

may be appropriate to make other incremental changes going forward, it is important that we affirm the established regulatory program for SEFs to maintain these benefits and facilitate further expansion of this framework.

I thank the staff of the Division of Market Oversight for their work on these two rules and their helpful engagement with my office.

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## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 210

[Docket No. 2020-7]

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

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

**ACTION:** Interim rule.

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

**DATES:** Effective March 15, 2021.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) which, among other things, substantially modifies the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>1</sup> It does so by switching

from a song-by-song licensing system to a blanket licensing regime administered by a mechanical licensing collective (“MLC”), which became available on January 1, 2021 (the “license availability date”). In July 2019, the Copyright Office (the “Office”) designated an entity to serve as the MLC, as required by the MMA.<sup>2</sup> Among other things, the MLC is responsible for collecting and distributing royalties under the blanket license, engaging in efforts to identify musical works embodied in particular sound recordings and to identify and locate the copyright owners of such musical works, and administering a process by which copyright owners can claim ownership of musical works (or shares of such works).<sup>3</sup> It also must “maintain the musical works database and other information relevant to the administration of licensing activities under [section 115].”<sup>4</sup> The Office has also designated a digital licensee coordinator (“DLC”) to represent licensees in proceedings before the Copyright Royalty Judges (“CRJs”) and the Office, to serve as a non-voting member of the MLC, and to carry out other functions.<sup>5</sup>

##### A. Regulatory Authority Granted to the Office

The MMA specifically directs the Office to “adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used, including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective.”<sup>6</sup> The MMA additionally makes several explicit references to the Office’s regulations governing the treatment of confidential and other sensitive information, including with respect to: (1) “all material records of the operations of the [MLC]”;<sup>7</sup> (2) steps

the MLC must take to “safeguard the confidentiality and security of usage, financial, and other sensitive data used to compute market shares” when distributing unclaimed accrued royalties;<sup>8</sup> (3) steps the MLC and DLC must take to “safeguard the confidentiality and security of financial and other sensitive data shared” by the MLC with the DLC about significant nonblanket licensees;<sup>9</sup> (4) voluntary licenses administered by the MLC;<sup>10</sup> (5) examination of the MLC’s “books, records, and data” pursuant to audits by copyright owners;<sup>11</sup> and (6) examination of digital music providers’ “books, records, and data” pursuant to audits by the MLC.<sup>12</sup>

Beyond these specific directives, Congress invested the Office with “broad regulatory authority”<sup>13</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>14</sup> The legislative history contemplates that the Office will “thoroughly review[ ]”<sup>15</sup> policies and procedures established by the MLC and its three committees, which the MLC is statutorily bound to ensure are “transparent and accountable,”<sup>16</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>17</sup>

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

a period of not less than 7 years after the date of creation or receipt, whichever occurs later.”).

<sup>8</sup> *Id.* at 115(d)(3)(f)(i)(II)(bb).

<sup>9</sup> *Id.* at 115(d)(6)(B)(ii).

<sup>10</sup> *Id.* at 115(d)(11)(C)(iii).

<sup>11</sup> *Id.* at 115(d)(3)(L)(i)(II).

<sup>12</sup> *Id.* at 115(d)(4)(D)(i)(II).

<sup>13</sup> H.R. Rep. No. 115-651, at 5-6 (2018); S. Rep. No. 115-339, at 5 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 4 (2018), [https://www.copyright.gov/legislation/mma\\_conference\\_report.pdf](https://www.copyright.gov/legislation/mma_conference_report.pdf) (“Conf. Rep.”).

<sup>14</sup> 17 U.S.C. 115(d)(12)(A).

<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. 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>16</sup> 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

<sup>17</sup> H.R. Rep. No. 115-651, at 5-6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12.

<sup>2</sup> 84 FR 32274 (July 8, 2019).

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

<sup>4</sup> *Id.* at 115(d)(3)(C)(i)(IV).

<sup>5</sup> *Id.* at 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>6</sup> 17 U.S.C. 115(d)(12)(C).

<sup>7</sup> *Id.* at 115(d)(3)(M)(i) (“The mechanical licensing collective shall ensure that all material records . . . are preserved and maintained in a secure and reliable manner, with appropriate commercially reasonable safeguards against unauthorized access, copying, and disclosure, and subject to the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C) for

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

appropriate steps in those situations.”<sup>18</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>19</sup> Accordingly, in designating the MLC as the entity to administer the section 115 license, 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>20</sup>

### B. Rulemaking Background

On September 24, 2019, the Office issued a notification of inquiry (“NOI”) seeking, among other things, public input on any issues that should be considered regarding the treatment of confidential and other sensitive information under the blanket license regime.<sup>21</sup> In response, the Office received suggested regulatory language from both the DLC and the MLC, and a few comments about confidentiality more generally from other stakeholders. The MLC’s approach generally proposed requiring the MLC and the DLC to implement confidentiality policies to prevent improper or unauthorized use of various categories of confidential information, but lacked specific requirements for those policies or a proposed definition of “confidential information.”<sup>22</sup> By contrast, the DLC contended that the MLC’s proposal, by investing the MLC and DLC with broad discretion to implement policies regarding confidentiality, “would inappropriately redelegate that authority [granted to the Register] to itself and

DLC.”<sup>23</sup> The DLC maintained that the Office’s regulations should provide necessary guidance, not merely give the MLC and DLC discretion to create their own policies.<sup>24</sup>

On April 22, 2020, the Office issued a notice of proposed rulemaking (“NPRM”) regarding the treatment of confidential and other sensitive information under the blanket license regime, and solicited public comments on the proposed rule, including comments about the use of confidentiality designations and nondisclosure agreements.<sup>25</sup> Overall, the Office proposed to adopt specific confidentiality regulations in order to assure those providing confidential and commercially sensitive information to the MLC that this information will be protected, as well as “provide the ground rules for the relationship between DLC, the MLC, and its respective members.”<sup>26</sup> In response to the proposed rule, the DLC found its “basic framework” to be “sound.”<sup>27</sup> The MLC noted that “it is critical that confidential information be maintained with appropriate safeguards,” and offered proposed adjustments to certain provisions.<sup>28</sup> Another commenter expressed appreciation for the Office’s approach “in distinguishing what is commonly thought of as generic ‘confidential information’ and what ought to be confidential information for the DLC, [t]he MLC, their respective vendors and in particular the MLC’s three Statutory Committees.”<sup>29</sup>

Having carefully considered the comments and other record materials in this proceeding, the Office is now issuing an interim rule. The Office has determined that it is prudent to promulgate this rule on an interim basis in order to retain added flexibility for responding to unforeseen circumstances. In some cases, the Office has adopted certain provisions in light of conflicting approaches suggested by various stakeholders. At times, the Office has opted for the more conservative approach to new issues presented in this rulemaking to ward against inappropriate disclosure or use of sensitive business information in the first instance, concluding that subsequent adjustment of an overly cautious rule is preferable to later addressing types of information that have already been shared. The Office

will consider modifications as needed in response to new evidence, unforeseen issues, or where something is otherwise not functioning as intended as the MLC starts receiving confidential information from digital music providers and copyright owners for purposes of administering the section 115 license.

In issuing this interim rule, the Office is mindful of Congress’s overall goals for the MMA to enhance transparency, accountability, and public access to musical work ownership information.<sup>30</sup> The Office thus intends for its interim confidentiality rule to complement separate regulations regarding transparency, accountability, and public accessibility, which were adopted to prescribe the categories of information to be included in the public musical works database and rules related to the usability, interoperability, and usage restrictions of the database, as well as require the MLC to disclose certain categories of information in its statutorily-required annual reports and one-time written public update in December 2021 regarding its operations.<sup>31</sup>

## II. Interim Rule

The interim rule adopts certain provisions of the proposed rule and makes a number of adjustments in response to public comments regarding the definition of “confidential information” and the use and disclosure of such information.

Because the MMA does not define the term “confidential,” the interim rule defines “confidential information”—both by what it is and what it is *not*. The definition of “confidential information” is adjusted to mean sensitive financial or business information disclosed by DMPs, significant non-blanket licensees, or copyright owners (or any of their authorized agents or vendors) to the

<sup>18</sup> H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12.

<sup>19</sup> H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12.

<sup>20</sup> 84 FR at 32280.

<sup>21</sup> 84 FR 49966, 49973 (Sept. 24, 2019). All rulemaking activity, including public comments, as well as educational material regarding the Music Modernization Act, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization/>. Specifically, comments received in response to the NOI are available at <https://beta.regulations.gov/document/COLC-2019-0002-0001> and comments received in response to the notice of proposed rulemaking are available at <https://beta.regulations.gov/document/COLC-2020-0004-0001>. Guidelines for *ex parte* communications, along with records of such communications, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. References to these comments are by party name (abbreviated where appropriate), followed by “Initial NOI Comment,” “Reply NOI Comment,” “NPRM Comment,” “Letter,” or “*Ex Parte* Letter,” as appropriate.

<sup>22</sup> See MLC Initial NOI Comment at 29–30, App. H.

<sup>23</sup> DLC Reply NOI Comment at 27.

<sup>24</sup> See *id.* at 28.

<sup>25</sup> 85 FR 22559 (Apr. 22, 2020).

<sup>26</sup> *Id.* at 22561 (quoting DLC Initial NOI Comment at 3).

<sup>27</sup> DLC NPRM Comment at 1.

<sup>28</sup> MLC NPRM Comment at 2.

<sup>29</sup> Castle NPRM Comment at 1.

<sup>30</sup> See, e.g., 17 U.S.C. 115(d)(3)(E), (e)(20); *id.* at 115(d)(3)(E)(v) (stating the database must “be made available to members of the public in a searchable, online format, free of charge”); 164 Cong. Rec. S501, 504 (daily ed. Jan. 24, 2018) (statement of Sen. Chris Coons) (“This important piece of legislation will bring much-needed transparency and efficiency to the music marketplace.”).

<sup>31</sup> See 37 CFR 210.31, 210.32, 210.33; DLC *Ex Parte* Letter Feb. 24, 2020 (“DLC *Ex Parte* Letter #2”) at 5 (acknowledging that the “MLC will be under certain legal transparency requirements,” and that confidentiality regulations should “not stand in the way of that transparency”); The International Confederation of Societies of Authors and Composers (“CISAC”) & The International Organisation representing Mechanical Rights Societies (“BIEM”) Reply NOI Comment at 2 (stating that “musical works information populated in the database can include confidential, personal and/or sensitive data, and as such, the Regulations should ensure the required balance between the public interest in having transparent access to such information and the protection of commercially sensitive information and personal data”).

MLC or DLC, as opposed to information provided to the MLC and DLC more generally (e.g., supply contracts). The definition is also adjusted to generally refer to “information” (as opposed to “documents and information”) to clarify that a document containing both confidential and non-confidential information should be extended protection, though the rule retains provisions identifying specific documents that the Office’s regulations require to be disclosed (e.g., notices of license) to clarify that they are not subject to the interim rule’s restrictions on disclosure and use. As proposed by the MLC, “confidential information” does not include any top-level compilation data presented in anonymized format that does not allow identification of such data as belonging to any particular digital music provider, significant nonblanket licensee, or copyright owner. At the DLC’s suggestion, the rule creates categories of “MLC Internal Information” and “DLC Internal Information,” to separately address the use and disclosure of sensitive financial or business information about the MLC’s and DLC’s internal operations (as opposed to confidential information disclosed to the MLC and DLC by third parties).

The interim rule creates various restrictions on the disclosure and use of confidential information by the MLC and DLC, as well as their employees, agents, consultants, vendors, and independent contractors, and members of their boards of directors and committees. In response to concerns about competitive harm that could result from the improper disclosure of confidential information from DMPs and copyright owners, the interim rule states that the MLC and DLC must limit disclosure of confidential information to their employees, agents, consultants, vendors, and independent contractors who are engaged in the entities’ respective authorized functions and who require access to confidential information for the purpose of performing their duties during the ordinary course of their work. The MLC and DLC are prohibited from disclosing confidential information to members of their boards of directors and committees, and from using confidential information for any purpose other than their authorized functions under section 115. Consistent with the proposed rule, the MLC and DLC may disclose confidential information to qualified auditors or outside counsel under the statutorily-permitted audits, and to the Office, Copyright Royalty Board, and federal courts, or when such disclosure

is required by court order or subpoena, subject to an appropriate protective order. Notwithstanding any restrictions, the rule states that the MLC may fulfill its disclosure obligations under section 115 (e.g., delivering royalty statements to copyright owners or communicating with the DLC). In keeping with the Office’s preexisting rule governing comparable royalty statement reporting requirements under the song-by-song section 115 license, the interim rule does not place any confidentiality restrictions on copyright owners once they receive royalty statements from the MLC. The rule clarifies, however, that royalty statements to copyright owners should not include confidential information that does not relate to the recipient copyright owner or relevant songwriter in addition to the minimum information required by the Office’s regulations.

Because “MLC Internal Information” and “DLC Internal Information” do not relate to sensitive business information disclosed by DMPs, significant nonblanket licensees, or copyright owners, the rule does not impose strict disclosure requirements as it does with “confidential information.” Instead, it creates categories of individuals to whom the MLC and DLC may disclose “MLC Internal Information” and/or “DLC Internal Information” (subject to a confidentiality agreement), giving the MLC and DLC some flexibility if they decide additional disclosure is necessary. For example, the interim rule states that the MLC may disclose MLC Internal Information to members of the MLC’s board of directors and committees, including representatives of the DLC who serve on the board or committees. Should the MLC decide to disclose MLC Internal Information to a contractor, the rule does not prohibit the MLC from doing so; it states that the MLC may disclose MLC Internal Information to other individuals in its discretion, subject to the adoption of reasonable confidentiality policies. The rule contains a parallel provision for the DLC and DLC Internal Information. It also permits representatives of the DLC who serve on the MLC’s board of directors or committees and who receive MLC Internal Information to share such information (subject to a confidentiality agreement) with employees, agents, consultants, vendors, and independent contractors of the DLC who require access to MLC Internal Information for the purpose of performing their duties.<sup>32</sup>

<sup>32</sup> In a parallel rulemaking regarding notices of license, notices of nonblanket activity, and reports of usage and payment, the Office expressed an intention to adjust those regulations to directly

These issues are discussed in turn below.

