

## LIBRARY OF CONGRESS

## Copyright Office

## 37 CFR Part 210

[Docket No. 2020–8]

**The Public Musical Works Database and Transparency of the Mechanical Licensing Collective****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 Musical Works Modernization Act, title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act. Title I establishes a blanket compulsory license, which digital music providers may obtain to make and deliver digital phonorecords of musical works. The law establishes a new blanket license to become available on the January 1, 2021 license availability date that will be administered by a mechanical licensing collective, which will make available a public musical works database as part of its statutory duties. Having solicited public comments through previous notifications of inquiry, through this notice the Office is proposing regulations concerning the new blanket licensing regime, including prescribing categories of information to be included in the public musical works database, as well as rules related to the usability, interoperability, and usage restrictions of the database. The Office is also proposing regulations in connection with its general regulatory authority related to ensuring appropriate transparency of the mechanical licensing collective itself.

**DATES:** Written comments must be received no later than 11:59 Eastern Time on October 19, 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:**

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Associate Register of Copyrights, by email at [regans@copyright.gov](mailto:regans@copyright.gov) or Anna B. 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> 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.<sup>3</sup> Among other things, the MLC is responsible for “[c]ollect[ing] and distribut[ing] royalties” for covered activities, “[e]ngag[ing] in efforts to identify musical works (and shares of such works) embodied in particular sound recordings and to identify and locate the copyright owners of such musical works (and shares of such works),” and “[a]dminister[ing] a process by which copyright owners can claim ownership of musical works (and shares of such works).”<sup>4</sup> It also must “maintain the musical works database and other information relevant to the administration of licensing activities under [section 115].”<sup>5</sup>

**A. Regulatory Authority Granted to the Copyright Office**

The MMA enumerates several regulations that the Copyright Office is specifically directed to promulgate to govern the new blanket licensing regime, and Congress invested the

Copyright Office with “broad regulatory authority”<sup>6</sup> to “conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license].”<sup>7</sup> The MMA specifically directs the Copyright Office to promulgate regulations related to the MLC’s creation of a free database to publicly disclose musical work ownership information and identify the sound recordings in which the musical works are embodied.<sup>8</sup> As discussed more below, the statute requires the public database to include various types of information, depending upon whether a musical work has been matched to a copyright owner.<sup>9</sup> For both matched and unmatched works, the database must also include “such other information” “as the Register of Copyrights may prescribe by regulation.”<sup>10</sup> The database must “be made available to members of the public in a searchable, online format, free of charge,”<sup>11</sup> as well as “in a bulk, machine-readable format, through a widely available software application,” to certain parties, including blanket licensees and the Copyright Office, free of charge, and to “[a]ny other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.”<sup>12</sup>

In addition, the legislative history contemplates that the Office will “thoroughly review[]”<sup>13</sup> policies and procedures established by the MLC and its three committees, of which the MLC is statutorily bound to ensure are “transparent and accountable,”<sup>14</sup> and promulgate regulations that “balance[] the need to protect the public’s interest with the need to let the new collective operate without over-regulation.”<sup>15</sup>

<sup>6</sup> H.R. Rep. No. 115–651, at 5–6; S. Rep. No. 115–339, at 5; Conf. Rep. at 4.

<sup>7</sup> 17 U.S.C. 115(d)(12)(A).

<sup>8</sup> See *id.* at 115(d)(3)(E), (e)(20).

<sup>9</sup> *Id.* at 115(d)(3)(E)(ii), (iii).

<sup>10</sup> *Id.* at 115(d)(3)(E)(ii)(V), (iii)(II).

<sup>11</sup> *Id.* at 115(d)(3)(E)(v).

<sup>12</sup> *Id.*

<sup>13</sup> H.R. Rep. No. 115–651, at 5–6, 14; S. Rep. No. 115–339, at 5, 15; Conf. Rep. at 4, 12. The Conference Report further contemplates that the Office’s review will be important because the MLC must operate in a manner that can gain the trust of the entire music community, but can only be held liable under a standard of gross negligence when carrying out certain of the policies and procedures adopted by its board. Conf. Rep. at 4.

<sup>14</sup> 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

<sup>15</sup> H.R. Rep. No. 115–651, at 5–6, 14; S. Rep. No. 115–339, at 5, 15; Conf. Rep. at 4, 12. See also SoundExchange Initial September NOI Comment at 15; Future of Music Coalition (“FMC”) Reply September NOI Comment at 3 (appreciating “SoundExchange’s warning against too-detailed regulatory language,” but “urging[] the Office to balance this concern for pragmatism and flexibility

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

<sup>4</sup> 17 U.S.C. at 115(d)(3)(C)(i)(V).

<sup>5</sup> *Id.* at 115(d)(3)(C)(i)(IV).

Congress acknowledged that “[a]lthough the legislation provides specific criteria for the collective to operate, it is to be expected that situations will arise that were not contemplated by the legislation,” and that “[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations.”<sup>16</sup> Legislative history further states that “[t]he Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation.”<sup>17</sup> Accordingly, in designating the MLC, the Office stated that it “expects ongoing regulatory and other implementation efforts to . . . extenuate the risk of self-interest,” and that “the Register intends to exercise her oversight role as it pertains to matters of governance.”<sup>18</sup> Finally, as detailed in the Office’s prior notification, while the MMA envisions the Office reasonably and prudently exercising regulatory authority to facilitate appropriate transparency of the collective and the public musical works database, the statutory language as well as the collective’s structure separately include aspects to promote disclosure absent additional regulation.<sup>19</sup>

### B. Rulemaking Background

Against that backdrop, on September 24, 2019, the Office issued a notification of inquiry (“September NOI”) seeking public input on a variety of aspects related to implementation of title I of the MMA, including issues that should be considered regarding information to be included in the public musical works database (e.g., which specific additional categories of information might be appropriate to include by regulation), as well as the usability, interoperability, and usage restrictions of the database (e.g., technical or other specific

against the need to provide as much clear guidance and oversight as possible to encourage trust”).

<sup>16</sup> H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12.

<sup>17</sup> H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12.

<sup>18</sup> 84 FR at 32280.

<sup>19</sup> See 85 FR 22568, 22570–71 (Apr. 22, 2020) (detailing various ways the statute promotes transparency of the mechanical licensing collective, such as by requiring the collective to publish an annual report, make its bylaws publicly available and its policies and practices “transparent and accountable,” identify a point of contact for publisher inquiries and complaints with timely redress, establish an anti-comingling policy for funds collected and those not collected under section 115, and submit itself to a public audit every five years; the statute also permits copyright owners to audit the collective to verify the accuracy of royalty payments, and establishes a five-year designation process for the Office to periodically review the mechanical licensing collective’s performance).

language that might be helpful to consider in promulgating regulations, discussion of the pros and cons of applicable standards, and whether historical snapshots of the database should be maintained to track ownership changes over time).<sup>20</sup> In addition, the September NOI sought public comment on any issues that should be considered relating to the general oversight of the MLC.<sup>21</sup>

In response, many commenters emphasized the importance of transparency of the public database and the MLC’s operations,<sup>22</sup> and urged the Office to exercise “expansive”<sup>23</sup> and

<sup>20</sup> 84 FR 49966, 49972 (Sept. 24, 2019).

<sup>21</sup> *Id.* at 49973. 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 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>, and comments received in response to the April 2020 notification of inquiry are available at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2020-0006>. 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, although does not require, parties to refrain from requesting *ex parte* meetings on this notice of proposed rulemaking 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. References to these comments are by party name (abbreviated where appropriate), followed by “Initial September NOI Comment,” “Reply September NOI Comment,” “April NOI Comment,” “Letter,” or “*Ex Parte* Letter,” as appropriate.

<sup>22</sup> See Music Artists Coalition (“MAC”) Initial September NOI Comment at 2 (indicating “the need for more transparency” regarding the MLC’s structure); Music Innovation Consumers (“MIC”) Coalition Initial September NOI Comment at 3 (“All stakeholders in the music marketplace benefit when current and accurate information about copyright ownership is easily accessible.”); Screen Composers Guild of Canada (“SCGC”) Reply Comment at 2, 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> (“We urge you to make the choice that gives us transparency in the administration and oversight of our creative works, and a fair chance at proper compensation for those works, now and in the future.”); Iconic Artists LLC Initial Comment at 2, 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> (“In the current paradigm there is a need for greater transparency and accuracy in reporting.”); DLC Reply September NOI Comment at 28 (noting that “transparency will be critical to ensuring that the MLC fulfills its duties in a fair and efficient manner”).

<sup>23</sup> Songwriters Guild of America, Inc. (“SGA”) Initial September NOI Comment at 6.

“robust”<sup>24</sup> oversight. Given these comments, on April 22, 2020, the Office issued a second notification of inquiry seeking further comment on information to be included in the public musical works database, usability, interoperability, and usage restrictions of the database, and transparency and general oversight of the MLC (“April NOI”).<sup>25</sup>

Having reviewed and considered all relevant comments received in response to both notifications of inquiry, and having engaged in *ex parte* communications with commenters, the Office issues a proposed rule regarding the categories of information to be included in the public musical works database, as well as the usability, interoperability, and usage restrictions of the database. The Office is also proposing regulations concerning its general regulatory authority related to ensuring appropriate transparency of the mechanical licensing collective itself. Commenters are reminded that while the Office’s regulatory authority is relatively broad, it is obviously constrained by the law Congress enacted.<sup>26</sup> As previously noted, given the start-up nature of the collective, after reviewing the comments received in response to this proposed rule the Office will consider whether fashioning an interim rule, rather than a final rule, may be best-suited to ensure a sufficiently responsive and flexible regulatory structure.<sup>27</sup> Where appropriate, the proposed rule is intended to grant the MLC flexibility in various ways instead of adopting certain oversight suggestions that may prove overly burdensome as it prepares for the license availability date. For example, and as discussed below, the proposed rule grants the MLC flexibility in the following ways:

- Flexibility to label fields in the public database, as long as the labeling

<sup>24</sup> FMC Reply September NOI Comment at 2. See also Recording Academy Initial September NOI Comment at 4; Lowery Reply September NOI Comment at 2.

<sup>25</sup> 85 FR at 22568. The Office disagreed with the MLC that regulations regarding issues related to transparency “may be premature” because the MLC’s “policies and procedures are still being developed”—including because the statute directs the Office to promulgate regulations concerning contents of the public database. *Id.* at 22570; 17 U.S.C. 115(d)(3)(E)(ii)(V), (iii)(II); MLC Initial September NOI Comment at 30–31.

<sup>26</sup> 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 Conf. Rep. at 4, 12.

<sup>27</sup> 85 FR at 22571.

considers industry practice and reduces the likelihood of user confusion.

- Flexibility not to include information regarding terminations, performing rights organization (“PRO”) affiliation, and DDEX Party Identifier (DPID) in the public database.

- Flexibility to allow songwriters, or their representatives, to have songwriter information listed anonymously or pseudonymously.

- Flexibility as to the most appropriate method for archiving and maintaining historical data to track ownership and other information changes in the public database.

- Flexibility as to the most appropriate method for displaying data provenance information in the public database.

- Flexibility on the precise disclaimer language used in the public database to alert users that the database is not an authoritative source for sound recording information.

- Flexibility to include information in the public database that is not specifically identified by the statute but the MLC finds useful (but would not have serious privacy or identity theft risks to individuals or entities).

- Flexibility to develop reasonable terms of use for the public database, including restrictions on use.

- Flexibility to block third parties from bulk access to the public database after attempts to bypass marginal cost recovery or where persons have engaged in other unlawful activity with respect to the database.

- Flexibility regarding the initial format in which the MLC provides bulk access to the public database.

To aid the Office’s review, it is requested that where a submission responds to more than one of the below categories, it be divided into discrete sections that have clear headings to indicate the category being discussed in each section. Comments addressing a single category should also have a clear heading to indicate which category it discusses. The Office welcomes parties to file joint comments on issues of common agreement and consensus. While all public comments are welcome, should parties disagree with aspects of the proposed rule, the Office encourages parties to provide specific proposed changes to regulatory language for the Office to consider.

## II. Proposed Rule

### A. Categories of Information in the Public Musical Works Database

As noted above, the MLC must establish and maintain a free public database of musical work ownership

information that also identifies the sound recordings in which the musical works are embodied,<sup>28</sup> a function expected to provide transparency across the music industry.<sup>29</sup> While the mechanical licensing collective must “establish and maintain a database containing information relating to musical works,”<sup>30</sup> the statute and legislative history emphasize that the database is meant to benefit the music industry overall and is not “owned” by the collective itself.<sup>31</sup> Under the statute, if the Copyright Office designates a new entity to be the mechanical licensing collective, the Office must “adopt regulations to govern the transfer of licenses, funds, records, *data*, and administrative responsibilities from the existing mechanical licensing collective *to the new entity.*”<sup>32</sup> The legislative history highlights the intent of the public database—providing access to musical works ownership information and promoting transparency across the music industry<sup>33</sup>—and distinguishes it from past attempts to control and/or own industry data.<sup>34</sup> Accordingly, the MLC “agrees that the data in the public MLC musical works database is not owned by the MLC or its vendor,” and that “data in this database will be accessible to the public at no cost, and bulk machine-readable copies of the data in the database will be available to

<sup>28</sup> 17 U.S.C. 115(d)(3)(E), (e)(20).

<sup>29</sup> See The MLC, Transparency, <https://themlc.com/faqs/categories/transparency> (last visited Sept. 1, 2020) (noting that the MLC will “promote transparency” by “[p]roviding unprecedented access to musical works ownership information through a public database”).

<sup>30</sup> 17 U.S.C. 115(d)(3)(E)(i).

<sup>31</sup> See Castle April NOI Comment at 1 (“The musical works database does not belong to the MLC or The MLC and if there is any confusion about that, it should be cleared up right away.”). Any use by the Office referring to the public database as “the MLC’s database” or “its database” was meant to refer to the creation and maintenance of the database, not ownership.

<sup>32</sup> 17 U.S.C. 115(d)(3)(B)(ii)(III) (emphasis added).

<sup>33</sup> See 164 Cong. Rec. S6292, 6293 (daily ed. Sept. 25, 2018) (statement of Sen. Hatch) (“I need to thank Chairman Grassley, who shepherded this bill through the committee and made important contributions to the bill’s oversight and transparency provisions.”); 164 Cong. Rec. S 501, 504 (daily ed. Jan. 24, 2018) (statement of Sen. Coons) (“This important piece of legislation will bring much-needed transparency and efficiency to the music marketplace.”); 164 Cong. Rec. H3522, 3541 (daily ed. Apr. 25, 2018) (statement of Rep. Steve Chabot); 164 Cong. Rec. H3522 at 3542 (daily ed. Apr. 25, 2018) (statement of Rep. Norma Torres).

<sup>34</sup> Conf. Rep. at 6 (“Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on.”); *id.* (noting that the Global Repertoire Database project, an EU-initiated attempt to create a comprehensive and authoritative database for ownership and administration of musical works, “ended without success due to cost and data ownership issues”).

the public, either for free or at marginal cost, pursuant to the MMA.”<sup>35</sup>

For musical works that have been matched (*i.e.*, the copyright owner of such work (or share thereof) has been identified and located), the statute requires the public database to include:

1. The title of the musical work;
2. The copyright owner of the musical work (or share thereof), and the ownership percentage of that owner;
3. Contact information for such copyright owner; and
4. To the extent reasonably available to the MLC, (a) the ISWC for the work, and (b) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist,<sup>36</sup> sound recording copyright owner, producer, ISRC, and other information commonly used to assist in associating sound recordings with musical works.<sup>37</sup>

For unmatched musical works, the statute requires the database to include, to the extent reasonably available to the MLC:

1. The title of the musical work;
2. The ownership percentage for which an owner has not been identified;
3. If a copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner;
4. Identifying information for sound recordings in which the work is embodied, including sound recording name, featured artist, sound recording copyright owner, producer, ISRC, and other information commonly used to assist in associating sound recordings with musical works; and
5. Any additional information reported to the MLC that may assist in identifying the work.<sup>38</sup>

For both matched and unmatched works, the public database must also include “such other information” “as the Register of Copyrights may prescribe by regulation.”<sup>39</sup> The “Register shall use its judgement to determine what is

<sup>35</sup> MLC *Ex Parte* Letter Aug. 21, 2020 (“MLC *Ex Parte* Letter #7”) at 2. The MLC also confirmed that “the musical work and sound recording data used by the MLC to allocate royalties to copyright owners will be the same musical work and sound recording data that is made available in the public database.” *Id.* at 3–4. See Music Reports April NOI Comment at 2.

