

**§ 165.T08–801 Safety Zone; Cumberland River, Nashville, TN.**

(a) *Location.* The following area is a safety zone: All navigable waters of the Cumberland River, Mile Markers 189.7 to 191.1, extending the entire width of the river.

(b) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the Captain of the Port Sector Ohio Valley (COTP) or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced from 11 p.m. to 12:15 a.m. on June 9, 2022, through June 10, 2022.

Dated: May 19, 2022.

**A.M. Beach,**

*Captain, U.S. Coast Guard, Captain of the Port Sector Ohio Valley.*

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BILLING CODE 9110–04–P

comments on whether it should further modify these particular reporting requirements going forward.

**DATES:**

*Effective date:* The supplemental interim rule is effective May 24, 2022.

*Comments due date:* Written comments must be received no later than 11:59 p.m. Eastern Time on July 8, 2022.

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

**FOR FURTHER INFORMATION CONTACT:**

Megan Efthimiadis, Assistant to the General Counsel, by email at [mef@copyright.gov](mailto:mef@copyright.gov) or telephone at 202–707–8350.

**SUPPLEMENTARY INFORMATION:****I. Background**

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) substantially modified the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>1</sup> It did so by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the “license availability date”), administered by a mechanical licensing collective (“MLC”) designated by the Copyright Office (the “Office”).<sup>2</sup> Digital music providers (“DMPs”) are able to obtain the new compulsory blanket license to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity” where such activity qualifies

for a compulsory license), subject to compliance with various requirements, including reporting obligations. DMPs may also continue to engage in those activities solely through voluntary licensing with copyright owners, in which case the DMP may be considered a significant nonblanket licensee (“SNBL”) under the statute,<sup>3</sup> subject to separate reporting obligations.

On September 17, 2020, the Office issued an interim rule adopting regulations concerning certain types of reporting required under the statute after the license availability date: Notices of license and reports of usage by DMPs and notices of nonblanket activity and reports of usage by SNBLs (the “September 2020 rule”).<sup>4</sup> As relevant here, those interim regulations provide requirements governing annual reporting and the ability to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated inputs with finally determined figures.<sup>5</sup>

Under the September 2020 rule, DMPs must deliver annual reports of usage (“AROU”) and any related royalty payment to the MLC no later than the twentieth day of the sixth month following the end of the DMP's fiscal year covered by the AROU.<sup>6</sup> AROUs must contain cumulative information for the applicable fiscal year, broken down by month and by activity or offering, including the total royalty payable, the total sum paid, the total adjustments made, the total number of payable units, and to the extent applicable to calculating the royalties owed, total service provider revenue, total costs of content, total performance royalty deductions, and total subscribers.<sup>7</sup> In describing these requirements, the Office said that “[r]eceiving these totals and having them broken down this way seems beneficial to the MLC in confirming proper royalties, while not unreasonably burdening DMPs, who would not have to re-provide all of the information contained in the monthly reports covered by the annual reporting period.”<sup>8</sup>

Under the September 2020 rule, DMPs have the ability to make adjustments to previously delivered monthly reports of usage (“MROUs”) and AROUs,

**LIBRARY OF CONGRESS****Copyright Office****37 CFR Part 210**

[Docket No. 2020–5]

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

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

**ACTION:** Supplemental interim rule; request for comments.

**SUMMARY:** The U.S. Copyright Office is amending its regulations governing certain reporting requirements of digital music providers pursuant to title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act. This amendment modifies provisions concerning reports of adjustment and annual reports of usage in light of a recent request prompted by operational and compliance challenges with existing regulations. Based on the request and the imminence of related reporting deadlines, the Copyright Office has determined that there is a legitimate need to make this amendment effective immediately, while soliciting public

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

<sup>2</sup> 17 U.S.C. 115(d)(3)(B), (d)(3)(C); 84 FR 32274 (July 8, 2019). As permitted under the MMA, the Office 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. 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(B), (d)(5)(C); 84 FR 32274.

<sup>3</sup> 17 U.S.C. 115(e)(31).

<sup>4</sup> 85 FR 58114 (Sept. 17, 2020).

<sup>5</sup> 37 CFR 210.27(f), (g)(3)–(4), (k).

<sup>6</sup> *Id.* at 210.27(g)(3).

<sup>7</sup> *Id.* at 210.27(f); *see also* 37 CFR pt. 385 (defining terms, including “service provider revenue” “total cost of content,” and “subscription,” and permitting certain deductions).

<sup>8</sup> 85 FR 22518, 22533 (Apr. 22, 2020).

including related royalty payments, by delivering reports of adjustment (“ROAs”) to the MLC.<sup>9</sup> An ROA adjusting one or more MROUs may, but need not, be combined with the AROU for the annual period covering the MROUs and related payments.<sup>10</sup> When an ROA and AROU are combined, the AROU is also considered an ROA, and the AROU must comply with the regulatory requirements applicable to both types of reports.<sup>11</sup> The deadlines to deliver ROAs and any related royalty payment to the MLC differ depending on whether the ROA is adjusting an MROU or AROU and whether the ROA is combined with an AROU. An ROA adjusting an MROU that is not combined with an AROU must be delivered after the date that the MROU being adjusted is delivered and before the date that the AROU covering that MROU is delivered.<sup>12</sup> If the ROA is combined with the AROU, then the due date for the AROU applies.<sup>13</sup>