#### A. Defining “Confidential Information”

##### 1. “Confidential Information” as Defined Under the Proposed Rule

The MMA does not define the term “confidential.”<sup>33</sup> The proposed rule defined “confidential information” as including “sensitive financial or business information, including information relating to financial or business terms that could be used for commercial advantage” and “trade secrets,” and enumerated categories of information and documents expressly intended by the statute to be covered by the Office’s regulations governing the treatment of confidential and other sensitive information,<sup>34</sup> including with respect to “the confidentiality and security of usage, financial, and other sensitive data used to compute market shares,”<sup>35</sup> “financial and other sensitive data shared” by the MLC to the DLC about significant nonblanket licensees,<sup>36</sup> and voluntary licenses.<sup>37</sup> The proposed rule also defined “confidential information” as including “sensitive personal information, including but not limited to, an individual’s Social Security number, taxpayer identification number, financial account number(s), or date of birth (other than year).”<sup>38</sup>

As these are potentially broad categories, the proposed rule also refined the definition of “confidential information” by excluding information that is *not* confidential. Borrowing from current regulations governing SoundExchange in connection with the section 114 license, and as recommended by the DLC, the proposed

reference the Office’s confidentiality regulations once they had taken effect. 85 FR 58114, 58140 n.365 (Sept. 17, 2020). The Office has now determined that such adjustment is not necessary.

<sup>33</sup> See 17 U.S.C. 115(d)(12)(C), (e).

<sup>34</sup> 85 FR at 22562.

<sup>35</sup> 17 U.S.C. 115(d)(3)(j)(i)(II)(bb); see H.R. Rep. No. 115–651, at 27 (“Unclaimed royalties are to be distributed based upon market share data that is confidentially provided to the collective by copyright owners.”); S. Rep. No. 115–339, at 24 (same); Conf. Rep. at 20 (same). CISAC & BIEM contend that creators’ percentage share should not be made publicly accessible in the database. CISAC & BIEM NPRM Comment at 2. The statute, however, contemplates such information being made publicly available in the database. 17 U.S.C. 115(d)(3)(E)(ii)–(iii).

<sup>36</sup> 17 U.S.C. 115(d)(6)(B)(ii).

<sup>37</sup> *Id.* at 115(d)(11)(C)(iii). Music Artists Coalition (“MAC”) contends that “data relating to market share determinations and voluntary licenses” should be publicly shared. MAC Reply NOI Comment at 2–3. The statute, however, specifically contemplates such information being treated as confidential information. *Id.* at 115(d)(3)(j)(i)(II)(bb), (d)(11)(C)(iii).

<sup>38</sup> 85 FR at 22562.

rule stated that “confidential information” excludes “documents or information that may be made public by law” or “that at the time of delivery to the [MLC] or [DLC] is public knowledge,” and that “[t]he party seeking information from the [MLC] or [DLC] based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.”<sup>39</sup> Because documents and information may be subsequently disclosed by the party to whom the information would otherwise be considered confidential, or by the MLC or DLC pursuant to participation in proceedings before the Office or Copyright Royalty Judges (including proceedings to redesignate the MLC or DLC), the proposed rule also excluded such information and documents from the definition of “confidential information.”<sup>40</sup>

Recognizing that important restrictions on the disclosure of information are cabined by equally significant countervailing considerations of transparency in reporting certain types of information, the proposed rule also excluded the following from the definition of “confidential information”: Information made publicly available through notices of license,<sup>41</sup> notices of nonblanket activity, the MLC’s online database, and information disclosable through the MLC bylaws, annual report, audit report, or the MLC’s adherence to transparency and accountability with respect to the collective’s policies or practices, including its anti-commingling policy, pursuant to 17 U.S.C. 115(d)(3)(D)(ii), (vii), and (ix).<sup>42</sup> In addition, adopting a suggestion from the MLC, the proposed rule excluded from the meaning of “confidential information” any top-level compilation data presented in anonymized format that does not allow identification of such data as belonging to any digital music provider, significant nonblanket licensee, or copyright owner.<sup>43</sup> Finally,

<sup>39</sup> *Id.*; DLC Reply Add. at A–20.

<sup>40</sup> 85 FR at 22562.

<sup>41</sup> Consistent with the Office’s then-proposed rule regarding notices of license, the definition of confidentiality excluded any addendum to general notices of license that provides a description of any applicable voluntary license or individual download license the digital music provider is, or expects to be, operating under concurrently with the blanket license that is sufficient for the mechanical licensing collective to fulfill its obligations under 17 U.S.C. 115(d)(3)(G)(i)(I)(bb). 85 FR at 22567; see 85 FR 22518 (Apr. 22, 2020).

<sup>42</sup> 85 FR at 22562.

<sup>43</sup> *Id.*; see MLC Initial NOI Comment at 30 (proposing that “the MLC, when providing necessary data to its board or committee Members, will only share proprietary or confidential data as necessary, and in a format that is anonymized and

the proposed rule clarified that documents or information created by a party will not be considered confidential with respect to usage of that information by the same party (*e.g.*, documents created by the DLC should not be considered confidential with respect to the DLC).<sup>44</sup>

As discussed below, the interim rule adjusts the definition of “confidential information” based on public comments.

## 2. Royalty Statements Provided to Musical Work Copyright Owners by the MLC

The DLC contends that the definition of “confidential information” should expressly include “any sensitive data provided by digital music providers related to royalty calculations (including, but not limited to, service revenues, subscriber counts, and performing rights organization fee information).”<sup>45</sup> The DLC states that “statements of account delivered to copyright owners contain highly sensitive information” such as “service revenues, subscriber counts, and amounts paid to performing rights organizations,” and “this information is competitively sensitive between digital music providers, in that it provides extremely granular detail about each digital music provider’s operations and performance.”<sup>46</sup> The DLC asserts that “[i]f the Office places *no* restrictions on copyright owners’ use of the sensitive digital music provider information they receive from the MLC on statements of account, the Office will have failed to comply with [the] unambiguous congressional direction” to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective is not improperly disclosed or used.<sup>47</sup> While recognizing that “[c]opyright owners are entitled to know how their royalties have been calculated,”<sup>48</sup> the DLC proposes regulatory language that would require copyright owners’ access to be contingent upon “a written confidentiality agreement with the MLC that is enforceable by the licensee,”<sup>49</sup> as “this sensitive data [should] be used only to provide transparency into how mechanical royalties have been

cannot be identified as belonging to any particular copyright owner, in order to prevent any disclosure to potential competitors”); MLC Reply NOI Comment App. at 27.

<sup>44</sup> 85 FR at 22562.

<sup>45</sup> DLC NPRM Comment at 5, Add. A–1.

<sup>46</sup> *Id.* at 4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 5.

calculated and paid,” and not “for other, unrelated purposes.”<sup>50</sup>

By contrast, the MLC, the National Music Publishers’ Association (“NMPA”), the Songwriters of North America (“SONA”), and the Future of Music Coalition (“FMC”) maintain that receipt of statements of account should not impose confidentiality restrictions on copyright owners, with SONA “seek[ing] to ensure that the final confidentiality rule . . . does not become a basis to withhold records from copyright owners, self-published songwriters, and their authorized representatives.”<sup>51</sup> Likewise, the MLC expressed concern that the proposed rule “leaves unclear the right of copyright owners to receive the royalty pool calculation information that they have always received in royalty statements.”<sup>52</sup> The MLC would exclude from the definition of “confidential information,” “[i]nformation concerning the calculation of the payable royalty pool and the per-work royalty allocation under part 385 to be reported in royalty statements to copyright owners under 37 CFR 210.29(c)(1)(vi).”<sup>53</sup> The MLC also proposes that the “MLC and the DLC may disclose Confidential Information to” “[c]opyright owners, including their agents, whose works were used in covered activities, in connection with royalty payments and statements.”<sup>54</sup>

<sup>50</sup> *Id.*

<sup>51</sup> SONA NPRM Comment at 4 (“[R]oyalty recipients need to be able to use and share royalty information with attorneys, financial advisors, and others in order to carry on their business affairs.”); see MLC NPRM Comment at 3 (“[T]he Proposed Regulation on confidentiality should be modified to expressly state that information required to be reported by the MLC to copyright owners in . . . statements [of account] is not confidential information.”); NMPA NPRM Comment at 5 (“[T]he Office should revise the proposed rule to make clear that royalty pool information reported by DMPs to the MLC shall not be subject to confidentiality restrictions so that the MLC may report that information to copyright owners, and so that the copyright owners themselves shall not be burdened by restrictions on their use of such information, as is the current practice.”). See also FMC NPRM Comment at 1; Alliance for Recorded Music (“ARM”) NPRM Comment at 2 n.1 (both in general accord). One commenter suggests that the MLC should publicly post “the basic elements of these rate sheets.” Castle NPRM Comment at 12. In a parallel rulemaking, the Office issued interim regulations setting forth the information that the MLC is required to report in statements to copyright owners. See 37 CFR 210.29.

<sup>52</sup> MLC NPRM Comment at 8; see MLC NPRM Comment at 7, U.S. Copyright Office Dkt. No. 2020–6, available at <https://beta.regulations.gov/docket/COLC-2020-0003> (“[T]he proposed regulation being addressed in the Confidentiality Proceeding should be revised to provide that information required to be included in royalty statements does not fall under the definition of Confidential Information.”).

<sup>53</sup> MLC NPRM Comment App. at ii.

<sup>54</sup> *Id.* at iv.

While the Office appreciates that DMPs understandably want to ensure that sensitive business information provided to the MLC is not unlawfully or inappropriately disclosed or used, the definition of “confidential information” is already inclusive of information that is competitively sensitive as between digital music providers. Indeed, the DLC itself states that this information “plainly falls within the definition of Confidential Information in the Proposed Rule.”<sup>55</sup> The Office believes that amending the language to define “confidential information” as including “any sensitive data provided by digital music providers related to royalty calculations” could be overly broad in light of various statutory transparency and disclosure obligations; the suggestion to include “subscriber counts” and “service revenues” may also overreach as some DMPs are public companies who already disclose this information in financial statements.<sup>56</sup> The Office previously declined to adopt the DLC’s proposed definition that included “all the usage and royalty information” reported by DMPs for this reason.<sup>57</sup> Nonetheless, for clarity, the interim rule includes “sensitive data provided by digital music providers related to royalty calculations” in the enumeration of types of confidential information. As explained further below, however, the interim rule also separately addresses the DLC’s concerns by imposing restrictions on disclosure of these types of information to MLC board members and others involved with the operation of the mechanical license.

With respect to disclosure of information provided in royalty statements to copyright owners specifically, prior to the MMA, the Office previously considered and rejected the suggestion to place confidentiality requirements on copyright owners receiving statements of account under the section 115 statutory license due to the inclusion of “competitively sensitive” information, determining instead that “once the statements of account have been delivered to the copyright owners, there should be no restrictions on the copyright owners’ ability to use the

statements or disclose their contents.”<sup>58</sup> Royalty statements for the section 115 license have been provided to copyright owners for years without the confidentiality restrictions now requested by the DLC. No commenters provided examples of past harm caused by the existing regulations failing to impose such restrictions.<sup>59</sup> Given that an animating goal of the MMA is to facilitate increased transparency and accuracy in reporting payments to copyright owners, the Office reiterates that it sees no compelling reason to deviate from this established policy.<sup>60</sup> Further supporting the Office’s conclusion that it should not depart from the status quo, the Office’s adopted royalty payment and accounting information reporting requirements similarly “essentially retain the current rule governing non-blanket section 115 licenses.”<sup>61</sup> The Office is not persuaded by the DLC’s suggestion that the statutory directive to promulgate regulations to avoid information “in the records of the mechanical licensing collective” being “improperly disclosed or used” counsels differently.<sup>62</sup> Royalty statements are records of, and designed to be provided to, recipient copyright owners, and the statute and legislative history do not suggest that maintaining status quo expectations with respect to copyright owners’ receipt of royalty information would fall under the category of improper use.

Accordingly, the interim rule states that once a royalty statement has been delivered to a copyright owner, there are no restrictions on that copyright owner’s ability to use the statement or disclose its contents. The Office declines the MLC’s proposal to exclude from the definition of “confidential information,” “[i]nformation concerning the calculation of the payable royalty pool

and the per-work royalty allocation under part 385 to be reported in royalty statements to copyright owners under 37 CFR 210.29(c)(1)(vi).” Instead, as discussed below, the rule states that the mechanical licensing collective shall be permitted to prepare and deliver royalty statements to musical work copyright owners (and the contents therein) in accordance with the Office’s regulations governing royalty statements, which require “[a] detailed and step-by-step accounting of the calculation of royalties under applicable provisions of part 385 of this title, sufficient to allow the copyright owner to assess the manner in which the royalty owed was determined and the accuracy of the royalty calculations, which shall include details on each of the components used in the calculation of the payable royalty pool.”<sup>63</sup> This language is meant to clarify that despite the rule’s general restrictions on disclosing confidential information, the MLC is not prevented from preparing and delivering royalty statements to copyright owners. The rule clarifies, however, that royalty statements to copyright owners should not include confidential information that does not relate to the recipient copyright owner or relevant songwriter in addition to the minimum information required by the Office’s regulations. As discussed more below, the Office believes the MLC’s proposed language that the MLC and DLC may disclose confidential information to “[c]opyright owners, including their agents, whose works were used in covered activities, in connection with royalty payments and statements” becomes unnecessary.

### 3. Information Disclosed by Digital Music Providers, Copyright Owners, and Third Parties

The MLC and FMC suggest that the proposed rule’s definition of “confidential information” is too broad.<sup>64</sup> Specifically, the MLC contends the definition “is not limited to information exchanged in connection with the MLC’s royalty processing functions, and thus on its face could be read to regulate every aspect of the MLC’s and DLC’s businesses.”<sup>65</sup> The MLC maintains that instead, the “definition should be limited to information disclosed by DMPs, copyright owners, the MLC, or the DLC, and that relate to the MLC’s statutory functions, so that it does not inadvertently sweep into its ambit

<sup>55</sup> DLC NPRM at 4.

