**LIBRARY OF CONGRESS**

**Copyright Office**

**37 CFR Part 210**

**[Docket No. 2020–5]**

## Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment

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

**ACTION:** Interim rule.

**SUMMARY:** The U.S. Copyright Office is issuing an interim rule regarding information to be provided by digital music providers pursuant to the new compulsory blanket license to make and deliver digital phonorecords of musical works established by title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act. The law establishes a new blanket license, to be administered by a mechanical licensing collective, and to become available on the January 1, 2021 license availability date. Having solicited multiple rounds of public comments through a notification of inquiry and notice of proposed rulemaking, the Office is adopting interim regulations concerning notices of license, data collection and delivery efforts, and reports of usage and payment by digital music providers. The Office is also adopting interim regulations concerning notices of nonblanket activity and reports of usage by significant nonblanket licensees and data collection efforts by musical work copyright owners.

**DATES:** Effective October 19, 2020.

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**SUPPLEMENTARY INFORMATION:**

## I. Background

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.[1] 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, including reporting obligations.[2] DMPs may also continue to engage in those activities solely through voluntary, or direct, licensing with copyright owners, in which case the DMP may be considered a significant nonblanket licensee (''SNBL'') under the statute, subject to separate reporting obligations.

In September 2019, the Office issued a notification of inquiry (''NOI'') that describes in detail the legislative background and regulatory scope of the present rulemaking proceeding.[3] As detailed in the NOI, the statute specifically directs the Copyright Office to adopt a number of regulations to govern the new blanket licensing regime and vests the Office with broad general authority to adopt such regulations as may be necessary or appropriate to effectuate the new blanket licensing structure. After thoroughly considering the public comments received in response, the Office issued a series of notices addressing various subjects presented in the NOI. In April 2020, the Office issued a notice of proposed rulemaking (''NPRM'') specifically addressing notices of license, notices of nonblanket activity, data collection and delivery efforts, and reports of usage and payment, and is now promulgating an interim rule based upon that NPRM.[4]

The Office received comments from a number of stakeholders in response to the NPRM, largely expressing support for the overall proposed rule. The MLC ''appreciates the significant time, effort and thoughtfulness that the Office expended to craft these substantial rules'' and ''agrees with the bulk of the language in the Proposed Regulations as appropriate and well-crafted to implement the MMA.'' [5] The DLC ''commends the Office for its thoughtful, careful, and thorough consideration of many highly complex issues that are posed by this rulemaking,'' and states that ''the Proposed Rule largely succeeds in fusing the MMA's statutory design with what is reasonable and practical from an industry perspective.'' [6] Others expressed similar sentiments. For example, Music Reports ''acknowledges the massive effort that the Office has undertaken in constructing these extensive proposed rules, and enthusiastically endorses the overall framework and degree of balance achieved throughout'' [7] and the National Music Publishers' Association (''NMPA'') ''lauds the Copyright Office for its thorough and educated work.'' [8] Commenters also acknowledged the inclusiveness and fairness the Office showed to all parties' concerns in the proposed rule. For example, the Recording Academy states that ''[t]he NPRM strikes an appropriate balance to a number of complex and technical questions, and throughout the rulemaking process the Office was inclusive of stakeholders' comments, input, and ideas'' [9] and Future of Music Coalition (''FMC'') noted ''the Office's ongoing efforts to implement the Music Modernization Act in ways that accord with legislative intent, that demonstrate ongoing concern for fairness to all parties, that increase transparency, and that harmonize the public interest with the interests of creators, including songwriters and composers.'' [10]

That said, the public comments also revealed a number of discrete issues for the Copyright Office to consider and

[1] Public Law 115–264, 132 Stat. 3676 (2018).

[2] 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).

[3] 84 FR 49966 (Sept. 24, 2019).

[4] 85 FR 22518 (Apr. 22, 2020). 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/*. Specifically, comments received in response to the NOI are available at *https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001* and comments received in response to the NPRM are available at *https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=title&po=0&dct=PS&D=COLC-2020-0005*. 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*. References to these comments are by party name (abbreviated where appropriate), followed by ''Initial NOI Comment,'' ''Reply NOI Comment,'' ''NPRM Comment,'' ''Letter,'' or ''*Ex Parte* Letter,'' as appropriate.

[5] MLC NPRM Comment at 2.

[6] DLC NPRM Comment at 1.

[7] Music Reports NPRM Comment at 2.

[8] NMPA NPRM Comment at 1.

[9] Recording Academy NPRM Comment at 1.

[10] FMC NPRM Comment at 1.

address in promulgating this rule. The MMA significantly altered the complex music licensing landscape after careful congressional deliberation following extensive input from, and negotiations between, a variety of stakeholders.[11] The Office has endeavored to build upon that foundation and adopt a reasonable regulatory framework for the MLC, DMPs, copyright owners and songwriters, and other interested parties to operationalize the various duties and entitlements set out by statute.[12] The subjects of this rule have made it necessary to adopt regulations that navigate convoluted nuances of the music data supply chain and differing expectations of the MLC, DMPs, and other stakeholders, while remaining cognizant of the potential effect upon varied business practices across the digital music marketplace.[13] As noted in the NPRM, while the Office's task was aided by receipt of numerous helpful and substantive comments representing interests from across the music ecosystem, the comments also uncovered divergent assumptions and expectations as to the shouldering and execution of relevant duties assigned by the MMA.

Although the Office has encouraged continued dialogue to expeditiously resolve or refine these areas of stakeholder disagreement—in particular, to facilitate cooperation between the MLC and DLC on business-specific questions[14]—areas of consensus have remained sparse.[15] While the Copyright Office appreciates that the relevant stakeholders remain in active discussions on operational matters, the administrative record reflects spots of significant stakeholder disagreement despite the broad general support for the overall framework of the proposed rule. The Office facilitated the rulemaking process by, among other things, convening *ex parte* meetings with groups of stakeholders to discuss aspects of the proposed rule and granting requests for additional time to submit comments.[16] At times, the Office found it necessary to address a lack of agreement or a dearth of sufficiently detailed information through additional requests for information and/or convening joint *ex parte* meetings to confirm issues of nuance, which complicated the pace of this rulemaking, but was helpful to gather useful information for the Office to consider in promulgating the regulations. The Office thanks the commenters for their thoughtful perspectives and would welcome continued dialogue across industry stakeholders and with the Office in the months before the license availability date.

In recognition of the significant legal changes brought by the MMA, and challenges both in setting up a fully functional MLC and for DMPs to adjust their internal practices, the NPRM invited comments on whether it would be beneficial to adopt the rule on an interim basis.[17] The majority of commenters weighing in on this issue support an interim rule.[18] The MLC, for example, says ''[t]here are many moving pieces and tight statutory deadlines, and permitting further adjustment to these Proposed Regulations after the interested parties have lived with and been operating under them for a reasonable period of time is a practical and flexible approach'' and ''may be particularly useful with respect to the Proposed Regulations concerning the substantive information DMPs are to provide in their Usage Reports.'' [19] The DLC sounded caution, stating that ''it is critical that [DMPs], [SNBLs], and other participants have clarity and certainty about the regulatory regime as they begin to build systems to accommodate that regime.'' [20]

After careful consideration of these comments, the Office has decided to adopt this rule on an interim basis for those reasons expressed in the NPRM and identified by commenters in support of the proposal. In doing so, the Office emphasizes that adoption of this rule on an interim basis is not an open-ended invitation to revisit settled provisions or rehash arguments, but rather is intended to maintain flexibility to make necessary modifications in response to new evidence, unforeseen

[11] *See, e.g., Music Policy Issues: A Perspective from Those Who Make It: Hearing on H.R. 4706, H.R. 3301, H.R. 831 and H.R. 1836 Before H. Comm. On the Judiciary,* 115th Cong. 4 (2018) (statement of Rep. Nadler) (''This emerging consensus gives us hope that this committee can start to move beyond the review stage toward legislative action.''); 164 Cong. Rec. H3522, 3537 (daily ed. Apr. 25, 2018) (statement of Rep. Collins) (''[This bill] comes to the floor with an industry that many times couldn't even decide that they wanted to talk to each other about things in their industry, but who came together with overwhelming support and said this is where we need to be.''); 164 Cong. Rec. S501, 502 (daily ed. Jan. 24, 2018) (statement of Sen. Hatch) (''I don't think I have ever seen a music bill that has had such broad support across the industry. All sides have a stake in this, and they have come together in support of a commonsense, consensus bill that addresses challenges throughout the music industry.''); 164 Cong. Rec. H3522, 3536 (daily ed. Apr. 25, 2018) (statement of Rep. Goodlatte) (''I tasked the industry to come together with a unified reform bill and, to their credit, they delivered, albeit with an occasional bump along the way.''). *See also* U.S. Copyright Office, Copyright and the Music Marketplace at Preface (2015), *https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf* (noting ''the problems in the music marketplace need to be evaluated as a whole, rather than as isolated or individual concerns of particular stakeholders'').

[12] *See Alliance of Artists & Recording Cos.* v. *DENSO Int'l Am., Inc.,* 947 F.3d 849, 863 (D.C. Cir. 2020) (''[T]he best evidence of a law's purpose is the statutory text, and most certainly when that text is the result of carefully negotiated compromise among the stakeholders who will be directly affected by the legislation.'') (internal quotation marks, brackets, and citations omitted); *see also* 17 U.S.C. 115(d)(12)(A) (''The Register of Copyrights may conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection.'').

[13] *See, e.g., Nat'l Cable & Telecomms. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 980 (2005) (''[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'') (citing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984)); *see also* 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* (''Conf. Rep.'') (acknowledging that ''it is to be expected that situations will arise that were not contemplated by the legislation,'' and that ''[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations''); H.R. Rep. No. 115–651, at 14 (2018); S. Rep. No. 115–339, at 15 (2018); 17 U.S.C. 115(d)(12)(A).

[14] *See* 85 FR at 22519, 22523; *see also* 84 FR at 32296; 84 FR at 49968.

[15] For example, the MLC and DLC did not collaborate before submitting initial comments in response to the notification of inquiry. MLC Initial NOI Comment at 1 n.2 (''While the MLC and the [DLC] have not collaborated on the submission of initial comments in this proceeding, collaboration has been discussed and is anticipated in connection with reply comments, with the intent to provide supplemental information in reply comments as to any areas of common agreement.''); DLC Initial NOI Comment at 2 n.3 (same). After extending the deadline for reply comments at the MLC's and DLC's shared request, no compromise resulted. MLC Reply NOI Comment at 1 n.2 (''Following the filing of the initial comments, the DLC and the MLC have engaged in a concerted effort to reach compromise on regulatory language. While the complexity of the issues has made it difficult to reach compromise, the DLC and the MLC plan to continue discussions and will revert back to the Office with any areas of compromise.''); DLC Reply NOI Comment at 1 n.3 (same). *See also* DLC Letter July 8, 2020 at 2 (''DLC reached out to the MLC to schedule an OAC meeting before submitting this letter, as the Office had requested. That meeting has not yet been scheduled.''); MLC Letter July 8, 2020 (no mention of meeting or Office's request).

[16] *See, e.g.,* U.S. Copyright Office Letter June 8, 2020; U.S. Copyright Office Letter June 10, 2020; U.S. Copyright Office Letter June 30, 2020; 84 FR 65739 (Nov. 29, 2019).

[17] 85 FR at 22519.

[18] *See, e.g.,* The Alliance for Recorded Music (''ARM'') NPRM Comment at 11; MLC NPRM Comment at 45; Music Reports NPRM Comment at 2–3 (''[I]t would be beneficial for the Office to adopt the proposed rule on an interim basis due to the intricacies of the subject matter and the further issues likely to arise during the MLC's first full year of operation following the blanket license availability date.''); Peermusic NPRM Comment at 2 (''[T]his is an excellent suggestion.''); FMC NPRM Comment at 1–2 (calling the proposal a ''reasonable idea,'' but saying, ''[w]hat we don't want to do is have an interim rule that sets out ambitious goals and standard-setting best practices and then a final rule that rolls back some of that ambition'').

[19] MLC NPRM Comment at 45.

[20] DLC NPRM Comment at 1.

issues, or where something is otherwise not functioning as intended. Moreover, if any significant changes prove necessary, the Office intends, as the DLC requests, to provide adequate and appropriate transition periods.[21] During the proceeding, the DLC has advocated for collaboration through the MLC's operations advisory committee to address various issues and ''evaluate potential areas for improvement once all parties have had more experience with the new blanket license system.'' [22] The Office supports collaboration between the MLC and DLC, and believes that adopting the rule on an interim basis will help facilitate any necessary rule changes identified through such cooperation. Going forward, the Office particularly invites the operations advisory committee, or the MLC and DLC collectively, to inform the Office on any aspects of the interim rule where there is consensus that a modification is needed.

Having now reviewed and considered all relevant comments received in response to the NOI and NPRM, including through a number of *ex parte* communications as detailed under the Office's procedures, the Office has weighed all appropriate legal, business, and practical implications and equities that have been raised, and pursuant to its authority under 17 U.S.C. 115 and 702 is adopting interim regulations with respect to notices of license, notices of nonblanket activity, data collection and delivery efforts, and reports of usage and payment under the MMA. The Office has adopted regulations that it believes best reflect the statutory language and its animating goals in light of the record before it.[23] Indeed, the Office has ''use[d] its best judgment in determining the appropriate steps.'' [24]

## II. Interim Rule

Based on the public comments received in response to the NPRM, the Office finds it reasonable to adopt the majority of the proposed rule as interim regulations. As noted above, commenters generally strongly supported the overall rule as well as particular provisions. Where parties have objected to certain aspects of the proposed rule, the Office has considered those comments and resolved these issues as discussed below. If not otherwise discussed, the Office has concluded that the relevant proposed provision should be adopted for the reasons stated in the NPRM.

The resulting interim rule is intended to represent a balanced approach that, on the one hand, ensures the MLC will receive the information it needs to successfully fulfill its statutory duties, while mindfully accounting for the operational and engineering challenges being imposed on DMPs to provide this information. In some instances, the interim rule expands DMP reporting obligations, such as in connection with unaltered metadata and by eliminating a ''practicability'' exception—both areas of the proposed rule over which the MLC expressed significant concern. But the interim rule also acknowledges competing concerns raised by the DLC and creates transition periods for DMPs to update their systems. In other instances, the interim rule expands or preserves DMP reporting flexibility, though similarly taking into account the MLC's concerns. For example, in connection with monthly royalty payments, the interim rule retains the proposed rule's generally open approach to permitting DMPs to reasonably use estimates as royalty accounting inputs, but to address the MLC's comments, it requires DMPs to provide additional information about the estimates they may use. The interim rule also benefits from input received from a multitude of other interested parties. For example, the interim rule significantly revises the proposed approach to certain information relating to statutory termination rights in light of comments from groups representing songwriter interests, and in response to sound recording copyright owners, limits MLC access to certain data held by DMPs flagged as being particularly business-sensitive.

### *A. Notices of License and Nonblanket Activity*

Commenters agreed with the general framework of the NPRM regarding the notice of license (''NOL'') and notice of nonblanket activity (''NNBA'') requirements, with a number of minor adjustments proposed, as discussed below.[25]

#### 1. Notices of License

*Name and contact information and submission criteria.* The NPRM generally adopted the requirements for name and contact information and submission criteria suggested by the MLC, DLC, and other commenters in response to the NOI. The proposed language regarding the requirements for providing a description of the DMP and its covered activities were unopposed by the MLC, while the DLC recommended two adjustments. First, the DLC requested that the Office remove ''noninteractive streams'' from the list of DPD configurations required to be identified in the notice of license.[26] The DLC explained, ''industry practice and customs for decades have acknowledged that noninteractive streaming does not require a mechanical license, and this rulemaking should not include any language that could call that industry practice into question.'' [27] It added that it ''is unaware of any noninteractive streaming service that obtains mechanical licenses.'' [28] The Office declines to adopt this suggestion. As the Office has explained in rulemakings predating the MMA, while it may be uncommon for a noninteractive stream to result in a DPD, there is nothing in the statutory language that categorically prevents it.[29] Section 115 provides only that a specific *type* of noninteractive stream is not a DPD, namely: ''[a] digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.'' [30] The MMA did not alter the statutory definition of a DPD with respect to noninteractive streams, and the existence of any industry customs or norms to the contrary (or lack of a current rate) do not override the plain language of the statute. Accordingly, the Office has retained the proposed language in the interim rule.

The Office also declines to adopt the DLC's suggestion to remove

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[21] *See id.*

[22] DLC *Ex Parte* Letter July 24, 2020 at 2; *see also* DLC *Ex Parte* Letter June 23, 2020 at 5–6; DLC Letter July 8, 2020 at 2; DLC *Ex Parte* Letter June 26, 2020 at 2; DLC Letter July 13, 2020 at 6.

[23] *See* H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12 (''The Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation.''); *see also* 17 U.S.C. 115(d)(12)(A); 84 FR at 49967–68.

[24] H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12; *see* 17 U.S.C. 115(d)(12)(A); *Brand X,* 545 U.S. at 980 (citing *Chevron,* 467 U.S. 837).

[25] *See, e.g.,* Songwriters of North America (''SONA'') & Music Artists Coalition (''MAC'') NPRM Comment at 4 (supporting the proposed information DMPs must provide in notices of license, including with respect to voluntary licenses); ARM NPRM Comment at 3 (supporting requirement that MLC ''maintain a current, free, and publicly accessible and searchable online list of all blanket licenses including information about whether a notice of license was rejected and why and whether a blanket license has been terminated and why'').

[26] DLC NPRM Comment at 3.

[27] *Id.*

[28] *Id.*

[29] 74 FR 4537, 4541 (Jan. 26, 2009); 73 FR 66173, 66180–81 (Nov. 7, 2008).

[30] 17 U.S.C. 115(e)(10).

''Discounted, but not free-to-the-user'' from the list of service types the DMP offers,[31] but it has amended the language of that provision in response to the DLC's comments. The Office agrees with the MLC that it is likely important to the MLC and copyright owners to know when services are offered at discounted rates, and so those should be identified in NOLs.[32] At the same time, the Office accepts the DLC's point that a discounted service is not actually a separate service *type* but rather ''a particular pricing level *for* a service type.'' [33] The Office has clarified the language of that provision.

Finally, the Office declines to adopt the Future of Music Coalition's (''FMC'') suggestion to require that the description of the DMP's service type be tied to the specific categories of activities or offerings adopted by the Copyright Royalty Judges.[34] While the Office supports FMC's stated aims of increasing trust and transparency, as noted in the NPRM, ''such details may go beyond the more general notice function the Office understands NOLs to serve'' and will be reported to the MLC in reports of usage [35] (and, as addressed in a separate rulemaking, to copyright owners in royalty statements).[36]

*Voluntary license numerical identifier.* Music Reports proposed requiring DMPs to include a unique, persistent identifier in NOLs for each voluntary license described therein, saying it would promote efficiency and ''provide a strong foundation for other administrative functions.'' [37] Music Reports proposed that the MLC should, in turn, include the same numerical identifiers in response files sent to DMPs, and that the DMPs should include them in reports of usage.[38] In response, the MLC stated that while it ''intends to include in response files a persistent and unique (to that DMP) identifier for voluntary licenses,'' and ''DMPs would provide those identifiers when they provide (or update) their voluntary license repertoires,'' it did ''not believe that DMPs need to be required to include these identifiers in their monthly usage reporting,'' since that would essentially require DMPs to duplicate the matching work that the MLC is charged with administering.[39] The Office adopts Music Reports' proposal except as to the requirement for DMPs to report a numerical identifier in reports of usage for the reasons identified by the MLC.

*Voluntary license descriptions.* The NPRM required DMPs to provide a description of any applicable voluntary license or individual download license that it is operating under (or expects to be operating under) concurrently with the blanket license to aid the MLC [40] in fulfilling its obligations to ''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.'' [41] The MLC and DLC each commented on the timing aspects of this proposal. With respect to voluntary licenses taking effect before March 31, 2021, the MLC requested that DMPs who wish to have these licenses carved out of their blanket license royalty processing be required to provide this information at least 90 days prior to the first reporting of usage under such voluntary licenses, to allow the MLC sufficient time to process early 2021 usage and avoid a ''processing logjam.'' [42] The DLC concurred generally that the MLC will face significant burdens around the license availability date, but suggested that the proposed language requiring the submission of updated information about voluntary licenses ''at least 30 calendar days before delivering a report of usage covering a period where such license is in effect'' could ''cause confusion.'' [43] The DLC contended that ''[i]t is common for voluntary licenses to cover past period terms,'' meaning that even when a DMP delivers information about such licenses promptly after execution of such deals, the description would not be considered timely under the language of the rule if the period the license covers began more than 30 days prior to execution.[44] In response, the MLC said while it ''does not oppose clarifying that notice of a retroactive license is not a violation,'' ''the regulation should be clear that the MLC cannot be required to process voluntary licenses that have not been submitted sufficiently in advance of usage reporting, and also that the voluntary license should be reported promptly, to minimize adjustments that copyright owners would have to address.'' [45]

The Office is adjusting the interim rule to address these concerns, and has adopted deadline language similar to what the MLC has proposed.[46] At the same time, the Office also credits the DLC's suggestion that the rule expressly account for retroactive licenses, to avoid a situation where descriptions of such licenses would potentially inevitably be untimely submitted. The interim rule has been amended to take these considerations into account with respect to submissions of descriptions of voluntary licenses prior to the first usage reporting date following the license availability date as well as subsequent amendments. It also excuses the MLC from undertaking any related obligations for descriptions submitted either less than 90 calendar days prior to the delivery of a report of usage prior to March 31, 2021, or less than 30 calendar days prior to the delivery of a report of usage after that date. The Office notes that the timing requirement for DMPs to deliver updated information regarding voluntary licenses is already subject to the qualification that it be to the extent commercially reasonable. It would not be commercially reasonable to expect the impossible (*i.e.,* delivery of a retroactive license prior to it going into effect).

In connection with the description of a voluntary license, Music Reports proposed amending the proposed requirement to identify the musical work copyright owner to instead alternatively permit identification of a licensor or administrator.[47] Although Music Reports persuasively outlined the practical realities underlying this request,[48] the Office believes the NPRM best reflects the statutory language requiring DMPs to ''identify and provide contact information for all *musical work copyright owners* for works embodied in sound recordings as to which a voluntary license, rather than the

[31] DLC NPRM Comment at 3.

[32] *See* MLC Initial NOI Comment at 5.

[33] DLC NPRM Comment at 3.

[34] FMC NPRM Comment at 2.

[35] 85 FR at 22520.

[36] *See* U.S. Copyright Office, Interim Rule, *Royalty Reporting and Distribution Obligations of the Mechanical Licensing Collective,* Dkt. No. 2020–6, published elsewhere in this issue of the **Federal Register**.

[37] Music Reports NPRM Comment at 4.

[38] *Id.* at 5–6.

[39] MLC *Ex Parte* Letter Aug. 16, 2020 at 5.

[40] 85 FR at 22520.

[41] 17 U.S.C. 115(d)(3)(G)(i)(I)(bb).

[42] MLC NPRM Comment at 6.

[43] DLC NPRM Comment at 1, 4.

[44] *Id.* at 4.

[45] MLC *Ex Parte* Letter Aug. 16, 2020 at 4.

[46] As discussed below, the DLC separately proposes that DMPs be permitted to submit NOLs at least 30 days prior to the license availability date, which supports the reasonableness of the MLC's proposed timeline for voluntary license submissions (which works out to being 45 days before the license availability date for a voluntary license subject to the January 2021 reporting period for a DMP intending to receive an invoice from the MLC prior to delivering its royalty payment). *See* DLC NPRM Comment at 1–2.

[47] Music Reports NPRM Comment at 6.

[48] *Id.* (''DMPs notoriously do not have a clear view of all the distinct copyright owners that may be administered from time to time by the publishing administrators with whom they have licenses, much less the contact information for such copyright owners.'').

blanket license, is in effect with respect to the uses being reported.'' [49] In addition, while Music Reports suggests that this amendment would provide clarity to DMPs,[50] the DLC did not itself call for such an amendment or object to the provision as it appeared in the NPRM. The interim rule retains the requirement to identify the musical work copyright owner, but allows contact information for a relevant administrator or other licensor to be listed instead of contact information for the copyright owner.

*Harmless errors.* The DLC suggested that the harmless error rule proposed in the NPRM—which provides that ''[e]rrors in the submission or content of a notice of license that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the notice invalid or provide a basis for the mechanical licensing collective to reject a notice or terminate a blanket license'' [51]—should be extended to apply to ''failures in the timeliness in amendments.'' [52] The Office has amended the interim rule to include good faith failures in the timeliness in amendments within the scope of the harmless error rule.

*Transition to blanket license.* The NPRM proposed that DMPs should submit notices of license to the MLC within 45 days after the license availability date where such DMPs automatically transition to operating under the blanket license pursuant to 17 U.S.C. 115(d)(9)(A). The DLC suggested the rule should allow DMPs to submit notices earlier—at least 30 days prior to the license availability date—and to provide that the blanket license would become effective as of the license availability date for such notices.[53] The MLC has represented that it intends to begin accepting NOLs even sooner—''as soon as these regulations have been promulgated and the MLC is able to complete its online NOL form and make it available.'' [54] The Office agrees that this is reasonable and has amended the language of the rule to require the MLC to begin accepting such notices no less than 30 days prior to the license availability date.

The DLC separately requested that the rule clarify, for notices of licenses submitted during this period of transition to the blanket license, that ''the rejection of such a notice of license based on any challenge the MLC may make to the adequacy of the notice will not immediately terminate the blanket license during the notice and cure period or any follow-on litigation challenging the MLC's final decision to reject the notice of license, provided the blanket licensee meets the blanket license's other required terms.'' [55] The Office has considered this comment and made an adjustment to this aspect of the interim rule. The NPRM articulated the Office's view that the statutory provisions regarding notices of license and the transition to the blanket license must be read together, such that DMPs transitioning to the blanket license must still submit notices of license to the MLC. But because the statute provides that the blanket license ''shall, without any interruption in license authority enjoyed by such [DMP], be automatically substituted for and supersede any existing compulsory license,'' the Office agrees with the DLC that clarification may be helpful.[56] In general, because a compliant notice of license is a condition to ''obtain'' a blanket license, a notice of license in the first instance that has been finally rejected (*i.e.,* where the alleged deficiency is not cured within the relative period and/or the rejection overruled by an appropriate district court) by the MLC would seem to never take effect.[57] In the case of a defective notice of license submitted in connection with a DMP's transition from existing compulsory license(s) to the blanket license, however, because the blanket license is ''automatically substituted,'' a finally rejected notice of license may be more akin to a default, which would begin after the resolution of the notice and cure period or any follow-on litigation challenging the MLC's final decision to reject the notice of license, provided the blanket licensee meets the blanket license's other required terms.

2. Notices of Nonblanket Activity

The proposed regulations for notices of nonblanket activity (''NNBAs'') from SNBLs generally mirror the requirements for NOLs, with conforming adjustments reflecting appropriate distinctions between the two types of notices. The DLC submitted comments regarding the description of the DMP and its covered activities and the harmless error rule that mirror its suggestions for these two issues for NOLs. For the same reasons discussed above, the Office incorporates the DLC's proposed changes into the interim rule.

*B. Data Collection and Delivery Efforts*

While the MLC is ultimately tasked with matching musical works to sound recordings embodying those works and identifying and locating the copyright owners of those works (and shares thereof), DMPs and musical work copyright owners also have certain obligations under the MMA to engage in data collection efforts. The Office proposed regulations related to the obligations of both sets of parties, discussed in turn below.

1. Efforts by Digital Music Providers

The MMA requires DMPs to ''engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings'' certain data about sound recordings and musical works.[58] A DMP that fails to fulfill this obligation may be in default of the blanket license if, after being served written notice by the MLC, it refuses to cure its noncompliance within 60 days.[59] The NPRM proposed a minimum set of acts that would be a part of good-faith, commercially reasonable efforts under the MMA. These acts would have included requesting in writing ''from sound recording copyright owners and other licensors of sound recordings'' specific information about the sound recordings and underlying musical works that it had not previously obtained on an ongoing basis, at least once per quarter.[60] For information that a DMP has already obtained, the rule proposed an ongoing and continuous obligation to request any updates from owners or licensors.[61] Alternatively, the proposed rule permitted DMPs to satisfy their obligations to obtain the desired information from sound recording copyright owners and other licensors by arranging for the MLC to receive this information from an authoritative source of such information, such as SoundExchange, unless the DMP has actual knowledge that the source lacks such information for the relevant

[49] 17 U.S.C. 115(d)(4)(A)(ii)(II) (emphasis added).

[50] Music Reports NPRM Comment at 6.

[51] 85 FR at 22538 (proposed § 210.24(e)). The harmless error provision further requires that it ''shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.''

[52] DLC NPRM Comment at 2.

[53] *Id.* at 1–2. The DLC made this suggestion ''[i]n order to lay the groundwork for an orderly processing of the notices (and avoid overwhelming the MLC with the simultaneous submission of notices from every licensee on the license availability date).'' *Id.* at 1.

[54] MLC *Ex Parte* Letter Aug. 16, 2020 at 5.

[55] DLC NPRM Comment at 2.

[56] 17 U.S.C. 115(d)(9)(A).

[57] *See id.* at 115(d)(2)(A) (detailing procedure for obtaining blanket license, including specifying requirements for rejection of license and the operation of a related notice and cure period).

[58] *Id.* at 115(d)(4)(B).

[59] *Id.* at 115(d)(4)(E)(i)(V).

[60] 85 FR at 22524. The information required to be collected by the NPRM mirrored the information enumerated in 17 U.S.C. 115(d)(4)(B).

[61] *Id.* at 22524, 22540.

work.[62] The NPRM noted the relationship between data collection efforts by DMPs and reports of usage. Because of this, some issues raised during this proceeding are relevant to both provisions. One such issue is the reporting by DMPs of sound recording metadata that has been altered by DMPs for normalization and display purposes. This issue is discussed below in the section on reports of usage.

In addition to comments from parties on various aspects of this issue, the MLC and DLC both proposed regulatory text.[63] Several commenters expressed their support for the general approach taken by the NPRM. They include representatives of the sound recording copyright owner community, who disagreed with calls for more robust obligations. ARM agreed specifically with the NPRM's approach of not imposing a requirement for DMPs to contractually require sound recording copyright owners to provide DMPs with the information required by regulations, opining that such a requirement ''run[s] counter to the statute.'' [64] The Recording Academy also supported the approach outlined in the NPRM, calling it a ''balanced process.'' [65]

Others advanced alternative proposals to the obligations provided in the NPRM. The MLC urged stronger obligations on the part of DMPs to obtain sound recording information, saying the NPRM ''read[s] the requirement to make such efforts out of the statute, substituting a plain request for information, with no true affirmative steps to achieve the MMA's required efforts to 'obtain' the data.'' [66] The MLC proposed revisions to the regulatory language in accordance with its position; these included ''[s]pecificity in correspondence,'' ''[t]argeted follow-up,'' ''[r]eporting on efforts,'' ''[r]eporting on failures,'' ''[c]ertification of compliance,'' and ''[e]nforcement.'' [67] It also called for a most-favored-nation-type provision that would require that ''a DMP shall undertake no lesser efforts to obtain the [applicable] metadata . . . than it has undertaken to obtain any other sound recording or musical work information from such sound recording copyright owners or licensors,'' arguing that ''[r]egardless of the differences among DMPs, every DMP can undertake the same level of efforts [for the statutory data collection requirement] that it has undertaken to obtain other metadata from the same licensors where it desired such data for its own business purposes.'' [68] The music publishing community generally echoed the position of the MLC on this issue and called for greater obligations on DMPs to provide sound recording and musical work information to the MLC.[69]

The DLC agreed with the general approach of the NPRM but offered some amendments. Several concerned the collection and reporting of unaltered sound recording or musical work data and are addressed below in the section on reports of usage. The DLC asked the Office to clarify that ''a digital music provider can satisfy the 'good-faith, commercially reasonable efforts' standard by relying on'' a data feed of metadata that it receives from a record label or distributor, ''and is not obligated to manually incorporate additional data that it may happen to receive through other means, such as through emails,'' since doing so would be ''inefficient and time-consuming.'' [70]

While, as noted, ARM was supportive of the NPRM's rejection of any obligations for DMPs to contractually require information from sound recording copyright owners, it ''strongly oppose[d]'' the requirement for DMPs to request metadata from sound recording copyright owners on a quarterly basis.[71] It noted that the major record labels already provide regular metadata feeds to DMPs, which ''include weekly delivery of the sound recording metadata that accompanies that week's new releases *and* real-time updates and corrections to previously provided sound recording metadata.'' [72] ARM argued, ''[g]iven the comprehensiveness, frequency and immediacy of the record companies' metadata updates, the proposal to have DMPs request quarterly and other ad hoc updates from sound recording copyright owners is nothing more than makework.'' [73]

*Good-faith efforts.*

The Office has adjusted the interim rule based on public feedback. First, no commenter supported the Office's proposal regarding quarterly written requests for sound recording and musical work information. The rule adopts a more flexible requirement that such efforts be taken ''periodically,'' rather than specifying the period. Adopting some of the MLC's proposals, the interim rule requires such efforts to be ''specific and targeted'' toward obtaining any missing information. DMPs are also required to solicit updates of any previously obtained information if requested by the MLC and keep the MLC ''reasonably informed'' of all data collection efforts. Finally, the interim rule retains the requirement from the proposed rule that DMPs certify to their compliance with these obligations as part of their reports of usage, but the Office does not find it necessary to adopt the additional certification requirement proposed by the MLC. The certification language adopted as proposed in the NPRM is based in part on the MLC's comments to the September NOI.[74]

As with the approach taken in the NPRM, the interim rule establishes a floor for what constitutes good-faith, commercially reasonable efforts.[75] Each DMP will have to decide based on its own circumstances whether the statute requires it to undertake efforts going beyond this floor.[76] The DLC has previously endorsed such an approach, saying the statute is sufficiently specific as to a DMP's data collection obligations so as to make additional regulatory guidance unnecessary.[77]

Although it has eliminated the quarterly reporting requirement in favor of a ''periodic'' standard, the Office finds ARM's characterization of the provision as ''makework'' to be somewhat of an overstatement. While it may be that in many cases, particularly involving more sophisticated sound recording copyright owners or licensors, such requests could yield little or no new information not already provided to DMPs, the record does not establish the futility of such requests across the board. The DLC noted that there are instances where DMPs do request and receive additional metadata from sound recording copyright owners—it explained that, for example, ''record labels sometimes provide blank fields'' for some of the data types DMPs are required to report to the MLC, and ''DMPs may leave that metadata as is,

[62] *Id.* at 22524–25, 22540.