<sup>36</sup> The Alliance for Recorded Music (“ARM”) asks that “the MLC be required to label [the featured artist field] . . . using the phrase ‘primary artist,’” because “‘primary artist’ is the preferred term as ‘featured artist’ is easily confused with the term ‘featured’ on another artist’s recording, as in Artist X feat. Artist Y.” ARM April NOI Comment at 6. Because this is a statutory term and the Office wishes to afford the MLC some flexibility in labeling the public database, it tentatively declines this request. The proposed rule does, however, require the MLC to consider industry practices when labeling fields in the public database to reduce the likelihood of user confusion.

<sup>37</sup> 17 U.S.C. 115(d)(3)(E)(ii).

<sup>38</sup> *Id.* at 115(d)(3)(E)(iii).

<sup>39</sup> *Id.* at 115(d)(3)(E)(ii)(V), (iii)(II).

an appropriate expansion of the required fields, but shall not adopt new fields that have not become reasonably accessible and used within the industry unless there is widespread support for the inclusion of such fields.”<sup>40</sup>

As noted in the April NOI, in considering whether to prescribe the inclusion of additional fields beyond those statutorily required, the Office has focused on fields that advance the goal of the public database: Reducing the number of unmatched musical works by accurately identifying musical work copyright owners so they can be paid what they are owed by digital music providers (“DMPs”) operating under the section 115 statutory license.<sup>41</sup> At the same time, the Office is mindful of the MLC’s corresponding duties to keep confidential business and personal information secure and inaccessible; for example, data related to computation of market share is contemplated by the statute as sensitive and confidential.<sup>42</sup> Recognizing that a robust musical works database may contain many fields of information, the proposed rule may be most valuable in establishing a floor of required information that users can reliably expect to access in the public database, while providing the MLC with flexibility to include additional data fields that it finds helpful.<sup>43</sup> Both notifications of inquiry asked which specific additional categories of information, if any, should be required for inclusion in the public database, and stakeholder comments, generally seeking inclusion of additional information, are discussed by category below.<sup>44</sup>

<sup>40</sup> Conf. Rep. at 7.

<sup>41</sup> 85 FR at 22573. See Conf. Rep. at 7 (noting that the “highest responsibility” of the MLC includes “efforts to identify the musical works embodied in particular sound recordings,” “identify[ing] and locat[ing] the copyright owners of such works so that [the MLC] can update the database as appropriate,” and “efficient and accurate collection and distribution of royalties”).

<sup>42</sup> 17 U.S.C. 115(d)(3)(j)(i)(II)(bb). See MLC Initial September NOI Comment at 24 (contending that not all information contained in its database “would be appropriate for public disclosure,” and that it “should be permitted to exercise reasonable judgment in determining what information beyond what is statutorily required should be made available to the public”).

<sup>43</sup> See 85 FR 22549 (Apr. 22, 2020) (proposing a floor of categories of information to be required in periodic reporting to copyright owners, but noting that the MLC expects to include additional information); 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**.

<sup>44</sup> 84 FR at 49972; 85 FR at 22573. See, e.g., SoundExchange Initial September NOI Comment at 6 (“[T]he data fields recited in the statute should be viewed as a minimal and vaguely described set of data for understanding rights with respect to a

## 1. Songwriter or Composer

Commenters overwhelmingly agreed with the Office’s tentative conclusion that the database should include songwriter and composer information,<sup>45</sup> including the MLC.<sup>46</sup> The proposed rule requires the MLC to include songwriter and composer information in the public database, to the extent reasonably available to the collective.<sup>47</sup> In response to a concern raised about songwriters potentially wanting to mask their identity to avoid being associated with certain musical works, the proposed rule grants the MLC discretion to allow songwriters, or their representatives, the option of having songwriter information listed anonymously or pseudonymously.<sup>48</sup>

## 2. Studio Producer

As the statute requires the public database to include “producer,” to the extent reasonably available to the MLC,<sup>49</sup> so does the proposed rule.

musical work in a crowded field where there are many millions of relevant works with similar titles in different languages and complicated ownership structures to understand and communicate.”)

<sup>45</sup> See SGA Initial September NOI Comment at 2 (“While the names of copyright owners and administrators associated with a musical work may change on a constant basis, and other variables and data points are subject to frequent adjustment, the title and the names of the creators never vary from the date of a work’s creation forward.”); The International Confederation of Societies of Authors and Composers (“CISAC”) & the International Organisation representing Mechanical Rights Societies (“BIEM”) April NOI Comment at 2; Songwriters of North America (“SONA”) April NOI Comment at 2; DLC April NOI Comment at 4 n.19; see also Barker Initial September NOI Comment at 2; FMC Reply September NOI Comment at 2; DLC Reply September NOI Comment at 26.

<sup>46</sup> MLC April NOI Comment at 9 (agreeing with inclusion of songwriter information for musical works); MLC Reply September NOI Comment at 32 (same).

<sup>47</sup> Because the statute’s definition of “songwriter” includes composers, the proposed rule uses the term “songwriter” to include both songwriters and composers. 17 U.S.C. 115(e)(32). To reduce the likelihood of confusion, the MLC may want to consider labeling this field “Songwriter or Composer” in the public database. Following the statutory language, the proposed rule requires the MLC to include the songwriter field in the public database, and the other fields discussed below, “to the extent reasonably available to the mechanical licensing collective.” See *id.* at 115(d)(3)(E)(ii)(IV), (iii)(I). See also 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** (requiring the MLC to report certain types of information to copyright owners “known to the MLC”).

<sup>48</sup> See Kernen NPRM Comment at 1, U.S. Copyright Office Dkt. No. 2020–7, available at <https://beta.regulations.gov/document/COLC-2020-0004-0001>.

<sup>49</sup> 17 U.S.C. 115(d)(3)(E)(ii)(IV), (iii)(I)(dd). See MLC April NOI Comment at 9 (stating that it “is willing to include producer information in the public database to the extent the Office requires it be reported from DMPs”). The Office notes that the

Initially, there appeared to be stakeholder disagreement about the meaning of the term “producer,” which has since been resolved to clarify that “producer” refers to the studio producer.<sup>50</sup> Because the term “producer” relates not only to the public database, but also to information provided by digital music providers in reports of usage, the Office included an overarching definition of “producer” in its interim rule concerning reports of usage, notices of license, and data collection efforts, among other things, that applies throughout its section 115 regulations to define “producer” as the studio producer.<sup>51</sup>

## 3. Unique Identifiers

As noted above, the statute requires the MLC to include ISRC and ISWC codes, when reasonably available.<sup>52</sup> According to the legislative history, “[u]sing standardized metadata such as ISRC and ISWC codes, is a major step forward in reducing the number of unmatched works.”<sup>53</sup>

In response to the September NOI, the DLC proposed including the Interested Parties Information (IPI)<sup>54</sup> or

statute requires digital music providers to report “producer” to the mechanical licensing collective. 17 U.S.C. 115(d)(3)(E)(ii)(IV), (iii)(I)(dd). See also U.S. Copyright Office, Interim Rule, *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>50</sup> See MLC Initial September NOI Comment at 13 n.6 (originally believing that “producer” referred to “the record label or individual or entity that commissioned the sound recording”); Recording Academy Initial September NOI Comment at 3 (urging Office to “clarify that a producer is someone who was part of the creative process that created a sound recording”); Recording Industry Association of America, Inc. (“RIAA”) Initial September NOI Comment at 11 (stating “producer” should be defined as “the primary person(s) contracted by and accountable to the content owner for the task of delivering the recording as a finished product”); MLC Reply September NOI Comment at 35 (updating its understanding).

<sup>51</sup> See U.S. Copyright Office, Interim Rule, *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>52</sup> 17 U.S.C. 115(d)(3)(E)(ii)–(iii).

<sup>53</sup> Conf. Rep. at 7. The legislative history also notes that “the Register may at some point wish to consider after an appropriate rulemaking whether standardized identifiers for individuals would be appropriate, or even audio fingerprints.” *Id.*

<sup>54</sup> IPI is “[a] unique identifier assigned to rights holders with an interest in an artistic work, including natural persons or legal entities, made known to the IPI Centre. The IPI System is an international registry used by CISAC and BIEM societies.” U.S. Copyright Office, Unclaimed Royalties Study Acronym Glossary, <https://www.copyright.gov/policy/unclaimed-royalties/glossary.pdf>.

International Standard Name Identifier (“ISNI”),<sup>55</sup> to the extent reasonably available to the MLC.<sup>56</sup> SoundExchange asserted that the “CWR standard contemplates a much richer set of information about ‘interested parties’ linked to CISAC’s Interested Party Information (“IPI”) system, including information about songwriters and publishers at various levels,” and so the database “should include and make available a full set of information about interested parties involved in the creation and administration of the musical work, including shares and identifiers.”<sup>57</sup> For its part, the MLC stated that it plans to include IPI and ISNI in the public database (but should not be required to do so through regulation),<sup>58</sup> and create its own proprietary identifier for each musical work in the database.<sup>59</sup>

In the subsequent April NOI, the Office sought public input on issues relating to the inclusion of unique identifiers for musical works in the public database, including whether regulations should require including IPI or ISNI, the MLC’s own standard identifier, or any other specific additional standard identifiers reasonably available to the MLC.<sup>60</sup> In response, multiple commenters agree that the public database should include IPI and/or ISNI.<sup>61</sup> SONA also “strongly encourage[d]” the inclusion of Universal Product Code (“UPC”) because “these codes are sometimes the only reliable way to identify the particular product for which royalties are being paid and thus ensure that royalties are correctly allocated.”<sup>62</sup> The MLC reiterated its plan to include IPI and ISNI, as well as “other unique identifiers” and “any other third party

proprietary identifiers . . . to the extent the MLC believes they will be helpful to copyright owners.”<sup>63</sup> As part of that effort, the MLC “intend[s] to make available unique identifiers reported by the DMPs in the public database.”<sup>64</sup> The MLC does not, however, intend to include the UPC field “in the initial versions of the portal or public database (which focus on providing the data needed for matching and claiming).”<sup>65</sup>

The Office finds the comments regarding IPI and ISNI persuasive in light of the statute, and thus proposes to require the public database to include IPI and/or ISNI for each songwriter, publisher, and musical work copyright owner, as well as UPC,<sup>66</sup> to the extent reasonably available to the MLC. The Office seeks public comment on whether IPIs and/or ISNIs for foreign collective management organizations (“CMOs”) should be required to be listed separately. Under the proposed rule, the public database must also include the MLC’s standard identifier for the musical work, and to the extent reasonably available to the MLC, unique identifier(s) assigned by the blanket licensee, if reported by the blanket licensee.<sup>67</sup>

#### 4. Information Related to Ownership and Control of Musical Works

By statute, the database must include information regarding the ownership of the musical work as well as the underlying sound recording, including “the copyright owner of the work (or share thereof), and the ownership percentage of that owner,” or, if unmatched, “the ownership percentage for which an owner has not been identified.”<sup>68</sup> The statute also requires

a field called “sound recording copyright owner,” the meaning of which is discussed further below.

Although the MMA does not specifically call out music publishing administrators, that is, entities responsible for managing copyrights on behalf of songwriters, including administering, licensing, and collecting publishing royalties without receiving an ownership interest in such copyrights, a number of commenters urge inclusion of this information in the public musical works database.<sup>69</sup> As one publisher suggests, because “[t]he copyright owner may not necessarily be the entity authorized to control, license, or collect royalties for the musical work,” the public database should include information identifying the administrators or authorized entities who license or collect on the behalf of musical work copyright owners.<sup>70</sup> He also proposed that because “a copyright owner’s ‘ownership’ percentage may differ from that same owner’s ‘control’ percentage,” the public database should include separate fields for “control” versus “ownership” percentage.<sup>71</sup> The MLC agrees with that approach,<sup>72</sup> stating that “the database should include information identifying the administrators or authorized entities who license the relevant musical work and/or collect royalties for such work on behalf of the copyright owner.”<sup>73</sup>

In addition, with respect to specific ownership percentages, which are required by statute to be made publicly

should not be made publicly accessible in the database. CISAC & BIEM NPRM Comment at 2, U.S. Copyright Office Dkt. No. 2020–7, available at <https://beta.regulations.gov/document/COLC-2020-0004-0001>. The statute, however, specifically contemplates such information being made publicly available in the database. 17 U.S.C. 115(d)(3)(C)(E)(ii)–(iii).

<sup>69</sup> DLC Reply September NOI Comment Add. at A–16 (urging inclusion of “all additional entities involved with the licensing or ownership of the musical work, including publishing administrators and aggregators, publishers and sub-publishers, and any entities designated to receive license notices, reporting, and/or royalty payment on the copyright owners’ behalf”); ARM April NOI Comment at 2 (agreeing that “information related to all persons or entities that own or control the right to license and/or collect royalties related to musical works in the United States should be included”). See also FMC April NOI Comment at 2; SONA April NOI Comment at 5–6; SoundExchange Initial September NOI Comment at 8 (observing that “[c]ommericalization of musical works often involves chains of publishing, sub-publishing and administration agreements that determine who is entitled to be paid for use of a work,” and that the CWR standard contemplates gathering this information, such that the MLC database should also collect and make available this information).

<sup>70</sup> Barker Initial September NOI Comment at 2.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> MLC Reply September NOI Comment at 32 n.16.

<sup>73</sup> MLC April NOI Comment at 9.

<sup>55</sup> ISNI is “[a] unique identifier for identifying the public identities of contributors to creative works, regardless their legal or natural status, and those active in their distribution. These may include researchers, inventors, writers, artists, visual creators, performers, producers, publishers, aggregators, and more. A different ISNI is assigned for each name used.” U.S. Copyright Office, Unclaimed Royalties Study Acronym Glossary, <https://www.copyright.gov/policy/unclaimed-royalties/glossary.pdf>.

<sup>56</sup> DLC Initial September NOI Comment at 21; DLC Reply September NOI Comment Add. at A–16.

<sup>57</sup> SoundExchange Initial September NOI Comment at 8; see *id.* at 7–8 (“Reflecting all applicable unique identifiers in the MLC Database will allow users of the MLC Database readily to match records in the database to other databases when ISWC is not included in one or the other of the databases.”).

<sup>58</sup> MLC Reply September NOI Comment at 33.

<sup>59</sup> *Id.* at 34.

<sup>60</sup> 85 FR at 22574.

<sup>61</sup> DLC April NOI Comment at 4 n.19; SONA April NOI Comment at 4; CISAC & BIEM April NOI Comment at 2.

<sup>62</sup> SONA April NOI Comment at 5.

<sup>63</sup> MLC April NOI Comment at 9.

<sup>64</sup> MLC *Ex Parte* Letter #7 at 5.

<sup>65</sup> *Id.*

<sup>66</sup> The Office notes that the MLC supports including the UPC field in royalty reports to copyright owners, and in reports of usage provided by DMPs to the MLC. See MLC Initial September NOI Comment at App. G; MLC NPRM Comment at App. C, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001>. In addition, the MLC has maintained it will use UPC in its matching efforts. See MLC Letter July 13, 2020 at 7 (stating “[a]ll of the metadata fields proposed in § 210.27(e)(1) will be used as part of the MLC’s matching efforts”); see also 85 FR 22518, 22541 (Apr. 22, 2020) (UPC proposed in § 210.27(e)(1)).