<sup>56</sup> See, e.g., Press Release, Spotify Technology S.A., Shareholder Letter Q4 2020 (Feb. 3, 2021), [https://s22.q4cdn.com/540910603/files/doc\\_financials/2020/q4/Shareholder-Letter-Q4-2020-FINAL.pdf](https://s22.q4cdn.com/540910603/files/doc_financials/2020/q4/Shareholder-Letter-Q4-2020-FINAL.pdf); Spotify Technology S.A., Form 6-K Report of Foreign Private Issuer (2020) [https://s22.q4cdn.com/540910603/files/doc\\_financials/2020/q3/69e72911-517a-47bb-ab3e-1b1248654d1a.pdf](https://s22.q4cdn.com/540910603/files/doc_financials/2020/q3/69e72911-517a-47bb-ab3e-1b1248654d1a.pdf).

<sup>57</sup> 85 FR at 22561.

<sup>58</sup> *Id.*; 79 FR 56190, 56206 (Sept. 18, 2014); see SONA NPRM Comment at 3 (“[S]trongly endors[ing] the Copyright Office’s rejection of any confidentiality restrictions on the use of royalty statements issued to copyright owners by the MLC.”). The Office similarly declined to adopt the DLC’s proposal that copyright owners (and their designated agents) could receive confidential information, “so long as they sign an appropriate confidentiality agreement with the MLC.” 85 FR at 22561; see DLC *Ex Parte* Letter #2 at 5; see DLC Reply NOI Comment at 28; 37 CFR 380.5(c)(3).

<sup>59</sup> Similarly, the administrative record contains no indicia that direct, voluntary licensing typically include restrictions on the uses of information in royalty statements by copyright owners.

<sup>60</sup> See 85 FR at 22561.

<sup>61</sup> See 85 FR at 22529; 85 FR 58160, 58162 (Sept. 17, 2020) (“This information is provided to copyright owners under the song-by-song license. It will continue to be reported by DMPs to the MLC as part of their monthly reports of usage, and the MLC intends to pass along this information to copyright owner.”).

<sup>62</sup> DLC NPRM at 4 (citing 17 U.S.C. 115(d)(12)(C)).

<sup>63</sup> 37 CFR 210.29(c)(4)(v).

<sup>64</sup> MLC NPRM Comment at 2; FMC NPRM Comment at 1.

<sup>65</sup> MLC NPRM Comment at 2.

information that the MLC or DLC receives in connection with leasing office space or equipment, requisitioning supplies, or making other contractual arrangements.”<sup>66</sup> FMC asserts that “[f]inancial or business terms that could be used for commercial advantage’ is an inherently problematic category definition when some DSPs and some copyright owners have seemed eager to use every piece of available data for their commercial advantage, if they can think of a possible way to do so.”<sup>67</sup>

The Office agrees that cabining “confidential information” to include “sensitive financial or business information” disclosed by digital music providers, significant non-blanket licensees, or copyright owners (or any of their authorized agents or vendors) to the mechanical licensing collective or digital licensee coordinator would help reasonably ensure that the Office’s regulations apply in relation to the administration of the section 115 statutory license, as opposed to information provided to the MLC and DLC more generally (e.g., supply contracts). The interim rule accordingly adjusts the definition of “confidential information” to mean sensitive financial or business information disclosed by digital music providers, significant non-blanket licensees, and copyright owners (or any of their authorized agents or vendors) to the mechanical licensing collective or digital licensee coordinator. With respect to FMC’s position that the phrase “financial or business terms that could be used for competitive disadvantage or be used for commercial advantage” could apply to data generally—to even non-confidential information—the Office notes that the phrase already modifies “sensitive financial or business information” to exclude broader types of information, and is also limited by the enumeration of non-confidential information articulated above.

ARM, while asserting that the proposed “general definition is appropriate,” asks that the definition specifically include “information such as royalty rates and other provisions of agreements between recorded music companies and digital service providers.”<sup>68</sup> The MLC supports ARM’s position.<sup>69</sup> In recognition of the need to protect sensitive data in agreements between recorded music companies and

DMPs, the interim rule amends the definition of “confidential information” to also mean sensitive data concerning agreements between sound recording companies and digital music providers.

At the MLC’s suggestion, the proposed rule excluded from the definition of “confidential information,” top-level compilation data presented in an anonymized format that does not allow identification of such data as belonging to any digital music provider, significant nonblanket licensee, or copyright owner.<sup>70</sup> Both the MLC and DLC incorporated this language into their respective proposed regulatory language,<sup>71</sup> and no commenters objected. Accordingly, the interim rule adopts this aspect of the proposed rule without modification.

Commenters supported the definition of “confidential information” including “information submitted by a third party that is reasonably designated as confidential by the party submitting the information,” as well as “usage data and other sensitive data used to compute market shares when distributing unclaimed accrued royalties, sensitive data shared between the MLC and DLC regarding any significant nonblanket licensee, and sensitive data concerning voluntary licenses or individual download licenses administered by and/or disclosed to the MLC.”<sup>72</sup> In their respective proposals, the MLC and DLC retained the Office’s proposed provisions stating that “confidential information” does *not* include “documents or information that are public or may be made public by law or regulation,” or “documents or information that may be made public by law or that at the time of delivery to the MLC or DLC is public knowledge.”<sup>73</sup> By contrast, ARM expresses concern with the phrase “information that may be made public by law,” saying it is “unclear,” and that “[w]hen inserted in an exception to the general definition of Confidential Information, that phrase could be read to say that any information the disclosure of which is not otherwise prohibited by law is excluded from the definition of Confidential Information, meaning that

information only qualifies as Confidential Information when its disclosure is otherwise prohibited by law.”<sup>74</sup> The Office believes the language is reasonably clear, and notes that the phrase “information that may be made public by law” is meant to cover information for which the Office’s own regulations require certain disclosures from DMPs and significant nonblanket licensees that would not be considered confidential. This intention is made clear by subsequent subparagraphs enumerating these categories. After carefully considering these comments, the interim rule retains these aspects of the proposed definition.

Finally, ARM contends that because this rule focuses on the protection of information, “referring to *documents* uniquely in the exclusions from the definition of Confidential Information creates interpretive issues,” as documents “embody information” and “a document that contains some Confidential Information should not be excluded from protection simply because it also includes some other information that is excluded from the definition of Confidential Information.”<sup>75</sup> ARM maintains that “the exceptions should apply only to information, and not to some potentially broader category of documents.”<sup>76</sup> The Office agrees that the regulation intends to prevent the improper use or disclosure of confidential information. The Office also agrees that a document containing both confidential and non-confidential information should be extended protection, and did not suggest otherwise when issuing the proposed rule. Rather, the proposed rule identified specific documents (e.g., notices of nonblanket activity) and sources of information (e.g., the public musical works database) for which the Office’s regulations require disclosure and to which confidentiality restrictions would not apply.

Accordingly, the Office has adjusted the phrase “documents or information that are public or may be made public by law or regulation” to refer solely to “information.” By focusing on “information” as opposed to “documents,” the rule clarifies that the MLC and DLC would be prohibited from disclosing documents containing “confidential information” disclosed by digital music providers, significant non-blanket licensees, and copyright owners (or any of their authorized agents or vendors) or third parties that reasonably designate information as confidential—

<sup>70</sup> 85 FR at 22562; MLC Initial NOI Comment at 30; MLC Reply NOI Comment App. at 27.

<sup>71</sup> MLC NPRM Comment App. at ii; DLC NPRM Comment Add. at A–2.

<sup>72</sup> 85 FR at 22567; see MLC NPRM Comment at 8 (stating that the phrase “information submitted by a third party that is reasonably designated as confidential by the party submitting the information” “can largely be integrated into this definition of Confidential Information”); DLC NPRM Comment Add. at A–1; ARM NPRM Comment at 11.

<sup>73</sup> MLC NPRM Comment App. at i–ii; DLC NPRM Comment Add. at A–1.

<sup>74</sup> ARM NPRM Comment at 5.

<sup>75</sup> *Id.* at 4–5.

<sup>76</sup> *Id.* at 5.

<sup>66</sup> *Id.*

<sup>67</sup> FMC NPRM Comment at 1.

<sup>68</sup> ARM NPRM Comment at 4; see *id.* at 12–14.

<sup>69</sup> MLC NPRM Comment at 20 (“[C]onfidential information for particular sound recording licensors shall not be disclosed to copyright owners, songwriters or digital music providers.”).

even in cases where the MLC or DLC may have created the underlying documents.<sup>77</sup> The Office is retaining, however, the provisions identifying specific documents that the Office's regulations require to be disclosed (*e.g.*, notices of license, the MLC's annual report) to clarify that they do not embody confidential information, subject to any exceptions included in the relevant regulatory section (*e.g.*, addendums to notices of license, to the extent they provide a description of any applicable voluntary license or individual download license the digital music provider is, or expects to be, operating under concurrently with the blanket license).

#### 4. Personal Information

In response to stakeholder concern about the disclosure of sensitive personal information, particularly relating to copyright owner information,<sup>78</sup> the proposed rule included in the definition of "confidential information" "sensitive personal information, including but not limited to, an individual's Social Security number, taxpayer identification number, financial account number(s), or date of birth (other than year)." <sup>79</sup> In response, SONA generally agrees with the proposed definition, but believes it "should explicitly include other instances of 'personal information,' including home address and home phone number." <sup>80</sup> CISAC & BIEM maintain that date of birth should be confidential, noting that "creators often wish to keep [it] confidential in order to protect their image." <sup>81</sup>

<sup>77</sup> See ARM NPRM Comment at 6 n.7 (stating that restrictions on "confidential information of a third party (such as a recorded music company)" should not be lifted "merely because the MLC or DLC wrote down the third-party confidential information in a new document").

<sup>78</sup> CISAC & BIEM Reply NOI Comment at 8 (encouraging "the Office to adopt suitable regulations that aim to protect sensitive and/or private information from public disclosure"); MAC Reply NOI Comment at 2–3 (noting that "certain information such as . . . personal addresses should obviously be kept out of public documents").

<sup>79</sup> 85 FR at 22562.

<sup>80</sup> SONA NPRM Comment at 3.

<sup>81</sup> CISAC & BIEM NPRM Comment at 1. CISAC & BIEM also maintain that "[e]xisting regulations, such as the GDPR, can be used as a reference for the protection of personal data." CISAC & BIEM NPRM Comment at 3. While the Office does not disagree that the MLC may use GDPR as a reference, the interim rule does not incorporate GDPR. As noted previously by the Office, the MLC has committed to establishing an information security management system that is certified with ISO/IEC 27001 and meets the EU General Data Protection Regulation requirements, and other applicable laws. 84 FR at 32290 (citing Proposal of Mechanical Licensing Collective, Inc. Submitted in Response to U.S. Copyright Office's December 21, 2018, Notice of Inquiry, at 50 (Mar. 21, 2019). The

Having carefully considered these issues, the Office has adjusted the interim rule to include birth year in the definition of confidential information.<sup>82</sup> Because the statute requires the musical works database to make contact information for musical work copyright owners for matched works publicly available,<sup>83</sup> the interim rule includes "home address or personal email" in the definition of "confidential information" to the extent they are "not musical work copyright owner contact information as required under 17 U.S.C. 115(d)(3)(E)(ii)(III)." <sup>84</sup>

#### 5. Information Made Publicly Available to the Office or Copyright Royalty Judges

Under the proposed rule, "confidential information" excluded information made publicly available by the MLC or DLC pursuant to participation in proceedings before the Office or Copyright Royalty Judges (including proceedings to redesignate the MLC or DLC).<sup>85</sup> In response, the DLC states that "if this provision is meant to only cover material that the DLC and MLC have voluntarily (and with appropriate authority) filed in a CRB or Copyright Office docket publicly and without any restrictions, the provision is unnecessary, because by definition such material is not confidential." <sup>86</sup> The DLC also contends that the reference "will lead to considerable confusion," as "[f]ilings in CRB proceedings are governed by comprehensive protective orders, and those orders should determine whether material is or is not confidential." <sup>87</sup> ARM similarly asserts that this specific reference to Office and Copyright

MLC has also expressed its "commit[ment] to maintaining robust security to protect confidential user data, and that it contractually requires vendors to maintain robust security to protect confidential information handled for the MLC." MLC *Ex Parte* Letter Jan. 29, 2020 ("MLC *Ex Parte* Letter #1") at 4.

<sup>82</sup> The MLC does not intend to include date of birth in the public musical works database. MLC NOI Comment at 16, U.S. Copyright Office Dkt. No. 2020–8, available at <https://beta.regulations.gov/docket/COLC-2020-0006>. In a parallel rulemaking, the Office issued regulations prohibiting the MLC from including data of birth in the database. See 37 CFR 210.31(g).

<sup>83</sup> 17 U.S.C. 115(d)(3)(E)(ii)(III).

<sup>84</sup> In a parallel rulemaking, the Office issued a proposed rule prohibiting the mechanical licensing collective from "includ[ing] 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)." 85 FR at 58189.

<sup>85</sup> 85 FR at 22562.

<sup>86</sup> DLC NPRM Comment at 7.

<sup>87</sup> *Id.*

Royalty Board proceedings should be removed in the definition of "confidential information," as "[t]he MLC and DLC should not have the power to make other entities' confidential information non-confidential by disclosing it publicly in a proceeding," and that rather than an exception to the definition of "confidential information," "it would be more consistent with protection of third-party confidential information . . . to treat disclosure in proceedings" through the proposed rule's provision stating that the MLC and DLC may disclose confidential information to "[a]ttorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order or agreement." <sup>88</sup> For its part, the MLC does not object to including this provision.<sup>89</sup>

After consideration, the Office has adjusted this aspect of the proposed rule by eliminating the reference to "information made publicly available by the mechanical licensing collective or digital licensee coordinator pursuant to participation in proceedings before the Office or Copyright Royalty Judges." The Office agrees that this specific reference is not necessary because information is no longer confidential once it has been publicly disclosed voluntarily and without any restrictions (and with appropriate authority). The Office retains the provision that excludes "information that is public" from the definition of "confidential information" so as to cover authorized public filings by the MLC or DLC with the Office or Copyright Royalty Board.

