



**LIBRARY OF CONGRESS**

**U.S. Copyright Office**

**37 CFR Part 210**

**[Docket No. 2020-12]**

**Music Modernization Act Transition Period Transfer and Reporting of Royalties to 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 digital music providers' obligations to transfer and report accrued royalties for unmatched musical works (or shares) to the mechanical licensing collective for purposes of being eligible for the limitation on liability for prior unlicensed uses under title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. Having solicited public comments through multiple prior notices, the Office is now proposing an update to regulations concerning the transfer and reporting of such royalties, namely the content, format, and delivery of cumulative statements of account to be submitted by digital music providers to the mechanical licensing collective at the conclusion of the statutory transition period.

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

**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-transition-reporting>. 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](mailto:regans@copyright.gov), John R. Riley, Assistant General Counsel, by email at [jril@copyright.gov](mailto:jril@copyright.gov), or Jason E. Sloan, Assistant General Counsel, by email at [jslo@copyright.gov](mailto:jslo@copyright.gov). Each can be contacted by telephone by calling (202) 707-8350.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This notice of proposed rulemaking (“NPRM”) is being issued subsequent to a notification of inquiry, published in the Federal Register on September 24, 2019, that describes in detail the legislative background and regulatory scope of the present rulemaking proceeding.<sup>1</sup> The Copyright Office assumes familiarity with that document,

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<sup>1</sup> 84 FR 49966 (Sept. 24, 2019). All rulemaking activity, including public comments, as well as legislative history and 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>. Related *ex parte* letters are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. References to these comments and letters are by party name (abbreviated where appropriate), followed by “Initial,” “Reply,” or “*Ex Parte* Letter” as appropriate.

and encourages anyone reading this NPRM who has not reviewed that notice to do so before continuing here.

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”) which, among other things, substantially modifies the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>2</sup> It does so by switching from a song-by-song licensing system to a blanket licensing regime that will become available on January 1, 2021 (the “license availability date”), and be administered by a mechanical licensing collective (“MLC”) designated by the Copyright Office. Digital music providers (“DMPs”) will be able to obtain the new compulsory blanket license 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), subject to compliance with various requirements.<sup>3</sup>

Prior to the MMA, DMPs 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 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.<sup>4</sup> The MMA includes a “transition period” for the

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<sup>2</sup> Pub. L. 115-264, 132 Stat. 3676 (2018).

<sup>3</sup> As permitted under the MMA, the Office designated a digital licensee coordinator (“DLC”) to represent licensees in proceedings before the Copyright Royalty Judges (“CRJs”) and the Copyright Office, to serve as a non-voting member of the MLC, and to carry out other functions. 17 U.S.C. 115(d)(5)(B); 84 FR 32274 (July 8, 2019); *see also* 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(C).

<sup>4</sup> *See* 17 U.S.C. 115(b)(1), (c)(5) (2017).

period following the new law’s enactment, before the blanket license becomes available.<sup>5</sup> During this transition period, anyone seeking to obtain a compulsory license to make DPDs must continue to do so on a song-by-song basis by serving NOIs on copyright owners “if the identity and location of the musical work copyright owner is known,” and paying them applicable royalties accompanied by statements of account.<sup>6</sup> If the musical work copyright owner is unknown, a DMP may no longer file an NOI with the Copyright Office, but instead may rely on a limitation on liability that requires the DMP to “continue[] to search for the musical work copyright owner” using good-faith, commercially reasonable efforts and bulk electronic matching processes.<sup>7</sup> The DMP must eventually either account for and pay accrued royalties to the relevant musical work copyright owner(s) when found or, if they are not found before the end of the transition period, account for and transfer the royalties to the MLC at that time.<sup>8</sup> Congress believed that the liability limitation, which limits recovery in lawsuits commenced on or after January 1, 2018 to the statutory royalty due, would “ensure that more artist royalties will be paid than otherwise would be the case through continual litigation”<sup>9</sup> and viewed this provision as a “key component that was necessary” to ensure support for legislative change.<sup>10</sup>

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<sup>5</sup> H.R. Rep. No. 115-651, at 10 (2018); S. Rep. No. 115-339, at 10 (2018).

<sup>6</sup> 17 U.S.C. 115(b)(2)(A), (c)(2)(I); *see* H.R. Rep. No. 115-651, at 4; S. Rep. No. 115-339, at 3.

<sup>7</sup> 17 U.S.C. 115(b)(2)(A), (d)(9)(D)(i), (d)(10)(A)–(B); *see* H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10, 22.

<sup>8</sup> 17 U.S.C. 115(d)(10)(B); *see* H.R. Rep. No. 115-651, at 4, 10; S. Rep. No. 115-339, at 3, 10.

<sup>9</sup> H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 14–15; Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 12 (2018), [https://www.copyright.gov/legislation/mma\\_conference\\_report.pdf](https://www.copyright.gov/legislation/mma_conference_report.pdf) (“Conf. Rep.”).

<sup>10</sup> H.R. Rep. No. 115-651, at 13; S. Rep. No. 115-339, at 14; Conf. Rep. at 12.

With respect to the specific reporting and payment requirements to be eligible for the limitation on liability, the statute details three scenarios. First, if the matching efforts are successful in identifying and locating a copyright owner of a musical work (or share) by the end of the calendar month in which the DMP first makes use of the work, the DMP must provide statements of account and pay royalties to that copyright owner in accordance with section 115 and applicable regulations.<sup>11</sup> The second and third scenarios apply if the copyright owner is not identified or located by the end of the calendar month in which the DMP first makes use of the work.<sup>12</sup> In such cases, the DMP must accrue and hold applicable statutory royalties in accordance with usage of the work, from the initial use of the work until these royalties can be paid to the copyright owner or are required to be transferred to the MLC.<sup>13</sup> If a copyright owner of an unmatched musical work (or share) is identified and located by or to the DMP before the license availability date, the DMP must, among other things, pay the copyright owner all accrued royalties accompanied by a cumulative statement of account that includes the information that would have been provided to the copyright owner had the DMP been providing monthly statements of account to the copyright owner from initial use of the work in accordance with section 115 and applicable regulations.<sup>14</sup> If a copyright owner of an unmatched musical work (or share) is not identified and located by the license availability date, the DMP must, among other things, transfer, no later than 45 calendar days after the license availability date, all accrued royalties to the MLC accompanied by a cumulative

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<sup>11</sup> 17 U.S.C. 115(d)(10)(B)(iii).