An ROA adjusting an AROU is only permitted in response to certain enumerated triggering events (*e.g.*, in exceptional circumstances, when making an adjustment to a previously estimated input, or in response to a change in applicable rates or terms set by the CRJs under the section 115 license).<sup>14</sup> Such an ROA is due no later than six months after the occurrence of such an event.<sup>15</sup>

All ROAs must include detailed information, including about the specific changes being made and the reason(s) for the adjustment.<sup>16</sup> In response to comments from the DLC, the Office significantly modified these requirements between the Office’s April 2020 notice of proposed rulemaking<sup>17</sup> and the September 2020 rule. As the Office explained in the September 2020 rule, the DLC proposed deleting two portions of the proposed rule addressing reports of adjustments. The first was the requirement for DMPs to include in the description of adjustment “the monetary amount of the adjustment” and second, the requirement to include “a detailed and step-by-step accounting of the calculation of the adjustment sufficient to allow the mechanical licensing collective to assess the manner in which the blanket licensee determined the adjustment and the accuracy of the adjustment.” As the DLC explained,

“[a]lthough DMPs must provide *inputs* to the MLC, it is typically the MLC, not the providers, that will use those inputs to perform a ‘step-by-step accounting’ and determine the ‘monetary amount[s]’ due to be paid.” In response, the MLC confirmed its shared understanding it would verify this math and did not oppose the DLC’s proposal. The MLC proposed additional language, modeled off language in the monthly usage reporting provisions found in § 210.27(d)(1)(ii) of the proposed rule to confirm “DMPs must always provide all necessary royalty pool calculation information.” As it found these changes reasonable, the Office adopted the DLC’s proposal with the addition of the language proposed by the MLC.<sup>18</sup>

In adopting these proposals, the Office also modified the due date for delivering any underpayment of royalties to the MLC. Instead of always being due contemporaneously with the ROA’s delivery, as was originally proposed, the September 2020 rule provides that it may either be due then “or promptly after being notified by the mechanical licensing collective of the amount due.”<sup>19</sup>

Separate from the requirements for ROAs and AROUs, the September 2020 rule contains processes through which DMPs may receive royalty invoices and response files from the MLC in connection with MROUs, including after delivering MROUs but before making royalty payments.<sup>20</sup> The Office explained that “[a]lthough the MMA does not explicitly address invoices and response files, the DLC has consistently articulated the importance of addressing requirements for each in Copyright Office regulations,”<sup>21</sup> and that accommodating invoices and response files “is intended to further the Office’s longstanding policy objective that the compulsory license should be a realistic and practical alternative to voluntary licensing.”<sup>22</sup> Notably, the DLC did not request an invoice or response file process in connection with AROUs or ROAs.

After the adoption of these rules, which involved multiple rounds of public comments through a notification of inquiry,<sup>23</sup> notice of proposed rulemaking,<sup>24</sup> and an *ex parte* communications process,<sup>25</sup> the DLC

raised a new concern regarding the applicability of certain reporting provisions to pass-through licenses for permanent downloads which the Office addressed through supplemental interim rules.<sup>26</sup> The DLC now raises another new concern, this time arising from “several operational and compliance challenges with the existing AROU and adjustment regulations.”<sup>27</sup>

As the DLC describes it, “[t]he identified challenges stem principally from differences between the regulations governing AROUs and adjustments on the one hand, and the regulations governing monthly reporting under the blanket license that licensees and the MLC have now been successfully operating under for over a year.”<sup>28</sup> These “differences” appear to largely refer to the lack of an express back-and-forth process through which DMPs can obtain invoices and response files from the MLC in connection with AROUs and ROAs.<sup>29</sup> To address its concerns, the DLC essentially proposes to amend the content requirements and royalty payment timing for AROUs and create a response file process for ROAs.<sup>30</sup> The DLC further states that “[g]iven the time pressure for those services that are currently in the AROU process, we urge the Office to consider adopting an immediately effective interim rule.”<sup>31</sup> The DLC also suggests that an alternative solution could be for the Office to “postpon[e] the deadline for the 2021 annual reports of usage entirely until some period after the [CRJs] decide[] the *Phonorecords III* rate proceeding.”<sup>32</sup>

The MLC opposes the DLC’s proposal for reasons discussed below, which mostly concern the disruptive impact it would have on the MLC’s core operations, *e.g.*, processing monthly royalty distributions and historical

those referenced herein, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. 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/>.

<sup>26</sup> See 85 FR 84243 (Dec. 28, 2020), 86 FR 12822 (Mar. 5, 2021).

<sup>27</sup> DLC *Ex Parte* Letter at 1 (Mar. 14, 2022).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 3, add. at i–iv.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 4. The D.C. Circuit partially vacated and remanded the CRJs’ *Phonorecords III* determination, which was intended to set rates and terms for the section 115 license for the period from January 1, 2018 through December 31, 2022. *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020). Remand proceedings before the CRJs are ongoing and it is unknown at this time when the CRJs will issue their new determination.

<sup>9</sup> 37 CFR 210.27(k).

<sup>10</sup> *Id.* at 210.27(k)(1); see 85 FR 22518, 22527.

<sup>11</sup> 37 CFR 210.27(k)(1).

<sup>12</sup> *Id.* at 210.27(g)(4)(i).

<sup>13</sup> See *id.* at 210.27(g)(3), (k)(1).

<sup>14</sup> *Id.* at 210.27(k)(6).