[63] DLC NPRM Comment Add. at A–9–A–10; MLC NPRM Comment App. B.

[64] ARM NPRM Comment at 2. *See also* 85 FR 22518 at 22524 (concluding that ''the MMA did not impose a data delivery burden on sound recording copyright owners and licensors, so any rule compelling their compliance would seem to be at odds with Congress's intent'').

[65] Recording Academy NPRM Comment at 1–2.

[66] MLC NPRM Comment at 8.

[67] *Id.* at 10–11; *see* MLC Reply NOI Comment App. B at 7–8.

[68] MLC NPRM Comment at 11–12.

[69] NMPA NPRM Comment at 3–4; Association of Independent Music Publishers (''AIMP'') NPRM Comment at 3–4; PeerMusic NPRM Comment at 3–4.

[70] DLC NPRM Comment at 7.

[71] ARM NPRM Comment at 7.

[72] *Id.*

[73] *Id.* at 8.

[74] MLC Reply NOI Comment App. at 8.

[75] 85 FR at 22524.

[76] *See id.* (observing what constitutes appropriate efforts under the statute).

[77] DLC Initial NOI Comment at 3 (''Finally, we do not believe any rulemaking is necessary or appropriate with respect to data collection efforts by licensees. The MMA already has specific requirements that do not need to be supplemented by regulation.'').

or, in order to satisfy the ingestion requirements of their particular systems, may fill in the blanks based on their own research *or ask the label to redeliver a more complete set of metadata.*'' [78] Moreover, the statutory provisions on data collection efforts would largely be rendered superfluous if DMPs had no obligations beyond merely passing through what sound recording and musical work information they received from sound recording copyright owners in the ordinary course of business. Congress clearly envisioned that additional efforts would play some role in obtaining data, otherwise it would not have included the provision. Thus, the Office declines to adopt the DLC's proposed clarification that would limit DMPs' obligations to providing just the data it receives from a record label feed.

The Office again declines to mandate that DMPs require delivery of information from sound recording copyright owners and licensors through contractual or other means for the same reasons identified in the NPRM.[79] The Office does, however, presume that at least some DMPs and sound recording copyright owners may include such data delivery obligations in subsequent contracts even absent a regulatory requirement. DMPs have an incentive to ensure they are fulfilling their data collection obligations, and labels are also incentivized to ensure accurate and robust metadata accompanies the licensing and use of their recordings. Relatedly, the Office declines to adopt the most-favored-nation provision proposed by the MLC (and supported by NMPA). In some cases, DMPs may have entered into licensing agreements with sound recording copyright owners that require the provision of sound recording or musical work information; a most-favored-nation provision would under those circumstances obligate DMPs to contractually require other sound recording copyright owners to provide such information or alter existing agreements, a requirement that the Office has previously rejected.[80]

Finally, the MLC highlighted what it considered a ''circularity'' in the data collection requirements.[81] It observed that while the regulations obligate DMPs to obtain sound recording information that is required by the Office to be included in reports of usage, the reports of usage regulations do not ''strictly require'' many items to be reported by DMPs.[82] The MLC argued that the result of this circularity would ''render null'' the obligation to make efforts to obtain sound recording information by DMPs.[83] This was not the Office's intent, and to address the MLC's concerns, the interim rule clarifies that the required categories of information to which DMP data collection obligations apply are without regard to any limitations that may apply to the reporting of such information in reports of usage.[84]

*SoundExchange option.*

The interim rule retains the proposed ability for DMPs to alternatively satisfy their data collection obligations by arranging for the MLC to receive the required information from an authoritative source of information provided by sound recording copyright owners and other licensors, such as SoundExchange. As the Office noted in its NPRM, ''the record suggests that access to such a sound recording database can be expected to provide the MLC with more authoritative sound recording ownership data than it may otherwise get from individual DMPs engaging in separate efforts to coax additional information from entities that are under no obligation to provide it for purposes of the section 115 license.'' [85] SoundExchange in particular has assembled a large set of data due to its administration of the section 114 license, and since July 22, 2020, has been designated as the authoritative source of ISRC data in the United States.[86] The proposal drew support from a number of commenters; [87] no one, including the MLC, objected to this provision.

Both the DLC and MLC suggested amendments to this option. The DLC proposed language to clarify that the proposed knowledge standard meant ''actual knowledge'' and that the provision does not require ''DMPs to affirmatively engage in a track-by-track assessment of whether a particular sound recording is or is not in the SoundExchange database.'' [88] The MLC essentially seeks the opposite, that a DMP should only be able to use this option where it affirmatively knows that the third-party data source has the relevant information for the relevant recording.[89] The MLC expressed concern that without prematching by a DMP of its library to a third-party database, the job of cross-matching DMP feeds with third-party data would fall on the MLC itself, a project of large scope and scale that it asserts is outside the MLC's core responsibilities.[90] In addition, the MLC noted ''even a source such a[s] SoundExchange does not have data for all of the sound recordings that any particular DMP may stream (as a reminder of scale, even 99 percent coverage of a 50 million track catalog leaves 500,000 tracks not covered).'' It also suggested that the SoundExchange database lacked corresponding musical work metadata for sound recordings in its database,[91] although the MLC subsequently stated that it intends to populate the public database with information from musical works copyright owners, and rely on the same data for matching.[92]

In balancing these interests, the Office is mindful that a main goal underlying the data collection provision is to ensure the MLC is receiving adequate and accurate data to assist in the core task of matching musical works and their owners to the sound recordings that are reported by DMPs, ultimately leading to musical work copyright

[78] DLC Letter July 13, 2020 at 7 (emphasis added). The DLC added, by way of example, ''MediaNet's platform requires certain metadata fields to be present in order to ingest the content itself. MediaNet therefore must fill in the blanks for those data types, either through one-off research or seeking redelivery from the relevant record label.'' *Id.* at 7 n.10.

[79] 85 FR at 22524. The Office explained that ''the MMA did not impose a data delivery burden on sound recording copyright owners and licensors, so any rule compelling their compliance would seem to be at odds with Congress's intent.'' *Id.*

[80] As noted in the NPRM, the Office ''is wary of proposals mandating DMPs to require delivery of information from sound recording copyright owners and licensors through contractual or other means.'' *See id.*

[81] MLC NPRM Comment at 15–17.

[82] *Id.* at 15–16.

[83] *Id.* at 16.

[84] The interim rule also explicitly cross-references the relevant categories of information listed in the report of usage provision rather than enumerating a separate list for collection efforts.

[85] 85 FR at 22524.

[86] SoundExchange *Ex Parte* Letter July 24, 2020 at 1; SoundExchange *Ex Parte* Letter Sept. 1, 2020, at 2; ARM *Ex Parte* Letter July 27, 2020 at 2 (citing RIAA, *RIAA Designates SoundExchange as Authoritative Source of ISRC Data in the United States* (July 22, 2020), *https://www.riaa.com/riaa-designates-soundexchange-as-authoritative-source-of-isrc-data-in-the-united-states/; see also* SoundExchange Initial NOI Comment at 2–3.

[87] ARM NPRM Comment at 2; Recording Academy NPRM Comment at 1–2; DLC NPRM Comment at 7 (''In general, DLC appreciates the Office's decision to create this option for DMPs to satisfy their data collection obligations'').

[88] DLC NPRM Comment at 8.

[89] MLC NPRM Comment at 14–15, App. at viii.

[90] *Id.* at 13–15.

[91] *Id.* at 14. *Compare* ARM NPRM Comment at 9 (describing the Music Data Exchange (''MDX'') system operated by SoundExchange, stating it is ''a central 'portal' that facilitates the exchange of sound recording and publishing data between record labels and music publishers for new releases and establishes a sound recording-musical work link'' and ''a far more efficient source of musical work data for new releases than any metadata various DMPs are likely to receive . . . from the record companies'').

[92] *See* MLC *Ex Parte* Letter Aug. 21, 2020 at 2 (''For musical works information, the MLC maintains that it ''will be sourced from copyright owners.'').

owners receiving the royalties to which they are entitled. The Office acknowledges what it understands to be the MLC's position, that DMPs should be sufficiently motivated to engage in data collection efforts for those edge cases that may not appear in a third-party database, as well as the MLC's concern that the proposed language ''might be misread to imply that, as long as a DMP remains ignorant of exactly which particular sound recordings are not covered by the third party, it can use an incomplete resource to substitute for complete efforts.'' [93] At the same time, however the Office is reluctant to accept the MLC's proposal that DMPs must prematch their libraries against a third-party database to take advantage of this option, as it seems to go so far as to make this option, one that might seemingly aid the MLC as well as individual DMPs, impractical from a DMP perspective.[94]

The Office has therefore adjusted the proposed rule. Under the interim rule, a DMP can satisfy its obligations under this provision by arranging for the MLC to receive the required information from an authoritative source of sound recording information, unless it either has actual knowledge that the source lacks such information as to the relevant sound recording or a set of sound recordings, or has been notified about the lack of information by the source, the MLC, or a copyright owner, licensor, or author (or their respective representatives, including by an administrator or a collective management organization) of the relevant sound recording or underlying musical work. The introduction of this notification provision establishes a mechanism for the MLC or others who are similarly incentivized to identify those gaps. Moreover, for a DMP to use this option, its arrangement with the third-party data source must require that source to report such gaps as are known to it. The Office notes that this provision applies not only to gaps as to specific sound recordings but also gaps as to specific data fields for sound recordings, specific labels and distributors, and specific categories of sound recordings, such as those from missing or underrepresented genres or countries of origin. This approach is intended to empower the MLC and others to notify DMPs regarding areas where it believes the data may fall short, in service of the statutory obligation for each DMP to engage in good faith efforts to obtain this additional data.

2. Efforts by Copyright Owners

The MMA requires musical work copyright owners whose works are listed in the MLC's public database to ''engage in commercially reasonable efforts to deliver to the mechanical licensing collective, [] 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 practicable.'' [95] Many commenters speaking to the issue of musical work copyright owner efforts contended that the proposed rule's requirements were too onerous.[96] The Office did not intend for this aspect of the proposed rule to impose a significantly greater burden on musical work copyright owners than the statute already prescribes.[97] The proposed obligation to ''monitor[] the musical works database for missing and inaccurate sound recording information relating to applicable musical works'' was not meant to require copyright owners to regularly review the entirety of the MLC's database. And while the MLC and others criticize the proposed reference to provision of information within the copyright owner's ''possession, custody, or control,'' [98] that language came from the MLC's comments.[99] Further, the provision referring to delivery to the MLC ''by any means reasonably available to the copyright owner'' was not meant to *compel* delivery by any means reasonably available, but rather *permit* delivery by any such means of the owner's choosing.

Nevertheless, given the comments, the Office is amenable to clarification and acknowledges that under the statute, copyright owners are already incentivized to provide this information to the MLC to help ensure their works are matched and that they receive full and proper royalty payments.[100] Indeed, copyright owners are further incentivized to ensure that the MLC has much greater information, such as about their identity, location, and musical works, than just the sound recording information required by 17 U.S.C. 115(d)(3)(E)(iv) and addressed by this aspect of the proposed rule. Consequently, the Office believes it is reasonable for the interim rule to track the MLC's proposed language, under which musical work copyright owners should provide the applicable sound recording information to the extent the owner has the information and becomes aware that it is missing from the MLC's database.[101]

Regarding the information required to be delivered, the Office again declines the DLC's request to require provision of performing rights organization information.[102] Assuming *arguendo* that the DLC is correct that such a requirement is within the Office's authority to compel, the current record does not indicate that such information is sufficiently relevant to the MLC's matching efforts or the mechanical licensing of musical works so as to persuade the Office to require it to be provided at this time.[103] The MLC, of course, may permissively accept such information, although the MMA explicitly restricts the MLC from licensing performance rights.[104]

### *C. Reports of Usage and Payment—Digital Music Providers*

Commenters raised a number of issues related to the NPRM's provisions covering the form, content, delivery, certification, and adjustment of reports of usage and payment, as well as requirements under which records of

[93] *See* MLC NPRM Comment at 14.

[94] *See* DLC NPRM Comment at 8.

[95] 17 U.S.C. 115(d)(3)(E)(iv).

[96] *See, e.g.,* MLC NPRM Comment at 18–20; Nashville Songwriters Association International (''NSAI'') NPRM Comment at 4; NMPA NPRM Comment at 5–6; Peermusic NPRM Comment at 4; Songwriters Guild of America, Inc. (''SGA'') NPRM Comment at 2–3. *But see* Recording Academy NPRM Comment at 2 (''appreciat[ing] the consideration the Office shows for independent and self-published songwriters who could be vulnerable to overly burdensome requirements and regulations,'' and stating that the ''proposal to adopt a minimal floor requirement is a fair approach, and strikes a proper balance to avoid instituting an undue burden for independent and self-published songwriters''). Regarding SGA's proposal that the MLC have a ''parallel requirement . . . to utilize *best efforts* to provide adequate hands-on help, technical guidance and active assistance to all Copyright Owners in order to prompt the highest achievable level of compliance,'' SGA NPRM Comment at 2, that is beyond the scope of this proceeding, but the MLC's duties are addressed elsewhere in the statute and potentially germane to the Office's ongoing Unclaimed Royalties Study. *See, e.g.,* 17 U.S.C. 115(d)(3)(J)(iii)(II)(bb); 85 FR at 33735.

[97] *See* 85 FR at 22526 (''[T]he Office proposes to codify a minimal floor requirement that should not unduly burden less-sophisticated musical work copyright owners.'').

[98] *See* MLC NPRM Comment at 12 n.4, 19; NMPA NPRM Comment at 5.

[99] *See* MLC Reply NOI Comment at 12 (''[U]nder the MLC's proposal, the musical work copyright owners would be required to provide the sound recording information they actually have in their possession, custody, or control.'').

[100] *See* MLC NPRM Comment at 19 & n.8; NMPA NPRM Comment at 5–6; NSAI NPRM Comment at 4; SoundExchange NPRM Comment at 4.

[101] *See* MLC NPRM Comment App. at viii–ix.

[102] *See* DLC NPRM Comment at 8–9; *see also* 85 FR at 22526.

[103] *See, e.g.,* Recording Academy NPRM Comment at 3 (''[P]erformance rights organization information is not relevant data.''); DLC Initial NOI Comment at 20; MLC Reply NOI Comment at 36.

[104] *See* 17 U.S.C. 115(d)(3)(C)(ii)–(iii).

use must be maintained and made available to the MLC by DMPs.

1. Content of Monthly Reports of Usage

i. Royalty Pool Calculation Information

The MLC proposed that the language regarding usage reporting be ''amended to expressly reference royalty pool information'' to provide what it says is needed clarity.[105] The Office has considered this request but does not currently believe the added language is necessary. Based on its comments, the MLC seems to be referring to the top-line payable royalty pool calculation inputs, such as service provider revenue, total cost of content, performance royalties, and user/subscriber counts.[106] DMPs are already required to report these inputs to the extent they are sufficient to ''allow the mechanical licensing collective to assess the manner in which the blanket licensee determined the royalty owed and the accuracy of the royalty calculations.'' [107]

ii. Sound Recording and Musical Work Information

The interim rule retains the same three tiers of sound recording and musical work information proposed in the NPRM, with some modifications to certain categories of information discussed below.[108] The DLC does not propose eliminating any of the proposed categories [109] and the MLC states that ''[a]ll of the metadata fields proposed in § 210.27(e)(1) will be used as part of the MLC's matching efforts.'' [110] Other commenters concur, including the Recording Academy, which agrees that the ''proposed tiers of information for sound recordings is an accurate interpretation of the statute, identifies a simple and standardized process for the DMPs to follow, and will help improve matching and minimize instances of unclaimed royalties.'' [111] While ARM questions the value of certain categories of information, and seeks to confirm that sound recording copyright owners are not obligated to provide DMPs with data outside of the regular digital supply chain, ARM does not ultimately oppose their inclusion in the rule.[112] As discussed above, although the statute does not place any affirmative obligation on sound recording copyright owners to provide data, it does establish a framework whereby DMPs must engage in appropriate efforts to obtain sound recording and musical work information from sound recording copyright owners that such owners may not have otherwise provided to DMPs.

iii. Playing Time

During the course of the proceeding it came to light that the playing time reported to DMPs by sound recording copyright owners may not always be accurate.[113] Having accurate playing time is critical because it can have a bearing on the computation of royalties.[114] Therefore, in accord with the positions of both the MLC and DLC, the interim rule makes clear that DMPs must report the actual playing time as measured from the sound recording audio file itself.[115]

iv. Release Dates

The proposed rule would require provision of ''release date(s)'' and the NPRM invited comment as to whether this proposed requirement should be explicitly limited to reporting only release years instead.[116] While ARM and the Recording Academy suggested that release years alone are sufficient,[117] FMC contends that it can be useful to have full dates ''[b]ecause it's not uncommon for multiple versions of a track to be released within the same calendar year'' and it ''would help distinguish between the versions to ensure the right publishers and songwriters are compensated if there is any ambiguity, or if other data fields are missing for any reason.'' [118] The MLC and DLC did not comment on this issue.[119] Based on the current record, the Office is not convinced that the requirement should be explicitly limited to only the release year, and has adopted the language as proposed.

v. Sound Recording Copyright Owners

The NPRM proposed that DMPs may satisfy their obligations to report sound recording copyright owner information by reporting three DDEX fields identified by the American Association of Independent Music (''A2IM'') & the Recording Industry Association of America (''RIAA'') as fields that may provide indicia relevant to determining sound recording copyright ownership [120] (to the extent such data is provided to DMPs by sound recording copyright owners or licensors): DDEX Party Identifier (DPID), LabelName, and PLine.[121] In response, the MLC, DLC, and DDEX express concern with using DPID, with DDEX explaining that ''although a unique identifier and in relevant instances an identifier of 'record companies,' [DPID] does not identify sound recording copyright owners,'' but rather ''only identifies the sender and recipient of a DDEX formatted message and, in certain circumstances, the party that the message is being sent on behalf of.'' [122] DDEX further states that ''[i]n the vast majority of cases . . . the DPIDs . . . will not be attempting to identify the copyright owner of the sound recordings.'' [123] The MLC agrees, explaining that DPID ''does not identify sound recording copyright owner, but rather, the sender and/or recipient of a DDEX-formatted message.'' [124] ARM

[105] MLC NPRM Comment at 40–41.

[106] *Id.* at 40; *see also* 37 CFR 385.21–385.22.

[107] Interim rule at section 210.27(d)(1)(i). For similar reasons, the Office is not amending section 210.27(d)(1)(ii), to which the MLC proposed adding the same language.

[108] *See* 85 FR at 22530–32, 22541–42.

[109] DLC NPRM Comment Add. at A–15–16.

[110] MLC Letter July 13, 2020 at 7.

[111] Recording Academy NPRM Comment at 2 (''[T]he Academy appreciates and concurs with the Office's proposal to include certain additional data fields that will prove beneficial in the matching efforts.''); *see, e.g.,* SONA & MAC NPRM Comment at 2, 6 (''Additional data fields proposed to be added by the Office . . . will also play a critical role in identification and matching efforts.''). The Office declines SONA & MAC's request ''to elevate [the second and third tiers of information] to the first tier of mandatory information.'' *See* SONA & MAC NPRM Comment at 6–7. Much of the second and third tier information is enumerated in the statute, which expressly states that it be provided ''to the extent acquired.'' *See* 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa)–(bb); *see also* 85 FR at 22531 (rejecting a similar request from the MLC).

[112] *See* ARM NPRM Comment at 9, 11. The Office disagrees with ARM's suggestion to delete the requirement that DMPs report ''[o]ther information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody.'' *See id.* at 9. That requirement is enumerated in the statute. 17 U.S.C. 115(d)(4)(A)(ii)(I)(aa).

[113] ARM NPRM Comment at 6–7; DLC Letter July 13, 2020 at 4, 7; DLC *Ex Parte* Letter July 24, 2020 at 4.

[114] *See* 37 CFR 385.11(a), 385.21(c).

[115] *See* DLC *Ex Parte* Letter July 24, 2020 at 4 n.12 (''DLC would not oppose a requirement to report, in all instances, the playing time value based on the processing of the actual sound recording file, rather than the value reported by the label.''); MLC *Ex Parte* Letter July 24, 2020 at 9 (''Playing Time could be reported either as the unaltered version or as calculated automatically based upon an analysis of the audio file being streamed.'').

[116] *See* 85 FR at 22525, 22541.

[117] ARM NPRM Comment at 7; Recording Academy NPRM Comment at 2–3.

[118] FMC NPRM Comment at 2–3.

[119] *See* DLC NPRM Comment Add. at A–15; MLC NPRM Comment App. at xv.

[120] During the proceeding, RIAA submitted comments both individually and jointly with other commenters, including with A2IM. A2IM and the RIAA also submitted comments together under the name of an organization called the Alliance for Recorded Music (''ARM''). References herein are to the name used in each respective comment (*e.g.,* ''RIAA,'' ''A2IM & RIAA,'' ''ARM,'' etc.).

[121] 85 FR at 22532, 22542.

[122] Digital Data Exchange, LLC (''DDEX'') NPRM Comment at 2; *see* DLC Letter July 13, 2020 at 10–11; DLC *Ex Parte* Letter July 24, 2020 at 5 n.15; MLC *Ex Parte* Letter July 24, 2020; *see also* A2IM & RIAA Reply NOI Comment at 8–9, 11.

[123] DDEX NPRM Comment at 2.

[124] MLC NOI Comment at 13, U.S. Copyright Office Dkt. No. 2020–8, available at *https://beta.regulations.gov/document/COLC-2020-0006-0001.*

does not dispute this position, but suggests that DPID should nonetheless be retained because its inclusion in the public musical works database ''will be useful to members of the public who are looking for a [sound recording] licensing contact.'' [125] By contrast, the DLC contends that DPID ''is not a highly valuable data field,'' and that the burden of converting DPID numerical codes into parties' names (to address ARM's concern about displaying the numerical identifier) outweighs ''the benefit that would accrue from requiring DMPs to convert DPID numerical codes into parties' names.'' [126]

Having considered these comments, it seems that DPID may not have a strong connection to the MLC's matching efforts or the mechanical licensing of musical works. In light of this, and the commenters' concerns, the Office declines at this time to require DMPs to report DPID, although they are not precluded from reporting it. In concurrent rulemakings, the Office is separately considering related comments regarding the display of information provided through fields relevant to the statutory references to ''sound recording copyright owners'' in the public musical works database and in royalty statements provided to copyright owners.[127]

vi. Audio Access

The NPRM proposed requiring DMPs to report any unique identifier assigned by the DMP, including any code that can be used to locate and listen to the sound recording on the DMP's service.[128] In doing so, the NPRM adopted the DLC's proposal that DMPs provide these in lieu of the audio links the MLC had requested.[129] The NPRM described the dispute on this point, and noted that ''while the [MLC's] planned inclusion of audio links [in its claiming portal] is commendable, the record to date does not establish that the method by which the MLC receives audio links should be a regulatory issue, rather than an operational matter potentially resolved by MLC and DLC members, including through the MLC's operations advisory committee.'' [130] The Office concluded that it ''declines at this time to propose a rule including audio links in monthly reporting, but encourages the parties, including individual DLC members, to further collaborate upon a solution for the MLC portal to include access to specific tracks (or portions thereof) when necessary, without cost to songwriters or copyright owners. The Office hopes that this matter can be resolved after the parties confer further, but remains open to adjusting this aspect of the proposed rule if developments indicate it is necessary.'' [131]

Despite the Office's encouragement, this issue has not yet been resolved, although the parties provided additional information underlying their respective positions. The MLC maintains that audio links should be included in monthly reports of usage, stating they are ''a critical tool for addressing the toughest of the unmatched.'' [132] The MLC states that it does not seek to host any copies of the audio on its own servers but rather link to audio files residing on the DMPs' respective servers; it further proposes to limit audio access to registered users of its password-protected claiming portal, to provide audio only for unmatched uses, and to limit access to 30-second previews or samples of the audio.[133] NSAI, SONA & MAC, and the MLC Unclaimed Royalties Oversight Committee also submitted comments discussing the importance of audio access in identifying unmatched works.[134] NSAI, for example, reiterates a concern previously raised by the MLC that songwriters may need to purchase subscriptions to the majority of the DMPs' services to be able to actually use the proposed unique identifiers to listen to the audio.[135] The DLC's comments to the NPRM do not address this issue, although it reported separate engagement on the subject with the MLC.[136] ARM supports the use of unique identifiers instead of links, but does not object to links ''to the extent that the MLC seeks the audio links solely for inclusion in its private, password-protected claiming portal in order to assist musical work copyright owners in identifying and claiming their works,'' and ''provided that the links take the user to the DMPs, that no audio files reside on the MLC's servers and that links are only provided for unmatched works.'' [137] ARM seeks to ensure that the MLC's portal and database do not become ''a free online jukebox that competes with DMPs.'' [138]

In light of these comments, to help progress the rulemaking, the Office sent a letter to these parties seeking additional information and responses to specific questions on this issue.[139] The Office then held an *ex parte* meeting with these commenters to further discuss the matter, which was followed up with additional written submissions.[140]

These efforts revealed further details concerning how the MLC intends to use sound recording audio obtained through DMP reporting and the obstacles DMPs face in accommodating what the MLC seeks. For example, the MLC confirms that it does not intend to make or host any copies of such sound recordings, or use audio access to undertake matching efforts involving digital fingerprinting

[125] ARM *Ex Parte* Letter July 27, 2020 at 4. ARM does not object to including the DPID party's name in the public musical works database, but does ''object to the numerical identifier being disclosed, as the list of assigned DPID numbers is not public and disclosing individual numbers (and/or the complete list of numbers) could have unintended consequences.'' ARM NPRM Comments at 10, U.S. Copyright Office Dkt. No. 2020–5, available at *https://beta.regulations.gov/document/COLC-2020-0005-0001*.

[126] DLC Letter July 13, 2020 at 10 (stating that while converting the DPID numerical code into the party's actual name for reporting purposes ''is conceptually possible'' for DMPs, ''it would require at least a substantial effort for some services'' (around one year of development), and ''would be an impracticable burden for some others'').

[127] *See, e.g.,* RIAA Initial NOI Comment at 2–3; A2IM & RIAA Reply NOI Comment at 8–10; ARM NOI Comment at 4, U.S. Copyright Office Dkt. No. 2020–8, available at *https://beta.regulations.gov/document/COLC-2020-0006-0001; see also* U.S. Copyright Office, Notice of Proposed Rulemaking, *The Public Musical Works Database and Transparency of the Mechanical Licensing Collective,* Dkt. No. 2020–8, published elsewhere in this issue of the **Federal Register**; U.S. Copyright Office, Interim Rule, *Royalty Reporting and Distribution Obligations of the Mechanical Licensing Collective,* Dkt. No. 2020–6, published elsewhere in this issue of the **Federal Register**.

[128] 85 FR at 22530–31, 22541.

[129] *Id.* at 22530–31. The Office understands that an audio link is a unique identifier, but not necessarily the other way around, as some services use different types of unique identifiers, such as numbers or codes rather than links, which can be used within a platform to access a given recording.

[130] *Id.* at 22531.

[131] *Id.*

[132] MLC NPRM Comment at 39–40.

[133] *Id.* at 39–40, 39 n.12, App. at xiv.

[134] NSAI NPRM Comment at 4–5 (''The most difficult sound recordings to match will be those that have substantially missing or inaccurate metadata. In these situations, there may be no other possible way to make a match except through the audio.''); SONA & MAC NPRM Comment at 7–8; MLC Unclaimed Royalties Oversight Committee NPRM Comment at 2–5 (''[A] readily available audio reference is the easiest, most reliable and transparent way to confirm ownership of a song.'').

[135] NSAI NPRM Comment at 5; *see* MLC *Ex Parte* Letter Apr. 3, 2020 at 5(''[I]t would be unfair, and economically infeasible for many songwriters, to require the purchase of monthly subscriptions to each DMP service in order to fully utilize the statutorily-mandated claiming portal.'').

[136] DLC Letter June 15, 2020 at 1.

[137] ARM NPRM Comment at 3.

[138] *Id.*

[139] U.S. Copyright Office Letter June 8, 2020; *see* DLC Letter June 15, 2020; MLC Letter June 15, 2020; MLC Unclaimed Royalties Oversight Committee Letter June 15, 2020.

[140] *See* DLC *Ex Parte* Letter June 23, 2020; MLC *Ex Parte* Letter June 23, 2020; MLC Unclaimed Royalties Oversight Committee *Ex Parte* Letter June 23, 2020; MAC *Ex Parte* Letter June 23, 2020; NSAI *Ex Parte* Letter June 24, 2020; RIAA *Ex Parte* Letter June 22, 2020; SONA *Ex Parte* Letter June 23, 2020; DLC Letter July 8, 2020; MLC Letter July 8, 2020; RIAA Letter July 8, 2020.

analysis (though the MLC says it ''will explore a more systematic and direct process'' for utilizing audio content analysis to help reduce the incidence of unmatched works).[141] It appears to the Office that what the MLC essentially wants is for its claiming portal to have an embedded player (or something similar) where, even though the audio files still reside with the DMPs, portal users would be able to listen to the audio directly within the portal environment without having to link out or navigate away to each DMP's service.[142] The DLC raises numerous concerns with what the MLC seeks, which it summarizes as ''three main problems, which are interrelated: (1) The use case for the audio links is overly vague and requires better definition and development; (2) there are significant licensing issues impacting (and currently, prohibiting) the MLC from streaming music or the DMPs from streaming music outside of their services; and (3) there are significant technological challenges that make the MLC's proposal unripe for regulation, and in some instances would likely render it cost-prohibitive.'' [143] Notably, the DLC asserts that while ''[a]ll DLC members use unique identifiers for tracks,'' [144] ''[t]he idea of a persistent, clickable 'audio link' to be used as the MLC describes simply does not exist today.'' [145] The RIAA also expresses concern over licensing issues, as well as content protection, and states that the ''simplest approach is to have DMPs provide web links that take portal users directly to the referenced track or parent album on the DMP's service.'' [146]

Despite concerns with the manner in which the MLC seeks to provide portal users with audio access, the DLC agrees that the availability of audio can improve the incidence of unmatched works, and emphasizes its commitment and willingness to work on this issue further with the MLC, including through the operations advisory committee.[147] The MLC concedes that unique identifiers ''could be acceptable if instructions were also provided to convert the identifiers into links to provide [no-cost audio] access to portal users.'' [148] But the MLC prefers that the Office adopt a rule specifically requiring the provision of links, even though the MLC also seems to agree that there is much left to be worked out between the MLC and the DMPs to implement such a requirement. To that end, the MLC proposes an additional provision that it says ''provides a framework to support and address any audio link implementation concerns while maintaining the acknowledged imperative of reaching the goal, and also delivers flexibility by explicitly providing for the Register to adjust the commencement date for the audio link usage reporting, if appropriate, based upon [joint reporting of implementation obstacles and responsive strategies] from the MLC and DLC.'' [149] Absent such adjustment, however, the MLC's proposed approach would require DMPs to provide audio links in monthly reports of usage as early as the first reporting period, a condition the DLC represents is not operationally possible. The DLC's most recent submission on this issue contains information describing the degree of audio access that can be obtained using the unique identifiers assigned by each DLC member and instructions on how to use the identifiers to obtain such access.[150] From this information, it appears that most tracks (or at least 30-second clips of most tracks), with relatively few exceptions, can be accessed for free through most DLC members' services using a unique identifier, and that for most DLC members, the way the unique identifier is used is by plugging it into a URL that can be used either in the address bar of a web browser or to create a hyperlink.[151] Indeed, the DLC states

[141] MLC Letter June 15, 2020 at 6–7; MLC *Ex Parte* Letter June 23, 2020 at 2; *see also* SONA & MAC NPRM Comment at 7–8 (''[T]he ability to employ 'fingerprinting' technology to compare unidentified audio files to known sound recordings would augment and improve matching and claiming efforts.'').

