

**Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.**

In the Matter of:

Mechanical and Digital Phonorecord Delivery
Compulsory License

Docket No. 2012-7

JOINT COMMENTS

The Digital Media Association, National Music Publishers' Association, Inc., Recording Industry Association of America, Inc., The Harry Fox Agency, Inc. and Music Reports, Inc. (the "Joint Commenters") are pleased to submit these Joint Comments in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. The Joint Commenters represent the most active participants on all sides of the mechanical licensing system, including owners and users of musical work copyrights and agents involved in obtaining and administering compulsory mechanical licenses.

The Joint Commenters appreciate the Copyright Office's attention to updating the accounting regulations under Section 115. These regulations are complicated and esoteric, but perform an important role in facilitating the legitimate distribution of recorded music. Updating the regulations to reflect the new statutory royalty rate structures is necessary, and presents a good opportunity to clean up and modernize certain other aspects of the regulations. The proposed rule set forth in the NPRM (the "Proposed Rule") makes important strides in that direction.

The Joint Commenters believe, however, that the Proposed Rule can be improved upon. The Joint Commenters have discussed the Proposed Rule and the issues raised in the NPRM in detail and are pleased to have reached substantial agreement concerning modifications to the

Proposed Rule that would conform it more closely to the statutory rate structure, attend to issues raised in the NPRM but not addressed in the Proposed Rule, and generally facilitate use of the compulsory license system for copyright owners and users alike.¹ The Joint Commenters have attached as Exhibit A a set of proposed regulations reflecting the points upon which they agreed, and as Exhibit B a copy of those proposed regulations marked to show changes from Subpart B of the Proposed Rule.

In the remainder of these comments, the Joint Commenters describe their proposed revisions to the Proposed Rule and their further thoughts concerning the issues raised in the NPRM. We begin with two issues concerning the Proposed Rule in general. We then discuss in turn each of the specific issues raised by the NPRM as to which we were able to reach agreement. We conclude by discussing certain additional specific issues.

1. Structure of the Proposed Rule

The Office proposes creating a new 37 C.F.R. Part 210 Subpart B specifying accounting rules for uses with a statutory cents rate (rates set forth in 37 C.F.R. Part 385 Subpart A) and a new Part 210 Subpart C specifying accounting rules for the more recent categories of uses with a statutory percentage rate (rates set forth in 37 C.F.R. Part 385 Subpart B and proposed Part 385 Subpart C). 77 Fed. Reg. at 44,180-81.

The Joint Commenters agree that it is necessary to modify the Copyright Office's current regulations for Statements of Account under Section 115 as set forth in 37 C.F.R. § 201.19 (the "Existing Regulations") to reflect the rate categories in Part 385 Subpart B and Subpart C

¹ The Joint Commenters were not able to reach agreement concerning certain issues. These include treatment of negative reserve balances and identification of third party services, which are not addressed herein. Each Joint Commenter reserves the right to comment separately concerning the open issues.

(assuming Subpart C is adopted by the Copyright Royalty Judges).² The Joint Commenters also agree that the subject of compulsory mechanical license accounting is sufficiently complicated, and its treatment in regulations sufficiently lengthy, to warrant a separate C.F.R. part or subpart, rather than shoehorning it into a single section as in the Existing Regulations. However, the Joint Commenters have concerns about the specific implementation of these principles in the Proposed Rule, and think it would be best to combine the subparts of the Proposed Rule.

First, the Proposed Rule does not accurately conform to the rate classes in the Proposed Rates, and as a result, the division between the subparts described in the NPRM is not actually implemented in the Proposed Rule. For example:

- The caption of Subpart B of the Proposed Rule accurately tracks the configurations identified in Part 385 Subpart A, but the same product configurations also can be covered by certain of the percentage rate structures proposed to be included in Part 385 Subpart C.³
- Proposed Section 210.11 states the subject matter of Subpart B of the Proposed Rule in terms general enough to encompass all uses under Section 115.
- The caption of Subpart C of the Proposed Rule indicates that it addresses “Other Digital Phonorecord Delivery Services” (as well as interactive streaming and limited downloads). However, the largest category of digital phonorecord

² See *Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords*, 77 Fed. Reg. 29,259 (May 17, 2012) (the “Proposed Rates”).

³ This is specified, among other places, in the definition of the term “Licensed subpart C of this part activity” in Section 385.21 of the Proposed Rates, which identifies the various product configurations that can be compensable under each of the proposed new Subpart C rate classes. Proposed Section 385.20(a) resolves this potential overlap by specifying that when a product configuration with a rate specified in Subpart A is included in Subpart C activity, that use generally is subject to the Subpart C rates rather than the Subpart A rates (except in the case of music bundles, as to which the licensee may elect between the two subparts).

deliveries (“DPDs”) other than interactive streams and limited downloads – permanent digital downloads – is generally subject to Part 385 Subpart A, not Part 385 Subpart B or C, as are ringtones.

- Proposed Section 210.21 states the subject matter of Subpart C of the proposed Rule as “certain services which offer digital phonorecord deliveries.” However, a physical phonorecord included in a music bundle can be subject to Subpart C of the Proposed Rates, and again, permanent digital downloads and ringtones are generally subject to Part 385 Subpart A.

Second, the division of the Proposed Rule into subparts, and various references in each subpart to separate statements being provided for activity under a subpart or section, seem to indicate that the Proposed Rule requires a licensee to account for its cents rate usage and percentage rate usage separately. *See* Proposed Rule, §§ 210.12(f), 210.16(g)(3), 210.22(h), 210.23(g)(3). Often, a particular licensee may have only cents rate usage or only percentage rate usage to report. However, in any case in which a licensee must account for both types of usage, the Joint Commenters support giving the licensee the option of combining both types of usage on a single statement. When it is practicable, it will generally be easier for licensees to produce and deliver, and copyright owners to ingest, one statement rather than two.

Finally, the Proposed Rule is unnecessarily long and repetitive, and hence more difficult than necessary to understand and use, due to the inclusion in both subparts of definitions, basic reporting elements, certification and service requirements, and other language that is the same or substantially the same in both subparts.

The Joint Commenters believe that the best solution to all these concerns is to combine the two subparts of the Proposed Rule. Thus, Sections 210.16(c) and (d) and 210.17(d) of the

Joint Commenters' proposed regulations have separate subparagraphs for cents rate and percentage rate usage, but other aspects of the proposed regulations are not repeated.

2. Details of the Proposed Rule Should be Conformed to the Proposed Rates

The NPRM indicates that the primary motivation for revising the mechanical royalty accounting regulations is to reflect the new rate structures. 77 Fed. Reg. at 44,180. In doing so, it is obviously important that the accounting regulations match the current rate regulations.

Toward that end, the Joint Commenters agree with the Office's general approach of incorporating by reference in the accounting regulations the rate calculation methodology set forth in current Part 385 Subpart B and in the Proposed Rates. NPRM, 77 Fed. Reg. 44,181.

However, the Office also included in the Proposed Rule certain specific reporting elements that are not consistent with Part 385 Subpart B and the Proposed Rates. For example, proposed Section 210.23(c) identifies specific information to be reported on monthly statements, including numbers of phonorecords involved broken down by configuration. Proposed Section 210.24(d)(1) does the same for annual statements. Proposed Section 210.23(d)(1) refers to payment for every phonorecord distributed. Proposed Section 210.23(d)(2) contemplates separate calculation of a per-phonorecord payment by offering (giving as examples thereof limited downloads and streams).