<sup>15</sup> *Id.* at 210.27(g)(4)(ii).

<sup>16</sup> *Id.* at 210.27(k)(3).

<sup>17</sup> 85 FR 22518.

<sup>18</sup> 85 FR 58114, 58138 (internal citations omitted).

<sup>19</sup> 37 CFR 210.27(k)(4); 85 FR 58114, 58139 n.341.

<sup>20</sup> 37 CFR 210.27(d)(1), (g)(1)–(2); see 85 FR 58114, 58137–38; 85 FR 22518, 22528.

<sup>21</sup> 85 FR 58114, 58138.

<sup>22</sup> 85 FR 22518, 22528.

<sup>23</sup> 84 FR 49966 (Sept. 24, 2019).

<sup>24</sup> 85 FR 22518.

<sup>25</sup> Guidelines for *ex parte* communications, along with records of such communications, including

unmatched royalties.<sup>33</sup> The MLC explains that its understanding is “that the interim status of the rule is not intended to enable new and onerous substantive requirements to be added without meaningful notice, comment and transition, as the DLC Letter now seems to propose.”<sup>34</sup> Nevertheless, the MLC states that “it intends to provide response files to DSPs in connection with AROUs” and “can provide invoices in connection with AROUs,” noting that it “will continue to work with DSPs on timing and coordination, as it has done since its inception.”<sup>35</sup>

Having reviewed and considered all relevant comments, the Office concludes, based on the current record, that it is necessary and appropriate under its authority pursuant to 17 U.S.C. 115 and 702 to amend the regulations governing AROUs and ROAs to address the DLC’s concerns.<sup>36</sup> Because of the short amount of time remaining before the June 20, 2022 deadline for many DMPs to deliver their AROUs, and the even shorter period of time that may remain for DMPs whose AROUs are due sooner, the Office finds there is good cause to adopt the supplemental interim rule without public notice and comment, and to make it effective immediately upon publication.<sup>37</sup> In doing so, the Office notes that, as discussed below, the aspects of the rule that impose new obligations on the MLC come with a nine-month transition period, which means that the Office can make modifications in response to public comments before the transition period expires. The Office solicits public comments on any aspect of the supplemental interim rule that stakeholders wish to address.

<sup>33</sup> MLC *Ex Parte* Letter at 2–4 (Apr. 4, 2022) (discussing the MLC’s “inability to shift resources without delaying critical path royalty distribution work”).

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Id.* at 3 & n.2.

<sup>36</sup> See 17 U.S.C. 702, 115(c)(2)(I), 115(d)(4)(A)(iv)(II), 115(d)(12)(A); see also H.R. Rep. No. 115–651, at 5–6, 14 (2018); S. Rep. No. 115–339, at 5, 15 (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, 12 (2018), [https://www.copyright.gov/legislation/\\_conference\\_report.pdf](https://www.copyright.gov/legislation/_conference_report.pdf); *Nat’l Cable & Telecomms. Ass’n v. Brand X internet Servs.*, 545 U.S. 967, 980 (2005) (discussing an agency’s congressionally delegated authority and stating that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion”).

<sup>37</sup> See 5 U.S.C. 553(b)(B), (d)(3); see also DLC *Ex Parte* Letter at 3 (Mar. 14, 2022) (“urg[ing] the Office to consider adopting an immediately effective interim rule” because of “the time pressure for those services that are currently in the AROU process”).

## II. Supplemental Interim Rule and Request for Comments

Based on the current record, the Office agrees with the DLC that it should amend the regulations governing AROUs and ROAs, but disagrees with much of the DLC’s proposed regulatory approach. Each aspect is discussed in turn below.

*Content of AROUs.* The DLC proposes to strike § 210.27(f)(4)(i) and (iii), which respectively require DMPs to report the total royalty payable and total adjustments for the annual reporting period, calling them “unnecessary” and “redundant of each other.”<sup>38</sup> The DLC also proposes to amend § 210.27(f)(4)(ii), which requires DMPs to report the total sum paid for the annual reporting period including the amount of any adjustments, to instead “require reporting of the sum paid . . . prior to any adjustments being made.”<sup>39</sup> In the alternative, the DLC proposes adding language allowing DMPs to use estimates in calculating the amounts required to be reported under § 210.27(f)(4)(i)–(iii).<sup>40</sup> The DLC calls these provisions “a vestige of the old [pre-blanket license] annual statement of account regulations,” where “licensees were responsible for matching and calculating royalties owed to individual publishers and delivering annual statements directly to those publishers.”<sup>41</sup> The DLC explains that because “under the blanket license, the MLC is, on a month-to-month basis, responsible for matching usage, calculating the amount of royalties owed, and ultimately for confirming proper payment,” the lack of “a mechanism by which a service can request and obtain an invoice and/or response file” for AROUs “has created operational issues for services that depend on the MLC to engage in the calculations necessary to ensure the proper amounts are reported and paid.”<sup>42</sup> The DLC states that this issue “is not limited to services that have voluntary licenses for which MLC matching is required,” and says that while “[t]his issue might be of limited import if the AROU process were merely an exercise in adding together figures reported and paid as part of monthly reporting,” “the reality is that nearly every service engages in a process of adjustment as part of the year end process,” meaning that “most, if not all, DMPs will need to adjust previously

<sup>38</sup> DLC *Ex Parte* Letter at 3, add. at i (Mar. 14, 2022).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at 1–2.