[142] *See* MLC *Ex Parte* Letter June 23, 2020 at 2–3; MLC Letter June 15, 2020 at 5–6, 6 n. 5; DLC *Ex Parte* Letter June 23, 2020 at 2.

[143] DLC *Ex Parte* Letter June 23, 2020 at 1–2; *see also id.* at 2–6; DLC Letter June 15, 2020 at 2–5. The DLC also disputes the MLC's assertions that this has been done before in other contexts. DLC *Ex Parte* Letter June 23, 2020 at 2 (''[T]hese claiming portals do not contain audio assets and users cannot listen to tracks directly within the portals; instead, and only in the case of certain DMP agreements, users are redirected to the DMP's individual service, where they can listen to the track after logging in.''); DLC Letter July 8, 2020 at 2.

[144] DLC Letter June 15, 2020 at 5; *see also* MLC *Ex Parte* Letter June 23, 2020 at 2 (''[A] unique DMP identifier is already reported under the DDEX DSRF standard.'').

[145] DLC *Ex Parte* Letter June 23, 2020 at 3.

[146] RIAA Letter July 8, 2020 at 1–2 (''[R]equiring every DMP to build an embedded audio player that can be incorporated into the MLC portal will mean DMP/label contract amendments and expensive service functionality changes that could introduce security holes leading to piracy and loss of revenue.''); RIAA *Ex Parte* Letter June 22, 2020 at 2 (''[I]t would be inappropriate for the Copyright Office to issue regulations that would have the effect of mandating that certain terms be included in private marketplace deals between record companies and DMPs.'').

[147] DLC Letter June 15, 2020 at 1; DLC *Ex Parte* Letter June 23, 2020 at 1, 3–4, 5–6; DLC Letter July 8, 2020 at 2.

[148] MLC *Ex Parte* Letter June 23, 2020 at 2–3 (''Whatever process is used to resolve the stable DMP identifier into the audio access is the relevant process.''); MLC Letter June 15, 2020 at 5–6, 6 n.5; *see also* MLC Unclaimed Royalties Oversight Committee Letter June 15, 2020 at 2 (seeking that ''[r]ights holders are entitled to full & frictionless transparency, for themselves and for their clients to whom they are accountable,'' though ''defer[ring] to The MLC's position on this from an operational perspective'').

[149] MLC Letter July 8, 2020 at 2, Ex. A. *See* MLC *Ex Parte* Letter June 23, 2020 at 2–4; *see also* NSAI *Ex Parte* Letter June 24, 2020 at 1(''The USCO must mandate a set timeline and framework for DSPs to be able to provide those audio links.''); MAC *Ex Parte* Letter June 23, 2020 at 2 (asking the Office ''to adopt a rule requiring DMPs to provide such links even if DMPs are not able to make the audio files immediately available'' by the license availability date, and observing that there is a ''lack of agreement on how to coordinate the operationalization of these links within the MLC claiming portal''); SONA *Ex Parte* Letter June 23, 2020 at 2 (same).

[150] DLC Letter July 8, 2020 Add.

[151] *See* DLC Letter July 8, 2020 Add. For example, for Amazon, the URL formula is *https://music.amazon.com/albums/;album ID/track ID. Id.* at 3. According to the DLC, and from some spot-testing by the Office, it appears that the degree of audio access currently offered by each DLC member is as follows:

Amazon's unique identifiers can be converted into URLs (an album identifier and track identifier are needed) and used to locate tracks, but a subscription is required to listen to a specific track on demand. *See id.* at 3–4.

Apple's unique identifiers can be converted into URLs and used to locate and listen to ''30-second clips of tracks . . . without a login or subscription.'' *See id.* at 5–6.

Google/YouTube's unique identifiers can be converted into URLs or entered into a search bar and can be used to locate and listen to full tracks without a login or subscription, except for ''[a] small percentage of content [which] requires a subscription for access (per label policy).'' *See id.* at 7–9.

Pandora's unique identifiers can be converted into URLs and used to locate and listen to full tracks without a subscription by launching an ad-based ''Premium Session'' within a free tier account. ''In some instances, the URL navigates to a different version of the same sound recording (*e.g.,* studio release vs. 'best of').'' *See id.* at 10–11.

Qobuz's unique identifiers can be converted into URLs and used to locate and listen to ''30-second clips of most tracks . . . without a login or subscription.'' *See id.* at 12–13.

SoundCloud's unique identifiers can be converted into URLs (an artist name, song title, and track identifier are needed) and used to locate and listen to ''30-second clips of most tracks . . . without a login or subscription[.] A small percentage of content is not available for 30-second clips and requires a subscription for access (per label policy).'' *See id.* at 14–17.

Spotify's unique identifiers can be entered into a search bar and used to locate and listen to full tracks without a subscription by using a free tier, ad-based account. It appears that access may be more limited when using Spotify's mobile app. Spotify's unique identifiers can also be used to generate an embeddable player. ''Certain 30-second clips may be available without logging in depending on the terms of label agreements.'' *See id.* at 18–22.

Tidal's unique identifiers can be converted into URLs and used to locate and listen to ''30-second clips of all tracks . . . without a login or subscription.'' *See id.* at 23–25.

MediaNet ''does not own or operate a consumer-facing service in which playing audio tracks is

that the MLC ''should easily be able to add functionality to convert the unique DMP identifier into a clickable URL on the portal.'' [152] It further appears that at least one major DMP (Spotify) already offers an embeddable player that the MLC can integrate into its portal so users can listen without navigating away.[153]

After careful consideration of the record on this issue, the Office concludes that the proposed rule should be modified. The interim rule retains the requirement to report unique identifiers instead of audio links, but with important changes. First, the rule requires DMP-assigned unique identifiers, including unique identifiers that can be used to locate and listen to reported sound recordings, to always be reported, subject to exceptions discussed below, in contrast to the proposed rule which was limited to ''if any.'' In consideration of the importance of audio access emphasized by the MLC and others, the DLC's agreement that audio access can improve the incidence of unmatched works, and the fact that the Office has not been made aware of any DMP that does not currently use unique identifiers for its tracks, the Office believes this to be a reasonable change that will facilitate access of audio when necessary for matching and claiming purposes.[154]

Second, in light of being informed that one of the DLC's members does not operate its own consumer-facing service,[155] the proposed language referring to access being through the DMP's public-facing service has been dropped. In its place, the interim rule instead requires DMPs to provide clear instructions describing how their unique identifiers can be used to locate and listen to the reported sound recordings. This approach requires that audio access be obtainable, but flexibly allows each DMP to specify how such access may be achieved in accordance with its licensed offerings. For example, it could be by using an identifier as part of a URL or as part of a service's search function. A DMP without its own consumer-facing service could provide instructions on how unique identifiers can be used to access audio through a service it supports, or otherwise provide some kind of customer service mechanism.

With respect to these changes, the Office is cognizant that if a DMP's unique identifiers cannot currently be used to obtain audio access, it may take some time for the DMP to be able to fully comply with the interim rule. Consequently, the rule includes a one-year transition period for a DMP that is not already equipped to comply to begin reporting unique identifiers that can be used to locate and listen to sound recordings, accompanied by clear instructions describing how to do so. To make use of the transition period, the DMP will need to notify the MLC and describe any implementation obstacles. The DMP will also still need to report DMP-assigned unique identifiers generally; the transition period is only, as needed, for identifiers and instructions relating to audio access. Nothing, of course, prevents an eligible DMP from providing this information before the end of the transition period.

Third, since the MLC and others [156] agree they are adequate, and the DLC states that several DMPs already provide free access to them,[157] the interim rule permits DMPs, in their discretion, to limit audio access to 30-second clips.

The interim rule's updated approach is intended to better ensure that, subject to the transition period, audio can be accessed where necessary for the MLC's duties. Based on the record, for most tracks on most DLC-member services, such access is currently available to users without a paid subscription and can be obtained using URLs, thus largely achieving what the MLC and others seek. To help ensure that current levels of access are not reduced in the future, the interim rule includes a provision restricting DMPs from imposing conditions that materially diminish the degree of access to sound recordings in relation to their potential use by the MLC or its registered users in connection with their use of the MLC's claiming portal. For example, if a paid subscription is not required to listen to a sound recording as of the license availability date, the DMP should not later impose a subscription fee for users to access the recording through the portal. This restriction does not apply to other users or methods of accessing the DMP's service (including the general public), if subsequent conditions resulting in diminished access are required by a relevant licensing agreement, or where such sound recordings are no longer made available through the DMP's service.

In promulgating this aspect of the interim rule, the Office notes that the MLC, DLC, and others have suggested that further operational discussions may be fruitful. A seamless experience using embedded audio is a commendable goal worthy of further exploration, but in the meantime, where significant engineering, licensing, or other unresolved hurdles stand in the way, providing hyperlinks in the portal—which it seems can be done at present for most DLC-member services based on the record—or other identifiers that permit access to a recording appears to be a reasonable compromise.[158]

But to incentivize future discussions, the interim rule includes a provision, similar to the MLC's proposal, requiring the MLC and DLC to report to the Office, over the next year or as otherwise requested, about identified implementation obstacles preventing the audio of any reported sound recording from being accessed directly or indirectly through the portal without cost to portal users, and any other obstacles to improving the experience of portal users. Such reporting should also identify an implementation strategy for addressing any identified obstacles, and any applicable progress made. The Office expects such reporting will help inform it as to whether any modifications to the interim rule prove necessary on this subject, and facilitate continued good-faith collaboration through the MLC's operations advisory committee.

Finally, the reporting should also identify any agreements between the MLC and DMPs to provide for access to relevant sound recordings for portal users through an alternate method rather than by reporting unique identifiers (*e.g.,* separately licensed solutions). The interim rule provides that if such an alternate method is implemented pursuant to any such

possible for any purpose[.] Accordingly, MediaNet does not have a publicly accessible search function that uses unique identifiers as inputs; MediaNet utilizes unique links that are usable for a single play only.'' *See id.* at 26–27.

[152] DLC Letter July 8, 2020 at 1.

[153] DLC Letter July 8, 2020 Add. at 18–19.

[154] *See* DLC Letter June 15, 2020 at 5 (''All DLC members use unique identifiers for tracks.'').

[155] *See* DLC *Ex Parte* Letter June 23, 2020 at 3 n.7; DLC Letter July 8, 2020 Add. at 27.

[156] *See, e.g.,* NSAI *Ex Parte* Letter June 24, 2020 at 1 (''[E]ven a 15–20 second audio clip would suffice.'').

[157] *See* DLC Letter July 8, 2020 Add. at 5, 12, 14, 18, 23.

[158] Some commenters raised the issue of audio deduplication in the claiming portal. *See* DLC *Ex Parte* Letter June 23, 2020 at 5 (asking ''whether and how the MLC's portal would 'de-duplicate' files so that a user does not need to listen through the same song 10 times on 10 different services''); RIAA Letter July 8, 2020 at 2 (''[W]ill portal users be required to listen to every unidentified track on every service (which is not realistic) or does the solution leverage recording industry standard identifiers such as ISRC codes so that identifying a track once is sufficient (because the track has the same ISRC across all services).''). The Office is addressing audio deduplication in the portal and public musical works database in a parallel rulemaking. *See* U.S. Copyright Office, Notice of Proposed Rulemaking, *The Public Musical Works Database and Transparency of the Mechanical Licensing Collective,* Dkt. No. 2020–8, published elsewhere in this issue of the **Federal Register**.

agreement, the requirement to report identifiers and instructions to obtain audio access is lifted for the relevant DMP(s) for the duration of the agreement. The purpose of this provision is to provide flexibility for the MLC and DMPs to collaboratively find other mutually agreeable ways of ensuring relatively easy audio access to portal users seeking to identify works.

vii. Altered Data

One of the more contested issues in this proceeding concerns the practice of DMPs sometimes altering certain data received from sound recording copyright owners and other licensors for normalization and display purposes in their public-facing services, and whether DMPs should be permitted to report the modified data to the MLC or instead be required to report data in the original unmodified form in which it is received. The NPRM explained that: ''[A]fter analyzing the comments and conducting repeated meetings with the MLC, DLC, and recording company and publishing interests, it is apparent to the Copyright Office that abstruse business complexities and misunderstandings persist . . . . [I]t is not clear that the relevant parties agree on exactly which fields reported from sound recording owners or distributors to DMPs are most useful to pass through to the MLC, which fields the MLC should be expected or does expect to materially rely upon in conducting its matching efforts, or which fields are typical or commercially reasonable for DMPs to alter.'' [159] Ultimately, the Office explained that: ''The Office has essentially been told by the DLC that retaining and reporting unaltered data is generally burdensome and unhelpful for matching, while the MLC and others argue that it is generally needed and helpful for matching. Both positions seem to have at least some degree of merit with respect to certain aspects. The Office therefore offers what it believes to be a reasonable middle ground to balance these competing concerns.'' [160] The proposed middle ground was one where altered data could be reported, but subject to what the Office believed to be meaningful limitations. The first limitation was that DMPs would have been required to report unaltered data in any of the following three cases: (1) Where the MLC has adopted a nationally or internationally recognized standard, such as DDEX, that is being used by the particular DMP, and either the unaltered version or both versions are required to be reported under that standard; (2) where either the unaltered version or both versions are reported by the particular DMP pursuant to any voluntary license or individual download license; or (3) where either the unaltered version or both versions were periodically reported by the particular DMP to its licensing administrator or to copyright owners directly prior to the license availability date. The second limitation was that DMPs would not have been permitted to report only modified versions of any unique identifier, playing time, or release date. The third limitation was that DMPs would not have been permitted to report only modified versions of information belonging to categories that the DMP was not periodically altering prior to the license availability date.

In response, the MLC and others reject the proposed approach, reasserting that having unaltered data is imperative for matching, and arguing that the DLC has not sufficiently supported its assertions of DMP burdens associated with reorienting existing reporting practices.[161] The DLC objects to most of the conditions under the first limitation described above (the first and third scenarios),[162] but does not object to the second or third limitations.[163] ARM also commented regarding its members' equities on this subject, but noted its ''primary concern,'' rather than MLC matching efforts, ''is ensuring that all sound recording data that ultimately appears in the MLC's public-facing database is as accurate as possible and is taken from an authoritative source (*e.g.,* SoundExchange).'' [164] To that end, ARM states that while ''sympathetic to the operational challenges'' that would be created by requiring DMPs to maintain a ''parallel archive'' of data, ''this task would be made easier if the DMPs were required to populate their monthly reports of usage with only unaltered data.'' [165]

In light of these comments, and at ARM's suggestion,[166] the Office sent a letter seeking additional information from the MLC and DLC on this issue.[167] The Office then held an *ex parte* meeting with the commenters on this matter, which was followed up with additional written submissions.[168] Although the MLC and DLC largely maintain the same general positions about burdens and usefulness for matching, these efforts have revealed additional helpful information, discussed below.

In light of the further-developed record, the Office has made certain revisions to the proposed rule. First, the rule has been clarified or adjusted in light of a few areas of agreement. The relevant provisions on altered data no longer apply to playing time because, as discussed above, actual playing time must be reported by DMPs. The interim rule also clarifies, as the DLC requests and as the MLC agrees, that where the regulations refer to modifying data, modification does not include the act of filling in or supplementing empty or blank data fields with information known to the DMP, nor does it include updating information at the direction of the sound recording copyright owner or licensor (such as when a record label may send an email updating information previously provided in an ERN message).[169] The modification at issue is modification of information actually acquired from a sound recording copyright owner or licensor that the DMP then changes in some fashion without being directed to by the owner or licensor.[170]

The interim rule has also removed the reference requiring reporting of unaltered data where this reporting is required by a nationally or internationally recognized standard that has been adopted by the MLC and used by the particular DMP, *e.g.,* DDEX.[171] At bottom, although this provision was intended to allow room for future

[159] 85 FR at 22523.

[160] *Id.* at 22525.

[161] MLC NPRM Comment at 21–26, App. at xvi–xvii; *see, e.g.,* NMPA NPRM Comment at 6–9; Peermusic NPRM Comment at 2–3.

[162] DLC NPRM Comment at 5–7, Add. at A–16–17.

[163] DLC NPRM Comment Add. at A–17.

[164] ARM NPRM Comment at 6–7. The Office is addressing the display of sound recording data in the public musical works database in a parallel rulemaking. *See* U.S. Copyright Office, Notice of Proposed Rulemaking, *The Public Musical Works Database and Transparency of the Mechanical Licensing Collective,* Dkt. No. 2020–8, published elsewhere in this issue of the **Federal Register**.

[165] ARM NPRM Comment at 6.

[166] *Id.* (''If the Office wishes to convene some sort of informal stakeholder meeting to explore solutions to this particular issue, we and relevant executives from our member companies would be happy to participate in such a process. SoundExchange . . . should also be included in any such meeting.'').

[167] U.S. Copyright Office Letter June 30, 2020; *see* DLC Letter July 13, 2020; MLC Letter July 13, 2020.

[168] *See* ARM *Ex Parte* Letter July 27, 2020; DLC *Ex Parte* Letter July 24, 2020; MLC *Ex Parte* Letter July 24, 2020; SoundExchange *Ex Parte* Letter July 24, 2020.

[169] *See* DLC NPRM Comment at 5, Add. at A–16–17; DLC Letter July 13, 2020 at 7–8; MLC Letter July 13, 2020 at 2; MLC *Ex Parte* Letter July 24, 2020 at 9.

[170] *See* MLC Letter July 13, 2020 at 2 (''If, for example, a sound recording copyright owner conveyed generally to DMPs a request to update Title metadata for a particular licensed sound recording, the new title should qualify as metadata 'acquired from' the sound recording copyright owner.'').

[171] *See* 85 FR at 22525.

consensus to emerge among relevant copyright owners and DMPs through their chosen participation in non-governmental standards-setting processes, the comments suggest the parties would prefer clear and immediate direction from the Office. The MLC, DLC, and others are in agreement that this provision should be eliminated.[172] In the case of DDEX, the MLC and others explain that, if DMPs do not want to report unaltered data (or anything else for that matter), it is unlikely that a consensus will be reached for DDEX to mandate such reporting, absent regulation.[173] Conversely, the DLC expresses concern that future changes adopted by a standards-setting body could expand the categories of information otherwise required by the rule to be reported unaltered, in its view effectively delegating future adjustments to the rule.[174] As the commenters recognize, any changes that may need to be made to DDEX's standards to accommodate the Office's regulations will either need to be pursued by the parties or some other reporting mechanism will need to be used.[175]

Turning to the larger question regarding altered data and its role in matching, the DLC characterizes the issue as a marginal one and notes that DMPs only make minor, mostly cleanup, modifications to a fraction of fields for a small fraction of tracks (estimated at less than 1%).[176] It asserts that the MLC's matching processes should be sophisticated enough to overcome these alterations, and that the MLC should be able to use an ISRC, artist, and title keyword to identify over 90% of recordings through automated matching by using SoundExchange's database.[177] In the DLC's words, ''[i]t should be (and is) the MLC's job to construct technological solutions to handle those minor differences in the matching process, not DMPs' job to re-engineer their platforms, ingestion protocols, and data retention practices so that the MLC receives inputs it likely does not require.'' [178] (Relatedly, ARM strongly opines that the ISRC is a reliable identifier, noting that all ARM members distribute tracks pursuant to direct licenses that require provision of ISRCs to the DMPs, and that all major record labels use ISRCs to process royalties.[179] SoundExchange subsequently supplied further information regarding the effectiveness and reliability of ISRC identifiers.[180]) The DLC also explains that providing unaltered data is challenging because ''label metadata isn't simply saved wholesale in a single table,'' but instead ''is processed and divided into a number of different systems built for distinct purposes, and royalty accounting systems pull from those various systems for purposes of generating a report,'' and ''[i]t is that entire chain that would need to be reengineered to ensure that label metadata is passed through in unaltered form.'' [181] But ultimately, the DLC characterizes the incremental costs to provide at least limited types of unaltered data, as compared to the costs of creating the broader DMP-to-MLC reporting infrastructure, as ''minimal'' for most DMPs and requests that if the scope of unaltered data is expanded then DMPs be given a one-year transition period to comply.[182] The DLC further states that ''[m]any DMPs do not alter metadata at all.'' [183] Lastly, the DLC notes that at least some DMPs have not maintained the original unaltered data, meaning they no longer have it available to report ''for the tens of millions of tracks currently in their systems.'' [184] The DLC and ARM oppose any rule requiring DMPs to recreate this data from new feeds from sound recording copyright owners.[185]

In contrast, the MLC generally argues that receipt of the sound recording copyright owner or licensor's unaltered data is critical for proper and efficient matching, explaining how its absence can frustrate and obstruct automated efforts.[186] The MLC asserts that this will lead to more tracks needing to be matched manually, and that manual matching is made all the more difficult where an unknown multiplication of different data variations are reported due to DMP alteration.[187] While the MLC concedes that it will need to deal with other data issues, it says that ''there is no 'inefficiency cap' when it comes to metadata inconsistencies,'' and that ''each additional metadata inconsistency compounds the previous one and makes the process even harder as they synergise with each other.'' [188] The MLC states that it is impossible to quantify to what extent permitting reporting of altered data will affect matching because there are too many unknown variables about the scope of DMP alterations, but nonetheless argues that this is not as minor an issue as the DLC characterizes it.[189] Rather, the MLC contends that even if only a small fraction of 1% of tracks are implicated, given the number of DMPs and the massive size of their libraries, ''it could

[172] *See* DLC NPRM Comment at 5, 10; MLC NPRM Comment at 22–23; NMPA NPRM Comment at 8–9; Peermusic NPRM Comment at 3; MLC *Ex Parte* Letter July 24, 2020 at 7.

[173] *See* MLC NPRM Comment at 22–23; NMPA NPRM Comment at 8–9; MLC *Ex Parte* Letter July 24, 2020 at 7; *see also* DLC Letter July 13, 2020 at 9 (acknowledging that ''DDEX is a consensus-driven organization'').

[174] DLC NPRM Comment at 5 (raising practical questions such as whether optional fields would be required for reporting or whether the rule would account for different versions of the relevant standard).

[175] *See* MLC NPRM Comment at 23; NMPA NPRM Comment at 8–9; Peermusic NPRM Comment at 3; ARM NPRM Comment at 10; MLC *Ex Parte* Letter July 24, 2020 at 7.

[176] DLC Letter July 13, 2020 at 2–4; DLC *Ex Parte* Letter July 24, 2020 at 2–3.

[177] DLC Letter July 13, 2020 at 2–4 (''[T]he MLC's continued insistence on regulating the nuances of highly variegated metadata practices reflects a failure of prioritization. . . . Hairsplitting among metadata fields . . . is not mission-critical.''); DLC *Ex Parte* Letter July 24, 2020 at 2–3.

[178] DLC Letter July 13, 2020 at 2 (''Even on the altered fields, it should be trivial to construct 'fuzzy' search or matching technologies that render immaterial the differences between original and altered data.''); DLC *Ex Parte* Letter July 24, 2020 at 3 (''If the MLC's matching algorithm cannot handle simple variations like 'The Beatles' versus 'Beatles, The,' it needs to adopt a better algorithm.'').

[179] *See* ARM *Ex Parte* Letter July 27, 2020 at 2. According to ARM, the companies it represents ''collectively create, manufacture and/or distribute nearly all of the sound recordings commercially produced and distributed in the United States.'' ARM NPRM Comment at 1. ARM also informs that the RIAA has designated SoundExchange as the authoritative source of ISRC data in the United States. ARM *Ex Parte* Letter July 27, 2020 at 2.

[180] SoundExchange *Ex Parte* Letter Sept. 1, 2020. SoundExchange states that ISRC, ''while used imperfectly when first introduced, has become the standard for uniquely identifying music asserts'' because they ''are used by everyone in the recorded music ecosystem.'' *Id.*

[181] DLC *Ex Parte* Letter July 24, 2020 at 2 & n.4; DLC Letter July 13, 2020 at 2 (''For at least some DMPs, doing this work would touch every part of the digital supply chain, involving interactions from multiple cross-functional teams, modifications of legacy systems, and new engineering pathways to capture, store, and report unaltered data.'').

[182] *See* DLC Letter July 13, 2020 at 4–5. The DLC later asserts that ballpark cost estimates for a larger pass through of unaltered data could ''reach as high as millions of dollars.'' DLC *Ex Parte* Letter July 24, 2020 at 4 n.10.

[183] DLC Letter July 13, 2020 at 1, 3.

[184] DLC *Ex Parte* Letter July 24, 2020 at 2.

[185] *Id.;* ARM *Ex Parte* Letter July 27, 2020 at 3–4.

[186] MLC Letter July 13, 2020 at 3–4 (''While a matching algorithm may not be fully defeated by a minor or cosmetic change to a single metadata field, the alteration of metadata makes the algorithms harder to maintain, and reduces the confidence levels, and thus the automated matching rate regardless of how sophisticated the algorithms are.''); MLC *Ex Parte* Letter July 24, 2020 at 3.

[187] MLC Letter July 13, 2020 at 4–5 (suggesting a possibility of getting as many as 50 different variations for each data field for a single sound recording from 50 different DMPs).

[188] *Id.* at 6 (''[A]ltered metadata will be a force for reducing matching efficiency and effectiveness, and will only compound the negative effects that arise from other metadata inconsistencies.'').

[189] *Id.* at 4–5; MLC *Ex Parte* Letter July 24, 2020 at 8 n. 5 (''[U]sage reporting of both unaltered and altered metadata is the only way that one could precisely quantify the effect of altered metadata reporting on matching performance.'').

amount to millions of works thrown into manual matching, which could amount to literally hundreds of human work years reestablishing matches.'' [190] In terms of relative burdens, the MLC argues that the DLC has not made a satisfactory showing of undue burden on DMPs [191] and points out the ''asymmetry'' between requiring DMPs ''to make a one-time workflow change'' and the ''ongoing and constant drain and wear on [the MLC's] systems, making its automated processes harder to maintain and less effective, and also compounding the amount of manual review required, increasing costs and decreasing efficiency.'' [192] Moreover, the MLC contends that ''[f]orcing the MLC to use the same altered metadata that the DMPs used that contributed to the system that the MLC was created to fix is inconsistent with the statutory goals.'' [193]

Regarding the contention that the MLC can use an ISRC, artist, and title keyword to match using SoundExchange's database, the MLC disagrees, asserting, among other things, that SoundExchange cannot be compelled to provide its data, that its coverage is not 100% and may omit ''possibly the majority of track entries that the MLC must match each month,'' that such cross-matching would be obstructed if the artist or title have themselves been altered, and that ''tasking the MLC with trying to clean sound recording data for public display by cross-matching and 'rolling up' DMP reporting against a third-party database is not part of the MLC's mandate.'' [194] The MLC also emphasizes that ''[t]he problems necessitating the establishment of the MLC were not centered around the matching of works embodied in established catalogs and hits,'' and thus ''the MLC sees the matching of [ ] 'edge cases' as perhaps its most critical mandate.'' [195] In response to the DLC's identification of the particular categories of information DMPs sometimes modify,[196] the MLC states that of those data fields, the MLC must have the unaltered version of the sound recording name, featured artist, ISRC, version, album title, and songwriter.[197] With respect to the DLC's statement that some DMPs cannot report unaltered data for tracks currently in their systems because they no longer have such data, the MLC requests that such DMPs be required to certify that they no longer have the data before being excused from reporting it.[198] Subsequent discussions seemingly revealed agreement among the participants that such DMPs should not be required to obtain from sound recording copyright owners, and such owners not be required to provide to DMPs, replacement ''back catalog'' data.[199]

While the Office has taken note of the thoughtful points raised by the DLC, it is ultimately persuaded by the MLC and others to update the regulatory language from the proposed rule to require reporting of four additional fields of unaltered data, subject to the requested on-ramp period. At bottom, millions of tracks are still millions of tracks, and the need to match ''edge'' cases potentially affects a large number of copyright owners and songwriters, even if only a fraction of the DMPs' aggregated libraries, and the number of altered tracks will only grow over time.[200] A core goal of the MMA is ''ensuring fair and timely payment to *all* creators'' of musical works used by DMPs.[201] As Congress has recognized, even seemingly minor inconsistencies can still pose a problem in the matching process.[202] The MLC, as bolstered by other commenters,[203] has made a reasonable showing that receiving only the modified DMP data for the fields at-issue [204] may hinder its intended matching efforts, or at least take additional time to match, thus delaying prompt and accurate royalty payments to copyright owners and songwriters.[205] The MLC has a strong incentive to match to the greatest extent reasonably possible, and so has a corresponding operational equity with respect to its professed metadata needs.[206] Additionally, while the Office agrees with the DLC that ''[t]he MLC's system is meant to be a pacesetter in the industry,'' [207] as the MLC points out, this may not necessarily support the reporting of potentially millions of tracks with certain metadata in a less-advantaged state. While the DLC also raises points worthy of consideration regarding the apparent feasibility of technological approaches to tackle cleanup edits which perhaps the

[190] MLC Letter July 13, 2020 at 5; MLC *Ex Parte* Letter July 24, 2020 at 3; *see also* MLC NPRM Comment at 25 n.10 (noting that reporting unaltered data will ''greatly improv[e] . . . the speed and accuracy of royalty processing and accounting'').

[191] MLC *Ex Parte* Letter July 24, 2020 at 4–6.

[192] MLC Letter July 13, 2020 at 5–6.

[193] *Id.* at 6.

[194] MLC *Ex Parte* Letter July 24, 2020 at 2–3.

[195] *Id.* at 3–4.

[196] DLC Letter July 13, 2020 at 2–3.

[197] MLC *Ex Parte* Letter July 24, 2020 at 9.

[198] *Id.* at 10.

[199] *See* DLC *Ex Parte* Letter July 24, 2020 at 2 (noting the meeting's ''apparent agreement between the MLC, DLC and record label representatives that there should be no obligation for DMPs to try to recreate such data from new feeds from the sound recording copyright owners''). The MLC subsequently asserts in its letter that ''there should be no carve out from the DMP efforts obligation for this metadata, and further that an efforts carve out would conflict with the MMA's unreserved efforts requirement.'' MLC *Ex Parte* Letter July 24, 2020 at 10–11. The interim rule does not adopt an explicit carve out, but the Office questions, in light of this apparent consensus or near-consensus (especially between the DMPs and sound recording copyright owners regarding their direct deals), whether efforts to reobtain such a large amount of data can be fairly characterized as ''commercially reasonable efforts.'' Having said that, if sound recording copyright owners do provide this data, DMPs would still be obligated to report it to the extent required by the interim rule.

[200] *See* MLC *Ex Parte* Letter Apr. 3, 2020 at 8 (''[D]uring an earnings call last year, Spotify's CEO stated that Spotify ingests about 40,000 tracks every day.'').

[201] *See* Conf. Rep. at 6 (emphasis added) (''Th[e present] situation must end so that all artists are paid for their creations and that so-called 'black box' revenue is not a drain on the success of the entire industry.''); H.R. Rep. No. 115–651, at 7–8; S. Rep. No. 115–339, at 8; Letter from Lindsey Graham, Chairman, Senate Committee on the Judiciary, to Karyn Temple, Register of Copyrights, U.S. Copyright Office (Nov. 1, 2019) (''All artists deserve to be fully paid for the uses of their works and the adoption of accurate metadata . . . will be key to accomplishing this.'').

[202] *See* Conf. Rep. at 6 (''Unmatched works routinely occur as a result of different spellings of artist names and song titles. Even differing punctuation in the name of a work has been enough to create unmatched works.''); H.R. Rep. No. 115–651, at 8; S. Rep. No. 115–339, at 8.

[203] *See, e.g.,* RIAA Initial NOI Comment at 3, 5–6 (explaining that passing through altered data ''will make it difficult, if not impossible, for the MLC to do machine matching without intervention from a knowledgeable human''); Jessop Initial NOI Comment at 2–3 (explaining that altered data ''make[s] matching much harder''); NMPA NPRM Comment at 7–9; Peermusic NPRM Comment at 2–3.

[204] Of the fields the DLC says DMPs sometimes modify, the MLC says it needs the unaltered version of the sound recording name, featured artist, ISRC, version, album title, and songwriter. *See* DLC Letter July 13, 2020 at 2–3; MLC *Ex Parte* Letter July 24, 2020 at 9.

[205] *See also* Conf. Rep. at 6 (observing that the status quo ''has led to significant challenges in ensuring fair and timely payment to all creators''); H.R. Rep. No. 115–651, at 7–8; S. Rep. No. 115–339, at 8; Letter from Lindsey Graham, Chairman, Senate Committee on the Judiciary, to Karyn Temple, Register of Copyrights, U.S. Copyright Office (Nov. 1, 2019) (observing one of the causes of unmatched royalties to be ''errors and omissions in metadata as the work is commercialized''); 85 FR at 22526 (''In promulgating reporting and payment rules for the section 115 license,'' one of the '''fundamental criteria''' used to '''evaluate[ ] proposed regulatory features''' is that it '''must insure prompt payment''') (quoting 79 FR 56190, 56190 (Sept. 18, 2014)).