Under Part 385 Subparts B and C, the number of phonorecords made and distributed is not generally determinative of the rate calculation, and phonorecords of multiple configurations are generally treated together as part of a single rate calculation. Setting aside music bundles, services may deliver various kinds of transmissions (depending on the rate class). In each case, the rate calculation is performed on the basis of an offering (defined as a subscription plan or similar service offering, not a type of transmission). For the offering, royalties are allocated on

the basis of actual or constructive plays, as set forth in Section 385.12(b)(4) and Section 382.22(b)(3) of the Proposed Rates, rather than phonorecords made and distributed.

The Joint Commenters believe that the best way to conform the Proposed Rule to the Proposed Rates is to take a minimalist approach to incorporating into the accounting regulations details imported from Part 385. In addition, because it is foreseeable that Part 385 may continue to evolve in future rate periods, it is desirable to structure the accounting regulations in a manner likely to minimize the need for future maintenance. Thus, in the Joint Commenters' proposed regulations, Section 210.16(c)(2) specifies few details specific to the percentage rate classes, identifies no specific configurations, and contemplates the possibility of future similar rate structures in Part 385. The Joint Commenters' proposed Section 210.16(d)(3) is similarly a minimalist and more generic version of Section 210.23(d) of the Proposed Rule.

3. Performance Royalties that Have Not Been Finally Determined

The NPRM discusses accounting for royalties under Part 385 Subpart B and C when public performance royalties for a service have not been finally determined. 77 Fed. Reg. at 44,181. The Proposed Rule addresses this situation in Section 210.23(d)(4) and Section 210.25. The analogous provisions of the Joint Commenters' proposed regulations are Sections 210.16(d)(3)(i) and 210.17(d)(2)(iii).

The Joint Commenters generally agree with the Office's proposed approach. It will sometimes be necessary for services to confront this situation, and the accounting regulations should specify procedures for addressing it. The Joint Commenters also agree that in such a case, it will be necessary to proceed on the basis of an estimate, with a true-up later, once all the final performance rates for the service for the period have been determined. The Office identifies an interim performance rate as one option for deriving such an estimate, and the Joint Commenters agree that such an approach is reasonable.

However, the Joint Commenters propose two refinements to the Office's approach. First, as the Office notes, an interim rate may not have been set. An interim rate also may be low enough to create a material risk of overpayment of mechanical royalties, which a licensee may not be able readily to recoup from a copyright owner with which it does a low volume of business. Accordingly, the Joint Commenters think it would be useful to indicate in the regulations that it may be reasonable to use the aggregate amount of public performance royalties then sought from the licensee by performing rights licensors as a basis for computing the public performance royalty component, if that approach is supportable under GAAP.

Second, the Proposed Regulations specify two slightly different procedures for making adjustments based on such estimated payments once final rates are determined, and the Joint Commenters believe that neither of them is optimal. Section 210.23(d)(4) contemplates that an adjustment will be made by filing an amended annual statement within six months of obtaining information concerning actual performance royalty payments (assuming that is after the first annual statement based on estimates is provided). Section 210.25 contemplates providing multiple amended annual statements (if payments based on estimates span multiple years) within six months from the date final rates for the relevant works are established.

The Joint Commenters have various concerns about these approaches:

- The Joint Commenters believe that a performance rate adjustment for a particular service offering should be made only once for a particular accounting period. A service may license different works from different performing rights organizations or other licensors, and have uncertainty in performance rates as to different licensors at different times. Because the performance royalty deduction under Part 385 Subparts B and C is made at the level of a service offering, not a particular work, final determination of mechanical royalty rates requires knowing final performance rates

for all works used by the service in an accounting period. Thus, when Section 210.25 contemplates making an adjustment based on known performance rates for particular works, it implies that a further adjustment may be required later if performance rates are then undetermined for any other works. Multiple rounds of adjustment for a single accounting period would be burdensome and confusing for licensees and copyright owners alike.

- The Joint Commenters believe that an adjustment should be made on one annual statement, not multiple amended annual statements. Multiple annual statements would be difficult and expensive for licensees to prepare and have certified, and burdensome for copyright owners to process. In addition, where ownership of a work may have changed over the relevant period, the only practicable approach is to make the adjustment between the licensee and the current copyright owner. This implies that the adjustment should not be implemented by a requirement to amend an annual statement originally sent to a previous owner.
- The Joint Commenters believe that the adjustment should be made on an annual statement submitted in the ordinary course. Proposed Sections 210.23(d)(4) and 210.25 contemplate annual statements being provided six months after either obtaining certain information concerning payments or the establishment of final rates. Either way, that will almost certainly be sometime other than the usual annual statement date (the 20th day of the sixth month following the licensee's fiscal year end). This means that the licensee would need to obtain and pay for two sets of annual statement certifications within one year. Because the cost of certification is potentially large, the Joint Commenters do not believe that should be necessary.

Accordingly, the Joint Commenters have proposed in their Sections 210.16(d)(3)(i) and 210.17(d)(2)(iii) that any adjustment necessary when performance royalty rates finally are determined would occur on the single, regular statement of account for the year in which the final royalty expense for the offering is paid.

The Office inquired specifically about the potential application of GAAP to this process. GAAP contains rules for the recognition of expenses that the Joint Commenters believe to be helpfully related to accounting for performance royalties that have not been finally determined. Moreover, within the current larger regulatory environment, the Joint Commenters do not see any real alternative to the use of GAAP in this context at this time. Publicly-traded companies in the U.S. are generally required to use GAAP accounting, and as the NPRM notes, the rate regulations in Part 385 Subparts B and C are permeated with references to GAAP.

However, the Joint Commenters have proposed including in Section 210.12 a definition of the term “GAAP” contemplating that GAAP itself may eventually be replaced by the International Financial Reporting Standards (“IFRS”). This mirrors a definition in Section 385.11 of the Proposed Rules. The Joint Commenters believe that it is appropriate to plan for the possible eventual migration of U.S. accounting from GAAP to IFRS, because the SEC has long been exploring a move in that direction. *See, e.g.*, U.S. SEC, Work Plan for the Consideration of Incorporating International Financial Reporting Standards into the Financial Reporting System for U.S. Issuers (July 13, 2012), *available at* <http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-final-report.pdf>. For purposes of consistency with the Proposed Rules, the Joint Commenters respectfully request that all references in the Proposed Rule to Generally Accepted Accounting Principles be replaced by references to this defined term.

4. Rounding

The NPRM indicated that the Office would like to address the degree of rounding appropriate in computation of percentage rate royalties. 77 Fed. Reg. at 44,182. The Proposed Rule itself does not address this topic. The Joint Commenters' proposed regulations address this topic in Sections 210.16(d)(3)(ii).

The Joint Commenters propose that an actual or constructive per-play allocation (the number that is then multiplied by the number of plays to determine the per-work royalty allocation) be calculated to at least six decimal places if the systems used by the compulsory licensee are designed to make royalty calculations to at least six decimal places, and in any event to at least four decimal places. The issue is that older royalty accounting systems originally designed primarily for physical configurations may not have been designed to perform royalty calculations to more than four decimal places, while newer systems generally would. As a result, the Joint Commenters understand that many, but not all, payors have the capability to make this calculation to at least six decimal places, and view that degree of precision as desirable where available.

However, rounding does not inherently favor one party or another. For any given payor and payee, the benefits and detriments of calculating this number to six digits rather than four are essentially random, will generally be very small (if discernable at all), and will tend to average out. Thus, for payors that do not have the capability to make this calculation to more than four decimal places, the Joint Commenters do not view the benefits of the additional precision as sufficient to require reengineering of the relevant systems.