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

<sup>68</sup> 17 U.S.C. 115(d)(3)(C)(E)(ii)–(iii). CISAC & BIEM contend that creators’ percentage share

available, SoundExchange raises the question of how the database should best address “the frequent situation (particularly with new works) where the various co-authors and their publishers have, at a particular moment in time, collectively claimed more or less than 100% of a work.”<sup>74</sup> Noting that it may be difficult for the MLC to withhold information regarding the musical work until shares equal 100% (the practice of other systems), it suggests the MLC “make available information concerning the shares claimed even when they total more than 100% (frequently referred to as an ‘overclaim’) or less than 100% (frequently referred to as an ‘underclaim’).”<sup>75</sup> In response, the MLC stated that it “intends to mark overclaims as such and show the percentages and total of all shares claimed so that overclaims and underclaims will be transparent.”<sup>76</sup>

Relatedly, CISAC & BIEM raise concerns about needing “to clarify the concept of ‘copyright owner,’” as “foreign collective management organizations (CMOs) . . . are also considered copyright owners or exclusively mandated organizations of the musical works administered by these entities,” and thus “CMOs represented by CISAC and BIEM should be able to register in the MLC database the claim percentages they represent.”<sup>77</sup> While the MMA does not reference foreign musical works specifically, nothing in the statute indicates that foreign copyright owners should be treated differently from U.S. copyright owners under the blanket licensing regime, or prevents the MLC from seeking or including data from foreign CMOs in building the public database.<sup>78</sup> Where copyright ownership has been assigned or otherwise transferred to a foreign CMO or, conversely, a U.S. sub-publisher, the statute does not specify that it should be treated differently from a similarly-situated U.S. entity that has been assigned or otherwise been transferred copyright ownership.<sup>79</sup> The MLC has maintained that it will “engage in non-discriminatory treatment towards domestic and foreign copyright

owners, CMOs and administrators,”<sup>80</sup> and that it “intends to operate on a non-discriminatory basis, and all natural and legal persons or entities of any nationality are welcome to register their claims to works with the MLC.”<sup>81</sup> In addition, the MLC appears to be planning for data collection from foreign CMOs, as evidenced by the creation of its Data Quality Initiative (DQI), which “provide[s] a streamlined way for music publishers, administrators and foreign collective management organizations (CMOs) to compare large schedules of their musical works’ data against The MLC’s data . . . so that they can . . . improve the quality of The MLC’s data.”<sup>82</sup> According to the MLC, the DQI “does not act as a mechanism for delivering work registrations/works data,” but “[m]usic publishers, administrators and foreign CMOs may use [Common Works Registration] to deliver new and updated work registrations to The MLC.”<sup>83</sup>

After considering the comments, the Office concludes that to the extent reasonably available to the MLC, it will be beneficial for the database to include information related to all persons or entities that own or control the right to license and collect royalties related to musical works in the United States, and that music publishing administrator and control information would be valuable additions. Accordingly, the proposed rule requires the public database to include administrator(s) or other authorized entity(ies) who license the musical work (or share thereof) and/or collect mechanical royalties for such musical work (or share thereof) in the United States. The proposed rule would not prevent the MLC from including additional information with respect to foreign CMOs. The Office solicits comments on the proposed language, including any specific suggestions for adjustment.

With respect to the question SoundExchange raises regarding works that may reflect underclaiming and overclaiming of shares, the Office concludes that it may make sense for the MLC to retain flexibility to implement such a system as it apparently intends, and notes that the MLC’s dispute resolution committee may be an appropriate forum to consider this issue further, as part of the committee’s charge to establish policies and

procedures related to resolution of disputes related to ownership interests in musical works.<sup>84</sup> As noted above, the MLC “intends to mark overclaims as such and show the percentages and total of all shares claimed so that overclaims and underclaims will be transparent.”<sup>85</sup>

## 5. Additional Information Related To Identifying Musical Works and Sound Recordings

Commenters proposed that the public database include various other fields to identify the musical work at issue or the sound recording in which it is embodied. With respect to musical works, some commenters pointed to fields included in the existing Common Works Registration (“CWR”) format, and supported inclusion of information relating to alternate titles for musical works,<sup>86</sup> whether the work utilizes samples and medleys of preexisting works,<sup>87</sup> and opus and catalog numbers and instrumentation of classical compositions.<sup>88</sup> With respect to sound recordings, commenters suggested inclusion of information relating to track duration, version, and release date of sound recording.<sup>89</sup>

The MLC acknowledged the merits of including these fields proposed by commenters, recognizing “CWR as the *de facto* industry standard used for registration of claims in musical works, and intends to use CWR as its primary mechanism for the bulk electronic

<sup>74</sup> 17 U.S.C. 115(d)(3)(K).

<sup>75</sup> MLC *Ex Parte* Letter #7 at 5.

<sup>76</sup> See RIAA Initial September NOI Comment at 8; MLC Reply September NOI Comment at 32; ARM April NOI Comment at 3; Recording Academy April NOI Comment at 3; see also SONA April NOI Comment at 5–6 (contending that data supplied to the MLC via the CWR format for musical works should be in the public database).

<sup>77</sup> SoundExchange Initial September NOI Comment at 9; ARM April NOI Comment at 3.

<sup>78</sup> SoundExchange Initial September NOI Comment at 7; ARM April NOI Comment at 3.

<sup>79</sup> See MLC Reply September NOI Comment at 33, App. E (agreeing with inclusion of duration, version, and release year of the sound recording, to the extent available to the MLC); Recording Academy Initial September NOI Comment at 3 (noting such information would “help distinguish between songs that have been recorded and released under different titles or by different artists multiple times”); RIAA Initial September NOI Comment at 6–7 (same); Recording Academy April NOI Comment at 3 (stating database should include version titles, track duration, and release date); SONA April NOI Comment at 6 (contending track duration, version, and release date should be included in the database). ARM agrees that track duration, version, and release year should be in the database, but only if such data is obtained from an authoritative source. ARM April NOI Comment at 3. RIAA recommends revising the “sound recording name” field to “sound recording track title,” or in the alternative, “sound recording name/sound recording track title.” RIAA Initial September NOI Comment at 10–11.

<sup>74</sup> SoundExchange Initial September NOI Comment at 8.

<sup>75</sup> *Id.* at 9; see also *id.* at 15.

<sup>76</sup> MLC *Ex Parte* Letter #7 at 5.

<sup>77</sup> CISAC & BIEM April NOI Comment at 1. See also Japanese Society for Rights of Authors, Composers and Publishers (“JASRAC”) Initial September NOI Comment at 2 (“[A]n effective and efficient claims process needs to be established for works that are not initially matched, which will allow foreign rights owners to claim works without significant burden.”).

<sup>78</sup> See 17 U.S.C. 115.

<sup>79</sup> See *id.* at 101 (defining “copyright owner” and “transfer of copyright ownership”); *id.* at 115.

<sup>80</sup> MLC *Ex Parte* Letter #7 at 6.

<sup>81</sup> MLC Reply September NOI Comment at 44.

<sup>82</sup> The MLC, Play Your Part, <https://themlc.com/play-your-part> (last visited Sept. 1, 2020).

<sup>83</sup> The MLC, MLC Data Quality Initiative, <https://themlc.com/sites/default/files/2020-08/2020%20-%20DQI%20One%20Pager%20Updated%208-18-20.pdf> (last visited Sept. 1, 2020).

registration of musical works data.”<sup>90</sup> The MLC reported plans to include alternative titles of the musical work, and for sound recordings, the track duration, version, and release date,<sup>91</sup> as well as additional fields “reported to the mechanical licensing collective as may be useful for the identification of musical works that the mechanical licensing collective deems appropriate to publicly disclose.”<sup>92</sup> Regarding opus and catalog numbers for classical compositions, the MLC maintains that it “is working with DDEX to determine if it is possible or appropriate to add Opus Number and (Composer) Catalogue Number to the data specifications.”<sup>93</sup> Regarding whether the work utilizes samples and medleys of preexisting works, the MLC contends that “[b]ecause medleys and musical works that sample other musical works are unique derivative copyrighted works, each will be included in the database as a unique composition,” and that such an approach addresses SoundExchange’s concern because it will “treat[] each medley or work that incorporates a sample as a separate musical work, as to which ownership will be separately claimed and identified.”<sup>94</sup>

Given the consensus of comments, the proposed rule requires the MLC to include the following fields in the public database, to the extent reasonably available to the MLC: Alternate titles for musical works, opus and catalog numbers of classical compositions, and track duration,<sup>95</sup> version, and release date of sound recordings. The Office has issued an interim rule requiring digital music providers to report the actual playing time as measured from the sound recording file to the MLC,<sup>96</sup> which the Office expects to be the value displayed in the public musical works database. Finally, the proposed rule mirrors the statute by requiring the public database to include, to the extent reasonably available to the mechanical licensing collective, other non-confidential information commonly used to assist in associating sound recordings with musical works (for matched musical works), and for

unmatched musical works, other non-confidential information commonly used to assist in associating sound recordings with musical works, and any additional non-confidential information reported to the mechanical licensing collective that may assist in identifying musical works.<sup>97</sup>

#### 6. Performing Rights Organization Affiliation

In response to the September NOI, a few commenters maintained that the public database should include performing rights organization (“PRO”) affiliation, with MIC Coalition asserting that “[a]ny data solution must not only encompass mechanical rights, but also provide information regarding public performance rights, including PRO affiliation and splits of performance rights.”<sup>98</sup>

By contrast, the MLC and FMC raised concerns about including and maintaining PRO affiliation in the public database.<sup>99</sup> The largest PROs, The American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), similarly objected that because “music performing rights organizations such as BMI and ASCAP all have comprehensive databases on musical works ownership rights, and these databases are publicly available,” so “administration of data with respect to the licensing of public performing rights does not require government intervention.”<sup>100</sup>

After evaluating these comments, in the April NOI the Office tentatively concluded against requiring PRO affiliation in the public database, noting that “[b]ecause the MMA explicitly restricts the MLC from licensing

performance rights, it seems unlikely to be prudent or frugal to require the MLC to expend resources to maintain PRO affiliations for rights it is not permitted to license.”<sup>101</sup> In response, the DLC asked the Office to reconsider and include PRO affiliation in the public database.<sup>102</sup> The MIC Coalition commented that “[i]ncorporating PRO information into the musical works database . . . will foster a wide range of innovations in music licensing,”<sup>103</sup> and that the Office should not view “the joint database proposed by ASCAP and BMI as a viable alternative to the one that’s currently being developed by the MLC.”<sup>104</sup> But CISAC & BEIM agree “that there is no need for the MLC to include and maintain the PRO’s performing right information in the database,”<sup>105</sup> and FMC finds the “Office’s tentative conclusion against requiring the MLC to include PRO affiliation in its database is sound.”<sup>106</sup> For its part, the MLC contends that it “should be afforded the opportunity to focus on its main priority of a robust and fulsome mechanical rights database,” and not include PRO affiliation, but that “[i]f, at some time in the future, the MLC has the capacity and resources to also incorporate performance rights information, it may undertake this task . . . .”<sup>107</sup>

Having considered these comments, the statutory text, and legislative history, the Office concludes that the mechanical licensing collective should not be required to include PRO affiliation in the public database.<sup>108</sup> As previously noted by the Office, this conclusion does not inhibit PRO access or use of the database for their own efforts, and explicitly permits bulk access for a fee that does not exceed the MLC’s marginal cost to provide such access; nor does it restrict the MLC from

<sup>97</sup> 17 U.S.C. 115(d)(3)(E)(ii)(IV)(bb), (iii)(I)(dd)–(ee).

<sup>98</sup> MIC Coalition Initial September NOI Comment at 2. See DLC Initial September NOI Comment at 20 (suggesting that including PRO affiliation “will ensure that the [public] database is fully usable, including as a resource for direct licensing activities”); see also Barker Initial September NOI Comment at 8–9.

<sup>99</sup> See MLC Reply September NOI Comment at 36 (pointing out that its “primary responsibility is to engage in the administration of mechanical rights and to develop and maintain a mechanical rights database,” and that “gather[ing], maintain[ing], updat[ing] and includ[ing] . . . performance rights information—which rights it is not permitted to license—would require significant effort which could imperil [its] ability to meet its statutory obligations with respect to mechanical rights licensing and administration by the [license availability date]”); FMC Reply September NOI Comment at 3 (“[I]t’s difficult to see how including PRO information in the MLC database could work—as the MLC won’t be paying PROs, it’s hard to envision what would incentivize keeping this data accurate and authoritatively up to date.”).

<sup>100</sup> ASCAP & BMI Reply September NOI Comment at 2.

<sup>101</sup> 85 FR at 22576; 17 U.S.C. 115(d)(3)(C)(iii) (limiting administration of voluntary licenses to “only [the] reproduction or distribution rights in musical works for covered activities”).

<sup>102</sup> DLC April NOI Comment at 3–4.

<sup>103</sup> MIC Coalition April NOI Comment at 3.

<sup>104</sup> *Id.* at 2.

<sup>105</sup> CISAC & BIEM April NOI Comment at 3.

<sup>106</sup> FMC April NOI Comment at 2.

<sup>107</sup> MLC April NOI Comment at 10.

<sup>108</sup> In a related rulemaking, the Office has declined to require musical work copyright owners to provide information related to performing rights organization affiliation in connection with the statutory obligation to undertake commercially reasonable efforts to deliver sound recording information to the MLC. U.S. Copyright Office, *Interim Rule, 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**. See also 17 U.S.C. 115(d)(3)(E)(iv).

<sup>90</sup> MLC Reply September NOI Comment at 38.

<sup>91</sup> *Id.* at App. E; MLC April NOI Comment at 10.

<sup>92</sup> MLC Reply September NOI Comment at App. E.

<sup>93</sup> MLC *Ex Parte* Letter #7 at 5.

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

<sup>95</sup> The proposed rule uses the term “playing time.” See U.S. Copyright Office, *Interim Rule, 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>96</sup> *Id.*

optionally including such information.<sup>109</sup>

## 7. Historical Data

In response to the September NOI, SoundExchange asserted that the public database should “maintain and make available historical interested party information so it is possible to know who is entitled to collect payments for shares of a work both currently and at any point in the past.”<sup>110</sup> The DLC also proposed that the public database include “information regarding each entity in the chain of copyright owners and their agents for a particular musical work” as well as “relational connections between each of these entities for a particular musical work.”<sup>111</sup> The MLC sought clarity about the DLC’s specific proposal, suggesting “[i]t is unclear whether the DLC . . . is referring to the entire historical chain of title for each musical work. If so, the MLC objects that “such information is voluminous, burdensome to provide and maintain, and in this context unnecessary and must not be required.”<sup>112</sup> The MLC stated, however, that it intends to maintain information in its database about “each and every entity that, at any given point in time, owns a share of the right to receive mechanical royalties for the use of a musical work in covered activities.”<sup>113</sup> After considering these comments, the Copyright Office tentatively agreed with the MLC’s approach to focus on current relationships, but welcomed further public input and noted that it did not envision language *prohibiting* the MLC from providing such historical information.<sup>114</sup>

In response to the April NOI, SoundExchange reiterated its request for the public database to include historical information, acknowledging that it “seems reasonable” for the MLC not to “go out of its way to collect information about entitlement to payment for times *before* the license availability date,” but discouraging an approach where “the MLC may discard or not make publicly available information about entitlement to payment that . . . applies to times after the license availability date, . . .

[because] in some cases (such as where a service provider makes a significantly late payment or distribution is delayed because the copyright owners have not agreed among themselves concerning ownership shares) the MLC may not be able to distribute royalties until long after the usage occurred.”<sup>115</sup> CISAC & BIEM, FMC, and SONA agree that historical ownership information should be in the public database, noting that ownership of musical works changes over time.<sup>116</sup>

For its part, the MLC reaffirmed its intention to “maintain information about each and every entity that, at any given point in time, owns a share of the right to receive mechanical royalties for the use of a musical work in covered activities,” and to “maintain at regular intervals historical records of the information contained in the database.”<sup>117</sup> The MLC also clarified that it “will maintain an archive of data provided to it after the license availability date (‘LAD’) and that has subsequently been updated or revised (e.g., where there is a post-LAD change in ownership of a share of a musical work), and the MLC will make this historic information available to the public.”<sup>118</sup> The MLC contends that “it should be permitted to determine, in consultation with its vendors, the best method for maintaining and archiving historical data to track ownership and other information changes in its database.”<sup>119</sup>

Having carefully considered this issue, the Office proposes that the MLC shall maintain at regular intervals historical records of the information contained in the public musical works database, including a record of changes to such database information and changes to the source of information in database fields, in order to allow tracking of changes to the ownership of musical works in the database over time. The proposed rule adopts the MLC’s request for flexibility as to the most appropriate method for archiving and maintaining such historical data to track ownership and other information changes in the database. As previously noted by the Office, the MLC must maintain all material records of the operations of the mechanical licensing

collective in a secure and reliable manner, and such information will also be subject to audit.<sup>120</sup>

## 8. Terminations

Title 17 allows, under certain circumstances, authors or their heirs to terminate an agreement that previously granted one or more of the author’s exclusive rights to a third party.<sup>121</sup> In response to the September NOI, one commenter suggested that to the extent terminations of musical work grants have occurred, the public database should include “separate iterations of musical works with their respective copyright owners and other related information, as well as the appropriately matched recording uses for each iteration of the musical work, and to make clear to the public and users of the database the appropriate version eligible for future licenses.”<sup>122</sup> Separately, as addressed in a parallel rulemaking, the MLC asked that the Office require digital music providers to include server fixation dates for sound recordings, contending that this information will be helpful to its determination whether particular usage of musical works is affected by the termination of grants under this statutory provision.<sup>123</sup> The DLC objected to this request.<sup>124</sup>

In the April NOI, the Office sought public input on issues that should be considered relating to whether termination information should be included in the public database.<sup>125</sup> The DLC, SGA, and SONA support including information concerning the termination of grants of rights by copyright creators in the public database.<sup>126</sup> By contrast, the MLC contends that it “should not be required to include in the public database information regarding statutory termination of musical works *per se*.”<sup>127</sup> The Recording Academy, expressing concern that the Office’s parallel rulemaking involving server fixation dates for sound recordings “could have a substantive impact on the termination rights of songwriters,”<sup>128</sup>

<sup>120</sup> 85 FR at 22576; 17 U.S.C. 115(d)(3)(M)(i); *id.* at 115(d)(3)(D)(ix)(II)(aa).

