### Docket No. 2023-2

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**LIBRARY OF CONGRESS**

**Copyright Office**

**37 CFR Part 210**

[Docket No. 2023-2]

**FEES FOR LATE ROYALTY PAYMENTS UNDER THE MUSIC MODERNIZATION ACT**

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

**ACTION:** Interpretive rule; termination of notification of inquiry

**SUMMARY:** The U.S. Copyright Office adopts the following interpretive rule regarding fees for late royalty payments under the Music Modernization Act's statutory mechanical blanket license and terminates its notification of inquiry on this subject that was published on February 23, 2023.

**DATES:** Effective September 5, 2023.

**FOR FURTHER INFORMATION CONTACT:** Rhea Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov or telephone at 202–707–8350.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On February 23, 2023, the Copyright Office ("Office") published a notification of inquiry ("NOI") in the Federal Register seeking public comments regarding when fees for late royalty payments should be assessed in connection with reporting by digital music providers ("DMPs") under the Orrin G. Hatch-Bob Goodlatte Music Modernization Act's ("MMMA") statutory mechanical blanket license (the "blanket license"). The Office opened the February NOI based on comments and thoroughly examined the statute and legislative history, the Office is terminating the inquiry without issuing any regulations on this subject.

Rather, the Office is issuing an interpretive rule to provide the mechanical licensing collective ("MLC"), DMPs, and other parties with its conclusion that the statute's due date provisions are unambiguous. Interpretive rules "advise the public of the agency's construction of the statutes and rules which it administers." Under the Administrative Procedure Act, interpretive rules are not subject to notice and comment procedures and can be published with an immediate effective date. Consequently, the publication of this document concludes this proceeding.

**A. Statutory Background**

The MMMA substantially modified the statutory "mechanical" license for reproducing and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115, including 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 the MLC designated by the Office. The Office also designated a digital licensee coordinator (the "DLC") to represent DMPs in proceedings before the Copyright Royalty Judges ("CRJs," also sometimes referred to as the "Copyright Royalty Board" or "CRB"). The DLC also serves as a non-voting member of the MLC and carries out other functions. Under the MMA, DMPs are able to obtain the blanket license to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams, subject to various requirements, including payment and reporting obligations.

As relevant to this proceeding, the MMA states that with respect to DMPs' payment and reporting obligations under the blanket license, "monthly reporting shall be due on the date that is 45 calendar days . . . after the end of the monthly reporting period." The MMA also states that "[l]ate fees for past due royalty payments shall accrue from the due date for payment until payment is received by the [MLC]." Other reporting and payment deadlines, including regulations governing estimates and adjustments, are regulatory in nature. These provisions are further discussed below.

**1. Statutory Division of Responsibility**

The Copyright Act, as amended by the MMA, assigns different responsibilities to the CRJs and Office with respect to the blanket license. Congress granted the CRJs the responsibility to set the blanket license's royalty rates and terms. As part of this ratesetting authority, the CRJs' determinations may include terms with respect to late payment[s]. These "late fees" are a consequence of late royalty payments. While the CRJs' authority to set such late fees predated the MMA, the MMA added a provision stating that, with respect to the blanket license, "[l]ate fees for past due royalty payments shall accrue from the due date for payment until payment is received by the [MLC]."

The Office's responsibilities under the MMA include overseeing the administration of the blanket license, including by promulgating various regulations specifically required by Congress, such as those governing reporting and payment requirements for DMPs. Relevant to this proceeding, Congress directed the Office to adopt regulations "regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods." Additionally, Congress granted the Office "broad regulatory authority" to "conduct such

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88 FR 11398 (Feb. 23, 2023).
proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license].”

### B. Regulatory Background

On September 17, 2020, the Office issued an interim rule adopting regulations concerning reporting and payment requirements under the blanket license (the “September 2020 Rule”). The September 2020 Rule addressed the ability of DMPs to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated royalty calculation inputs (e.g., the amount of applicable public performance royalties) with finally determined figures. The interim regulations permit DMPs to make adjustments in other situations as well, such as in exceptional circumstances, following an audit, or in response to a change in the applicable statutory rates or terms adopted by the CRJs.

In a public rulemaking proceeding that culminated in the September 2020 Rule, the MLC and DLC raised concerns about when a payment should be considered “late,” thus triggering the obligation to pay a late fee, in the context of the MMA, the Office’s adjustments to reports of usage regulations, and the CRJs’ late fee regulations. The MLC’s view was that the MMA requires a DMP’s payment to be considered “late” if not received by the 45th calendar day after the end of the monthly reporting period. The DLC took an opposing view and contended that late fees should not be due for any timely adjustments to good faith estimates made pursuant to the Office’s regulations or in response to a change in rates and terms made by the CRJs. At the time of the September 2020 Rule, the Office declined to address the interplay between the statute, the CRJs’ late fee regulation, and the Office’s provisions for adjustments, in part, because it believed that “the CRJs may wish themselves to . . . update their operative regulation in light of the [September 2020 Rule].”