5. Electronic Payment and Transmission of Payments Generally

The NPRM discusses the possibility of electronic payment. 77 Fed. Reg. at 44,182. The Proposed Rule provides for that possibility in Section 210.16(g)(6) and Section 210.23(g)(6).

The Proposed Rule also provides in Sections 210.16(g)(7) and 210.23(g)(7) for copyright owners to adopt and publicize policies for receiving electronic statements and related payment procedures. Payment is addressed in Sections 210.16(g)(1) and (9), and 210.17(g)(4) and (7), of the Joint Commenters' proposed regulations.

Electronic payment of mechanical royalties is a common occurrence. However, as a practical matter, it can only occur with agreement of the payor and payee, because the payor needs to have the capability and desire to make an electronic payment, and the payee needs to have the desire to receive electronic payments and provide the bank routing information necessary for the payment to be made. The Joint Commenters do not believe that it is necessary for the accounting regulations to address voluntary arrangements, since there is a very long history of voluntary mechanical licensing without that possibility being addressed in the regulations. However, in the end, the Joint Commenters concluded that it may be helpful to include in the regulations a brief statement that the regulations are not intended to foreclose consensual arrangements. That is what the Joint Commenters have provided in their proposed 210.16(g)(9) and 210.17(g)(7).

The Joint Commenters have specifically proposed omitting two aspects of the Proposed Rule. First, Sections 210.16(g)(6) and (7) and 210.23(g)(6) and (7) of the Proposed Rule each reiterated the statutory payment deadline. That deadline is set forth in Sections 210.16(g)(1) and 210.23(g)(1) of the Proposed Rule, and it is not necessary to repeat it. It would be particularly inappropriate to repeat the deadline in a provision concerning consensual arrangements, since the deadline is one of the terms most commonly varied in consensual mechanical licensing. Second, the provisions of Sections 210.16(g)(7) and 210.23(g)(7) concerning copyright owners' publicizing policies concerning electronic statements and payments seem unnecessary, because they simply provide one route to a consensual arrangement.

The Proposed Rule provides that when statements and payments are sent by mail or courier, they should be sent together. The Joint Commenters propose modification of this aspect of the Proposed Rule. Paper checks sometimes originate from a payor department other than the department that generates royalty statements, and the printing and mailing of checks is sometimes outsourced to a third party. Moreover, some payees of mechanical royalties prefer to have their payments sent to their lockbox service, while receiving their statements themselves. As a result, it is fairly common for paper-based statements and payments (as well as electronic ones) to be sent separately. Separate transmission of statements and payments has worked satisfactorily when the statement is identified on the check stub or electronic payment information. Accordingly, the Joint Commenters have proposed generalizing 210.16(g)(1) and 210.17(g)(4) to provide that paper or electronic statements and payments may be sent together or separately, but if sent separately, the payment must include information reasonably sufficient to allow the payee to match the statement and the payment.

6. Electronic statements of account

The NPRM discusses electronic delivery of statements of account. 77 Fed. Reg. at 44,182-83. The Proposed Rule generally provides for paper-based statements (Sections 210.16(g)(1), 210.17(g)(1), 210.23(g)(1), 210.24(g)(1)), but permits the copyright owner to demand electronic statements if more than 50 works are involved (Section 210.16(g)(5), 210.17(g)(5), 210.23(g)(5), 210.24(g)(5)). Electronic statements are addressed in Sections 210.16(g)(2) and (3), and 210.17(g)(2) and (3), of the Joint Commenters' proposed regulations.

As the NPRM notes, different constituencies have different preferences concerning delivery of statements. What has happened in practice is that services and agents making large scale use of the compulsory license have defaulted to electronic delivery, but when some payees have requested paper statements, they have provided them. Conversely, record companies have

defaulted to paper statements, and still use them for many payees, but deliver statements electronically when requested. The Joint Commenters believe that the regulations should implement exactly this arrangement. Each payor could in the first instance choose its preferred mode of delivery, but if a payee requests the other approach, that request would be honored within a reasonable grace period. To minimize disruption, a payee could change its preference no more frequently than annually.

Once electronic delivery is determined to apply, there is a further question concerning the mode of delivery. The Proposed Rule contemplates mailing of discs or other media as the preferred mode of electronic delivery, with email or other transmission an alternative if authorized by the payee. The Joint Commenters do not believe that such an approach is workable. In practice, electronic statements are generally sent by email, made available for download from a portal, or uploaded to an FTP site. Since electronic delivery is accomplished in many ways, and future technological changes could bring further changes in the way statements are delivered, the Joint Commenters believe that regulations should not address this subject in detail. Accordingly, they have included in their proposed regulations only a general statement concerning format and security.

Sections 210.16(f)(3), 210.17(f)(5), 210.23(f)(3) and 210.24(f)(5) of the Proposed Rule specify that if a statement is served electronically, the license and copyright owner are to agree upon a procedure for verification of authority. This is impracticable for large-scale uses of the compulsory license, creates a risk of disagreement, and is simply unnecessary. Federal law supports the use of electronic signatures, *see* 15 U.S.C. § 7004(b); sending of unauthorized mechanical accounting statements has not been a problem; and there is no reason to believe that unauthorized mechanical accounting statements are more likely to be a problem with electronic transmission than paper-based transmission. Accordingly, the Joint Commenters have provided

for electronic signature of electronic statements in Section 210.16(f)(3) and 210.17(f)(4) of their proposed regulations.

7. Minimum Payment Threshold

The NPRM raises the possibility of a minimum royalty threshold that must be met before payment is due, and inquires whether that is permissible under the statute. 77 Fed. Reg. at 44,183. The Proposed Rule does not include such a threshold. The Joint Commenters' proposed regulations provide such a threshold in Section 210.16(g)(6).

The availability of digital music services offering large catalogs of tracks makes it appropriate to consider implementing a payment threshold at this time. It is desirable that the public should have the ability to access, and creators and copyright owners should have the ability to be paid for, a wide selection of music. However, experience indicates that fewer than 10% of tracks typically will constitute more than 90% of usage of such a service, and that usage of other tracks will be highly diffuse. Many copyright owners may be entitled to payments that are small, and sometimes less than a cent. As the NPRM notes, processing small payments can be burdensome for both licensees and copyright owners: Licensees must generate and mail statements and payments, and copyright owners must process them through their financial and royalty systems. The effort and expense required on each side can dwarf the payments sometimes generated from use of less popular songs.

Because the banking system cannot process payments for less than a cent, a minimum royalty threshold of a cent is simply necessary. However, the Joint Commenters believe that Section 115 provides the Office more flexibility than that to determine a payment threshold. The relevant statutory payment provision provides that each payment is to include "royalties for the month next preceding." 17 U.S.C. § 115(c)(5). This language appears to have been carefully chosen. Determining precisely what are the "royalties for the month next preceding" is a topic

for the accounting regulations, which are contemplated by the next sentence of the statute. In the case of reserve accounting for physical products, the accounting regulations have always included a mechanism that can result in the deferral of payments for some products. There is no statutory language specifying that a record distributed with a return privilege can be reserved, but must be considered payable no later than nine months later, as provided in Section 210.12(i)(3)(ii) of the Proposed Rule. Those features of the Proposed Rule are an exercise of the Office's discretion in determining "royalties for the month next preceding." That same discretion would permit the Office to set a reasonable minimum payment threshold, so long as the full royalties are payable within a reasonable time.