<sup>121</sup> 17 U.S.C. 203, 304(c), 304(d).

<sup>122</sup> Barker Initial September NOI Comment at 4.  
<sup>123</sup> MLC Reply September NOI Comment at 19, App. at 10; *see also* 85 FR at 22532–33.

<sup>124</sup> DLC *Ex Parte* Letter Feb. 14, 2020 (“DLC *Ex Parte* Letter #1”) at 3; DLC *Ex Parte* Letter #1 Presentation at 15; DLC *Ex Parte* Letter Feb. 24, 2020 at 4; DLC *Ex Parte* Letter Mar. 4, 2020 at 5.

<sup>125</sup> 85 FR at 22576.

<sup>126</sup> DLC April NOI Comment at 4 n.19; SGA April NOI Comment at 8; SONA April NOI Comment at 2.

<sup>127</sup> MLC April NOI Comment at 10.

<sup>128</sup> Recording Academy April NOI Comment at 3.

<sup>109</sup> 17 U.S.C. 115(d)(3)(E)(v); 85 FR at 22576. *See* Barker Initial September NOI Comment at 9; SONA April NOI Comment at 6 (“While SONA does not believe this data should be mandatory, we also do not think that the rule should prohibit a songwriter from publicly listing PRO affiliation if he or she believes that it could be important identifying information.”).

<sup>110</sup> SoundExchange Initial September NOI Comment at 10.

<sup>111</sup> DLC Initial September NOI Comment at 20.

<sup>112</sup> MLC Reply September NOI Comment at 34.

<sup>113</sup> *Id.*

<sup>114</sup> 85 FR at 22576.

<sup>115</sup> SoundExchange April NOI Comment at 4 (emphasis added). *See id.* at 4–5 (“To pay the proper payee for the time when usage occurred, the MLC will need to know who is entitled to receive royalty payments for all times after the license availability date.”).

<sup>116</sup> CISAC & BIEM April NOI Comment at 3; FMC April NOI Comment at 2; SONA April NOI Comment at 9.

<sup>117</sup> MLC April NOI Comment at 12.

<sup>118</sup> MLC *Ex Parte* Letter #7 at 4.

<sup>119</sup> MLC April NOI Comment at 12.

asks the Office to “set aside any issue related to termination rights and the MLC until it conducts a full and thorough examination of the implications . . . for songwriters and other authors, including an opportunity for public comment.”<sup>129</sup>

Having considered these comments, the statutory text, and legislative history, the Office takes the position that the mechanical licensing collective should not be required to include termination information in the public database. This conclusion does not restrict the MLC from optionally including such information. In addition, the Office notes that the MLC has agreed to include information regarding administrators that license musical works and/or collect royalties for such works,<sup>130</sup> as well as information regarding “each and every entity that, at any given point in time, owns a share of the right to receive mechanical royalties for the use of a musical work in covered activities,”<sup>131</sup> which presumably should include updated ownership information that may be relevant for works that are being exploited post-exercise of the termination right.

#### 9. Data Provenance

In response to the September NOI, the DLC maintained that if the public database includes third-party data, “it should be labeled as such.”<sup>132</sup> The DLC provided proposed language suggesting that for musical work copyright owner information, the database should indicate “whether the ownership information was received directly from the copyright owner or from a third party.”<sup>133</sup> SoundExchange agreed, stating that the public database “should identify the submitters of the information in it, because preserving that provenance will allow the MLC and users of the MLC to make judgments about how authoritative the information is.”<sup>134</sup> Others commenters noted that for sound recordings, first-hand data is more likely to be accurate.<sup>135</sup>

<sup>129</sup> *Id.*

<sup>130</sup> MLC April NOI Comment at 9.

<sup>131</sup> MLC Reply September NOI Comment at 34.

<sup>132</sup> DLC Initial September NOI Comment at 20.

<sup>133</sup> DLC Reply September NOI Comment at Add. A–15–16.

<sup>134</sup> SoundExchange Initial September NOI Comment at 10–11.

<sup>135</sup> The American Association of Independent Music (“A2IM”) & RIAA Reply September NOI Comment at 2 (asserting MLC should be required to obtain its sound recording data from a single authoritative source); Jessop Initial September NOI Comment at 3 (“The MLC should obtain sound recording information from as close to the source as possible. In practice this means from the record label or someone directly or indirectly authorized to manage this information for them.”).

In the April NOI, the Office noted that while issues related to data sourcing, confidence in data quality, accurate copyright ownership information, and agency or licensing arrangements, are important, they can be nuanced, and so “the MLC may be better-suited to explore the best way to promote accuracy and transparency in issues related to data provenance without such regulatory language, including through the policies and practices adopted by its dispute resolution and operations committees, and by establishing digital accounts through which copyright owners can view, verify, or adjust information.”<sup>136</sup> The Office sought further public input on any issues that should be considered relating to the identification of data sourcing in the public database, including whether (and how) third-party data should be labeled.<sup>137</sup>

In response, the DLC asked the Office to reconsider and include data provenance information in database, stating that “users of the database should have the ability to consider whatever information the MLC can obtain from copyright owners, and make their own judgments as to its reliability based on the MLC’s identification of the information’s source.”<sup>138</sup> ARM, FMC, and CISAC & BIEM agree that the public database should include data provenance information,<sup>139</sup> although CISAC & BIEM and SONA contend that regulations requiring such information are not necessary.<sup>140</sup> For its part, the MLC “agrees with the Office’s tentative conclusion that the MLC and its committees are better suited to establish policies and practices . . . to meet the goal of improving data quality and accuracy,”<sup>141</sup> and that “[t]he MLC should be given sufficient flexibility to determine the best and most

<sup>136</sup> 85 FR at 22576.

<sup>137</sup> *Id.*

<sup>138</sup> DLC April NOI Comment at 4.

<sup>139</sup> ARM April NOI Comment at 3 (contending that the public database should indicate “which data was provided to the MLC by the actual copyright owner or its designee, which was provided by a DMP and which was provided some other third party”); FMC April NOI Comment at 2 (agreeing that public database “should include provenance information, not just because it helps allow for judgments about how authoritative that data is, but because it can help writers and publishers know where to go to correct any bad data they discover”); CISAC & BIEM April NOI Comment at 3 (“Submitters of information should be identified, and when the information is derived from copyright owners (creators, publishers, CMOs, etc.), it should be labelled, and it should prevail over other sources of information.”).

<sup>140</sup> CISAC & BIEM April NOI Comment at 3 (maintaining that “any issues should be resolved through the MLC’s dispute resolution policy”); SONA April NOI Comment at 8.

<sup>141</sup> MLC April NOI Comment at 11.

operationally effective way to ensure the accuracy and quality of the data in its database, rather than requiring it to identify the source of each piece of information contained therein.”<sup>142</sup> The MLC also stated that it “intends to show the provenance of each row of sound recording data, including both the name of and DPID for the DMP from which the MLC received the sound recording data concerned,” and that it “intends to put checks in place to ensure data quality and accuracy.”<sup>143</sup> For musical works information, the MLC maintains that it “will be sourced from copyright owners.”<sup>144</sup>

After carefully reviewing these comments, the Office agrees that the MLC should be granted some discretion on how to display data provenance information in the public database. Because the commenters generally supported the MLC’s intent to source musical works information from copyright owners, data provenance issues appear to be especially relevant to sound recording information in the public database. This is particularly true given that the MLC intends to populate sound recording information in the public database from reports of usage, as opposed to using a single authoritative source (discussed below). Accordingly, the proposed rule states that the MLC must display data provenance information for sound recording information in the public database. The Office seeks public input on this aspect of the proposed rule.

#### *B. Sound Recording Information and Disclaimers or Disclosures in the Public Musical Works Database*

##### 1. “Sound Recording Copyright Owner” Information

In response to the September NOI, RIAA and individual record labels expressed concern about which information will populate and be displayed to satisfy the statutory requirement to include “sound recording copyright owner” (SRCO) in the public musical works database.<sup>145</sup> Specifically, RIAA explained that under current industry practice, digital music providers send royalties pursuant to information received from record companies or others releasing recordings to DMPs “via a specialized DDEX message known as the ERN (or Electronic Release Notification),” which is “typically populated with information about the party that is entitled to receive royalties (who may or

<sup>142</sup> *Id.* at 12.

<sup>143</sup> MLC *Ex Parte* Letter #7 at 4.

<sup>144</sup> *Id.* at 2.

<sup>145</sup> 17 U.S.C. 115(d)(3)(E)(ii)(IV)(bb), (iii)(D)(dd).

may not be the actual legal copyright owner), because that is the information that is relevant to the business relationship between record labels and DMPs.”<sup>146</sup> In short, information in “the ERN message is not meant to be used to make legal determinations of ownership.”<sup>147</sup> RIAA noted the potential for confusion stemming from a field labelled “sound recording copyright owner” in the public database being populated by information taken from the labels’ ERN messages—for both the MLC (*i.e.*, the MLC could “inadvertently misinterpret or misapply the SRCO data”), and users of the free, public database (*i.e.*, they could mistakenly assume that the so-called “sound recording copyright owner” information is authoritative with respect to ownership of the sound recording).<sup>148</sup> Separate but relatedly, SoundExchange noted that it “devotes substantial resources” to tracking changes in sound recording rights ownership, suggesting that inclusion of a SRCO field “creates a potential trap for the unwary.”<sup>149</sup> A2IM & RIAA and Sony suggested that three fields—DDEX Party Identifier (DPID), LabelName, and PLine—may provide indicia relevant to determining sound recording copyright ownership.<sup>150</sup>

<sup>146</sup> RIAA Initial September NOI Comment at 2. Although the RIAA’s initial September NOI comments suggested that the ERN feed included a field labeled sound recording copyright owner (SRCO), upon reply, it clarified that there is no such specific field. See A2IM & RIAA Reply September NOI Comment at 8 n.5.

<sup>147</sup> RIAA Initial September NOI Comment at 2.  
<sup>148</sup> *Id.* at 3; see *id.* (“If database users seek out and enter into sound recording licenses with the wrong parties and/or make payments to the wrong parties—because they misunderstand what the data in the SRCO column of the MLC database *actually* represents—that would negatively impact our member companies and the artists whose recordings they own and/or exclusively license.”). Those concerns were echoed in *ex parte* meetings with individual record labels. Universal Music Group (“UMG”) explained that “actual copyright ownership is irrelevant” in the digital supply chain, as “DMPs only need to know who to pay and, maybe, who to call,” whereas record companies separately track copyright ownership information. UMG & RIAA *Ex Parte* Letter Dec. 9, 2019 at 2. UMG suggested that the MLC’s inclusion of a field labeled “sound recording copyright owner” might confuse relations between the actual copyright owner and the record label conveying information to the DMP, where the label is functioning as a non-copyright owner distributor through a licensing or press and distribution (P&D) arrangement. UMG & RIAA *Ex Parte* Letter at 2–3. Sony Music (“Sony”) expressed similar concerns, suggesting that the Office’s regulations specify how the “sound recording copyright owner” line in the public database should be labeled or defined to minimize confusion. Sony & RIAA *Ex Parte* Letter Dec. 9, 2019 at 1–2.

<sup>149</sup> SoundExchange Initial September NOI Comment at 11–12.

<sup>150</sup> Sony & RIAA *Ex Parte* Letter at 2 (noting that “DIY artists and aggregators serving that community” may be most likely to populate the

In the April NOI, the Copyright Office sought public comment regarding which data should be in the public database to satisfy the statutory requirement, including whether to require inclusion of multiple fields to lessen the perception that a single field contains definitive data regarding sound recording copyright ownership information.<sup>151</sup> ARM states that it does not object “to a regulation that requires the MLC to include [DDEX Party Identifier (DPID), LabelName, and PLine] in the Database, provided the fields are each labeled in a way that minimizes confusion and/or misunderstanding,” as “this will lessen the perception that a single field contains definitive data regarding sound recording copyright ownership information.”<sup>152</sup> The MLC “has no issue with including LabelName and

DPID field); A2IM & RIAA Reply September NOI Comment at 8–10 (identifying DPID, LabelName, and PLine fields in relation to sound recording copyright owner information). The LabelName represents the “brand under which a Release is issued and marketed. A Label is a marketing identity (like a MusicPublisher’s ‘Imprint’ in book publishing) and is not the same thing as the record company which controls it, even if it shares the same name. The control of a Label may move from one owner to another.” Digital Data Exchange (“DDEX”), DDEX Data Dictionary, [http://service.ddex.net/dd/ERN411/dd/ddex\\_Label.html](http://service.ddex.net/dd/ERN411/dd/ddex_Label.html) (last visited Sept. 1, 2020). As noted by A2IM & RIAA, “PLine” is “[a] composite element that identifies the year of first release of the Resource or Release followed by the name of the entity that owns the phonographic rights in the Resource or Release. . . . In the case of recordings that are owned by the artist or the artist’s heirs but are licensed to one of [their] member companies, the PLine field typically lists those individuals’ names, even though they generally are not actively involved in commercializing those recordings.” A2IM & RIAA Reply September NOI Comment at 9 (citing Music Business Association and DDEX, *DDEX Release Notification Standard Starter Guide for Implementation* 28 (July 2016), [https://kb.ddex.net/download/attachments/327717/MusicMetadata\\_DDEX\\_V1.pdf](https://kb.ddex.net/download/attachments/327717/MusicMetadata_DDEX_V1.pdf)). DPID “is an alphanumeric identifier that identifies the party delivering the DDEX message,” and “is also generally the party to whom the DMP sends royalties for the relevant sound recording.” *Id.* at 8.  
<sup>151</sup> 85 FR at 22577.

<sup>152</sup> ARM April NOI Comment at 4. A2IM & RIAA initially stated that “[b]ecause the PLine party is, in many cases, an individual who would not want to be listed in a public database and is often not the party who commercializes the recording, the regulations should prohibit that party name from appearing in the public-facing database.” A2IM & RIAA Reply September NOI Comment at 9. The Office understands that ARM, of which A2IM and RIAA are members, does not object to PLine being displayed in the public musical works database. For DPID, the Office also understands that ARM does not object to including the DPID party’s name in the public 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 Comment at 10, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001>.

PLine information in the public database to the extent the MLC receives that information from the DMPs,” but expressed concern about including DPID because it “does not identify sound recording copyright owner, but rather, the sender and/or recipient of a DDEX-formatted message.”<sup>153</sup> The DLC states that LabelName and PLine “are adequate on their own,” as DPID “is not a highly valuable data field,” and contends that the burden of converting DPID numerical codes into parties’ names (to address ARM’s concern about displaying the numerical identifier) outweighs any benefit of including DPID in the public database.<sup>154</sup> The Recording Academy, although maintaining that “DDEX ERN information is an important source of reliable and authoritative data about a sound recording,” contends that “many of the fields serve a distinct purpose in the digital supply chain and do not satisfy the ‘sound recording copyright owner’ field required in the MLC database.”<sup>155</sup>

Having considered all relevant comments on this issue, it seems that DPID does not have as strong a connection to the MLC’s matching efforts or the mechanical licensing of musical works as the other fields identified as relevant to the statutory requirement to list a sound recording copyright owner. In light of this, and the commenters’ concerns, the proposed rule would not require the MLC to include DPID in the public database. In case the MLC later decides to include DPID in the public database, given the confidentiality considerations raised, the proposed rule states that the DPID party’s name may be displayed, but not the numerical identifier. In addition, because industry practice has not included a single data field to provide definitive data regarding sound recording copyright ownership, to

<sup>153</sup> MLC April NOI Comment at 13. See also Digital Data Exchange (“DDEX”) NPRM Comment at 1–2, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001> (“[T]he DPID, although a unique identifier and in relevant instances an identifier of ‘record companies’, does not identify sound recording copyright owners. It 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.”).

<sup>154</sup> DLC Letter July 13, 2020 at 10 (stating that while converting the DPID numerical code into the party’s actual name of 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”).