<sup>12</sup> *Id.* at 115(d)(10)(B)(iv).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 115(d)(10)(B)(iv)(II).

statement of account that includes the information that would have been provided to the copyright owner had the DMP been serving monthly statements of account on the copyright owner “from initial use of the work in accordance with [section 115] and applicable regulations,” including the certification that would have been provided to an identified copyright owner as well as an additional certification attesting to the DMP’s matching efforts during the transition period.<sup>15</sup>

In December 2018, the Office published an interim rule and requested comments to address the current transition period.<sup>16</sup> With respect to the payment and reporting obligations to be eligible for the limitation on liability, the Office adopted regulations specifying that DMPs must pay royalties and provide cumulative statements of account to copyright owners and the MLC in compliance with the Office’s preexisting monthly statement of account regulations in 37 CFR 210.16.<sup>17</sup> The Office required that cumulative statements of account include “a clear identification of the total period covered by the cumulative statement and the total royalty payable for the period.”<sup>18</sup> The Office did not receive any comments in response to this public rulemaking and finalized the rule in March 2019.<sup>19</sup> In promulgating the rule, the Office observed that “[t]he intent of the legislation does not signal to the Office that it should be overhauling its existing regulations during the transition period before the blanket license becomes available.”<sup>20</sup> But the rule did separate provisions regarding the reporting of cumulative statements of

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<sup>15</sup> *Id.* at 115(d)(10)(B)(iv)(III).

<sup>16</sup> 83 FR 63061 (Dec. 7, 2018).

<sup>17</sup> 37 CFR 210.20.

<sup>18</sup> *Id.* at 210.20(b)(2)(i), (3)(i).

<sup>19</sup> *See* 84 FR 10685 (Mar. 22, 2019).

<sup>20</sup> 83 FR at 63062.

account and payment of royalties for matched works provided to copyright owners on the one hand from the reporting of cumulative unmatched usages and transfer of associated royalties to the MLC on the other. This approach includes the extra step of statutorily required certifications for reports provided to the MLC.<sup>21</sup>

Following the adoption of this rule, in September 2019, the Office issued a notification of inquiry regarding multiple topics related to MMA implementation.<sup>22</sup> Noting the “persistent concern about the ‘black box’ of unclaimed royalties, including its amount and treatment by digital music providers and the MLC,” the Office provided another opportunity for the public to comment on the regulations governing the reporting of cumulative statements of account and generally on “any issues that should be considered relating to the transfer and reporting of unclaimed royalties by digital music providers to the MLC.”<sup>23</sup>

In response to this later inquiry, both the MLC and the DLC provided comments. The MLC proposed that the cumulative statements of account to be delivered to the MLC at the end of the transition period, instead of complying with the Office’s preexisting monthly statement of account regulations in 37 CFR 210.16, should include the same information and be in the same format as required for monthly reports of usage under the blanket license.<sup>24</sup> The MLC also proposed requiring these cumulative statements to include: (1) per-play allocations or other applicable rates and amounts allocated to identified usage, and perpetually unique DMP transaction identifiers for usage; (2)

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<sup>21</sup> See 83 FR at 63065–66; 37 CFR 210.16, 210.20.

<sup>22</sup> 84 FR 49966 (Sept. 24, 2019).

<sup>23</sup> *Id.* at 49971.

<sup>24</sup> MLC Reply App. D at 19; *see also* MLC Initial at 23; MLC Reply at 27–28; MLC *Ex Parte* Letter at 2 (June 17, 2020).

information about matched shares of a musical work where unmatched shares for the work are reported; (3) information about any applicable earned interest; and (4) information about any claimed or applied deductions or adjustments to the aggregate accrued royalties payable.<sup>25</sup> The DLC proposed that DMPs not be “required to accrue any royalties that are required to be paid to copyright owners of musical works pursuant to any agreements entered into prior to the effective date of the [MMA]” and that those royalties not be treated as “accrued royalties” under the statute.<sup>26</sup>

Having reviewed and carefully considered all relevant comments, the Office now issues a proposed rule and invites further public comment. While all public comments are welcome, as applicable, should commenters disagree with language in the proposed rule, the Office encourages commenters to offer alternate potential regulatory language.

## **II. Proposed Rule**

### **A. Cumulative Statement of Account Content and Format**

*General.* The MLC proposed requiring cumulative statements of account to “include[] all of the information, and [be] in the same format, as required to be provided in the monthly usage reports pursuant to [section] 115(d)(4)(A)(i)-(iii), as supplemented by [the reports of usage regulations].”<sup>27</sup> The MLC explained that it needs the additional information to properly administer the transferred royalties.<sup>28</sup>

In response, the DLC suggested that the Copyright Office is restricted in its ability to require DMPs to provide additional information in a different format than what was

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<sup>25</sup> MLC Reply App. D at 19; *see also* MLC Initial at 22–23; MLC Reply at 27–28; MLC *Ex Parte* Letter at 3–4 (June 17, 2020).

<sup>26</sup> DLC Reply App. at A-24; *see also* DLC Initial at 18–19.

<sup>27</sup> MLC Reply App. D at 19.

<sup>28</sup> MLC Initial at 22; *see also* MLC *Ex Parte* Letter at 2 & n.1 (June 17, 2020).

required by the Office’s preexisting monthly statement of account regulations, because doing so “is contrary to the MMA, which requires the digital music provider to only provide ‘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.’”<sup>29</sup> The DLC further claimed that the MLC’s proposal was “impractical,” explaining that “digital music providers have maintained usage information . . . with the *existing* statement of account regulations in mind.”<sup>30</sup>

The MLC noted that the cited clause “does not imply that DMPs should not report anything additional or otherwise limit the Copyright Office’s general authority under [s]ection 115(d)(12)(A) to adopt regulations necessary or appropriate to effectuate the provisions of [s]ection 115(d)” and that regulations to “effectuate the proper disposition of accrued unclaimed royalties” are “necessary or appropriate” for the MLC to execute its functions under section 115(d).<sup>31</sup>

After considering the issue, the Office tentatively concludes that it would be within its regulatory authority and in clear furtherance of the statute’s goals and the legislative intent to update the rule concerning cumulative statements of account as proposed below. In the course of analyzing these public comments and promulgating a related rule concerning post-blanket license monthly reporting of usage information, the Office’s review indicates that updating certain requirements related to the content and delivery of cumulative statements may help the MLC more effectively identify and locate the copyright owners of unmatched works to ensure they are paid the royalties due to

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<sup>29</sup> DLC Reply at 24 (quoting 17 U.S.C. 115(d)(10)(B)(iv)(III)(aa)).

<sup>30</sup> *Id.* at 24.