[206] *See* 17 U.S.C. 115(d)(3)(B)(ii); 84 FR at 32283 (''[I]f the designated entity were to make unreasonable distributions of unclaimed royalties, that could be grounds for concern and may call into question whether the entity has the 'administrative and technological capabilities to perform the required functions of the [MLC].'''') (quoting 17 U.S.C. 115(d)(3)(A)(iii)); Letter from Lindsey Graham, Chairman, Senate Committee on the Judiciary, to Karyn Temple, Register of Copyrights, U.S. Copyright Office (Nov. 1, 2019) (''Reducing unmatched funds is the measure by which the success of [the MMA] should be measured.'').

[207] *See* DLC Letter July 13, 2020 at 2.

operations advisory committee should discuss, its comments do not address other instances raised by commenters where '''fuzzy' search[es] or matching technologies'' are unlikely to resolve a discrepancy.[208] Finally, ARM, while advocating for the MLC to obtain sound recording metadata from a single source with respect to its public-facing database, also acknowledges the utility of it receiving unaltered metadata from DMPs as opposed to data that reflects alteration by individual DMPs.[209]

Concerning the issues raised regarding the MLC's potential use of SoundExchange's database, as discussed above and in the NPRM,[210] the Office notes the DLC's and ARM's explanations how access to a third party's authoritative sound recording data may be generally advantageous to the MLC in fulfilling its statutory objectives.[211] The Office has also noticed this issue in a parallel proceeding regarding the public musical works database, including the MLC's assertion that cleaning and/or deduping sound recording information is not part of its statutory mandate.[212] Specifically as to the DLC's suggestion that the MLC should be able to use an ISRC, artist, and title keyword to identify over 90% of recordings through automated matching by using SoundExchange's database,[213] while not opining as to the comparative feasibility of that approach, for purposes of the interim rule, the Office finds it reasonable to accept the MLC's assertion that such access alone would be an inadequate substitute for having DMPs report unaltered data. As discussed above, even a relatively small percentage gap in repertoire coverage can translate to a substantial number of tracks. Moreover, the Office cannot *compel* SoundExchange to provide its data.[214]

This approach seemingly fits within the statutory framework. The MMA obligates DMPs to facilitate the MLC's matching duties by engaging in efforts to collect data from sound recording copyright owners and passing it through to the MLC via reports of usage. A requirement to report such collected data in unaltered form is consonant with that structure, as the statute specifically contemplates musical work information being passed through from ''the metadata provided by sound recording copyright owners or other licensors of sound recordings.'' [215] While the reporting of sound recording information does not have this same limitation, its inclusion with respect to musical work information nevertheless signals that Congress contemplated sound recording information being passed through from the metadata as well; the material difference being that DMPs have an added burden with respect to sound recording information, but not musical work information, to report missing metadata from another source ''to the extent acquired.'' [216]

That being said, the interim rule also adopts the one-year transition period the DLC requests, to afford adequate time both for DMPs to reengineer their reporting systems and, if necessary, for DDEX to update its standards. As with the provision adopted concerning unique identifiers relevant to audio access, the Office concludes that the DLC's requested transition period is appropriate. The statute seemingly does not contemplate the engineering time that both the MLC and DLC have identified as necessary for the MLC and DMPs to operationalize their respective obligations.[217] To start, each entity has a core statutory duty to ''participate in proceedings before the Copyright Office,'' but neither one existed at the law's enactment. Instead, following the development of its own extensive public record, the Copyright Office concluded a proceeding to designate the MLC and DLC in July, 2019, in full conformance with the statutory timeframe, but leaving less than 18 months before the license availability date.[218] The first notification of inquiry for this (and parallel) rulemakings was issued in September 2019, at a time when the MLC and DLC were separately engaged in an assessment proceeding before the CRJs, as also contemplated by the statute.[219] The Office has conducted this rulemaking at an industrious clip, while maintaining due attention to adequately developing and analyzing the now-expansive record. Indeed, in one academic study analyzing over 16,000 proceedings, rulemakings were generally found to take, on average, 462.79 days to complete; an unrelated GAO study of rulemakings conducted by various executive branch agencies concluded that rulemakings take on average four years to complete.[220] But even with this diligence, given the statutory clock remaining before the license availability date, the Office concludes that it is appropriate to adopt reasonable transition periods with

[208] *See id.* For example, using ''fuzzy'' matching would not help with an altered release date. *See id.* at 4. Nor would it help with wholesale data replacement, such as where ''Puffy'' is changed to ''Diddy,'' *see* DLC Reply NOI Comment at 9, or ''An der schönen, blauen Donau'' is changed to ''Blue Danube Waltz,'' *see* Jessop Initial NOI Comment at 2.

[209] *See* ARM NPRM Comment at 6; ARM *Ex Parte* Letter July 27, 2020 at 1–2; A2IM & RIAA Reply NOI Comment at 3 n.1 (''In the event the Office rejects our call for the sound recording metadata to come from a single authoritative source, any metadata the DMPs are required to provide to the MLC must be provided in the exact same form in which it is received from record labels and other sound recording copyright owners (*i.e.,* in an unaltered form).'').

[210] *See* 85 FR at 22524.

[211] DLC NPRM Comment at 7–8; ARM NPRM Comment at 6–9; *see also, e.g.,* SoundExchange *Ex Parte* Letter July 24, 2020 at 1 (explaining how SoundExchange has a database of all the variations of sound recording information reported by DMPs, a separate database of authoritative sound recording data populated with information submitted by rights owners, and then a proprietary matching algorithm to join the two together); SoundExchange NPRM Comment at 2–6.

[212] *See* U.S. Copyright Office, Notice of Proposed Rulemaking, *The Public Musical Works Database and Transparency of the Mechanical Licensing Collective,* Dkt. No. 2020–8, published elsewhere in this issue of the **Federal Register**; MLC Letter June 15, 2020 at 3 n.3.

[213] DLC *Ex Parte* Letter July 24, 2020 at 2–3. SoundExchange subsequently clarified that ''ISRCs in SoundExchange's repertoire database cover 90 percent of the value of commercially released tracks based on SoundExchange distributions,'' and that ''a significant portion of the remaining 10 percent would likely match to repertoire data as well.'' SoundExchange *Ex Parte* Letter Sept. 1, 2020 at 2.

[214] *See also* ARM NPRM Comment at 6; ARM *Ex Parte* Letter July 27, 2020 at 1–2; A2IM & RIAA Reply NOI Comment at 3 n.1.

[215] *See* 17 U.S.C. 115(d)(4)(A)(ii)(I)(bb).

[216] *See id.* at 115(d)(4)(A)(ii)(I)(aa)–(bb) (noting that sound recording name and featured artist must always be reported). With respect to the requirement for most sound recording and musical work information to be reported ''to the extent acquired,'' at least in the strictest sense, acquired data that is altered is no longer the same as what was acquired.

[217] *See, e.g.,* MLC *Ex Parte* Letter Jan. 29, 2020 at 2; DLC Letter July 13, 2020 at 1; Spotify *Ex Parte* Letter Aug. 26, 2020 at 1.

[218] *See* 84 FR at 32274 (designating the MLC and DLC); 17 U.S.C. 115(d)(3)(B)(i) (''Not later than 270 days after the enactment date, the Register of Copyrights shall initially designate the mechanical licensing collective . . .''); 17 U.S.C. 115(e)(15) ''The term 'license availability date' means January 1 following the expiration of the 2-year period beginning on the enactment date.'').

[219] *See* 84 FR at 49966; U.S. Copyright Royalty Board, Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective, Docket No. 19–CRB–0009–AA. As noted in the comments to the NOI, the Office understands the contemporaneous assessment proceeding, to have deferred, to some extent, discussions between the MLC and DLC in this rulemaking. *See* 84 FR 65739 (Nov. 29, 2019) (extending comment period for reply comments to NOI, at commenters' requests).

[220] Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions,* 105 Nw. L. Rev. 471, 513 (2011); U.S. Government Accountability Office, *Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* 5–6 (2009), *available at https://www.gao.gov/new.items/d09205.pdf* (''GAO Report''). *See also* Christopher Carrigan & Russell W. Mills, *Organizational Process, Rulemaking Pace, and the Shadow of Judicial Review,* 79 Public Admin. Rev. 721, 726–27 (2019) (for economically significant rules, finding a mean of 360.3 days from publication of proposed rule or interim final rule to publication of final rule).

respect to certain identified operational needs.[221]

During the one-year transition period, reporting altered data is permitted, subject to the same two limitations proposed in the NPRM that the DLC did not oppose: (1) DMPs are not permitted to report only modified versions of any unique identifier or release date; and (2) DMPs are not permitted to report only modified versions of any information belonging to categories that the DMP was not periodically altering prior to the license availability date. After the one-year transition period ends, DMPs additionally must report unmodified versions of any sound recording name, featured artist, version, or album title—which are the remaining categories of information that the DLC says at least some DMPs alter and that the MLC says it needs in unaltered form, with one exception. The Office declines the MLC's requested inclusion of the songwriter field at this time because it is a musical work field rather than a sound recording field, and according to the DLC, when it is provided by sound recording copyright owners, it is usually duplicative of the featured artist field, which will already have to be reported unaltered.[222]

As the DLC requests, the interim rule includes an exception for where DMPs cannot report unaltered data for tracks currently in their systems because they no longer have such data.[223] Obviously DMPs cannot report what they do not have, but the Office agrees with the MLC that the ability to use the exception should be contingent upon an appropriate certification. The interim rule, therefore, requires the DMP to certify to the best of its knowledge that: (1) The information at issue belongs to a category (each of which must be identified) that the DMP was periodically altering prior to the effective date of the interim rule; and (2) despite engaging in good-faith, commercially reasonable efforts, the DMP has not located the unaltered version of the information in its records. Since DMPs that no longer have this information may not know with granularity which data is in fact altered, the interim rule also makes clear that the certification need not identify specific sound recordings or musical works, and that a single certification may be used to encompass all unaltered information satisfying the conditions that must be certified to. For any DMP that to the best of its knowledge no longer has the unaltered data in its possession, this should not be an onerous burden.

The Office would welcome updates from the MLC's operations advisory committee, or the MLC or DLC separately, on any emerging or unforeseen issues that may arise during the one-year transition period.

viii. Practicability

In addition to the three tiers of sound recording and musical work information described in the NPRM, the Office further proposed that certain information, primarily that covered by the second and third tiers, must be reported only to the extent ''practicable,'' a term defined in the proposed rule.[224] The DLC had asserted that it would be burdensome from an operational and engineering standpoint for DMPs to report additional categories of data not currently reported, and that DMPs should not be required to do so unless it would actually improve the MLC's matching ability.[225] Based on the record, the NPRM observed that all of the proposed data categories appeared to possess some level of utility, despite disagreement as to the particular degree of usefulness of each, and that different data points may be of varying degrees of helpfulness depending on which other data points for a work may or may not be available.[226] Consequently, the proposed rule defined ''practicable'' in a specific way.[227] First, the proposed definition would have always required reporting of the expressly enumerated statutory categories (*i.e.,* sound recording copyright owner, producer, ISRC, songwriter, publisher, ownership share, and ISWC, to the extent appropriately acquired, regardless of any associated DMP burden). Second, it would have required reporting of any other applicable categories of information (*e.g.,* catalog number, version, release date, ISNI, etc.) under the same three scenarios that were proposed with respect to unaltered data: (1) Where the MLC has adopted a nationally or internationally recognized standard, such as DDEX, that is being used by the particular DMP, and the information belongs to a category of information required to be reported under that standard; (2) where the information belongs to a category of information that is reported by the particular DMP pursuant to any voluntary license or individual download license; or (3) where the information belongs to a category of information that was periodically reported by the particular DMP to its licensing administrator or to copyright owners directly prior to the license availability date. The NPRM explained that, as with the proposed rules about unaltered data, the Office's proposed compromise sought to appropriately balance the need for the MLC to receive detailed reporting with the burden that more detailed reporting may place on certain DMPs.[228]

In response to the NPRM, the MLC argues against the proposed rule, questioning how it can be impracticable for a DMP to report information it has in fact acquired, and generally contending that the DLC has not sufficiently supported its assertions of DMP operational burdens.[229] The DLC's comments do not propose any changes to this aspect of the proposed rule.[230] The Office gave the DLC an opportunity to elaborate on this matter and address the MLC's contentions, asking the DLC to ''[l]ist each data field proposed in § 210.27(e)(1) that the DLC contends would be overly burdensome for certain DLC members to report if the Office does not limit reporting to the extent practicable'' and, for any such field, to ''[d]escribe the estimated burden, including time, expense, and nature of obstacle, that individual DLC members anticipate they will incur if required to report.'' [231] The DLC responded by stating that ''assuming (against experience) that DMPs actually acquired *all* of the metadata types listed in subsections (e)(1)(i)(E) and (e)(1)(ii), the answer is that it would be impracticable (and for some data fields, impossible) to report subsection (e)(1)(ii)'s musical work information to the MLC.'' [232] The

[221] The Office's reasoning is further supported by the delayed statutory timeframe before the MLC may consider distributing unclaimed, unmatched funds. Because the MLC will have at least three years to engage in matching activities with respect to a particular work, this additional time may be used by the MLC to make up for any inefficiencies felt during a relevant transition period, rather than have a rule adopted that limited consideration to only changes that would be operationally feasible by the license availability date. 17 U.S.C. 115(d)(3)(H)(i), (J)(i)(I); 85 FR 33735, 33738 (June 2, 2020).

[222] *See* DLC Letter July 13, 2020 at 7–8. The MLC has stated in the Office's concurrent rulemaking about the musical works database that ''[t]he musical works data will be sourced from copyright owners.'' MLC *Ex Parte* Letter Aug. 21, 2020 at 2.

[223] *See* DLC *Ex Parte* Letter July 24, 2020 at 2; MLC *Ex Parte* Letter July 24, 2020 at 10 (proposing regulatory language); *see also* DLC *Ex Parte* Letter July 24, 2020 at 2 n.3 (''DMPs should [not] be held to a 'burden of proof' about the absence of data they were never required to maintain.'').

[224] 85 FR at 22531–32, 22541–42.

[225] *Id.* at 22531.

[226] *Id.*

[227] *Id.* at 22531–32.

[228] *Id.* at 22532.

[229] *See* MLC NPRM Comment at 4, 16–17, 38; *see also* NMPA NPRM Comment at 2.

[230] DLC NPRM Comment Add. at A–17–18.

[231] U.S. Copyright Office Letter June 30, 2020 at 3–4.

[232] DLC Letter July 13, 2020 at 8–9. For reference, paragraphs (e)(1)(i)(E) and (e)(1)(ii) cover all sound

DLC explains that ''[t]he fundamental problem arises from the fact that for subsection (e)(1)(ii)'s data types, there are no mandatory DDEX data fields, and in some instances, no data fields at all.'' [233]

In light of these comments, the Office concludes that this reporting limitation should be revised, and so the interim rule replaces this concept with a one-year transition period. The DLC states that it is only impracticable to provide musical work information (not sound recording information), because of a current lack of DDEX data fields. As discussed above, however, the Office is persuaded that it should not refer to DDEX's requirements in promulgating these rules, and that parties may need to pursue changes to DDEX's standards to accommodate the Office's regulations if they wish to use that standard.[234] Additionally, some of the musical work fields that the DLC says are impracticable to report because of DDEX are statutorily required, which means that not reporting them was never a possibility, including under the originally proposed practicability limitation. Moreover, the MLC states that ''[a]ll of the metadata fields proposed in § 210.27(e)(1) will be used as part of the MLC's matching efforts.'' [235]

The Office is mindful that it will take time both for DMPs to reengineer their reporting systems and for DDEX to update its standards. The interim rule establishes a one-year transition period (the length of time the DLC states is necessary for DMPs to make significant reporting changes) [236] during which DMPs may report largely in accord with what was proposed in the NPRM, though for clarity, the regulatory language has been amended to address this condition in terms of the transition period, rather than the previously proposed defined term ''practicable.'' The main substantive change is that, following the reasoning above, the Office has eliminated the scenario where the MLC has adopted a nationally or internationally recognized standard, such as DDEX, that is being used by the particular DMP, and the information belongs to a category of information required to be reported under that standard.[237]

ix. Server Fixation Date and Termination

Another disputed issue in this proceeding has been the MLC's proposal to require DMPs to report the date on which each sound recording is first reproduced by the DMP on its server. As discussed in the NPRM, the MLC said it needs this date to operationalize its interpretation of the derivative works exception to the Copyright Act's termination provisions in sections 203 and 304(c).[238] Under the MLC's legal interpretation, the exception applies to the section 115 compulsory license, and therefore, if the compulsory license ''was issued before the termination date, the pre-termination owner is paid. Otherwise, the post-termination owner is paid.'' [239] The MLC argued that, in contrast to the prior regime where ''the license date for each particular musical work was considered to be the date of the NOI [240] for that work,'' under ''the new blanket license, there is no license date for each individual work,'' [241] and, therefore, the MLC sought the so-called server fixation date, which it contended is ''the most accurate date for the beginning of the license for that work.'' [242] The DLC said that not all DMPs store this information and argued that it should not need to be reported.[243] No other commenter directly spoke to this issue prior to the issuance of the NPRM.

Based on the record to that point, the Office suggested that the MLC's interpretation ''seems at least colorable,'' noting the lack of comments disagreeing with what the MLC had characterized as industry custom and understanding.[244] The Office also said that, to the extent the MLC's approach is not invalidated or superseded by precedent, it seemed reasonable for the MLC to want to know the applicable first use date, upon which to base a license date, so it could essentially have a default practice to follow in the absence of a live controversy between parties or a challenge to the MLC's approach.[245]

Without opining on the merits of the MLC's interpretation, the Office proposed a rule concerning what related information DMPs should maintain or provide.[246] The NPRM distinguished among three categories of works.[247] First, the rule did not propose regulatory language to govern musical works licensed by a DMP prior to the license availability date because it did not seem necessary to disrupt whatever the status quo may be in such cases. Second, for musical works being used by a DMP prior to the effective date of that DMP's blanket license (which for any currently operating DMP should ostensibly be the license availability date) either pursuant to a NOI filed with the Office or without a license, the Office observed that this blanket license effective date may be the relevant license date, and proposed requiring each DMP to take an archival snapshot of its database as it exists immediately prior to that date to establish a record of the DMP's repertoire at that point in time. Last, for musical works that subsequently become licensed pursuant to a blanket license after the effective date of a given DMP's blanket license, the rule proposed requiring each DMP to keep and retain in its records, but not provide in monthly reports of usage, at least one of three dates for each sound recording embodying such a musical work: (1) Server fixation date; (2) date of the grant first authorizing the DMP's use of the sound recording; and (3) date on which the DMP first obtained the sound recording.

In response to the NPRM, in addition to further comments from the MLC and DLC, the Office received comments from a publisher, generally supporting the MLC's position, and a number of organizations representing songwriter interests that raised notes of caution regarding that position.[248] Following an *ex parte* meeting with commenters to further discuss the matter, the Office received additional written submissions

recording and musical work data fields except for sound recording name, featured artist, playing time, and DMP-assigned unique identifier.

[233] *Id.* at 9.

[234] The Office, therefore, disagrees with the DLC's proposed approach that ''the MLC should be left to progress these issues with DDEX in the absence of regulation or any other insertion of the Office into those ongoing discussions.'' *See* DLC Letter July 13, 2020 at 9. Especially considering that the DLC in other contexts argues that the Office should not ''delegate[ ] any future determination about the wisdom of adopting [reporting requirements] to a standards-setting body.'' *See* DLC NPRM Comment at 5, 10.

[235] MLC Letter July 13, 2020 at 7.

[236] DLC NPRM Comment at 6, 11; DLC Letter July 13, 2020 at 5.

[237] The NPRM had noted that the Office was contemplating a potential fourth scenario where reporting would have been considered practicable, *see* 85 FR at 22532, but since the Office is only retaining this limitation on reporting temporarily, the Office does not find it prudent to include the additional scenario. *See* DLC NPRM Comment at 6 (arguing that the scenario is ''not workable'' because it ''embeds too many questions, to which the answers are too subjective, for useful and operable regulation to take hold'').

[238] *See* 85 FR at 22532–33.

[239] MLC *Ex Parte* Letter Feb. 26, 2020 at 6.

[240] In this discussion, ''NOI'' refers to notices of intention to obtain a compulsory license under section 115. *See* 37 CFR 201.18.

[241] MLC *Ex Parte* Letter Apr. 3, 2020 at 6.

[242] MLC *Ex Parte* Letter Feb. 26, 2020 at 7.

[243] 85 FR at 22532.

[244] *Id.*

[245] *Id.* at 22532–33.

[246] *See id.* at 22533, 22546.

[247] *Id.*

[248] *See* MLC NPRM Comment at 26–32, App. at xiv–xv, xxviii–xxix; DLC NPRM Comment at 15–16, Add. at A–29–30; Peermusic NPRM Comment at 5–6; SONA & MAC NPRM Comment at 8–12; Recording Academy NPRM Comment at 3.

on this issue.[249] The record has benefited from this expansion of perspectives. Because the voting publisher members of the MLC's board must be publishers ''to which songwriters have assigned [certain] exclusive rights'' and the voting songwriter members of the MLC's board must be songwriters ''who have retained and exercise [certain] exclusive rights,'' the MLC's views, however well-meaning and informed, are not presumptively representative of the interests of those who may exercise termination rights in the future.[250] In sum, and as discussed below, commenters representing songwriter interests are generally deeply concerned with protecting termination rights and ensuring that those rights are not adversely impacted by anything in this proceeding or any action taken by the MLC; the MLC seeks reporting of information it believes it needs to operate effectively; and the DLC seeks to ensure that any requirements placed upon DMPs are reasonable. Additionally, there seems to be at least some level of agreement that knowing the date of first use of the particular sound recording by the particular DMP may be of some utility, and various additional dates other than server fixation date have been suggested to represent that date, such as the recording's street date (the date on which the sound recording was first released on the DMP's service).

Having considered these comments, the Office is adjusting the proposed regulatory language as discussed below. The Office also offers some clarifications concerning the underlying termination issues that have been raised and the MLC's related administrative functions. Although the NPRM suggested that the MLC's interpretation might be colorable, the Office's intent was neither to endorse nor reject the MLC's position; the Office made clear that it ''does not foreclose the possibility of other interpretations, but also does not find it prudent to itself elaborate upon or offer an interpretation of the scope of the derivative works exception in this particular rulemaking proceeding.'' [251] Indeed, a position contrary to the MLC's may well be valid, as the issue does not appear definitively tested by the courts. For example, Nimmer's treatise expresses the opinion that ''a compulsory license of rights in a musical work is not subject to termination'' because ''it is executed by operation of law, not by the consent of the author or his successors,'' [252] which Nimmer says means that where a songwriter (or heir) terminates an assignment to a publisher, ''at that point the compulsory license royalties would be payable solely to [the terminating songwriter (or heir)] as copyright owner[ ], rather than to [the terminated publisher] whose copyright ownership at that point would cease.'' [253]

The Office again stresses that in this proceeding it is not making any substantive judgment about the proper interpretation of the Copyright Act's termination provisions, the derivative works exception, or their application to section 115. Nor is the Office opining as to how the derivative works exception, if applicable, may operate in this particular context, including with respect to what information may or may not be appropriate to reference in determining who is entitled to royalty payments. To this end, as requested by several commenters representing songwriter interests and agreed to by the MLC, the interim rule includes express limiting language to this effect.[254]

In light of the additional comments, the Office is not convinced of the need for the MLC to implement an automatically administered process for handling this aspect of termination matters. Rather, as others suggest, it seems reasonable for the MLC to act in accordance with letters of direction received from the relevant parties, or else hold applicable royalties pending direction or resolution of any dispute by the parties.[255] The Office understands and appreciates the MLC's general need to operationalize its various functions and desire to have a default method of administration for terminated works in the normal course. The comments, however, suggest that this might stray the MLC from its acknowledged province into establishing what would essentially be a new industry standard based on an approach that others argue is legally erroneous and harmful to songwriters.[256] The information that may be relevant in administering termination rights may not be the same as what the MLC may be able to most readily obtain and operationalize.[257] While the MLC does intend to follow letters of direction, it states that they ''typically do not have [the necessary] level of detail, which underscores the importance of having a data point to assist with identifying whether first use by a DMP falls before or after statutory termination.'' [258] MAC, however, states that ''Letters of Direction universally supply an operative date.'' [259] In cases where the MLC lacks sufficient ownership and payment information resulting from termination of transfers, a cautious approach may be to simply continue holding the relevant royalties

[249] *See* U.S. Copyright Office Letter June 10, 2020; DLC *Ex Parte* Letter June 26, 2020; MLC *Ex Parte* Letter June 26, 2020; MAC *Ex Parte* Letter June 26, 2020; NSAI *Ex Parte* Letter June 26, 2020; Peermusic *Ex Parte* Letter June 26, 2020; Recording Academy *Ex Parte* Letter June 26, 2020; SGA *Ex Parte* Letter June 26, 2020; SONA *Ex Parte* Letter June 26, 2020.

[250] *See* 17 U.S.C. 115(d)(3)(D)(i)(I)–(II).

[251] *See* 85 FR 22532 & n.210.

[252] Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright sec. 11.02 n.121 (2020); *see Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 168 n.36 (1985) (referring to the section 115 license as ''self-executing''); *see also* Paul Goldstein, Goldstein on Copyright sec. 5.4.1.1.a. (3d ed. 2020) (''The requirement that, to be terminable, a grant must have been 'executed' implies that compulsory licenses, such as section 115's compulsory license for making and distributing phonorecords of nondramatic musical works, are not subject to termination.'').

[253] Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright sec. 11.02 n.121 (2020); *see Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 185 n.12 (1985) (White, J., dissenting) (stating that the statutory royalty for the section 115 license ''is payable to the current owner of the copyright''); *see also* Recording Academy *Ex Parte* Letter at 2 (June 26, 2020) (''[T]he Office's rulemaking should not imply or assume that a terminated party necessarily continues to benefit from the blanket license after termination.'').

[254] *See* SONA & MAC NPRM Comment at 12; MAC *Ex Parte* Letter June 26, 2020 at 2; Recording Academy *Ex Parte* Letter June 26, 2020 at 2–3; SGA *Ex Parte* Letter June 26, 2020 at 1–2; SONA *Ex Parte* Letter June 26, 2020 at 3–4; NSAI *Ex Parte* Letter June 26, 2020 at 1; MLC *Ex Parte* Letter June 26, 2020 at 4, 5; Peermusic *Ex Parte* Letter June 26, 2020 at 1–2.

[255] *See, e.g.,* SONA & MAC NPRM Comment at 11–12 (''The allocation of royalty income for a song as between the terminated grantee and the owner of the termination rights is a legal question and is typically communicated by the parties to a licensing administrator via a letter of direction. . . . To the extent a legal dispute were to arise . . . it would be best resolved by a court based on the facts of that particular dispute.''); MAC *Ex Parte* Letter June 26, 2020 at 3 (''MAC also questioned the operational reasoning for MLC gathering the server fixation data as MLC will ultimately rely on the parties to resolve disputes. After all, Letters of Direction universally supply an operative date.''); SONA *Ex Parte* Letter June 26, 2020 at 3 (''[T]ermination rights are typically administered according to letters of direction submitted by the interested parties . . .''); Recording Academy *Ex Parte* Letter June 26, 2020 at 2 (''[T]hese questions could be negotiated or litigated by future parties in a dispute.'').

[256] *See, e.g.,* SONA & MAC NPRM Comment at 8–11 (expressing ''serious reservations about [the MLC's] approach, which would seemingly redefine and could adversely impact songwriters' termination rights''); Recording Academy *Ex Parte* Letter June 26, 2020 at 2 (''MLC was erroneously using the server fixation date as a proxy for a grant of a license.''); SONA *Ex Parte* Letter June 26, 2020 at 2; MAC *Ex Parte* Letter June 26, 2020 at 2.

[257] *See* MLC NPRM Comment at 30–31 (arguing against aspects of the proposed rule by asserting, for example, that certain information ''would be impossible for the DMPs or the MLC to ascertain,'' ''the Proposed Regulation does not require [third-party] vendors to provide the NOIs or their dates,'' and ''[t]he MLC also may not have the date of a voluntary license''). *Cf. id.* at 30 (''An arbitrary decision by a DMP as to which date to provide cannot be the basis for determining whether the pre- or post-termination copyright owner is paid.'')

[258] MLC *Ex Parte* Letter June 26, 2020 at 4.

[259] MAC *Ex Parte* Letter June 26, 2020 at 3.

until it receives a letter of direction or other submissions from the relevant musical work copyright owner(s) that have sufficient detail to enable the MLC to carry out the parties' wishes.[260]

Moreover, if the MLC establishes a default process that applied the derivative works exception, the appropriate dividing line for determining who is entitled to relevant royalty payments remains unclear (and beyond the scope of this proceeding). SONA & MAC provide the following example to illustrate why ''the server-fixation approach could cause economic harm to songwriters'':

> [I]f a sound recording derivative is first reproduced on a server by DMP X in 2015 under a voluntary license granted by Publisher Y, and Songwriter Z terminates the grant to Publisher Y and recaptures her rights in 2020 before the blanket license goes into effect, under the server-fixation rule articulated by the MLC, the 'license date' for that derivative would be 2015. Accordingly, Publisher Y, rather than Songwriter Z, would continue to receive royalties for DMP X's exploitation of the musical work as embodied in that sound recording, even if the voluntary license came to an end and the DMP X began operating under the new blanket license as of January 1, 2021.[261]

Other suggested dates, such as street date, may raise similar questions. The same concern could arise after the license availability date as well—for example where a DMP in 2022 has both a blanket license and a voluntary license, the DMP first uses a work in 2024 pursuant to the voluntary license, a relevant termination occurs in 2028, the voluntary license expires in 2030, and afterward the DMP continues using the work but, for the first time, pursuant to its blanket license—because ''[w]here a voluntary license or individual download license applies, the license authority provided under the blanket license shall exclude any musical works (or shares thereof) subject to the voluntary license or individual download license.'' [262] In that instance, using SONA's nomenclature and assuming the derivative work exception applies, the work terminated in 2028 should see royalties payable to Songwriter Z starting in 2030 (once the pre-termination grant ends by its own terms), but a reliance upon the server fixation date would result in continued payment to Publisher Y. And following from the interpretation advanced regarding section 115 and termination rights, it seems that there may be other potentially relevant dates not raised by the commenters, for example: The date that the particular musical work becomes covered by the DMP's blanket license, *i.e.,* the date that it becomes ''available for compulsory licensing'' and not subject to a voluntary license or individual download license held by that DMP (*e.g.,* 2030 and post-termination in the previous example, as opposed to 2024 and pre-termination if a street, server, or other first-use date is applied).[263] Of course this would have to be assessed in conjunction with the date of creation of the relevant sound recording derivative.[264]

Additionally, while the MLC does not see its function as enforcing termination rights or otherwise resolving disputes over terminations or copyright ownership, stating repeatedly that it takes no position on what the law should be and that it is not seeking to change the law,[265] its position on the proposed rule may unintentionally be in tension with its stated goals.[266] For example, the MLC's view assumes the derivative works exception applies, would reject the alternative dates proposed by the NPRM because they ''will not resolve the issue of whether the pre- or post-termination rights owner is entitled to payment,'' and proposes receiving certain dates for works licensed before the license availability date despite its statement that customary practice is to use NOI dates instead.[267] Similarly, MLC board member Peermusic characterizes the MLC's approach as a '' 'fix' . . . to avoid confusion in the marketplace (and to head off disputes among copyright-owning clients of the MLC)'' by ''designat[ing]'' an ''appropriate substitute for the prior individual NOI license date.'' [268]

Based on the foregoing, it does not seem prudent to incentivize the MLC to make substantive decisions about an unsettled area of the law on a default basis. But the record also suggests that the transition to the blanket license represents a significant change to the status quo that may eliminate certain dates, such as NOI dates, that may have historically been used in post-termination activities, such as the renegotiation and execution of new agreements between the relevant parties to continue their relationship on new terms.[269] Perhaps as a result, after discussion, some commenters representing songwriter interests supported the preservation of various dates ''that may be pertinent and necessary to the determination of future legal issues.'' [270]

Accordingly, the interim rule maintains the proposed requirement for DMPs to retain certain information, adjusted as discussed below. The purpose of this rule is to aid retention of certain information that commenters

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[260] *Compare* MLC *Ex Parte* Letter Aug. 21, 2020 at 2 (indicating that ownership information pertaining to musical works in the public database ''will be sourced from copyright owners'').

[261] SONA & MAC NPRM Comment at 11; *see id.* at 8 (noting that termination rights ''are tied to *grants* of copyright interests—not when or where a work is reproduced''); SONA *Ex Parte* Letter June 26, 2020 at 3 (''SONA representatives underscored the distinction between utilization of a work and a license grant, which are not the same and should not be conflated . . .'').

[262] 17 U.S.C. 115(d)(1)(C)(i); *see also id.* at 115(d)(1)(B)(i).

