

downloads, plays, and constructive plays.

(v) The royalty rate and amount.

(vi) The interest amount.

(vii) The distribution amount.

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

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

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

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

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

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

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

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

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

(iii) The date of signature and certification.

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

(v) One of the following statements:

(A) Statement one:

I certify that (1) I am duly authorized to sign this royalty statement on behalf of the mechanical licensing collective; (2) I have examined this royalty statement; and (3) All statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith; or

(B) Statement two:

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

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

(2) Royalties under the blanket license shall not be considered payable, and no royalty statement shall be required, until the cumulative unpaid royalties collected for the copyright owner equal at least one cent. Moreover, in any case in which the cumulative unpaid royalties under the blanket license that would otherwise be distributed by the mechanical licensing collective to the copyright owner are less than \$2 if the copyright owner receives payment by direct deposit, \$100 if the copyright owner receives payment by physical check, or \$250 if the copyright owner receives payment by wire transfer and the copyright owner has not notified the mechanical licensing collective in writing that it wishes to receive royalty statements reflecting payments of less than the threshold, the mechanical licensing collective may choose to defer the payment date for such royalties and provide no royalty statements until the earlier of the time for rendering the royalty statement for the month in which the unpaid royalties under the blanket license for the copyright owner exceed the threshold, at which time the mechanical licensing collective may provide one statement and payment covering the entire period for which royalty payments were deferred.

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

Dated: April 15, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

[FR Doc. 2020-08375 Filed 4-17-20; 4:15 pm]

**BILLING CODE 1410-30-P**

## LIBRARY OF CONGRESS

### U.S. Copyright Office

#### 37 CFR Part 210

[Docket No. 2020-7]

#### Treatment of Confidential Information by the Mechanical Licensing Collective and Digital Licensee Coordinator

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding the protection of confidential information by the mechanical licensing collective and digital licensee coordinator under title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act. After soliciting public comments through a notification of inquiry, the Office is now proposing regulations identifying appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used. The Office solicits additional public comments on the proposed rule, including regarding the use of confidentiality designations and nondisclosure agreements.

**DATES:** Written comments must be received no later than 11:59 Eastern Time on June 8, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <https://copyright.gov/rulemaking/ma-confidentiality>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Regan A. Smith, General Counsel and Associate Register of Copyrights, by

email at [regans@copyright.gov](mailto:regans@copyright.gov) or Anna Chauvet, Associate General Counsel, by email at [achau@copyright.gov](mailto:achau@copyright.gov). Each can be contacted by telephone by calling (202) 707-8350.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”).<sup>1</sup> Title I of the MMA, the Musical Works Modernization Act, substantially modifies the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>2</sup> Prior to the MMA, licensees obtained a section 115 compulsory license on a per-work, song-by-song basis, by serving a notice of intention to obtain a compulsory license (“NOI”) on the relevant copyright owner (or filing it with the Copyright Office if the Office’s public records did not identify the copyright owner) and then paying applicable royalties accompanied by accounting statements.<sup>3</sup> The MMA amends this regime most significantly by establishing a new blanket compulsory license that digital music providers may obtain to make digital phonorecord deliveries (“DPDs”) of musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity,” where such activity qualifies for a compulsory license).<sup>4</sup> Instead of licensing one song at a time by serving NOIs on individual copyright owners, the blanket license will cover all musical works available for compulsory licensing and will be centrally administered by a mechanical licensing collective (“MLC”), which has been designated by the Register of Copyrights.<sup>5</sup>

By statute, digital music providers will bear the reasonable costs of

establishing and operating the MLC through an administrative assessment, to be determined, if necessary, by the Copyright Royalty Judges (“CRJs”).<sup>6</sup> As permitted under the MMA, the Office designated a digital licensee coordinator (“DLC”) to represent licensees in proceedings before the CRJs and the Copyright Office, to serve as a non-voting member of the MLC, and to carry out other functions.<sup>7</sup>

The MMA directs the Copyright Office to “adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the [MLC] and [DLC] is not improperly disclosed or used, including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the [MLC].”<sup>8</sup>

The MMA additionally makes several explicit references to the Office’s regulations governing the treatment of confidential and other sensitive information in various circumstances, including with respect to: (1) “all material records of the operations of the [MLC]”;<sup>9</sup> (2) steps the MLC must take to “safeguard the confidentiality and security of usage, financial, and other sensitive data used to compute market shares” when distributing unclaimed accrued royalties;<sup>10</sup> (3) steps the MLC and DLC must take to “safeguard the confidentiality and security of financial and other sensitive data shared” by the MLC to the DLC about significant nonblanket licensees;<sup>11</sup> (4) voluntary licenses administered by the MLC;<sup>12</sup> (5) examination of the MLC’s “books,

records, and data” pursuant to audits by copyright owners;<sup>13</sup> and (6) examination of digital music providers’ “books, records, and data” pursuant to audits by the MLC.<sup>14</sup>

On September 24, 2019, the Office issued a notification of inquiry seeking, among other things, public input on any issues that should be considered relating to the treatment of confidential and other sensitive information under the blanket license regime.<sup>15</sup> In response, the Office received proposed regulatory language relating to confidentiality requirements from both the DLC and MLC, and a few comments about confidentiality more generally from other stakeholders.<sup>16</sup>

The MLC’s approach generally proposes requiring the MLC and DLC to implement confidentiality policies to prevent improper or unauthorized use of various categories of confidential information, but lacks specific requirements for those policies or a proposed definition of “confidential information.”<sup>17</sup> The DLC contends that the MLC’s proposal, by providing broad discretion to the MLC and DLC to implement policies regarding confidentiality, “would inappropriately redelegate that authority [granted to the Register] to itself and DLC.”<sup>18</sup> The DLC maintains that the Office’s regulations should provide necessary guidance, not merely provide the MLC and DLC discretion to create their own policies.<sup>19</sup> Taking into account the statutory text, legislative history, and comments received, the Office agrees with the DLC’s concern. As noted previously by the Office, “establishing confidentiality

<sup>13</sup> *Id.* at 115(d)(3)(L)(i)(II).

<sup>14</sup> *Id.* at 115(d)(4)(D)(i)(II).

<sup>15</sup> 84 FR 49966, 49973 (Sept. 24, 2019).

<sup>16</sup> All rulemaking activity, including public comments, as well as educational material regarding the Music Modernization Act, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization/>. Comments received in response to the September 2019 notification of inquiry are available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001>. References to these comments and letters are by party name (abbreviated where appropriate), followed by either “Initial,” “Reply,” or “Ex Parte Letter,” as appropriate. Guidelines for *ex parte* communications, along with records of such communications, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. The Office encourages parties to refrain from requesting *ex parte* meetings on this proposed rule until they have submitted written comments. As stated in the guidelines, *ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters.

<sup>17</sup> See MLC Initial at 29–30, App. H.

