactions rather than hundreds of millions of CDs.").

[101] DLC Reply at 27.

license allow a compulsory licensee to defer the payment date for royalties until the cumulative unpaid royalties exceed $5.[102] The Office set the threshold at $5 after a proposal to set it at $50.[103] The Office concluded that although it lacked express statutory authority to set a threshold, it could create one through its "inherent authority to allow the withholding of amounts it determines are *de minimis*."[104] It determined that a threshold of $5 was permitted under that standard.[105]

In light of the additional general rulemaking authority delegated to the Register of Copyrights under section 115(d)(12)(A), it appears that the Office would not be similarly constrained in establishing a minimum threshold for royalty payments and can set a threshold higher than $5. Indeed, it may be appropriate to provide for different thresholds depending on the payment method, given that there are different costs associated with processing payments by direct deposit, physical check, or wire transfer, and such tiered structures are standard in comparable distributions. At this point, there are insufficient data regarding how much it will cost the MLC to process payments, but existing thresholds within the market provide a useful starting point. For example, SoundExchange has a minimum payment threshold of $10 for electronic payments and $100 for paper checks.[106] For ASCAP, the minimum thresholds are set at $1 and $100, respectively;[107] for BMI, the thresholds are $2 and $100.[108] Based on these benchmarks,

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[102] 37 CFR 210.16(g)(6).

[103] 79 FR at 56198.

[104] *Id.*

[105] *Id.* at 56198–99.

[106] SoundExchange, General FAQs, *https://www.soundexchange.com/about/general-faqs/* (last visited Apr. 2, 2020).

[107] ASCAP, Performance Periods and Payment Methods, *https://www.ascap.com/help/royalties-and-payment/payment/payment* (last visited Apr. 2, 2020).

the Office proposes establishing a minimum payment threshold of $5 for direct deposit, $100 for paper checks, and $250 for wire transfer. In any case, the copyright owner would retain the ability under the regulations to request payment for accrued royalties that fall below the threshold set by the MLC. The Office seeks comment on this threshold, including whether amounts proposed are appropriate.

*7. Annual royalty statement*

At this time, the Office is not proposing including a requirement for annual royalty statements. Although section 115 requires non-blanket licensees to provide an annual statement of account to copyright owners, there is a key difference in how adjustments to royalties distributed in prior reporting periods are proposed to be reported under the blanket license. Under the non-blanket license, licensees are required to serve an amended annual statement of account when royalties are adjusted.[109] Under the blanket license, to facilitate timely payment of royalties to copyright owners, the proposed rule would provide for adjustments to be reported to copyright owners with their regular monthly statements, as the MLC receives and processes reports of adjustments from the DMPs.[110] Thus, the proposed rule ensures copyright owners continue to receive the same information under the blanket license they expect under the non-blanket license, just in a different type of statement. In fact, since the Office is proposing that adjustments be reported by DMPs to the MLC and subsequently, from the

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[108] BMI, How We Pay Royalties, *https://www.bmi.com/creators/royalty/general_information* (last visited Apr. 2, 2020).

[109] 37 CFR 210.17(d)(2)(iii).

[110] The Office is proposing that DMPs report adjustments on a monthly basis in a separate, concurrent rulemaking. *See* U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

MLC to copyright owners, in a more frequent manner than once a year, the Office hopes that adjustments will be made and any additional royalties paid out more quickly under the blanket license than under the non-blanket license.

As with the type of information this rule requires the MLC to report to copyright owners, this rule establishes only minimum reporting obligations. The MLC may choose to provide copyright owners with annual statements if it sees a value in doing so. The rule is silent on the requirement to preserve maximum flexibility to the MLC for providing statements beyond what the Office has identified as required to ensure transparency and accountability. The Office seeks comment on this proposal.

*8. Disclosures; Education and Outreach*

Under the MMA, the MLC is required to engage in certain outreach and educational efforts, including, "engag[ing] in diligent, good-faith efforts to publicize, throughout the music industry—the existence of the collective and the ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works) held by the collective; the procedures by which copyright owners may identify themselves and provide contact, ownership, and other relevant information to the collective in order to receive payments of accrued royalties; any transfer of accrued royalties for musical works under paragraph (10)(B), not later than 180 days after the date on which the transfer is received; and any pending distribution of unclaimed accrued royalties and accrued interest, not less than 90 days before the date on which the distribution is made."[111] Royalty statements provide a valuable avenue for communicating with copyright owners. The Office is not proposing any specific

[111] 17 U.S.C. 115(d)(3)(J)(iii)(II).

disclosures, but encourages the MLC to use royalty statements as part of its educational and outreach obligations under the statute.