[263] *See id.* at 115(d)(1)(B)(i), (C). The MLC states that ''[u]nder the new blanket license, there will no longer be a specific license date for each individual work; the license date for all musical works will be the date the DMP first obtained the blanket license, and that date could potentially remain in effect indefinitely for millions of musical works, even as new ones are created and subsequently become subject to the blanket license.'' MLC NPRM Comment at 27; *see also* Peermusic NPRM Comment at 5 (''[T]he NOL date will cover all works then subject to the compulsory license as well as all works created later, as long as the NOL remains in effect.''). But that is a significant and seemingly erroneous assumption with respect to works created post-blanket license or licensed voluntarily. *See* 17 U.S.C. 115(d)(1)(B)(i), (C). *Cf.* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 2310.3(C)(3) (3d ed. 2017) (''[A] transfer that predates the existence of the copyrighted work cannot be effective (and therefore cannot be 'executed') until the work of authorship (and the copyright) come into existence.'') (quotation omitted); *Waite* v. *UMG Recordings, Inc.,* No. 19–cv–1091(LAK), 2020 WL 4586893, at *6 (S.D.N.Y. Aug. 10, 2020) (''If a work does not exist when the parties enter into a transfer or assignment agreement, there is no copyright that an artist (or third party company) can transfer.'').

[264] *See Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 173 (1985) (''The critical point in determining whether the right to continue utilizing a derivative work survives the termination of a transfer of a copyright is whether it was 'prepared' before the termination. Pretermination derivative works—those prepared under the authority of the terminated grant—may continue to be utilized under the terms of the terminated grant. Derivative works prepared after the termination of the grant are not extended this exemption from the termination provisions.'').

[265] MLC *Ex Parte* Letter June 26, 2020 at 2; *see also* Peermusic *Ex Parte* Letter June 26, 2020 at 1; NSAI *Ex Parte* Letter June 26, 2020 at 1.

[266] *See* Recording Academy *Ex Parte* Letter June 26, 2020 at 1–2 (''Despite stating repeatedly that the MLC has no interest in altering, changing, or diminishing the termination rights of songwriters, it was clearly conveyed that one of the primary reasons for seeking this data is to determine the appropriate payee for the use of a musical work that is the subject of a termination. The Academy's view is that using the data in this way *would* diminish termination rights.'').

[267] *See* MLC NPRM Comment at 29; *see id.* at 30 (''The date provided will be the dividing line that will determine which copyright owner—the pre- or post-termination owner—will be paid.'').

[268] Peermusic NPRM Comment at 5–6; *see id.* at 6 (''[T]he alternatives proposed do not provide for the certainty that is required in establishing dates of grants under Sections 203 and 304.'').

[269] *See* Peermusic *Ex Parte* Letter June 26, 2020 at 1 (''[T]he MMA's elimination of individual NOIs has in fact already upset the status quo.'').

[270] *See* SGA *Ex Parte* Letter June 26, 2020 at 2; *see also* SONA *Ex Parte* Letter June 26, 2020 at 3, 4; NSAI *Ex Parte* Letter June 26, 2020 at 1.

have signaled may be useful in facilitating post-termination activities, such as via inclusion in letters of direction to the MLC, that may not otherwise be available when the time comes if not kept by the DMPs.[271] To be clear, the Office is not adopting or endorsing a specific ''proxy'' for a grant date.[272]

After considering relevant comments, including the MLC's arguments to the contrary, the interim rule maintains the NPRM's proposed approach of tiering the requirements according to when, out of three time periods, the musical work was licensed by a DMP.[273] Maintaining the status quo, the interim rule does not include regulatory language to govern musical works licensed by a DMP prior to the license availability date. If previous industry consensus was to use NOI dates (a factual matter the Office passes no judgment on), then the Office sees no reason why that should necessarily change.[274] As it has not been suggested that the relevant parties' access to historic NOI (or voluntary license) dates is any different than pre-MMA, it does not seem appropriate to require DMPs to retain any additional information for such parties' potential future use in directing the MLC with respect to this category of works.

Next, to provide a data point with respect to works that first become licensed as of a DMP's respective blanket license effective date, the interim rule largely adopts the proposed database snapshot requirement. The DLC does not object to this general requirement, but requests two modifications to the proposed language to be practical for DMPs to implement: The required data fields for the snapshot should be limited to those the MLC reasonably requires and that the DMP has reasonably available (which the DLC says are sound recording name, featured artist, playing time, and DMP-assigned unique identifier); and instead of the snapshot needing to be of the database as it exists immediately prior to the effective date of the DMP's blanket license, it should be as it exists at a time reasonably approximate to that date.[275] The MLC opposes the DLC's proposal to limit the data fields of the snapshot.[276] The Office finds the DLC's requested modifications to be reasonable, and adopts them with two slight changes. First, although requiring all of the data fields required for usage reporting and matching, as the MLC requests, seems unnecessary for the markedly different purpose of the snapshot, the interim rule adds ISRC (to the extent acquired by the DMP) so that, at least for most tracks, there is a second unique identifier in case the DMP-assigned unique identifier fails for some reason.[277] Second, while the Office finds that, based on the technological issues discussed in the DLC's comments, it is reasonable to permit the snapshot to be of a time reasonably approximate to the attachment of the DMP's blanket license, the interim rule requires DMPs to use commercially reasonable efforts to make the snapshot as accurate and complete as reasonably possible in representing the service's repertoire as of immediately prior to the effective date of the DMP's blanket license.

As for the last category—musical works that subsequently become licensed pursuant to a blanket license after the effective date of a given DMP's blanket license—the comments reflect that the proposed rule should be updated. As discussed below, the interim rule requires each DMP to retain, to the extent reasonably available, both the server fixation date and street date for each sound recording embodying a musical work that is part of this category. If a DMP only has one of these dates, it should retain that one. If a DMP has neither, then the DMP should retain the date that, in the assessment of the DMP, provides a reasonable estimate of the date the sound recording was first distributed on its service within the U.S. For each retained date, the DMP should also identify which type of date it is (*i.e.,* server date, street date, or estimated first distribution date), so any party seeking to use such information will know which date is being relied upon.[278]

This approach strives to accommodate the competing equities raised over this issue. The comments indicate some level of agreement that knowing the date of first use of the particular sound recording by the particular DMP may be of some utility—regardless of whether such date may or may not be the ''correct'' item to look at under the Copyright Act.[279] And among those commenters suggesting particular dates, there seems to be a general consensus that the server and street dates may be appropriate representations or approximations of first use.[280] Other proposed dates have not been included generally because they do not seem to be dates that DMPs would have in their possession, there lacks consensus that such dates would be useful, and/or confidentiality concerns have been raised by the RIAA with respect to private agreements between individual record companies and individual DMPs. Although confidentiality concerns were also broached by the RIAA over the server date and estimated first distribution date, the Office understands those concerns to be less significant than with other data and disputed by the DLC,[281] and the Office finds those

[271] *See, e.g.,* SGA *Ex Parte* Letter June 26, 2020 at 2; Recording Academy *Ex Parte* Letter June 26, 2020 at 2; SONA *Ex Parte* Letter June 26, 2020 at 4.

[272] SONA & MAC NPRM Comment at 10 (''There is no suggestion that the correct payee can or should be determined based upon a 'proxy' server fixation date or other than as provided in the Copyright Act.''); *id.* at 8, 10–11; SONA *Ex Parte* Letter June 26, 2020 at 2 (''[SONA] would be apprehensive of any rule treating a piece of data as a 'proxy' for a grant under copyright law.''); Recording Academy *Ex Parte* Letter June 26, 2020 at 3 (''The data . . . should not be interpreted to represent, or serve as a proxy for, a grant of a license.''); *id.* at 2.

[273] *See* MLC NPRM Comment at 30–31.

[274] *See id.*

[275] DLC NPRM Comment at 15–16 (explaining that ''the number of data fields and volume of data contained in the snapshot or archive is likely to be enormous—unduly burdensome and impractical both for the DMPs to produce and for the MLC to use,'' and that ''the process of creating the snapshot or archive will . . . involve so much data that it cannot be completed in a single day'' which means that ''works that are added to the service while the snapshotting or archiving process is underway may not ultimately be captured in the archive''); *id.* at 16 & n.66, Add. at A–30; DLC *Ex Parte* Letter June 26, 2020 at 4. While the DLC requests that the snapshot be at a time reasonably approximate to the ''license availability date,'' the Office believes the DLC meant for that to mean the effective date of the DMP's blanket license. This requirement will also apply to any new DMP that first obtains a blanket license at a time subsequent to the license availability date.

[276] *See* MLC *Ex Parte* Letter June 26, 2020 at 6–7.

[277] *See id.* (asserting that other fields like ISRC and version ''can be critical for aligning the records where the unique identifier fails'').

[278] *See* MLC NPRM Comment at 32, App. at xiv–xv (proposing DMPs identify which type of date it is).

[279] *See id.* at 32, App. at xiv; MLC *Ex Parte* Letter June 26, 2020 at 2 (''[T]he call confirmed consensus'' that DMPs should ''include a data field identifying a date that reflects the first use of each sound recording by the service.''); *id.* at 2–4, 6; SONA *Ex Parte* Letter June 26, 2020 at 4 (stating ''the initial utilization date can be critical''); *id.* at 3–4; SGA *Ex Parte* Letter June 26, 2020 at 2; NSAI *Ex Parte* Letter June 26, 2020 at 1.

[280] *See* MLC NPRM Comment at 32, App. at xiv; MLC *Ex Parte* Letter June 26, 2020 at 2–4, 6; SONA *Ex Parte* Letter June 26, 2020 at 4 (''[I]t seems that both server fixation date and the 'street date' specific to a particular DMP may be useful to establish initial utilization of a specific sound recording by a particular service.''); *id.* at 3; SGA *Ex Parte* Letter June 26, 2020 at 2; NSAI *Ex Parte* Letter June 26, 2020 at 1.

[281] *See* RIAA *Ex Parte* Letter Aug. 24, 2020 at 1–2. Potentially contradictory, despite concerns with the estimated first distribution date, the RIAA has no concerns with the date that a track is first streamed. *See id.* The DLC disagrees that the estimated first distribution date is confidential data because it is ''generated by the DMPs themselves, and therefore could not be considered proprietary to the record labels.'' DLC *Ex Parte* Letter Aug. 27, 2020 at 2. It also states that dates generated by DMPs themselves should not be confidential. The Office is considering confidentiality issues

concerns as articulated to be outweighed by the need to provide DMPs with a reasonable degree of flexibility in carrying out the obligations this aspect of the interim rule places upon them.

The dates incorporated into the interim rule represent three of the four dates for which the DLC said would be feasible for DMPs to retain at least one.[282] Although the Office declines to include the fourth date, ingestion date, because there was no consensus as to its utility,[283] the interim rule does include the DLC's proposed ''catch-all'' estimated first distribution date, such that all DMPs should be able to comply with the rule even if not in possession of a server or street date for a given recording.[284] For this same reason, and also because the retention requirement is limited to where the server and street dates are reasonably available to the DMP, the requirement to potentially have to retain both of these dates (where available), instead of merely a single date of the DMP's choosing, is not anticipated to be overly burdensome.[285]

The Office again declines the MLC's suggestion that DMPs should have to provide this information in their monthly reports of usage, instead encouraging the MLC to view the administration of terminations of transfers as more akin to one of a number of changes in musical work ownership or licensing administration scenarios the MLC is readying itself to administer apart from the DMPs' monthly usage reporting. Although the MLC warns of processing inefficiencies and potential delays if it does not receive the pertinent information in monthly reporting, it is unclear why this would be the case.[286] As discussed above, the Office presumes the MLC will be operating in accordance with letters of direction (or other instructions or orders) that provide the requisite information needed for the MLC to properly distribute the relevant royalties to the correct party. In cases where the MLC is directed to use the DMP-retained information, it would seem that the MLC, as a one-time matter, could pull the information for each DMP for that work and apply it appropriately. The DLC makes a similar observation and further explains that monthly reporting is unnecessary because ''termination is relevant to only a subset of musical works . . . [a]nd only a (likely small) subset of grants are terminated in any event,'' and that ''as to each work, termination is an event that happens once every few *decades*.'' [287] The MLC does not address these points. While the MLC seems to characterize its need for this data as a usage matching issue, it seems more appropriately understood as a change in ownership issue, and the record does not address why a change in ownership prompted by a termination of transfer would be materially more difficult to operationalize than any other change in ownership the MLC will have to handle in the ordinary course, including by following the procedures recommended by its dispute resolution committee.

Nevertheless, the Office recognizes that it may take more time for the MLC to request access to the relevant information from the DMPs, rather than having it on hand upon receiving appropriate direction about a termination. While not requiring monthly reporting, the interim rule requires DMPs to report the relevant information to the MLC annually and grant the MLC reasonable access to the records of such information if needed by the MLC prior to it being reported. The DLC previously requested that if the Office requires affirmative reporting of this information that it be on a quarterly basis and subject to a one-year transition period, so the Office believes this to be a reasonable annual requirement.[288] The Office also expects this adjustment to alleviate some of the MLC's concerns with the proposed rule's retention provision discussed above.[289] This reporting may, but need not, be connected to the DMP's annual report of usage, and DMPs may of course report this information more frequently at their option. Such reporting should also include the same data fields required for the snapshot discussed above to assist in work identification and reconciliation. Information for the same track does not need to be reported more than once. With respect to the required snapshot discussed above, that should be delivered to the MLC as soon as commercially reasonable, but no later than contemporaneously with the first annual reporting.

2. Royalty Payment and Accounting Information

The NPRM required DMPs that do not receive an invoice from the MLC to provide ''a detailed and step-by-step accounting of the calculation of royalties payable by the blanket licensee under the blanket license . . . including but not limited to the number of payable units . . . *whether pursuant to a blanket license, voluntary license, or individual download license*.'' [290] Similarly, blanket licensees that do receive an invoice are required to provide ''all information necessary for the mechanical licensing collective to compute . . . the royalties payable under the blanket license . . . including but not limited to the number of payable units . . . *whether pursuant to a blanket license, voluntary license, or individual download license*.'' The DLC asked the Office to confirm its understanding that this language only requires reporting usage information, not royalty payment or accounting information, for any uses under voluntary licenses or individual download licenses.[291] The DLC is correct in its understanding that the language requires DMPs to report only usage information for uses made under voluntary or individual download licenses.

The International Confederation of Societies of Authors and Composers (''CISAC'') & the International Organisation representing Mechanical

concerning the MLC in a parallel rulemaking. *See* 85 FR 22559 (Apr. 22, 2020).

[282] *See* DLC *Ex Parte* Letter June 25, 2020 at 2–3. Although the DLC had previously discussed street date in terms of an ERN data field called ''StartDate,'' which the Office understands to be more of a planned or intended street date that does not necessarily equate to the actual street date (and which the RIAA says the use of would raise confidentiality concerns, *see* RIAA *Ex Parte* Letter Aug. 24, 2020 at 1), the DLC does not object to using the actual street date, so long as it is not the only date option. *See* DLC *Ex Parte* Letter Aug. 27, 2020 at 2.

[283] *See* MLC NPRM Comment at 30 (''The 'date on which the blanket licensee first obtains the sound recording' is . . . vague and can be interpreted many different ways by many different DMPs, resulting in inconsistent dates.''). The RIAA also raised confidentiality concerns over this date, RIAA *Ex Parte* Letter Aug. 24, 2020 at 1–2, but the DLC disputes that this information can properly be considered confidential, DLC *Ex Parte* Letter Aug. 27, 2020 at 2.

[284] *See* DLC *Ex Parte* Letter June 26, 2020 at 3.

[285] *See id.* at 2 (''[DMPs] should be given a choice of the date to report, based on the [DMP's] specific operational and technical needs.''); *id.* at 3 n.4.

[286] *See* MLC *Ex Parte* Letter June 26, 2020 at 4 (''If instead that data was only maintained in records of use and not reported monthly, the MLC would be required to create a parallel monthly reporting process, and that process would not be able to begin until after the MLC received the regular usage reporting, at which point the MLC would need to contact each DMP each month to request the data, and then each DMP would have to send a separate transmission with such data, which the MLC would have to reintegrate with all of the data that had been reported in the standard monthly reporting.''); MLC NPRM Comment at 31; *see also* Peermusic *Ex Parte* Letter June 26, 2020 at 2; NSAI *Ex Parte* Letter June 26, 2020 at 1.

[287] DLC *Ex Parte* Letter June 26, 2020 at 3; *see id.* at 4 (''The MLC has not adequately justified imposing the investment that would be required by DSPs to engineer their reports of usage to include this date field.'').

[288] *See id.* at 4.

[289] It also renders moot Peermusic's concerns about the length of the proposed rule's retention period. *See* Peermusic NPRM Comment at 6; Peermusic *Ex Parte* Letter June 26, 2020 at 2.

[290] 85 FR at 22541 (emphasis added).

[291] DLC NPRM Comment at 12.

Rights Societies (''BIEM'') raised a pair of issues which the Office address here. First, CISAC & BIEM said, ''[t]he Proposed Rulemaking does not provide rules enabling the MLC to compute and check the calculation of the royalty payment, which will be based on information provided unilaterally by DMPs, with no clear indication of the amount deducted for the performing rights' share.'' [292] CISAC & BIEM additionally proposed that the interim rule ''introduce clear provisions on back-claims in order to enable the MLC to claim works after the documentation has been properly set in the MLC database. For instance, the MLC should be able to invoice works previously used by DMPs, but which had not been ingested until afterwards into the MLC database, or which were subject to conflicting claim [sic].'' [293] Regarding the first issue, the Office believes the statute and proposed rule already adequately address CISAC & BIEM's concern. The MLC has access to DMP records of use under the interim rule and the statutory right to conduct a triennial audit to confirm the accuracy of royalty payments, which together provide the MLC with sufficient ability to compute and check DMP calculations of royalty payments.[294]

Regarding the second issue, the statute and proposed regulations also already address the substance of CISAC & BIEM's proposal.[295] Upon receiving reports of usage from DMPs, the MLC will be able to match royalties for musical works where it has data identifying the work and copyright owner. For those works that are not initially matched due to insufficient data, the MLC is required to engage in ongoing matching efforts.[296] As part of those efforts, the MLC is required to create and maintain a database of musical works that identifies their copyright owners and the sound recordings in which they are embodied.[297] The MLC is expected to employ a variety of automated matching efforts, and also manual matching in some cases. Musical work copyright owners themselves are required to ''engage in commercially reasonable efforts'' to provide information to the MLC and its database regarding names of sound recordings in which their musical works are embodied.[298] The MLC will operate a publicly accessible claiming portal through which copyright owners may claim ownership of musical works, and will operate a dispute resolution committee for resolving any ownership disputes that may arise over musical works, including implementation of ''a mechanism to hold disputed funds pending the resolution of the dispute.'' [299]

Together, these provisions provide mechanisms that Congress considered to be reasonably sufficient for ensuring that royalties that are not initially matched to musical works are ultimately distributed to copyright owners once either (1) the musical work or copyright owner is identified and located through the MLC's ongoing matching efforts, or (2) the work is claimed by the copyright owner, which is what CISAC & BIEM are essentially proposing, as the Office understands it.

Separately, but relatedly, CISAC & BIEM recommended the Office promulgate regulations on ''issues such as dispute resolution procedures or claiming processes that would allow Copyright Owners to raise identification conflicts before the MLC,'' and asked, ''How will claims be reconciled in case a work is also covered by a voluntary licence? Is the MLC also in charge of matching voluntary licences?'' [300] Regarding the first question, as noted above, a DMP is required to provide the MLC with applicable voluntary license information as part of its NOL. Thus, instances where the MLC erroneously distributes blanket license royalties for a work that is covered by a voluntary license should be minimal. Disputes over which license is applicable to a given work will be addressed by procedures established by the MLC's dispute resolution committee. The statute provides that this committee ''shall establish policies and procedures . . . for copyright owners to address in a timely and equitable manner disputes relating to ownership interests in musical works licensed under this section,'' although actions by the MLC will not affect the legal remedies available to persons ''concerning ownership of, and entitlement to royalties for, a musical work.'' [301]

Regarding the second question, the MLC will, as part of its matching efforts, ''confirm uses of musical works subject to voluntary licenses'' and deduct those amounts from the royalties due from DMPs.[302] The MLC does not otherwise administer voluntary licenses unless designated to do so by copyright owners and blanket licensees.[303]

i. Late Fees

The NPRM was silent on the issue of when late fees are imposed on adjustments to estimates. As it did in comments to the NOI, the DLC called for language to ensure DMPs are not subject to late fees for adjustments to estimates after final figures are determined, so long as adjustments are made ''either before (as permitted under the Proposed Rule) or with the annual report of adjustment or, if not finally determined by then, promptly after the estimated amount is finally determined.'' [304] In support of its proposal, the DLC said, ''[a]lthough the CRJs set the *amount* of the late fee, the Office is responsible for establishing *due dates* for adjusted payments. It is those due dates that establish whether or not a late fee is owed.'' [305] Several commenters objected to this proposal.[306] In particular, the MLC was ''troubled by the DLC's arguments'' and explained that ''if the DMPs are concerned about having to pay late fees, whenever they estimate an input they should do so in a manner that ensures that there will not be an underpayment of royalties. To permit DMPs to estimate inputs in a manner that results in underpayment to songwriters and copyright owners, without the penalty of late fees, encourages DMPs to underpay, to the detriment of songwriters and copyright owners.'' [307] The MLC proposed to add language prescribing that no use of an

[292] CISAC & BIEM NPRM Comment at 3–4.

[293] *Id.* at 4.

[294] 17 U.S.C. 115(d)(4)(D). DMPs are also required to have annual reports of usage certified by a CPA, providing an additional check on the accuracy of royalties.

[295] The Copyright Office has commissioned and published a report on *Collective Rights Management Practices Around the World* as baseline informational material for the public to reference in replying to a notice of inquiry seeking public comment in connection with the Office's policy study regarding best practices the MLC may implement to reduce the overall incidence of unclaimed royalties. Susan Butler, *Collective Rights Management Practices Around the World: A Survey of CMO Practices to Reduce the Occurrence of Unclaimed Royalties in Musical Works* 3 (2020), *https://www.copyright.gov/policy/unclaimed-royalties/CMO-full-report.pdf*. The report may also be helpful in highlighting the similarities and differences between the MLC's processes and existing processes used by foreign CMOs as they pertain to this proceeding.

[296] 17 U.S.C. 115(d)(3)(C)(i)(III).

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

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

[299] *Id.* at 115(d)(3)(K)(ii), (J)(iii)(I); MLC Initial NOI Comment at 84, U.S. Copyright Office Dkt. No. 2018–11, available at *https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2018-0011&refD=COLC-2018-0011-0001*. The MLC is required to ''deposit into an interest-bearing account . . . royalties that cannot be distributed due to . . . a pending dispute before the dispute resolution committee . . .'' 17 U.S.C. 115(d)(3)(G)(i)(III)(bb).

[300] CISAC & BIEM NPRM Comment at 4.

[301] 17 U.S.C. 115(d)(3)(K).

[302] *Id.* at 115(d)(3)(G)(i)(I)(bb).

[303] *Id.* at 115(d)(11)(C), (d)(3)(C)(iii).

[304] DLC NPRM Comment at 14.

[305] *Id.*

[306] *See* MLC NPRM Comment at 36–37; AIMP NPRM Comment at 4–5; Peermusic NPRM Comment at 5.

[307] MLC NPRM Comment at 36–37.

estimate changes or affects the statutory due dates for royalty payments or the applicability of late fees to any underpayment of royalties that results from using an estimate.[308] AIMP raised general concerns about the problem of late royalty payments and said ''expanded use of estimates, and the result of retroactive adjustment of royalty payments, does create increased risk and additional burden to copyright owners.'' [309] And Peermusic wrote that it ''appreciate[d] the Copyright Office's rejection of the DLC request that underpayments, when tied to 'estimates,' should not be subject to the late fee provision of the CRJ regulations governing royalties payable under Section 115, and we would request that the regulations be clear on this point.'' [310]

After careful consideration, the Office has adopted the language as proposed in the NPRM.[311] The Office appreciates the need for relevant regulations to avoid unfairly penalizing DMPs who make good faith estimates from incurring late fees due to subsequent finalization of those inputs outside the DMPs' control, and also to avoid incentivizing DMPs from applying estimates in a manner that results in an initial underpayment that delays royalty payments to copyright owners and other songwriters. Under the currently operative CRJ regulation, late fees are due ''for any payment owed to a Copyright Owner and remaining unpaid after the due date established in [ ] 115(d)(4)(A)(i),'' [312] that is, ''45 calendar days [ ] after the end of the monthly reporting period.'' [313] The statute itself specifies that where ''the Copyright Royalty Judges establish a late fee for late payment of royalties for uses of musical works under this section, such fee shall apply to covered activities under blanket licenses, as follows: (i) Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.'' [314] Meanwhile, the Office is now adopting, as directed by statute, regulations regarding adjustments to these reports, including ''mechanisms to account for overpayment and underpayment of royalties in prior periods'' and associated timing for such adjustments.[315] It is not clear that the best course is for the Office to promulgate language under this mandate that accounts for the interplay between the CRJs' late fee regulation and the Office's interim rule's provision for adjustments, particularly where the CRJs may wish themselves to take the occasion of remand or otherwise update their operative regulation in light of the interim rule.[316] The Office intends to monitor the operation of this aspect of the interim rule, and as appropriate in consultation with the CRJs.

ii. Estimates

The Office also declines to adopt the MLC's proposal to narrow a DMP's ability to use estimates for any inputs that cannot be finally determined at the time a report of usage is due, an ability the MLC described as ''overly broad and permissive.'' [317] The Office concludes that the NPRM does not provide unwarranted discretion to DMPs to use estimates. An input is either finally determined at the time a report of usage is due or it is not, and in the latter case, the rule provides that a DMP can only rely on estimates when the reason for the lack of a final input is beyond the DMP's control. Furthermore, the Office notes that while the MLC originally proposed limiting the use of estimates to performance royalties,[318] it has now expanded its proposal to include two additional circumstances where DMPs could provide estimates that the Office provided as examples in the NPRM preamble (total cost of content and inputs, subject to bona fide, good faith disputes between the DMP and a third party).[319] The Office believes the interim rule will benefit from the flexibility the current language provides and, based on the current record, that the potential for abuse is minimal.

The Office does appreciate the concerns raised by the MLC and others regarding the use of estimates, so while it declines to narrow the ability to use estimates, it has adopted the majority of the MLC's proposal to require DMPs using estimates to ''(i) clearly identify in its Usage Report any and all royalty calculation inputs that have been estimated; (ii) provide the justification for the use of estimate; (iii) provide an explanation as to how the estimate was made, and (iv) in each succeeding Usage Report, provide an update and report on the status of all estimates taken in prior statements.'' [320] The interim rule includes the first three requirements but not the fourth; the Office believes the rules provide sufficient transparency because they already include deadlines for making adjustments of estimates and require DMPs to explain reason(s) for adjustments when they deliver a report of adjustment after the estimate becomes final.

One additional scenario where DMPs may need to rely on estimates is where a DMP is operating under both the blanket license and voluntary licenses, has not filed a report of usage within 15 days of the end of the applicable reporting period, and thus will not receive an invoice prior to the royalty payment deadline, but will receive notification from the MLC of any underpayment or overpayment by day 70.[321] The MLC acknowledged the need for estimates under these circumstances, but added, ''there should not be an extensive delay between the time of the estimate and the time the adjustment based on actual usage can be made. The required adjustment should be made within 5 calendar days of the provision to the DMP of the response file, and the DMP should not be permitted to make this adjustment 18 months after the estimate, as is currently permitted in the Proposed Regulation by reference to § 210.27(k).'' [322] The interim rule adopts the MLC's proposed amendment, and no report of adjustment is required in that circumstance.

iii. Invoices and Response Files

A persistent issue throughout this rulemaking has been how the regulations should address the

[308] MLC NPRM Comment App. at xiv.

[309] AIMP NPRM Comment at 4–5.

[310] Peermusic NPRM Comment at 5.

[311] Relatedly, though, the Office understands that a DMP following the adjustment process laid out in the regulations should not be deemed in default for failure to make earlier payments, provided the adjustment is timely made. For example, if a DMP made a reasonable good-faith estimate of a performance royalty that turned out to result in a significant underpayment of the relevant mechanical royalties, upon the establishment of the final rates, as long as the DMP paid the remainder mechanical royalties in accordance with the adjustment process, neither this timing nor the underpayment would be deemed material or otherwise put the DMP in default.

[312] 37 CFR 385.3.

[313] 17 U.S.C. 115(d)(4)(A)(i).

[314] *Id.* at 115(d)(8)(B).

[315] *Id.* at 115(d)(4)(A)(iv)(II).

[316] *See* 85 FR at 22530 (''Any applicable late fees are governed by the CRJs, and any clarification should come from them.'').

[317] MLC NPRM Comment at 33. *See also* AIMP NPRM Comment at 4–5 (''It is also important to note that expanded use of estimates, and the result of retroactive adjustment of royalty payments, does create increased risk and additional burden to copyright owners''); Peermusic NPRM Comment at 5 (''Peermusic is particularly concerned about what appears to an expansion in the proposed rules to DMP's use of estimates in royalty calculations'').

[318] 85 FR at 22530.

[319] *Compare* MLC NPRM Comment App. at xii–xiii, *with* 85 FR at 22530 (inputs subject to bona fide, good faith disputes between the DMP and a third party), 85 FR at 22541 (''the amount of applicable consideration for sound recording copyright rights'').

[320] MLC NPRM Comment at 34; *see also* AIMP NPRM Comment at 5; Peermusic NPRM Comment at 5.

[321] MLC NPRM Comment at 34–35.

[322] *Id.*

choreography between a DMP and the MLC through which a DMP receives royalty invoices and response files from the MLC after delivering monthly reports of usage, but before royalty payments are made or deducted from a DMP's account with the MLC.[323] Although the MMA does not explicitly address invoices and response files, the DLC has consistently articulated the importance of addressing requirements for each in Copyright Office regulations.[324] The Office endeavored in its NPRM to balance the operational concerns of all parties consistent with the MMA's legal framework and underlying goals. The DLC, MLC, and Music Reports each commented on this aspect of the NPRM, and the interim rule updates the proposed rule in some ways based on these comments, as discussed below.[325]

While ''appreciat[ing]'' the proposed rule's general approach, the DLC recommended requiring the MLC to provide an invoice to a DMP five days earlier than what the Office proposed.[326] The Office declines to adopt this recommendation because it believes the timeline in the proposed rule is reasonable and can be adjusted if necessary once the blanket license becomes operational. The Office also declines to add the MLC's proffered amendment that would only require it to ''engage in efforts'' to deliver an invoice within 40 days after the end of the reporting period for timely reports of usage; the MLC has represented that 25 days is sufficient for it to process a report of usage and return an invoice, so if a DMP submits a report of usage within the time period entitling it to an invoice under the interim rule (which is 30 days earlier than it is required to submit a report of usage under the statute), it seems reasonable for the DMP to have certainty that it will receive an invoice prior to the statutory royalty payment deadline.[327]

The interim rule clarifies when the MLC must provide a response file to a DMP. The rule essentially takes the approach proposed by the MLC that eliminates any set deadline for the MLC to provide a response file if a DMP fails to file a report of usage within the statutory timeframe,[328] by providing that the MLC need only provide a response file ''in a reasonably timely manner'' in such circumstances. It also accepts the DLC's recommendation of permitting a DMP to request an invoice even when it did not submit its monthly report of usage within 15 calendar days after the end of the applicable monthly reporting period. [329]

The MLC asked the Office to clarify that a DMP is required by statute to pay royalties owed within 45 days after the end of the reporting period, even if the MLC is unable to deliver a response file within the time period required under the rule, and that the rule should only require the MLC to ''use its efforts'' to meet the interim response file deadline.[330] The Office declines to adopt this proposal—the payment deadline is already spelled out in the statute, so any rule would be redundant.[331]

The NPRM provided that response files should generally ''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 DMPs by applicable third-party administrators.'' The DLC requested that the rule ''should provide further specification and detail regarding the content'' in response files to ''ensure the regular and prompt receipt of necessary accounting information.'' [332] Specifically, the DLC proposed requiring the following fields: ''song title, vendor-assigned song code, composer(s), publisher name, publisher split, vendor-assigned publisher number, publisher/license status, [ ] royalties per track[,] . . . top publisher, original publisher, admin publisher and effective per play rate[,] and time adjusted plays.'' [333] In an *ex parte* meeting, the MLC reiterated its position that the regulations need not set forth this level of detail, but confirmed that it intended to include the information identified by the DLC in response files.[334] The interim rule adopts the DLC's proposal to spell out the minimum information required in response files, with the Office using language that conforms with the MLC's terminology.