<sup>42</sup> *Id.* at 2.

reported information to the MLC as part of the AROU process and will need the MLC to calculate the amount of royalties owed.”<sup>43</sup>

The MLC disagrees with the DLC’s proposed changes, including its alternative proposal, stating that “DSPs are able to calculate their own royalty pools, and indeed many DSPs choose to calculate their royalty pools each month and pay that amount, which the MLC then verifies as part of processing.”<sup>44</sup> The MLC also notes that § 210.27(k)(3)(ii) already permits using estimates under certain circumstances.<sup>45</sup>

The Office declines to adopt the specific amendments proposed by the DLC, but agrees that certain changes are warranted. With respect to AROUs that are not combined with ROAs, the Office continues to believe that the existing reporting requirements are reasonable and beneficial to the MLC without unduly burdening DMPs. The DLC has not presented evidence to the contrary. The Office disagrees that § 210.27(f)(4)(i) and (iii) are unnecessary and redundant (one is a subset of the other). In any event, the Office declines the DLC’s apparent “invitation to revisit settled provisions or rehash arguments.”<sup>46</sup> As the Office emphasized when it decided to adopt the September 2020 rule on an interim basis, the intent was “to maintain flexibility to make necessary modifications in response to new evidence, unforeseen issues, or where something is otherwise not functioning as intended.”<sup>47</sup>

In contrast, the Office agrees with the DLC that changes should be made with respect to the reporting requirements for AROUs that are combined with ROAs. In that context, the regulations do not appear to be functioning as intended. As discussed above, in response to a DLC proposal that the MLC did not oppose, the Office significantly modified some of the requirements for ROAs between the notice of proposed rulemaking and the September 2020 rule to provide that, rather than reporting information such as the monetary amount of the adjustment and a detailed accounting of the calculation of the adjustment, as was originally proposed, the reporting would instead include the information necessary for the MLC to compute the adjusted royalties payable by the DMP.<sup>48</sup> In making those changes, the Office recognized that DMPs may not

<sup>43</sup> *Id.*

<sup>44</sup> MLC *Ex Parte* Letter at 3 & n.2 (Apr. 4, 2022).

<sup>45</sup> *Id.* at 3 n.2.

<sup>46</sup> 85 FR 58114, 58115.

<sup>47</sup> *Id.* at 58115–16.

<sup>48</sup> *Id.* at 58138.

necessarily be making the ultimate royalty calculations in connection with their ROAs; they may instead be dependent on the MLC to make such computations and then provide notice to them of the amount due (if there is an underpayment).<sup>49</sup>

The current requirements in § 210.27(f)(4)(i) and (iii) to report certain royalty totals seem at odds with the Office's prior decision, at least where such totals are required in connection with an AROU that is combined with an ROA. Consequently, to resolve this tension, the Office is amending these provisions so that where an ROA is combined with an AROU, and the DMP is relying on the MLC to provide notice of the amount due with respect to the adjustment (which, as discussed below, will take the form of an invoice), the totals required to be reported in the AROU may exclude non-invoiced amounts related to the adjustment.<sup>50</sup> The Office believes this approach is more appropriate than the DLC's proposal to eliminate the reporting entirely. The Office declines to amend § 210.27(f)(4)(ii) because doing so seems unnecessary. To the extent the total sum paid must include the amount of any adjustment made in connection with the AROU, the provision is already limited to where the adjustment is delivered contemporaneously with the AROU.<sup>51</sup>

Because the Office has decided to address this issue in the manner discussed, the Office declines to adopt the DLC's alternative proposal to broadly allow the use of estimates in reporting the AROU totals. The Office is, however, taking this opportunity to add language to clarify that information reported pursuant to § 210.27(f)(4) may be calculated using estimates as permitted by § 210.27(d)(2)(i). This is intended as a non-substantive clarification to merely recognize that certain relevant royalty inputs may be unable to be finally determined at the time the AROU is due.<sup>52</sup>

<sup>49</sup> See 85 FR 58114, 58139–40 (discussing changes to proposed certification requirements to reflect that “under the blanket license, DMPs are no longer solely responsible for making all royalty calculations”); 37 CFR 210.27(k)(4) (contemplating that when royalties are underpaid, as part of an adjustment, the DMP will pay the difference, including “after being notified by the mechanical licensing collective of the amount due”).

<sup>50</sup> To be clear, the exclusion of such amounts from the reporting of these totals does not alter the “requirement that DMPs must still certify to any underlying data necessary for such calculations.” 85 FR 58114, 58140.

<sup>51</sup> See 37 CFR 210.27(f)(4)(ii).

<sup>52</sup> See *id.* at 210.27(k)(6)(ii) (permitting AROUs to be adjusted “[w]hen making an adjustment to a previously estimated input under paragraph (d)(2)(i)”).