Here, the Joint Commenters propose giving licensees discretion to set a minimum payment threshold of up to \$50. Payment of any royalty accrual that remains less than that amount could potentially be deferred until the time of the annual statement, but whenever the accrual exceeds \$50, that amount would become payable. Importantly, the Joint Commenters propose that any copyright owner that wishes to receive monthly payments of smaller amounts would have the right to request and receive such payments. Thus, if the Office views Section 115(c)(5) as requiring payment for every unit distributed in the preceding month – even though that is not what it says – the Joint Commenters' proposed regulations provide a mechanism for a copyright owner to obtain a monthly payment any time it has at least a cent in royalty accruals. With this mechanism, the Joint Commenters believe that their proposed regulations are fully consistent with any interpretation of Section 115(c)(5), and that the minimum payment threshold should be viewed as unobjectionable.

8. Promotional DPDs

The NPRM discusses accounting for zero-rate promotional DPDs. 77 Fed. Reg. at 44,183. Section 210.23(c)(1)(ii) of the Proposed Rule requires reporting the number of

promotional streams and limited downloads, even though they have no bearing on the royalty calculation. Sections 210.23(c)(1)(i) and 210.24(d)(1) of the Proposed Rule also appear to require combining zero-rate promotional DPDs with payable ones in certain data fields to be reported on monthly and annual statements. Section 210.16(c)(2)(i) of the Joint Commenters' proposed regulations provide that zero-rate promotional DPDs need not be reflected on statements.

The Joint Commenters strongly disagree with the Office's approach to this issue. As an initial matter, it is important to understand what uses are covered by the promotional rate in Sections 385.14 and 385.24 of the Proposed Rates. These provisions encompass a wide range of uses. These uses include, but are certainly not limited to, certain free trial periods as identified in the NPRM. The category of zero-rate promotional use that is probably far and away the most common is streaming of preview clips from download stores. The zero rate uses also include things like on-demand streaming from artist and record company websites and promotional on-demand streaming from other sites that may not be regular participants in the mechanical licensing system.

The NPRM assumes that because the promotional royalty rate regulations require the service making the promotional use to keep records of such use, it would not be a "hardship" to reflect such use on statements. That assumption is wrong. The mere fact that information exists somewhere in some form does not mean that it would be easy to gather and report that information and process it through royalty accounting systems. To the contrary, reporting such use would impose significant burdens up and down the license and distribution chain:

- Today, these promotional uses are not generally reported to anyone. Imposing a new reporting requirement would necessitate creating new reporting processes from the operator of the site back to the compulsory licensee (if different). A site operator that

previously was content to meet a recordkeeping obligation through statistics maintained by the site would instead need to figure out how to translate those statistics into a data feed that could be ingested by a royalty accounting system. This would be particularly burdensome for operators of artist sites and other third party sites relying on pass-through licenses, since they are not necessarily accustomed to reporting any usage at all.

- Sites transmitting promotional streams sometimes rely on mechanical licenses obtained by record companies. Record company royalty systems are not set up to process and report these zero rate uses. New zero-rate products would need to be set up in their systems, and data feeds from new sources would need to be ingested. The capacity of their systems may need to be increased to handle the volume of new zero-rate data flows.
- In the case of preview clips through a download store, reporting the clip streams as well as the downloads sold would likely at least double the volume of data that would need to be processed for the service.
- Reporting zero-rate uses would significantly increase the size of the statements finally delivered to copyright owners. The typical statement size easily could double (or more). Statements for percentage rate uses already can be massive. Doubling the volume of data flowing through music publisher royalty accounting systems would tax the capacity of those systems. Despite all the effort that licensees would have put into collecting and delivering this information to copyright owners, it is quite possible that copyright owners would end up reprogramming their systems to filter out and discard the zero rate data.

None of this disruption is warranted. The promotional royalty rate is zero. As a result, accounting for these uses has no financial impact. To keep these valueless uses from clogging up royalty accounting systems designed to process data that does have financial impact, the promotional royalty rate provisions have extensive provisions requiring that records be kept and made available on request. *E.g.*, 37 C.F.R. § 385.14(a)(2), (3). These provisions were carefully calculated to provide copyright owners access to usage information if desired without burdening the entire royalty accounting process in the ordinary case when such information is not desired. These kinds of provisions do not apply to royalty-bearing uses. By layering the entire usual royalty accounting regime on top of these special provisions, the Proposed Rule makes the least valuable uses the ones most subject to recordkeeping and reporting obligations. In view of the lack of financial impact and the existing extensive recordkeeping requirements, there can be no justification for imposing on participants in the mechanical licensing system the significant burden of providing what they have agreed to be unnecessary accounting for the zero rate use.

This disruption also is not legally required. The NPRM mentions statements made by the Register in 2009 in the context of reviewing the promotional royalty rate regulations upon their adoption by the Copyright Royalty Judges. *See Review of Copyright Royalty Judges Determination*, 74 Fed. Reg. 4537, 4543 (Jan. 26, 2009). In considering a sentence then included in Section 385.14 concerning reporting of promotional royalty rate uses on statements of account, the Register reached two conclusions. First, the Register concluded that “[t]he CRJs cannot alter requirements issued by the Register regarding statements of account.”

The Register then went on – unnecessarily, in view of the first conclusion – to discuss the last sentence of Section 115(c)(5). That sentence provides that “[t]he regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records

distributed.” The Register then stated that “[t]here is no statutory authority for an exception to this requirement for certain types of ‘phonorecords.’” The last sentence of Section 115(c)(5) is difficult to parse, and perhaps not entirely grammatical. However, it seems most natural to read it as listing three aspects of statements that must be prescribed by these regulations:

- The form of the statements;
- The content of the statements; and
- The manner of certification with respect to the number of records made and the number of records distributed, as presented on the statements.

Thus, the Joint Commenters respectfully suggest that the Register’s prior determination missed the point of this sentence. The purpose of this sentence is to identify matters that must be addressed in the Office’s mechanicals accounting regulations. The statutory “requirement” is that the Office’s regulations address those topics. The Office’s current regulations, the Proposed Rule, and the Joint Commenters’ proposed regulations all address those topics, and hence are all consistent with the requirement. The point of giving the Office discretion to consider these topics is precisely to allow the Office to consider matters like the question of whether zero-rate uses must be reported. Nothing in the sentence seems to foreclose the Office from exercising its discretion to conclude that zero-rate uses do not need to be reported.

9. Certification Language

The Proposed Rule retains the same or substantially the same certification language for monthly and annual statements as the current regulations, but the NPRM inquires whether alternative certification language should be provided for annual statements. 77 Fed. Reg. at 44,184.

The Joint Commenters agree that, for both monthly and annual statements, the current certification language is insufficient. In the case of monthly statements, the certification assumes

human review that is impracticable and pointless for large-scale use of the compulsory license. In the case of annual statements, the certification assumes examination that is inappropriate for large-scale use of the compulsory license, and also is inconsistent with the current opinion practices of many auditors. While the Joint Commenters agree that updating of the certifications is necessary, it has proven challenging to figure out language that will assure copyright owners that statements are reasonably accurate, while not imposing undue costs on licensees, and also passing muster with the opinion committees of international audit firms. As a result, the Joint Commenters are not in a position to suggest specific certification language at this time. We hope to be able to do so in reply comments.