Finally, the Office has added language that permits DMPs to make a one-time request for response files in light of comments from the DLC stating that ''the operational need for a response file is unlikely to change from month to month.'' [335]

The Office recognizes the above provisions addressing invoices and response files include a number of specific deadlines for both the MLC and DMPs and understands that they have been made based on reasonable estimates, but that before the blanket license becomes operational they remain only estimates. The Office would welcome updates from the MLC's operations advisory committee, or the MLC or DLC separately if, once the process becomes operational, the parties believe changes are necessary.

iv. Adjustments

The DLC proposed deleting two portions of the proposed rule addressing reports of adjustments: First, the requirement that DMPs include in the description of adjustment ''the monetary amount of the adjustment'' and second, the requirement to include ''a detailed and step-by-step accounting of the calculation of the adjustment sufficient to allow the mechanical licensing collective to assess the manner in which the blanket licensee determined the adjustment and the accuracy of the adjustment.'' [336] The DLC explained, ''[a]lthough DMPs must provide *inputs* to the MLC, it is typically the MLC, not the providers, that will use those inputs to perform a 'step-by-step accounting' and determine the 'monetary amount[s]' due to be paid.'' [337] In response, the MLC confirmed its shared understanding that it would be verifying this math and did not oppose the DLC's proposal.[338] The MLC proposed additional language, modeled off language in the monthly usage reporting provisions found in § 210.27(d)(1)(ii) of the proposed rule to confirm ''that DMPs must always provide all necessary royalty pool calculation information.'' [339] Finding the above reasonable, the Office adopts the DLC's proposal with the addition of the language proposed by the MLC.

The DLC separately requested that the rule permit a DMP the option of

[323] *See* 85 FR at 22528.

[324] DLC Initial NOI Comment at 13; DLC Reply NOI Comment at 13–16; DLC *Ex Parte* Letter Feb. 14, 2020.

[325] Music Reports' suggestion that the MLC includes a unique, persistent numerical identifier for individual shares of a work in response files is addressed above.

[326] DLC NPRM Comment at 12.

[327] 85 FR at 22528.

[328] MLC NPRM Comment at 43–44. This concern stems from the requirement that the MLC provide response files within 70 days of the end of the applicable month. The MLC suggested that the text of the rule could be read to require a response file from the MLC on day 70 even if a DMP submitted a usage report on day 69, which would be operationally untenable. *Id.* at 44.

[329] DLC NPRM Comment at 12–13.

[330] MLC NPRM Comment at 43.

[331] 17 U.S.C. 115(d)(4)(A)(i).

[332] DLC NPRM Comment at 13.

[333] *Id.* (internal quotation marks omitted).

[334] MLC *Ex Parte* Letter Aug. 16, 2020 at 3.

[335] DLC NPRM Comment at 12 n.48. The DLC added, ''[w]e understand from our initial conversations with the MLC that it plans to provide such a mechanism.'' *Id.*

[336] *Id.* at 13–14.

[337] *Id.* at 13.

[338] MLC *Ex Parte* Letter Aug. 16, 2020 at 2.

[339] *Id.*

requesting a refund for overpayments instead of an offset or credit.[340] The Office has added this option to the rule.[341]

Regarding the permissible categories that may be adjusted for annual reports of usage, ARM suggested a slight expansion of the audit exception in the proposed rule to include audits by sound recording copyright owners.[342] It explained that ''[i]t is highly unlikely that an audit by a sound recording copyright owner would be completed before an annual statement issues, meaning that there should be an exception for adjusting TCC in past annual statements based on a sound recording audit.'' [343] The Office accepts ARM's suggestion as reasonable and has added slightly broader language to permit a report of adjustment adjusting an annual report of usage following any audit of a blanket licensee.

3. Format and Delivery

The MLC and DLC each offered suggested changes to the report of usage format and delivery requirements. The MLC asked that DMPs that either also engage in voluntary licensing or operate as ''white-label'' services be excluded from being able to use a simplified format for reports of usage.[344] The DLC recommended amending the proposed rule in the opposite direction and permit all DMPs, regardless of size or level of sophistication, to elect to use a simplified report of usage format.[345] The Office declines to make either change. As noted in the NPRM, ''[i]n accord with both the MLC and DLC proposals, the Office does not propose to provide more detailed requirements in the regulations, in order to leave flexibility as to the precise standards and formats.'' [346] The NPRM proposed to ''require the MLC to offer at least two options, where one is dedicated to smaller DMPs that may not be reasonably capable of complying with the requirements that the MLC may see fit to adopt for larger DMPs.'' [347] The DLC's proposal runs contrary to the logic for requiring a simplified format. And the MLC's proposal would seem unnecessary given the flexibility afforded by the rule; the MLC retains the discretion to include limitations in its format requirements that address its concerns, and its ability to work with DMPs to develop such requirements would likely produce more optimal results on this issue than bright-line regulations developed by the Office.

The Office has adopted the DLC's proposal to include a requirement that the MLC provide DMPs with confirmation of receipt of both reports of usage and payment.[348] The Office additionally has determined that such confirmation should be provided within a specified time period and believes that two business days is reasonable, given that this process will likely be automated.

i. Modification of Report of Usage Format Requirements

The DLC raised concerns about what it describes as the ''unfettered authority'' for the MLC to modify format and payment method requirements and proposed the addition of procedural guardrails in the rule, specifically, ''that the MLC cannot impose new requirements under Section 210.27(h) except after a thorough and good-faith consultation with the Operations Advisory Committee established by the MMA, with due consideration to the technological and cost burdens that would result, and the proportionality of those burdens to any expected benefits.'' [349] Although the Office assumes that the MLC and DLC will regularly consult on these and other operational issues, particularly through the operations advisory committee, it has added the suggested language to the interim rule.

The DLC raised a related concern that this provision ''could be used [by the MLC] to override the Office's determinations about the appropriate content of the reports of usage.'' [350] The Office adopts the DLC's proposed language prohibiting the MLC from imposing reporting requirements otherwise inconsistent with this section.

Next, the DLC proposed increasing the time period in which DMPs must implement modifications made by the MLC to reporting or data formats or standards from six months to one year, noting the operational challenges for services to ''implement new data fields and protocols on a platform-wide basis.'' [351] The Office is persuaded by the DLC's explanation and incorporates the proposal in the interim rule.

Finally, the DLC also expressed concern that a proposed provision which addressed instances of IT outages by the MLC did not encompass instances where the DMP is unaware of the outage resulting in a usage report or royalty payment not being received by the MLC.[352] It stated, ''[l]icensees should not be held to a strict 2- or 5-day deadline to rectify problems of which they are not immediately aware,'' and proposed regulatory language to address this scenario.[353] The Office has adopted this proposal in the interim rule.

ii. Certification of Monthly and Annual Reports of Usage

The NPRM included rules regarding certification by DMPs of both monthly and annual reports of usage, which generated a number of comments. SGA supported the annual certification requirement, saying, ''[t]his tool of oversight is essential to the smooth functioning of the MLC, and will assist in the fulfillment of three of the most important mandates of the Act: efficiency, openness and accountability.'' [354] SONA supported the certification requirements in general and specifically called the annual certification requirement ''imperative,'' saying, ''[t]his level of certification is a fundamental element of promoting accuracy and transparency in royalty reporting and payments to copyright owners whose musical works are being used by these DMPs.'' [355] As noted above, the MLC proposed an amendment to the certification requirement with respect to data collection efforts.[356] Finally, the DLC proposed two amendments, discussed in turn below.

First, the DLC proposed language to address its concern that the proposed rule would require DMPs to certify royalty calculations they do not make,

[340] DLC NPRM Comment at 14.

[341] The Office has also made clear that any underpayment is due from DMPs contemporaneously with delivery of the report of adjustment, or promptly after being notified by the mechanical licensing collective of the amount due.

[342] ARM NPRM Comment at 5 n.4.

[343] *Id.*

[344] MLC NPRM Comment at 42.

[345] DLC NPRM Comment at 10.

[346] 85 FR at 22534.

[347] *Id.* Separately, the Office notes the reply comments from Music Librarians, Archivists, and Library Copyright Specialists in response to the NOI, which encouraged ''the Office to include options in the new blanket licensing structure appropriate for libraries, archives, museums, and other educational and cultural institutions.'' Quilter, et al. Reply NOI Comment at 1. Although those comments spoke broadly about flexible licensing options, and the Office cannot expand the statutory contours of the section 115 compulsory license, the requirement for the MLC to provide a simplified report of usage format can be seen as one specific way for ensuring the blanket license is a workable option for the types of nonprofit and educational institutions identified in the comment.

[348] DLC NPRM Comment at 13.

[349] *Id.* at 11.

[350] *Id.* at 10.

[351] *Id.* at 11.

[352] *Id.* at 17.

[353] *Id.*

[354] SGA NPRM Comment at 2.

[355] SONA NPRM Comment at 5; *see id.* at 4 (''SONA and MAC are pleased that the Copyright Office has confirmed the importance of robust certification requirements for usage reports provided under blanket licenses by DMPs.'').

[356] MLC NPRM Comment at 10–11; *see also* Peermusic NPRM Comment at 4 (agreeing with MLC's recommendation for ''robust certification of compliance'').

since it is the MLC that generally bears responsibility for applying and calculating the statutory royalties based on the DMPs' reported usage.[357] The Office has adopted the majority of the DLC's proposed language, with some changes. First, the interim rule uses the language ''to the extent reported'' in place of the DLC's proposed ''only if the blanket licensee chose to include a calculation of such royalties.'' The Office believes this more accurately clarifies that, under the blanket license, DMPs are no longer solely responsible for making all royalty calculations.[358] Notwithstanding this clarification, the Office draws attention to the interim rule's further requirement that DMPs must still certify to any underlying data necessary for such calculations.

Second, the DLC commented that ''there are inconsistencies in the regulatory text's description of the accountant's certifications. After consulting with the auditor for one of the DLC member companies, we have proposed changes that use more consistent language throughout and are in better alignment with the relevant accounting standards and practices.'' [359] No party raised objections to these proposed technical changes. The Office believes it is reasonable to largely accept the representation that this language better conforms to and reflects standard accounting practices and has largely adopted the DLC's proposed language.[360]

iii. Voluntary Agreements to Alter Process

The NPRM ''permit[ted] individual DMPs and the MLC to agree to vary or supplement the particular reporting procedures adopted by the Office—such as the specific mechanics relating to adjustments or invoices and response files,'' with two caveats to safeguard copyright owner interests.[361] ''First, any voluntarily agreed-to changes could not materially prejudice copyright owners owed royalties under the blanket license. Second, the procedures surrounding the certification requirements would not be alterable because they serve as an important check on the DMPs that is ultimately to the benefit of copyright owners.'' [362] Two commenters raised concerns with this proposal. FMC appreciated the proposal but asked the Office to consider ''language to stipulate how any voluntary agreements between the MLC and DLC would be disclosed and/or announced publicly, for the sake of additional transparency.'' [363] SONA said that the caveats were insufficient because they would not prevent the MLC from entering into an agreement with a DMP that disregards statutory or regulatory terms, and SONA ''oppose[s] the adoption of any rule that would permit a blanket licensee to provide less robust reporting that what the MMA and reporting regulations require.[364]

The interim rule addresses both these concerns. It requires the MLC to maintain a publicly accessible list of voluntary agreements and specifies that such agreements are considered records that a copyright owner is entitled to access and inspect under 17 U.S.C. 115(d)(3)(M)(ii).[365] It also clarifies that voluntary agreements are limited to modifying only procedures for usage reporting and royalty payment, not substantive requirements such as sound recording and musical work information DMPs are required to report.

4. Documentation of Records of Use

Pursuant to its statutory authority, the Office proposed ''regulations setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license.'' [366] The proposed rule adopted the same general approach regarding records of use under the MMA that was previously taken with regards to the nonblanket section 115 license, obligating DMPs to retain documents and records that are ''necessary and appropriate'' to support the information provided in their reports of usage. Some records may be relevant to a DMP's calculations of an input in its report of usage without being necessary and appropriate to support the calculation, and thus outside the scope of the documentation requirement. The NPRM further clarified this language by ''enumerating several nonexclusive examples of the types of records DMPs are obligated to retain and make available to the MLC.'' [367] These examples are meant to be illustrative of the types of ''necessary and appropriate'' documents and records required to be retained under this provision,[368] rather than materially increasing the types of records DMPs currently retain.

The MLC and NSAI supported the proposed records of use provisions, with both proposing the addition of a deadline for DMP compliance with reasonable requests by the MLC for access to records of use.[369] By contrast, the DLC expressed ''significant concerns about these provisions.'' [370] The DLC's overall concern is that the documentation requirements are ''significantly more extensive than DLC proposed in its comments,'' and raised

[357] DLC NPRM Comment at 18.

[358] The Office notes that under the blanket license, while DMPs are never making the actual ultimate royalty calculation for a particular musical work, they are doing varying degrees of relevant and important calculations along the way, the extent to which depends on whether or not they will receive an invoice under paragraph (g)(1)—if a DMP does not, then it must calculate the total royalty pool; if it does, then it must calculate or provide the underlying inputs or components that the MLC will use to calculate the pool, and then the amount per work from there.

[359] DLC NPRM Comment at 19.

[360] Among the changes the Office declines to make is substituting ''presents fairly'' for ''accurately represents.'' While the Office appreciates the DLC's representation of its proposed changes as increasing consistency and alignment with relevant accounting standards and practices, this particular change strikes the Office as perhaps more meaningful, and the Office is hesitant to adopt it without further elaboration. *See* 85 FR at 22534 (''The current certification requirements were adopted in 2014 after careful consideration by the Office, and the Office is disinclined to relitigate the details of these provisions unless presented with a strong showing that they are unworkable either because of something specifically to do with the changes made by the MMA or some other significant industry change that occurred after they were adopted.'').

[361] *Id.*

[362] *Id.*

[363] FMC NPRM Comment at 3.

[364] SONA NPRM Comment at 13.

[365] Under the statute, such records are ''subject to the confidentiality requirements prescribed by the Register of Copyrights.'' 17 U.S.C. 115(d)(3)(M)(i). The Office is addressing confidentiality considerations in a parallel rulemaking. 85 FR at 22559. While the interim rule refers to confidential information in a few provisions, it does not directly reference the Office's forthcoming confidentiality regulations. The Office intends to adjust the interim rule to directly reference the Office's confidentiality regulations once they take effect.

[366] 17 U.S.C. 115(d)(4)(A)(iii), (iv)(I).

[367] 85 FR at 22535.

[368] For example, the proposed rule requires DMPs to retain ''Records and documents with information sufficient to reasonably demonstrate whether and how any royalty floor established in part 385 of this title does or does not apply'' and ''Records and documents with information sufficient to reasonably demonstrate, if applicable, whether service revenue and total cost of content, as those terms may be defined in part 385 of this title, are properly calculated in accordance with part 385 of this title.'' *Id.* at 22546. Under the current 37 CFR 385.22, certain royalty floors are calculated based on the number of DMP subscribers, and the Office understands reports of usage to typically only provide the total number of subscribers. But DMPs may offer different types of subscription plans, such as a family plan or a student plan, and under 37 CFR 385.22(b), such subscribers are weighted when calculating total subscribers (a family plan is treated as 1.5 subscribers, while a student plan is treated as 0.5 subscribers under the regulation). This provision would permit the MLC to access documentation that discloses those underlying numbers if necessary to support the reported total subscriber number.

[369] MLC NPRM Comment at 44–45; NSAI NPRM Comment at 2.

[370] DLC NPRM Comment at 19–20.

questions about the interplay between this provision and the MLC's statutory triennial audit right, allowing for a more thorough examination of royalty calculation records.[371] While the Office has adjusted the proposed rule, as addressed below in response to other specific DLC suggestions, it believes these general objections were essentially already considered and appropriately addressed by the NPRM.[372] As noted, the proposed rule was intended as a compromise between the need for transparency and the ability of the MLC to ''engage in efforts to . . . confirm proper payment of royalties due'' [373] on the one hand, with a desire to ensure that the blanket license remains a workable tool and the accounting procedures are not so complicated that they make the license impractical on the other.[374] The provisions are meant to allow the MLC to spot-check royalty provisions; [375] but not to provide the MLC with unfettered access to DMP records and documentation. And setting aside MLC access, general obligations relating to retention of records have been a feature of the section 115 regulations since at least implementation of the Copyright Act of 1976.[376] As an interim rule, the Office can subsequently expand or limit the recordkeeping provisions, if necessary.[377]

iv. Retention Period

The NPRM proposed requiring DMPs operating under the blanket license to ''keep and retain in its possession all records and documents necessary and appropriate to support fully the information set forth in such report of usage'' for a period of five years from the date of delivery of a report of usage to the MLC. The Office noted it ''may consider extending the retention period to seven years to align with the statutory recordkeeping requirements the MMA places on the MLC.'' [378] FMC supported this extension, saying, it ''would help engender necessary trust in the system from songwriters—if there are questions or problems, parties would be able to go back and look at the data.'' [379] The MLC also proposed extending the retention period from five to seven years.[380] No commenter opposed the proposed extension. Therefore, the Office is adopting a seven-year retention period in the interim rule to afford greater transparency and harmonize the record retention period for DMPs with the statutory retention period for the MLC.[381] Additionally, the Office is adopting the MLC's proposed amendment clarifying that the retention period for records relating to an estimate accrues from receipt of the report containing the final adjustment. This rule is roughly analogous to the current documentation rule in 37 CFR 210.18, which bases the retention period for licensees from the date of service of an annual or amended annual statement.

v. Non-Royalty Bearing DPDs

Another concern raised by the DLC relates to the proposed requirement to retain records and documents accounting for DPDs that do not constitute plays, constructive plays, or other payable units. Although the DLC says this provision is ''unnecessary because these are not relevant to the information set forth in a report of usage,'' [382] the Office disagrees; this provision is relevant to confirming reported royalty-bearing uses. ''Play'' is a defined term under the current section 385, and retention of these records may facilitate transparency in understanding adherence to this regulatory definition.

The DLC further argues that the CRJs have already ''issued regulations related to recordkeeping of a narrower set of uses that do not affect royalties—promotional and free trial uses—after an extensive ratesetting proceeding, pursuant to its separate authority to issue recordkeeping requirements,'' and that ''[r]ather than dividing responsibility for establishing recordkeeping rules for these closely related categories of uses between the Copyright Office and the CRB, it would be far more appropriate for the CRB to address any need to retain an expanded universe of non-royalty-related information, in the context of the next ratemaking proceeding.'' [383] The DLC misconstrues the division of authority between the Office and the CRJs. The Office has previously opined on the division of authority between it and the CRJs over the pre-MMA section 115 license and concluded that ''the scope of the CRJs' authority in the areas of notice and recordkeeping for the section 115 license must be construed in light of Congress's more specific delegation of responsibility to the Register of Copyrights.'' [384] The CRJs have also previously stated that they can adopt notice and recordkeeping rules ''to the extent the Judges find it necessary to augment the Register's reporting rules.'' [385] Finally, notwithstanding the CRJs' authority to ''specify notice and recordkeeping requirements of users of the copyrights at issue,'' in their determinations,[386] the MMA eliminated the section 115 provision regarding CRJ recordkeeping authority [387] and specifically assigned that authority, for the blanket license, to the Copyright Office.[388] The Office concludes that it is the appropriate body to promulgate these recordkeeping provisions under the MMA.

vi. Royalty Floors

The DLC raised some concern that the requirement for keeping ''records and documents regarding whether and how any royalty floor is established [ ] is redundant of the other provisions, particularly paragraph (m)(1)(vi), which already requires retention of all information needed to support royalty calculations, including the various inputs into royalty floors.'' [389] The Office notes that there is conceivably some distinction between records about whether and how floors apply and records about the various inputs that go into the determination of applying the floors, meaning the two provisions are not superfluous. And to the extent there is any redundancy between recordkeeping provisions, such overlap would seem to be harmless, and so the Office has not removed the provision identified by the DLC.

vii. Access By the MLC

The NPRM also limited access to records of use by the MLC. The interim rule is amended to require a DMP to make arrangements for access to records

[371] *Id.* at 19. *See* 17 U.S.C. 115(d)(4)(D)(i).

[372] *See, e.g.,* 85 FR at 22529–30 (rejecting the MLC's proposal for monthly reporting of certain types of information but explaining they would be included in recordkeeping requirements, addressing interplay with the triennial audit right); *id.* at 22535 (proposing recordkeeping retention and access requirements, including declining to adopt some of the MLC's more expansive proposals).

[373] *See* 17 U.S.C. 115(d)(3)(G)(i)(I)(cc).

[374] 85 FR at 22526.

[375] *See* NSAI NPRM Comment at 2 (''[W]hile the MLC's ability to audit a digital service once every three years is an important tool for license administration, it is no substitute for a trusted administrator like the MLC having ongoing visibility into royalty accounting practices.'').

[376] *See* 42 FR 64889, 64894 (Dec. 29, 1977). *See also* 43 FR 44511, 44515 (Sept. 28, 1978) (discussing records of use retention period provision in connection with statute of limitations for potential claims).

[377] The Office can also update this rule if the relevant provisions of 37 CFR part 385 change.

[378] 85 FR at 22534.

[379] FMC NPRM Comment at 3.

[380] MLC NPRM Comment App. at xxvii.

[381] 17 U.S.C. 115(d)(3)(M)(i).

[382] DLC NPRM Comment at 19 (internal quotation marks and brackets omitted).

[383] *Id.*

[384] 73 FR 48396, 48397–98 (Aug. 19, 2008).

[385] 84 FR 1918, 1962 (Feb. 5, 2019).

[386] 17 U.S.C. 803(c)(3).

[387] *See id.* at 115(c)(3)(D) (2017).

[388] *Id.* at 115(d)(4)(A)(iii), (iv)(I); *see also* 73 FR at 48397–98 (discussing Congress's more specific delegation to the Copyright Office).

[389] DLC NPRM Comment at 19.

within 30 days of a request from the MLC, as suggested by the MLC and endorsed by NSAI.[390] The interim rule also limits the frequency that the MLC can request records of use to address concerns raised by the DLC, but with a less expansive limit than the DLC suggested.[391] Factoring into account the MLC's countervailing comments, the Office believes a more frequent period may be appropriate, and the interim rule thus limits the MLC to one request to a particular DMP per quarter, covering a period of one quarter in the aggregate. Finally, the Office clarifies its understanding that the requirement to retain ''[a]ny other records or documents that may be appropriately examined pursuant to an audit under 17 U.S.C. 115(d)(4)(D)'' should not be read as giving the MLC access to documents held pursuant to this category outside of such an audit.[392]

viii. Total Cost of Content

Because the total cost of content (''TCC'') is a fundamental component of the current royalty rates under the blanket license, the NPRM included language permitting the MLC access to ''[r]ecords and documents with information sufficient to reasonably demonstrate . . . whether . . . total cost of content . . . [is] properly calculated.'' ARM voiced strong opposition to this provision.[393] It contended that such access would interfere with highly commercially sensitive agreements between its member record labels and DMPs, and that confidentiality regulations proposed by the Office lacked sufficient enforcement mechanisms to remedy any breach that might occur.[394] The RIAA reiterated its concern in an *ex parte* meeting that access to underlying records and inputs used to calculate the TCC could undermine ''the confidentiality of commercial agreements negotiated between individual record companies and digital music providers (''DMPs'') in a competitive marketplace.'' [395]

The RIAA recognized that the MLC may have a need to confirm that the usage reports were calculated in accordance with the total aggregated TCC figure reflected in DMP financial records (as opposed to terms of agreements with individual record labels or other distributors), and that there may be separate needs for document retention beyond access by the MLC for routine administration functions.[396] Accordingly, it suggested that with respect to TCC, access by the MLC to DMP records ''should be limited to confirming that the DMP accurately reported to the MLC the aggregated TCC figure kept on its books.'' [397] The interim rule has thus retained an obligation on the part of DMPs to keep records sufficient to reasonably support and confirm the accuracy of the TCC figure, while amending the access provision to limit the MLC to only the aggregated figure.

*D. Reports of Usage—Significant Nonblanket Licensees*

As discussed in the NOI and NPRM, SNBLs are also required to deliver reports of usage to the MLC.[398] Based on the ''fairly sparse'' comments received in response to the notification and the Office's observation that ''[t]he statutory requirements for blanket licensees and SNBLs differ in a number of material ways,'' the Office concluded that it seemed ''reasonable to fashion the proposed rule for SNBL reports of usage as an abbreviated version of the reporting provided by blanket licensees.'' [399] In light of the ''particularly thin record on SNBLs,'' the Office particularly encouraged further comment on this issue.[400]

The Office received little more in response. Only the MLC, DLC, and FMC comments discuss SNBLs, all in brief.[401] FMC says it ''agree[s] that SNBL reporting can serve an array of aims, including distribution of unclaimed royalties and administrative assessment calculations, and general matching support,'' and also ''transparency aims.'' [402] FMC further states that it thus ''tend[s] to favor more robust reporting requirements'' and that ''[r]ecords of use, in particular, should be included.'' [403] FMC does not propose specific regulatory language. The MLC says that ''it seems possible that the MLC may have good reason to include [SNBL] data in the public database to the extent such data is not otherwise available,'' that it plans to ''use usage reporting from SNBLs . . . as part of the determination of administrative assessment allocations,'' and that ''[t]he rule does not provide excessive information, as use in connection with any market share calculation for any distribution of unclaimed accrued royalties would require a full processing and matching of the usage reporting data.'' [404] The MLC does not propose any changes to the NPRM's regulatory language that do not align with changes it also proposed with respect to blanket licensee reporting.[405] The DLC's proposed regulatory language also largely mirrors, to the extent applicable, its proposal for blanket licensee reporting.[406] The DLC further requests a modification to one of the certification provisions specifically for SNBL reporting because it says that it ''incorrectly assumes that such licensees engage in a CPA certification process.'' [407]

Having considered these comments, the record does not indicate to the Office that it should change its overall proposed approach to SNBL reporting requirements. Therefore, the Office is essentially adopting the proposed rule as an interim rule, but with appropriate updates to incorporate and apply the relevant decisions detailed above that the Office has made with respect to blanket licensee reporting requirements. The Office has not carried over the

[390] *See* MLC NPRM Comment at 44–45 (''The MLC retains a concern about the absence of a prescribed time frame for DMP compliance with reasonable requests by the MLC for access to records of use, which could delay the MLC's access to information that the MLC may require on a timely basis. The MLC therefore requests that DMPs be required to provide access to requested information within 30 days of the MLC's request.''); NSAI NPRM Comment at 2 (''NSAI agrees with the MLC that the digital services' obligation to provide reasonable access to records of use on request should have a prompt deadline in the regulations. This will prevent stonewalling and avoid disagreement over such timing.'').

[391] DLC NPRM Comment at 20 (stating ''since the MMA limits audits both in their frequency and their scope, similar limits should apply to the MLC's access to documentation and records of use. DLC therefore proposes that the MLC's access be limited in frequency to once per 12-month period, and limited in scope to no more than two months (in the aggregate) of records.'').

[392] *See id.* at 21, Add. at A–29–30.

[393] ARM NPRM Comment at 4.

[394] *Id.* at 4–5.

[395] RIAA *Ex Parte* Letter June 16, 2020 at 1. The RIAA elaborated, ''[c]ommercial agreements between record companies and DMPs are so highly competitively sensitive they amount to trade secrets and must be treated as such. Because these agreements typically have short terms, they are renegotiated frequently and any leakage of their terms and conditions could have a significant detrimental impact on the streaming marketplace. There are several important considerations: (1) Individual MLC board members may be employees of companies owned by a music group competitor; (2) It is possible to derive the percentage of revenue equivalent of a DMP's payment to each record company once it is known (a) the amount the DMP paid to each record company that month and (b) the DMP's monthly Service Provider Revenue(which is a required part of its monthly mechanical royalty calculation, *see* 37 CFR 385.21); and (3) There is no clear remedy for violating proposed confidentiality regulations, especially given the damage that could ensue.'' *Id.* at 1–2.

[396] *See, e.g.,* supra note 376.

[397] RIAA *Ex Parte* Letter Aug. 24, 2020 at 2.

[398] 84 FR at 49971; 85 FR at 22535.

[399] 85 FR at 22535.

[400] *Id.* at 22535–36.

[401] *See* MLC NPRM Comment at 46, App. at xxx–xxxvii; DLC NPRM Comment at 18, Add. at A–30–38; FMC NPRM Comment at 3.

[402] FMC NPRM Comment at 3.

[403] *Id.*

[404] MLC NPRM Comment at 46.

[405] *See* MLC NPRM Comment App. at xxx–xxxvii.

[406] *See* DLC NPRM Comment Add. at A–30–38.

[407] DLC NPRM Comment at 18, Add. at A–37.

interim rule's expanded audio access and unaltered data requirements because it does not seem necessary to impose those additional obligations on SNBLs given the purpose their reporting serves as compared to blanket licensee reporting.

Similarly, regarding FMC's request to add a records of use provision and generally require more robust reporting, the Office declines to do so at this time, at least based upon the thin current record. The Office believes the interim rule strikes an appropriate balance with respect to SNBLs given the material differences between them and blanket licensees—most notably that SNBLs do not operate under the blanket license and do not pay statutory royalties to the MLC.[408]

As to the DLC's proposal concerning the certification language, the Office declines this request at this time. At least based on the limited record, the Office is not persuaded that the certification requirement for SNBLs should materially differ from the requirement for blanket licensees. The fact that SNBLs may not have traditionally engaged in a CPA certification process in connection with their voluntary licenses does not move the Office to eliminate this component of the certification in the different context of their new statutory obligation to report to the MLC for purposes that go beyond their private agreements—especially considering that the rule does not impose a records of use requirement on SNBLs. To the extent an SNBL does not wish to engage in a CPA certification process, the alternative certification option provided for in the regulations remains available to them.

**List of Subjects in 37 CFR Part 210**

Copyright, Phonorecords, Recordings.

**Interim Regulations**

For the reasons set forth in the preamble, the Copyright Office amends 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 A [Removed]

■ 2. Remove subpart A.

[408] As noted in the NPRM, the statutory records of use requirement for blanket licensees does not expressly apply to SNBLs. 85 FR at 22535.

### Subpart B [Redesignated as Subpart A] and §§ 210.11 through 210.21 [Redesignated as §§ 210.1 through 210.11]

■ 3. Redesignate subpart B as subpart A and, in newly redesignated subpart A, §§ 210.11 through 210.21 are redesignated as §§ 210.1 through 210.11.

### Subpart A [Amended]

■ 4. In newly redesignated subpart A:
■ a. Remove ''§ 210.12(g)(3)(i),'' ''§ 210.12(g)(3)(ii),'' ''§ 210.12(g)(3),'' ''§ 210.12(g),'' ''§ 210.12(h),'' and ''§ 210.12(i)'' and add in their places ''§ 210.2(g)(3)(i),'' ''§ 210.2(g)(3)(ii),'' ''§ 210.2(g)(3),'' ''§ 210.2(g),'' ''§ 210.2(h),'' and ''§ 210.2(i),'' respectively;
■ b. Remove ''§ 210.15'' and add in its place ''§ 210.5'';
■ c. Remove ''§ 210.16(d)(2),'' ''§ 210.16,'' ''§ 210.16(g),'' and ''§ 210.16(g)(3)'' and add in their places ''§ 210.6(d)(2),'' ''§ 210.6,'' ''§ 210.6(g),'' and ''§ 210.6(g)(3),'' respectively;
■ d. Remove ''§ 210.17(d)(2)(iii)'' and ''§ 210.17 of this subpart'' and add in their places ''§ 210.7(d)(2)(iii)'' and ''§ 210.7,'' respectively;
■ e. Remove ''§ 210.18'' and add in its place ''§ 210.8''; and
■ f. Remove ''§ 210.21'' and add in its place ''§ 210.11''.

■ 5. Amend newly redesignated § 210.1 by adding a sentence after the first sentence to read as follows:

#### § 210.1 General.

* * * Rules governing notices of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works are located in § 201.18. * * *

#### §§ 210.12 through 210.20 [Added and Reserved]

■ 6. Add reserve §§ 210.12 through 210.20.

■ 7. Add a new subpart B to read as follows:

### Subpart B—Blanket Compulsory License for Digital Uses, Mechanical Licensing Collective, and Digital Licensee Coordinator

**Sec.**

210.21 General.
210.22 Definitions.
210.23 Designation of the mechanical licensing collective and digital licensee coordinator.
210.24 Notices of blanket license.
210.25 Notices of nonblanket activity.
210.26 Data collection and delivery efforts by digital music providers and musical work copyright owners.
210.27 Reports of usage and payment for blanket licensees.
210.28 Reports of usage for significant nonblanket licensees.

#### § 210.21 General.

This subpart prescribes rules for the compulsory blanket license to make and distribute digital phonorecord deliveries of nondramatic musical works pursuant to 17 U.S.C. 115(d), including rules for digital music providers, significant nonblanket licensees, the mechanical licensing collective, and the digital licensee coordinator.

#### § 210.22 Definitions.

For purposes of this subpart:

(a) Unless otherwise specified, the terms used have the meanings set forth in 17 U.S.C. 115(e).

(b) The term *blanket licensee* means a digital music provider operating under a blanket license.

(c) The term *DDEX* means Digital Data Exchange, LLC.

(d) The term *GAAP* means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as ''GAAP'' for purposes of this section.

(e) The term *IPI* means interested parties information code.

(f) The term *ISNI* means international standard name identifier.

(g) The term *ISRC* means international standard recording code.

(h) The term *ISWC* means international standard musical work code.

(i) The term *producer* means the primary person(s) contracted by and accountable to the content owner for the task of delivering the sound recording as a finished product.