*Timing of royalty payments related to AROUs and ROAs.* Under the September 2020 rule, the deadlines to deliver an AROU and any related royalty payment are the same.<sup>53</sup> The DLC proposes to change this by “[a]mend[ing] § 210.27(g)(3) to allow the delivery of any royalty payment either contemporaneously with the AROU or promptly after being notified by the MLC about the amount owed.”<sup>54</sup> The DLC is seeking this change for the same reasons as detailed above.<sup>55</sup> The MLC similarly opposes this aspect of the DLC's proposal for the same reasons as noted above, adding that it “does not see a reason to change DSP royalty payment deadlines.”<sup>56</sup>

The Office agrees with the DLC that the timing provision should be changed. Similar to the content provisions discussed above, the timing provision in the September 2020 rule for royalty payments related to AROUs seems at odds with the Office's previous recognition that DMPs may be dependent on the MLC to make ultimate royalty calculations in connection with ROAs and then provide notice of the amount due (if there is an underpayment). Indeed, where an ROA is combined with an AROU, there appears to be a direct conflict between the AROU royalty payment deadline in § 210.27(g)(3) and the ROA royalty payment deadline in § 210.27(k)(4). The former provides that an AROU and related royalty payment have the same deadline which is fixed based on the end of the DMP's fiscal year, while the latter provides that they do not necessarily have the same deadline and that the royalty payment deadline may be connected to whenever the MLC provides notice of the amount due.<sup>57</sup>

To resolve this issue, the Office is amending § 210.27(g)(3) to strike the language about related royalty payments, as the DLC proposes. The Office declines to adopt the DLC's proposed additional language because it appears to be unnecessary. Where an AROU is not combined with an ROA, there should not be any related royalty payment to deliver. Where an AROU is combined with an ROA, then the royalty payment timing provision for ROAs in § 210.27(k)(4) should govern because “such an annual report of usage shall

<sup>53</sup> *Id.* at 210.27(g)(3) (noting that both must be delivered “no later than the 20th day of the sixth month following the end of the fiscal year covered by the [AROU]”).

<sup>54</sup> DLC *Ex Parte* Letter at 3, add. at ii (Mar. 14, 2022).

<sup>55</sup> *Id.* at 1–2.

<sup>56</sup> MLC *Ex Parte* Letter at 3 & n.2 (Apr. 4, 2022).

<sup>57</sup> Compare 37 CFR 210.27(g)(3) with *id.* at 210.27(k)(4).

also be considered a report of adjustment, and must satisfy the requirements of both paragraphs (f) and (k).”<sup>58</sup>

Though not raised by the DLC, the same problem exists with § 210.27(g)(4), which provides that the deadlines to deliver an ROA and any related royalty payment are the same.<sup>59</sup> This provision appears to directly conflict with the royalty payment deadline for ROAs specified in § 210.27(k)(4). Therefore, the Office is making the same change to § 210.27(g)(4), to clarify that § 210.27(k)(4) should govern when royalty payments related to ROAs are due.

*Invoices and response files for ROAs.* The DLC proposes to add a new provision creating a response file process for ROAs. Specifically, the proposed provision would require the MLC to deliver a response file to a DMP, if requested, “within a reasonable period of time” after receiving the ROA, except that “if the digital music provider states that a response file is necessary to the digital music provider's ability to timely submit an annual report of usage, the MLC shall deliver an invoice and/or a response file to the digital music provider within 45 days.”<sup>60</sup> As the DLC explains:

The adjustment provision (unlike the annual report of usage provision) does appear to contemplate some process by which the MLC can inform a service of the amount of money owed after submission of the report of adjustment . . . . But that provision—unlike the provision for regular monthly reports of usage—does not specify that a response file shall be sent from the MLC to the blanket licensee. The lack of a response file provision is particularly problematic for services that have voluntary licenses. Because many blanket licensees are adjusting both the top line royalty figures and usage figures, the MLC matching and response file process is critical to allow those services to accurately pay their voluntary license partners as well as the MLC, just as it is in the ordinary course of monthly reporting.<sup>61</sup>

The MLC opposes the DLC's proposal, detailing the disruptive impact that “add[ing] an accelerated 45-day deadline for the MLC to deliver ARoU response files to DSPs” would have on the MLC's core operations.<sup>62</sup> The MLC says that its “resources are fully dedicated to critical path statutory functions, and—even if it were feasible to accelerate ARoU processing or response files on the proposed timeline—the MLC cannot remove

<sup>58</sup> *Id.* at 210.27(k)(1).

<sup>59</sup> *Id.* at 210.27(g)(4).

<sup>60</sup> DLC *Ex Parte* Letter add. at iv (Mar. 14, 2022).

<sup>61</sup> *Id.* at 2 (internal citation omitted).

<sup>62</sup> MLC *Ex Parte* Letter at 2–3 (Apr. 4, 2022).

resources and delay such core functions as monthly royalty distributions and processing the substantial historical unmatched royalties in order to assist with these voluntary license administration concerns.”<sup>63</sup> As the MLC further explains:

ARoU processing is not at all the same as monthly processing and requires substantial time and work to design and execute. This type of complex processing—which involves data comparison and integration across thousands of usage reporting files from over forty DSPs containing billions of data points—is a very significant task, and this is the first year that it is being done under the blanket license. This project involves requirements gathering, design, implementation, testing, production, and processing. The MLC has begun this project, but it will take a number of additional months and cannot reasonably be accelerated.<sup>64</sup>

The MLC also states that while it intends to provide invoices and response files in connection with AROUs, it is not in a position at this time to guarantee or estimate any particular turnaround time before receiving and reviewing the various AROUs.<sup>65</sup>