<sup>31</sup> MLC *Ex Parte* Letter at 2 n.1 (June 17, 2020).

them. Congress has signaled this is a core task of the MLC.<sup>32</sup> Where statements of account provided to copyright owners have historically been intended to “increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations,”<sup>33</sup> cumulative statement reporting to the MLC is meant to facilitate the additional critical function of matching DMP usage to musical works and their owners—a task already accomplished where a statement is being served by the DMP directly on the copyright owner.<sup>34</sup> The legislative history of the MMA is in accord, providing that reporting accompanying unmatched royalties transferred to the MLC at the end of the transition period should contain “*as much information about usage and ownership information as possible.*”<sup>35</sup> The present rule for cumulative statements of account differentiates between reports provided to copyright owners and reports provided to the MLC by requiring DMPs to certify to the MLC that they have engaged in good faith efforts to obtain a variety of statutorily mandated categories of sound recording and musical work information.<sup>36</sup> The current rule also separately addresses transfer of royalties and reporting to the MLC. To some extent, then, the MLC’s request for additional information related to partially matched works (not least, when partial

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<sup>32</sup> See H.R. Rep. No. 115-651, at 9 (The MLC’s duty to “identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works” is its “highest responsibility” next to the “efficient and accurate collection and distribution of royalties.”); S. Rep. No. 115-339, at 9 (same); Conf. Rep. at 7 (same); see also Letter from Lindsey Graham, Chairman, Senate Judiciary Committee, to Karyn Temple, Register of Copyrights 1 (Nov. 1, 2019) (on file with Copyright Office) (“Reducing unmatched funds is the measure by which the success of this important legislation should be measured.”).

<sup>33</sup> H.R. Rep. No. 94-1476, at 111 (1976).

<sup>34</sup> 17 U.S.C. 115(d)(3)(C)(i)(II)–(III).

<sup>35</sup> H.R. Rep. No. 115-651, at 29 (emphasis added); S. Rep. No. 115-339, at 26 (same); Conf. Rep. at 22 (same).

<sup>36</sup> 17 U.S.C. 115(d)(B)(i)(I)(aa)–(bb).

payments have occurred) and the identity of these unmatched works may be viewed as an extension of these provisions regarding transfer and certification of efforts to obtain additional information about these works.<sup>37</sup>

Accordingly, to effectuate the provisions of section 115(d)(10), and against that provision's specific reference to "regulations" as well as the MMA's broad grant of regulatory authority to the Copyright Office, the Office tentatively concludes that it is necessary and appropriate to require DMPs to provide additional information to aid the MLC in fulfilling its statutory duty to identify and locate the copyright owners of unmatched works and pay the royalties due to them.<sup>38</sup> The proposed rule employs the MLC's preferred approach of generally importing the requirements that are eventually adopted for monthly reports of usage under the blanket license. While those regulations are still under consideration in a separate proceeding,<sup>39</sup> it seems reasonable to harmonize these rules in places, since the MLC is tasked with the same mission of matching works and distributing royalties, and DMPs, too, may benefit from consistency in reporting usage information in a similar manner (to the extent they have acquired such information).<sup>40</sup> Accordingly, the Office is proposing adjustments to requirements, such as those addressing format, royalty payment and accounting information, and sound recording and musical work information, that largely mirror the requirements proposed for reports of usage.<sup>41</sup> Notably, several categories of sound recording and musical work

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<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 115(d)(10)(B)(iv)(III); *id.* at 115(d)(12)(A).

<sup>39</sup> *See generally* 85 FR 22518 (Apr. 22, 2020).

<sup>40</sup> In fact, cumulative statements of account will be due around the same time as the first monthly reports of usage begin to come in, and so it may create some efficiencies for DMPs, as well as the MLC, if these reports follow similar requirements.

<sup>41</sup> *See* 85 FR at 22540–46.

information proposed to be imported from the reports of usage regulations are already required under the current rule,<sup>42</sup> including artist,<sup>43</sup> playing time,<sup>44</sup> ISRC,<sup>45</sup> ISWC,<sup>46</sup> songwriter,<sup>47</sup> ISNI,<sup>48</sup> and ownership share.<sup>49</sup> In other respects, the proposed rule reorganizes and clarifies preexisting requirements, generally by replacing cross references to section 210.16 with the relevant regulatory language.<sup>50</sup> For example, while the current provision incorporates by reference section 210.16's provision with respect to performance royalty estimates, the proposed rule specifically addresses use of such estimates in the context of cumulative statements, which unlike monthly statements delivered to copyright owners, are not reconciled via annual statements of account.<sup>51</sup> Additionally, recognizing the function served by the cumulative statements, the proposed rule requires reporting of data related to partially paid shares of musical works and information needed to reconcile any deviation between royalty statements and the amounts transferred to the MLC.

Regarding the DLC's assertion that DMPs have been maintaining certain information with only the preexisting statement of account regulations in mind, under the

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<sup>42</sup> See 37 CFR 210.20(b)(3)(i) (referring to "the information and certification required by §210.16").

<sup>43</sup> See *id.* at 210.16(c)(3)(iv).

<sup>44</sup> See *id.* at 210.16(c)(3)(v).

<sup>45</sup> See *id.* at 210.16(c)(3)(iii).

<sup>46</sup> See *id.* at 210.16(c)(3)(viii).

<sup>47</sup> See *id.* at 210.16(c)(3)(vii).

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 210.16(c)(3)(vi).

<sup>50</sup> See, e.g., *id.* at 210.16(e) ("clear statements" requirement); *id.* at 210.16(d)(3)(i) (performance royalty estimates); *id.* at 210.16(d)(3)(ii) (NOI reference number); *id.* at 210.16(f) (certification requirement).

<sup>51</sup> See *id.* at 210.16(d)(3)(i).

proposed rule, required information is generally limited to items that are either equivalent to the information required by section 210.16 or otherwise “to the extent acquired” by a DMP.<sup>52</sup> The Office believes that this qualification reasonably addresses the DLC’s concern.

Where the NPRM imports the proposed reports of usage requirements, the Office’s intent is for both rules to remain largely harmonized when finalized. After considering the MLC’s suggestion, the Office declines to simply cross reference the reports of usage regulations because they may change over time after becoming effective (especially if adopted on an interim basis as has been proposed);<sup>53</sup> whereas the cumulative statement of account requirements, tied to the license availability date, will not change. To minimize duplication, commenters may cross reference or incorporate by reference comments submitted in the separate reports of usage proceeding as appropriate, and focus their comments here on items uniquely relevant to cumulative statements of account. To the extent commenters believe a separate approach is appropriate for cumulative statements of account compared to the proposed rule regarding reports of usage, they are encouraged to identify those areas of differentiation and explain their position.

*Format.* While the rule adopted in December 2018 was silent as to method of delivery, now that the MLC has been designated and is further along in its operational activities, the Office proposes to carry over the proposed reports of usage format

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<sup>52</sup> Compare *id.* at 210.16(c) with 85 FR at 22541–42.