<sup>18</sup> DLC Reply at 27.

<sup>19</sup> See *id.* at 28.

<sup>6</sup> 17 U.S.C. 115(d)(7)(D).

<sup>7</sup> *Id.* at 115(d)(5)(B); 84 FR at 32274; see also 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(C).

<sup>8</sup> 17 U.S.C. 115(d)(12)(C).

<sup>9</sup> *Id.* at 115(d)(3)(M)(i) (“The mechanical licensing collective shall ensure that all material records of the operations of the mechanical licensing collective, including those relating to notices of license, the administration of the claims process of the mechanical licensing collective, reports of usage, royalty payments, receipt and maintenance of accrued royalties, royalty distribution processes, and legal matters, are preserved and maintained in a secure and reliable manner, with appropriate commercially reasonable safeguards against unauthorized access, copying, and disclosure, and subject to the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C) for a period of not less than 7 years after the date of creation or receipt, whichever occurs later.”).

<sup>10</sup> *Id.* at 115(d)(3)(f)(i)(II)(bb); see H.R. Rep. No. 115–651, at 27 (“Unclaimed royalties are to be distributed based upon market share data that is confidentially provided to the collective by copyright owners.”); S. Rep. No. 115–339, at 24 (same); Conf. Rep. at 20 (same).

<sup>11</sup> 17 U.S.C. 115(d)(6)(B)(ii).

<sup>12</sup> *Id.* at 115(d)(11)(C)(iii).

<sup>1</sup> Public Law 115–264, 132 Stat. 3676 (2018).

<sup>2</sup> See S. Rep. No. 115–339, at 1–2 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 1 (2018), [https://www.copyright.gov/legislation/mma\\_conference\\_report.pdf](https://www.copyright.gov/legislation/mma_conference_report.pdf) (“Conf. Rep.”); see also H.R. Rep. No. 115–651, at 2 (2018) (detailing the House Judiciary Committee’s efforts to review music copyright laws).

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

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

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

rules sooner rather than later may help the MLC and DLC share information as effectively and efficiently as possible as they both get ready for the license availability date.”<sup>20</sup> In addition, having more specific confidentiality regulations in place may assure those providing confidential and commercially sensitive information to the MLC that it will be protected, as well as “provide the ground rules for the relationship between DLC, the MLC, and its respective members.”<sup>21</sup>

In issuing this proposed confidentiality rule, the Office is mindful of Congress’s countervailing goals for the MMA to enhance transparency, accountability, and public access to musical work ownership information.<sup>22</sup> The Office thus intends for its proposed confidentiality rule to complement separate regulations regarding transparency, accountability, and public accessibility.<sup>23</sup> Concurrent with this notice of proposed rulemaking, the Office issued a notification of inquiry seeking additional information on a variety of topics relating to the disclosure of non-confidential material to facilitate the MMA’s goals of enhanced transparency, accountability, and public accessibility of certain data.<sup>24</sup> Specifically, the

notification seeks public input regarding which information in the MLC’s database should be publicly available, which information the MLC should be required to disclose in its annual reports (including issues related to vendor selection and performance), which entities should have bulk access to the MLC’s database (and through which manner), restrictions on the use of data from the MLC’s database, and other ways in which transparency may be promoted. The Office encourages interested commenters in connection with this notice of proposed rulemaking to review that separate notice carefully and consider commenting on that notice as well.

Having reviewed and carefully considered all relevant comments, the Office now issues a proposed rule and invites further public comment. While all public comments are welcome, as applicable, should commenters disagree with language in the proposed rule, the Office encourages commenters to offer alternate language not yet considered by the Office. Depending on the feedback received, the Office will either issue a final rule, or an interim rule with further request for comment.

## II. Proposed Rule

### A. Defining “Confidential Information”

Although the MMA requires the Office to issue regulations governing the protection of confidential information contained in the records of the MLC and DLC, the statute does not define the term “confidential.”<sup>25</sup> The MLC’s proposed language would also not expressly define material as confidential, instead referencing categories of material which may contain confidential material and allowing the MLC and DLC to establish their own policies to ensure the safeguarding of such information. Although the Office has considered the merits of this approach, in part given the interplay between confidential material and material that should be disclosed, the proposed rule defines “confidential information” to provide sufficient guidance.

The DLC, which does proffer a definition, proposes that “confidential information” include, “at a minimum, all the usage and royalty information received by the MLC from a digital music provider,”<sup>26</sup> “including the amount of royalty payments and calculations thereunder.”<sup>27</sup> While the

Office recognizes that digital music providers understandably want to ensure that sensitive business provided information to the MLC is not unlawfully or inappropriately disclosed or used, defining confidential information as including “all the usage and royalty information” would be overly broad and unnecessarily place restrictions on information that must necessarily be shared with copyright owners receiving statements of accounts from the MLC.<sup>28</sup> As a workaround, the DLC proposes that the regulations allow copyright owners (and their designated agents) to receive confidential information, “so long as they sign an appropriate confidentiality agreement with the MLC.”<sup>29</sup> Prior to the MMA, however, the Copyright Office previously considered and expressly rejected the idea of placing a confidentiality requirement on copyright owners receiving statements of account under the section 115 statutory license due to the inclusion of “competitively sensitive” information (e.g., licensees’ overall revenues, royalty payments to record companies and performance rights organizations, and overall usage); rather, “once the statements of account have been delivered to the copyright owners, there should be no restrictions on the copyright owners’ ability to use the statements or disclose their contents.”<sup>30</sup> Particularly given that an animating goal of the MMA is to facilitate increased transparency and accuracy in reporting payments to copyright owners, the Office sees no reason to deviate from this policy.<sup>31</sup>

information which [should] not be visible by the public”); The American Association of Independent Music (“A2IM”) and the Recording Industry Association of America, Inc. (“RIAA”) Reply at 4 (asserting that the MLC should not receive “all of the metadata associated with the sound recordings,” as “a portion of the metadata provided to a DMP with a sound recording can, and typically does, include confidential deal points and usage information”); *id.* at 6 (“The contractual terms between DMPs and record companies are highly confidential and represent extremely sensitive business information.”).

<sup>28</sup> See 37 CFR 210.16(c).

<sup>29</sup> DLC *Ex Parte* Letter #2 at 5; see DLC Reply at 28; 37 CFR 380.5(c)(3).

<sup>30</sup> 79 FR 56190, 56206 (Sept. 18, 2014); *id.* (holding that placing a confidentiality restriction on copyright owners receiving statements of account “would have burdened copyright owners’ ability to disclose to the public the royalties they received under the statutory license. The Office is particularly reluctant to so drastically restrict copyright owners’ ability to freely discuss the effects of government policy.”).

<sup>31</sup> See 164 Cong. Rec. H 3522, 3542 (statement of Rep. Norma Torres) (“In addition to an increase in efficiency, the [MMA] would foster a more transparent relationship between creators and music platforms. Information regarding music owed

Continued

<sup>20</sup> 84 FR at 49968.