(j) The term *UPC* means universal product code.

#### § 210.23 Designation of the mechanical licensing collective and digital licensee coordinator.

The following entities are designated pursuant to 17 U.S.C. 115(d)(3)(B) and (d)(5)(B). Additional information regarding these entities is available on the Copyright Office's website.

(a) Mechanical Licensing Collective, incorporated in Delaware on March 5,

2019, is designated as the mechanical licensing collective; and

(b) Digital Licensee Coordinator, Inc., incorporated in Delaware on March 20, 2019, is designated as the digital licensee coordinator.

**§ 210.24 Notices of blanket license.**

(a) *General.* This section prescribes rules under which a digital music provider completes and submits a notice of license to the mechanical licensing collective pursuant to 17 U.S.C. 115(d)(2)(A) for purposes of obtaining a statutory blanket license.

(b) *Form and content.* A notice of license shall be prepared in accordance with any reasonable formatting instructions established by the mechanical licensing collective, and shall include all of the following information:

(1) 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 is engaging, or seeks to engage, in any covered activity.

(2) 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.

(3) A telephone number and email address for the digital music provider where an individual responsible for managing the blanket license can be reached.

(4) Any website(s), software application(s), or other online locations(s) where the digital music provider's applicable service(s) is/are, or expected to be, made available.

(5) A description sufficient to reasonably establish the digital music provider's eligibility for a blanket license and to provide reasonable notice to the mechanical licensing collective, copyright owners, and songwriters of the manner in which the digital music provider is engaging, or seeks to engage, in any covered activity pursuant to the blanket license. Such description shall be sufficient if it includes at least the following information:

(i) A statement that the digital music provider has a good-faith belief, informed by review of relevant law and regulations, that it:

(A) Satisfies all requirements to be eligible for a blanket license, including that it satisfies the eligibility criteria to be considered a digital music provider pursuant to 17 U.S.C. 115(e)(8); and

(B) Is, or will be before the date of initial use of musical works pursuant to the blanket license, able to comply with all payments, terms, and responsibilities associated with the blanket license.

(ii) A statement that where the digital music provider seeks or expects to engage in any activity identified in its notice of license, it has a good-faith intention to do so within a reasonable period of time.

(iii) A general description of the digital music provider's service(s), or expected service(s), and the manner in which it uses, or seeks to use, phonorecords of nondramatic musical works.

(iv) Identification of each of the following digital phonorecord delivery configurations the digital music provider is, or seeks to be, making as part of its covered activities:

(A) Permanent downloads.

(B) Limited downloads.

(C) Interactive streams.

(D) Noninteractive streams.

(E) Other configurations, accompanied by a brief description.

(v) Identification of each of the following service types the digital music provider offers, or seeks to offer, as part of its covered activities (the digital music provider may, but is not required to, associate specific service types with specific digital phonorecord delivery configurations or with particular types of activities or offerings that may be defined in part 385 of this title):

(A) Subscriptions.

(B) Bundles.

(C) Lockers.

(D) Services available through discounted pricing plans, such as for families or students.

(E) Free-to-the-user services.

(F) Other applicable services, accompanied by a brief description.

(vi) Any other information the digital music provider wishes to provide.

(6) The date, or expected date, of initial use of musical works pursuant to the blanket license.

(7) Identification of any amendment made pursuant to paragraph (f) of this section, including the submission date of the notice being amended.

(8) A description of any applicable voluntary license or individual download license the digital music provider is, or expects to be, operating under concurrently with the blanket license that is sufficient for the mechanical licensing collective to fulfill its obligations under 17 U.S.C. 115(d)(3)(G)(i)(I)(bb). This description should be provided as an addendum to the rest of the notice of license to help preserve any confidentiality to which it may be entitled. With respect to any applicable voluntary license or individual download license executed and in effect before March 31, 2021, the description required by this paragraph (b)(8) must be delivered to the mechanical licensing collective either no later than 10 business days after such license is executed, or at least 90 calendar days before delivering a report of usage covering the first reporting period during which such license is in effect, whichever is later. For any reporting period ending on or before March 31, 2021, the mechanical licensing collective shall not be required to undertake any obligations otherwise imposed on it by this subpart with respect to any voluntary license or individual download license for which the collective has not received the description required by this paragraph (b)(8) at least 90 calendar days prior to the delivery of a report of usage for such period, but such obligations attach and are ongoing with respect to such license for subsequent periods. The rest of the notice of license may be delivered separately from such description. The description required by this paragraph (b)(8) shall be sufficient if it includes at least the following information:

(i) An identification of each of the digital music provider's services, including by reference to any applicable types of activities or offerings that may be defined in part 385 of this title, through which musical works are, or are expected to be, used pursuant to any such voluntary license or individual download license. If such a license pertains to all of the digital music provider's applicable services, it may state so without identifying each service.

(ii) The start and end dates.

(iii) The musical work copyright owner, identified by name and any known and appropriate unique identifiers, and appropriate contact information for the musical work copyright owner or for an administrator or other representative who has entered into an applicable license on behalf of the relevant copyright owner.

(iv) A satisfactory identification of any applicable catalog exclusions.

(v) At the digital music provider's option, and in lieu of providing the information listed in paragraph (b)(8)(iv) of this section, a list of all covered musical works, identified by appropriate unique identifiers.

(vi) A unique identifier for each such license.

(c) *Certification and signature.* The notice of license shall be signed by an appropriate duly authorized officer or representative of the digital music provider. The signature shall be

accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that he or she has appropriate authority to submit the notice of license to the mechanical licensing collective on behalf of the digital music provider and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith.

(d) *Submission, fees, and acceptance.* Except as provided by 17 U.S.C. 115(d)(9)(A), to obtain a blanket license, a digital music provider must submit a notice of license to the mechanical licensing collective. Notices of license shall be submitted to the mechanical licensing collective in a manner reasonably determined by the collective. No fee may be charged for submitting notices of license. Upon submitting a notice of license to the mechanical licensing collective, a digital music provider shall be provided with a prompt response from the collective confirming receipt of the notice and the date of receipt. The mechanical licensing collective shall send any rejection of a notice of license to both the street address and email address provided in the notice.

(e) *Harmless errors.* Errors in the submission or content of a notice of license, including the failure to timely submit an amended notice of license, that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the notice invalid or provide a basis for the mechanical licensing collective to reject a notice or terminate a blanket license. This paragraph (e) shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(f) *Amendments.* A digital music provider may submit an amended notice of license to cure any deficiency in a rejected notice pursuant to 17 U.S.C. 115(d)(2)(A). A digital music provider operating under a blanket license must submit a new notice of license within 45 calendar days after any of the information required by paragraphs (b)(1) through (6) of this section contained in the notice on file with the mechanical licensing collective has changed. An amended notice shall indicate that it is an amendment and shall contain the submission date of the notice being amended. The mechanical licensing collective shall retain copies of all prior notices of license submitted by a digital music provider. Where the information required by paragraph (b)(8) of this section has changed, instead of submitting an amended notice of license, the digital music provider must promptly deliver updated information to the mechanical licensing collective in an alternative manner reasonably determined by the collective. To the extent commercially reasonable, the digital music provider must deliver such updated information either no later than 10 business days after such license is executed, or at least 30 calendar days before delivering a report of usage covering the first reporting period during which such license is in effect, whichever is later. Except as otherwise provided for by paragraph (b)(8) of this section, the mechanical licensing collective shall not be required to undertake any obligations otherwise imposed on it by this subpart with respect to any voluntary license or individual download license for which the collective has not received the description required by paragraph (b)(8) of this section at least 30 calendar days prior to the delivery of a report of usage for such period, but such obligations attach and are ongoing with respect to such license for subsequent periods.

(g) *Transition to blanket licenses.* Where a digital music provider obtains a blanket license automatically pursuant to 17 U.S.C. 115(d)(9)(A) and seeks to continue operating under the blanket license, a notice of license must be submitted to the mechanical licensing collective within 45 calendar days after the license availability date and the mechanical licensing collective shall begin accepting such notices at least 30 calendar days before the license availability date, provided, however, that any description required by paragraph (b)(8) of this section must be delivered within the time period described in paragraph (b)(8). In such cases, the blanket license shall be effective as of the license availability date, rather than the date on which the notice is submitted to the collective. Failure to comply with this paragraph (g), including by failing to timely submit the required notice or cure a rejected notice, shall not affect an applicable digital music provider's blanket license, except that such blanket license may become subject to default and termination under 17 U.S.C. 115(d)(4)(E). The mechanical licensing collective shall not take any action pursuant to 17 U.S.C. 115(d)(4)(E) before the conclusion of any proceedings under 17 U.S.C. 115(d)(2)(A)(iv) or (v), provided that the digital music provider meets the blanket license's other required terms and conditions.

(h) *Additional information.* Nothing in this section shall be construed to prohibit the mechanical licensing collective from seeking additional information from a digital music provider that is not required by this section, which the digital music provider may voluntarily elect to provide, provided that the collective may not represent that such information is required to comply with the terms of this section.

(i) *Public access.* The mechanical licensing collective shall maintain a current, free, and publicly accessible and searchable online list of all blanket licenses that, subject to any confidentiality to which they may be entitled, includes:

(1) All information contained in each notice of license, including amended and rejected notices;

(2) Contact information for all blanket licensees;

(3) The effective dates of all blanket licenses;

(4) For any amended or rejected notice, a clear indication of its amended or rejected status and its relationship to other relevant notices;

(5) For any rejected notice, the collective's reason(s) for rejecting it; and

(6) For any terminated blanket license, a clear indication of its terminated status, the date of termination, and the collective's reason(s) for terminating it.

### § 210.25 Notices of nonblanket activity.

(a) *General.* This section prescribes rules under which a significant nonblanket licensee completes and submits a notice of nonblanket activity to the mechanical licensing collective pursuant to 17 U.S.C. 115(d)(6)(A) for purposes of notifying the mechanical licensing collective that the licensee has been engaging in covered activities.

(b) *Form and content.* A notice of nonblanket activity shall be prepared in accordance with any reasonable formatting instructions established by the mechanical licensing collective, and shall include all of the following information:

(1) The full legal name of the significant nonblanket licensee and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the significant nonblanket licensee is engaging, or expects to engage, in any covered activity.

(2) The full address, including a specific number and street name or rural route, of the place of business of the

significant nonblanket licensee. 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.

(3) A telephone number and email address for the significant nonblanket licensee where an individual responsible for managing licenses associated with covered activities can be reached.

(4) Any website(s), software application(s), or other online locations(s) where the significant nonblanket licensee's applicable service(s) is/are, or expected to be, made available.

(5) A description sufficient to reasonably establish the licensee's qualifications as a significant nonblanket licensee and to provide reasonable notice to the mechanical licensing collective, digital licensee coordinator, copyright owners, and songwriters of the manner in which the significant nonblanket licensee is engaging, or expects to engage, in any covered activity. Such description shall be sufficient if it includes at least the following information:

(i) A statement that the significant nonblanket licensee has a good-faith belief, informed by review of relevant law and regulations, that it satisfies all requirements to qualify as a significant nonblanket licensee under 17 U.S.C. 115(e)(31).

(ii) A statement that where the significant nonblanket licensee expects to engage in any activity identified in its notice of nonblanket activity, it has a good-faith intention to do so within a reasonable period of time.

(iii) A general description of the significant nonblanket licensee's service(s), or expected service(s), and the manner in which it uses, or expects to use, phonorecords of nondramatic musical works.

(iv) Identification of each of the following digital phonorecord delivery configurations the significant nonblanket licensee is, or expects to be, making as part of its covered activities:

(A) Permanent downloads.

(B) Limited downloads.

(C) Interactive streams.

(D) Noninteractive streams.

(E) Other configurations, accompanied by a brief description.

(v) Identification of each of the following service types the significant nonblanket licensee offers, or expects to offer, as part of its covered activities (the significant nonblanket licensee may, but is not required to, associate specific service types with specific digital phonorecord delivery configurations or with particular types of activities or offerings that may be defined in part 385 of this title):

(A) Subscriptions.

(B) Bundles.

(C) Lockers.

(D) Services available through discounted pricing plans, such as for families or students.

(E) Free-to-the-user services.

(F) Other applicable services, accompanied by a brief description.

(vi) Any other information the significant nonblanket licensee wishes to provide.

(6) Acknowledgement of whether the significant nonblanket licensee is operating under one or more individual download licenses.

(7) The date of initial use of musical works pursuant to any covered activity.

(8) Identification of any amendment made pursuant to paragraph (f) of this section, including the submission date of the notice being amended.

(c) *Certification and signature.* The notice of nonblanket activity shall be signed by an appropriate duly authorized officer or representative of the significant nonblanket licensee. The signature shall be accompanied by the name and title of the person signing the notice and the date of the signature. The notice may be signed electronically. The person signing the notice shall certify that he or she has appropriate authority to submit the notice of nonblanket activity to the mechanical licensing collective on behalf of the significant nonblanket licensee and that all information submitted as part of the notice is true, accurate, and complete to the best of the signer's knowledge, information, and belief, and is provided in good faith.

(d) *Submission, fees, and acceptance.* Notices of nonblanket activity shall be submitted to the mechanical licensing collective in a manner reasonably determined by the collective. No fee may be charged for submitting notices of nonblanket activity. Upon submitting a notice of nonblanket activity to the mechanical licensing collective, a significant nonblanket licensee shall be provided with a prompt response from the collective confirming receipt of the notice and the date of receipt.

(e) *Harmless errors.* Errors in the submission or content of a notice of nonblanket activity, including the failure to timely submit an amended notice of nonblanket activity, that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the notice invalid or provide a basis for the mechanical licensing collective or digital licensee coordinator to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C). This paragraph (e) shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(f) *Amendments.* A significant nonblanket licensee must submit a new notice of nonblanket activity with its report of usage that is next due after any of the information required by paragraphs (b)(1) through (7) of this section contained in the notice on file with the mechanical licensing collective has changed. An amended notice shall indicate that it is an amendment and shall contain the submission date of the notice being amended. The mechanical licensing collective shall retain copies of all prior notices of nonblanket activity submitted by a significant nonblanket licensee.

(g) *Transition to blanket licenses.* Where a digital music provider that would otherwise qualify as a significant nonblanket licensee obtains a blanket license automatically pursuant to 17 U.S.C. 115(d)(9)(A) and does not seek to operate under the blanket license, if such licensee submits a valid notice of nonblanket activity within 45 calendar days after the license availability date in accordance with 17 U.S.C. 115(d)(6)(A)(i), such licensee shall not be considered to have ever operated under the statutory blanket license until such time as the licensee submits a valid notice of license pursuant to 17 U.S.C. 115(d)(2)(A).

(h) *Additional information.* Nothing in this section shall be construed to prohibit the mechanical licensing collective from seeking additional information from a significant nonblanket licensee that is not required by this section, which the significant nonblanket licensee may voluntarily elect to provide, provided that the collective may not represent that such information is required to comply with the terms of this section.

(i) *Public access.* The mechanical licensing collective shall maintain a current, free, and publicly accessible and searchable online list of all significant nonblanket licensees that, subject to any confidentiality to which they may be entitled, includes:

(1) All information contained in each notice of nonblanket activity, including amended notices;

(2) Contact information for all significant nonblanket licensees;

(3) The date of receipt of each notice of nonblanket activity; and

(4) For any amended notice, a clear indication of its amended status and its relationship to other relevant notices.

**§ 210.26 Data collection and delivery efforts by digital music providers and musical work copyright owners.**

(a) *General.* This section prescribes rules under which digital music providers and musical work copyright owners shall engage in efforts to collect and provide information to the mechanical licensing collective that may assist the collective in matching musical works to sound recordings embodying those works and identifying and locating the copyright owners of those works.

(b) *Digital music providers.* (1)(i) Pursuant to 17 U.S.C. 115(d)(4)(B), in addition to obtaining sound recording names and featured artists and providing them in reports of usage, a digital music provider operating under a blanket license shall engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service(s) of such digital music provider the information belonging to the categories identified in § 210.27(e)(1)(i)(E) and (e)(1)(ii), without regard to any limitations that may apply to the reporting of such information in reports of usage. Such efforts must be undertaken periodically, and be specific and targeted to obtaining information not previously obtained from the applicable owner or other licensor for the specific sound recordings and musical works embodied therein for which the digital music provider lacks such information. Such efforts must also solicit updates for any previously obtained information if reasonably requested by the mechanical licensing collective. The digital music provider shall keep the mechanical licensing collective reasonably informed of the efforts it undertakes pursuant to this section.

(ii) Any information required by paragraph (b)(1)(i) of this section, including any updates to such information, provided to the digital music provider by sound recording copyright owners or other licensors of sound recordings (or their representatives) shall be delivered to the mechanical licensing collective in reports of usage in accordance with § 210.27(e).

(2)(i) Notwithstanding paragraph (b)(1) of this section, a digital music provider may satisfy its obligations under 17 U.S.C. 115(d)(4)(B) with respect to a particular sound recording by arranging, or collectively arranging with others, for the mechanical licensing collective to receive the information required by paragraph (b)(1)(i) of this section from an authoritative source of sound recording information, such as the collective designated by the Copyright Royalty Judges to collect and distribute royalties under the statutory licenses established in 17 U.S.C. 112 and 114, provided that:

(A) Such arrangement requires such source to inform, including through periodic updates, the digital music provider and mechanical licensing collective about any relevant gaps in its repertoire coverage known to such source, including but not limited to particular categories of information identified in § 210.27(e)(1)(i)(E) and (e)(1)(ii), sound recording copyright owners and/or other licensors of sound recordings (*e.g.,* labels, distributors), genres, and/or countries of origin, that are either not covered or materially underrepresented as compared to overall market representation; and

(B) Such digital music provider does not have actual knowledge or has not been notified by the source, the mechanical licensing collective, or a copyright owner, licensor, or author (or their respective representatives, including by an administrator or a collective management organization) of the relevant sound recording or musical work that is embodied in such sound recording, that the source lacks such information for the relevant sound recording or a set of sound recordings encompassing such sound recording.

(ii) Satisfying the requirements of 17 U.S.C. 115(d)(4)(B) in the manner set out in paragraph (b)(2)(i) of this section does not excuse a digital music provider from having to report sound recording and musical work information in accordance with § 210.27(e).

(3) The requirements of paragraph (b) of this section are without prejudice to what a court of competent jurisdiction may determine constitutes good-faith, commercially reasonable efforts for purposes of eligibility for the limitation on liability described in 17 U.S.C. 115(d)(10).

(c) *Musical work copyright owners.* (1) Pursuant to 17 U.S.C. 115(d)(3)(E)(iv), each musical work copyright owner with any musical work listed in the musical works database shall engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, by providing, to the extent a musical work copyright owner becomes aware that such information is not then available in the database and to the extent the musical work copyright owner has such missing information, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent practicable.

(2) As used in paragraph (c)(1) of this section, ''information regarding the names of the sound recordings'' shall include, for each applicable sound recording:

(i) Sound recording name(s), including any alternative or parenthetical titles for the sound recording;

(ii) Featured artist(s); and

(iii) ISRC(s).

**§ 210.27 Reports of usage and payment for blanket licensees.**

(a) *General.* This section prescribes rules for the preparation and delivery of reports of usage and payment of royalties for the making and distribution of phonorecords of nondramatic musical works to the mechanical licensing collective by a digital music provider operating under a blanket license pursuant to 17 U.S.C. 115(d). A blanket licensee shall report and pay royalties to the mechanical licensing collective on a monthly basis in accordance with 17 U.S.C. 115(c)(2)(I), 17 U.S.C. 115(d)(4)(A), and this section. A blanket licensee shall also report to the mechanical licensing collective on an annual basis in accordance with 17 U.S.C. 115(c)(2)(I) and this section. A blanket licensee may make adjustments to its reports of usage and royalty payments in accordance with this section.

(b) *Definitions.* For purposes of this section, in addition to those terms defined in § 210.22:

(1) The term *report of usage,* unless otherwise specified, refers to all reports of usage required to be delivered by a blanket licensee to the mechanical licensing collective under the blanket license, including reports of adjustment. As used in this section, it does not refer to reports required to be delivered by significant nonblanket licensees under 17 U.S.C. 115(d)(6)(A)(ii) and § 210.28.

(2) A *monthly report of usage* is a report of usage accompanying monthly royalty payments identified in 17 U.S.C. 115(c)(2)(I) and 17 U.S.C. 115(d)(4)(A), and required to be delivered by a blanket licensee to the mechanical licensing collective under the blanket license.

(3) An *annual report of usage* is a statement of account identified in 17 U.S.C. 115(c)(2)(I), and required to be delivered by a blanket licensee annually to the mechanical licensing collective under the blanket license.

(4) A *report of adjustment* is a report delivered by a blanket licensee to the mechanical licensing collective under the blanket license adjusting one or

more previously delivered monthly reports of usage or annual reports of usage, including related royalty payments.

(c) *Content of monthly reports of usage.* A monthly report of usage shall be clearly and prominently identified as a ''Monthly Report of Usage Under Compulsory Blanket License for Making and Distributing Phonorecords,'' and shall include a clear statement of the following information:

(1) The period (month and year) covered by the monthly report of usage.

(2) The full legal 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. If the blanket licensee 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 blanket licensee. 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 that is used by the blanket licensee in covered activities during the applicable monthly reporting period, a detailed statement, from which the mechanical licensing collective may separate reported information 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) For any voluntary license or individual download license in effect during the applicable monthly reporting period, the information required under § 210.24(b)(8). If this information has been separately provided to the mechanical licensing collective, it need not be contained in the monthly report of usage, provided the report states that the information has been provided separately and includes the date on which such information was last provided to the mechanical licensing collective.

(6) Where the blanket licensee will not receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section:

(i) The total royalty payable by the blanket licensee under the blanket license for the applicable monthly reporting period, 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 each applicable activity or offering including as may be defined in part 385 of this title; and

(ii) The amount of late fees, if applicable, included in the payment associated with the monthly report of usage.

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

(1) *Calculations.* (i) Where the blanket licensee will not receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, a detailed and step-by-step accounting of the calculation of royalties payable by the blanket licensee under the blanket license 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 blanket licensee 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, whether pursuant to a blanket license, voluntary license, or individual download license.

(ii) Where the blanket licensee will receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, all information necessary for the mechanical licensing collective to compute, in accordance with the requirements of this section and part 385 of this title, the royalties payable by the blanket licensee under the blanket license, and all information necessary to enable the mechanical licensing collective to provide a detailed and step-by-step accounting of the calculation of such royalties under applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the mechanical licensing collective, using the blanket licensee's information, 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, whether pursuant to a blanket license, voluntary license, or individual download license.

(2) *Estimates.* (i) Where computation of the royalties payable by the blanket licensee under the blanket license depends on an input that is unable to be finally determined at the time the report of usage is delivered to the mechanical licensing collective and where the reason the input cannot be finally determined is outside of the blanket licensee's control (*e.g.,* as applicable, the amount of applicable public performance royalties and the amount of applicable consideration for sound recording copyright rights), a reasonable estimation of such input, determined in accordance with GAAP, may be used or provided by the blanket licensee. Royalty payments based on such estimates shall be adjusted pursuant to paragraph (k) of this section after being finally determined. A report of usage containing an estimate permitted by this paragraph (d)(2)(i) should identify each input that has been estimated, and provide the reason(s) why such input(s) needed to be estimated and an explanation as to the basis for the estimate(s).

(ii) Where the blanket licensee will not receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, and the blanket licensee is dependent upon the mechanical licensing collective to confirm usage subject to applicable voluntary licenses and individual download licenses, the blanket licensee shall compute the royalties payable by the blanket licensee under the blanket license using a reasonable estimation of the amount of payment for such non-blanket usage to be deducted from royalties that would otherwise be due under the blanket license, determined in accordance with GAAP. Royalty payments based on such estimates shall be adjusted within 5 calendar days after the mechanical licensing collective confirms such amount to be deducted and notifies the blanket licensee under paragraph (g)(2) of this section. Any overpayment of royalties shall be handled in accordance with paragraph (k)(5) of this section. Where the blanket licensee will receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, the blanket licensee shall not provide an estimate of or deduct such amount in the information delivered to the mechanical licensing collective under paragraph (d)(1)(ii) of this section.

(3) *Good faith.* 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 blanket licensee at the time the report of usage 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) *Sound recording and musical work information.* (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 all known alternative and parenthetical titles for the sound recording;

(B) Featured artist(s);

(C) Unique identifier(s) assigned by the blanket licensee, including unique identifier(s) (such as, if applicable, Uniform Resource Locators (URLs)) that can be used to locate and listen to the sound recording, accompanied by clear instructions describing how to do so (such audio access may be limited to a preview or sample of the sound recording lasting at least 30 seconds), subject to paragraph (e)(3) of this section;

(D) Actual playing time measured from the sound recording audio file; and

(E) To the extent acquired by the blanket licensee in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to 17 U.S.C. 115(d)(4)(B):

(*1*) Sound recording copyright owner(s);

(*2*) Producer(s);

(*3*) ISRC(s);

(*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*) UPC(s); 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 blanket licensee 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, including pursuant to 17 U.S.C. 115(d)(4)(B):

(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*) ISNI(s) and IPI(s) for each such songwriter, publisher, and musical work copyright owner; and

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

(B) ISWC(s) 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 blanket licensee, or any corporate parent, subsidiary, or affiliate of the blanket licensee, is a copyright owner of the musical work embodied in the sound recording.

(2) Where any of the information called for by paragraph (e)(1) of this section, except for playing time, is acquired by the blanket licensee from sound recording copyright owners or other licensors of sound recordings (or their representatives), and the blanket licensee revises, re-titles, or otherwise modifies such information (which, for avoidance of doubt, does not include the act of filling in or supplementing empty or blank data fields, to the extent such information is known to the licensee), the blanket licensee shall report as follows:

(i) It shall be sufficient for the blanket licensee to report either the licensor-provided version or the modified version of such information to satisfy its obligations under paragraph (e)(1) of this section, except for the reporting of any information belonging to a category of information that was not periodically modified by that blanket licensee prior to the license availability date, any unique identifier (including but not limited to ISRC and ISWC), or any release date. On and after September 17, 2021, it additionally shall not be sufficient for the blanket licensee to report a modified version of any sound recording name, featured artist, version, or album title.

(ii) Where the blanket licensee must otherwise report the licensor-provided version of such information under paragraph (e)(2)(i) of this section, but to the best of its knowledge, information, and belief no longer has possession, custody, or control of the licensor-provided version, reporting the modified version of such information will satisfy its obligations under paragraph (e)(1) of this section if the blanket licensee certifies to the mechanical licensing collective that to the best of the blanket licensee's knowledge, information, and belief: The information at issue belongs to a category of information called for by paragraph (e)(1) of this section (each of which must be identified) that was periodically modified by the particular blanket licensee prior to October 19, 2020; and that despite engaging in good-faith, commercially reasonable efforts, the blanket licensee has not located the licensor-provided version in its records. A certification need not identify specific sound recordings or musical works, and a single certification may encompass all licensor-provided information satisfying the conditions of the preceding sentence. The blanket licensee should deliver this certification prior to or contemporaneously with the first-delivered report of usage containing information to which this paragraph (e)(2)(ii) is applicable and need not provide the same certification to the mechanical licensing collective more than once.

(3) With respect to the obligation under paragraph (e)(1) of this section for blanket licensees to report unique identifiers that can be used to locate and listen to sound recordings accompanied by clear instructions describing how to do so:

(i) On and after the license availability date, blanket licensees providing such unique identifiers may not impose conditions that materially diminish the degree of access to sound recordings in connection with their potential use by the mechanical licensing collective or its registered users in connection with their use of the collective's claiming portal (*e.g.,* if a paid subscription is not required to listen to a sound recording as of the license availability date, the blanket licensee should not later impose a subscription fee for users to access the recording through the portal). Nothing in this paragraph (e)(3)(i) shall be construed as restricting a blanket licensee from otherwise imposing conditions or diminishing access to sound recordings: With respect to other users or methods of access to its service(s), including the general public; if required by a relevant agreement with a sound recording copyright owner or other licensor of sound recordings; or where such sound recordings are no longer made available through its service(s).

(ii) Blanket licensees who do not assign such unique identifiers as of September 17, 2020, may make use of a transition period ending September 17, 2021, during which the requirement to

report such unique identifiers accompanied by instructions shall be waived upon notification, including a description of any implementation obstacles, to the mechanical licensing collective.

(iii)(A) By no later than December 16, 2020, and on a quarterly basis for the succeeding year, or as otherwise directed by the Copyright Office, the mechanical licensing collective and digital licensee coordinator shall report to the Copyright Office regarding the ability of users to listen to sound recordings for identification purposes through the collective's claiming portal. In addition to any other information requested, each report shall:

(*1*) Identify any implementation obstacles preventing the audio of any reported sound recording from being accessed directly or indirectly through the portal without cost to portal users (including any obstacles described by any blanket licensee pursuant to paragraph (e)(3)(ii) of this section, along with such licensee's identity), and any other obstacles to improving the experience of portal users seeking to identify musical works and their owners;

(*2*) Identify an implementation strategy for addressing any identified obstacles, and, as applicable, what progress has been made in addressing such obstacles; and

(*3*) Identify any agreements between the mechanical licensing collective and blanket licensee(s) to provide for access to the relevant sound recordings for portal users seeking to identify musical works and their owners through an alternate method rather than by reporting unique identifiers through reports of usage (*e.g.,* separately licensed solutions). If such an alternate method is implemented pursuant to any such agreement, the requirement to report unique identifiers that can be used to locate and listen to sound recordings accompanied by clear instructions describing how to do so is lifted for the relevant blanket licensee(s) for the duration of the agreement.

(B) The mechanical licensing collective and digital licensee coordinator shall cooperate in good faith to produce the reports required under paragraph (e)(3)(iii)(A) of this section, and shall submit joint reports with respect to areas on which they can reach substantial agreement, but which may contain separate report sections on areas where they are unable to reach substantial agreement. Such cooperation may include work through the operations advisory committee.

(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 blanket licensee by sound recording copyright owners or other licensors of sound recordings (or their representatives) contained in each of the following DDEX fields: LabelName and PLine. Where a blanket licensee acquires this information in addition to other information identifying a relevant sound recording copyright owner, all such information should be reported.

(5) A blanket licensee may make use of a transition period ending September 17, 2021, during which the blanket licensee need not report information that would otherwise be required by paragraph (e)(1)(i)(E) or (e)(1)(ii) of this section, unless:

(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) It belongs to a category of information that is reported by the particular blanket licensee pursuant to any voluntary license or individual download license; or

(iii) It belongs to a category of information that was periodically reported by the particular blanket licensee prior to the license availability date.

(f) *Content of annual reports of usage.* An annual report of usage, covering the full fiscal year of the blanket licensee, shall be clearly and prominently identified as an ''Annual Report of Usage Under Compulsory Blanket License for Making and Distributing Phonorecords,'' and shall include a clear statement of the following information:

(1) The fiscal year covered by the annual report of usage.

(2) The full legal 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. If the blanket licensee 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 blanket licensee. 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) The following information, cumulative for the applicable annual reporting period, for each month for each applicable activity or offering including as may be defined in part 385 of this title, and broken down by month and by each such applicable activity or offering:

(i) The total royalty payable by the blanket licensee under the blanket license, computed in accordance with the requirements of this section and part 385 of this title.

(ii) The total sum paid to the mechanical licensing collective under the blanket license, including the amount of any adjustment delivered contemporaneously with the annual report of usage.

(iii) The total adjustment(s) made by any report of adjustment adjusting any monthly report of usage covered by the applicable annual reporting period, including any adjustment made in connection with the annual report of usage as described in paragraph (k)(1) of this section.

(iv) The total number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each sound recording used, whether pursuant to a blanket license, voluntary license, or individual download license.

(v) To the extent applicable to the calculation of royalties owed by the blanket licensee under the blanket license:

(A) Total service provider revenue, as may be defined in part 385 of this title.

(B) Total costs of content, as may be defined in part 385 of this title.

(C) Total deductions of performance royalties, as may be defined in and permitted by part 385 of this title.

(D) Total subscribers, as may be defined in part 385 of this title.

(5) The amount of late fees, if applicable, included in any payment associated with the annual report of usage.

(g) *Processing and timing.* (1) Each monthly report of usage and related royalty payment must be delivered to the mechanical licensing collective no later than 45 calendar days after the end of the applicable monthly reporting period. Where a monthly report of usage satisfying the requirements of 17 U.S.C. 115 and this section is delivered to the mechanical licensing collective no later than 15 calendar days after the end of the applicable monthly reporting period, the mechanical licensing collective shall deliver an invoice to the blanket licensee no later than 40 calendar days after the end of the applicable monthly reporting period that sets forth the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, which shall be broken down by each applicable activity or

offering including as may be defined in part 385 of this title.

(2) After receiving a monthly report of usage, the mechanical licensing collective shall engage in the following actions, among any other actions required of it:

(i) The mechanical licensing collective shall engage in efforts to identify the musical works embodied in sound recordings reflected in such report, and the copyright owners of such musical works (and shares thereof).

(ii) The mechanical licensing collective shall engage in efforts to confirm uses of musical works subject to voluntary licenses and individual download licenses, and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license.