#### 6. Confidentiality as to a Party's Own Information

In the definition of "confidential information," the proposed rule stated that documents or information created by a party will not be considered confidential with respect to usage of those documents or information by the same party (*e.g.*, documents created by the DLC should not be considered confidential with respect to the DLC).<sup>90</sup> ARM agrees that it "makes sense" to "avoid imposing on the MLC or DLC a duty to protect its own information," but advises against implementing this principle as part of the definition of "confidential information." <sup>91</sup> ARM

<sup>88</sup> ARM NPRM Comment at 6; see 85 FR at 22568.

<sup>89</sup> See MLC NPRM Comment App. at ii.

<sup>90</sup> 85 FR at 22562.

<sup>91</sup> ARM NPRM Comment at 6.

maintains that, for example, the provision of the proposed rule intending to prevent the MLC and DLC from imposing use and disclosure restrictions on their board members in addition to those contemplated by the regulations “may not achieve its intended effect” if the MLC’s own confidential information “is not included in the defined term Confidential Information as to the MLC.”<sup>92</sup> ARM contends that “[t]he principle of not restricting an entity’s use or disclosure of its own confidential information is typically accomplished in nondisclosure agreements by carefully drafting the substantive provisions so as to limit disclosure and use of other entities’ confidential information, rather than one’s own,” and “[t]hat seems like a preferable approach here.”<sup>93</sup> Though not expressly commenting on this issue, in its proposed regulatory language the DLC excludes the paragraph referencing use of a party’s own documents or information.<sup>94</sup> For its part, the MLC suggests revising the paragraph to “documents or information concerning a party, to the extent such party authorizes the usage of such documents or information.”<sup>95</sup>

The Office has adjusted the interim rule to remove the paragraph referencing “documents or information created by a party” from the definition of “confidential information.” Because the definition of “confidential information” has been revised to mean sensitive financial or business information disclosed by digital music providers, significant non-blanket licensees, or copyright owners (or any of their authorized agents or vendors) to the MLC or DLC, and because the rule clearly restricts use and disclosure of such information by the MLC and DLC (as discussed below), this paragraph is no longer necessary. As described below, the Office has also adopted provisions relating to the confidentiality of MLC and DLC internal information. Should the Office learn of instances where a party is prevented from using or disclosing its own confidential information under the regulations, the Office will consider any necessary adjustments.

### B. Disclosure and Use of Confidential Information

#### 1. Proposed Rule’s Approach to Disclosure and Use of Confidential Information

The proposed rule included various categories of permitted disclosure and use by MLC and DLC employees, board and committee members of the MLC and DLC (and their respective employers), and vendors and agents of the MLC and DLC. Given the somewhat divergent views from the MLC and DLC in response to the NOI, and the need for regulatory language to accommodate unforeseen issues, the proposed rule was intended to provide parity in access to confidential information, rather than hard and fast categories prohibiting disclosure of information relevant to, or accessed by, digital music providers or music publishers.<sup>96</sup> The proposed rule permitted the following disclosures, while requiring all individuals receiving confidential information to execute a written confidentiality agreement:<sup>97</sup>

- Employees of the MLC or DLC may receive confidential information.
- Agents, consultants, vendors, and independent contractors of the MLC or DLC may receive confidential information, only when necessary to carry out their duties.
- Other individuals authorized by the MLC may receive confidential information, but only to the extent necessary for such persons to know such information and only when necessary for the MLC to perform its duties.
- Non-DLC members of the MLC’s board or statutory committees as well as DLC representatives on the MLC’s board or statutory committees may receive confidential information only on a need-to-know basis and to the extent necessary to carry out their duties.
- The MLC and DLC may disclose confidential information to qualified auditors or outside counsel under the statutorily-permitted audits.<sup>98</sup>
- The MLC and DLC may disclose confidential information to the Office, Copyright Royalty Board, and federal courts by parties to their proceedings, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order.
- DLC representatives who serve on the board of directors or committees of

the MLC may share confidential information with individuals:

- Serving on the board of directors and committees of the DLC, but only to the extent necessary for such persons to know such information and only when necessary to carry out their duties for the DLC.
- Employed by DLC members, only to the extent necessary for such persons to know such information and for the DLC to perform its duties.

The proposed rule included the following use restrictions for confidential information:<sup>99</sup>

- The MLC, including its employees, agents, consultants, vendors, independent contractors, and non-DLC members of the MLC board of directors or committees, shall not use any confidential information for any purpose under than for section 115 activities for the MLC.<sup>100</sup>
- The DLC, including its employees, agents, consultants, vendors, independent contractors, members of the DLC board of directors or committees, and DLC representatives serving on the board of directors or committees of the MLC, shall not use any confidential information for any purpose other than section 115 activities for the DLC.<sup>101</sup>
- Individuals employed by DLC members who receive confidential information from DLC representatives would be prohibited from using confidential information for any purpose other than for work performed during the ordinary course of business for the DLC or MLC.

#### 2. Interim Rule—Disclosure of Confidential Information

Comments in response to disclosure requirements under the proposed rule were mixed. As discussed below, the DLC objected to this aspect of the proposed rule, maintaining that members of the MLC’s board of directors and committees should not have access to DMP-specific information relating to sensitive financial or business information. By contrast, the MLC

<sup>99</sup> 85 FR at 22567.

<sup>100</sup> The specific provision stated that they “shall not use any Confidential Information for any purpose other than determining compliance with statutory license requirements, royalty calculation, collection, matching, and distribution, and activities related directly thereto, in performing their duties during the ordinary course of their work for the MLC.” *Id.*

<sup>101</sup> The specific provision stated that they “shall not use any Confidential Information for any purpose other than determining compliance with statutory license requirements, royalty calculation, collection, matching, and distribution, and activities related directly thereto, in performing their duties during the ordinary course of their work for the DLC.” *Id.*

<sup>96</sup> See 85 FR at 22564.

<sup>97</sup> 85 FR at 22567.

<sup>98</sup> The MMA expressly permits audits by copyright owners of the MLC’s “books, records, and data,” 17 U.S.C. 115(d)(3)(L)(i)(II), and by the MLC of digital music providers’ “books, records, and data,” *id.* at 115(d)(4)(D)(i)(II).

<sup>92</sup> *Id.*

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

<sup>94</sup> DLC NPRM Comment Add. at A–2.

<sup>95</sup> MLC NPRM Comment App. at ii.



asserted that MLC governance requires seeing DMP-specific information, subject to appropriate written confidentiality agreements and the restriction that they not see information relating to specific, identified copyright owners. Other commenters supported either a more limited or a broader approach. These comments are discussed in turn below.

The DLC contends that “it is absolutely critical that the Office maintain a strict firewall between the MLC Board and the sensitive information provided by digital music providers to the MLC,”<sup>102</sup> and that “[i]t would likewise be inappropriate for the MLC Board to gain information about the identity of digital music providers’ voluntary license partners, or the terms of those licenses.”<sup>103</sup> The DLC suggests that the MLC’s forty employees “are the ones who should be running the day-to-day operations of the MLC, and reporting high-level, anonymized, aggregate information to the Board, sufficient for the Board to engage in oversight.”<sup>104</sup> The DLC states that “the MMA requires the MLC’s officers to be independent of the Board, prohibiting anyone serving as an officer of the MLC to simultaneously ‘also be an employee or agent of any member of the board of directors of the collective or any entity represented by a member of the board of directors,’” and that “[i]t would be improper for MLC Board members to circumvent this restriction by becoming directly involved in the day-to-day operations of the MLC, especially if it means demanding special access to commercially sensitive information from digital music providers as a result.”<sup>105</sup> The DLC expresses concern about music publishers serving on the MLC Board and having access to sensitive financial and business information about DMPs, as they would “gain a special advantage in any commercial negotiations with [a] digital music provider,” which “harms both the digital music providers, and (crucially) publishers that do not serve on the Board, who will be at a competitive disadvantage.”<sup>106</sup>

The DLC proposes that “[a]t most, members of MLC and DLC boards and committees should be given access only

to aggregated and anonymized data—a category of information that the Proposed Rule already excludes from the definition of Confidential Information.”<sup>107</sup> The DLC also argues that “the final rule needs to address in some manner the confidentiality of information that the MLC and DLC themselves generate as part of their own operations, while maintaining the ability for DLC members to get and share information related to MLC operations.”<sup>108</sup> To achieve this, the DLC proposes creating categories of “MLC Internal Information” and “DLC Internal Information” that may be more widely shared amongst the MLC and DLC because these categories would encompass information that “may be confidential from the perspective of the MLC and DLC,” but do not include “information specific to a particular digital music provider or licensee,” and so are “less likely to create a risk that the Office expressed concern about—of ‘confidential information from being misused by competitors for commercial advantage.’”<sup>109</sup>

The DLC’s proposal would also specify conditions under which DLC members of the MLC board and committees could “share information about MLC operations with its membership, and with appropriate personnel within DLC member companies,” as well as DLC activities.<sup>110</sup> Under the DLC’s approach, the MLC could share MLC Internal Information with representatives of the DLC who serve on the board of directors or committees of the MLC, only to the extent necessary for such persons to know such information, only when necessary to carry out their duties for the DLC, and subject to an appropriate written confidentiality agreement.<sup>111</sup>

<sup>107</sup> DLC NPRM Comment at 6.

<sup>108</sup> *Id.* at 5.

<sup>109</sup> *Id.* at 6–7 (quoting 85 FR at 22564). The DLC proposes defining “MLC Internal Information” as “sensitive financial or business information created or collected by the mechanical licensing collective for purposes of its internal operations, such as personnel, procurement, or technology information.” DLC *Ex Parte* Letter Dec. 11, 2020 (“DLC *Ex Parte* Letter #8”) at 5. The DLC also proposes that “MLC Internal Information” would be subject to certain exclusion provisions in the proposed rule so as not to include documents or information that are public or may be made public as well as top-level compilation data presented in anonymized format. DLC *Ex Parte* Letter #8 at 5. The DLC similarly proposes a category of information called “DLC Internal Information” to cover sensitive financial or business information created or collected by the digital licensee coordinator for purposes of its internal operations. DLC NPRM Comment at 6–7, Add. A–2–A–3; DLC *Ex Parte* Letter #8 at 5.

<sup>110</sup> DLC NPRM Comment at 5.

<sup>111</sup> *Id.* at Add. A–3. As discussed more below, the DLC proposes that confidentiality agreements

The DLC proposes that DLC recipients of this information may further share such MLC Internal Information with (1) employees, agents, consultants, vendors, and independent contractors of the DLC, only to the extent necessary for the purpose of performing their duties during the ordinary course of their work for the DLC, only to the extent necessary for such persons to know such information, subject to an appropriate written confidentiality agreement; (2) individuals serving on the board of directors and committees of the DLC, only to the extent necessary for such persons to know such information and only when necessary to carry out their duties for the DLC, subject to an appropriate written confidentiality agreement; and (3) individuals otherwise employed by members of the DLC, only to the extent necessary for such persons to know such information and only when necessary for the DLC to perform its duties, subject to an appropriate written confidentiality agreement.<sup>112</sup> DLC Internal Information could be shared with members of the DLC board of directors and committees, subject to an appropriate written confidentiality agreement.<sup>113</sup>

By contrast, the MLC contends that it would not “be appropriate to promulgate a regulation that prevents the MLC’s governance from seeing DMP-specific information, subject to appropriate written confidentiality agreements and the restriction that they not see information relating to specific, identified copyright owners.”<sup>114</sup> The MLC asserts that “because the MLC board oversees the blanket license administration and administrative assessment collection processes, [it] must be able to be informed as to compliance with these processes,” and that because “compliance is an individual DMP issue, not an industry

covering MLC Internal Information may be executed by the employers of the DLC representatives serving on the MLC board of directors or committees. DLC NPRM Comment at 3, Add. A–3.

<sup>112</sup> DLC NPRM Comment Add. at A–3.

<sup>113</sup> *Id.* In response to the NOI, the DLC initially proposed making a category of information called “MLC Confidential Information” available to DLC representatives serving on the boards or committees of the MLC, which the DLC defined as “any non-public financial or business information created by the mechanical licensing collective.” DLC Reply NOI Comment Add. at A–22 (emphasis added). In the NPRM, the Office noted that “without more background, the Office [was] not sure this approach [was] advisable. It was not immediately clear to the Office whether the MLC would be able to recreate information that would otherwise not be accessible to board and committee members, and so the Office tentatively conclude[d] that the proposed rule offer[ed] a reasonable alternative.” 85 FR at 22564 n.55.

<sup>114</sup> MLC *Ex Parte* Letter Oct. 15, 2020 (“MLC *Ex Parte* Letter #9”) at 2.

<sup>102</sup> DLC *Ex Parte* Letter Oct. 14, 2020 (“DLC *Ex Parte* Letter #6”) at 5; see *id.* (“This is particularly so because, in addition to the regular usage and royalty reporting that digital music providers will provide to the MLC the Office’s interim rule gives the MLC access to a broad range of additional information through the records of use provision.”).

<sup>103</sup> *Id.* at 6.

<sup>104</sup> *Id.* (citation omitted).

<sup>105</sup> *Id.* (quoting 17 U.S.C. 115(d)(3)(D)(viii)).