## III. Subjects of Inquiry

Before promulgating a final rule, the Copyright Office seeks additional public comment on all aspects of the proposed rule, including the specific subjects below:

1. Should the regulations require distribution and reporting of royalties to occur within a specified time period?
2. Should the rule establish electronic delivery of statements by default, with the option to request paper statements?
3. Is "known to the MLC" an appropriate standard for triggering an obligation to report information that the MLC is not expected to have for all musical works, sound recordings, and/or copyright owners?
4. Is there any additional content that should be reported to copyright owners, or, conversely, is there any content proposed to be reported that is unnecessary to require by regulation?
5. Are the minimum payment thresholds ($2 for direct deposit, $100 for paper checks, and $250 for wire transfer) for distribution of royalties appropriate?
6. Should the mechanical licensing collective be required to send annual statements in addition to monthly royalty statements?

## List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

## Proposed Regulations

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

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

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

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

**Subpart B--Blanket Compulsory License for Digital Uses, Mechanical Licensing Collective, and Digital Licensee Coordinator**

2. Add § 210.29 to read as follows:

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

(a) *General*. This section prescribes reporting obligations of the mechanical licensing collective to copyright owners for the distribution of royalties for musical works, licensed under the blanket license for digital uses prescribed in 17 U.S.C. 115(d)(1), that have been matched, either through the processing by the mechanical licensing collective upon receipt of a report of usage and royalty payment from a digital music provider, or during the holding period for unmatched works as defined in 17 U.S.C. 115(d)(3)(H)(i).

(b) *Distribution of royalties and royalty statements*. (1) Royalty distributions shall be made on a monthly basis and shall include:

(i) All royalties to a copyright owner for a musical work matched in the ordinary course under 17 U.S.C. 115(d)(3)(G)(i)(II) for the month next preceding;

(ii) All accrued royalties for any particular musical work that has been matched in the month next preceding and a proportionate amount of accrued interest associated with that work; and

(iii) Any overpayment or underpayment of royalties in prior periods based on adjustments to reports of usage by digital music providers.

(2) Royalty distributions shall be accompanied by a royalty statement containing the information set forth in paragraph (c) of this section.

(c) *Content*—(1) *General content of royalty statements*. Accompanying the distribution of royalties to a copyright owner, the mechanical licensing collective shall provide to the copyright owner a statement that includes, at a minimum, the following information:

(i) The period (month and year) covered by the statement.

(ii) The name and address of the mechanical licensing collective.

(iii) The name and mechanical licensing collective identification number of the copyright owner.

(iv) ISNI and IPI name and identification number of the copyright owner, to the extent it has been provided to the mechanical licensing collective by a copyright owner.

(v) The name and mechanical licensing collective identification number of the copyright owner's administrator (if applicable), to the extent one has been provided to the mechanical licensing collective by a copyright owner.

(vi) ISNI and IPI of the copyright owner's administrator, to the extent one has been provided to the mechanical licensing collective by a copyright owner, songwriter, or administrator.

(vii) Payment information, such as check number, ACH identification, or wire transfer number.

(viii) The total royalty payable to the relevant copyright owner for the month covered by the royalty statement.

(2) *Musical work information*. For each matched musical work owned by the copyright owner for which accompanying royalties are being distributed to that copyright owner, the mechanical licensing collective shall report the following information:

(i) The musical work name, including primary and any alternative and parenthetical titles for the musical work known to the mechanical licensing collective.

(ii) ISWC for the musical work, to the extent it is known to the mechanical licensing collective.

(iii) The mechanical licensing collective identification number of the musical work.

(iv) The administrator's unique identifier for the musical work, to the extent one has been provided to the mechanical licensing collective by a copyright owner or its administrator.

(v) The name(s) of the songwriter(s), to the extent they are known to the mechanical licensing collective.

(vi) ISNI(s) and IPI(s) of each songwriter, to the extent either is known to the mechanical licensing collective.

(vii) The percentage share of musical work owned or controlled by the copyright owner.

(viii) For each sound recording embodying the musical work, the identifying information enumerated in paragraph (c)(3) of this section and the royalty information enumerated in paragraph (c)(4) of this section.

(3) *Sound recording information*. For each sound recording embodying a musical work included in a royalty statement, the mechanical licensing collective shall report the following information:

(i) The sound recording name(s), including primary and all known alternative and parenthetical titles for the sound recording.