10. Timing of Annual Statements

The NPRM raises the possibility of extending the time period for preparing annual statements (currently three months) to six months. 77 Fed. Reg. at 44,184. This change is implemented in Sections 210.17(g)(1) and 210.24(g)(1) of the Proposed Rule and Section 210.17(g)(1) of the Joint Commenters' proposed regulations.

The Joint Commenters agree with the Office that it would be reasonable to make this change. Large-scale use of the compulsory license, particularly for percentage-rate uses, has made preparation and auditing of annual statements a complex process. In addition, it is important to remember that the first month of the annual statement period is necessarily devoted to completing the monthly accounting for the last month of the year, since the monthly statements can't be tallied until the last one is done. Two months after preparation of the last monthly statement is completed is not long to complete the whole annual statement process. Six months after the fiscal year end is a deadline more appropriate to the task than three.

11. Statements for Past Periods

The NPRM states that the Office is required to establish dates for filing of statements to cover all past reporting periods since the effective date of the current rate regulations (March 1, 2009). 77 Fed. Reg. at 44,184. Toward that end, Sections 210.19 and 210.27 of the Proposed Rule provide that statements for any reporting period prior to the effective date of the regulations adopted in this proceeding will be due 180 days after the effective date of those regulations. The Joint Commenters' proposed regulations address in Section 210.17(h) the more limited question of annual statements not provided because it was impracticable for the compulsory licensee to do so.

The Joint Commenters do not fully understand either the Office's proposal or the grounds for the Office's believing this proposal is necessary. To the extent that what the Office intended is broader than what is set forth in Section 210.17(h) of the Joint Commenters' proposed regulations, the Joint Commenters' believe the Office's proposal is unnecessary and inappropriate.

As a threshold matter, there is a question of what the Office really means to propose. While the NPRM mentions March 1, 2009 and the percentage rates in Part 385 Subparts B and C (assuming Subpart C is adopted), the Office proposed addressing this matter in Subpart B of the Proposed Rule (Section 210.19), which the Joint Commenters understand to have been intended to cover usage subject to the cents rates in Part 385 Subpart A. Moreover, Sections 210.19 and 210.27 of the Proposed Rule, taken literally, seem to say that statements going all the way back to the introduction of the compulsory license in 1909 are due 180 days after the effective date of the new regulations, regardless of whether the relevant use was previously accounted for.

There are also important limits on the Office's authority in this regard. It is difficult to read Section 115(c)(5) as permitting a due date for monthly statements other than the 20th of the month next following. Moreover, as the Office recently noted in a different context:

“a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (citations omitted). *See also Motion Picture Association of America, Inc. v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992) (explaining that the Register of Copyrights does “not have authority to promulgate retroactive rules unless Congress gives [her] that authority in express terms”).

Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers, 77 Fed. Reg. 35,643, 35,645 (June 14, 2012). Since nothing in Section 115 suggests that the Office ought to be able to impose accounting requirements retroactively, the Office would not seem to have the power to impose on licensees new requirements for past periods.

In view of our questions about what the Office meant to propose and whether the Office can do anything in this regard, the Joint Commenters discussed whether there are in fact gaps in past reporting that might warrant special reporting procedures. The Joint Commenters are not aware of users of the compulsory license system that have been proceeding in good faith yet have not been providing monthly statements on a current basis. For cents rate uses, such compliance has been straightforward. While new ringtone rates went into effect on March 1, 2009, responsible users have accounted for their ringtones by using the proper rate, just as they have long accounted for their physical products and permanent downloads by using the proper rate, even though a superseded rate is provided in the regulations. *See* 37 C.F.R. §§ 201.19(e)(4)(ii).

The Office properly notes that the situation with percentage rate uses is a little more complicated. However, Section 385.12(e) addresses accounting for these uses. That provision

was intended to be sufficient to address accounting for percentage rate uses, and the Joint Commenters' experience has been that it has proven up to the task. In Section 210.23(c) of the Proposed Rule, the Office identifies some specific data points to be reported. However, as noted above, many of those are unrelated to the royalty calculation, and for that reason are omitted from Section 210.16(c)(2) of the Joint Commenters' proposed regulations. What is left are basic items of identifying information that are sufficiently obvious that the lack of Copyright Office regulations specifically addressing this matter has not prevented preparation of useable monthly statements. Restating several years of monthly statements that have passed without objection would be a massive undertaking serving no useful purpose. The Office should not require that.

In the case of annual statements, the Joint Commenters are aware that certain licensees making large-scale use of the compulsory license for percentage rate configurations have not been providing annual statements. However, this is not really a function of the rate structure. It is a consequence of annual statement requirements with which it is difficult or impracticable to comply. Providing missing annual statements for past years likely would not be an easy undertaking for licensees. Such accountings also may be of little utility to copyright owners, or even present complications for copyright owners, when they long ago processed the relevant monthly statements and paid their writers. Nonetheless, the Joint Commenters agree that when an annual statement for a fiscal year after March 1, 2009 was not provided because it was impracticable for the licensee to provide it, and the copyright owner still wants it, there should be a mechanism for the statement to be provided in conformity with the regulations adopted in this proceeding. That mechanism is provided in Section 210.17(h) of the Joint Commenters' proposed regulations.

In other respects, the Joint Commenters are not aware of any general pattern of non-submission of annual statements. Neither are the Joint Commenters aware of any circumstance

that would warrant imposing on licensees a requirement to redo annual statements that have already been provided so as to make them conform to new requirements that would be applied retroactively.

12. Record Retention

The NPRM addresses extension of the period for retention of records. 77 Fed. Reg. at 44,184-85. This is implemented in Sections 210.18 and 210.26 of the Proposed Rule and Section 210.18 of the Joint Commenters' proposed regulations. The Joint Commenters generally agree with the Office's approach to this issue.

However, the Office included in Section 210.26 a special provision for circumstances in which the performance royalty used in a percentage rate calculation initially must be estimated. Given the Joint Commenters' proposed approach to implementing an adjustment when performance royalties finally are determined (see Section 210.17(d)(2)(iii) of the Joint Commenters' proposed regulations), it does not seem necessary to address that situation specially in the record retention provision.

13. Harmless Errors

The NPRM discusses the possibility of adding a harmless error provision to the accounting regulations and specifically inquires concerning the Office's authority to adopt such a provision. 77 Fed. Reg. at 44,185. The Proposed Rule does not contain such a provision. The Joint Commenters have included one in Section 210.19 of their proposed regulations.

The Joint Commenters do not see any legal impediment to the Office choosing to include such a provision. Section 115(c)(5) authorizes the Register to prescribe requirements for monthly and annual statements. Those regulations are to address "the form, content, and manner of certification." The Office has significant discretion as to those matters. If the Office can

design specific requirements within the scope of that discretion, the Office can provide limited relief from those requirements in the case of harmless errors.

The Joint Commenters also believe such a provision is appropriate. The accounting regulations are exceedingly intricate, and ultimately implemented in an operational environment in which it is impossible to achieve perfection all the time. One can easily imagine errors that would not affect the accuracy or usefulness of a statement. For example, precise forms of certification language are prescribed. At the most trivial extreme, a spelling error in a certification does not seem like something that should render a statement invalid and potentially subject the licensee to termination of the license. Similarly, in the case of large scale uses, where statements are commonly delivered electronically, publishers and their agents may ingest those statements with sophisticated computer systems that use “fuzzy logic” to match reported uses to known repertoire. In such a case, failing to report an item of identifying information as to certain songs, where a match nonetheless can be made, has no effect.