<sup>155</sup> Recording Academy April NOI Comment at 3. Compare ARM April NOI Comment at 5 (stating “there is no single field in the ERN that can simultaneously tell the public who owns a work, who distributes the work and who controls the right to license the work”).

satisfy the statute's requirement to include information regarding "sound recording copyright owner," the proposed rule requires the MLC to include data for both LabelName and PLine in the public database, to the extent reasonably available.<sup>156</sup> In light of numerous comments expressing similar views on this subject, the Office tentatively concludes that inclusion of these two fields would adequately satisfy the statutory requirement by establishing an avenue for the MLC to include relevant data that is transmitted through the existing digital supply chain, and thus reasonably available for inclusion in the public database.

As for labeling these fields, the MLC contends that "the names or labels assigned to these fields in the public database is not ultimately the MLC's decision," claiming that "it is ultimately at DDEX's discretion."<sup>157</sup> The Office strongly disagrees with this notion. While DDEX "standardizes the formats in which information is represented in messages and the method by which the messages are exchanged" "along the digital music value chain"<sup>158</sup> (e.g., between digital music providers and the MLC), DDEX does not control the public database or how information is displayed and/or labeled in the public database. While the Office wishes to afford the MLC some flexibility in administering the public database, and thus tentatively declines to regulate the precise names of these fields,<sup>159</sup> due to the comments noted above, the proposed rule precludes the MLC from labeling either the PLine or LabelName field "sound recording copyright owner," and requires the MLC to consider industry practices when labeling fields in the public database to

reduce the likelihood of user confusion.<sup>160</sup> The Office appreciates the MLC's intention to "make available in the database a glossary or key, which would include field descriptors."<sup>161</sup> The Office specifically encourages the MLC to consider ARM's labeling suggestions with respect to the PLine and LabelName fields.

## 2. Disclaimer

Relatedly, the Office received persuasive comments requesting that the MLC be required to include a conspicuous disclaimer regarding sound recording copyright ownership information in its database. For example, in response to the September NOI, RIAA suggested that the MLC should be required to "include a clear and conspicuous disclaimer on the home screen" of the public database that it does not purport to provide authoritative information regarding sound recording copyright owner information.<sup>162</sup> A2IM & RIAA, CISAC & BIEM, and SoundExchange agreed that the public database should display such a disclaimer.<sup>163</sup> And the MLC itself agreed to display a disclaimer that its database should not be considered an authoritative source for sound recording information.<sup>164</sup> Subsequent comments in response to the April NOI similarly pushed for such a disclaimer,<sup>165</sup> and the MLC reiterated its intention to include a disclaimer that the public database is not an authoritative source for sound recording information.<sup>166</sup> Both ARM and the Recording Academy further suggested that the disclaimer include a link to SoundExchange's ISRC Search database (located at <https://isrc.soundexchange.com/>).<sup>167</sup>

<sup>160</sup> The same limitation applies if the MLC elects to include DPID information.

<sup>161</sup> MLC *Ex Parte* Letter #7 at 4.

<sup>162</sup> RIAA Initial September NOI Comment at 10.

<sup>163</sup> A2IM & RIAA Reply September NOI Comment at 9 (urging Office to require "a strong, prominent disclaimer" to "make[] it explicitly clear that the database does not purport to provide authoritative information about sound recording copyright ownership"); CISAC & BIEM Reply September NOI Comment at 8 ("CISAC and BIEM also encourage the use of appropriate disclaiming language in regard to the content of the database, where necessary."); SoundExchange Initial September NOI Comment at 12 ("At a minimum, the MLC Database should at least include a disclaimer that the MLC Database is not an authoritative source of sound recording rights owner information.")

<sup>164</sup> MLC Reply September NOI Comment at 36–37.

<sup>165</sup> ARM April NOI Comment at 6–7; Recording Academy April NOI Comment at 3–4.

<sup>166</sup> MLC April NOI Comment at 13.

<sup>167</sup> ARM April NOI Comment at 6–7; Recording Academy April NOI Comment at 3–4. The RIAA has designated SoundExchange as the authoritative source of ISRC data in the U.S. ARM *Ex Parte* Letter July 27, 2020 at 2; RIAA, *RIAA Designates SoundExchange as Authoritative Source of ISRC*

In light of the comments received urging a disclaimer, and the fact that no single field may indicate sound recording copyright ownership, the proposed rule requires the MLC to include in the public-facing version of the musical works database a conspicuous disclaimer that states that the database is not an authoritative source for sound recording information, and explains the labeling of information in the database related to sound recording copyright owner, including the "LabelName" and "PLine" fields.<sup>168</sup> The proposed rule would not require that the disclaimer include a link to SoundExchange's ISRC Search database, though it certainly does not prohibit such inclusion.

## 3. Populating and Deduping Sound Recording Information in the Public Musical Works Database

The statute requires the MLC to "establish and maintain a database containing information relating to musical works (and shares of such works) and, to the extent known, . . . the sound recordings in which the musical works are embodied."<sup>169</sup> As noted, for both matched and unmatched musical works, the public database must include, to the extent reasonably available to the MLC, "identifying information for sound recordings in which the musical work is embodied."<sup>170</sup>

Throughout this rulemaking and parallel rulemakings, commenters have expressed concern about the MLC using non-authoritative source(s) to populate the sound recording information in the public database. For example, ARM expressed concern about "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)," <sup>171</sup> and that

*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/>.

<sup>168</sup> See Recording Academy April NOI Comment at 3 ("support[ing] the use of a disclaimer that would properly contextualize the use of 'sound recording copyright owner' and safeguard the legal rights of artists").

<sup>169</sup> 17 U.S.C. 115(d)(3)(E)(i).

<sup>170</sup> *Id.* at 115(d)(3)(E)(ii)(IV)(bb), (iii)(I)(dd).

<sup>171</sup> ARM NPRM Comment at 6, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001>. See also SoundExchange Initial September NOI Comment at 12 ("[T]he MLC is not in a good position to capture or track changes in sound recording rights ownership, because it does not have a direct relationship with sound recording copyright owners like SoundExchange does, nor does it have an ongoing business need to ensure that sound recording rights information is always accurate and up-to-date."); Jessop Initial September

<sup>156</sup> As the MMA also requires "sound recording copyright owner" to be reported by DMPs to the mechanical licensing collective in monthly reports of usage, the Office has separately issued an interim rule regarding which information should be included in such reports to satisfy this requirement. Because industry practice has not included a single data field to provide definitive data regarding sound recording copyright ownership, that rule proposes DMPs can satisfy this obligation by reporting information in the following fields: LabelName and PLine. See also U.S. Copyright Office, Interim Rule, *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>157</sup> MLC *Ex Parte* Letter #7 at 4.

<sup>158</sup> DDEX NPRM Comment at 1, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001>.

<sup>159</sup> See ARM April NOI Comment at 5 (suggesting that "LabelName" be described as "U.S. Releasing Party (if available)," and that "PLine" be described as "Sound Recording Owner of Record (who may not be the party that commercializes the recording; note that this party may change over time)").

“the MLC not propagate non-authoritative sound recording data in its public-facing database and outward reporting.”<sup>172</sup> Similarly, ARM members RIAA and A2IM contend that “the MLC should be required to build its database from authoritative data that is obtained from copyright owners or their designated data providers,” a consideration echoed by other commenters representing sound recording interests.<sup>173</sup> Though raised in the context of data collection by DMPs, as opposed to populating the public database, the DLC agrees with having the MLC obtain sound recording information from a single, authoritative source, such as SoundExchange, because “[w]ith record labels acting as the primary and authoritative source for their own sound recording metadata, the MLC could then rely on only a single (or limited number of) metadata field(s) from licensees’ monthly reports of usage to look up the sound recordings in the MLC database (e.g., an ISRC or digital music provider’s unique sound recording identifier that would remain constant across all usage reporting).”<sup>174</sup> The DLC further maintains that “the MLC’s suggestion to obtain disparate sound recording data from every digital music provider and significant non-blanket licensee is far less efficient than obtaining it from a single source like SoundExchange.”<sup>175</sup>

By contrast, the MLC asserts that “[t]hird-party data from SoundExchange or another ‘authoritative source’ cannot, by definition, be ‘authoritative’ as to particular sound recordings made

NOI Comment at 3 (“The MLC should obtain sound recording information from as close to the source as possible. In practice this means from the record label or someone directly or indirectly authorized to manage this information for them.”). As noted above, RIAA recently designated SoundExchange as the authoritative source of ISRC data in the United States. ARM *Ex Parte* Letter July 27, 2020 at 2; 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/>.

<sup>172</sup> ARM *Ex Parte* Letter July 27, 2020 at 1. See also ARM April NOI Comment at 3 (“[I]t is critical that the Database not disseminate unverified data, whether received from DMPs in their reports of usage or from other third-party sources.”).

<sup>173</sup> A2IM & RIAA Reply September NOI Comment at 3. See SoundExchange Initial September NOI Comment at 4 (noting its “firm determination not to mix potentially suspect data provided by licensees with the authoritative data provided by rights owners in its repertoire database”). See also Music Reports Initial September NOI Comment at 3 (“[A] row of sound recording metadata provided by one DMP in relation to a discrete sound recording may differ from the row of metadata a second DMP provides in relation to the same sound recording, with additional or different data fields or identifiers unique to that DMP.”).

<sup>174</sup> DLC Reply September NOI Comment at 10.

<sup>175</sup> DLC *Ex Parte* Letter Mar. 4, 2020 at 2.

available through the DMP’s service, unless and until the DMP compares the third-party data to its own data to match the third-party sound recording database to the DMP’s database of tracks streamed.”<sup>176</sup> While the MLC has previously stated that it “intends to use SoundExchange as a valuable source of information for sound recording identifying information” (but that a regulation “requiring SoundExchange as a single source would be . . . unnecessarily limiting”<sup>177</sup>), the MLC also contends that “much of the information [it] believes is necessary to build and maintain a useful database is consistent with the data the MLC believes should be provided by the DMPs in their [notices of license], through their data collection efforts, and through their usage reporting (including the reports of usage).”<sup>178</sup> The MLC maintains that “receiving from DMPs the unaltered sound recording data they originally received from the corresponding sound recording owners [in reports of usage] would both improve the MLC’s ability to match musical works to sound recordings, as the MLC would have fewer metadata matches to make (i.e., between musical works and the unaltered data for an associated sound recordings), and would better allow the MLC to ‘roll up’ sound recording data under entries that are more likely to reflect more ‘definitive’ versions of that sound recording data (i.e., the unaltered data originally provided by the sound recording owners).”<sup>179</sup> The MLC further states that “for uses where the sound recording has not yet been matched to a musical work, the sound recording data received from DMPs will be used to populate the database, as that is the only data the MLC will have for such uses,” and that “[f]or uses where the sound recording has been matched but all musical work ownership shares have not been claimed and are not known, the database will contain the sound recording data received from DMPs, organized and displayed under each individual musical work to which the MLC matched that sound recording usage data.”<sup>180</sup> For “sound recordings that are matched to a specific musical work and for sound recordings that are unmatched, the MLC intends to include sound recording information in the

<sup>176</sup> MLC NPRM Comment at 11–12, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001>.

<sup>177</sup> MLC Reply September NOI Comment at 11 n.7.

<sup>178</sup> MLC Initial September NOI Comment at 24.

<sup>179</sup> MLC *Ex Parte* Letter #7 at 2.

<sup>180</sup> *Id.*

disparate forms received from the DMPs that provided that information.”<sup>181</sup>

Having carefully considered this issue in light of the statute and legislative history, the Office invites the MLC to take a step back as it assesses how it will populate sound recording information in the public database. Although the Office has, separately, adopted an interim rule that provides a method for the MLC to generally receive certain data fields in unaltered form that it has identified as being useful for matching, it is not foregone that the same demands must drive display considerations with respect to the public database, particularly for matched works.<sup>182</sup> First, while perhaps not authoritative (hence the use of the disclaimer, as discussed above), the Office believes the MMA anticipates a general reliability of the sound recording information appearing in the public database.<sup>183</sup> The MLC’s observation that data from SoundExchange is not “authoritative” with respect to usage of recordings, because only reports of usage provide evidence as to which sound recordings were actually streamed through a DMP’s service, does not seem dispositive. While it may be true that reports of usage are the better indicators of which sound recordings were actually streamed, the public database is not necessarily meant to serve that same function.<sup>184</sup> The statute requires the public database to contain information relating to “the sound recordings in which the musical works are embodied,” which can reasonably be read as information to *identify* the sound recordings in which musical works are embodied, regardless of whether they were streamed pursuant to

<sup>181</sup> *Id.* at 3.

<sup>182</sup> U.S. Copyright Office, Interim Rule, *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**. For some fields, the interim rule provides for a one-year transition period for DMPs that are not currently set up to provide this data unaltered from what was provided by the sound recording copyright owner or licensor.

<sup>183</sup> See SoundExchange Initial September NOI Comment at 5 (“[T]he success of the MLC Database . . . will depend on it having sufficiently comprehensive data of sufficiently high quality that it will be respected and used throughout the industry.”); RIAA Initial September NOI Comment at 11 (asserting that record labels “anticipate making frequent use of the MLC database”).

<sup>184</sup> See SoundExchange NPRM Comment at 5, U.S. Copyright Office Dkt. No. 2020–5, available at <https://beta.regulations.gov/document/COLC-2020-0005-0001> (“Reporting by digital service providers should be viewed primarily as a means of identifying the works used by the service, rather than as a way for the MLC to learn about ownership and other characteristics of those works.”).

disparate attendant metadata or not.<sup>185</sup> As RIAA explains, “member labels vary the metadata they send the different DMPs in order to meet the services’ idiosyncratic display requirements,” which if passed to the MLC even in unaltered form, would result in the MLC “still receiv[ing] conflicting data that it will have to spend time and resources reconciling.”<sup>186</sup> Populating certain fields in the public database from reports of usage instead of from an authoritative, normalized source thus may increase the likelihood of inaccurate or confusing sound recording information in the database. Second, the MLC must issue monthly royalty reports to musical copyright owners, which will include information about the sound recordings in which their musical works are embodied.<sup>187</sup> Inaccuracies or confusion in the public database regarding sound recording information may translate into inaccuracies in royalty statements to musical work copyright owners.<sup>188</sup> Finally, the statute requires the MLC to grant digital music providers bulk access to the public database free of charge,<sup>189</sup> which seems less meaningful if bulk access were to mean regurgitating the same information from reports of usage back to digital music providers.

While the proposed regulatory language does not address this aspect, commenters may address this topic in their responses. Commenters may consider whether their concerns are heightened, or perhaps assuaged, by the MLC’s belief that deduplicating sound recording records, or cross-matching sound recording data, is “outside the MLC’s mandate.”<sup>190</sup> Specifically, the MLC maintains that “[t]he workable approach to deduplicating DMP audio would be for DMPs to pre-match their data against an authoritative source of sound recording data and audio, or digitally match their audio against an authoritative database of sound recording audio, and then provide the unique ID field for the audio in that

authoritative audio database, along with access for the MLC to the audio from the authoritative database.”<sup>191</sup> For both the public database and claiming portal, the MLC anticipates that for unmatched musical works, there will be separate records for each unmatched use (*i.e.*, separate records for each stream of a sound recording embodying the unmatched musical work).<sup>192</sup> The MLC does, however, intend to match multiple sound recordings to the same musical work in the public database and “list[] all of those sound recordings together as associated with the musical work”; but observes that “it is the additional step of having the MLC be the arbiter of which sound recordings are ‘the same,’ as opposed to just reflecting which ones match to the same musical work through similar metadata, that can be problematic.”<sup>193</sup> The Office notes that as DMPs will be able to satisfy their section 115(d)(4)(B) obligations to “engage in good-faith, commercially reasonable efforts to obtain” sound recording information from sound recording copyright owners by arranging for the MLC to receive data directly from an authoritative source (*e.g.*, SoundExchange),<sup>194</sup> it may be unlikely that DMPs pre-match their data as proposed by the MLC.