<sup>21</sup> DLC Initial at 3.

<sup>22</sup> See 17 U.S.C. 115(d)(3)(E), (e)(20); *id.* at 115(d)(3)(E)(v) (stating the database must “be made available to members of the public in a searchable, online format, free of charge”); 164 Cong. Rec. S501, 504 (daily ed. Jan. 24, 2018) (statement of Sen. Chris Coons) (“This important piece of legislation will bring much-needed transparency and efficiency to the music marketplace.”); 164 Cong. Rec. H3522, 3541 (daily ed. April 25, 2018) (statement Rep. Steve Chabot) (“This legislation provides much-needed updates to bring music licensing into the digital age, particularly improving market efficiencies and transparency to reflect the modern music marketplace.”); *id.* at 3542 (statement of Rep. Norma Torres) (“Information regarding music owed royalties would be easily accessible through the database created by the Music Modernization Act. This transparency will surely improve the working relationship between creators and music platforms and aid the music industry’s innovation process.”).

<sup>23</sup> See DLC *Ex Parte* Letter Feb. 24, 2020 (“DLC *Ex Parte* Letter #2”) at 5 (acknowledging that the “MLC will be under certain legal transparency requirements,” and that confidentiality regulations should “not stand in the way of that transparency”); The International Confederation of Societies of Authors and Composers (“CISAC”) & The International Organisation representing Mechanical Rights Societies (“BIEM”) Reply at 2 (stating that “musical works information populated in the database can include confidential, personal and/or sensitive data, and as such, the Regulations should ensure the required balance between the public interest in having transparent access to such information and the protection of commercially sensitive information and personal data”).

<sup>24</sup> U.S. Copyright Office, Notification of Inquiry, *Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information*, Dkt. No. 2020–8, published elsewhere in this issue of the **Federal Register**.

<sup>25</sup> See 17 U.S.C. 115(d)(12)(C), (e).

<sup>26</sup> DLC *Ex Parte* Letter #2 at 5.

<sup>27</sup> DLC Reply Add. at A–20. See also CISAC & BIEM Initial at 4 (asserting that “ownership shares are particularly sensitive and confidential

Accordingly, the proposed rule instead defines “confidential information” as including “sensitive financial or business information, including information relating to financial or business terms that could be used for commercial advantage” and “trade secrets.” This definition specifically includes categories of information and documents expressly referenced in the statute: “the confidentiality and security of usage, financial, and other sensitive data used to compute market shares” when distributing unclaimed accrued royalties,<sup>32</sup> “financial and other sensitive data shared” by the MLC to the DLC about significant nonblanket licensees,<sup>33</sup> and voluntary licenses.<sup>34</sup>

The DLC suggests that third parties may submit other types of information to the MLC or DLC “that should properly be treated as confidential,” and so proposes that “confidential information” include “any other information submitted by a third party,” where it has been “reasonably designated as confidential by the party submitting the information,”<sup>35</sup> and the proposed rule largely adopts this approach. The Office notes, however, that under the proposed rule, third-party submissions to the MLC and DLC remain subject to the other provisions of the proposed rule, including the exclusion of certain categories of material subject to disclosure from being considered confidential, to ensure that third-party submissions do not receive heightened protection over those submitted by digital music providers

royalties would be easily accessible through the database created by the [MMA]. This transparency will surely improve the working relationship between creators and music platforms and aid the music industry’s innovation process.”); Proposal of Digital Licensee Coordinator, Inc. at 2, U.S. Copyright Office Dkt. No. 2018–11, available at <https://www.regulations.gov/docket/Browser?rpp=25&po=0&dct=PS&D=COLC-2018-0011&refD=COLC-2018-0011-0001> (acknowledging that goals of the MMA include “provid[ing] licensing efficiency and transparency, and . . . ensur[ing] that the new blanket licensing system is, and remains, workable for digital music providers as well as copyright owners”).

<sup>32</sup> 17 U.S.C. 115(d)(3)(j)(i)(II)(bb); see H.R. Rep. No. 115–651, at 27 (“Unclaimed royalties are to be distributed based upon market share data that is confidentially provided to the collective by copyright owners.”); S. Rep. No. 115–339, at 24 (same); Conf. Rep. at 20 (same).

<sup>33</sup> 17 U.S.C. 115(d)(6)(B)(ii).

<sup>34</sup> *Id.* at 115(d)(11)(C)(iii). Music Artists Coalition (“MAC”) contends that “data relating to market share determinations and voluntary licenses” should be publicly shared. MAC Reply at 2–3. The statute, however, specifically contemplates such information being treated as confidential information. 17 U.S.C. 115(d)(3)(j)(i)(II)(bb); *id.* at 115(d)(11)(C)(iii).

<sup>35</sup> DLC *Ex Parte* Letter #2 at 5; DLC Reply Add. at A–20.

and significant nonblanket licensees or musical work copyright owners.

Other stakeholders expressed concern about the disclosure of confidential personal information, particularly relating to copyright owner information.<sup>36</sup> The Office appreciates this concern, as among many other data points, the MLC must maintain, for example, banking information and mailing addresses for copyright owners to whom it remits royalty payments. Appreciating this concern, the MLC notes that it is “committed to maintaining robust security to protect confidential user data, and that it contractually requires vendors to maintain robust security to protect confidential information handled for the MLC.”<sup>37</sup> Accordingly, the proposed rule also includes in the definition of “confidential information” “sensitive personal information, including but not limited to, an individual’s Social Security number, taxpayer identification number, financial account number(s), or date of birth (other than year).”

As noted above, the proposed rule also defines “confidential information” by what it is *not*. Borrowing from current regulations governing SoundExchange in connection with the section 112/114 license, and as recommended by the DLC, the rule proposes that the definition of “confidential information” exclude “documents or information that may be made public by law” or “that at the time of delivery to the [MLC] or [DLC] is public knowledge,” and that “[t]he party seeking information from the [MLC] or [DLC] based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.”<sup>38</sup> In addition, because documents and information may be subsequently disclosed by the party to whom the information would otherwise be considered confidential, or by the MLC or DLC pursuant to participation in proceedings before the Copyright Office or Copyright Royalty Judges (including proceedings to redesignate the MLC or DLC), the proposed rule excludes such information and documents from the definition of “confidential information.”

Recognizing that important restrictions on the disclosure of

<sup>36</sup> CISAC & BIEM Reply at 8 (encouraging “the Office to adopt suitable regulations that aim to protect sensitive and/or private information from public disclosure”); MAC Reply at 2–3 (noting that “certain information such as . . . personal addresses should obviously be kept out of public documents”).

<sup>37</sup> MLC *Ex Parte* Letter Jan. 29, 2020 (“MLC *Ex Parte* Letter #1”) at 4.