<sup>53</sup> See 85 FR at 22519 (noting that an interim rule would offer “more flexibility to make necessary modifications in response to new evidence, unforeseen issues, or where something is otherwise not functioning as intended”).

provision, which would require delivery to the MLC in a machine-readable format that is compatible with its information technology systems, as reasonably determined by the MLC and taking into consideration relevant industry standards. If a large amount of musical works remain unmatched after the transition period, the MLC may be required to ingest a significant amount of cumulative statements of account from DMPs. As the MLC explains, using the same format will ensure efficient processing and ultimately support “efficient and accurate reporting.”<sup>54</sup> Further, as the MLC points out, “a workflow will already have to be developed by the DMPs and the MLC for reporting in this format” to process reports of usage,<sup>55</sup> and the MLC is “mindful of the varying data formats used by DMPs with varying resources and intends to coordinate with the DMP community to ensure the most appropriate version of data standards is selected.”<sup>56</sup> The Office notes that current monthly statement of account regulations already allow a copyright owner to “demand that Monthly Statements of Account be submitted in a readily accessible electronic format consistent with prevailing industry practices applicable to comparable electronic delivery of comparable financial information.”<sup>57</sup>

*Certifications and clear statements.* The Office does not propose any substantive changes to the certifications required under the previously adopted rule for cumulative statements of account.<sup>58</sup> The rule proposes a technical change to include the actual

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<sup>54</sup> MLC Initial at 20.

<sup>55</sup> MLC *Ex Parte* Letter at 2 (June 17, 2020).

<sup>56</sup> MLC Initial at 20.

<sup>57</sup> 37 CFR 210.16(g)(2).

<sup>58</sup> *See id.* at 210.20(b)(3)(i). As noted, to the extent the proposed rule would obligate DMPs to engage in reporting additional sound recording and musical works information, the statute requires DMPs to certify that they have attempted to acquire much of this information, and so an alternate method of providing this information to the MLC may be to require reporting the fruits of these inquiries in the certification.

language for clarity (with appropriate conforming edits), rather than merely referring to the “certification required by §210.16.” The Office has moved the other required certification—“that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner”—to be in the same paragraph as the language from section 210.16. The proposed rule also imports the “clear statements” requirement from the preexisting regulations.<sup>59</sup>

*Estimates and adjustments.* Under the previously adopted cumulative statement of account regulation, DMPs could make estimates to the extent currently permitted by 37 CFR 210.16(d)(3)(i) (covering where the final public performance royalty has not yet been determined), and there would be no adjustments mechanism. The Office proposes to retain this status quo rather than conform to the estimates and adjustments provisions proposed for reports of usage, given the one-time nature of the cumulative statements, compared to the proposed regulatory structure designed for ongoing reporting. The Office does propose, however, that any overpayment (whether resulting from an estimate or otherwise) should be credited to the DMP’s account, or refunded upon request.

*Response files and invoices.* In light of the DLC’s comments concerning the value of receiving invoices and response files,<sup>60</sup> the proposed rule allows a DMP to request and obtain a response file and/or invoice from the MLC. Because the MLC will be ingesting a

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<sup>59</sup> *Id.* at 210.16(e).

<sup>60</sup> See DLC Comments at 12–13, Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, Docket No. 2020–5, <https://www.regulations.gov/contentStreamer?documentId=COLC-2020-0005-0012&attachmentNumber=1&contentType=pdf> (“Invoices and response files are critically important to licensees and their accounting processes.”); see also 85 FR at 22528.

large amount of data all around the same time, the rule proposes that any requested invoices and/or response files be delivered to DMPs within a “reasonable” period of time in lieu of imposing a strict deadline.

*NOI reference numbers.* The proposed rule restates a provision currently incorporated by reference to section 210.16(c)(3)(ii), which requires a DMP to provide a reference number or code identifying the relevant NOI if it, or its agent, provided such a number or code on its relevant NOI. The Office proposes to retain this provision because records of past NOIs issued may be helpful inputs for the MLC in identifying unmatched works (or shares).

*Sound recording and musical work information.* As noted, the proposed rule generally harmonizes with the reporting requirements proposed for DMPs’ monthly reports of usage to be delivered to the MLC following the transition to the blanket license. In many cases, this information is already required to be reported under the current rule, and in others, DMPs must certify that they have tried to obtain this information to receive the limitation on liability.<sup>61</sup> In some cases, additional fields are proposed to be required, including certain categories pertaining to identifying information for the sound recording that embodies a particular musical work.<sup>62</sup> As noted below, the obligation to report these additional fields is generally cabined by the extent the DMP has acquired this information, and, in some instances, is further limited by whether the DMP is already reporting this information.

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<sup>61</sup> 17 U.S.C. 115(d)(10)(B)(i)(I)(aa)–(bb), (iv)(III)(aa); see 37 CFR 210.20(b)(3)(i) (referring to “the information and certification required by §210.16”); *id.* at 210.16(c)(3) (addressing *e.g.*, artist, playing time, ISRC, ISWC, songwriter, ISNI, and ownership share).

<sup>62</sup> For example, sound recording name(s), producer(s), version(s), release date(s), album title(s), and distributor(s).

*Altered data and practicability of reporting.* For sound recording and musical work information, the rule proposes to require identifying whether the reported data has been modified by the DMP, compared to being passed through in its original, as-received form. This concept was suggested by the MLC and others.<sup>63</sup> As noted above, the Office is still considering comments in the reports of usage rulemaking and incorporation of the MLC’s suggestion here should not indicate that the Office has made any conclusions in either this rulemaking or the reports of usage rulemaking on this subject. The Office also proposes to import the practicability limitation concerning the reporting of sound recording and musical work information that was proposed in the reports of usage proceeding.<sup>64</sup> Under that proposal, much of the enumerated sound recording and musical work information would only need to be reported by a DMP “to the extent practicable,” which is defined in reference to categories of information that are statutorily required, required by a data standard used by the DMP, or were otherwise already being reported by the relevant DMP.<sup>65</sup> As with altered data, the inclusion of this limitation in the

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<sup>63</sup> MLC Comments at 26, Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, Docket No. 2020–5, <https://www.regulations.gov/contentStreamer?documentId=COLC-2020-0005-0014&attachmentNumber=1&contentType=pdf>; A2IM & RIAA Initial at 2–3 (noting provenance issues with using DMP-sourced sound recording data); Paul Jessop Initial at 2–3 (same); SoundExchange Comments at 4–5, Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, Docket No. 2020–5, <https://www.regulations.gov/contentStreamer?documentId=COLC-2020-0005-0006&attachmentNumber=1&contentType=pdf> (same).

<sup>64</sup> See 85 FR at 22541–42.