<sup>106</sup> *Id.*

issue, it is critical that the MLC governance be informed at the DMP level, not just the industry-aggregate level.”<sup>115</sup> Regarding the MLC’s committees, the MLC “envisions that the Unclaimed Royalties Oversight Committee would review DMP-specific data” to “create policies and procedures to minimize the incidence of unclaimed accrued royalties,” such as “specific examples of potential matches to get a concrete understanding of what types of results fall into different confidence levels” when analyzing matching performance and confidence levels.<sup>116</sup> Finally, regarding the DLC’s proposed categories of “MLC Internal Information” and “DLC Internal Information,” the MLC maintains they are “unnecessary” because the “MLC and DLC can control disclosures of their internal information through appropriate written confidentiality agreements.”<sup>117</sup>

Instead, to “ensure that the MLC board and committee members shall not receive inappropriate confidential information,” the MLC proposes language to “clarify] . . . that no copyright owners or songwriters (which captures all of the MLC’s directors and committee members, except for those representing DMPs) will be shown confidential information of other copyright owners,” and that digital music providers should “not receive] information concerning competitors.”<sup>118</sup> The MLC maintains that “neither DLC appointees, nor publisher or songwriter representatives should be permitted to share confidential information received in their roles as MLC board or committee members with their employers,”<sup>119</sup> and that allowing “disclosure[s] to

employers by any board or committee member, including DLC appointees, would raise significant competitive concerns and jeopardize the MLC’s ability to control, and ensure against, unfettered dissemination of confidential or competitively sensitive information.”<sup>120</sup> The MLC also contends that “MLC board and committee members, regardless of the identity of their employer (*i.e.*, whether a DMP, a publisher, a songwriter or a trade organization) should be subject to the same, strict provisions concerning the confidential information received in connection with their board or committee engagement.”<sup>121</sup> The MLC contends that the proposed conditions limiting access to information only “where necessary to carry out their duties” and “during the ordinary course of their work” is “confusing and unnecessary,” and suggests that “[i]f use of the information is limited to the performance of the MLC’s statutory functions, that should be sufficient.”<sup>122</sup> The MLC says these phrases also “create[] the argument that MLC vendors or contractors would have to use an alternate procedure to perform work without using Confidential Information if such was possible, even where it would be highly inefficient and costly.”<sup>123</sup>

Other comments regarding access of MLC and DLC board and committee members, and DLC member employers, to confidential information generally supported a more limited approach. CISAC & BIEM assert that “[w]hile there is certainly a need for the DLC to access certain Confidential Information to perform its duties, disclosure to individual employees of DLC members is not justified.”<sup>124</sup> Similarly, ARM argues that “it is not apparent that there is any need for board and committee members to share confidential information with their employers, except . . . to give them access to MLC

confidential information to obtain feedback concerning operational policies.”<sup>125</sup> To ARM, “[i]t is not apparent that the MLC board would ever need to discuss confidential information of particular third-party companies,” and “even in the context of considering whether to authorize an enforcement action by the MLC against a particular DMP, it would seem sufficient for the MLC board to understand that MLC management believes the DMP underpaid royalties by a certain aggregate amount.”<sup>126</sup> NMPA recommended that the Office’s regulations adopt the same standard for all board and committee members,<sup>127</sup> and stated that “DLC representatives on the MLC board and [committees] may have access to a host of sensitive confidential information that, if provided to their employers, could put music publishers and DMPs that are not members of the DLC at a competitive disadvantage.”<sup>128</sup> Noting that the MLC’s statutorily-created Operations Advisory Committee “is made up of various operations technology experts at the DMPs and music publishers” who were “presumably selected for their roles precisely because they have the relevant subject matter expertise,” NMPA further stated that because “DLC representatives work for technology companies,” they “are far less likely to need to ‘solicit additional subject matter expertise’ on ‘technical considerations’ from another individual employed by his or her DMP employer than might a music publisher representative on the MLC board or a committee.”<sup>129</sup>

In contrast, the Songwriters Guild of America, Inc. (“SGA”) and the Society of Composers & Lyricists (“SCL”) proposed a broader approach whereby “[n]on-DLC members on the MLC board of directors or committees may receive Confidential Information from the MLC subject to an appropriate written

<sup>125</sup> ARM NPRM Comment at 7–8; *see also* ARM NPRM Comment at 7 (“[T]he MLC simply should not have information about sound recording royalties to share with board and committee members and the like.”); *id.* (“If the MLC were to have access to such information, that kind of information should be protected either through an additional category of Highly Confidential Information that would include recorded music company deal terms and other third-party competitively sensitive information and could not be shared with such persons or through an equivalent mechanism (such as simply prohibiting disclosure of that type of Confidential Information to such persons).”).

<sup>126</sup> *Id.* at 7; *see id.* (noting that MLC committee members’ roles “seem directed to setting policy, rather than digging into the details of particular companies’ activities”).

<sup>127</sup> NMPA NPRM Comment at 3.

<sup>128</sup> *Id.* at 2 (providing music publisher market share data as an example).

<sup>129</sup> *Id.* at 3.

<sup>115</sup> *Id.*; *see also id.* at 3 (stating that “it is appropriate and necessary for the MLC to be permitted to share” information about specific DMP interactions with the MLC regarding “certifications, efforts obligations, or other reporting or royalty payment obligations,” and that such information “can be essential context for substantial decisions as to compliance that the board is tasked in the MMA with overseeing, such as whether to audit, notice a default or take other action against a DMP”).

<sup>116</sup> *Id.* at 2. The MLC does not anticipate its Dispute Resolution Committee or the Operations Advisory Committee needing to view DMP-specific data. *Id.* at 3.

<sup>117</sup> *Id.* at 4.

<sup>118</sup> MLC NPRM Comment at 19; *see id.* at 16 (“[J]ust as music publisher employees who sit on the MLC board or committees should not be permitted to share with their publisher employers confidential information provided to the MLC by competitors of such employer (which the Proposed Regulation does not allow), a DLC appointee employed by a DMP should not be permitted to share with their DMP employer confidential information provided to the MLC by a competitor of such DMP employer.”).

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 15; *see also id.* at 16–17 (“Each DLC appointee was specifically chosen for his or her knowledge and expertise in the relevant subject matter (*e.g.*, individuals chosen to serve on the operations advisory committee have technological and operational expertise),” and “[i]t would be wholly inappropriate to grant these individuals discretion to share the confidential information of copyright owners and other DMPs with any of more than a million people.”).

<sup>121</sup> *Id.* at 19.

<sup>122</sup> *Id.* at 12.

<sup>123</sup> *Id.*

<sup>124</sup> CISAC & BIEM NPRM Comment at 2; *see also id.* (“[A]ny disclosure of Confidential Information should at all times (i) be justified by a ‘need-to-know’ basis, and (ii) be very strictly interpreted in connection to the performance of the relevant duties. Furthermore, (iii) any individual receiving the Confidential Information should always be obliged to execute a Non-Disclosure Agreement (‘NDA’).”).

confidentiality agreement,” and “Confidential Information may be withheld from such members only in those instances in which it is demonstrably unnecessary for such persons to know such information in the course of carrying out their duties for the MLC.”<sup>130</sup>

i. Disclosure of Confidential Information to Mechanical Licensing Collective and Digital Licensee Coordinator Persons and Entities

After carefully considering these comments, the Office concludes that taking a more conservative approach to new issues presented in this rulemaking regarding the protection of sensitive financial or business information disclosed by digital music providers, significant non-blanket licensees, and copyright owners (or any of their authorized agents or vendors) to the mechanical licensing collective or digital licensee coordinator is appropriate. Although the MLC advocates for a generally more open approach than the DLC, both entities acknowledge that improper disclosure of confidential information could be harmful.<sup>131</sup> It is not apparent that the MLC’s board of directors must access *DMP-specific* confidential information in order to generally supervise and “manage the business and affairs of the Collective;”<sup>132</sup> as also raised by the MLC, the Office is mindful of the need to “control, and ensure against, unfettered dissemination of confidential or competitively sensitive information.”<sup>133</sup> The Office is inclined to agree with the DLC that although the MLC’s officers should be overseen by the MLC’s board of directors, the officers should be able to operate generally independently on a day-to-day basis, including when considering information that would be competitively sensitive if disclosed to MLC directors.<sup>134</sup> As noted above, the interim rule adopts the MLC’s proposal of excluding from the meaning of “confidential information” any top-level compilation data presented in anonymized format that does not allow

identification of such data as belonging to any digital music provider, significant nonblanket licensee, or copyright owner.<sup>135</sup> Accordingly, members of the MLC’s board of directors (and committees) will still receive aggregated data to know how the blanket license is functioning and whether remedial actions may be necessary (e.g., the collective’s matching rates and distribution times, royalty collection and distribution, budgeting and expenditures, aggregated royalty receipts and payments). As to the MLC’s examples for which it proposes that access to DMP-specific confidential information would be necessary (i.e., whether to audit, notice a default, or take other action against a DMP), the Office expects that the collective would be able to notify the MLC’s board of directors of such situations without needing to disclose granular details regarding the DMP’s sensitive financial or business information. To the extent future developments challenge this assumption, the Office believes the more prudent approach is to consider whether easing of restrictions is appropriate, as opposed to tightening up disclosure rules after the fact. Once the MLC has progressed in its administration of the blanket license, if there are concrete, specific examples of situations where members of the MLC or DLC boards or committees find themselves requiring access to certain information to fulfill their duties but are prohibited such access under the interim rule, the Office will consider adjustment of its regulations.

Against this backdrop, the interim rule takes the following approach. The mechanical licensing collective shall limit disclosure of confidential information to its employees, agents, consultants, vendors, and independent contractors who are engaged in the collective’s authorized functions under 17 U.S.C. 115(d) and activities related directly thereto and who require access to confidential information for the purpose of performing their duties during the ordinary course of their work for the mechanical licensing collective, subject to an appropriate written confidentiality agreement.<sup>136</sup> In

response to the MLC’s concern regarding the phrase “only when necessary to carry out their duties” being interpreted to require vendors or contractors to use an alternate procedure to perform work without using confidential information if possible (even where it would be highly inefficient and costly), the Office changed the language to read “require access to Confidential Information for the purpose of performing their duties.”<sup>137</sup> The interim rule includes this language because not all employees, agents, consultants, vendors, and independent contractors of the MLC and DLC will need access to confidential information (or the same types of confidential information) to perform their jobs (e.g., receptionists answering telephones for the MLC’s office).<sup>138</sup>

For the reasons discussed, the interim rule precludes the mechanical licensing collective from disclosing confidential information to members of its board of directors or committees, including the collective’s Unclaimed Royalties Oversight Committee, or the DLC’s board of directors or committees. Recipients of confidential information from the MLC shall not disclose such confidential information to anyone else except as expressly permitted in the Office’s regulations, with an exception for qualified auditors or outside counsel conducting statutorily-permitted audits, or attorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena (discussed below).

For parity, the interim rule states that the digital licensee coordinator shall limit disclosure of confidential information to its employees, agents, consultants, vendors, and independent contractors who are engaged in the digital licensee coordinator’s authorized functions under 17 U.S.C. 115(d)(5)(C) and activities related directly thereto, and require access to confidential information for the purpose of performing their duties during the

<sup>137</sup> See 37 CFR 380.5(c)(1) (requiring SoundExchange to limit access to confidential information to “employees, agents, consultants, and independent contractors of the Collective, subject to an appropriate written confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information for the purpose of performing their duties during the ordinary course of their work”); *id.* at 380.24(d)(1) (similar); *id.* at 380.34(d)(1) (similar).

<sup>138</sup> As discussed below, regarding disclosure of MLC Internal Information, the Office made similar adjustments with respect to receipt of such information by parties performing work for the DLC.

<sup>130</sup> SGA & SCL NPRM Comment at 2.

<sup>131</sup> See DLC *Ex Parte* Letter #6 at 6; MLC NPRM Comment at 5, 15.

<sup>132</sup> See The MLC, The MLC Bylaws, <https://themlc.com/sites/default/files/2020-05/Bylaws%20of%20The%20MLC.pdf> (last visited Feb. 6, 2021).

<sup>133</sup> MLC NPRM Comment at 15.

<sup>134</sup> See 17 U.S.C. 115(d)(3)(D)(viii); Conf. Rep. at 4 (“To ensure that the [MLC’s] officers are independent, individuals serving as officers of the collective may not, at the same time, also be an employee or agent of any member of the collective’s Board of Directors or any entity represented by a member of the collective’s Board of Directors.”).

<sup>135</sup> See MLC Initial NOI Comment at 30.

<sup>136</sup> See MLC *Ex Parte* Letter #9 at 5 (proposing general approach). The Office also adjusted some provisions of the interim rule to focus on *disclosure* rather than receipt of information, as the MLC requested. See MLC NPRM Comment at 3 (“A regulation governing the treatment of confidential information, like a confidentiality or nondisclosure agreement, should regulate disclosure, not receipt, of such information, as the party disclosing the information is in the best position to control dissemination of, and to protect, confidential information . . .”).

ordinary course of their work for the digital licensee coordinator, subject to an appropriate written confidentiality agreement. The interim rule also states that the digital licensee coordinator shall not disclose confidential information to members of the digital licensee coordinator's board of directors or committees, or the mechanical licensing collective's board of directors or committees. Recipients of confidential information from the DLC shall not disclose such confidential information to anyone else except as expressly permitted in the Office's regulations, with an exception for qualified auditors or outside counsel conducting statutorily-permitted audits, or attorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena (discussed below).

Notwithstanding the above restrictions, the interim rule clarifies that the mechanical licensing collective shall continue to fulfill its disclosure obligations under section 115 including, but not limited to, delivering royalty statements to copyright owners<sup>139</sup> and providing monthly reports to the digital licensee coordinator identifying any significant nonblanket licensees that are not in compliance with the Office's regulations regarding notices of nonblanket activity and reports of usage for the making and distribution of phonorecords of nondramatic musical works.<sup>140</sup> Because royalty statements could be confidential to copyright owners themselves, and given the MLC's suggestion that regulations should prohibit disclosure of confidential information regarding a "particular, identified copyright owner to other copyright owners (including their agents or representatives) or songwriters,"<sup>141</sup> the interim rule states that members of the MLC's board of directors or committees shall not have access to other musical work copyright owners' royalty statements, except where a copyright owner discloses its own statement to such bodies.<sup>142</sup> For parity, the digital licensee coordinator, including members of the digital licensee coordinator's board of directors or committees, shall be similarly restricted. Under the rule, members of the mechanical licensing collective's

board and committees are not, however, restricted in accessing their own royalty statements from the mechanical licensing collective.

#### Disclosure of MLC Internal Information and DLC Internal Information

As proposed by the DLC, the interim rule also incorporates "MLC Internal Information" as a category of information that can be shared with the MLC board of directors and committees, including representatives of the DLC, subject to an appropriate written confidentiality agreement.<sup>143</sup> To ensure that "MLC Internal Information" does not extend to sensitive business and financial information disclosed by DMPs, copyright owners, and significant nonblanket licensees to the MLC (*i.e.*, "confidential information"), the interim rule defines "MLC Internal Information" as sensitive financial or business information created by or collected by the mechanical licensing collective for purposes of its internal operations, such as personnel, procurement, or technology information.<sup>144</sup> Under the interim rule, "MLC Internal Information" excludes information that is public or may be made public by various avenues, similar to the regulatory definition of "Confidential Information."<sup>145</sup> In addition, the interim rule creates a corresponding category of "DLC Internal Information."