<sup>38</sup> DLC Reply Add. at A–20.

information are cabined by equally significant countervailing considerations of transparency in reporting certain types of information, the proposed rule also excludes the following from the definition of “confidential information”: Information made publicly available through notices of license,<sup>39</sup> notices of nonblanket activity, the MLC’s online database, and information disclosable through the MLC bylaws, annual report, audit report, or the MLC’s adherence to transparency and accountability with respect to the collective’s policies or practices, including its anti-commingling policy, pursuant to 17 U.S.C. 115(d)(3)(D)(ii),(vii), and (ix).

In addition, adopting a suggestion from the MLC, the proposed rule would exclude from the meaning of “confidential information” any top level, compilation data presented in anonymized format that does not allow identification of such data as belonging to any digital music provider, significant nonblanket licensee, or copyright owner.<sup>40</sup> This exclusion recognizes the MLC’s stated need for MLC board and committee members (including DLC representatives) to obtain access to anonymized information, as well as potentially members of the public in MLC reports.

Finally, the proposed rule clarifies that documents or information created by a party will not be considered confidential with respect to usage of that information by the same party (*e.g.*, documents created by the DLC should not be considered confidential with respect to the DLC).

<sup>39</sup> Consistent with the Office’s proposed rule regarding notices of license, the definition of confidentiality in this proposed rule excludes any addendum to general notices of license that provides 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). See U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020–5, published elsewhere in this issue of the **Federal Register**.

<sup>40</sup> MLC Initial at 30 (proposing that “the MLC, when providing necessary data to its board or committee Members, will only share proprietary or confidential data as necessary, and in a format that is anonymized and cannot be identified as belonging to any particular copyright owner, in order to prevent any disclosure to potential competitors”).

## B. Disclosure and Use of Confidential Information

### 1. Proposed Approach to Disclosure and Use

While the definition of confidential information is consistent for all uses, the rule proposes various categories of permitted disclosure and use by MLC employees, board and committee members of the MLC and DLC (and members' respective places of employment), and vendors and agents of the MLC and DLC. The segregation into categories of potential users of confidential material is common in analogous situations, such as protective orders in intellectual property litigation and the CRJ's applicable regulation for information under the section 112/114 statutory licenses.<sup>41</sup> The Office anticipates that this framework will allow for more flexible adjustment to the regulation, if it proves necessary to further adjust the permitted disclosure to, and use of confidential information by certain users.

As a general approach, the proposed rule would permit the disclosure of confidential information in the following tiers. First, all uses by the MLC must be limited to activities necessary to perform their duties during the ordinary course of work for the MLC. All recipients of confidential information, including MLC employees, must execute a written confidentiality agreement. Agents, consultants, vendors, and independent contractors of the MLC may receive confidential information, only when necessary to carry out their duties. This approach is somewhat similar to that of the DLC, which proposed that confidential information may be disclosed to "employees, agents, consultants, and independent contractors of the MLC or DLC, subject to an appropriate written confidentiality agreement, who are engaged in the calculation, collection, matching and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information, and only to the extent necessary for the purpose of performing their duties during the ordinary course of their work, *provided that* no employee or officer of any music publisher shall have access to Confidential Information."<sup>42</sup> Similarly, and discussed further below, non-DLC members of the board or statutory committees<sup>43</sup> as well as DLC

representatives on the board or statutory committees may receive confidential information only on a need to know basis and to the extent necessary to carry out their duties.

Second, uses by the DLC are also related to the DLC's ordinary work, with similar limitations for any employees, agents, consultants, vendors, and independent contractors of the DLC.

Third, the proposed rule would expressly permit access to certain categories of non-MLC or DLC persons or entities entitled to this information by law, including qualified auditors or outside counsel pursuant to the statutorily-permitted audits by the MLC of a digital music provider operating under the blanket license or audits by a copyright owner(s) of the MLC, in each case subject to an appropriate written confidentiality agreement. The MMA expressly permits audits by copyright owners of the MLC's "books, records, and data,"<sup>44</sup> and by the MLC of digital music providers' "books, records, and data,"<sup>45</sup> and this approach is similar, though not identical, to language proposed by the DLC.<sup>46</sup>

Finally, similar to current rules established for the administration of the section 112/114 licenses, information may also be disclosed by parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order. Neither the DLC nor MLC appear to object to such a provision.<sup>47</sup>

### 2. Restrictions on Use by Members of the Board of Directors and Committees of the MLC

The MLC and DLC share somewhat similar concerns as to how confidential information may be disclosed to and used by board and committee members of the MLC and DLC. Both the MLC and DLC express concern about the disclosure of confidential information to competitors. For example, the MLC maintains that "[g]iven that the MLC board and committee members may be

standing committees, which may not derogate the duties of the statutory committees; under the proposed rule, those members would presumably be treated as consultants of the MLC.

<sup>44</sup> 17 U.S.C. 115(d)(3)(L)(i)(II).

<sup>45</sup> *Id.* at 115(d)(4)(D)(i)(II).

<sup>46</sup> DLC Reply Add. at A-21.

<sup>47</sup> See MLC Initial at 30 ("The policies should allow a limited exception to allow disclosure of such information in response to court orders, subpoenas or other legal processes."); DLC Reply Add. at A-21 (proposing that confidential information could be disclosed to "[a]ttorneys and other authorized agents of parties to proceedings before the Copyright Royalty Board, acting under an appropriate protective order").

exposed to highly sensitive and confidential information, permitting [DLC] representatives to share such information with their employers or other individuals who may use such information for competitive advantage or other improper purposes runs contrary to the confidential nature of the information."<sup>48</sup> The DLC notes that "licensees will be providing a significant amount of highly confidential information to the MLC, especially through the filing of reports of usage, from which highly confidential details of private licensing agreements can be gleaned,"<sup>49</sup> and that "a music publisher representative on the MLC Board should not be able to see the financial terms that a digital music provider agreed to as part of a voluntary license with one of its competitors—or even that such a voluntary license exists."<sup>50</sup>

Both designated parties propose limits on the types of information that can be shared with board members, with the DLC focused on limiting access to information confidential to digital services and the MLC focused on limiting access to confidential information belonging to a particular musical work copyright owner.<sup>51</sup> The DLC asserts that "confidential information provided to the MLC and DLC (including by licensees in reports of usage) are maintained in the strictest of confidence and cannot generally be shared with Board members of those respective organizations."<sup>52</sup> The MLC proposes that it "implement and enforce a reasonable policy that prevents any member of its board of directors or any member of its committees from accessing or reviewing any confidential or sensitive data belonging to a particular musical work copyright owner but shall allow members of its

<sup>48</sup> MLC Reply at 41-42.

<sup>49</sup> DLC Initial at 22.

<sup>50</sup> DLC *Ex Parte* Letter #2 at 5.