#### *C. Access to Information in the Public Musical Works Database*

As noted above, the statute directs the Copyright Office to “establish requirements by regulations to ensure the usability, interoperability, and usage restrictions of the [public] musical works database.”<sup>195</sup> The database must “be made available to members of the public in a searchable, online format, free of charge.”<sup>196</sup> The mechanical licensing collective must make the data available “in a bulk, machine-readable format, through a widely available software application,” to digital music providers operating under valid notices

of license, compliant significant nonblanket licensees, authorized vendors of such digital music providers or significant nonblanket licensees, and the Copyright Office, free of charge, and to “[a]ny other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.”<sup>197</sup> The legislative history stresses the importance of the database and making it available to “the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public.”<sup>198</sup> It adds that “[i]ndividual lookups of works shall be free although the collective may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are attempting to download the database in bulk through repeated queries.”<sup>199</sup> And it further states that “there shall be no requirement that a database user must register or otherwise turn over personal information in order to obtain the free access required by the legislation.”<sup>200</sup>

#### 1. Method of Access

In response to the September NOI, the DLC maintained that the mechanical licensing collective should not be required to provide more than “[b]ulk downloads (either of the entire database, or of some subset thereof) in a flat file format, once per week per user,” and “[o]nline song-by-song searches to query the database, *e.g.*, through a website.”<sup>201</sup> The DLC also contended that “it would be unreasonable for digital music providers and significant nonblanket licensees to foot the bill for database features that would only benefit entities or individuals who are not paying a fair share of the MLC’s costs,”<sup>202</sup> and that application programming interfaces (“APIs”) are “not needed by digital music providers and significant nonblanket licensees.”<sup>203</sup>

Multiple commenters disagreed with the DLC, asserting that real-time access to the public database—not merely a weekly file—is necessary to meet the goals of the statute. For example, SoundExchange asserted that failure to provide real-time access “could unfairly

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 4; MLC *Ex Parte* Letter #7 at 2 (“[F]or sound recordings that are matched to a specific musical work and for sound recordings that are unmatched, the MLC intends to include sound recording information in the disparate forms received from the DMPs that provided that information. The MLC intends to show the provenance of each such row of sound recording data (*i.e.*, the DMP from which the MLC received the sound recording data concerned), including both the name of the DMP and the DPID for that DMP.”).

<sup>193</sup> MLC Letter June 15, 2020 at 5.

<sup>194</sup> See U.S. Copyright Office, Interim Rule, *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>195</sup> 17 U.S.C. 115(d)(3)(E)(vi).

<sup>196</sup> *Id.* at 115(d)(3)(E)(v).

<sup>185</sup> See 17 U.S.C. 115(d)(3)(E)(i), (ii)(IV)(bb), (iii)(I)(dd).

<sup>186</sup> A2IM & RIAA Reply September NOI Comment at 2.

<sup>187</sup> 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**.

<sup>188</sup> See SoundExchange NPRM Comment at 9, U.S. Copyright Office Dkt. No. 2020–6, available at <https://beta.regulations.gov/document/COLC-2020-0003-0001> (expressing concern about relying on DMP reports of usage “as a primary source of the information about musical works and sound recordings that will be reported on publisher royalty statements”).

<sup>189</sup> 17 U.S.C. 115(d)(3)(E)(v).

<sup>190</sup> MLC Letter June 15, 2020 at 3 n.3.

<sup>197</sup> *Id.*

<sup>198</sup> H.R. Rep. No. 115–651, at 8; S. Rep. No. 115–339, at 8; Conf. Rep. at 7.

<sup>199</sup> H.R. Rep. No. 115–651, at 8; S. Rep. No. 115–339, at 8–9; Conf. Rep. at 7.

<sup>200</sup> H.R. Rep. No. 115–651, at 8; S. Rep. No. 115–339, at 9; Conf. Rep. at 7.

<sup>201</sup> DLC Initial September NOI Comment at 21.

<sup>202</sup> *Id.*

<sup>203</sup> DLC Reply September NOI Comment at 26.

distort competition for musical work license administration services by giving the MLC and its vendors preferred access to current data,” and that the Office should “maintain[] a level playing field in the market for musical work license administration services.”<sup>204</sup> A2IM & RIAA noted that it would be “damaging to the entire music ecosystem for third parties to utilize stale data, especially if they use it in connection with some sort of public-facing, data-related business or to drive licensing or payment decisions.”<sup>205</sup> Further, FMC, MAC, and the Recording Academy also all stressed the importance of real-time access to the public database through APIs.<sup>206</sup>

In its April NOI, the Office tentatively declined to regulate the precise format in which the MLC provides bulk access to its database (e.g., APIs), so as to provide the MLC flexibility as technology develops in providing database access.<sup>207</sup> The Office noted, however, that the MMA’s goals—to have the public database serve as an authoritative source of information regarding musical work ownership information, to provide transparency, and to be used by entities other than digital music providers and significant nonblanket licensees—“support[ed] real-time access” to the public database, “either via bulk access or online song-by-song searches.”<sup>208</sup>

<sup>204</sup> SoundExchange Reply September NOI Comment at 9. See also *id.* at 4–5 (stating that “[w]eekly downloads of a copy of the database are distinctly different and less useful than real-time access to current data,” and noting that the MLC will be making constant updates and thus a weekly download would quickly become out of date).

<sup>205</sup> A2IM & RIAA Reply September NOI Comment at 7.

<sup>206</sup> FMC Reply September NOI Comment at 3 (concurring with SoundExchange’s recommendations about API access, “including the recommendations that API access include unique identifiers, catalog lookup, and fuzzy searching”); Recording Academy Initial September NOI Comment at 4 (“ensuring that the database has a user-friendly API and ‘machine-to-machine’ accessibility is important to its practical usability”); MAC Initial September NOI Comment at 2 (asserting that having API access and ensuring interoperability “with other systems is the best way to make certain the MLC database becomes part of the overall music licensing ecosystem”). See also RIAA Initial September NOI Comment at 11 (“To facilitate efficient business-to-business use of the MLC database, the regulations should require the MLC to offer free API access to registered users of the database who request bulk access.”); SoundExchange Reply September NOI Comment at 4–5, 8 (challenging the DLC’s assertion that providing APIs would be financially burdensome, stating that “it is not obvious that there would be a significant cost difference between providing full API access and the diminished access the DLC describes”).

<sup>207</sup> 85 FR at 22578.

<sup>208</sup> *Id.* See 17 U.S.C. 115(d)(3)(E)(v); see also RIAA Initial September NOI Comment at 11 (asserting that record labels “anticipate making

In response, SoundExchange maintains that bulk access to the public database should be provided via an API, though acknowledging that “[i]t does not seem necessary for the Office to regulate technical details of how the MLC implements an API.”<sup>209</sup> SoundExchange contends that to “ensure level access to the database, it must be made available via real-time, bulk access,” that “only a robust Application Programming Interface can deliver real-time results and achieve the industry-wide benefits of the musical works database contemplated by the MMA,” and that “[t]he use of APIs in modern software architectures is a commonly widespread best practice, and the level of effort behind their implementation is generally low and can be measured in weeks or even days depending on the chosen database technology.”<sup>210</sup> CISAC & BIEM, FMC, and ARM support real-time bulk access to the public database,<sup>211</sup> with ARM stating that “[i]t is hard to imagine any way the MLC could [offer bulk access that occurs in real time, in a machine-readable format where the data is transferred via a programmable interface] short of offering API access.”<sup>212</sup> ARM also urges the Office to “require the MLC to offer API access now, while permitting it to shift to other bulk-access technical solutions if and when those become widespread within the relevant industries”—but “[s]hould the Office decline to require API access,” ARM asks that the Office “require some form of bulk access and [] specify that the bulk-access solution provide real-time access in a machine-readable form via a programmable interface.”<sup>213</sup>

frequent use of the MLC database”); MIC Coalition Initial September NOI Comment at 3 (“The opaqueness of the current music marketplace creates uncertainty that disproportionately harms small artists and independent publishers and stifles innovation. All stakeholders in the music marketplace benefit when current and accurate information about copyright ownership is easily accessible.”).

<sup>209</sup> SoundExchange April NOI Comment at 5.

<sup>210</sup> SoundExchange *Ex Parte* Letter Sept. 1, 2020 at 1.

<sup>211</sup> CISAC & BIEM April NOI Comment at 3 (“Updated information in the database is crucial, therefore, CISAC and BIEM suggest supporting real-time access to ensure DSPs have the correct information to properly identify works.”); FMC April NOI Comment at 2 (“We appreciate the Office’s clear acknowledgment that real-time access is a priority, but are somewhat puzzled by the reluctance to require APIs. Requiring API access and interoperability doesn’t limit flexibility—done right, it enables flexibility.”); ARM April NOI Comment at 7 (asserting that “the MLC must offer bulk access that occurs in real time, in a machine-readable format where the data is transferred via a programmable interface”).

<sup>212</sup> ARM April NOI Comment at 7.

<sup>213</sup> *Id.* at 8.

Both the MLC and DLC agree with the Office’s tentative decision not to regulate the precise format in which the mechanical licensing collective must provide bulk access to the public database, but rather provide the collective flexibility as technology develops.<sup>214</sup> The MLC further emphasizes its commitment “to fulfilling this important requirement,” and that it is “working with DDEX and its members on the format for publishing data to ensure it is useful to the wide variety of constituents.”<sup>215</sup> In addition, the MLC maintains that it “does plan to provide bulk access to the public data and will determine how best to do so once it has completed its initial development and rollout of the portal,” and that “one of the solutions the MLC is contemplating is to provide bulk access to the publicly-available data via an API.”<sup>216</sup> Music Report contends that the Office’s regulations should “not require any specific file delivery protocols, but rather state general principles and standards to which the MLC must be held,” such as “bulk, machine-readable data access to eligible parties ‘via any process for bulk data management widely adopted among music rights administrators,’” which could include “flat-file, API, and XML protocols, but could in future also include distributed ledger protocols.”<sup>217</sup>

Having carefully considered this issue, the Office proposes that the MLC shall make the musical works database available to members of the public in a searchable, real-time, online format, free of charge. Regarding bulk access, the Office is inclined to agree that the MLC should—at least initially, due to its start-up nature—have some discretion regarding the precise format in which it provides bulk access to the public database. The Office is mindful, however, of the overwhelming desire for the MLC to provide bulk access through APIs from a broad swath of organizations representing various corners of the music ecosystem. Accordingly, the proposed rule states

<sup>214</sup> MLC April NOI Comment at 14; DLC April NOI Comment at 5.

<sup>215</sup> MLC April NOI Comment at 14; MLC April NOI Comment at 14 & n.8.

<sup>216</sup> MLC *Ex Parte* Letter #7 at 6.

<sup>217</sup> Music Reports April NOI Comment at 4. Music Reports also asks the Office to “consider requiring the MLC to review such protocols every two years to determine whether newer protocols have been widely adopted.” *Id.* Because digital music providers, significant nonblanket licensees, and third parties may base their business processes on the format in which the mechanical licensing collective provides bulk access to the public database, the Office is hesitant to require reevaluation of that format every two years.

that the MLC shall make the musical works database available in a bulk, real-time, machine-readable format through a process for bulk data management widely adopted among music rights administrators to: (1) Digital music providers operating under the authority of valid notices of license, and their authorized vendors, free of charge; (2) significant nonblanket licensees in compliance with their obligations under 17 U.S.C. 115(d)(6), and their authorized vendors, free of charge; (3) the Register of Copyrights, free of charge; and (4) any other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity, which shall not be unreasonable. In addition, starting July 1, 2021, the MLC must provide bulk access to the public database through APIs, although the proposed rule would provide the MLC flexibility to determine how to precisely implement that requirement.

## 2. Marginal Cost

Despite the statute and legislative history stating third parties may be charged the “marginal cost” of being provided bulk access, in response to the September NOI, A2IM & RIAA expressed concern about making the public database available to third parties “unless the fee those third parties are required to pay takes into account the cost for the MLC to acquire that data and all of the costs and hard work that goes into creating, compiling, verifying, deduping, etc. the sound recording data that will reside within the MLC database and the potential opportunity costs to [record labels] of having that data available to third parties via the MLC.”<sup>218</sup> RIAA & A2IM asked the Office to define “marginal cost” to “include not just the cost of creating and maintaining the bulk access, but also the cost to the MLC of acquiring the data, including payment to the data source, for the hard work of aggregating, verifying, deduping and resolving conflicts in the data.”<sup>219</sup> In its April NOI, the Office tentatively declined this request, stating that “[i]t is not clear that ‘marginal cost’ is a vague term,” and that the “MLC should be able to determine the best pricing information in light of its operations, based on the statutory and legislative history language.”<sup>220</sup>

<sup>218</sup> A2IM & RIAA Reply September NOI Comment at 7; *see also id.* (contending that otherwise third-party businesses “would be able to access that data at a highly subsidized, below-market price”).

<sup>219</sup> *Id.* at 8.

<sup>220</sup> 85 FR at 22579; *see* Conf. Rep. at 7 (“Given the importance of this database, the legislation makes clear that it shall be made available to the

In response, ARM asks the Office to reconsider its decision.<sup>221</sup> By contrast, Music Reports, a provider of music copyright ownership information and rights administration services, contends that “marginal cost” should be “acknowledged as modest” and read to mean solely the cost of making the data available to such person or entity.<sup>222</sup> Music Reports further maintains that “the cost of making such data available in bulk is non-trivial, but not expensive when distributed over time and among multiple parties,” and that even where a range of formats, protocols, and choreographies are offered, “and even when offered at high frequency and on a highly contemporary basis, once those elements are established and made public, the cost to maintain them tends to be relatively fixed and modest.”<sup>223</sup> For its part, the MLC agreed with the Office’s tentative conclusion that the MLC should be able to determine the best pricing information for bulk access to the database “to third parties not enumerated in the statute.”<sup>224</sup>

The Office notes that the MLC is required to provide access in a “bulk, machine-readable format” to digital music providers operating under the authority of valid notices of license and significant nonblanket licensees in compliance with their obligations under 17 U.S.C. 115(d)(6).<sup>225</sup> Given that the statute envisions digital service providers and significant nonblanket licensees funding the mechanical licensing collective’s activities, which includes the creation and maintenance of a public musical works database,<sup>226</sup> and that the term “marginal cost” is not vague, it is difficult for the Office to see how Congress intended third parties to offset the larger cost of the collective acquiring the data and aggregating, verifying, deduping and resolving

Copyright Office and the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public.”); *see also* Music Reports Initial September NOI Comment at 5 (“Music Reports notes that the marginal cost of automated daily data delivery protocols is relatively trivial, and calls upon the Office to ensure that such automated delivery be made available upon the first availability of the [public] database, and that the fee schedule scrupulously adhere to the ‘marginal cost’ standard.”).

<sup>221</sup> ARM April NOI Comment at 9.

<sup>222</sup> Music Reports April NOI Comment at 7.

<sup>223</sup> *Id.* at 8; *see also* Music Reports Initial September NOI Comment at 5 (“Music Reports notes that the marginal cost of automated daily data delivery protocols is relatively trivial, and calls upon the Office to ensure that such automated delivery be made available upon the first availability of the [public] database, and that the fee schedule scrupulously adhere to the ‘marginal cost’ standard.”).

<sup>224</sup> MLC April NOI Comment at 14.

<sup>225</sup> *See* 17 U.S.C. 115(d)(3)(E)(v)(I)–(II).

<sup>226</sup> *See id.* at 115(d)(3)(E), (d)(4)(C), (d)(7)(A).

conflicts in the data. Rather, the legislative history emphasizes the importance of accessibility to the public database<sup>227</sup> and indicates an intent to create a level playing field, recognizing that “[m]usic metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on.”<sup>228</sup> Requiring third parties to pay more than the “marginal cost” could create commercial disadvantages that the MMA sought to eliminate. Accordingly, the proposed rule states that the mechanical licensing collective shall make the musical works database available in a bulk, real-time, machine-readable format to any other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity, which shall not be unreasonable.<sup>229</sup> This allows the MLC to determine the best pricing information in light of its operations, while providing reassurance that “marginal cost” will not be unreasonable.

## 3. Abuse

The legislative history states that in cases of efforts by third parties to bypass the marginal cost recovery for bulk access (*i.e.*, abuse), the MLC “may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are attempting to download the database in bulk through repeated queries.”<sup>230</sup> In response to the September NOI, both the MLC and DLC proposed regulatory language that would provide the MLC discretion to block efforts to bypass the

<sup>227</sup> Conf. Rep. at 7 (“Given the importance of this database, the legislation makes clear that it shall be made available to the Copyright Office and the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public.”).

<sup>228</sup> *See id.* at 6. *See also* DLC April NOI Comment at 5 (“[T]he Office should ensure that neither the MLC nor its vendors are given a special competitive advantage because of their responsibility for maintaining this database.”); SoundExchange *Ex Parte* Letter Sept. 1, 2020 at 1 (“[T]he musical works database should be a resource for the entire music industry,” and “regulations should ensure that potential competitors have the same access to MLC data and the MLC database enjoyed by the MLC’s vendors.”).

<sup>229</sup> Music Reports also asks that bulk access to the public database be provided on a “competition-neutral basis.” Music Reports April NOI Comment at 5. Because the proposed rule requires the mechanical licensing collective to provide bulk access to any third party that pays the “marginal cost” of doing so, the Office does not believe such a condition needs to be codified in regulations.