<sup>65</sup> See *id.*; see also *id.* at 22531–32. As proposed, it would be “practicable” to provide the enumerated information if: (1) it belongs to a category of information expressly required by the enumerated list of information contained in 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa) or (bb); (2) where the MLC has adopted a particular nationally or internationally recognized reporting or data standard or format (e.g., DDEX) that is being used by the particular DMP, it belongs to a category of information required to be reported under such standard or format; (3) it belongs to a category of information that is reported by the particular DMP pursuant to any voluntary license

proposed rule should not indicate that the Office has finalized its approach with respect to this aspect of the reports of usage rulemaking. The Office recognizes that these are potential areas where it may make sense to consider whether the monthly and cumulative reporting rules should diverge, and invites comment on these issues.<sup>66</sup>

*Partially matched works.* The MLC requested that cumulative statements of account include information about matched shares of a musical work where unmatched shares for the work are reported, by proposing the following regulatory language:

for each track for which a share of a musical work has been matched and for which accrued royalties have been paid in accordance with section [210.20(b)(2)], but for which one or more shares of a musical work remains unmatched, identification of [the total period covered by the cumulative statement and the per-play allocation and unique DMP transaction identifier], and a clear identification of the share(s) that have been matched, the owner(s) of such matched shares, and the amount of such accrued royalties paid in accordance with section [210.20(b)(2)].<sup>67</sup>

The MLC explained that, in practice, a DMP may have paid one copyright owner their royalty share, and held accrued royalties for any remaining unmatched share(s).<sup>68</sup> The MLC is concerned that upon transfer of such unmatched royalties, if the paid share is not

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or individual download license; or (4) it belongs to a category of information that was periodically reported by the particular DMP prior to the license availability date.

<sup>66</sup> For example, the Office has inquired whether a reasonable transition period may be appropriate with respect to certain monthly usage reporting requirements. See Letter from Copyright Office to Alliance for Recorded Music, DLC, MLC, and SoundExchange, Inc., at 3–4 (June 30, 2020), <https://www.copyright.gov/rulemaking/mma-implementation/copyright-office-letters/2020-5-june-30-2020.pdf>. Since cumulative statements of account are reported only once, shortly after the license availability date, such a period would make less sense for this proposed rule, and reporting obligations for cumulative statements may need to be cognizant of the time period within which DMPs will ready such statements.

<sup>67</sup> MLC Reply App. D at 19.

<sup>68</sup> MLC *Ex Parte* Letter at 3 (June 17, 2020) (giving the example of an identified 50% co-owner being paid their 50% share by a DMP, and then subsequently being paid half of the remaining share by the MLC due to lack of record of the first payment; stating that “reporting on partially-matched works and the respective shares that the DMP already paid is essential to allow the MLC to properly credit share owners who have been paid and avoid double payments”).

properly identified, there is a risk that a paid co-owner would be able to collect a portion of an unpaid co-owner's share.<sup>69</sup>

The DLC does not appear to disagree with the MLC's description of the issue, but stated that "[t]his sort of operational detail should be worked out between the MLC and individual digital music providers."<sup>70</sup> The DLC suggested that DMPs' third-party vendors, who are subject to "strict contractual confidentiality restrictions," may have this information and not the DMPs themselves.<sup>71</sup> Although it did not propose suggested language, it asked the Office to "account for these [confidentiality] restrictions and protect digital music providers from any liability related to their breach," were it to promulgate a regulation.<sup>72</sup> The MLC presumed that the DLC's confidentiality concern "relates to the amounts of royalties paid under voluntary licenses" and offered to amend their proposal to limit share reporting "to the share percentage and the owner of the share that was paid, [and] omitting the precise amount of royalties paid under the voluntary license terms."<sup>73</sup>

The Copyright Office finds the MLC's proposal to be reasonable in light of the statutory function of cumulative statements of account. Current regulations already allow a compulsory licensee to elect to allocate monthly royalty payments between co-owners and serve statements on each co-owner reflecting the percentage share paid to that co-owner.<sup>74</sup> Further, the MMA contemplates that if a DMP's matching efforts are successful

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<sup>69</sup> MLC *Ex Parte* Letter at 3 (June 17, 2020).

<sup>70</sup> DLC Reply at 25.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MLC *Ex Parte* Letter at 4 (June 17, 2020).

<sup>74</sup> 37 CFR 210.16(g)(1).

during the transition period as to a share of a work, it will pay royalties to the owner of that share, while holding the unmatched remainder for further matching efforts and, if ultimately unsuccessful, eventual transfer to the MLC.<sup>75</sup> Thus, the situation the MLC anticipates seems likely to occur, and having the matched share information will be important. The proposed rule largely follows the MLC's language, although it does not include the MLC's proposed limitation to instances where royalty shares are paid in accordance with § 210.20(b)(2), which concerns payments related to musical works matched during the transition period. It seems that all instances of partial payment of royalty interests may be relevant to the MLC's identification and royalty distribution functions for the remaining unmatched share(s). The Office welcomes comments on all aspects of this proposed rule, and is interested in whether the MLC's suggestion to omit a requirement to report the amount of royalties paid to matched shares under voluntary licenses adequately addresses the DLC's concerns. To that end, the Office solicits comments regarding whether the rule should also permit the MLC and individual DMPs to enter into agreements to alter this process, provided that any such change does not materially prejudice the MLC's efforts with respect to locating and identifying copyright owners owed a portion of these accrued royalties. The Office has proposed a similar provision with respect to monthly reports of usage.<sup>76</sup>

*Reconciliation.* The MLC requested reporting of information concerning any applicable interest earned by DMPs on accrued royalties, and also “any claimed or applied deductions or adjustments” to applicable royalties “with a description of the

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<sup>75</sup> See 17 U.S.C. 115(d)(10)(B).

<sup>76</sup> See 85 FR 22546 (proposed 37 CFR 210.27(n)).

nature of, and basis for, such claimed deduction or adjustment.”<sup>77</sup> The DLC responded that interest “was purposefully *not* included in the statute” and “was specifically negotiated out of the draft legislation.”<sup>78</sup> In particular, the DLC objected to the inclusion of deductions or adjustments because it “is not aware of any deductions or adjustments that would be made to accrued royalties.”<sup>79</sup>

The MLC subsequently clarified that it “does not purport to dictate where interest must be applied or what would be applicable interest,” but wished to “ensure[] that any such interest paid over is also reported, so that the MLC can know to which copyright owners those moneys should ultimately be paid.”<sup>80</sup> Similarly, for deductions or adjustments, the MLC explained that it does not “intend to approve or condone of applying deductions, but merely wants to ensure that any such changes are properly reported, again so that the MLC can understand and exactly match the reporting to the payments.”<sup>81</sup> The MLC contended that these provisions are needed because “it is essential that the reporting on unclaimed accrued royalties match the accompanying royalty payments to the penny.”<sup>82</sup>

Recognizing the DLC’s comments regarding specific references to interest, adjustments, and deductions, the Copyright Office also appreciates the broader principle advanced by the MLC that it has an operational need for royalty statements to match the royalties transferred to the MLC, or at least minimize unexplained deviations. While not

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<sup>77</sup> MLC Reply App. D at 19.

<sup>78</sup> DLC Reply at 24.

<sup>79</sup> *Id.* at 25.