Since the Office issued the September 2020 Rule, the CRJs published two ratesetting determinations applicable to the blanket license: the Phonorecords III Remand determination (covering the 2018–2022 rate period) and the Phonorecords IV determination (covering the 2023–2027 rate period). Neither determination addressed the competing views within the industry on when the CRJs’ late fee provisions are triggered.

The Phonorecords IV determination, which adopted the terms of the parties’ settlement, contains the current late fee regulation, which states that, “[a] Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date . . . specified.” The regulations as proposed, should remove any doubt that might interfere with those late fee payments.”

This provision states that “[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license on a monthly basis in accordance with . . . subsection (c)(2)(I), except that the monthly reporting period shall be on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.”

This provision states that “[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license for digital uses” and moved to add the following language to the end of the quoted section 115(d)(4)(A)(i): “royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding.”

This provision states that “[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license for digital uses” and moved to add the following language to the end of the quoted section 115(d)(4)(A)(i): “royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding.”

This provision states that “[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license for digital uses” and moved to add the following language to the end of the quoted section 115(d)(4)(A)(i): “royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding.”
MLC and DLC requested the Office provide guidance and regulatory amendments. The DLC requested that the Office “specify that when both the initial estimated payments and the later adjustment of such payments to account for the updated and finalized information are made according to the timelines established in the regulations, such payments are proper and have been made by the ‘due date for payment’ as set forth in 17 U.S.C. [sec.] 115(d)(6)(B)(i).” The MLC opposed the DLC’s position and instead proposed regulatory language providing that nothing in the adjustment provisions “shall change a blanket licensee’s liability for late fees, where applicable.”

II. Discussion

The Office’s February NOI sought public comments on this disagreement and explained that, while it “typically does not offer interpretations of the CRJs’ regulations,” the Office is squarely within its authority to advise the public on the construction of the Copyright Act. Interested parties, including the MLC, National Music Publishers’ Association (“NMPA”), DLC, publishers, groups representing songwriters, and others submitted comments responding to the Office’s NOI.

A. Responsive Comments

1. Commenters Supporting the MLC’s Interpretation

The Copyright Alliance, Dina LaPolt, NMPA, Nashville Songwriters Association International (“NSAI”), Songwriters Guild of America, Society of Composers & Lyricists, and Music Creators North America supported the MLC’s position that the MMLA’s plain language indicates that the due date for payment is 45 calendar days after the end of a monthly reporting period and that late fees begin accruing after that point in time or that equitable policy considerations dictate the same result.

These parties generally argued that the “MMA’s plain language is conclusive with respect to the blanket license’s ‘due date for payment.’” The NMPA reasoned that “Congress was clear and unambiguous in establishing precisely when late fees shall begin to accrue,” as “the date that is 45 calendar days . . . after the end of the monthly reporting period.”

The Copyright Alliance echoed this reasoning, adding that there is language in the MMA’s legislative history stating that a DMP must provide the MCL certain data “along with its royalty payments due 45 calendar days after the end of a monthly reporting period.”

The NMPA added that the statute does not contain any exceptions for underpayments, including for those “caused by an error, a misestimate, or any other reason,” including “where the DMP later corrects its underpayment through an adjustment.” It noted that Congress could have created an exemption to when late fees accrue, as it did for royalty payments under the optional statutory limitation on liability for certain unlicensed uses prior to the license availability date, but it did not do so.

These parties also made policy arguments supporting their view that late fees should begin to accrue starting after 45 calendar days after the end of a monthly reporting period. For example, they argued that their approach would incentivize DMPs to pay the MLC—and, in turn, songwriters and publishers—accurately and on time and that the DLC’s opposing interpretation, discussed below, would disincentivize accurate and timely royalty payments. Some argued that the harm to songwriters under the DLC’s position would be significant, while the MLC’s position would not cause significant harm to DMPs. As NSAI explained, “[a]n underpayment of even a few hundred dollars for a few months can mean meaningful life decisions for a songwriter. The gravity of that must be considered against the inconsequential burden of a minimal late fee imposes on a DMP.”

2. The DLC’s Interpretation

The DLC contends that “the clear text of the statute and relevant regulations, unbroken historical precedent, and interests of efficiency and equity” support its position that late fees are not due for payments that are compliant with the Office’s estimate and adjustment reporting regulations. The DLC explained that because the MMA states that monthly payments must “comply with requirements that the Register of Copyrights shall prescribe by regulation” and because the CRJs referenced the Office’s section 115 amendments.