In their proposed regulations, the Joint Commenters have agreed to the addition of certain new fields of identifying information that they agree are appropriate to facilitate processing of statements by publishers and their agents. However, it is important to the willingness of licensees to provide that information that licensees not be prejudiced by omission of that information when it is without practical consequence to copyright owners. Accordingly, the Joint Commenters respectfully request inclusion of a harmless error provision.

14. Confidentiality

The NPRM also inquires concerning the scope of the confidentiality provision included in Sections 385.12(f) and 385.22(e) of the Proposed Rates. 77 Fed. Reg. at 44,185. In a footnote, the NPRM suggests that because the Office has jurisdiction over the form and content of statements of account, the Copyright Royalty Judges may be precluded from requiring, as a

term of the license, that the copyright owner maintain the confidentiality of such a statement. The Office then expresses its willingness to consider addressing the matter in this proceeding. *Id.* n.1. Neither the Proposed Rule nor the Joint Commenters' proposed regulations contain confidentiality provisions.

As an initial matter, the Joint Commenters appreciate the Office's willingness to have the matter of confidentiality addressed somewhere, and do not really care where. However, the Joint Commenters do not agree that the Proposed Rates are an improper place to do that. In the Section 114 context, there is a long history of providing for confidential treatment of statements of account as a "term" subject to the jurisdiction of the Copyright Royalty Judges. *See* 37 C.F.R. §§ 260.4, 261.5, 262.5, 380.5, 382.4, 382.14, 384.5.

Section 115 is different, because Section 115(c)(5) authorizes the Register to prescribe regulations concerning certain aspects of statements of account, and particularly their form, content, and manner of certification. *See Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License*, 73 Fed. Reg. 48,396, 48,397 (Aug. 19, 2008) ("the CRJs' authority to set 'terms' must be construed in light of the more specific delegations of authority to the Register"). However, the proposed confidentiality provision does not purport to add to or subtract from the content of the statement, modify the form of the statement or change the timing or manner of service of the statement. Addressing in terms what a licensee may do (or not do) with a statement after that statement has been prepared and served in accordance with the Office's regulations does not seem to impinge on the Office's power with respect to statements of account in any way.

The Proposed Rates have been published by the Copyright Royalty Judges with the confidentiality provision. Because the Proposed Rates address new business models for which it would be desirable to have statutory rates in place, the Joint Commenters hope that they will go

into effect soon. *See* 17 U.S.C. § 115(c)(3)(C) (specifying target effective date for new rates of January 1). It would be most consistent with the parties' settlement for the Proposed Rates to go into effect with the agreed-upon confidentiality provision, rather than having them in effect for some time without such a provision while this proceeding continues. As discussed above, it is not obvious to us that the inclusion of the confidentiality provision therein is contrary to law. Moreover, even if it were, the Office is not required to do anything about that. *See* 17 U.S.C. § 802(f)(1)(D) ("Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law . . . that underlies or is contained in a final determination of the Copyright Royalty Judges" (emphasis added)). Thus, the Joint Commenters respectfully request that the Office simply allow the Proposed Rates to go into effect with the confidentiality provision. Failing that, the Joint Commenters request that the Office include the confidentiality provision from the Proposed Rates in the Proposed Rule.

Either way, the Joint Commenters believe that the scope of the confidentiality provision is appropriate. It is important to remember that statements of account for percentage rate uses – unlike traditional cents rate uses – reflect information about matters such as services' overall revenues, royalty payments to record companies and performance rights organizations, and overall usage that may be competitively sensitive. The purpose of the provision is to prevent that information from being used against the service by a record company affiliated with the publisher receiving that information, or any other third party. That purpose was considered by the parties to the settlement to be important to operation of the percentage rate structure. The provision was carefully negotiated, and in the course of those negotiations the provision was carefully reviewed by numerous music publishers that would be bound by it, trade associations representing music publishers and songwriters, and their respective counsel. In the end, they judged the provision to be satisfactory in the context of the negotiated settlement.

With respect to the specific matter raised by the Office concerning disclosure in litigation, the Joint Commenters do not believe that the provision would interfere with the ordinary operation of legal process (such as disclosure pursuant to a subpoena or court order), and the Joint Commenters observe that confidential information is routinely shielded from disclosure in litigation by means of a protective order. Thus, the Joint Commenters do not perceive the confidentiality provision as interfering unreasonably with litigation to which a statement is likely to be relevant.

Because this provision is commercially reasonable, broadly acceptable within the affected industries, and integral to a negotiated settlement, the Joint Commenters urge the Office to allow it to enter into effect, either in the Proposed Rates or in the Proposed Rule.

15. Tax Withholding

In Section 210.16(g)(7), the Joint Commenters propose addressing an issue not raised in the NPRM that is of sufficient importance that we describe it here. Under applicable tax law and regulations, payees are generally required to provide payors a taxpayer identification number that can be used for tax reporting. When that does not happen, and in certain other circumstances, a payor may be required to take backup withholding from payments for remittance to the IRS. This happens fairly frequently in compulsory licensing, so the Joint Commenters believe the accounting regulations should provide guidance on how it is to happen. Licensees vary as to where in their payment processes backup withholding amounts are calculated. It may not be practicable to include this information on the statement itself. Accordingly, the Joint Commenters propose that licensees have the option of including backup withholding information either on the statement or on or with the payment.

16. Incomplete Transmissions and Retransmissions

The Proposed Rule in various places carries forward current provisions concerning incomplete transmissions and retransmissions (*e.g.*, Sections 210.12(m), (n); 210.16(c)(1)(F), (G); 210.16(c)(2)(v); 210.16(d)(2)(iv)(D), (E)). The Joint Commenters' proposed regulations omit these provisions and instead add to the definition of "digital phonorecord delivery" in Section 210.12 a new sentence specifying that a DPD does not include any transmission that, as reasonably determined by the distributor, did not result in a specifically identifiable reproduction of the entire product being transmitted, and for which the distributor did not charge, or fully refunded, any monies that would otherwise be due for the relevant transmission.

The existing provisions are problematic in numerous respects:

- As an "incomplete transmission" is defined in Section 210.12(m) of the Proposed Rule, all ringtones might seem to qualify, because they do not involve the whole full-length recording.
- As to products embodying the entire recording, an "incomplete transmission" as defined in Section 210.12(m) of the Proposed Rule would not seem to constitute a DPD as defined in Section 115(d) and Section 210.12(c) of the Proposed Rule. Thus, an incomplete transmission would not otherwise seem to be counted in the total units shipped.
- However, in Section 210.16(d)(2)(iv)(D), incomplete transmissions are to be subtracted from the total units shipped.
- Then, in Section 210.16(d)(2)(iv)(E), the retransmissions made to replace the incomplete transmissions are to be further subtracted from the total units shipped.
- Even if the foregoing made logical and mathematical sense, it would be impossible to apply. When a transmission is made by Internet Protocol via Transmission Control

Protocol and a packet is not delivered successfully, redelivery will generally be attempted until it is received. This happens frequently, but at a low level of implementation, so as to be essentially invisible.

- In Section 210.16(c)(2)(v), the regulations also require the date of and a reason for each incomplete transmission. If incomplete transmissions could be counted, this would require delivery of what would seem to be massive amounts of useless information.

Because of these problems, the Joint Commenters are not aware of any reporting of incomplete transmissions or retransmissions.

The Joint Commenters' approach is far preferable. It ignores the unknowable retransmissions that are inherent in the operation of the Internet and relies upon the generally-applicable definition of DPD to exclude incomplete transmissions. The Joint Commenters urge the Office to adopt this approach.

