

Congress of the United States

Washington, DC 20510

May 9, 2023

Ms. Shira Perlmutter
U.S. Copyright Office
101 Independence Ave SE
Washington, DC 20559

Dear Register Perlmutter:

We write to you today in response to the Copyright Office's [Notification of Inquiry](#) (NOI) seeking public comments regarding the obligation of digital music providers (DMPs) to pay late fees in cases where they do not make accurate, complete and timely payment of royalties under the blanket license created by the Music Modernization Act (MMA).

As Members of Congress, we believe that the statutory language is clear and reflects the intent of Congress. Late fees must be assessed on any royalty payments, including payments made in connection with a royalty adjustment, that are made after the initial date on which royalty payments are due to the Mechanical Licensing Collective (MLC), and such fees are to accrue from such initial due date until the date of payment to the MLC. The Office does not have the authority to modify the MMA in contravention of its clear language and Congressional intent.

Under the MMA, there are responsibilities and benefits shared by copyright owners and DMPs. The MLC, who represents copyright owners, assumes the obligation to match sound recordings to the underlying musical works and administers payment to songwriters, while DMPs are responsible for accurately and timely paying these royalties. DMPs benefit from the blanket license for all musical works, while the songwriters benefit from greater certainty that they will be appropriately compensated under Section 115 on a timely basis. Congress intentionally built in late fees to provide an important protection for songwriters to ensure timely payment of royalties.

We acknowledge that the DMPs have argued to the Office that there are occasions where they are unable to calculate Section 115 royalties due accurately or completely within 45 days after the end of the reporting period. In response to these concerns, the Office in September 2020 issued regulations that allow DMPs in certain circumstances to estimate royalty calculation inputs when making monthly royalty payments, and to subsequently adjust those calculations at a later date. This rulemaking was authorized by the MMA's grant of authority 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." 17 U.S.C. 115(d)(4)(A)(iv)(II).

In the NOI, however, it appears the Office is asking whether its September 2020 rulemaking, in which it accepted the proposition that DMPs can in certain cases make adjustments to previous royalty payments without sacrificing their access to the statutory blanket license, essentially allows DMPs to adjust previous royalty underpayments after the initial due date without penalty of a late fee accruing from that initial due date. Such an interpretation would plainly violate the statutory text and should not be adopted. The Office does not have the authority to modify the

applicability of statutory late fees to payments made after the statutory due date for payment. 17 U.S.C. 115(d)(4)(A)(iv)(II).

Congress intended late fees to accrue from the date that a DMP's payment is initially due, regardless of any subsequent adjustment or correction by the DMP. The late fee was intended to incentivize DMPs to avoid late payments so that songwriters may receive all of the royalties that are owed to them when they are due. On this, in addition, the clear and unambiguous statutory language, the legislative history is clear:

Although it would be far preferable for every digital music provider that obtains a compulsory license to meet all of the terms of such license, there may be occasions when that will not be the case. The legislation anticipates the imposition of a late fee to be determined in advance by the Copyright Royalty Judges to address late payments. However, the legislation also recognizes that such late fees may not be enough to bring a provider back into compliance and therefore identifies the conditions upon which digital music providers shall be deemed in default of such compulsory licenses, and thus allow the collective to terminate such license automatically.¹

Importantly, modifying the Congressionally-determined timing of late fees would have real consequences to songwriters and their financial well-being. If late fees did not apply from the initial payment due date, DMPs would not have the incentive to estimate accurately on the front-end royalties owed and could intentionally underestimate, holding onto these funds for up to 18 months or more. 37 CFR 210.27(g)(3), (4); 210.27(k). In fact, the regulations appear to state that the period during which a DMP can make an adjustment to an estimate (and during which a DMP can therefore hold money that belongs to songwriters) is indefinite. *Id.*; 210.27(k)(6). The 2020 rulemaking regarding the making of estimated payments should be viewed as a guide to DMPs as to how they can make late payments without jeopardizing their access to the statutory blanket license, not how they can evade their obligation to pay a statutory late fee when full payment is not made by the due date.

We urge the Copyright Office to follow the clear letter of the law, which requires that late fees apply to any underpayment of monthly royalties from the initial statutory due date until such payment is received in full by the MLC. Thank you for your prompt attention to this matter. If you have any questions, please do not hesitate to contact us.

Sincerely,

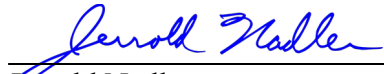
¹ https://www.copyright.gov/legislation/mma_conference_report.pdf



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