46 See, e.g., Copyright Alliance Reply Comments at 2; Dina LaPolt Reply Comments at 3; 47 NSAI Initial Comments at 2 (“Because DMPs are permitted to make good-faith estimates when reporting and paying royalties, there must be a safeguard in place to hold them accountable.”); NSAI Initial Comments at 2 (“If late fees were to apply only after the adjustment due date, DMPs will have latitude to underestimate amounts due and make more gains at the expense ofsongwriters and copyright holders by continuing to have those additional funds in their possession for as long as possible without incentive to change their royalty reporting practices.”); Songwriters Guild of Am., the Soc’y of Composers & Lyricists, and Music Creators N. Am. Initial Comments at 3 (adding that the “Congressional resort to late fees as a motivator was necessary in light of the fact that the MMA limits the ability of music creators and copyright owners to utilize copyright infringement litigation as an alternative means to compel accurate and timely royalty compliance.”)

46 See, e.g., Copyright Alliance Reply Comments at 2; Dina LaPolt Initial Comments at 3–4; MMLA Initial Comments at 2–3; NSAI Initial Comments at 2; NSAI Reply Comments at 2; NSAI Initial Comments at 2; Songwriters Guild of Am., Inc., Soc’y of Composers & Lyricists, and Music Creators N. Am. Initial Comments at 3.

47 NSAI Reply Comments at 2.
regulations in their late fee provision.49 “[t]aken together, these provisions compel the conclusion that when a payment is made on or before the due date, and is made in compliance with the regulatory requirements, it is not ‘late’ or otherwise legally deficient, even if it is based on estimated inputs, or is an adjustment to a payment made earlier.”50 It asserts that “estimates and adjustments are a necessary consequence of the CRB’s . . . rate structure” because the required inputs under the rate structure (e.g., royalties for sound recordings, as well as the public performance of musical works) may not be final or known when reporting is due to the MLC. Therefore, DMPs must be allowed to rely on estimates and adjustments and not incur late fees when doing so.51

The DLC also offered policy-based reasons in support of its position. For example, it claimed that “[i]f DMPs are threatened with late fees for every routine royalty payment, one can reasonably expect that at least some DMPs will systematically over pay royalties” and subsequent “clawback[s]” would cause operational challenges for the MLC and harm to songwriters and publishers.52 Finally, the DLC claimed that “[i]t defies common sense that failing to guess at and pay royalties at not-yet-determined rates would trigger late fees,”53 and suggested that Congress would not have intended such a “facially illogical result.”54

B. Statutory Analysis

1. Monthly Royalty Payments Made to the MLC More Than 45 Days After the End of the Applicable Monthly Reporting Period Are Late Under the Statute

The Office has reviewed the MMA’s text, context, and statutory scheme along with canons of statutory construction in its consideration of whether the statute is ambiguous.55 It concludes that the statute’s (i) due date provisions, (ii) direction to the Office to adopt regulations governing adjustments, and (iii) delegation of authority to the CRJs to promulgate late fee provisions are compatible and unambiguous. The Office, therefore, declines to issue any associated regulations.

Starting with the statute’s text, section 115(d)(8)(B)(i) states that CRJ-adopted “[l]ate fees for past due royalty payments [under blanket licenses] shall accrue from the due date for payment until payment is received by the mechanical licensing collective.”56 The phrase “due date for payment” is undefined and, therefore, these words must “be interpreted as taking their ordinary, contemporary, common meaning.”57 Black’s Law Dictionary defines “due date” as “the date on which something is supposed to happen, esp. as a matter of requirement.”58

In the Office’s view, “due date for payment” unambiguously refers to the “date on which monthly royalty payments are required to be delivered to the MLC.”59 Section 115(d)(4)(A)(i) provides that “[a] digital music provider shall report and pay royalties to the mechanical licensing collective under the blanket license on a monthly basis in accordance with . . . subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.”56 Section (c)(2)(I), in turn, states that monthly “royalty payments . . . shall include all royalties for the month next preceding.”60 Taken together, the plain and natural meaning of the statute is that “all royalties” for a given monthly reporting period are “due” no later than 45 days after the end of the monthly reporting period. Thus, any royalties received by the MLC for such reporting period after this “due date for payment” are late. They are “past due royalty payments” that are subject to such “late fees” as the CRJs may adopt.

The DLC argues that this construction of the statute yields an absurd result.61 While a statutory ambiguity can be found if clear statutory text would produce an absurd result,62 that is not the case here. Rather, the Office understands that the DLC’s concerns are really aimed at the potential effect of the CRJs’ regulations, not the statute itself.