17. Other Cleanup

The Joint Commenters' proposed regulations include numerous other changes to the Proposed Rule intended to clean up various technical points and facilitate accounting for all parties. We have not attempted to describe each of them, but comment on some of them in Exhibit C.

CONCLUSION

In view of the foregoing, the Joint Commentators respectfully request that the Office modify the Proposed Rule as indicated in Exhibits A and B.

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EXHIBIT A
PROPOSED REGULATIONS

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

Subpart A—[Reserved]

Sec.

210.1–210.10 [Reserved]

Subpart B—Royalties and Statements of Account Under Compulsory License

210.11 General.

210.12 Definitions.

210.13 Accounting requirements where sales revenue is “recognized.”

210.14 Accounting requirements for offsetting phonorecord reserves with returned
phonorecords.

210.15 Situations in which a compulsory licensee is barred from maintaining reserves.

210.16 Monthly statements of account.

210.17 Annual statements of account.

210.18 Documentation.

210.19 Harmless errors.

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

Subpart A—[Reserved]

§§ 210.1–210.10 [Reserved]

Subpart B—Royalties and Statements of Account Under Compulsory License

§ 210.11 General.

This subpart prescribes the rules pertaining to the preparation and service of Statements of Account covering compulsory licenses for the making and distribution of phonorecords, including by means of a digital phonorecord delivery, pursuant to 17 U.S.C. 115 and the regulations in 37 CFR part 385 governing rates and terms for use of musical works under compulsory license for the making and distribution of phonorecords.

§ 210.12 Definitions.

[Note to the Copyright Office: To facilitate review of the Joint Commenters’ proposed changes, the definitions are kept in their original order with a new proposed definition at the end. However, the Joint Commenters believe that it would be useful to alphabetize the

definitions in the final regulations. The Joint Commenters also propose removing the subsection designations from this section, as in the definition sections of Part 385, to facilitate the move to alphabetization and future changes.]

As used in this subpart:

A *Monthly Statement of Account* is a statement accompanying monthly royalty payments identified in 17 U.S.C. 115(c)(5), and required by that section to be made under the compulsory license to make and distribute phonorecords of nondramatic musical works, including by means of a digital phonorecord delivery.

An *Annual Statement of Account* is a statement identified in 17 U.S.C. 115(c)(5), and required by that section to be made under the compulsory license to make and distribute phonorecords of nondramatic musical works, including by means of a digital phonorecord delivery.

A *digital phonorecord delivery* is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery. A digital phonorecord delivery does not include any transmission that, as reasonably determined by the distributor, did not result in a specifically identifiable reproduction of the entire product being transmitted, and for which the distributor did not charge, or fully refunded, any monies that would otherwise be due for the relevant transmission.

Ringtone shall have the meaning given in § 385.2.

The term *copyright owner*, in the case of any work having more than one copyright owner, means any one of the co-owners.

A *compulsory licensee* is a person or entity exercising the compulsory license to make and distribute phonorecords of nondramatic musical works as provided under 17 U.S.C. 115, including by means of a digital phonorecord delivery.

A phonorecord is considered *voluntarily distributed* if the compulsory licensee has voluntarily and permanently parted with possession of the phonorecord. A compulsory licensee shall be considered to have “permanently parted with possession” of a phonorecord made under the license:

(1) In the case of phonorecords relinquished from possession for purposes other than sale, at the time at which the compulsory licensee actually first parts with possession;

(2) In the case of phonorecords relinquished from possession for purposes of sale without a privilege of returning unsold phonorecords for credit or exchange, at the time at which the compulsory licensee actually first parts with possession;

(3) In the case of phonorecords relinquished from possession for purposes of sale accompanied by a privilege of returning unsold phonorecords for credit or exchange:

(i) At the time when revenue from a sale of the phonorecord is “recognized” by the compulsory licensee; or

(ii) Nine months from the month in which the compulsory licensee actually first parted with possession, whichever occurs first. For these purposes, a compulsory licensee shall be considered to “recognize” revenue from the sale of a phonorecord when sales revenue would be recognized in accordance with GAAP.

(4) In the case of a digital phonorecord delivery, the phonorecord shall be treated as having been made, voluntarily distributed and relinquished from possession, and a compulsory licensee shall be treated as having permanently parted with possession of the digital phonorecord delivery, on the date that the phonorecord is digitally transmitted.

A *phonorecord reserve* comprises the number of phonorecords, if any, that have been relinquished from possession for purposes of sale in a given month accompanied by a privilege of return, as described in paragraph (3) of the definition of “voluntarily distributed” in this section, and that have not been considered voluntarily distributed during the month in which the compulsory licensee actually first parted with their possession. The initial number of phonorecords comprising a phonorecord reserve shall be determined in accordance with GAAP.

A *negative reserve balance* comprises the aggregate number of phonorecords, if any, that have been relinquished from possession for purposes of sale accompanied by a privilege of return, as described in paragraph (3) of the definition of “voluntarily distributed” in this section, and that have been returned to the compulsory licensee, but because all available phonorecord reserves have been eliminated, have not been used to reduce a phonorecord reserve.

GAAP means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

§ 210.13 Accounting requirements where sales revenue is “recognized.”

[Note to the Copyright Office: The Joint Commenters were not able to reach agreement concerning the proper treatment of negative reserve balances. Resolution of that issue

ultimately might affect this section and other sections of this subpart. To provide the Office a complete and comprehensible set of regulations reflecting the issues on which the Joint Commenters do agree, we have generally preserved and made only technical and conforming changes to the provisions relevant to negative reserve balances. Neither retention of such provisions nor agreed-upon changes to them implies agreement concerning any aspect of the negative reserve balance issue. The Joint Commenters reserve the right to submit separate comments, and separately to propose further changes to the regulations, concerning that issue.]

Where under paragraph (3)(i) of the definition of “voluntarily distributed” in § 210.12, revenue from the sale of phonorecords is “recognized” during any month after the month in which the compulsory licensee actually first parted with their possession, said compulsory licensee shall reduce particular phonorecord reserves by the number of phonorecords for which revenue is being “recognized,” as follows:

(a) If the number of phonorecords for which revenue is being “recognized” is smaller than the number of phonorecords comprising the earliest eligible phonorecord reserve, this phonorecord reserve shall be reduced by the number of phonorecords for which revenue is being “recognized.” Subject to the time limitations of paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(b) If the number of phonorecords for which revenue is being “recognized” is greater than the number of phonorecords comprising the earliest eligible phonorecord reserve but less than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall first eliminate those phonorecord reserves, beginning with the earliest eligible phonorecord reserve and continuing to the next succeeding phonorecord reserves, that are completely offset by phonorecords for which revenue is being “recognized.” Said compulsory licensee shall then reduce the next succeeding phonorecord reserve by the number of phonorecords for which revenue is being “recognized” that have not been used to eliminate a phonorecord reserve. Subject to the time limitations of paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(c) If the number of phonorecords for which revenue is being “recognized” equals the number of phonorecords comprising all eligible phonorecord reserves, the person or entity exercising the compulsory license shall eliminate all of the phonorecord reserves.

[Note to the Copyright Office: As an organizational matter, the Joint Commenters propose removing the provision below from the definitions section, because it is not really a definition, and including it here if it is to be included anywhere. This organizational move does not imply any agreement by the Joint Commenters concerning the proper treatment of negative reserve balances, including in this provision.]

(d) To the extent that the terms *reserve*, *credit* and *return* appear in this part, such provisions shall not apply to digital phonorecord deliveries.