<sup>51</sup> See DLC Initial at 22 ("licensees will be providing a significant amount of highly confidential information to the MLC, especially through the filing of reports of usage, from which highly confidential details of private licensing agreements can be gleaned"); DLC *Ex Parte* Letter #2 at 5 ("For instance, a music publisher representative on the MLC Board should not be able to see the financial terms that a digital music provider agreed to as part of a voluntary license with one of its competitors—or even that such a voluntary license exists."); MLC Initial at 30 (proposing that "when providing necessary data to its board or committee Members, the MLC will only share proprietary or confidential data as necessary, and in a format that is anonymized and cannot be identified as belonging to any particular copyright owner, in order to prevent any disclosure to potential competitors"); MLC Initial at App. H (proposing regulatory language in support of same); MLC Reply at App. H (same).

<sup>52</sup> DLC Reply at 28.

<sup>41</sup> 37 CFR 380.5(c).

<sup>42</sup> DLC Reply Add. at A-21.

<sup>43</sup> The Copyright Office understands that the MLC may have established or wish to establish other

board of directors or committee members, when necessary to carry out their duties, to review aggregated and/or anonymized data of musical work copyright owners that cannot be identified as belonging to any particular musical work copyright owner.”<sup>53</sup> It appears that the MLC’s approach would potentially allow its board and committee members to view confidential information from a digital music provider (subject to a confidentiality policy), while the DLC’s approach would potentially allow its board and committee members to view confidential information from musical work copyright owners. Both parties generally assert that access to confidential information may be necessary for the MLC and DLC to serve their statutory purposes.<sup>54</sup>

The proposed rule addresses these concerns by adopting a general approach that will allow a board or statutory committee member to access confidential information, but only upon a “need to know” and “necessary to carry out” relevant duties basis, and then only subject to a written confidentiality agreement. Given the somewhat divergent views from the MLC and DLC, and the need for regulatory language to be somewhat flexible to accommodate unforeseen issues, the proposed rule would permit parity in access with disclosure of information, if any, connected to direct performance of statutory duties, rather than hard and fast categories prohibiting disclosure of information relevant to, or accessed by, digital music providers or music publishers. As noted above, the proposed rule also wholly excludes top level, compilation data presented in anonymized format from the definition of “confidential information.” As noted below, the Office invites comment upon whether any further restrictions on access by board or committee members is advisable, such as whether to exclude from disclosure and use especially sensitive material, *i.e.*, an additional category of “highly confidential” information.<sup>55</sup>

<sup>53</sup> MLC Initial at App. H.

<sup>54</sup> See MLC Initial at 29 (“The MMA contemplates that certain confidential, private, proprietary, or privileged information will have to be provided in order for the MLC to carry out its statutory obligations . . .”); DLC Initial at 23 (maintaining that having DLC representatives on MLC boards and committees “is so the broader [DLC] has insight into how the MLC is being run . . . and to advise on operational issues,” and that DLC representatives should thus be able to share confidential information “with people with a need to know within DLC membership and within their companies”).

<sup>55</sup> While the DLC’s approach would limit disclosure to board and committee members only to information labeled “MLC Confidential

The proposed rule also addresses conditions upon which a DLC representative may share information within the DLC. The DLC contends that its representatives should be able to share confidential information among DLC membership because “[t]he purpose of that representation is so the broader [DLC] has insight into how the MLC is being run—after all, those licensees have agreed to fund it—and to advise on operational issues. DLC representatives are thus meant to represent the entire digital licensee community, and should be able to share information among DLC membership. Indeed, DLC might appoint someone who is not even employed by a licensee as its representative.”<sup>56</sup> The DLC’s proposed regulatory language thus includes provisions to handle the specific issues that arise with respect to DLC representatives to MLC boards and committees.<sup>57</sup> By contrast, the MLC maintains that “[g]iven that the MLC board and committee members may be exposed to highly sensitive and confidential information, permitting [DLC] representatives to share such information with . . . individuals who may use such information for competitive advantage or other improper purposes runs contrary to the confidential nature of the information.”<sup>58</sup>

The Copyright Office acknowledges that in developing operations policies for the MLC, DLC representatives may need to rely on the expertise of individuals within the DLC. The Office also acknowledges, however, the importance of preventing confidential information from being misused by competitors for commercial advantage. The proposed rule thus allows DLC representatives who serve on the board of directors or committees of the MLC to share confidential information with individuals serving on the board of directors and committees of the DLC, but only to the extent necessary for such persons to know such information and only when necessary to carry out their duties for the DLC, subject to an appropriate written confidentiality agreement. Under the proposed rule, all DLC representatives are prohibited from using confidential information for any

Information,” without more background, the Office is not sure this approach is advisable. It was not immediately clear to the Office whether the MLC would be able to recreate information that would otherwise not be accessible to board and committee members, and so the Office tentatively concludes that the proposed rule offers a reasonable alternative.

<sup>56</sup> DLC Initial at 23; see also DLC Reply at 28.

<sup>57</sup> See DLC Reply at 28, Add. A–22.

<sup>58</sup> MLC Reply at 41–42.

purpose other than for work performed during the ordinary course of business for the DLC or MLC.

In addition, the proposed rule addresses conditions upon which DLC representatives may share information with additional persons at their respective companies. The DLC contends that its representatives should be able to share confidential information obtained with people with a need to know within DLC companies.<sup>59</sup> By contrast, the MLC maintains that doing so risks disclosure to competitors or others who may misuse such information for competitive advantage or other improper purposes.<sup>60</sup>

In contributing to the operations advisory committee’s work on the MLC, some of which may involve fairly technical considerations, the Office tentatively concludes that some DLC representatives may reasonably need to solicit additional subject matter expertise of individuals within DLC member companies. To address the MLC’s concerns, under the proposed rule DLC representatives who serve on the MLC’s board of directors or committees may share confidential information with individuals employed by DLC members, subject to an appropriate written confidentiality agreement, and only to the extent necessary for such persons to know such information and for the DLC to perform its duties. Individuals employed by DLC members who receive confidential information from DLC representatives are prohibited from using confidential information for any purpose other than for work performed during the ordinary course of business for the DLC or MLC.

Finally, the proposed rule provides some flexibility by incorporating the MLC’s suggestion that confidential information may be shared with other individuals authorized by the MLC to receive such information, but only to the extent necessary for such persons to know such information and only when necessary for the MLC to perform its duties, subject to an appropriate written confidentiality agreement.

### 3. Restrictions on Use by MLC and DLC Vendors and Consultants

Multiple commenters expressed concern about MLC vendors using confidential information they acquire while conducting work for the MLC for commercial advantage or for purposes outside of the MLC’s statutory ambit.<sup>61</sup>

<sup>59</sup> DLC Initial at 23; DLC Reply at 28.

<sup>60</sup> MLC Reply at 41–42.