Because "MLC Internal Information" and "DLC Internal Information" do not relate to sensitive business information disclosed by DMPs, significant nonblanket licensees, or copyright owners, the rule does not impose strict disclosure requirements as it does with "confidential information" due to the less-sensitive nature of these information categories. Rather, the rule creates categories of individuals to whom the MLC and DLC *may* disclose "MLC Internal Information" and/or "DLC Internal Information" (subject to a confidentiality agreement), which gives the MLC and DLC some flexibility if

they decide additional disclosure is necessary. The rule also states that the MLC may disclose MLC Internal Information to other individuals in its discretion, subject to the adoption of reasonable confidentiality policies. The rule contains a parallel provision for the DLC and DLC Internal Information. Specifically, the interim rule states that the MLC may disclose MLC Internal Information to members of the MLC's board of directors and committees, including representatives of the DLC who serve on the MLC's board of directors or committees. The interim rule also states that representatives of the DLC who serve on the board of directors or committees of the mechanical licensing collective and receive MLC Internal Information may share such MLC Internal Information with the following persons, who require access to such information for the purpose of performing their duties during the ordinary course of their work for the DLC, subject to an appropriate written confidentiality agreement:

- Employees, agents, consultants, vendors, and independent contractors of the DLC;
- Individuals serving on the board of directors or committees of the DLC or MLC; and
- Individuals otherwise employed by members of the DLC.

Under the interim rule, the DLC may disclose DLC Internal Information to the following persons, subject to an appropriate written confidentiality agreement:

- Members of the DLC's board of directors and committees; and
- Members of the MLC's board of directors and committees.

#### ii. Disclosure of Confidential Information to Non-Mechanical Licensing Collective and Non-Digital Licensee Coordinator Persons and Entities

The proposed rule allowed disclosure of confidential information to attorneys and other authorized agents of parties to proceedings before federal courts, the Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order or agreement.<sup>146</sup> The proposed rule also permitted disclosure to qualified auditors or outside counsel pursuant to the statutorily-permitted audits by the MLC of a digital music provider operating under the blanket license or audits by copyright owners of the MLC. No commenter objected to these provisions, and the MLC, DLC, and

<sup>139</sup> See *id.* at 210.29(c).

<sup>140</sup> See 17 U.S.C. 115(d)(6)(A); 37 CFR 210.25; *id.* at 210.28.

<sup>141</sup> MLC NPRM Comment at 19.

<sup>142</sup> See *id.*, App. at iii (proposing that no copyright owners or songwriters should have access to confidential information of other copyright owners).

<sup>143</sup> See DLC NOI Initial Comment at 23 ("DLC representatives are thus meant to represent the entire digital licensee community, and should be able to share information among DLC membership."); see also *id.* at 28.

<sup>144</sup> See DLC *Ex Parte* Letter #6 at 7 (including "disciplinary files for personnel, or competing vendor bids" as examples of "MLC Internal Information").

<sup>145</sup> The definition of "MLC Internal Information" does not, as proposed by the DLC, exclude "top level, compilation data presented in anonymized format that does not allow identification of such data as belonging to any specific digital music provider, significant nonblanket licensee, or copyright owner." See DLC *Ex Parte* Letter #8 at 5. By definition, "MLC Internal Information" is restricted to information regarding the MLC's internal operations.

<sup>146</sup> 85 FR at 22568.

ARM retained them in their respective proposed statutory text.<sup>147</sup> In light of these comments, the interim rule adopts this aspect of the proposed rule. As noted above, while the rule generally states that recipients of confidential information from the MLC or DLC shall not disclose such confidential information to anyone else except as expressly permitted in the Office's regulations, it creates an exception for qualified auditors or outside counsel conducting statutorily-permitted audits, or attorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena.

### 3. Interim Rule—Restrictions on Use of Confidential Information

In response to multiple commenters expressing concern about MLC vendors expressing the confidential information they acquire while conducting work for the MLC for other purposes,<sup>148</sup> the proposed rule restricted MLC vendors from using confidential information for purposes other than for duties performed during the ordinary course of work for the MLC, including the administration of voluntary bundled licensing of performance and mechanical uses that the MLC itself is prohibited from administering.<sup>149</sup> The proposed rule similarly restricted DLC vendors.<sup>150</sup> In issuing the proposed rule, the Office tentatively declined to adopt the MLC's proposal to preferentially allow "users who submit confidential data to the MLC an ability to voluntarily 'opt in' to share that data for general use by its primary royalty processing vendor, the Harry Fox Agency"

<sup>147</sup> See MLC NPRM Comment App. at v; DLC NPRM Comment Add. at A-4; ARM NPRM Comment at 14.

<sup>148</sup> See, e.g., National Association of Independent Songwriters ("NOIS") et al. Initial NOI Comment at 16 ("The vendors for the MLC should not be . . . able to use information and data that the MLC will gather and control to their competitive advantage. If they are in competition with other entities considered to be similar in nature or can use the data to their own unique proprietary advantage, they should not be eligible to be selected as a vendor."); Lowery Reply NOI Comment at 12 ("If the Copyright Office does not prohibit HFA from selling for other commercial purposes the data it acquires through its engagement by MLC to facilitate the compulsory blanket license, the Congress will have just handed HFA a near insurmountable advantage over its competitors."); see also DLC NPRM Comment at 2, U.S. Copyright Office Dkt. No. 2020-8, available at <https://beta.regulations.gov/docket/COLC-2020-0006>.

<sup>149</sup> 85 FR at 22565; see also 37 CFR 380.5(b) (prohibiting SoundExchange from using "any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto").

<sup>150</sup> 85 FR at 22565.

("HFA"), as the MLC did not detail what it meant by "general use."<sup>151</sup>

FMC and CISAC & BIEM support this aspect of the proposed rule, noting that vendors' use of confidential information other than for duties performed during the ordinary course of work for the MLC or DLC has the potential to increase the risk of anti-competitive harm and conflicts of interest.<sup>152</sup> In a parallel rulemaking, the DLC, FMC, and SoundExchange emphasized the importance of MLC vendors not receiving preferential treatment or market advantage by virtue of their association with the MLC, with FMC stating that "Congress intended to encourage a healthy competitive marketplace for other kinds of licensing businesses and intermediaries," and "it's important that MLC's chosen vendors not be able to leverage their status with the MLC to advantage themselves in other business activities not covered under the MMA."<sup>153</sup> SoundExchange asserted that Congress "intended to preserve a vibrant and competitive marketplace for intermediaries [besides the MLC] who provide other license administration services," and this intent would be frustrated "[i]f the MLC's vendors were to receive an unfair advantage in the music licensing marketplace through means such as preferred access to digital music providers or referrals by the MLC for extrastatutory business opportunities in a manner not available to their competitors."<sup>154</sup> The DLC did not oppose this aspect of the proposed rule,<sup>155</sup> and in a parallel rulemaking,

<sup>151</sup> *Id.* (quoting MLC *Ex Parte* Letter #1 at 4) (citation omitted).

<sup>152</sup> FMC NPRM Comment at 1 ("There should be no provision for HFA to use confidential data for 'general use', even on an opt-in basis. The risk of anti-competitive harm is too great."); CISAC & BIEM NPRM Comment at 3 ("Our organisations support this Proposed Rulemaking because some Vendors may obtain commercially valuable information, use it for their own activities and thus create conflicts of interest.")

<sup>153</sup> FMC NPRM Comment at 1-2, U.S. Copyright Office Dkt. No. 2020-8, available at <https://beta.regulations.gov/docket/COLC-2020-0006>; see also *id.* at 2 ("The Office can require the MLC to disclose what it is doing to prevent any vendor from being too operationally enmeshed with the MLC that it either enjoys an unfair advantage through that relationship, or that it would be practically impossible for another vendor to step in.")

<sup>154</sup> SoundExchange NPRM Comment at 8, U.S. Copyright Office Dkt. No. 2020-8, available at <https://beta.regulations.gov/docket/COLC-2020-0006>.

<sup>155</sup> See DLC NPRM Comment Add. at A-2; DLC *Ex Parte* Letter #6 at 7. The DLC does propose an adjustment to the proposed rule to restrict its vendors from using confidential information to "duties that are made the responsibility of the DLC, under 17 U.S.C. 115(d)(5)(C), including efforts to enforce notice and payment obligations with respect to the administrative assessment." DLC *Ex Parte* Letter #6 at 7.

expressed concern as "to whether the MLC's selected vendors will gain a special competitive advantage in related marketplaces—such as the administration of voluntary licenses—merely by dint of their association with the collective responsible for licensing all mechanical rights in the United States."<sup>156</sup>

For its part, the MLC contends that this aspect of the proposed rule "is overly prescriptive, imposes unnecessary burdens and costs on copyright owners, and is likely not within the scope of the Office's authority."<sup>157</sup> While the proposed rule would restrict only actions of the mechanical licensing collective, the MLC argues that the proposed rule "prevent[s] the MLC's copyright owner members from voluntarily electing to share their own information with the MLC's vendors,"<sup>158</sup> and that "[c]opyright owners that wish to use the MLC's vendors for purposes other than the administration of the blanket license should not have to incur the time and expense to input duplicates of information that can be transferred voluntarily without any transaction costs."<sup>159</sup> NMPA echoes the MLC's position, maintaining that "[w]here a copyright owner provides to HFA its confidential information by virtue of HFA's role as administrator of the blanket license, it may make the most business sense (and be most efficient) to authorize HFA to use that information for the copyright [owners'] other licenses."<sup>160</sup> NMPA also asserts that "HFA gains no special advantage by receiving the same information one time rather than multiple times," but that "copyright owners are decidedly disadvantaged in having to submit multiple but identical data sets."<sup>161</sup>

As noted above, the MMA expressly directs the Office to adopt regulations to, among other things, prevent the improper use of confidential information contained in the mechanical licensing collective's records.<sup>162</sup> The MMA also expressly restricts the mechanical licensing collective to administering the mechanical license,<sup>163</sup> as the MLC

<sup>156</sup> DLC NPRM Comment at 1, U.S. Copyright Office Dkt. No. 2020-8, available at <https://beta.regulations.gov/docket/COLC-2020-0006>.

<sup>157</sup> MLC NPRM Comment at 13.

<sup>158</sup> *Id.* at 4.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> 17 U.S.C. 115(d)(12)(C).

<sup>163</sup> *Id.* at 115(d)(3)(C)(iii) (limiting administration of voluntary licenses to "only [the] reproduction or distribution rights in musical works for covered activities").

acknowledges,<sup>164</sup> and the legislative history reflects Congress's intention that this provision was critical to safeguard continued private competition outside of the MLC's administration of the blanket mechanical license.<sup>165</sup> Given Congress's actions to preserve competition for music licensing vendors and the overwhelming concern from commenters that MLC vendors should not be able to gain commercial advantage due to its association with the MLC, the Office again declines to adopt the MLC's proposal to allow "users who submit confidential data to the MLC an ability to voluntarily 'opt in' to share that data for general use by its primary royalty processing vendor, the Harry Fox Agency."<sup>166</sup>

If the Office were to adopt the MLC's proposal, HFA would receive an advantage for non-mechanical business opportunities not granted to competitors (*i.e.*, confidential information "for purposes other than the administration of the blanket license,"<sup>167</sup> such as the administration of copyright owners' "other licenses"<sup>168</sup>) and preferential access and treatment (*i.e.*, data "by virtue of HFA's role as administrator of

the blanket license,"<sup>169</sup> and "without any transaction costs"<sup>170</sup>). Allowing HFA to benefit from its association with the MLC for business opportunities outside the administration of the blanket license is precisely the scenario multiple commenters have warned against, and is in tension with Congress's deliberate decision to limit the scope of the mechanical licensing collective. Contrary to the MLC and NMPA's position, the Office is not preventing copyright owners from sending their information to a particular vendor; rather, the Office is preventing the MLC from providing its vendor with confidential information in a manner that results in disparate and preferential treatment.

The Office similarly rejects the MLC's proposed language stating that "[n]othing herein shall preclude the party or parties to whom information is confidential from voluntarily transmitting such Confidential Information to a third party with lesser restrictions on use, and nothing herein shall preclude the MLC from assisting in any such voluntary transfer."<sup>171</sup> To the extent this language is suggested to clarify the ability of those outside the MLC to exchange information, the Office finds it unnecessary, and to the extent the language is intended to allow the MLC to facilitate exchange of otherwise confidential information to preferred entities for private use, it would seem to create an end-run around the limitations of the rule.

In the NPRM, the Office noticed a potential alternative to the MLC's proposal. The Office had considered whether to propose language requiring the MLC to offer such information equally to third parties, perhaps restricted to those offering or administering music licensing services, for a reasonable cost, *i.e.*, both the MLC's preferred vendors and others similarly situated in the marketplace.<sup>172</sup> The Office noted that this approach would have the potential benefit of leveraging the unique nature of the MLC database in other aspects of the music ecosystem, without potentially affecting the competitive landscape in ways unrelated to the section 115 license.<sup>173</sup> The MLC and NMPA, however, did not respond regarding this proposed alternative.

After careful consideration, the interim rule adopts this aspect of the proposed rule, with the following slight

modifications. The Office adjusted the interim rule so that instead of stating the MLC "shall not use any Confidential Information for any purpose other than determining compliance with statutory license requirements, royalty calculation, collection, matching, and distribution, and activities related directly thereto," it states that the MLC "shall not use any Confidential Information for any purpose other than the collective's authorized functions under 17 U.S.C. 115(d) and activities related directly thereto."<sup>174</sup> Anyone to whom the MLC discloses confidential information as permitted under the regulations shall not use any confidential information for any purpose other than in performing their duties during the ordinary course of their work for the mechanical licensing collective, with an exception for qualified auditors or outside counsel conducting statutorily-permitted audits, or attorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena. For parity, the interim rule adopts similar language with respect to the DLC and its authorized functions under 17 U.S.C. 115(d)(5)(C).<sup>175</sup>

### C. Safeguarding Confidential Information

Both the MLC and DLC proposed having the MLC and DLC implement policies and procedures to prevent unauthorized access and/or use of confidential information, an approach that seems necessary to effectuate the intent of the regulations.<sup>176</sup> Accordingly, the proposed rule stated that the MLC, DLC, and recipients of confidential information from one of those entities must implement procedures to safeguard against

<sup>174</sup> See MLC NPRM Comment at 10 ("The MLC proposes, at a minimum, clarifying the Proposed Regulation to ensure that the MLC can conduct the statutory functions charged by Congress.").