The Office agrees with the DLC that an invoice and response file process should be established for ROAs (and by extension, AROUs that are combined with ROAs). With respect to invoices, there appears to perhaps be some ambiguity in the September 2020 rule, which allows a royalty payment to be delivered “promptly after being notified by the mechanical licensing collective of the amount due.”<sup>66</sup> In describing this provision, the DLC says it “*appear[s]* to contemplate *some* process by which the MLC can inform a service of the amount of money owed after submission of the report of adjustment.”<sup>67</sup> To resolve any potential uncertainty about this provision, the Office takes this opportunity to amend § 210.27(k)(4) to clarify that the notice to be delivered by the MLC of the amount due in connection with an ROA should be an invoice containing information similar to what is required for MROU invoices.<sup>68</sup> Since invoices for MROUs and ROAs serve similar functions, it seems reasonable that their content be

similar. The Office is also establishing a timeframe for the MLC to deliver such invoices (subject to the transition period discussed below). If the DMP is going to receive a response file in connection with the ROA, then the invoice must be delivered contemporaneously with the response file (see discussion below concerning response file timing); otherwise, the invoice must be delivered in a reasonably timely manner. This timing is similar to how the timing works for MROU invoices and response files and appears reasonable to adopt in the ROA context.<sup>69</sup>

Regarding response files, the MLC does not seem to disagree with the DLC that they should be provided, but the MLC appears to be primarily concerned with the DLC’s proposed turnaround time. These concerns echo those expressed by the MLC in connection with the adoption of the invoice and response file process for MROUs under the September 2020 rule.<sup>70</sup> As the Office said then, and believes now in the context of ROAs, “a rule would ultimately be valuable to build reliance that DMPs can obtain these items.”<sup>71</sup> Therefore, the Office is adopting a requirement for the MLC to provide DMPs with response files in connection with ROAs (and by extension, AROUs that are combined with ROAs) if requested by the DMP. Such a requirement naturally follows from the Office’s above-discussed previous recognition that DMPs may be dependent on the MLC to make ultimate royalty calculations in connection with ROAs and then provide notice of the amount due (if there is an underpayment).<sup>72</sup>

The Office believes, however, that the MLC’s timing concerns have merit and should be accommodated. First, the supplemental interim rule provides two different deadlines for delivering response files to DMPs in connection with ROAs—45 days after receipt of the ROA, or 60 days after receipt of the AROU where the ROA is combined with it. By proposing a 45-day deadline where the DMP “states that a response

file is necessary to the digital music provider’s ability to timely submit an annual report of usage,”<sup>73</sup> the DLC seems to suggest that a 45-day deadline is a reasonable turnaround time for DMPs with respect to ROAs that are not combined with AROUs. Meanwhile, the MLC’s comments appear to be primarily focused on AROUs, rather than uncombined ROAs. Given that 45 days is nearly double the 25-day timeline for the MLC to provide MROU response files,<sup>74</sup> and that ROAs that are not combined with AROUs will not necessarily be arriving mostly all at the same time like AROUs and likely will not cover the same volume of adjustments that AROUs are anticipated to cover, the Office believes that 45 days is reasonable based on the current record. Based on the MLC’s comments, however, the Office believes that additional time is warranted for providing response files for ROAs that are combined with AROUs, and 60 days strikes the Office as a reasonable deadline to both provide the MLC with extra processing time while not unreasonably delaying delivery of response files to DMPs needing to rely on them for voluntary license administration or other purposes.

Second, the supplemental interim rule provides for a nine-month transition period during which the MLC is not required to deliver invoices or response files within the specified timeframes. In adopting the September 2020 rule on an interim basis, the Office said that “if any significant changes prove necessary, the Office intends, as the DLC requests, to provide adequate and appropriate transition periods.”<sup>75</sup> Just as the Office provided DMPs with transition periods for aspects of the September 2020 rule that required them to update their systems or develop new processes, the Office finds it reasonable to provide one to the MLC here to minimize any potential disruption on the MLC’s current operations.<sup>76</sup> The Office understands that the adoption of a transition period may mean that certain DMPs may be unable to obtain response files from the MLC in time to meet certain near-term obligations that may exist under their voluntary licenses. While this is an unfortunate result, the MLC represents that, at this point, “even if an additional reasonable fee was paid,” it still would “not have the resources to complete an accelerated timetable” for processing AROUs and

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 3.

<sup>66</sup> 37 CFR 210.27(k)(4).

<sup>67</sup> DLC *Ex Parte* Letter at 2 (Mar. 14, 2022) (internal citation omitted) (emphasis added).

<sup>68</sup> See 37 CFR 210.27(g)(1) (requiring MROU invoices to “set[] forth the royalties payable by the blanket licensee under the blanket license for the applicable monthly reporting period, which shall be broken down by each applicable activity or offering including as may be defined in part 385”).

<sup>69</sup> See *id.* at 210.27(g)(2)(v).

<sup>70</sup> See 85 FR 22518, 22528 (citation omitted) (“The MLC does not seem to generally disagree with this choreography and ultimately states that it intends to provide DMPs with both invoices and response files, but argues that such matters, particularly with respect to timing, are not ripe for rulemaking.”).

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

<sup>72</sup> Cf. 37 CFR 210.27(g)(2)(ii) (“The mechanical licensing collective shall engage in efforts to confirm uses of musical works subject to voluntary licenses and individual download licenses, and, if applicable, the corresponding amounts to be deducted from royalties that would otherwise be due under the blanket license.”).

<sup>73</sup> DLC *Ex Parte* Letter add. at iv (Mar. 14, 2022).

<sup>74</sup> See 37 CFR 210.27(g)(1), (2)(v).

<sup>75</sup> 85 FR 58114, 58116.