<sup>61</sup> National Association of Independent Songwriters (“NOIS”) et al. Initial at 16 (“The

The MLC states that it “intends to provide users who submit confidential data to the MLC an ability to voluntarily ‘opt in’ to share that data for general use by its primary royalty processing vendor, the Harry Fox Agency,” but that “MLC users will not be required to opt in to any such sharing in order for the MLC to fully process and pay all royalties due to them under the blanket license.”<sup>62</sup> The MLC did not further detail what it means by “general use,” but presumably, such shared information may potentially include payment information by copyright owners, including self-published songwriters, who sign up through the MLC’s online portal. Without more information as to the intended use and anticipated benefit to MLC stakeholders, the Office is disinclined at this time to adopt the MLC’s proposal, and so the proposed rule would not permit MLC vendors to use confidential information for purposes other than for duties performed during the ordinary course of work for the MLC, *e.g.*, including the administration of voluntary bundled licensing of performance and mechanical uses that the MLC itself is prohibited from administering.<sup>63</sup>

Alternatively, where users of the MLC would have voluntarily opted-into “general use” of their information by the MLC’s vendors, the Office considered whether to propose language requiring the MLC to provide such information to other third parties, perhaps restricted to those offering or administering music licensing services, for a reasonable cost. This approach would have the potential benefit of leveraging the unique nature of the MLC database in other aspects of the music ecosystem, without potentially affecting the competitive landscape in ways unrelated to the section 115 license. This approach, however, could also begin to implicate broader questions of data privacy and sharing that are less central to the MMA’s goals, and the Office tentatively concludes that the

vendors for the MLC should not be . . . able to use information and data that the MLC will gather and control to their competitive advantage. If they are in competition with other entities considered to be similar in nature or can use the data to their own unique proprietary advantage, they should not be eligible to be selected as a vendor.”; Lowery Reply at 12 (“If the Copyright Office does not prohibit HFA from selling for other commercial purposes the data it acquires through its engagement by MLC to facilitate the compulsory blanket license, the Congress will have just handed HFA a near insurmountable advantage over its competitors.”).

<sup>62</sup> MLC *Ex Parte* Letter #1 at 4.

<sup>63</sup> See 37 CFR 380.5(b) (prohibiting SoundExchange from using “any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto”).

more prudent approach is to restrict the MLC’s disclosure of confidential information to its vendors, even with ostensible permission, to activities related to a given vendor’s work for the MLC. For parity, the proposed rule includes a similar provision for DLC vendors, as well as board and committee members, employees, agents, consultants, and independent contractors of either the MLC or DLC. The Office invites public comment on this aspect of the proposed rule.

### C. Safeguarding Confidential Information

Both the MLC and DLC propose having the MLC and DLC implement policies and procedures to prevent unauthorized access and/or use of confidential information, an approach that seems necessary to effectuate the intent of the proposed regulations.<sup>64</sup> Accordingly, the proposed rule states that the MLC, DLC, and any person or entity authorized to receive confidential information from either of those entities, must implement procedures to safeguard against unauthorized access to or dissemination of confidential information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own confidential information or similarly sensitive information.<sup>65</sup> In addition, the proposed rule states that the MLC and DLC shall each implement and enforce reasonable policies governing the confidentiality of its records.

### D. Maintenance of Records

The MMA requires the Copyright Office to issue regulations “setting forth requirements under which records of use shall be maintained and made

<sup>64</sup> MLC Initial at 29 (stating “protection of such confidential, private, proprietary or privileged information may be accomplished through a regulation that requires the MLC and the DLC to implement confidentiality policies that prevent improper or unauthorized use of such material by their directors, committee members, and personnel”); DLC Reply Add. at A-21-22 (proposing that the MLC and DLC (and any person authorized to receive confidential information) “must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information”).

<sup>65</sup> See 37 CFR 380.5(d) (“[SoundExchange] and any person authorized to receive Confidential Information from [SoundExchange] must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.”).

available to the [MLC] by digital music providers engaged in covered activities under a blanket license.”<sup>66</sup> While the Copyright Office will address records maintenance in connection with a separate rulemaking addressing data collection and reporting obligations by digital music providers,<sup>67</sup> the proposed rule provides that any written confidentiality agreements relating to the use or disclosure of confidential information must be maintained and stored by the relevant parties for at least the same amount of time that certain digital music providers are required to maintain records of use pursuant to 17 U.S.C. 115(d)(4)(A)(iv).

### E. Confidentiality Designations

The proposed rule does not impose a requirement that confidential information necessarily bear a designation of confidentiality, although the MLC or DLC could presumably impose such a requirement in their own policies.

### F. Nondisclosure Agreements

The MLC and DLC disagree as to whether DLC representatives should be required to sign nondisclosure agreements (“NDAs”) in their personal capacities. The DLC suggests that only the DLC as an organization should be bound, and not the DLC representatives in their personal capacities or as representatives of their employers.<sup>68</sup> Instead, the DLC contends, confidentiality obligations for the MLC and DLC should operate at “an organization-to-organization level,”<sup>69</sup> as “some companies prohibit [DLC representatives from] taking on such personal liability for actions taken in the scope of employment.”<sup>70</sup> The MLC disagrees, stating that if only the DLC, which is relatively assetless, is bound by a confidentiality agreement, there would be no recourse against the DLC for breach of confidentiality, and that such a proposal “disincentives individuals on the MLC Board and committees from protecting confidential information, as there will be no penalty for unlawful disclosure.”<sup>71</sup>

While the Office acknowledges the DLC’s concerns, having confidentiality obligations operate at an MLC-to-DLC

<sup>66</sup> 17 U.S.C. 115(d)(4)(A)(iii), (iv)(I).

<sup>67</sup> See U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the **Federal Register**.

<sup>68</sup> DLC Initial at 23.

<sup>69</sup> *Id.*

<sup>70</sup> DLC *Ex Parte* Letter #2 at 6.

<sup>71</sup> MLC Reply at 41.

level presents some potential shortcomings. For example, if DLC representatives are not bound in their personal capacities, what recourse would be available should a former DLC representative disclose or misuse confidential information, including after having left a DLC member company? Moreover, as the DLC would like its representatives to be able to share confidential information with employees of DLC member companies—who themselves do not serve on a DLC board or committee—ensuring that such confidential information is not improperly disclosed or misused may seem to necessitate employees of DLC member companies signing nondisclosure agreements in their personal capacities. In examining the analogous context of preventing confidential information produced through litigation discovery from being improperly disclosed or misused, the Copyright Office observes that model protective orders appear to bind individuals in their personal capacities.<sup>72</sup> Accordingly, at this time, the Office is disinclined to require that confidentiality obligations for the MLC and DLC operate at an organization-to-organization level. Instead, the proposed rule states that the various categories of individuals to receive confidential information do so subject to an appropriate written confidentiality agreement. The Copyright Office invites public comment on this aspect of the proposed rule.