<sup>80</sup> MLC *Ex Parte* Letter at 4 (June 17, 2020).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

adopting the MLC’s proposed language, the rule proposes that if the total royalties turned over to the MLC do not reconcile with the corresponding cumulative statement of account (for whatever reason), the DMP should include a clear and detailed explanation of the deviation. The Office has previously adopted a similar rule in the context of annual statements of account.<sup>83</sup>

*Per-play allocation and unique transaction identifiers.* The MLC proposed that cumulative statements of account be required to include “[t]he per-play allocation or any other applicable rates and amounts allocated to the identified usage, and a perpetually unique DMP transaction identifier for the usage.”<sup>84</sup> During a subsequent *ex parte* meeting, the MLC explained that while the proposed reports of usage requirements do not explicitly include references to these items, this information would nonetheless be adequately captured if the Office applied those proposed requirements.<sup>85</sup> As a result, the Office has not included the MLC’s proposed language.<sup>86</sup>

## **B. Treatment of Negotiated Agreements**

As described above, in addition to the MLC’s request for additional reporting, the DLC asked for a “regulatory clarification” related to negotiated agreements that predate the MMA’s enactment.<sup>87</sup> In its words, certain music publishers “negotiated agreements with several of the major digital music providers to liquidate accrued royalties for unmatched works through payments based on market share, or other mechanisms *not*

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<sup>83</sup> See 37 CFR 210.17(d)(2)(ii).

<sup>84</sup> MLC Reply App. D at 19.

<sup>85</sup> See MLC *Ex Parte* Letter at 3 (June 17, 2020).

<sup>86</sup> The proposed rule adopts the same approach with respect to reporting of partially matched works. See MLC Reply App. D at 19.

<sup>87</sup> DLC Initial at 18.

based on matching to specific compositions that generated the royalties,” and some of these agreements have continued in force through the MMA’s enactment date such that “some digital music providers will continue to be obligated to pay some amount of accrued unmatched royalties to publishers with whom they have direct deals.”<sup>88</sup> According to the DLC, “[t]his creates a conflict between the terms of those preexisting agreements and the MMA’s directions in section 115(d)(10) regarding the accrual of unmatched royalties.”<sup>89</sup> To address this, and the DLC’s overarching concern that “[i]n no event should digital music providers be made to pay double,”<sup>90</sup> the DLC proposed adding the following regulatory language:

Notwithstanding anything in this section to the contrary, digital music providers are not required to accrue any royalties that are required to be paid to copyright owners of musical works pursuant to any agreements entered into prior to the effective date of the Music Modernization Act, and such royalties shall not be treated as “accrued royalties” for purposes of this section or 17 U.S.C. § 115(d)(10).<sup>91</sup>

The MLC objected, stating that this proposed regulation would both “conflict[] with the statute’s requirement that all royalties accrued from initial use of the unmatched work be transferred” to the MLC and “exceed the Copyright Office’s authority.”<sup>92</sup> The MLC stated that “[w]hile prior to the enactment of the MMA, certain DMPs entered into settlement agreements with certain music publishers in connection with disputes arising from their failure to license, match and/or pay royalties due, such settlement payments were definitively not the proper payment of royalties to copyright owners of unmatched

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<sup>88</sup> *Id.* at 18–19.

<sup>89</sup> *Id.* at 18.

<sup>90</sup> *Id.* at 19.

<sup>91</sup> *Id.*

<sup>92</sup> MLC Reply at 27–30.

uses,” and were “more likely consideration for releases from liability for copyright infringement or covenants not to sue.”<sup>93</sup> The MLC further argued that royalties lose their “unclaimed” status only when they are matched.<sup>94</sup>

The proposed rule does not include regulatory language specifically addressing the relationship between private settlement agreements and whether works are required to be reported on cumulative statements of account (with accompanying payment of accrued royalties). The statute is somewhat instructive to this issue. Provisions regarding the treatment of voluntary licenses and accrued, unclaimed royalties were carefully negotiated during the legislative process.<sup>95</sup> To maintain eligibility for the limitation on liability, when making available a sound recording of a musical work via a covered activity, a digital music provider must accrue and hold royalties for each musical work for which a copyright owner has not been identified or located.<sup>96</sup> At the end of this current holding period, all accrued royalties for which “a copyright owner of an unmatched musical work (or share thereof) is not identified and located” must be transferred to the MLC along with associated reporting.<sup>97</sup> Works are considered “matched” when “the copyright owner of such work (or share thereof) has been identified and located.”<sup>98</sup> The law further states that “[v]oluntary license[s]” will “remain in effect” by their respective terms notwithstanding the license availability date, and by implication,

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<sup>93</sup> *Id.* at 29.

<sup>94</sup> *Id.*

<sup>95</sup> See H.R. Rep. No. 115-651, at 9–10, 24; S. Rep. No. 115-339, at 10–11, 33–34.

<sup>96</sup> 17 U.S.C. 115(d)(10).

<sup>97</sup> *Id.* at 115(d)(10)(B)(iv)(III); see *id.* at 115(e)(2) (“The term ‘accrued royalties’ means royalties accrued for the reproduction or distribution of a musical work (or share thereof) in a covered activity, calculated in accordance with the applicable royalty rate under this section.”).

<sup>98</sup> *Id.* at 115(e)(17); see also *id.* at 115(e)(35) (defining “unmatched”).

DMPs would not retain accrued royalties (as defined in the MMA) for works licensed under private agreements.<sup>99</sup>

The Office understands the DLC’s concerns to center around whether payments made pursuant to various private settlement agreements can extinguish the obligation to deliver accrued royalties to the MLC. In light of the statutory language, these questions may be best resolved by determining whether a given agreement constitutes a valid license to the work(s) at issue (and if so, the scope of the license).<sup>100</sup> In such cases, the work(s) licensed under such agreements could be considered “matched” and may not need to be reported at the close of the transition period. In the case of jointly authored works, a further potential wrinkle may be determining whether any license extended pursuant to a settlement agreement was conveyed to the entirety of the work, or only to a partial interest in a co-owned work.<sup>101</sup>

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<sup>99</sup> *Id.* at 115(e)(36) (“The term ‘voluntary license’ means a license for use of a musical work (or share thereof) other than a compulsory license obtained under this section.”); *id.* at 115(d)(9)(C) (describing transition to blanket license). The MLC will “confirm 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.” *Id.* at 115(d)(3)(G)(i)(I)(bb). The Office has proposed a rule that would require DMPs to provide a description (including the start and end dates, the musical work copyright owner, and either a list of all covered musical works or an identification of any applicable catalog exclusions) of any applicable voluntary licenses to the MLC so that the MLC can confirm such uses for DMPs. *See* 85 FR 22537, 22541.