(ii) The featured artist(s).

(iii) The record label name(s), to the extent it is known to the mechanical licensing collective.

(iv) ISRC, to the extent it is known to the mechanical licensing collective.

(v) The sound recording copyright owner(s).

(vi) The MLC is encouraged to include other information commonly used in the industry to identify sound recordings, such as any other unique identifier(s) for or associated with the sound recording, including any unique identifier(s) for any associated album, including but not limited to:

(A) Playing time

(B) Album title(s) or product name(s).

(C) Album or product featured artist(s), if different from sound recording featured artist(s).

(D) Distributor(s).

(4) *Royalty information*. The mechanical licensing collective shall separately report, for each service, offering, or activity reported by a blanket licensee, the following royalty information for each sound recording embodying a musical work included in a royalty statement:

(i) The name of the blanket licensee and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the blanket licensee engages in covered activities.

(ii) The service tier or service description.

(iii) The use type (download or stream).

(iv) The number of payable units, including, as applicable, permanent downloads, plays, and constructive plays.

(v) The royalty rate and amount.

(vi) The interest amount.

(vii) The distribution amount.

(d) *Cumulative statements of account, and adjustments*. (1) For royalties reported under paragraph (b)(1)(ii) of this section, the mechanical licensing collective shall provide a cumulative statement of account that includes, in addition to the information in paragraph (c) of this section, a clear identification of the total period covered and the total royalty payable for the period.

(2) For adjustments reported under paragraph (b)(1)(iii) of this section, the mechanical licensing collective shall clearly indicate the original reporting period of the royalties being adjusted.

(e) *Delivery of royalty statements*. Royalty statements may be delivered electronically or, upon written request of the copyright owner, by mail. Nothing in this section shall prevent the mechanical licensing collective from alternatively providing, upon written request of the copyright owner:

(1) A separate, simplified report containing fewer data fields that may be more understandable for the copyright owner; or

(2) Access to statements through an online password protected portal, accompanied by email notification of the availability of the statement in the portal.

(f) *Clear statements*. The information required by paragraph (c) of this section requires intelligible, legible, and unambiguous statements in the royalty statements without incorporation of facts or information contained in other documents or records.

(g) *Certification*. (1) Each royalty statement in which the total royalty payable to the relevant copyright owner for the month covered is equal to or greater than $100 shall be accompanied by:

(i) The name of the person who is signing and certifying the statement.

(ii) A signature of a duly authorized officer of the mechanical licensing collective.

(iii) The date of signature and certification.

(iv) The title or official position held by the person who is signing and certifying the statement.

(v) One of the following statements:

(A) Statement one:

> I certify that (1) I am duly authorized to sign this royalty statement on behalf of the mechanical licensing collective; (2) I have examined this

royalty statement; and (3) All statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith; or

(B) Statement two:

This statement was prepared by the Mechanical Licensing Collective and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed Certified Public Accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly statements that accurately reflect, in all material respects, the blanket licensee's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(h) *Delivery*. (1) Subject to paragraph (h)(2) of this section, a separate royalty statement shall be provided for each month during which there is any activity relevant to the distribution of royalties under the blanket license.

(2) Royalties under the blanket license shall not be considered payable, and no royalty statement shall be required, until the cumulative unpaid royalties collected for the copyright owner equal at least one cent. Moreover, in any case in which the cumulative unpaid royalties under the blanket license that would otherwise be distributed by the mechanical licensing collective to the copyright owner are less than $2 if the copyright

owner receives payment by direct deposit, $100 if the copyright owner receives payment by physical check, or $250 if the copyright owner receives payment by wire transfer and the copyright owner has not notified the mechanical licensing collective in writing that it wishes to receive royalty statements reflecting payments of less than the threshold, the mechanical licensing collective may choose to defer the payment date for such royalties and provide no royalty statements until the earlier of the time for rendering the royalty statement for the month in which the unpaid royalties under the blanket license for the copyright owner exceed the threshold, at which time the mechanical licensing collective may provide one statement and payment covering the entire period for which royalty payments were deferred.

(3) If the mechanical licensing collective is required, under applicable tax law and regulations, to make backup withholding from its payments required hereunder, the mechanical licensing collective shall indicate the amount of such withholding on the royalty statement or on or with the distribution.

**Dated:** April 15, 2020

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**Regan A. Smith,**

*General Counsel and*
*Associate Register of Copyrights*

**[BILLING CODE 1410-30-P]**

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