In addition, a few commenters expressed concern about the MLC's ability to require NDAs for its board and committee members. The National Association of Independent Songwriters ("NOIS"), joined by individual stakeholders, contend that there "must be a rejection of any incremental NDA put forth by the MLC to its board and/or committee members that requires anything not mandated by the MMA."<sup>73</sup>

<sup>72</sup> See, e.g., United States District Court for the Northern District of California, Model Protective Orders, <https://www.cand.uscourts.gov/forms/model-protective-orders/> (last visited Mar. 25, 2020); United States District Court for the Southern District of New York, Model Protective Order, [https://nysd.uscourts.gov/sites/default/files/practice\\_documents/judge%20Parker%20Model%20Protective%20Order%205-21-19%20%281%29.pdf](https://nysd.uscourts.gov/sites/default/files/practice_documents/judge%20Parker%20Model%20Protective%20Order%205-21-19%20%281%29.pdf) (last visited Mar. 25, 2020).

<sup>73</sup> NOIS et al. Initial at 16. The NOIS comment did not provide any information regarding membership of the National Association of Independent Songwriters; many of the individual signatories were previously affiliated with the American Music Licensing Collective ("AMLC"), and do not all appear to be songwriters based on information previously submitted by the AMLC. See AMLC Proposal at 35, U.S. Copyright Office Dkt. No. 2018-11, available at <https://www.regulations.gov/docketBrowser?rpp=25&po=>

Similarly, the DLC maintains that Office's regulations "should be the ceiling on any confidentiality requirements" by the MLC.<sup>74</sup> For its part, the MLC states that it should have discretion to impose additional confidentiality requirements for board or committee participation, as it would "allow[ ] the MLC to fill in inevitable gaps to ensure that confidential information is kept confidential . . ."<sup>75</sup>

Under the proposed rule, the MLC may not impose additional restrictions relating to the use or disclosure of confidential information, beyond those imposed by the Office's regulations, as a condition for participation on a board or committee. The DLC is similarly restricted. In addition, the proposed rule states that the use of confidentiality agreements by the MLC and DLC is subject to the Office's confidentiality regulations, and that neither entity can permit broader use or disclosure of confidential information than what is permitted under the Office's regulations.

### III. Subjects of Inquiry

The Copyright Office seeks additional public comment on all aspects of the proposed rule, including the specific subjects below:

1. Should the proposed rule further limit access to confidential material by MLC board and committee members? What about access to confidential material by employees at companies of MLC and DLC board members?

2. In addition to a "Confidential Information" designation, should the regulations provide for a "Highly Confidential Information" designation to provide an additional layer of protection for certain documents and information that only the employees, or employees, agents, and vendors of the MLC, may access (*i.e.*, not members of the board or committees of either the MLC or DLC)? If so, should the proposed rule specify which types of information and documents should be eligible for the "Highly Confidential Information" designation, or provide the MLC with flexibility to establish such policies, and how would that designation relate to permitted use of such material?

3. Should the Office's regulations address instances of inadvertent disclosure? If so, how?

4. If DLC representatives are not permitted to sign confidentiality agreements in their personal capacities, should the Office's regulations address

the penalty for disclosure? If so, how? The Office welcomes suggestions of preferable alternative solutions that would balance the interests identified above to allow DLC representatives to participate on the MLC committees without creating disincentives to protect confidential information, or present issues should a DLC representative end employment with a DLC member company.

### List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

### Proposed Regulations

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

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

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

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

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

#### §§ 210.30 through 210.32 [Reserved]

■ 2. Add reserved §§ 210.30 through 210.32.  
 ■ 3. Add § 210.33 to read as follows:

#### § 210.33 Treatment of confidential and other sensitive information.

(a) *General.* This section prescribes the rules under which the mechanical licensing collective (MLC) and digital licensee coordinator (DLC) shall ensure that confidential, private, proprietary, or privileged information received by the MLC or DLC or contained in their records is not improperly disclosed or used, in accordance with 17 U.S.C. 115(d)(12)(C), including with respect to actions of the board of directors, committee members, and personnel of the MLC or DLC.

(b) *Definitions.* For purposes of this section:

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

(2) "Confidential Information" includes sensitive financial or business information, including information relating to financial or business terms that could be used for commercial advantage, trade secrets, or sensitive personal information, including but not limited to, an individual's Social Security number, taxpayer identification number, financial account number(s), or

0&dt=PS&D=COLC-2018-0011&refID=COLC-2018-0011-0001.

<sup>74</sup> DLC Reply at 28.

<sup>75</sup> MLC Reply at 42.

date of birth (other than year). Confidential Information specifically includes usage data and other sensitive data used to compute market shares when distributing unclaimed accrued royalties, sensitive data shared between the MLC and DLC regarding any significant nonblanket licensee, and sensitive data concerning voluntary licenses or individual download licenses administered by and/or disclosed to the MLC. "Confidential information" also includes information submitted by a third party that is reasonably designated as confidential by the party submitting the information, subject to the other provisions of this section. "Confidential Information" does not include:

(i) Documents or information that are public or may be made public by law or regulation, including but not limited to information made publicly available through:

(A) Notices of license, excluding any addendum that provides 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.

(B) Notices of nonblanket activity, the MLC's online database, and information disclosable through the MLC bylaws, annual report, audit report, or the MLC's adherence to transparency and accountability with respect to the collective's policies or practices, including its anti-commingling policy, pursuant to 17 U.S.C.

115(d)(3)(D)(ii),(vii), and (ix). Confidential Information also excludes information made publicly available by the MLC or DLC pursuant to participation in proceedings before the Copyright Office or Copyright Royalty Judges, including proceedings to redesignate the MLC or DLC.

(ii) Documents or information that may be made public by law or that at the time of delivery to the MLC or DLC is public knowledge, or is subsequently disclosed by the party to whom the information would otherwise be considered confidential. The party seeking information from the MLC or DLC based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.

(iii) Top level, compilation data presented in anonymized format that does not allow identification of such data as belonging to any digital music provider, significant nonblanket licensee, or copyright owner.

(iv) Documents or information created by a party with respect to usage of such

documents or information by that originating party.

(c) *Disclosure and Use of Confidential Information by the MLC and DLC.* (1)

The MLC, including its employees, agents, consultants, vendors, independent contractors, and non-DLC members of the MLC board of directors or committees, shall not use any Confidential Information for any purpose other than determining compliance with statutory license requirements, royalty calculation, collection, matching, and distribution, and activities related directly thereto, in performing their duties during the ordinary course of their work for the MLC. Access and use of Confidential Information by the MLC shall be further limited as follows:

(i) Employees of the MLC may receive Confidential Information, subject to an appropriate written confidentiality agreement.

(ii) Agents, consultants, vendors, and independent contractors of the MLC may receive Confidential Information, only when necessary to carry out their duties during the ordinary course of their work for the MLC and subject to an appropriate written confidentiality agreement.

(iii) Non-DLC members on the MLC board of directors or committees may receive Confidential Information from the MLC, only to the extent necessary for such persons to know such information, only when necessary to carry out their duties for the MLC, and subject to an appropriate written confidentiality agreement.