<sup>100</sup> While in some cases, the terms of a settlement agreement may provide continuing license authority, the Second Circuit has opined that, “absent clear language to the contrary, they are not licenses for future use.” *Compare Davis v. Blige* 505 F.3d 90, 102–04 (2d Cir. 2007) (holding that “a license or assignment in copyright can only act prospectively,” and that a co-owner cannot convey “his co-owners’ right to prosecute past infringements”) *with Jacobs v. Nintendo of Am., Inc.*, 370 F.3d 1097, 1101 (Fed. Cir. 2004) (holding that a settlement with an unrestricted grant to engage in patented activities carried with it an implied sublicense); *see also United States v. Youngstown Sheet & Tube Co.*, 171 F.2d 103, 111 (6th Cir. 1948) (“A release for wrongs done in the past is not the equivalent of a license to do rightfully the same thing in the future.”).

<sup>101</sup> For a background discussion on considerations related to licensing co-owned works in the performance royalty context, see U.S. Copyright Office, *Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works* (Jan. 2016), <https://www.copyright.gov/policy/pro-licensing.pdf>. As a starting point, “[j]oint authors co-

The Office appreciates the DMP’s motivation for further guidance on this important issue, but must be careful to avoid speaking over either the statute or private transactions. It would seem that the specific terms of each agreement would be highly relevant to addressing this issue, and that questions regarding the interpretation of various private contracts may be better resolved by the relevant parties rather than a blanket rule by the Copyright Office.<sup>102</sup> To the extent that preexisting settlement agreements may be, as the DLC asserts, in “conflict” with “the MMA’s directions in section 115(d)(10) regarding the accrual of unmatched royalties,”<sup>103</sup> the statutory directive could not yield to such agreements, but the Office offers no opinion as to whether this is indeed the case. Additionally, if a DMP is unsure about its obligations under the statute vis-a-vis a given agreement (or with respect to a particular musical work or share of a work) and inadvertently transfers royalties later determined to have indeed been properly matched and paid by the DMP, the Office has proposed a provision that, as noted, would require the MLC to credit or refund any overpayment back to the DMP. For these reasons, based on the current record, the Office tentatively declines the DLC’s suggestion to offer regulatory language regarding the interaction of preexisting settlement agreements and cumulative reporting obligations.<sup>104</sup> The Office recognizes that the DLC’s comments

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owning copyright in a work . . . ‘each hav[e] an independent right to use or [non-exclusively] license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.’” *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988). Collaborators can and sometimes do “alter this statutory allocation of rights and liabilities by contract,” including with respect to licensing. Paul Goldstein, 1 *Goldstein on Copyright* sec. 4.2 (3d. ed. 2020); *see, e.g., Corbello v. DeVito*, 832 F. Supp. 2d 1231, 1244 (D. Nev. 2011).

<sup>102</sup> The Office has not been provided copies of these settlement agreements.

<sup>103</sup> DLC Initial at 18.

<sup>104</sup> Further, while the Office appreciates the DLC’s view that enactment of the MMA was not intended to result in services “pay[ing] double” to the same parties for the same activities, *id.* at 19, its specific proposed regulatory language may conflict with the statutory definition of “accrued royalties” and lack precision with respect to scenarios where a payment does not

arise out of a complicated and nuanced treatment of private transactions and remains available to dialogue further, in accordance with the public process for written comments and/or *ex parte* meetings.

### **III. Subjects of Inquiry**

The proposed rule is designed to reasonably implement regulatory duties assigned to the Copyright Office under the MMA and facilitate the administration of the compulsory licensing system. The Office solicits additional public comment on all aspects of the proposed rule.

#### **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.

2. Amend § 210.12 by revising paragraph (k) and removing paragraphs (i) through (o).

The revision reads as follows:

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extinguish royalty entitlements for all copyright owners for the relevant works; that is, where usage remains fully or partially “unmatched” within the meaning of the statute.

**§ 210.12 Definitions.**

\* \* \* \* \*

(k) Any terms not otherwise defined in this section shall have the meanings set forth in 17 U.S.C. 115(e).

3. Amend §210.20 by revising paragraph (b)(3)(i) and adding paragraphs (c) through (j) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(i) Not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective (as required by paragraph (i)(2) of this section), such payment to be accompanied by a cumulative statement of account that:

(A) Includes all of the information required by paragraphs (c) through (e) of this section covering the period starting from initial use of the work;

(B) Is delivered to the mechanical licensing collective as required by paragraph (i)(1) of this section; and

(C) Is certified as required by paragraph (j) of this section; and

\* \* \* \* \*

(c) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be clearly and prominently

identified as a “Cumulative Statement of Account for Making and Distributing Phonorecords,” and shall include a clear statement of the following information:

(1) The period (months and years) covered by the cumulative statement of account.

(2) The full legal name of the digital music provider and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the digital music provider engages, or has engaged at any time during the period identified in paragraph (c)(1) of this section, in covered activities. If the digital music provider has a unique DDEX identifier number, it must also be provided.

(3) The full address, including a specific number and street name or rural route, of the place of business of the digital music provider. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(4) For each sound recording embodying a musical work for which accrued royalties must be transferred to the mechanical licensing collective under paragraph (b)(3)(i) of this section, a detailed cumulative statement, from which the mechanical licensing collective may separate reported information for each month and year for each applicable activity or offering including as may be defined in part 385 of this title, of all of:

(i) The royalty payment and accounting information required by paragraph (d) of this section; and

(ii) The sound recording and musical work information required by paragraph (e) of this section.

(5) The total royalty payable by the digital music provider for the period identified in paragraph (c)(1) of this section for the sound recordings embodying musical works identified in paragraph (c)(4) of this section, computed in accordance with the requirements of this section and part 385 of this title, and including detailed information regarding how the royalty was computed, with such total royalty payable broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title.

(6) If the total royalty payable under paragraph (c)(5) of this section does not reconcile with the royalties actually transferred to the mechanical licensing collective, a clear and detailed explanation of the difference and the basis for it.

(d) The royalty payment and accounting information called for by paragraph (c)(4)(i) of this section shall consist of the following:

(1) A detailed and step-by-step accounting of the calculation of royalties payable by the digital music provider under applicable provisions of this section and part 385 of this title, sufficient to allow the mechanical licensing collective to assess the manner in which the digital music provider determined the royalty owed and the accuracy of the royalty calculations, including but not limited to the number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording.

(2) A digital music provider may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim public performance royalty rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid in accordance with GAAP.

(3) All information and calculations provided pursuant to paragraph (d) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief of the digital music provider at the time the cumulative statement of account is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section.