<sup>76</sup> See, e.g., 37 CFR 210.27(e)(2)(i), (e)(3)(ii), (e)(5), (h)(3).

delivering response files to DMPs.<sup>77</sup> Consequently, while the supplemental interim rule is intended to address this issue going forward, DMPs affected by the MLC's current, though ultimately temporary, inability to provide response files for AROUs and ROAs may need to make other arrangements with respect to their voluntary licenses.<sup>78</sup>

Based on the current record, the Office believes the supplemental interim rule "is a reasonable approach to ensuring that DMPs that need invoices and response files can get them, while providing the MLC the time it needs to generate them."<sup>79</sup> The Office recognizes that because the MLC is still in the process of developing systems to process AROUs and has not yet reviewed the various AROUs yet to be delivered, the MLC may not be in a position to fully address the timing of the new response file requirement for several months—long after the comment period for the supplemental interim rule has expired. Consequently, the Office will continue to welcome updates from the MLC's operations advisory committee or the MLC or DLC separately if, after development is further along or after the process becomes operational and the MLC has reviewed the AROUs, the parties believe timing changes are necessary.

**AROU deadline postponement.** In light of the changes being made by the Office to the AROU and ROA regulations, the Office declines to adopt the DLC's alternative solution to "postpon[e] the deadline for the 2021 annual reports of usage entirely until some period after the [CRJs] decide[] the *Phonorecords III* rate proceeding."<sup>80</sup> Moreover, it does not appear that delaying the deadline would necessarily provide meaningful relief to DMPs needing response files in the near-term. As the DLC explains, "for some services that have independent annual reporting obligations under voluntary licenses, those services may still require response files from the MLC to fulfill existing obligations," "[b]ut presumably if all annual reporting to the MLC were

postponed, the MLC would then have sufficient bandwidth to address the needs of those services."<sup>81</sup> In response, the MLC makes clear that this is "not accurate," as "the AROU processing design and implementation needs to be completed before any AROUs can be processed."<sup>82</sup> Thus, it appears that postponing the deadline would not resolve the issue any more satisfactorily than the solution being adopted in the supplemental interim rule.

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

Copyright, Phonorecords, Recordings.

#### Interim Regulations

For the reasons stated in the preamble, the U.S. 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.

■ 2. Amend § 210.27 as follows:

■ a. In paragraph (f)(4) introductory text, add the words "which may, as appropriate, be calculated using estimates permitted under paragraph (d)(2)(i) of this section," after the word "information," and before the word "cumulative" in the first sentence.

■ b. In paragraph (f)(4)(i), add a sentence at the end of the paragraph.

■ c. In paragraph (f)(4)(iii), add a sentence at the end of the paragraph.

■ d. In paragraph (g)(3), remove the words "and, if any, related royalty payment".

■ e. In paragraph (g)(4), remove the words "and, if any, related royalty payment".

■ f. Revise paragraph (k)(4).

■ g. Add paragraphs (k)(8) and (9).

The revision and additions read as follows:

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

\* \* \* \* \*

(f) \* \* \*

(4) \* \* \*

(i) \* \* \* Where the blanket licensee will receive an invoice under paragraph (k)(4) of this section with respect to an adjustment made in connection with the annual report of usage as described in paragraph (k)(1) of this section, the reporting of such total royalty payable

may exclude non-invoiced amounts related to such adjustment.

\* \* \* \* \*

(iii) \* \* \* Where the blanket licensee will receive an invoice under paragraph (k)(4) of this section with respect to an adjustment made in connection with the annual report of usage as described in paragraph (k)(1) of this section, the reporting of such total adjustment(s) may exclude non-invoiced amounts related to such adjustment.

\* \* \* \* \*

(k) \* \* \*

(4) In the case of an underpayment of royalties, the blanket licensee shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the report of adjustment or promptly after receiving an invoice from the mechanical licensing collective that sets forth the royalties payable by the blanket licensee under the blanket license with respect to the adjustment, which shall be broken down by each applicable activity or offering including as may be defined in part 385 of this title. Where the blanket licensee will receive a response file under paragraph (k)(8) of this section, the mechanical licensing collective shall deliver the invoice to the blanket licensee contemporaneously with such response file. The mechanical licensing collective shall otherwise deliver the invoice to the blanket licensee in a reasonably timely manner. A report of adjustment and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the report of adjustment to the payment.

\* \* \* \* \*

(8) If requested by the blanket licensee, the mechanical licensing collective shall deliver a response file to the blanket licensee that contains the information required by paragraph (g)(2)(v) of this section to the extent applicable to the adjustment. The response file shall be delivered no later than 45 calendar days after receiving the relevant report of adjustment, unless the report of adjustment is combined with an annual report of usage, in which case the response file shall be delivered no later than 60 calendar days after receiving the relevant annual report of usage.

(9) The mechanical licensing collective may make use of a transition period ending February 24, 2023, during which the mechanical licensing collective shall not be required to deliver invoices or response files within

<sup>77</sup> MLC *Ex Parte* Letter at 2 n.1 (Apr. 4, 2022).

<sup>78</sup> The Office understands that DMPs used outside vendors or in-house services to meet reporting obligations that may have existed under their voluntary licenses prior to the MMA's enactment. DMPs may wish to revisit those earlier methods to meet any obligations under their voluntary licenses until the MLC is able to deliver invoices or response files under this rule.