(2) The DLC, including its employees, agents, consultants, vendors, independent contractors, members of the DLC board of directors or committees, and representatives serving on the board of directors or committees of the MLC, shall not use any Confidential Information for any purpose other than determining compliance with statutory license requirements, royalty calculation, collection, matching, and distribution, and activities related directly thereto, in performing their duties during the ordinary course of their work for the DLC. Access and use of Confidential Information by the DLC shall be further limited as follows:

(i) Employees, agents, consultants, vendors, and independent contractors of the DLC may receive Confidential Information from the MLC, only when necessary to carry out their duties during the ordinary course of their work for the DLC and subject to an appropriate written confidentiality agreement.

(ii) Representatives of the DLC who serve on the board of directors or committees of the MLC may receive Confidential Information from the MLC, only to the extent necessary for such persons to know such information, only when necessary to carry out their duties for the DLC, and subject to an appropriate written confidentiality agreement.

(iii) Representatives of the DLC who serve on the board of directors or committees of the MLC, and receive Confidential Information, may share such information with the following persons:

(A) Employees, agents, consultants, vendors, and independent contractors of the DLC, only to the extent necessary for the purpose of performing their duties during the ordinary course of their work for the DLC, and persons otherwise authorized by the MLC to receive Confidential Information, only to the extent necessary for such persons to know such information, subject to an appropriate written confidentiality agreement.

(B) Individuals serving on the board of directors and committees of the DLC, only to the extent necessary for such persons to know such information and only when necessary to carry out their duties for the DLC, subject to an appropriate written confidentiality agreement.

(C) Individuals otherwise employed by members of the DLC, only to the extent necessary for such persons to know such information and only when necessary for the DLC to perform its duties, subject to an appropriate written confidentiality agreement.

(D) Persons otherwise authorized by the MLC to receive Confidential Information, only to the extent necessary for such persons to know such information and only when necessary for the MLC to perform its duties, subject to an appropriate written confidentiality agreement.

(d) *Disclosure of Confidential Information to Non-MLC and Non-DLC Persons and Entities.* In addition to the permitted use and disclosure of Confidential Information in paragraph (c) of this section, the MLC and the DLC may disclose Confidential Information to:

(1) A qualified auditor or outside counsel, pursuant to 17 U.S.C. 115(d)(4)(D), who is authorized to act on behalf of the mechanical licensing collective with respect to verification of royalty payments by a digital music provider operating under the blanket license, subject to an appropriate written confidentiality agreement;

(2) A qualified auditor or outside counsel, pursuant to 17 U.S.C. 115(d)(3)(L), who is authorized to act on behalf of a copyright owner or group of copyright owners with respect to verification of royalty payments by the mechanical licensing collective, subject to an appropriate written confidentiality agreement; and

(3) Attorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order or agreement.

(e) *Safeguarding Confidential Information.* The MLC, DLC, and any person or entity authorized to receive Confidential Information from either of those entities, must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information. The MLC and DLC shall each implement and enforce reasonable policies governing the confidentiality of their records, subject to the other provisions of this section.

(f) *Maintenance of records.* Any written confidentiality agreements relating to the use or disclosure of Confidential Information must be maintained and stored by the relevant parties for at least the same amount of time that certain digital music providers are required to maintain records of use pursuant to 17 U.S.C. 115(d)(4)(A)(iv).

(g) *Confidentiality agreements.* The use of confidentiality agreements by the MLC and DLC shall be subject to the other provisions of this section, and shall not permit broader use or disclosure of Confidential Information than permitted under this section. The MLC and DLC may not impose additional restrictions relating to the use or disclosure of Confidential Information, beyond those imposed by this provision, as a condition for participation on a board or committee.

Dated: April 15, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

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## LIBRARY OF CONGRESS

### U.S. Copyright Office

#### 37 CFR Part 210

[Docket No. 2020-8]

#### Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information

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

**ACTION:** Notification of inquiry.

**SUMMARY:** The U.S. Copyright Office is issuing a notification of inquiry regarding the Musical Works Modernization Act, title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. Title I establishes a blanket compulsory license, which digital music providers may obtain to make and deliver digital phonorecords of musical works. By statute, the blanket license, which will be administered by a mechanical licensing collective, will become available on January 1, 2021. The MMA specifically directs the Copyright Office to adopt a number of regulations to govern the new blanket licensing regime, including prescribing categories of information to be included in the mechanical licensing collective’s musical works database, as well as rules related to the usability, interoperability, and usage restrictions of the database. Congress has indicated that the Office should exercise its general regulatory authority to, among other things, help ensure that the collective’s policies and practices are transparent and accountable. The Office seeks public comment regarding the subjects of inquiry discussed in this notification, namely, issues related to ensuring appropriate transparency of the mechanical licensing collective itself, as well as the contents of the collective’s public musical work database, database access, and database use. This notification is being published concurrently with a related notice of proposed rulemaking related to confidentiality considerations with respect to the operation and records of the collective.

**DATES:** Written comments must be received no later than 11:59 Eastern Time on June 8, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting

comments are available on the Copyright Office website at <https://copyright.gov/rulemaking/mma-transparency>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

#### FOR FURTHER INFORMATION CONTACT:

Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at [regans@copyright.gov](mailto:regans@copyright.gov) or Anna Chauvet, Associate General Counsel, by email at [achau@copyright.gov](mailto:achau@copyright.gov). Each can be contacted by telephone by calling (202) 707-8350.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”).<sup>1</sup> Title I of the MMA, the Musical Works Modernization Act, substantially modifies the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>2</sup> Prior to the MMA, licensees obtained a section 115 compulsory license on a per-work, song-by-song basis, by serving a notice of intention to obtain a compulsory license (“NOI”) on the relevant copyright owner (or filing it with the Copyright Office if the Office’s public records did not identify the copyright owner) and then paying applicable royalties accompanied by accounting statements.<sup>3</sup> The MMA amends this regime most significantly by establishing a new blanket compulsory license that digital music providers may obtain to make digital phonorecord deliveries (“DPDs”) of musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity,” where such activity qualifies for a compulsory license).<sup>4</sup> Instead of licensing one song

<sup>1</sup> Public Law 115–264, 132 Stat. 3676 (2018).

<sup>2</sup> See S. Rep. No. 115–339, at 1–2 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 1 (2018), [https://www.copyright.gov/legislation/mma\\_conference\\_report.pdf](https://www.copyright.gov/legislation/mma_conference_report.pdf) (“Conf. Rep.”); see also H.R. Rep. No. 115–651, at 2 (2018) (detailing the House Judiciary Committee’s efforts to review music copyright laws).

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

<sup>4</sup> 17 U.S.C. 115(d)(1), (e)(7); see H.R. Rep. No. 115–651, at 4–6 (describing operation of the blanket