<sup>230</sup> H.R. Rep. No. 115–651, at 8; S. Rep. No. 115–339, at 8–9; Conf. Rep. at 7.

marginal cost recovery.<sup>231</sup> A2IM & RIAA also suggested that the MLC be required to implement technological protection measures (“TPMs”) to reduce the likelihood of third parties “scraping” data without paying any fee.<sup>232</sup> In the April NOI, the Office agreed that, in principle, the MLC should at a minimum have such discretion, and sought public input on any issues regarding the mechanical licensing collective’s ability to block efforts to bypass the marginal cost recovery, particularly how to avoid penalizing legitimate users while providing the collective flexibility to police abuse, and whether regulatory language should address application of TPMs.<sup>233</sup>

Both the MLC and DLC reiterate their support of granting the mechanical licensing collective discretion to block third parties from bulk access to the public database after attempts to bypass marginal cost recovery,<sup>234</sup> and no commenters opposed this proposal. The MLC further contends that it should have the discretion to block bulk database access where persons have engaged in other unlawful activity with respect to the database.<sup>235</sup>

In light of these comments, the proposed rule states that the MLC shall establish appropriate terms of use or other policies governing use of the database that allows it to suspend access to any individual or entity that appears, in the collective’s reasonable determination, to be attempting to bypass the MLC’s right to charge a fee to recover its marginal costs for bulk access through repeated queries, or to otherwise be engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database) or misappropriating or using information from the database for improper purposes. To ensure transparency regarding which persons or entities have had bulk database access suspended, as discussed more below, the proposed rule requires the mechanical licensing

collective to identify such persons and entities in its annual report and explain the reason(s) for suspension.

#### 4. Restrictions on Use

In response to the September 2019 NOI, CISAC & BIEM asked for regulations defining “strict terms and conditions” for use of data from the database by digital music providers and significant nonblanket licensees (and their authorized vendors), “including prohibition for DSPs to use data for purposes other than processing uses and managing licenses and collaborating with the MLC in data collection.”<sup>236</sup> By contrast, the DLC maintained that “licensees should be able use the data they receive from the MLC for any legal purpose.”<sup>237</sup> While the MLC “agree[d] that there should be some reasonable limitation on the use of the information to ensure that it is not misappropriated for improper purposes” and stated that it “intends to include such limitation in its terms of use in the database,” the MLC contended that appropriate terms of use should address potential misuse of information from the public database (rather than regulations).<sup>238</sup>

In its April 2020 NOI, the Office agreed that while it will be important for the collective to develop reasonable terms of use to address potential misuse of information in the public database, and that it appreciates the role that contractual remedies may play to deter abuse, the MMA directs the Office to issue regulations regarding “usage restrictions,” in addition to usability and interoperability of the database.<sup>239</sup> The Office also acknowledged the risk of misuse, and sought further public input on any issues that should be considered relating to restrictions on usage of information in the public database, including whether regulatory language should address remedies for misuse (and if so, how and why), or otherwise provide a potential regulatory floor for the MLC’s terms of use.<sup>240</sup>

Comments in response to the Office’s April 2020 notification were mixed. CISAC & BIEM again asked for “strict rules for the use of data available on the MLC database by the public, prohibiting commercial uses and allowing exclusively lookup functions,”<sup>241</sup> whereas Music Reports contends that data in the public database should be available for any legal use.<sup>242</sup> FMC is

“inclined to want to see some reasonable terms and conditions” regarding use of the public database, but that “[i]t’s entirely appropriate for the Office to offer a floor.”<sup>243</sup> The DLC contends that flexibility is appropriate regarding restrictions on use, that “the specific operational realities of the database to lend themselves to useful *ex ante* regulation,” and thus reiterated that “abusive access can be adequately addressed by empowering the MLC to block efforts to bypass marginal cost recovery.”<sup>244</sup>

For its part, the MLC continues to maintain that “there should be some reasonable limitation on the use of the information in the MLC database to ensure that it is not misappropriated for improper purposes,” and that it intends to “include such limitation in its terms of use in the database.”<sup>245</sup> In response to the Office’s concerns about misappropriation of personally identifiable information (PII) by bad actors,<sup>246</sup> the MLC maintains that it “does not intend to include in the public database the types of information that have traditionally been considered PII, such as Social Security Number (SSN), date of birth (DOB), and home address or personal email (to the extent those are not provided as the contact information required under 17 U.S.C. 115(d)(3)(E)(ii)(III)),” and that it “further intends to protect other types of PII.”<sup>247</sup> But the MLC also asks that it “be afforded the flexibility to disclose information not specifically identified by statute that would still be useful for the database but would not have serious privacy or identity theft risks to individuals or entities.”<sup>248</sup>

As noted above, the proposed rule requires the mechanical licensing collective to establish appropriate terms of use or other policies governing use of the database that allow it to suspend access to any individual or entity that appears, in the collective’s reasonable determination, to be engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database) or misappropriating or using information from the database for improper purposes. The proposed rule also requires the MLC to identify any persons and entities in its annual report that have had database access

<sup>231</sup> MLC Initial September NOI Comment at 25; DLC Reply September NOI Comment Add. at A-17.

<sup>232</sup> A2IM & RIAA Reply September NOI Comment at 7.

<sup>233</sup> 85 FR at 22579.

<sup>234</sup> MLC April NOI Comment at 15 (“[A] regulation allowing the MLC to block efforts by non-licensees or significant non-blanket licensees to bypass the marginal cost recovery for bulk database access through repeated queries would be useful.”); DLC April NOI Comment at 5 (“DLC reiterates its prior comment that the problem of abusive access can be adequately addressed by empowering the MLC to block efforts to bypass marginal cost recovery.”).

<sup>235</sup> MLC April NOI Comment at 15.

<sup>236</sup> CISAC & BIEM Initial September NOI Comment at 4.

<sup>237</sup> DLC Initial September NOI Comment at 21.

<sup>238</sup> MLC Reply September NOI Comment at 37.

<sup>239</sup> 85 FR at 22579; 17 U.S.C. 115(d)(3)(E)(vi).

<sup>240</sup> 85 FR at 22579.

<sup>241</sup> CISAC & BIEM April NOI Comment at 3.

<sup>242</sup> Music Reports April NOI Comment at 7.

<sup>243</sup> FMC April NOI Comment at 3.

<sup>244</sup> DLC April NOI Comment at 5.

<sup>245</sup> MLC April NOI Comment at 15.

<sup>246</sup> See 85 FR at 22579.

<sup>247</sup> MLC April NOI Comment at 16.

<sup>248</sup> *Id.* at 16 n.9.

suspended and explain the reason(s) for such suspension, for purposes of transparency. While wishing to grant the MLC some flexibility regarding restrictions on use regarding the public database, the Office reiterates that any database terms of use should not be overly broad or impose unnecessary restrictions upon good faith users.<sup>249</sup>

#### *D. Transparency of MLC Operations; Annual Reporting*

The legislative history and statute envision the MLC “operat[ing] in a transparent and accountable manner”<sup>250</sup> and ensuring that its “policies and practices . . . are transparent and accountable.”<sup>251</sup> The MLC itself has expressed its commitment to transparency, both by including transparency as one of its four key principles underpinning its operations on its current website,<sup>252</sup> and in written comments to the Office.<sup>253</sup> As noted in the April NOI, one avenue for MLC transparency is through its annual report.<sup>254</sup> The MMA requires the MLC to publish an annual report no later than June 30 of each year after the license availability date, setting forth information regarding: (1) its operational and licensing practices; (2) how royalties are collected and distributed; (3) budgeting and expenditures; (4) the collective total costs for the preceding calendar year; (5) the MLC’s projected annual budget; (6) aggregated royalty receipts and payments; (7) expenses that are more than ten percent of the MLC’s annual budget; and (8) the MLC’s efforts to locate and identify copyright owners of unmatched musical works (and shares of works).<sup>255</sup> The MLC must deliver a copy of the annual report to the Register of Copyrights and make this report publicly available.<sup>256</sup>

<sup>249</sup> See 85 FR at 22579.

<sup>250</sup> S. Rep. No. 115–339, at 7.

<sup>251</sup> 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

<sup>252</sup> The MLC, Mission and Principles, <https://themlc.com/mission-and-principles> (last visited Sept. 1, 2020) (“The MLC will build trust by operating transparently. The MLC is governed by a board of songwriters and music publishers who will help ensure our work is conducted with integrity.”). See also The MLC, The MLC Process, <https://themlc.com/how-it-works> (last visited Sept. 1, 2020) (“The MLC is committed to transparency. The MLC will make data on unclaimed works and unmatched uses available to be searched by registered users of The MLC Portal and the public at large.”).

<sup>253</sup> See, e.g., MLC Reply September NOI Comment at 42–43 (“The MLC is committed to transparency and submits that, while seeking to enact regulations is not an efficient or effective approach, the MLC will implement policies and procedures to ensure transparency.”).

<sup>254</sup> 85 FR at 22572.

<sup>255</sup> 17 U.S.C. 115(d)(3)(D)(vii)(I)(aa)–(hh); Conf. Rep. at 7.

<sup>256</sup> 17 U.S.C. 115(d)(3)(D)(vii)(I), (II).

The annual report provides much of the information requested by parties about the collective’s activities. For example, commenters sought disclosure of information in specific areas the statute envisions the annual report addressing, such as board governance,<sup>257</sup> the manner in which the MLC will distribute unclaimed royalties,<sup>258</sup> development updates and certifications related to its IT systems,<sup>259</sup> and the MLC’s efforts to identify copyright owners.<sup>260</sup> The MLC itself recognized that its annual report is one way in which it intends to “promote transparency.”<sup>261</sup> But based on the September NOI comments, the Office thus asked for further public input on specific types of information the MLC should include in its annual report, including whether to include issues related to vendor selection criteria and performance, board and committee selection criteria, and actual or potential conflicts raised with and/or addressed by its board of directors, if any, in accordance with the MLC’s policy.<sup>262</sup>

In response, the DLC, SGA, and FMC agree that the MLC’s annual report should be used to provide transparency on the collective’s activities more generally,<sup>263</sup> with both the DLC and

<sup>257</sup> Recording Academy Reply September NOI Comment at 2.

<sup>258</sup> Lowery Reply September NOI Comment at 8; Monica Corton Consulting Reply September NOI Comment at 3.

<sup>259</sup> Lowery Reply September NOI Comment at 5.

<sup>260</sup> SGA Initial September NOI Comment at 6. CISAC & BIEM contend that “[c]larifications should be made on how musical works will be matched to sound recording and how far these cross-references will not conflict with matching and or claims conducted by other entities, which could raise identification conflicts at DSP level.” CISAC & BIEM Initial September NOI Comment at 3. The statute requires the MLC to disclose in its annual report “the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works)” with respect to administration of the U.S. blanket license under section 115. 17 U.S.C. 115(d)(3)(D)(vii)(I)(hh).

<sup>261</sup> The MLC, Transparency, <https://themlc.com/faqs/categories/transparency> (last visited Sept. 1, 2020) (noting that the MLC will “promote transparency” by “[p]roviding an annual report to the public and to the Copyright Office detailing the operations of The MLC, its licensing practices, collection and distribution of royalties, budget and cost information, its efforts to resolve unmatched royalties, and total royalties received and paid out”).

<sup>262</sup> 85 FR at 22572; see also National Association of Independent Songwriters (“NOIS”) et al. Initial September NOI Comment at 16; MAC Initial September NOI Comment at 2; Lowery Reply September NOI Comment at 8; SGA Reply September NOI Comment at 5.

<sup>263</sup> See DLC April NOI Comment at 3 (stating that the transparency requirements in the annual report “are critical to ensuring that all industry participants—songwriters, publishers, licensees, and the Copyright Office itself—can confirm that the MLC is operating effectively and in the best

FMC stating that the annual report should include information about board governance and the selection and criteria used for the collective’s vendors.<sup>264</sup> CISAC & BIEM maintain that the annual report should include information regarding the “global amount of accrued undistributed royalties.”<sup>265</sup> SGA proposes that a section of the annual report “be dedicated to an independent report by the board’s music creator representatives on their activities in support of songwriter and composer interests, the handling of conflict-related problems by the board and its various controlled committees, and the issues of conflict that remain to be addressed and resolved.”<sup>266</sup> Other commenters asked for MLC oversight to ensure disclosure of certain information, though without directly linking such oversight to the annual report. For example, one commenter expressed concern about the ability of the MLC to apply unclaimed accrued royalties on an interim basis to defray the collective’s costs (and the transparency of any decisions to do so), should the administrative assessment fail to cover current collective total costs.<sup>267</sup> In the Office’s separate rulemaking regarding royalty statements, other commenters expressed a desire to impose a deadline on the MLC’s distribution of royalties to copyright owners to ensure prompt

interests of the industry.”); SGA April NOI Comment at 6 (“As the Copyright Office stated in its Notice, another ‘avenue for transparency with respect to the MLC is through its annual report.’ SGA emphatically agrees with this assessment . . . .”); FMC April NOI Comment at 1 (agreeing that the annual report should include information about board governance, the manner in which the collective will distribute unclaimed royalties, development updates and certifications related to its IT systems, and the collective’s efforts to identify copyright owners); see *id.* (“Annual reports would ideally also offer a sense where the areas of growth and needs for additional effort might lie, with regards to demographics and genres; this sort of candid self-assessment, would help writers and industry allies be effective partners to the MLC in reaching these populations most effectively.”).

<sup>264</sup> DLC April NOI Comment at 3; FMC April NOI Comment at 1.

<sup>265</sup> CISAC & BIEM April NOI Comment at 2.

<sup>266</sup> SGA April NOI Comment at 7. Although the Office tentatively declines to require an independent report from the board’s music creator representatives through regulation, the Office fully expects the MLC to give voice to its board’s songwriter representatives as well as its statutory committees, whether through its annual reporting or other public announcements.

<sup>267</sup> See Castle April NOI Comment at 13 (stating Office “regulations should provide that there be some written public statement by The MLC’s CFO . . . that these funds are being approved by the board for disbursement before the taking along with a justification statement. The MLC board should have to sign up to that statement with full transparency of why there is this compelling need and why that need can only be met this way.”); 17 U.S.C. 115(d)(7)(C).

payment, but presumably also to provide copyright owners some estimation as to when they will be paid.

For its part, although the MLC states that it “is committed to providing additional information about other areas of its operations in the annual report or in other public disclosures,”<sup>268</sup> and that it “is making public a substantial amount of information concerning its operations and communications as such information becomes available,”<sup>269</sup> it “does not believe that such further regulation in this area is necessary, as the MMA already identifies with sufficient detail the subjects that the MLC is to report on in the annual report,”<sup>270</sup> and any such regulation would be “premature.”<sup>271</sup> The MLC contends that it “has already publicly disclosed substantial details of the process by which it selected its primary technology and royalty administration vendors, and publicly filed copies of its [request for information] and [request for proposals],”<sup>272</sup> and regarding “the selection process of its initial board of directors and statutory committees,” with future board and committee selections being made pursuant to the MLC’s by-laws, which are currently public.<sup>273</sup> The MLC expresses concern that disclosure regarding vendor selection “will likely have a chilling effect on vendor participation in future RFIs and RFPs because bidders that do not want information in their proposals to be made publicly available will elect not to participate,”<sup>274</sup> while noting that statutory-required reporting regarding “aggregated royalty receipts and payments” and “efforts to locate and identify copyright owners of unmatched works (and shares of works)” will speak to vendor performance.<sup>275</sup> The MLC

maintains that if the Office does decide to require disclosure of vendor selection information in the annual report, the term “vendor” should mean “any vendor who is both performing services related to the mechanical licensing collective’s matching and royalty accounting responsibilities and who received compensation in an amount greater than 10% of the mechanical licensing collective’s budget.”<sup>276</sup> In addition, the MLC notes that “[i]t is not common practice to publish the details of how a conflicts policy is implemented or applied, because such publication may violate confidentiality obligations of board members that may be subject to separate confidentiality agreements,” and that “it is appropriate for the MLC’s conflicts policy to be enforced internally, with directors having the option to share any conflicts concerns privately with the MLC’s counsel and recuse themselves from votes if appropriate.”<sup>277</sup>

Given the overwhelming desire for transparency regarding the MLC’s activities, and the ability of the annual report to provide such transparency, the proposed rule requires the MLC to disclose certain information in its annual report besides the statutorily-required categories of information. *First*, the annual report must disclose the MLC’s selection of board members and criteria used in selecting any new board members during the preceding calendar year. *Second*, the annual report must disclose the MLC’s selection of new vendors hired to assist with the technological or operational administration of the blanket license during the preceding calendar year, including the criteria used in deciding to select such vendors, and any performance reviews of such vendors.<sup>278</sup> The proposed rule intends

17 U.S.C. 115(d)(3)(D)(vii)(I)(gg). Identification of the MLC’s vendors, should they exceed ten percent of the MLC’s budget, is not the same as identifying the criteria used to select those vendors, although the Office agrees this statutory requirement should encourage the MLC to be hearty in its annual reporting with respect to the performance of primary vendors as a result.