(iii) Where the blanket licensee will not receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, the mechanical licensing collective shall engage in efforts to confirm proper payment of the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, computed in accordance with the requirements of this section and part 385 of this title, after accounting for, if applicable, amounts to be deducted under paragraph (g)(2)(ii) of this section.

(iv) Where the blanket licensee will receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, the mechanical licensing collective shall engage in efforts to compute, in accordance with the requirements of this section and part 385 of this title, the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, after accounting for, if applicable, amounts to be deducted under paragraph (g)(2)(ii) of this section.

(v) The mechanical licensing collective shall deliver a response file to the blanket licensee if requested by the blanket licensee, and the blanket licensee may request an invoice even if not entitled to an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section. Such requests may be made in connection with a particular monthly report of usage or via a one-time request that applies to future reporting periods. Where the blanket licensee will receive an invoice prior to delivering its royalty payment under paragraph (g)(1) of this section, the mechanical licensing collective shall deliver the response file to the blanket licensee contemporaneously with such invoice. The mechanical licensing collective shall otherwise deliver the response file and/or invoice, as applicable, to the blanket licensee in a reasonably timely manner, but no later than 70 calendar days after the end of the applicable monthly reporting period if the blanket licensee has delivered its monthly report of usage and related royalty payment no later than 45 calendar days after the end of the applicable monthly reporting period. In all cases, 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, and shall include the results of the process described in paragraphs (g)(2)(i) through (iv) of this section on a track-by-track and ownership-share basis, with updates to reflect any new results from the previous month. Response files shall include the following minimum information: song title, mechanical licensing collective-assigned song code, composer(s), publisher name, including top publisher, original publisher, and admin publisher, publisher split, mechanical licensing collective-assigned publisher number, publisher/license status (whether each work share is subject to the blanket license or a voluntary license or individual download license), royalties per work share, effective per-play rate, time-adjusted plays, and the unique identifier for each applicable voluntary license or individual download license provided to the mechanical licensing collective pursuant to § 210.24(b)(8)(vi).

(3) Each annual report of usage and, if any, related royalty payment must be delivered to the mechanical licensing collective no later than the 20th day of the sixth month following the end of the fiscal year covered by the annual report of usage.

(4) The required timing for any report of adjustment and, if any, related royalty payment shall be as follows:

(i) Where a report of adjustment adjusting a monthly report of usage is not combined with an annual report of usage, as described in paragraph (k)(1) of this section, a report of adjustment adjusting a monthly report of usage must be delivered to the mechanical licensing collective after delivery of the monthly report of usage being adjusted and before delivery of the annual report of usage for the annual period covering such monthly report of usage.

(ii) A report of adjustment adjusting an annual report of usage must be delivered to the mechanical licensing collective no later than 6 months after the occurrence of any of the scenarios specified by paragraph (k)(6) of this section, where such an event necessitates an adjustment. Where more than one scenario applies to the same annual report of usage at different points in time, a separate 6-month period runs for each such triggering event.

(h) *Format and delivery.* (1) Reports of usage shall be delivered to the mechanical licensing collective 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 blanket licensees. The mechanical licensing collective must offer at least two options, where one is dedicated to smaller blanket licensees 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 blanket licensees 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 report of usage 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 report of usage to the payment.

(3) The mechanical licensing collective may modify the requirements it adopts under paragraphs (h)(1) and (2) of this section at any time, after good-faith consultation with the operations advisory committee and taking into consideration any technological and cost burdens that may reasonably be expected to result and the proportionality of those burdens to any reasonably expected benefits, provided that advance notice of any such change is reflected on its website and delivered to blanket licensees using the contact information provided in each respective licensee's notice of license. A blanket licensee shall not be required to comply with any such change before the first reporting period ending at least 30 calendar days after delivery of such notice, unless such change is a

significant change, in which case, compliance shall not be required before the first reporting period ending at least one year after delivery of such notice. For purposes of this paragraph (h)(3), a *significant change* occurs where the mechanical licensing collective changes any policy requiring information to be provided under particular reporting or data standards or formats. Where delivery of the notice required by this paragraph (h)(3) is attempted but unsuccessful because the contact information in the blanket licensee's notice of license is not current, the grace periods established by this paragraph (h)(3) shall begin to run from the date of attempted delivery. Nothing in this paragraph (h)(3) empowers the mechanical licensing collective to impose reporting requirements that are otherwise inconsistent with the regulations prescribed by this section.

(4) The mechanical licensing collective shall, by no later than the license availability date, establish an appropriate process by which any blanket licensee may voluntarily make advance deposits of funds with the mechanical licensing collective against which future royalty payments may be charged.

(5) A separate monthly report of usage shall be delivered for each month during which there is any activity relevant to the payment of mechanical royalties for covered activities. An annual report of usage shall be delivered for each fiscal year during which at least one monthly report of usage was required to have been delivered. An annual report of usage does not replace any monthly report of usage.

(6)(i) Where a blanket licensee attempts to timely deliver a report of usage and/or related royalty payment to the mechanical licensing collective but cannot because of the fault of the collective or an error, outage, disruption, or other issue with any of the collective's applicable information technology systems (whether or not such issue is within the collective's direct control) the occurrence of which the blanket licensee knew or should have known at the time, if the blanket licensee attempts to contact the collective about the problem within 2 business days, provides a sworn statement detailing the encountered problem to the Copyright Office within 5 business days (emailed to the Office of the General Counsel at *USCOGeneralCounsel@copyright.gov*), and delivers the report of usage and/or related royalty payment to the collective within 5 business days after receiving written notice from the collective that the problem is resolved, then the mechanical licensing collective shall act as follows:

(A) The mechanical licensing collective shall fully credit the blanket licensee for any applicable late fee paid by the blanket licensee as a result of the untimely delivery of the report of usage and/or related royalty payment.

(B) The mechanical licensing collective shall not use the untimely delivery of the report of usage and/or related royalty payment as a basis to terminate the blanket licensee's blanket license.

(ii) In the event of a good-faith dispute regarding whether a blanket licensee knew or should have known of the occurrence of an error, outage, disruption, or other issue with any of the mechanical licensing collective's applicable information technology systems, a blanket licensee that complies with the requirements of paragraph (h)(6)(i) of this section within a reasonable period of time shall receive the protections of paragraphs (h)(6)(i)(A) and (B) of this section.

(7) The mechanical licensing collective shall provide a blanket licensee with written confirmation of receipt no later than 2 business days after receiving a report of usage and no later than 2 business days after receiving any payment.

(i) *Certification of monthly reports of usage.* Each monthly report of usage shall be accompanied by:

(1) The name of the person who is signing and certifying the monthly report of usage.

(2) A signature, which in the case of a blanket licensee 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 blanket licensee 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 monthly report of usage.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this monthly report of usage on behalf of the blanket licensee, (2) I have examined this monthly report of usage, 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 monthly report of usage on behalf of the blanket licensee, (2) I have prepared or supervised the preparation of the data used by the blanket licensee and/or its agent to generate this monthly report of usage, (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 monthly report of usage was prepared by the blanket licensee 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 (A) the processes generated monthly reports of usage that accurately reflect, in all material respects, the blanket licensee's usage of musical works, the statutory royalties applicable thereto (to the extent reported), 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, and (B) the internal controls relevant to the processes used by or on behalf of the blanket licensee to generate monthly reports of usage were suitably designed and operated effectively during the period covered by the monthly reports of usage.

(6) A certification that the blanket licensee has, for the period covered by the monthly report of usage, engaged in good-faith, commercially reasonable efforts to obtain information about applicable sound recordings and musical works pursuant to 17 U.S.C. 115(d)(4)(B) and § 210.26.

(j) *Certification of annual reports of usage.* (1) Each annual report of usage shall be accompanied by:

(i) The name of the person who is signing the annual report of usage on behalf of the blanket licensee.

(ii) A signature, which in the case of a blanket licensee that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(iii) The date of signature.

(iv) If the blanket licensee is a corporation or partnership, the title or official position held in the partnership or corporation by the person signing the annual report of usage.

(v) The following statement: I am duly authorized to sign this annual report of usage on behalf of the blanket licensee.

(vi) A certification that the blanket licensee has, for the period covered by the annual report of usage, engaged in good-faith, commercially reasonable efforts to obtain information about applicable sound recordings and musical works pursuant to 17 U.S.C. 115(d)(4)(B) and § 210.26.

(2) Each annual report of usage shall also be certified by a licensed certified public accountant. Such certification shall comply with the following requirements:

(i) Except as provided in paragraph (j)(2)(ii) of this section, the accountant shall certify that it has conducted an

examination of the annual report of usage prepared by the blanket licensee in accordance with the attestation standards established by the American Institute of Certified Public Accountants, and has rendered an opinion based on such examination that the annual report of usage conforms with the standards in paragraph (j)(2)(iv) of this section.

(ii) If such accountant determines in its professional judgment that the volume of data attributable to a particular blanket licensee renders it impracticable to certify the annual report of usage as required by paragraph (j)(2)(i) of this section, the accountant may instead certify the following:

(A) That the accountant has conducted an examination in accordance with the attestation standards established by the American Institute of Certified Public Accountants of the following assertions by the blanket licensee's management:

(*1*) That the processes used by or on behalf of the blanket licensee generated annual reports of usage that conform with the standards in paragraph (j)(2)(iv) of this section; and

(*2*) That the internal controls relevant to the processes used by or on behalf of the blanket licensee to generate annual reports of usage were suitably designed and operated effectively during the period covered by the annual reports of usage.

(B) That such examination included examining, either on a test basis or otherwise as the accountant considered necessary under the circumstances and in its professional judgment, evidence supporting the management assertions in paragraph (j)(2)(ii)(A) of this section, and performing such other procedures as the accountant considered necessary in the circumstances.

(C) That the accountant has rendered an opinion based on such examination that the processes used to generate the annual report of usage generated annual reports of usage that conform with the standards in paragraph (j)(2)(iv) of this section, and that the internal controls relevant to the processes used to generate annual reports of usage were suitably designed and operated effectively during the period covered by the annual reports of usage.

(iii) In the event a third party or third parties acting on behalf of the blanket licensee provided services related to the annual report of usage, the accountant making a certification under either paragraph (j)(2)(i) or (ii) of this section may, as the accountant considers necessary under the circumstances and in its professional judgment, rely on a report and opinion rendered by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants that the processes and/or internal controls of the third party or third parties relevant to the generation of the blanket licensee's annual reports of usage were suitably designed and operated effectively during the period covered by the annual reports of usage, if such reliance is disclosed in the certification.

(iv) An annual report of usage conforms with the standards of this paragraph (j) if it presents fairly, in all material respects, the blanket licensee's usage of musical works in covered activities during the period covered by the annual report of usage, the statutory royalties applicable thereto (to the extent reported), and such other data as are relevant to the calculation of statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(v) Each certificate shall be signed by an individual, or in the name of a partnership or a professional corporation with two or more shareholders. The certificate number and jurisdiction are not required if the certificate is signed in the name of a partnership or a professional corporation with two or more shareholders.

(3) If the annual report of usage is delivered electronically, the blanket licensee may deliver an electronic facsimile of the original certification of the annual report of usage signed by the licensed certified public accountant. The blanket licensee shall retain the original certification of the annual report of usage signed by the licensed certified public accountant for the period identified in paragraph (m) of this section, which shall be made available to the mechanical licensing collective upon demand.

(k) *Adjustments.* (1) A blanket licensee may adjust one or more previously delivered monthly reports of usage or annual reports of usage, including related royalty payments, by delivering to the mechanical licensing collective a report of adjustment. A report of adjustment adjusting one or more monthly reports of usage may, but need not, be combined with the annual report of usage for the annual period covering such monthly reports of usage and related payments. In such cases, such an annual report of usage shall also be considered a report of adjustment, and must satisfy the requirements of both paragraphs (f) and (k) of this section.

(2) A report of adjustment, except when combined with an annual report of usage, shall be clearly and prominently identified as a ''Report of Adjustment Under Compulsory Blanket License for Making and Distributing Phonorecords.'' A report of adjustment that is combined with an annual report of usage shall be identified in the same manner as any other annual report of usage.

(3) A report of adjustment shall include a clear statement of the following information:

(i) The previously delivered monthly reports of usage or annual reports of usage, including related royalty payments, to which the adjustment applies.

(ii) The specific change(s) to the applicable previously delivered monthly reports of usage or annual reports of usage, including a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the blanket licensee under the blanket license depends. Such description shall include all information necessary for the mechanical licensing collective to compute, in accordance with the requirements of this section and part 385 of this title, the adjusted royalties payable by the blanket licensee under the blanket license, and all information necessary to enable the mechanical licensing collective to provide a detailed and step-by-step accounting of the calculation of the adjustment under applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the mechanical licensing collective, using the blanket licensee's information, determined the adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2)(i) of this section.

(iii) Where applicable, the particular sound recordings and uses to which the adjustment applies.

(iv) A description of the reason(s) for the adjustment.

(4) In the case of an underpayment of royalties, the blanket licensee shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the report of adjustment or promptly after being notified by the mechanical licensing collective of the amount due. A report of adjustment 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 report of adjustment to the payment.

(5) 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 blanket licensee's account, or upon request, issue a refund within a reasonable period of time.

(6) A report of adjustment adjusting an annual report of usage may only be made:

(i) In exceptional circumstances;

(ii) When making an adjustment to a previously estimated input under paragraph (d)(2)(i) of this section;

(iii) Following an audit under 17 U.S.C. 115(d)(4)(D);

(iv) Following any other audit of a blanket licensee that concludes after the annual report of usage is delivered and that has the result of affecting the computation of the royalties payable by the blanket licensee under the blanket license (*e.g.,* as applicable, an audit by a sound recording copyright owner concerning the amount of applicable consideration paid for sound recording copyright rights); or

(v) In response to a change in applicable rates or terms under part 385 of this title.

(7) A report of adjustment adjusting a monthly report of usage must be certified in the same manner as a monthly report of usage under paragraph (i) of this section. A report of adjustment adjusting an annual report of usage must be certified in the same manner as an annual report of usage under paragraph (j) of this section, except that the examination by a certified public accountant under paragraph (j)(2) of this section may be limited to the adjusted material and related recalculation of royalties payable. Where a report of adjustment is combined with an annual report of usage, its content shall be subject to the certification covering the annual report of usage with which it is combined.

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

(m) *Documentation and records of use.* (1) Each blanket licensee shall, for a period of at least seven years from the date of delivery of a report of usage to the mechanical licensing collective, keep and retain in its possession all records and documents necessary and appropriate to support fully the information set forth in such report of usage (except that such records and documents that relate to an estimated input permitted under paragraph (d)(2) of this section must be kept and retained for a period of at least seven years from the date of delivery of the report of usage containing the final adjustment of such input), including but not limited to the following:

(i) Records and documents accounting for digital phonorecord deliveries that do not constitute plays, constructive plays, or other payable units.

(ii) Records and documents pertaining to any promotional or free trial uses that are required to be maintained under applicable provisions of part 385 of this title.

(iii) Records and documents identifying or describing each of the blanket licensee's applicable activities or offerings including as may be defined in part 385 of this title, including information sufficient to reasonably demonstrate whether the activity or offering qualifies as any particular activity or offering for which specific rates and terms have been established in part 385 of this title, and which specific rates and terms apply to such activity or offering.

(iv) Records and documents with information sufficient to reasonably demonstrate, if applicable, whether service revenue and total cost of content, as those terms may be defined in part 385 of this title, are properly calculated in accordance with part 385 of this title.

(v) Records and documents with information sufficient to reasonably demonstrate whether and how any royalty floor established in part 385 of this title does or does not apply.

(vi) Records and documents containing such other information as is necessary to reasonably support and confirm all usage and calculations (including of any inputs provided to the mechanical licensing collective to enable further calculations) contained in the report of usage, including but not limited to, as applicable, relevant information concerning subscriptions, devices and platforms, discount plans (including how eligibility was assessed), bundled offerings (including their constituent components and pricing information), and numbers of end users and subscribers (including unadjusted numbers and numbers adjusted as may be permitted by part 385 of this title).

(vii) Any other records or documents that may be appropriately examined pursuant to an audit under 17 U.S.C. 115(d)(4)(D).

(2) The mechanical licensing collective or its agent shall be entitled to reasonable access to records and documents described in paragraph (m)(1) of this section, which shall be provided promptly and arranged for no later than 30 calendar days after the mechanical licensing collective's reasonable request, subject to any confidentiality to which they may be entitled. The mechanical licensing collective shall be entitled to make one request per quarter covering a period of up to one quarter in the aggregate. With respect to the total cost of content, as that term may be defined in part 385 of this title, the access permitted by this paragraph (m)(2) shall be limited to accessing the aggregated figure kept by the blanket licensee on its books for the relevant reporting period(s). Neither the mechanical licensing collective nor its agent shall be entitled to access any records or documents retained solely pursuant to paragraph (m)(1)(vii) of this section outside of an applicable audit. Each report of usage must include clear instructions on how to request access to records and documents under this paragraph (m).

(3) Each blanket licensee shall, in accordance with paragraph (m)(4) of this section, keep and retain in its possession and report the following information:

(i) With respect to each sound recording, that embodies a musical work, first licensed or obtained for use in covered activities by the blanket licensee on or after the effective date of its blanket license:

(A) Each of the following dates to the extent reasonably available:

(*1*) The date on which the sound recording was first reproduced by the blanket licensee on its server (''server fixation date'').

(*2*) The date on which the sound recording was first released on the blanket licensee's service (''street date'').

(B) If neither of the dates specified in paragraph (m)(3)(i)(A) of this section is reasonably available, the date that, in the assessment of the blanket licensee, provides a reasonable estimate of the date the sound recording was first distributed on its service within the United States (''estimated first distribution date'').

(ii) A record of materially all sound recordings embodying musical works in its database or similar electronic system as of a time reasonably approximate to the effective date of its blanket license. For each recording, the record shall include the sound recording name(s), featured artist(s), unique identifier(s) assigned by the blanket licensee, actual playing time, and, to the extent acquired by the blanket licensee in connection with its use of sound recordings of musical works to engage in covered activities, ISRC(s). The blanket licensee shall use commercially reasonable efforts to make this record as accurate and complete as reasonably possible in

representing the blanket licensee's repertoire as of immediately prior to the effective date of its blanket license.

(4)(i) Each blanket licensee must deliver the information described in paragraph (m)(3)(i) of this section to the mechanical licensing collective at least annually and keep and retain this information until delivered. Such reporting must include the following:

(A) For each sound recording, the same categories of information described in paragraph (m)(3)(ii) of this section.

(B) For each date, an identification of which type of date it is (*i.e.,* server fixation date, street date, or estimated first distribution date).

(ii) A blanket licensee must deliver the information described in paragraph (m)(3)(ii) of this section to the mechanical licensing collective as soon as commercially reasonable, and no later than contemporaneously with its first reporting under paragraph (m)(4)(i) of this section.

(iii) Prior to being delivered to the mechanical licensing collective, the collective or its agent shall be entitled to reasonable access to the information kept and retained pursuant to paragraphs (m)(4)(i) and (ii) of this section if needed in connection with applicable directions, instructions, or orders concerning the distribution of royalties.

(5) Nothing in paragraph (m)(3) or (4) of this section, nor the collection, maintenance, or delivery of information under paragraphs (m)(3) and (4) of this section, nor the information itself, shall be interpreted or construed:

(i) To alter, limit, or diminish in any way the ability of an author or any other person entitled to exercise rights of termination under section 203 or 304 of title 17 of the United States Code from fully exercising or benefiting from such rights;

(ii) As determinative of the date of the license grant with respect to works as it pertains to sections 203 and 304 of title 17 of the United States Code; or

(iii) To affect in any way the scope or effectiveness of the exercise of termination rights, including as pertaining to derivative works, under section 203 or 304 of title 17 of the United States Code.

(n) *Voluntary agreements with mechanical licensing collective to alter process.* (1) Subject to the provisions of 17 U.S.C. 115, a blanket licensee and the mechanical licensing collective may agree in writing to vary or supplement the procedures described in this section, including but not limited to pursuant to an agreement to administer a voluntary license, provided that any such change does not materially prejudice copyright owners owed royalties due under a blanket license. The procedures surrounding the certification requirements of paragraphs (i) and (j) of this section may not be altered by agreement. This paragraph (n)(1) does not empower the mechanical licensing collective to agree to alter any substantive requirements described in this section, including but not limited to the required royalty payment and accounting information and sound recording and musical work information.

(2) The mechanical licensing collective shall maintain a current, free, and publicly accessible online list of all agreements made pursuant to paragraph (n)(1) of this section that includes the name of the blanket licensee (and, if different, the trade or consumer-facing brand name(s) of the services(s), including any specific offering(s), through which the blanket licensee engages in covered activities) and the start and end dates of the agreement. Any such agreement shall be considered a record that a copyright owner may access in accordance with 17 U.S.C. 115(d)(3)(M)(ii). Where an agreement made pursuant to paragraph (n)(1) of this section is made pursuant to an agreement to administer a voluntary license or any other agreement, only those portions that vary or supplement the procedures described in this section and that pertain to the administration of a requesting copyright owner's musical works must be made available to that copyright owner.

**§ 210.28 Reports of usage for significant nonblanket licensees.**

(a) *General.* This section prescribes rules for the preparation and delivery of reports of usage for the making and distribution of phonorecords of nondramatic musical works to the mechanical licensing collective by a significant nonblanket licensee pursuant to 17 U.S.C. 115(d)(6)(A)(ii). A significant nonblanket licensee shall report to the mechanical licensing collective on a monthly basis in accordance with 17 U.S.C. 115(d)(6)(A)(ii) and this section. A significant nonblanket licensee may make adjustments to its reports of usage in accordance with this section.

(b) *Definitions.* For purposes of this section, in addition to those terms defined in § 210.22:

(1) The term *report of usage,* unless otherwise specified, refers to all reports of usage required to be delivered by a significant nonblanket licensee to the mechanical licensing collective, including reports of adjustment. As used in this section, it does not refer to reports required to be delivered by blanket licensees under 17 U.S.C. 115(d)(4)(A) and § 210.27.

(2) A *monthly report of usage* is a report of usage identified in 17 U.S.C. 115(d)(6)(A)(ii), and required to be delivered by a significant nonblanket licensee to the mechanical licensing collective.

(3) A *report of adjustment* is a report delivered by a significant nonblanket licensee to the mechanical licensing collective adjusting one or more previously delivered monthly reports of usage.

(c) *Content of monthly reports of usage.* A monthly report of usage shall be clearly and prominently identified as a ''Significant Nonblanket Licensee Monthly Report of Usage for Making and Distributing Phonorecords,'' and shall include a clear statement of the following information:

(1) The period (month and year) covered by the monthly report of usage.

(2) The full legal name of the significant nonblanket licensee and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the significant nonblanket licensee engages in covered activities. If the significant nonblanket licensee 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 significant nonblanket licensee. 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 that is used by the significant nonblanket licensee in covered activities during the applicable monthly reporting period, a detailed statement, from which the mechanical licensing collective may separate reported information 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) For each voluntary license and individual download license in effect during the applicable monthly reporting period, the information required under § 210.24(b)(8). If this information has been separately provided to the mechanical licensing collective, it need not be contained in the monthly report of usage, provided the report states that

the information has been provided separately and includes the date on which such information was last provided to the mechanical licensing collective.

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

(1) The mechanical royalties payable by the significant nonblanket licensee for the applicable monthly reporting period for engaging in covered activities pursuant to each applicable voluntary license and individual download license.

(2) The number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording.

(e) *Sound recording and musical work information.* (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 all known alternative and parenthetical titles for the sound recording;

(B) Featured artist(s);

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

(D) Actual playing time measured from the sound recording audio file; and

(E) To the extent acquired by the significant nonblanket licensee in connection with its use of sound recordings of musical works to engage in covered activities:

(*1*) Sound recording copyright owner(s);

(*2*) Producer(s);

(*3*) ISRC(s);

(*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*) UPC(s); 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 significant nonblanket licensee 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:

(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*) ISNI(s) and IPI(s) for each such songwriter, publisher, and musical work copyright owner; and

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

(B) ISWC(s) 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 significant nonblanket licensee, or any corporate parent, subsidiary, or affiliate of the significant nonblanket licensee, is a copyright owner of the musical work embodied in the sound recording.

(2) Where any of the information called for by paragraph (e)(1) of this section, except for playing time, is acquired by the significant nonblanket licensee from sound recording copyright owners or other licensors of sound recordings (or their representatives), and the significant nonblanket licensee revises, re-titles, or otherwise modifies such information (which, for avoidance of doubt, does not include the act of filling in or supplementing empty or blank data fields, to the extent such information is known to the licensee), the significant nonblanket licensee shall report as follows:

(i) It shall be sufficient for the significant nonblanket licensee to report either the licensor-provided version or the modified version of such information to satisfy its obligations under paragraph (e)(1) of this section, except that it shall not be sufficient for the significant nonblanket licensee to report a modified version of any information belonging to a category of information that was not periodically modified by that significant nonblanket licensee prior to the license availability date, any unique identifier (including but not limited to ISRC and ISWC), or any release date.

(ii) Where the significant nonblanket licensee must otherwise report the licensor-provided version of such information under paragraph (e)(2)(i) of this section, but to the best of its knowledge, information, and belief no longer has possession, custody, or control of the licensor-provided version, reporting the modified version of such information will satisfy its obligations under paragraph (e)(1) of this section if the significant nonblanket licensee certifies to the mechanical licensing collective that to the best of the significant nonblanket licensee's knowledge, information, and belief: The information at issue belongs to a category of information called for by paragraph (e)(1) of this section (each of which must be identified) that was periodically modified by the particular significant nonblanket licensee prior to October 19, 2020; and that despite engaging in good-faith, commercially reasonable efforts, the significant nonblanket licensee has not located the licensor-provided version in its records. A certification need not identify specific sound recordings or musical works, and a single certification may encompass all licensor-provided information satisfying the conditions of the preceding sentence. The significant nonblanket licensee should deliver this certification prior to or contemporaneously with the first-delivered report of usage containing information to which this paragraph (e)(2)(ii) is applicable and need not provide the same certification to the mechanical licensing collective more than once.

(3) 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 significant nonblanket licensee by sound recording copyright owners or other licensors of sound recordings (or their representatives) contained in each of the following DDEX fields: LabelName and PLine. Where a significant nonblanket licensee acquires this information in addition to other information identifying a relevant sound recording copyright owner, all such information should be reported.

(4) A significant nonblanket licensee may make use of a transition period ending September 17, 2021, during which the significant nonblanket licensee need not report information that would otherwise be required by paragraph (e)(1)(i)(E) or (e)(1)(ii) of this section, unless:

(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) It belongs to a category of information that is reported by the particular significant nonblanket licensee pursuant to any voluntary license or individual download license; or

(iii) It belongs to a category of information that was periodically reported by the particular significant nonblanket licensee prior to the license availability date.

(f) *Timing.* (1) An initial report of usage must be delivered to the mechanical licensing collective contemporaneously with the significant nonblanket licensee's notice of nonblanket activity. Each subsequent monthly report of usage must be delivered to the mechanical licensing collective no later than 45 calendar days after the end of the applicable monthly reporting period.

(2) A report of adjustment may only be delivered to the mechanical licensing collective once annually, between the end of the significant nonblanket licensee's fiscal year and 6 months after the end of its fiscal year. Such report may only adjust one or more previously delivered monthly reports of usage from the applicable fiscal year.

(g) *Format and delivery.* (1) Reports of usage shall be delivered to the mechanical licensing collective in any format accepted by the mechanical licensing collective for blanket licensees under § 210.27(h). With respect to any modifications to formatting requirements that the mechanical licensing collective adopts, the mechanical licensing collective shall follow the consultation process as under § 210.27(h), and significant nonblanket licensees shall be entitled to the same advance notice and grace periods as apply to blanket licensees under § 210.27(h), except the mechanical licensing collective shall use the contact information provided in each respective significant nonblanket licensee's notice of nonblanket activity. Nothing in this paragraph (g)(1) empowers the mechanical licensing collective to impose reporting requirements that are otherwise inconsistent with the regulations prescribed by this section.

(2) A separate monthly report of usage shall be delivered for each month during which there is any activity relevant to the payment of mechanical royalties for covered activities.

(3) Where a significant nonblanket licensee attempts to timely deliver a report of usage to the mechanical licensing collective but cannot because of the fault of the collective or an error, outage, disruption, or other issue with any of the collective's applicable information technology systems (whether or not such issue is within the collective's direct control) the occurrence of which the significant nonblanket licensee knew or should have known at the time, if the significant nonblanket licensee attempts to contact the collective about the problem within 2 business days, provides a sworn statement detailing the encountered problem to the Copyright Office within 5 business days (emailed to the Office of the General Counsel at *USCOGeneralCounsel@copyright.gov*), and delivers the report of usage to the collective within 5 business days after receiving written notice from the collective that the problem is resolved, then neither the mechanical licensing collective nor the digital licensee coordinator may use the untimely delivery of the report of usage as a basis to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C). In the event of a good-faith dispute regarding whether a significant nonblanket licensee knew or should have known of the occurrence of an error, outage, disruption, or other issue with any of the mechanical licensing collective's applicable information technology systems, neither the mechanical licensing collective nor the digital licensee coordinator may use the untimely delivery of the report of usage as a basis to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C) as long as the significant nonblanket licensee complies with the requirements of this paragraph (g)(3) within a reasonable period of time.

(4) The mechanical licensing collective shall provide a significant nonblanket licensee with written confirmation of receipt no later than 2 business days after receiving a report of usage.

(h) *Certification of monthly reports of usage.* Each monthly report of usage shall be accompanied by:

(1) The name of the person who is signing and certifying the monthly report of usage.

(2) A signature, which in the case of a significant nonblanket licensee 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 significant nonblanket licensee 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 monthly report of usage.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this monthly report of usage on behalf of the significant nonblanket licensee, (2) I have examined this monthly report of usage, 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 monthly report of usage on behalf of the significant nonblanket licensee, (2) I have prepared or supervised the preparation of the data used by the significant nonblanket licensee and/or its agent to generate this monthly report of usage, (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 monthly report of usage was prepared by the significant nonblanket licensee 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 (A) the processes generated monthly reports of usage that accurately reflect, in all material respects, the significant nonblanket licensee's usage of musical works and the royalties applicable thereto, and (B) the internal controls relevant to the processes used by or on behalf of the significant nonblanket licensee to generate monthly reports of usage were suitably designed and operated effectively during the period covered by the monthly reports of usage.

(i) *Adjustments.* (1) A significant nonblanket licensee may adjust one or more previously delivered monthly reports of usage by delivering to the mechanical licensing collective a report of adjustment.

(2) A report of adjustment shall be clearly and prominently identified as a ''Significant Nonblanket Licensee Report of Adjustment for Making and Distributing Phonorecords.''

(3) A report of adjustment shall include a clear statement of the following information:

(i) The previously delivered monthly report(s) of usage to which the adjustment applies.

(ii) The specific change(s) to the applicable previously delivered monthly report(s) of usage.

(iii) Where applicable, the particular sound recordings and uses to which the adjustment applies.

(iv) A description of the reason(s) for the adjustment.

(4) A report of adjustment must be certified in the same manner as a monthly report of usage under paragraph (h) of this section.

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

(k) *Harmless errors.* Errors in the delivery or content of a report of usage that do not materially affect the adequacy of the information required to serve the purpose of 17 U.S.C. 115(d) shall be deemed harmless, and shall not render the report invalid or provide a basis for the mechanical licensing collective or digital licensee coordinator to engage in legal enforcement efforts under 17 U.S.C. 115(d)(6)(C). This paragraph (k) shall apply only to errors made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(l) *Voluntary agreements with mechanical licensing collective to alter process.* (1) Subject to the provisions of 17 U.S.C. 115, a significant nonblanket licensee and the mechanical licensing collective may agree in writing to vary or supplement the procedures described in this section, including but not limited to pursuant to an agreement to administer a voluntary license, provided that any such change does not materially prejudice copyright owners owed royalties due under a blanket license. The procedures surrounding the certification requirements of paragraph (h) of this section may not be altered by agreement. This paragraph (l)(1) does not empower the mechanical licensing collective to agree to alter any substantive requirements described in this section, including but not limited to the required royalty payment and accounting information and sound recording and musical work information.

(2) The mechanical licensing collective shall maintain a current, free, and publicly accessible online list of all agreements made pursuant to paragraph (l)(1) of this section that includes the name of the significant nonblanket licensee (and, if different, the trade or consumer-facing brand name(s) of the services(s), including any specific offering(s), through which the significant nonblanket licensee engages in covered activities) and the start and end dates of the agreement. Any such agreement shall be considered a record that a copyright owner may access in accordance with 17 U.S.C. 115(d)(3)(M)(ii). Where an agreement made pursuant to paragraph (l)(1) of this section is made pursuant to an agreement to administer a voluntary license or any other agreement, only those portions that vary or supplement the procedures described in this section and that pertain to the administration of a requesting copyright owner's musical works must be made available to that copyright owner.

Dated: September 3, 2020.

**Maria Strong,**

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

Approved by:

**Carla D. Hayden,**

*Librarian of Congress.*

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