<sup>175</sup> The Office adjusted the interim rule to align with the DLC's responsibilities under section 115. See DLC NPRM Comment at 7–8.

<sup>176</sup> MLC Initial NOI Comment at 29 (stating "protection of such confidential, private, proprietary or privileged information may be accomplished through a regulation that requires the MLC and the DLC to implement confidentiality policies that prevent improper or unauthorized use of such material by their directors, committee members, and personnel"); DLC Reply NOI Comment Add. at A–21–22 (proposing that the MLC and DLC (and any person authorized to receive confidential information) "must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information").

<sup>164</sup> See MLC NOI Comment at 10, U.S. Copyright Office Dkt. No. 2020–8, available at <https://www.regulations.gov/docket/Browser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2020-0006> ("[B]ecause the MLC is prohibited from licensing rights other than mechanical rights, . . . the MLC agrees with the Office that . . . it is 'unlikely to be prudent or frugal to require the MLC to expend resources to maintain [in the public database] PRO affiliations for rights it is not permitted to license.'") (citing 85 FR at 22576).

<sup>165</sup> See also Senate Judiciary Comm., *Executive Business Meeting*, C–SPAN, at 53:24–53:59 (June 28, 2018), <https://www.c-span.org/video/?447464-1/judiciary> (statement of Sen. Cruz) ("The problem is that there is already right now a functioning marketplace that is doing that—there are many companies today that manage, collect, and distribute mechanical rights for digital music companies and this bill would put them all out of business. . . . The amendment that I filed, what it would do is open up blanket licenses to other entities—to promote competition at a lower price."); *Id.* at 50:41–50:55 (statement of Sen. Cornyn) ("I did want to highlight one issue that's been brought to my attention. The creation of this mechanical licensing collective in the Copyright Office—and precludes any private entity from perhaps providing that same service."); Shirley Halperin, *Music Modernization Act Stares Down Potential Snag*, *Variety* (July 23, 2018), <https://variety.com/2018/music/news/music-modernization-act-blackstone-sesac-congress-senate-1202881536/> (describing issue as endangering prospects for MMA passage); Steve Brachmann, *Compromise on Music Modernization Act Leads to Unconditional Support From Music Industry Organizations*, *IPWatchdog* (Aug. 18, 2018), <https://www.ipwatchdog.com/2018/08/18/compromise-music-modernization-act-music-industry-support/id=100162/> (reporting resolution through amendment limiting the MLC's ability to administer voluntary licenses).

<sup>166</sup> MLC *Ex Parte* Letter #1 at 4.

<sup>167</sup> MLC NPRM Comment at 4.

<sup>168</sup> NMPA NPRM Comment at 4.

<sup>169</sup> *Id.*

<sup>170</sup> MLC NPRM Comment at 4.

<sup>171</sup> MLC NPRM Comment App. at iii.

<sup>172</sup> 85 FR at 22565.

<sup>173</sup> *Id.*

unauthorized access to or dissemination of confidential information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own confidential information or similarly sensitive information.<sup>177</sup> In addition, the proposed rule stated that the MLC and DLC shall each implement and enforce reasonable policies governing the confidentiality of its records.<sup>178</sup>

The MLC and DLC retained this aspect of the proposed rule in their suggested regulatory text.<sup>179</sup> CISAC & BIEM maintain that the “reasonable standard of care” requirement is “vague and does not constitute a sufficient commitment.”<sup>180</sup> As the “reasonable standard of care” is commonly used in U.S. jurisprudence, and in light of a similar provision governing obligations of SoundExchange, the collective designated to administer the section 114 license, this aspect of the proposed rule is retained without modification.<sup>181</sup>

The NPRM also sought public comment on whether the regulations should address instances of inadvertent unauthorized disclosure.<sup>182</sup> The MLC contends that “the circumstances of such inadvertent disclosures, and the consequences of such disclosure are fact-specific” and that it should be afforded flexibility to establish its own policies to “permit the MLC to assess the facts and circumstances giving rise to the inadvertent disclosure and determine the most appropriate way to address and remedy such disclosure.”<sup>183</sup> Similarly, the DLC maintains that instances of inadvertent disclosure should “be addressed on a case-by-case basis.”<sup>184</sup> In light of these

comments, the interim rule does not address inadvertent disclosures.

#### D. Maintenance of Records

The proposed rule also provided that any written confidentiality agreements relating to the use or disclosure of confidential information must be maintained and stored by the relevant parties for at least the same amount of time that certain digital music providers are required to maintain records of use pursuant to 17 U.S.C. 115(d)(4)(A)(iv). At the time of the NPRM, a separate rulemaking proposed a five-year retention period for such records; the Office subsequently adopted a seven-year period in response to public comments in that proceeding.<sup>185</sup>

ARM generally supported this aspect of the proposed rule, but suggested an adjustment to require retention for a defined retention period of “five years after disclosures cease to be made pursuant to [the agreements].”<sup>186</sup> ARM suggests that any confidentiality agreements “should be retained until some years after disclosures cease to be made pursuant to it (such as when an employment relationship ends or the agreement is replaced by a new agreement).”<sup>187</sup> The Office has adopted ARM’s suggestion to tie retention requirements of confidentiality agreements to their dates of effectiveness in order to ensure they are retained for an appropriate period of time. The Office has also extended the retention period for two additional years, similar to records requirements imposed on digital music providers. Accordingly, the interim rule states that any written confidentiality agreements relating to the use or disclosure of confidential information must be maintained and stored by the relevant parties until at least seven years after disclosures cease to be made pursuant to them.

#### E. Confidentiality Designations

The proposed rule did not impose a requirement that confidential information must bear a designation of confidentiality, although the Office noted that the MLC or DLC could presumably impose such a requirement in their own policies.<sup>188</sup> No commenters responded to this aspect of the proposed rule, and so the interim rule does not impose a designation of confidentiality requirement.

<sup>185</sup> See 37 CFR 210.27(m) (generally requiring digital music providers to retain relevant records for seven years).

<sup>186</sup> ARM NPRM Comment at 8–9, 14.

<sup>187</sup> *Id.* at 9.

<sup>188</sup> 85 FR at 22565.

Relatedly, the Office asked in the NPRM whether, in addition to a category of “Confidential Information,” the regulations should provide for a “Highly Confidential Information” category to provide an additional layer of protection for certain documents and information.<sup>189</sup> Neither the MLC nor DLC believe a heightened category of “highly confidential” information is necessary,<sup>190</sup> and ARM “does not have strong views” as long as the regulations prohibit MLC board and committee members and companies that employ MLC and DLC board members from accessing confidential information of third-party companies (including recorded music companies).<sup>191</sup> Given these comments, and (as noted above) because the interim rule precludes the MLC from disclosing sensitive data concerning agreements between sound recording companies and digital music providers to members of the MLC’s board of directors or committees or the digital licensee coordinator’s board of directors or committees, the interim rule does not include a heightened category of “Highly Confidential Information.”

#### F. Nondisclosure Agreements

The MLC and DLC disagree as to whether DLC representatives on the MLC’s board of directors or committees should be required to sign nondisclosure agreements (“NDAs”) in their personal capacities. The DLC initially suggested that only the DLC as an organization should be bound, and not DLC representatives in their personal capacities or as representatives of their employers.<sup>192</sup> Instead, the DLC maintained, confidentiality obligations for the MLC and DLC should operate at “an organization-to-organization level,”<sup>193</sup> as “some companies prohibit [DLC representatives from] taking on such personal liability for actions taken in the scope of employment.”<sup>194</sup> The MLC disagreed, stating that if only the DLC, which lacks assets relatively, is bound by a confidentiality agreement, there would be no recourse against the DLC for breach, and that such a proposal “disincentiv[izes] individuals on the MLC Board and committees from protecting confidential information, as

<sup>189</sup> *Id.* at 22566.

<sup>190</sup> MLC NPRM Comment at 21 (“[T]he MLC does not believe further heightened restrictions are necessary.”); DLC NPRM Comment at 8 (“DLC believes it unnecessary to create an additional category of ‘highly’ confidential . . .”).

<sup>191</sup> ARM NPRM Comment at 8.

<sup>192</sup> DLC Initial NOI Comment at 23.

<sup>193</sup> *Id.*

<sup>194</sup> DLC *Ex Parte* Letter #2 at 6.

<sup>177</sup> 85 FR at 22565; see 37 CFR 380.5(d) (“[SoundExchange] and any person authorized to receive Confidential Information from [SoundExchange] must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.”).

<sup>178</sup> 85 FR at 22565.

<sup>179</sup> See MLC NPRM Comment App. at v; DLC NPRM Comment Add. at A–4.

<sup>180</sup> CISAC & BIEM NPRM Comment at 3.

<sup>181</sup> See 37 CFR 380.5(d) (“The Collective and any person authorized to receive Confidential Information from the Collective must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.”); *id.* at 380.24(e) (similar); *id.* at 380.34(e) (similar).

<sup>182</sup> 85 FR at 22566.

<sup>183</sup> MLC NPRM Comment at 21.

<sup>184</sup> DLC NPRM Comment at 8.

there will be no penalty for unlawful disclosure.”<sup>195</sup>

In the NPRM, the Office was disinclined to require that confidentiality obligations for the MLC and DLC operate at an organization-to-organization level. Instead, the proposed rule stated that the various categories of individuals to receive confidential information do so subject to an appropriate written confidentiality agreement. In response, the MLC “believes that the current Proposed Regulation, which provides that any DLC appointee to the MLC board or committees must sign a confidentiality agreement is the appropriate solution.”<sup>196</sup> The MLC maintains that “[i]f the DLC member company would like its employee to serve as an MLC board or committee member, then it can except the employee from such restriction and allow that individual to serve as a DLC appointee (and thus comply with the confidentiality obligations imposed on all board and committee members),” or else “identify an alternate appointee that can participate with full accountability to the MLC and its members.”<sup>197</sup> By contrast, the DLC asserts that because it proposes disclosing only MLC Internal Information to MLC and DLC board and committee members (as discussed above), the “[l]ess-sensitive nature of this internal MLC and DLC information diminishes to a substantial degree the rationale for imposing potential *personal* liability as a condition for board and committee membership.”<sup>198</sup> The DLC also notes that it has adopted a confidentiality policy that operates between itself and DLC member companies, which “allows the individual DLC representatives to share information and consult as needed within their companies, without the cumbersome process of requiring each person that is so consulted to first sign a confidentiality agreement with DLC.”<sup>199</sup>

The Office recognizes that the DLC would prefer for DLC representatives to be able to easily share MLC Internal Information and consult as needed within their companies, but the Office is mindful that sensitive information regarding the MLC’s internal operations needs appropriate protections in place to prevent improper disclosure or use. As noted in the NPRM, binding individuals in their personal capacities provides an avenue of recourse and is a

common practice in model protective orders used in the analogous context of preventing confidential information produced through litigation discovery from being improperly disclosed or misused.<sup>200</sup> Also, the DLC’s existing confidentiality policy with its members relates to information that would likely fall under the definition of “DLC Internal Information,” not information relating to the MLC’s operations.<sup>201</sup> Accordingly, the Office again declines the DLC’s proposal that confidentiality obligations for the MLC and DLC operate at an organization-to-organization level for both “confidential information” and “MLC Internal Information.”<sup>202</sup> The Office does not, however, intend to interfere with the DLC and its members having agreements at an organization-to-organization level to allow sharing of “DLC Internal Information” and consulting as needed regarding such information within their organization companies without having each individual signing an agreement in his or her personal capacity.

In response to commenters’ concern about the MLC requiring additionally restrictive NDAs for its board and committee members,<sup>203</sup> the proposed rule prevented the MLC and DLC from imposing additional restrictions relating to the use or disclosure of confidential information, beyond those imposed by the Office’s regulations, as a condition for participation on a board or

committee.<sup>204</sup> The proposed rule stated that “[t]he use of confidentiality agreements by the MLC and DLC shall be subject to the other provisions” of the Office’s confidentiality regulations, and “shall not permit broader use or disclosure of Confidential Information than permitted under” the regulations.<sup>205</sup> The proposed rule also stated that the MLC and DLC “may not impose additional restrictions relating to the use or disclosure of Confidential Information, beyond those imposed by this provision, as a condition for participation on a board or committee.”<sup>206</sup>

The MLC objected to these provisions, contending that “[l]imiting the scope of the ‘appropriate written confidentiality agreements’ to agreements that provide for no more and no less than what is already specified in the regulation renders meaningless the added qualifier that the use or disclosure shall be made subject to an ‘appropriate written confidentiality agreement.’”<sup>207</sup> The MLC suggests that additional appropriate restrictions not addressed in the regulations—such as “provisions requiring that adequate notice be given prior to any disclosure in response to a subpoena or other legal process” or “provid[ing] for the return or destruction of confidential materials on demand or at the end of a service period”—would be “imprudent” not to include in confidentiality agreements, but “could be considered additional restrictions on use” beyond those in the Office’s regulations.<sup>208</sup> By contrast, FMC supports the proposed rule, expressing its “appreciat[ion] that the Office has made it clear that the MLC cannot create additional restrictions on the use and disclosure of confidential information beyond the Office’s regulations,” which “will help writers and composers have an extra degree of confidence about the healthy internal functioning of the MLC and know that board and committee members who have concerns would feel free to speak freely to impacted copyright owners and writers.”<sup>209</sup>

The Office acknowledges that its regulations may not address all appropriate use restrictions and that confidentiality agreements may need to fill in some gaps (e.g., provisions regarding notice before disclosures in response to subpoenas or other legal processes, the return or destruction of confidential materials). The Office is

<sup>200</sup> 85 FR at 22566.