<sup>276</sup> MLC *Ex Parte* Letter #7 at 7. The MLC’s startup assessment is \$33,500,000 and its 2021 annual assessment is \$28,500,000, indicating that a 10% threshold would limit disclosure to vendors paid several million dollars. See 37 CFR 390.2(a), (b).

<sup>277</sup> MLC April NOI Comment at 6.

<sup>278</sup> The statute provides that the MLC is authorized to “arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective.” 17 U.S.C. 115(d)(3)(C)(i)(VII). The MLC selected its vendor Harry Fox Agency (“HFA”) without advance notice to the Office, following the designation of the MLC. Given commenters’ concerns regarding HFA’s past performance, the Office is receptive to receiving continual feedback regarding future performance of

to include vendors directly involved with collective’s administration of the section 115 license, versus any vendors it may hire, generally (*e.g.*, water delivery). *Third*, the annual report must disclose whether the MLC, pursuant to 17 U.S.C. 115(d)(7)(C), has applied any unclaimed accrued royalties on an interim basis to defray costs in the event that the administrative assessment is inadequate to cover collective total costs. *Fourth*, the annual report must disclose the average processing and distribution times for distributing royalties to copyright owners. And *fifth*, as noted above, the annual report must disclose whether the MLC suspended access to any individual or entity attempting to bypass the collective’s right to charge a fee to recover its marginal costs for bulk access outlined in 17 U.S.C. 115(d)(3)(E)(v)(V) through repeated queries, or to otherwise be engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database) or misappropriating or using information from the database for improper purposes.

As expressed in the April NOI, the Office encourages the MLC to publicly share with greater particularity planning information, such as notional schedules, beta wireframes, or other documentation, to provide context to MLC stakeholders in the months leading up to the license availability date. The Office appreciates that the MLC “still intends to publicly roll out the portal for beta testing at or shortly after the end of the third quarter of this year,” and that “[t]here will also be alpha testing (to a smaller group) prior to beta testing.”<sup>279</sup>

Relatedly, two commenters suggested that the Office’s regulations create a “feedback loop” to receive complaints about the mechanical licensing collective.<sup>280</sup> CISAC & BIEM<sup>281</sup> agree that “the identification of a point of contact for inquiries and complaints with timely redress is an indispensable feature for transparency.” The Office notes that the statute requires the mechanical licensing collective to

activities taken on behalf of the MLC. See Lowery Reply September NOI Comment at 3, 11–12; SGA Reply September NOI Comment at 5.

<sup>279</sup> MLC *Ex Parte* Letter #7 at 4.

<sup>280</sup> Castle April NOI Comment at 16 (contending the Office should create “a complaint webform with someone to read the complaints as they come in as part of the Office’s oversight role”); Lowery Reply September NOI Comment at 11 (stating “regulations should provide for a feedback loop that songwriters can avail themselves of that the Copyright Office must take into account when determining its re-designation”).

<sup>281</sup> CISAC & BIEM April NOI Comment at 2.

<sup>268</sup> MLC April NOI Comment at 4.

<sup>269</sup> *Id.* at 7.

<sup>270</sup> *Id.* at 3.

<sup>271</sup> *Id.* at 4.

<sup>272</sup> *Id.* at 5.

<sup>273</sup> *Id.* at 6; see The MLC, Governance and Bylaws, <https://themlc.com/governance> (last visited Sept. 1, 2020). The MLC notes that the collective’s board appointments are subject to additional oversight given that they require the approval of the [Library of Congress].” MLC April NOI Comment at 6. The Copyright Office also makes available information concerning the MLC’s board membership and the procedure to fill MLC board and statutory committee vacancies. See U.S. Copyright Office, MLC and DLC Contact Information, Boards of Directors, and Committees, <https://www.copyright.gov/music-modernization/mlc-dlc-info/> (last visited Sept. 1, 2020).

<sup>274</sup> MLC April NOI Comment at 5.

<sup>275</sup> *Id.* at 6. The MLC also suggests that because the statute requires the annual report to include information regarding “expenses that are more than 10 percent of the annual mechanical licensing collective budget,” “[t]his definition will include the MLC’s primary vendor, and thus provide even further disclosures.” MLC *Ex Parte* Letter #7 at 7;

“identify a point of contact for publisher inquiries and complaints with timely redress.”<sup>282</sup> The proposed rule emphasizes this responsibility by requiring the MLC to designate a point of contact for inquiries and complaints with timely redress, including complaints regarding the public musical works database and/or the collective’s activities. The name and contact information for the point of contact must be made prominently available on the MLC’s website.<sup>283</sup> In addition, the Copyright Office always welcomes feedback relevant to its statutory duties or service. Members of the public may communicate with the Office through the webform available <https://www.copyright.gov/help>. The Office requests that any inquiries or comments with respect to the MLC or MMA be indicated accordingly.

### III. Subjects of Inquiry

The proposed rule is designed to reasonably implement a number of regulatory duties assigned to the Copyright Office under the MMA. The Office solicits additional public comment on all aspects of the proposed rule. If the MLC believes it will need time and/or a transition period to implement any aspect of the proposed rule, the Office asks the MLC to provide an explanation and time estimate(s) for such implementation.

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

Copyright, Phonorecords, Recordings.

#### Proposed Regulations

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

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

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

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

■ 2. Add §§ 210.31 through 201.33 to read as follows:

<sup>282</sup> 17 U.S.C. 115(d)(3)(D)(ix)(I)(bb).

<sup>283</sup> See U.S. Copyright Office, Section 512 of title 17 159 (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (noting that while section 512 requires an online service provider’s agent information to be “publicly available” on its website, “there is currently no standardized practice for the location or content of user notifications regarding the takedown process,” and that Congress could thus “modify the language of section 512(c)(2) to provide that the designated agent’s information be not just ‘on its website in a location accessible to the public,’ but also ‘prominently displayed’”); 17 U.S.C. 512(c)(2).

#### § 210.31 Musical works database information.

(a) *General.* This section prescribes the rules under which the mechanical licensing collective will provide information relating to musical works (and shares of such works), and sound recordings in which the musical works are embodied, in the public musical works database prescribed by 17 U.S.C. 115(d)(3)(E), and to increase usability of the database.

(b) *Matched musical works.* With respect to musical works (or shares thereof) where the copyright owners have been identified and located, the musical works database shall contain, at a minimum, the following:

(1) Information regarding the musical work:

- (i) Musical work title(s);
- (ii) The copyright owner of the musical work (or share thereof), and the ownership percentage of that owner;
- (iii) Contact information for the copyright owner of the musical work (or share thereof), which can be a post office box or similar designation, or a “care of” address (e.g., publisher);
- (iv) The mechanical licensing collective’s standard identifier for the musical work; and
- (v) To the extent reasonably available to the mechanical licensing collective:

(A) Any alternative or parenthetical titles for the musical work;

(B) ISWC;

(C) Songwriter(s), with the mechanical licensing collective having the discretion to allow songwriters, or their authorized representatives, to have songwriter information listed anonymously or pseudonymously;

(D) Administrator(s) or other authorized entity(ies) who license the musical work (or share thereof) and/or collect mechanical royalties for use of such musical work (or share thereof) in the United States;

(E) ISNI(s) and/or IPI(s) for each musical work copyright owner, and, if different, songwriter, and administrator;

(F) Unique identifier(s) assigned by the blanket licensee, if reported by the blanket licensee; and

(G) For classical compositions, opus and catalog numbers.

(2) Information regarding the sound recording(s) in which the musical work is embodied, to the extent reasonably available to the mechanical licensing collective:

- (i) ISRC;
- (ii) Sound recording name(s), including all known alternative and parenthetical titles for the sound recording;
- (iii) Information related to the sound recording copyright owner, including

LabelName and PLine. Should the mechanical licensing collective decide to include DDEX Party Identifier (DPID) in the public database, the DPID party’s name may be displayed, but not the numerical identifier;

- (iv) Featured artist(s);
- (v) Playing time;
- (vi) Version;
- (vii) Release date(s);
- (viii) Producer;
- (ix) UPC; and
- (x) Other non-confidential

information commonly used to assist in associating sound recordings with musical works.

(c) *Unmatched musical works.* With respect to musical works (or shares thereof) where the copyright owners have not been identified or located, the musical works database shall include, to the extent reasonably available to the mechanical licensing collective:

(1) Information regarding the musical work:

(i) Musical work title(s), including any alternative or parenthetical titles for the musical work;

(ii) The ownership percentage of the musical work for which an owner has not been identified;

(iii) If a musical work copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner;

(iv) The mechanical licensing collective’s standard identifier for the musical work;

(v) ISWC;

(vi) Songwriter(s), with the mechanical licensing collective having the discretion to allow songwriters, or their authorized representatives, to have songwriter information listed anonymously or pseudonymously;

(vii) Administrator(s) or other authorized entity(ies) who license the musical work (or share thereof) and/or collect mechanical royalties for use of such musical work (or share thereof) in the United States;

(viii) ISNI(s) and/or IPI(s) for each musical work copyright owner, and, if different, songwriter and administrator;

(ix) Unique identifier(s) assigned by the blanket licensee, if reported by the blanket licensee; and

(x) For classical compositions, opus and catalog numbers.

(2) Information regarding the sound recording(s) in which the musical work is embodied:

- (i) ISRC;
- (ii) Sound recording name(s), including all known alternative and parenthetical titles for the sound recording;
- (iii) Information related to the sound recording copyright owner, including

LabelName and PLine. Should the mechanical licensing collective decide to include DDEX Party Identifier (DPID) in the public database, the DPID party's name may be displayed, but not the numerical identifier;

- (iv) Featured artist(s);
- (v) Playing time;
- (vi) Version;
- (vii) Release date(s);
- (viii) Producer;
- (ix) UPC; and
- (x) Other non-confidential

information commonly used to assist in associating sound recordings with musical works, and any additional non-confidential information reported to the mechanical licensing collective that may assist in identifying musical works.

(d) *Field labeling.* The mechanical licensing collective shall consider industry practices when labeling fields in the public database to reduce the likelihood of user confusion, particularly regarding information relating to sound recording copyright owner. Fields displaying PLine, LabelName, or, if applicable, DPID, information may not on their own be labeled "sound recording copyright owner."

(e) *Data provenance.* For information relating to sound recordings, the mechanical licensing collective shall identify the source of such information in the public musical works database.

(f) *Historical data.* The mechanical licensing collective shall maintain at regular intervals historical records of the information contained in the public musical works database, including a record of changes to such database information and changes to the source of information in database fields, in order to allow tracking of changes to the ownership of musical works in the database over time. The mechanical licensing collective shall determine, in its reasonable discretion, the most appropriate method for archiving and maintaining such historical data to track ownership and other information changes in the database.

(g) *Personally identifiable information.* The mechanical licensing collective shall not include in the public musical works database any individual's Social Security Number (SSN), taxpayer identification number, financial account number(s), date of birth (DOB), or home address or personal email to the extent it is not musical work copyright owner contact information required under 17 U.S.C. 115(d)(3)(E)(ii)(III). The mechanical licensing collective shall also engage in reasonable, good-faith efforts to ensure that other personally identifying information (*i.e.*, information that can be used to

distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to such specific individual), is not available in the public musical works database, other than to the extent it is required by law.

(h) *Disclaimer.* The mechanical licensing collective shall include in the public-facing version of the musical works database a conspicuous disclaimer that states that the database is not an authoritative source for sound recording information, and explains the labeling of information related to sound recording copyright owner, including the "LabelName" and "PLine" fields.

#### **§ 210.32 Musical works database usability, interoperability, and usage restrictions.**

This section prescribes rules under which the mechanical licensing collective shall ensure the usability, interoperability, and proper usage of the public musical works database created pursuant to 17 U.S.C. 115(d)(3)(E).

(a) *Database access.* (1)(i) The mechanical licensing collective shall make the musical works database available to members of the public in a searchable, real-time, online format, free of charge. In addition, the mechanical licensing collective shall make the musical works database available in a bulk, real-time, machine-readable format through a process for bulk data management widely adopted among music rights administrators to:

(A) Digital music providers operating under the authority of valid notices of license, and their authorized vendors, free of charge;

(B) Significant nonblanket licensees in compliance with their obligations under 17 U.S.C. 115(d)(6), and their authorized vendors, free of charge;

(C) The Register of Copyrights, free of charge; and

(D) Any other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity, which shall not be unreasonable.

(ii) Starting July 1, 2021, the mechanical licensing collective shall make the musical works database available at least in a bulk, real-time, machine-readable format under this paragraph (a)(1) through application programming interfaces (APIs).

(2) Notwithstanding paragraph (a)(1) of this section, the mechanical licensing collective shall establish appropriate terms of use or other policies governing use of the database that allows the mechanical licensing collective to suspend access to any individual or entity that appears, in the mechanical licensing collective's reasonable

determination, to be attempting to bypass the mechanical licensing collective's right to charge a fee to recover its marginal costs for bulk access outlined in 17 U.S.C. 115(d)(3)(E)(v)(V) through repeated queries, or to otherwise be engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database) or misappropriating or using information from the database for improper purposes.

(b) *Point of contact for inquiries and complaints.* In accordance with its obligations under 17 U.S.C. 115(d)(3)(D)(ix)(I)(bb), the mechanical licensing collective shall designate a point of contact for inquiries and complaints with timely redress, including complaints regarding the public musical works database and/or the mechanical licensing collective's activities. The mechanical licensing collective must make publicly available, including prominently on its website, the following information:

(1) The name of the designated point of contact for inquiries and complaints. The designated point of contact may be an individual (*e.g.*, "Jane Doe") or a specific position or title held by an individual at the mechanical licensing collective (*e.g.*, "Customer Relations Manager"). Only a single point of contact may be designated.

(2) The physical mail address (street address or post office box), telephone number, and email address of the designated point of contact.

#### **§ 210.33 Annual reporting by the mechanical licensing collective.**

(a) *General.* This section prescribes the rules under which the mechanical licensing collective will provide certain information in its annual report pursuant to 17 U.S.C. 115(d)(3)(D)(vii).

(b) *Contents.* Each of the mechanical licensing collective's annual reports shall contain, at a minimum, the following information:

(1) The operational and licensing practices of the mechanical licensing collective;

(2) How the mechanical licensing collective collects and distributes royalties, including the average processing and distribution times for distributing royalties for the preceding calendar year;

(3) Budgeting and expenditures for the mechanical licensing collective;

(4) The mechanical licensing collective's total costs for the preceding calendar year;

(5) The projected annual mechanical licensing collective budget;

(6) Aggregated royalty receipts and payments;

(7) Expenses that are more than 10 percent of the annual mechanical licensing collective budget;

(8) The efforts of the mechanical licensing collective to locate and identify copyright owners of unmatched musical works (and shares of works);

(9) The mechanical licensing collective's selection of board members and criteria used in selecting any new board members during the preceding calendar year;

(10) The mechanical licensing collective's selection of new vendors during the preceding calendar year, including the criteria used in deciding to select such vendors, and any performance reviews of the mechanical licensing collective's current vendors. Such description shall include a general description of any new request for information (RFI) and/or request for proposals (RFP) process, either copies of the relevant RFI and/or RFP or a list of the functional requirements covered in

the RFI or RFP, the names of the parties responding to the RFI and/or RFP. In connection with the disclosure described in this paragraph (b)(10), the mechanical licensing collective shall not be required to disclose any confidential or sensitive business information. For the purposes of this paragraph (b)(10), "vendor" means any vendor performing materially significant technology or operational services related to the mechanical licensing collective's matching and royalty accounting activities;

(11) Whether during the preceding calendar year the mechanical licensing collective, pursuant to 17 U.S.C. 115(d)(7)(C), applied any unclaimed accrued royalties on an interim basis to defray costs in the event that the administrative assessment is inadequate to cover collective total costs, including the amount of unclaimed accrued royalties applied and plans for future reimbursement of such royalties from future collection of the assessment; and

(12) Whether during the preceding calendar year the mechanical licensing

collective suspended access to the public database to any individual or entity attempting to bypass the collective's right to charge a fee to recover its marginal costs for bulk access outlined in 17 U.S.C. 115(d)(3)(E)(v)(V) through repeated queries, or to otherwise be engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database) or misappropriating or using information from the database for improper purposes. If the mechanical licensing collective so suspended access to the public database to any individual or entity, the annual report must identify such individual(s) and entity(ies) and provide the reason(s) for suspension.

Dated: September 4, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

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