(e)(1) The following information must be provided for each sound recording embodying a musical work required to be reported under paragraph (c)(4)(ii) of this section:

(i) Identifying information for the sound recording, including but not limited to:

(A) Sound recording name(s), including, to the extent practicable, all known alternative and parenthetical titles for the sound recording;

(B) Featured artist(s);

(C) Unique identifier(s) assigned by the digital music provider, if any, including any code(s) that can be used to locate and listen to the sound recording through the digital music provider's public-facing service;

(D) Playing time; and

(E) 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, and to the extent practicable:

(1) Sound recording copyright owner(s);

(2) Producer(s);

(3) International standard recording code(s) (ISRC);

(4) 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:

- (i) Catalog number(s);
  - (ii) Universal product code(s) (UPC); and
  - (iii) Unique identifier(s) assigned by any distributor;
- (5) Version(s);
- (6) Release date(s);
- (7) Album title(s);
- (8) Label name(s);
- (9) Distributor(s); and
- (10) Other information commonly used in the industry to identify sound

recordings and match them to the musical works the sound recordings embody.

(ii) Identifying information for the musical work embodied in the reported sound recording, to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, and to the extent practicable:

(A) Information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording, including but not limited to:

- (1) Songwriter(s);
- (2) Publisher(s) with applicable U.S. rights;
- (3) Musical work copyright owner(s);

(4) International standard name identifier(s) (ISNI) and interested parties information code(s) (IPI) for each such songwriter, publisher, and musical work copyright owner; and

(5) Respective ownership shares of each such musical work copyright owner;

(B) International standard musical work code(s) (ISWC) for the musical work embodied in the sound recording; and

(C) Musical work name(s) for the musical work embodied in the sound recording, including any alternative or parenthetical titles for the musical work.

(iii) Whether the digital music provider, or any corporate parent or subsidiary of the digital music provider, is a copyright owner of the musical work embodied in the sound recording.

(iv) A reference number or code identifying the relevant Notice of Intention, if the digital music provider, or its agent, chose to include such a number or code on its relevant Notice of Intention for the compulsory license.

(2) Subject to paragraph (e)(3) of this section, where any of the information called for by paragraph (e)(1) of this section is acquired by the digital music provider from sound recording copyright owners or other licensors of sound recordings (or their representatives), and the digital music provider revises, re-titles, or otherwise edits or modifies the information, it shall be sufficient for the digital music provider to report either the originally acquired version or the modified version of such information (but any modified information must be identified as such) to satisfy its obligations under paragraph (e)(1) of this section, unless one or more of the following scenarios apply, in which case either the unaltered version or both versions must be reported:

(i) If the mechanical licensing collective has adopted a particular nationally or internationally recognized reporting or data standard or format (*e.g.*, DDEX) that is being used by the particular digital music provider, and either the unaltered version or both versions are required to be reported under such standard or format.

(ii) Either the unaltered version or both versions are reported by the particular digital music provider pursuant to any voluntary license or individual download license.

(iii) Either the unaltered version or both versions were periodically reported by the particular digital music provider prior to the license availability date.

(3) Notwithstanding paragraph (e)(2) of this section, a digital music provider shall not be able to satisfy its obligations under paragraph (e)(1) of this section by reporting a modified version of any information belonging to a category of information that was not periodically revised, re-titled, or otherwise edited or modified by the particular digital music provider prior to the license availability date, and in no case shall a modified version of any unique identifier (including but not limited to ISRC and ISWC), playing time, or release date be sufficient to satisfy the digital music provider's obligations under paragraph (e)(1) of this section.

(4) Any obligation under paragraph (e)(1) of this section concerning information about sound recording copyright owners may be satisfied by reporting the information for applicable sound recordings provided to the digital music provider by sound recording copyright owners or other licensors of sound recordings (or their representatives) contained in each of the following DDEX fields: DDEX Party Identifier (DPID), LabelName, and PLine. Where a digital music provider acquires this information in

addition to other information identifying a relevant sound recording copyright owner, all such information must be reported to the extent practicable.

(5) As used in this paragraph (e), it is practicable to provide the enumerated information if:

(i) It belongs to a category of information expressly required by the enumerated list of information contained in 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa) or (bb);

(ii) Where the mechanical licensing collective has adopted a particular nationally or internationally recognized reporting or data standard or format (*e.g.*, DDEX) that is being used by the particular digital music provider, it belongs to a category of information required to be reported under such standard or format;

(iii) It belongs to a category of information that is reported by the particular digital music provider pursuant to any voluntary license or individual download license; or

(iv) It belongs to a category of information that was periodically reported by the particular digital music provider prior to the license availability date.

(6) Notwithstanding any information reported under paragraph (e)(1)(ii)(A)(5) of this section, for each track for which a share of a musical work has been matched and for which accrued royalties for such share have been paid, but for which one or more shares of the musical work remains unmatched and unpaid, the digital music provider must provide a clear identification of the share(s) that have been matched, the owner(s) of such matched shares, and, for shares other than those paid pursuant to a voluntary license, the amount of such accrued royalties paid.

(f) The information required by paragraphs (c) through (e) of this section requires intelligible, legible, and unambiguous statements in the cumulative statements of account, without incorporation by reference of facts or information contained in other documents or records.

(g) References to part 385 of this title, as used in paragraphs (c) and (d) of this section, refer to the rates and terms of royalty payments as in effect as to each particular reported use based on when the use occurred.

(h) If requested by a digital music provider, the mechanical licensing collective shall deliver an invoice and/or a response file to the digital music provider within a reasonable period of time after the cumulative statement of account and related royalties are received. The response file shall contain such information as is common in the industry to be reported in response files, backup files, and any other similar such files provided to digital music providers by applicable third-party administrators.

(i)(1) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be delivered in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective as reasonably determined by the mechanical licensing collective and set forth on its website, taking into consideration relevant industry standards and the potential for different degrees of sophistication among digital music providers. The mechanical licensing collective must offer at least two options, where one is dedicated to smaller digital music providers that may not be reasonably capable of complying with the requirements of a reporting or data standard or format that the mechanical licensing collective may see fit to adopt for larger digital music providers

with more sophisticated operations. Nothing in this section shall be construed as prohibiting the mechanical licensing collective from adopting more than two reporting or data standards or formats.

(2) Royalty payments shall be delivered to the mechanical licensing collective in such manner and form as the mechanical licensing collective may reasonably determine and set forth on its website. A cumulative statement of account and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the cumulative statement of account to the payment.

(3) In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the digital music provider's account. As an alternative to a credit, a digital music provider may request a refund for an overpayment of royalties, which the mechanical licensing collective shall pay within a reasonable period of time.

(j) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be accompanied by:

(1) The name of the person who is signing and certifying the cumulative statement of account.

(2) A signature, which in the case of a digital music provider that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(3) The date of signature and certification.

(4) If the digital music provider is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the cumulative statement of account.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider; (2) I have examined this cumulative statement of account; 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.

(ii) Statement two:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider, (2) I have prepared or supervised the preparation of the data used by the digital music provider and/or its agent to generate this cumulative statement of account, and (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this cumulative statement of account was prepared by the digital music provider 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 reports of usage that accurately reflect, in all material respects, the digital music provider'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.

(6) A certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner.

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

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

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