<sup>201</sup> See DLC NPRM Comment Ex. 1 (stating that information covered by the agreement “includes, but is not limited to personnel issues; information that is proprietary to, or the intellectual property of, the DLC or the other Member Companies; unpublished data and manuscripts; draft standards and policies; deliberations; and other information that has not been authorized for disclosure, has not become public and that is obtained through a Member Company’s or an individual’s relationship with the DLC”).

<sup>202</sup> One commenter suggests that the MLC make its form confidentiality agreement public. Castle NPRM Comment at 4. The MLC advised that it “does not know whether its confidentiality expectations for board and committee members will all be captured in a template agreement,” but that “as part of its ongoing and general informational activities, in addition to following the Office’s regulations as to confidential information, the MLC intends to provide information to the public as to any additional confidentiality expectations that it has for its board and advisory committee members, whether through posting template or exemplar agreements or otherwise identifying such confidentiality expectations.” MLC *Ex Parte* Letter #9 at 4.

<sup>203</sup> The DLC maintained that Office’s regulations “should be the ceiling on any confidentiality requirements” by the MLC. DLC Reply NOI Comment at 28. NOIS, joined by individual stakeholders, contended that there “must be a rejection of any incremental NDA put forth by the MLC to its board and/or committee members that requires anything not mandated by the MMA.” NOIS et al. Initial NOI Comment at 16.

<sup>204</sup> 85 FR at 22566.

<sup>205</sup> *Id.* at 22568.

<sup>206</sup> *Id.*

<sup>207</sup> MLC NPRM Comment at 17.

<sup>208</sup> *Id.* at 17–18.

<sup>209</sup> FMC NPRM Comment at 2.

<sup>195</sup> MLC Reply NOI Comment at 41.

<sup>196</sup> MLC NPRM Comment at 22.

<sup>197</sup> *Id.* at 23.

<sup>198</sup> DLC NPRM Comment at 9.

<sup>199</sup> *Id.*



mindful, however, that the statute directs the Office to promulgate regulations to prevent the improper use or disclosure of confidential information and that any confidentiality agreements should not be inconsistent with the Office's regulations.<sup>210</sup> To accommodate the MLC's concerns in the context of the regulatory framework, the interim rule is adjusted so that rather than requiring confidentiality agreements to be in compliance with the Office's regulations, they must not be inconsistent with them. This should afford the MLC and DLC sufficient flexibility, while ensuring that any resulting confidentiality agreements do not circumvent the spirit of the Office's regulations. Also, because the interim rule prohibits the MLC and DLC from sharing "confidential information" with members of their boards of directors and committees, the interim rule removes the provision prohibiting the MLC and DLC from imposing additional restrictions relating to the use or disclosure of confidential information, beyond those imposed by the regulations, as a condition for participation on a board or committee. Should the Office learn of the MLC or DLC inappropriately conditioning disclosure of MLC Internal Information or DLC Internal Information, the Office will consider whether further adjustment is necessary.

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

Copyright, Phonorecords, Recordings.

#### Interim Regulations

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

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

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

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

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

- 2. Add § 210.34 to read as follows:

<sup>210</sup> The Office declines to expressly adopt the MLC's proposed language that "[a]nyone receiving Confidential Information under this subsection may not further disclose such Confidential Information except as expressly authorized in their written confidentiality agreement." MLC NPRM Comment App. at iii.

#### **§ 210.34 Treatment of confidential and other sensitive information.**

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

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

(1) "Confidential Information" means sensitive financial or business information, including trade secrets or information relating to financial or business terms that could cause competitive disadvantage or be used for commercial advantage, disclosed by digital music providers, significant nonblanket licensees, and copyright owners (or any of their authorized agents or vendors) to the mechanical licensing collective or digital licensee coordinator. "Confidential Information" also means sensitive personal information, including but not limited to, an individual's Social Security number, taxpayer identification number, financial account number(s), or date of birth.

(i) "Confidential Information" specifically includes usage data and other sensitive data used to compute market shares when distributing unclaimed accrued royalties, sensitive data provided by digital music providers related to royalty calculations, sensitive data shared between the mechanical licensing collective and digital licensee coordinator regarding any significant nonblanket licensee, sensitive data concerning voluntary licenses or individual download licenses administered by and/or disclosed to the mechanical licensing collective, and sensitive data concerning agreements between sound recording companies and digital music providers. "Confidential information" also includes sensitive financial or business information disclosed to the mechanical licensing collective or digital licensee coordinator by a third party that is reasonably designated as confidential by the party disclosing the information, subject to the other provisions of this section.

(ii) "Confidential Information" does not include:

(A) Information that is public or may be made public by law or regulation, including but not limited to information made publicly available through:

(1) Notices of license, excluding any addendum that provides a description of any applicable voluntary license or individual download license the digital music provider is, or expects to be, operating under concurrently with the blanket license.

(2) Notices of nonblanket activity, information in the public musical works database prescribed by 17 U.S.C.

115(d)(3)(E), and information disclosable through the mechanical licensing collective's bylaws, annual report, audit report, or the mechanical licensing collective's adherence to transparency and accountability with respect to the collective's policies or practices, including its anti-commingling policy, pursuant to 17 U.S.C. 115(d)(3)(D)(ii), (vii), and (ix).

(B) Information that at the time of delivery to the mechanical licensing collective or digital licensee coordinator is public knowledge, or is subsequently publicly disclosed by the party to whom the information would otherwise be considered confidential. The party seeking information from the mechanical licensing collective or digital licensee coordinator based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.

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

(2) "MLC Internal Information" means sensitive financial or business information created by or collected by the mechanical licensing collective for purposes of its internal operations, such as personnel, procurement, or technology information. "MLC Internal Information" does not include:

(i) Information that is public or may be made public by law or regulation, information in the public musical works database prescribed by 17 U.S.C.

115(d)(3)(E), and information in the mechanical licensing collective's bylaws, annual report, audit report, or the mechanical licensing collective's adherence to transparency and accountability with respect to the collective's policies or practices, including its anti-commingling policy, pursuant to 17 U.S.C. 115(d)(3)(D)(ii), (vii), and (ix); or

(ii) Information that at the time of delivery to the mechanical licensing collective is public knowledge, or is subsequently publicly disclosed by the

party to whom the information would otherwise be considered confidential. The party seeking information from the mechanical licensing collective based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.

(3) “DLC Internal Information” means sensitive financial or business information created by or collected by the digital licensee coordinator for purposes of its internal operations, such as personnel, procurement, or technology information. “DLC Internal Information” does not include:

(i) Information that is public or may be made public by law or regulation, information in the public musical works database prescribed by 17 U.S.C.

115(d)(3)(E), and information disclosable through the digital licensee coordinator’s bylaws; or

(ii) Information that at the time of delivery to the digital licensee coordinator is public knowledge, or is subsequently publicly disclosed by the party to whom the information would otherwise be considered confidential. The party seeking information from the digital licensee coordinator based on a claim that the information sought is a matter of public knowledge shall have the burden of proving that fact.

(c) *Disclosure of Confidential Information.* (1) The mechanical licensing collective shall limit disclosure of Confidential Information to employees, agents, consultants, vendors, and independent contractors of the mechanical licensing collective who are engaged in the collective’s authorized functions under 17 U.S.C. 115(d) and activities related directly thereto and who require access to Confidential Information for the purpose of performing their duties during the ordinary course of their work for the mechanical licensing collective, subject to an appropriate written confidentiality agreement. The mechanical licensing collective shall not disclose Confidential Information to members of the mechanical licensing collective’s board of directors and committees, including the collective’s Unclaimed Royalties Oversight Committee, or the digital licensee coordinator’s board of directors or committees.

(2) Notwithstanding paragraph (c)(1) of this section, the mechanical licensing collective shall be permitted to fulfill its disclosure obligations under section 115 including, but not limited to:

(i) Providing monthly reports to the digital licensee coordinator setting forth any significant nonblanket licensees of which the collective is aware that have failed to comply with the Office’s

regulations regarding submission of a notice of nonblanket activity for purposes of notifying the mechanical licensing collective that the licensee has been engaging in covered activities, or regarding the delivery of reports of usage for the making and distribution of phonorecords of nondramatic musical works; and

(ii) Preparing and delivering royalty statements to musical work copyright owners that include the minimum information required in accordance with 37 CFR 210.29(c), but without including additional Confidential Information that does not relate to the recipient copyright owner or relevant songwriter. Once a copyright owner receives a royalty statement from the mechanical licensing collective, there are no restrictions on the copyright owner’s ability to use the statement or disclose its contents.

(A) Members of the mechanical licensing collective’s board of directors and committees shall not have access to musical work copyright owners’ royalty statements, except where a copyright owner discloses their own royalty statement to the members of the mechanical licensing collective’s board of directors or committees.

Notwithstanding this paragraph, members of the mechanical licensing collective’s board and committees are not restricted in accessing their own royalty statements from the mechanical licensing collective.

(B) The digital licensee coordinator, including members of the digital licensee coordinator’s board of directors and committees, shall not have access to musical work copyright owners’ royalty statements, except where a copyright owner discloses their own royalty statement to the mechanical licensing collective’s board of directors or committees.

(3) The digital licensee coordinator shall limit disclosure of Confidential Information to employees, agents, consultants, vendors, and independent contractors of the digital licensee coordinator who are engaged in the digital licensee coordinator’s authorized functions under 17 U.S.C. 115(d)(5)(C) and activities related directly thereto and require access to Confidential Information for the purpose of performing their duties during the ordinary course of their work for the digital licensee coordinator, subject to an appropriate written confidentiality agreement. The digital licensee coordinator shall not disclose Confidential Information to members of the digital licensee coordinator’s board of directors and committees, or the mechanical licensing collective’s board of directors or committees.

(4) In addition to the permitted disclosure of Confidential Information in this paragraph (c), the mechanical licensing collective and digital licensee coordinator may disclose Confidential Information to:

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

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

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

(5) With the exception of persons receiving information pursuant to paragraph (c)(4) of this section, anyone to whom the mechanical licensing collective or digital licensee coordinator discloses Confidential Information as permitted in section shall not disclose such Confidential Information to anyone else except as expressly permitted in this section.

(d) *Use of Confidential Information.* (1) The mechanical licensing collective shall not use any Confidential Information for any purpose other than the collective’s authorized functions under 17 U.S.C. 115(d) and activities related directly thereto. Anyone to whom the mechanical licensing collective discloses Confidential Information as permitted in this section shall not use any Confidential Information for any purpose other than in performing their duties during the ordinary course of their work for the mechanical licensing collective or as otherwise permitted under paragraph (c)(4) of this section.

(2) The digital licensee coordinator shall not use any Confidential Information for any purpose other than its authorized functions under 17 U.S.C. 115(d)(5)(C) and activities related directly thereto. Anyone to whom the digital licensee coordinator discloses Confidential Information as permitted in this section shall not use any Confidential Information for any

purpose other than in performing their duties during the ordinary course of their work for the digital licensee coordinator or as otherwise permitted under paragraph (c)(4) of this section.

(e) *Disclosure and Use of MLC Internal Information and DLC Internal Information.* (1) The mechanical licensing collective may disclose MLC Internal Information to members of the mechanical licensing collective's board of directors and committees, including representatives of the digital licensee coordinator who serve on the board of directors or committees of the mechanical licensing collective, subject to an appropriate written confidentiality agreement. The MLC may also disclose MLC Internal Information to other individuals in its discretion, subject to the adoption of reasonable confidentiality policies.

(2) Representatives of the digital licensee coordinator who serve on the board of directors or committees of the mechanical licensing collective and receive MLC Internal Information may share such MLC Internal Information with the following persons:

(i) Employees, agents, consultants, vendors, and independent contractors of the digital licensing coordinator who require access to MLC Internal Information for the purpose of performing their duties during the ordinary course of their work for the digital licensee coordinator, subject to an appropriate written confidentiality agreement;

(ii) Individuals serving on the board of directors and committees of the digital licensee coordinator or mechanical licensing collective who require access to MLC Internal Information for the purpose of performing their duties during the ordinary course of their work for the digital licensee coordinator or mechanical licensing collective, subject to an appropriate written confidentiality agreement;

(iii) Individuals otherwise employed by members of the digital licensee coordinator who require access to MLC Internal Information for the purpose of performing their duties during the ordinary course of their work for the digital licensee coordinator, subject to an appropriate written confidentiality agreement.

(3) The digital licensee coordinator may disclose DLC Internal Information to the following persons:

(i) Members of the digital licensee coordinator's board of directors and committees, subject to an appropriate written confidentiality agreement; and

(ii) Members of the mechanical licensing collective's board of directors

and committees, including music publisher representatives, songwriters, and representatives of the digital licensee coordinator who serve on the board of directors or committees of the mechanical licensing collective, subject to an appropriate written confidentiality agreement.

(iii) The DLC may also disclose DLC Internal Information to other individuals in its discretion, subject to the adoption of reasonable confidentiality policies.

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

(g) *Maintenance of records.* Any written confidentiality agreements relating to the use or disclosure of Confidential Information must be maintained and stored by the relevant parties until at least seven years after disclosures cease to be made pursuant to them.

(h) *Confidentiality agreements.* The use of confidentiality agreements by the mechanical licensing collective and digital licensee coordinator shall not be inconsistent with the other provisions of this section.

Dated: February 8, 2021.

**Shira Perlmutter,**

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

Approved by:

**Carla D. Hayden,**

*Librarian of Congress.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 62

[EPA-R01-OAR-2020-0593; FRL-10017-79-Region 1]

### Approval and Promulgation of State Plans (Negative Declarations) for Designated Facilities and Pollutants: Maine and Rhode Island

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking a direct final action to approve negative declarations submitted in lieu of State plans to satisfy the requirements of the Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills for the State of Maine and the State of Rhode Island. The negative declarations certify that there are no existing facilities in the States that must comply with this rule.

**DATES:** This direct final rule will be effective April 12, 2021 without further notice, unless the EPA receives adverse comments by March 15, 2021. If the EPA receives adverse comments, we will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R01-OAR-2020-0593 at <https://www.regulations.gov>, or via email to [kilpatrick.jessica@epa.gov](mailto:kilpatrick.jessica@epa.gov). For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, the EPA may publish any comments received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on