<sup>79</sup> 85 FR 22518, 22528 (referencing monthly invoice and response file process). Despite the MLC's contention that "this issue is extremely confined and does not affect blanket licensees at large," MLC *Ex Parte* Letter at 2 (Apr. 4, 2022), the Office believes that promulgating a rule is reasonable.

<sup>80</sup> DLC *Ex Parte* Letter at 4 (Mar. 14, 2022).

<sup>81</sup> *Id.* at 4 n.3.

<sup>82</sup> MLC *Ex Parte* Letter at 3 (Apr. 4, 2022).

the timeframes specified in paragraphs (k)(4) and (8) of this section.

\* \* \* \* \*

Dated: May 18, 2022.

**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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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 21

#### Clarification Regarding Self-Employment in the Context of “Employment” for VET TEC Training Programs

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notification of interpretation.

**SUMMARY:** The Department of Veterans Affairs (VA) provides notice of a policy advisory released on January 19, 2022, by VA’s Education Service. The policy advisory clarifies VA’s previous regulatory interpretation of “employment” and also explains when “self-employment” will be considered “employment” for the purpose of paying training providers participating in the Veterans Employment Through Technology Education Courses (VET TEC) training program.

**DATES:** May 24, 2022.

**FOR FURTHER INFORMATION CONTACT:** Cheryl Amitay, Chief of Policy and Regulations Team, Education Service (225), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202-461-9800. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:** On August 16, 2017, Public Law 115-48, the Harry W. Colmery Veterans Educational Assistance Act of 2017, was signed into law. Section 116 of this Act, codified at 38 U.S.C. 3001 note, requires the Secretary of Veterans Affairs to carry out a pilot program (commonly known as VET TEC) for 5 years to provide eligible Veterans who are entitled to educational assistance under 38 U.S.C. chapter 30, 32, 33, 34, or 35, or 10 U.S.C. chapter 1606 or 1607, with the opportunity to enroll in high technology programs of education intended to provide training and skills sought by employers in a relevant field or industry. Under section 116(c)(2)(C) of Public Law 115-48, VA

must pay 50% of the cost of providing a high technology program of education to qualified providers upon “employment” of a Veteran in a certain field of study. Also, under section 116(c)(5)(B), VA is required to give preference to a qualified provider that offers tuition reimbursement for students who do not find full-time “meaningful employment” in their field of study within 180 days after completing their program.

Based on a review of employment information since the initial roll-out of VET TEC, VA issued a policy advisory on January 19, 2022, titled Clarification Regarding Self-Employment in the Context of “Employment” for VET TEC Training Programs Established under section 116 of Public Law 115-48, to clarify how self-employment satisfies the meaning of “employment” for the purposes of determining whether VA must pay qualified providers for training provided to Veterans and selecting qualified providers. The advisory establishes objective standards for determining under what circumstances VA will consider self-employment to be employment and is intended to maximize economic outcomes for VET TEC participants. The advisory states generally that VA considers a person to be “employed” if that person performs services for another individual and is compensated for such services. It further states that the nature of the relationship may be that of an employee/employer or contractor/client. More specifically, the advisory states that “employment” includes the following:

- Establishing a new employee/ employer relationship in a career supported by the completed program of study; or,
- Promotion in the Veteran’s current employee/employer relationship in a career supported by the completed program of study; or,
- Self-employment in a career supported by the completed program of study.

With regard to clarifying the job certification requirements surrounding what is deemed as acceptable and reasonable for the reporting of employment, including self-employment (*i.e.*, the minimum standards for declaring a Veteran has obtained employment), the advisory provides as follows:

The following documentation is required for payment of employment certifications that claim any form of employment (both “employment” under section 116(c)(2)(C) and “meaningful employment” under section 116(c)(5)(B)):

- Contract Jobs. Reports of Contract Jobs must be *at least* 6 months in length.
- Salary or hourly wages.
- Hours worked per week.

Employment must be full-time. There is a minimum 30 hours per week requirement for all employment claims.

- Promotion in current job. Must be a monetary promotion. A promotion is NOT simply a job title change without an increase in salary.
- Offer letter and/or first pay stub.

Documentation must be official and display the official company letterhead.

#### “Self-Employment” Criteria and Verification Regarding Self-Employment

VA supports self-employment and other entrepreneurial endeavors as viable paths to achieving meaningful employment. However, training providers should encourage students to explore all possible employment prospects and opportunities, and should not direct students towards self-employment as the primary option for employment. To ensure that individuals electing to pursue employment through self-employment are adequately equipped for success, the following documentation is required for payment of employment certifications that claim any form of self-employment:

- Proof of ownership of the business. These can include a Federal Tax ID Number; Articles of Organization, or Articles of Incorporation; copy of personal tax return with schedule C; a copy of the Doing Business As declarations, etc. It may also include a state tax ID Number or state business registration information.
- Copies of any valid personal licenses or certifications required for business operations.
- A bill and payment from a client to show proof of legitimate business transactions for the type of services being provided and/or products sold; and
- Other documents: VA may request additional documentation to support the claim if existing evidence provided is insufficient to make a determination.

To avoid a conflict of interest, neither the training provider, its subsidiaries, nor a parent company may become the client of the self-employed VET TEC student.

Implementation of the new policy began on February 1, 2022, and it is applicable to both VET TEC students and training providers, regardless of when the student began or graduated from their program. Compliance with the requirements specified in the new policy is part of the annual approval or