The fact that the final amount due on the statutory due date may not be known to a DMP on that date is a product of the rate structure adopted by the CRJs, which involves calculating royalties using inputs that may not be finally determined at the time the royalty is due, necessitating the use of estimates and adjustments.63

To the extent Congress disapproved of this result, and instead intended the result advocated for by the DLC, Congress either would not have adopted the version of section 115(d)(8)(B)(i) that it did or it would have made other changes to the statute. A version of the CRJs’ current rate structure has been in place since the Phonorecords I settlement.64 which predated the MMA’s enactment by nine years. Congress would have been aware of the CRJs’ longstanding rate structure in passing the MMA, including with respect to the operation of estimates and adjustments, therefore the decision to enact section 115(d)(8)(B)(i) and the rest of the MMA against that backdrop must be understood as intentional.

This understanding is not incompatible with the MMA’s direction, in section 115(d)(4)(A)(iv)(II), for the Office to adopt regulations regarding adjustments. First, while the MMA requires the Office to establish regulations regarding adjustments, it does not require the CRJs to set royalty rates and terms using inputs that are not final at the time the royalties are due. For example, the CRJs could have set a per-stream rate that did not use any such inputs.65

Second, while DMPs who take advantage of the Office’s estimate...
and adjustment regulations may have to pay late fees under the CRJs’ regulations for any underpayments, that has no bearing on whether the statutory text is ambiguous. As the MLC points out, the estimate and adjustment regulations adopted by the Office pursuant to that provision allow DMPs “to use estimates where appropriate without violating the law, . . . but not the ability to pay royalties later than the statutory due date.”

Further, as the NMPA noted, Congress knows how to exempt certain types of royalty payments from incurring late fees, as it did with the optional statutory limitation on liability for certain unlicensed uses prior to the license availability date. Under the negative-imputation cannon of statutory construction, “[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning,” i.e., that textual difference is presumed to be intentional.

2. Distinguishing the Phonorecords III Remand Determination

Commenters appear to be in agreement that late fees do not apply to adjustments resulting from the change in rates and terms following the CRJs’ Phonorecords III Remand determination. For example, the MLC reasoned that where applicable royalty rates are changed, as with the Phonorecords III Remand proceeding, there would be no underpayment to trigger late fees, as the “rates were not in effect at those times.” Similarly, the NMPA states that “where rates have not yet been determined, payment under the not-yet-determined rates are not ‘due’” and “[payment] only become[s] ‘due’ when [the rates] are determined.” The DLC believes that it would be illogical and inconsistent for DMPs’ “true-up” payments made after the Phonorecords III Remand determination to be considered “late.”

The Office concurs that no late fees are owed in connection with any Phonorecords III Remand adjustments. Under section 115(c)(1)(C), for digital phonorecord deliveries (including uses under the blanket license), “the royalty payable shall be the royalty prescribed under subparagraphs (D) through (F), paragraph (2)(A), and chapter 8.” Therefore, what constitutes “all royalties” that are “due” for any given monthly reporting period are the royalties “prescribed” under the rates and terms that are in effect at that time. By definition, the newer rates and terms, despite having retroactive effect, were not “the royalty prescribed” at the time the previous payment was due, and therefore did not constitute “the royalty payable” at that time. Previously timely payments cannot subsequently be rendered late because of a retroactive change in the rates and terms adopted by the CRJs.

C. The CRJs’ Authority To Set Late Fees

As noted above, the Copyright Office concludes that the MMA’s provisions are not ambiguous or silent on the issue of when royalty payments are due; therefore our inquiry ends here. To the extent that interested parties have competing policy concerns about when or how late fees should be incurred, such concerns must be addressed either to Congress or the CRJs, as Congress delegated authority over the substance of late fees to the CRJs and not the Office.

While we offer no views regarding what late fee regulations should be adopted by the CRJs, if any, the Office does take the position that the CRJs have broad and flexible authority under section 803(c)(7) to adopt late fee terms, including by adopting differentiated or variable late fees (e.g., where the amounts can change over time), if the CRJs see fit to do so and such regulations are otherwise consistent with title 17 and based on an appropriate record. Nothing in title 17 suggests that the CRJs cannot adopt different late fees (whether with respect to their amount(s) or how they operate) based on competing policy concerns.


Suzanne V. Wilson, General Counsel and Associate Register of Copyrights.

This rule is effective on October 5, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2023–0189. All documents in the docket are listed on the https://www.regulations.gov website. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at https://www.regulations.gov or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the FOR FURTHER INFORMATION CONTACT section to schedule your inspection. The Regional Office’s official hours of business are Monday through Friday, 9:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID–19.

FOR FURTHER INFORMATION CONTACT: Jessica Kilpatrick, Air Permits, Toxics,