§ 210.14 Accounting requirements for offsetting phonorecord reserves with returned phonorecords.

(a) In the case of a phonorecord that has been relinquished from possession for purposes of sale accompanied by a privilege of return, as described in paragraph (3) of the definition of “voluntarily distributed” in § 210.12, where the phonorecord is returned to the compulsory licensee for credit or exchange before said compulsory licensee is considered to have “permanently parted with possession” of the phonorecord as described in the definition of “voluntarily distributed” in § 210.12, the compulsory licensee may use such phonorecord to reduce a “phonorecord reserve,” as defined in § 210.12.

(b) In such cases, the compulsory licensee shall reduce particular phonorecord reserves by the number of phonorecords that are returned during the month covered by the Monthly Statement of Account in the following manner:

(1) If the number of phonorecords that are returned during the month covered by the Monthly Statement is smaller than the number comprising the earliest eligible phonorecord reserve, the compulsory licensee shall reduce this phonorecord reserve by the total number of returned phonorecords. Subject to the time limitations in paragraph (3) of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(2) If the number of phonorecords that are returned during the month covered by the Monthly Statement is greater than the number of phonorecords comprising the earliest eligible phonorecord reserve but less than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall first eliminate those phonorecord reserves, beginning with the earliest eligible phonorecord reserve, and continuing to the next succeeding phonorecord reserves, that are completely offset by returned phonorecords. Said compulsory licensee shall then reduce the next succeeding phonorecord reserve by the number of returned phonorecords that have not been used to eliminate a phonorecord reserve. Subject to the time limitations of paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(3) If the number of phonorecords that are returned during the month covered by the Monthly Statement is equal to or is greater than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall eliminate all eligible phonorecord reserves. Where said number is greater than the total number of phonorecords comprising all eligible phonorecord reserves, said compulsory licensee shall establish a “negative reserve balance,” as defined in § 210.12.

(c) Except where a negative reserve balance exists, a separate and distinct phonorecord reserve shall be established for each month during which the compulsory licensee relinquishes phonorecords from possession for purposes of sale accompanied by a privilege of return, as described in paragraph (3) of the definition of “voluntarily distributed” in § 210.12. In

accordance with paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12, any phonorecord remaining in a particular phonorecord reserve nine months from the month in which the particular reserve was established shall be considered “voluntarily distributed”; at that point, the particular monthly phonorecord reserve shall lapse and royalties for the phonorecords remaining in it shall be paid as provided in § 210.16(d)(2).

(d) Where a negative reserve balance exists, the aggregate total of phonorecords comprising it shall be accumulated into a single balance rather than being separated into distinct monthly balances. Following the establishment of a negative reserve balance, any phonorecords relinquished from possession by the compulsory licensee for purposes of sale or otherwise, shall be credited against such negative balance, and the negative reserve balance shall be reduced accordingly. The nine-month limit provided by paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12 shall have no effect upon a negative reserve balance; where a negative reserve balance exists, relinquishment from possession of a phonorecord by the compulsory licensee at any time shall be used to reduce such balance, and shall not be considered a “voluntary distribution” within the meaning of § 210.12.

(e) In no case shall a phonorecord reserve be established while a negative reserve balance is in existence; conversely, in no case shall a negative reserve balance be established before all available phonorecord reserves have been eliminated.

§ 210.15 Situations in which a compulsory licensee is barred from maintaining reserves.

Notwithstanding any other provisions of this section, in any case where, within three years before the phonorecord was relinquished from possession, the compulsory licensee has had final judgment entered against it for failure to pay royalties for the reproduction of copyrighted music on phonorecords, or within such period has been definitively found in any proceeding involving bankruptcy, insolvency, receivership, assignment for the benefit of creditors, or similar action, to have failed to pay such royalties, that compulsory licensee shall be considered to have “Permanently parted with possession” of a phonorecord made under the license at the time at which that compulsory licensee actually first parts with possession. For these purposes the compulsory licensee shall include:

(a) In the case of any corporation, the corporation or any director, officer, or beneficial owner of twenty-five percent (25%) or more of the outstanding securities of the corporation;

(b) In all other cases, any entity or individual owning a beneficial interest of twenty-five percent (25%) or more in the entity exercising the compulsory license.

§ 210.16 Monthly statements of account.

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Monthly Statements of Account.

(b) *General content.* A Monthly Statement of Account shall be clearly and prominently identified as a “Monthly Statement of Account Under Compulsory License for Making and Distributing Phonorecords,” and shall include a clear statement of the following information:

- (1) The period (month and year) covered by the Monthly Statement;
- (2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;
- (3) The full address, including a specific number and street name or rural route, of the place of business of the compulsory licensee. A post office box or similar designation will not be sufficient for this purpose, except where it is the only address that can be used in that geographic location;
- (4) For each nondramatic musical work that is owned by the same copyright owner being served with the Monthly Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (c) of this section;
- (5) The total royalty payable to the relevant copyright owner for the month covered by the Monthly Statement, computed in accordance with the requirements of this section and the formula specified in paragraph (d) of this section;
- (6) Any late fees, if applicable, included in the payment associated with the Monthly Statement; and
- (7) In any case where the compulsory licensee falls within the provisions of § 210.15, a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that section.

(c) *Specific content of monthly statements:*

(1) *Identification and accounting of phonorecords subject to a cents rate royalty structure.*

(i) The information called for by paragraph (b)(4) of this section shall, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart A or any other applicable royalties computed on a cents-per-unit basis, include a separate listing of each of the following items of information:

(A) The number of phonorecords made during the month covered by the Monthly Statement;

(B) The number of phonorecords that, during the month covered by the Monthly Statement and regardless of when made, were either:

(I) Relinquished from possession for purposes other than sale;

(II) Relinquished from possession for purposes of sale without any privilege of returning unsold phonorecords for credit or exchange;

(III) Relinquished from possession for purposes of sale accompanied by a privilege of returning unsold phonorecords for credit or exchange;

(IV) Returned to the compulsory licensee for credit or exchange; or

(V) Placed in a phonorecord reserve (except that if a negative reserve balance exists give either the number of phonorecords added to the negative reserve balance, or the number of phonorecords relinquished from possession that have been used to reduce the negative reserve balance);

(C) The number of phonorecords, regardless of when made, that were relinquished from possession during a month earlier than the month covered by the Monthly Statement but that, during the month covered by the Monthly Statement either have had revenue from their sale “recognized” under paragraph (3)(i) of the definition of “voluntarily distributed” in § 210.12, or were comprised in a phonorecord reserve that lapsed after nine months under paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12;

(D) The per unit statutory royalty rate applicable to the relevant configuration; and

(E) The total royalty payable for the month covered by the Monthly Statement (i.e., the result in paragraph (d)(2)(v)) for the item described by the set of information called for, and broken down as required, by this paragraph (c)(1).

(ii) The information called for by paragraph (c)(1)(i) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) At least one of the following, as applicable and available for tracking sales and/or usage:

(I) The International Standard Recording Code (ISRC) associated with the relevant sound recording;

(II) The catalog number or numbers and label name or names, used on or associated with the phonorecords; or

(III) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords;

(D) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(E) The playing time of the relevant sound recording, except that playing time is not required in the case of a ringtone;

(F) If the compulsory licensee chooses to allocate its payment between co-owners of the copyright in the nondramatic musical work, as described in paragraph (g)(1), and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;

(G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Monthly Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by this paragraph (c)(1) or paragraph (c)(2); and

(H) Each phonorecord configuration involved (for example: compact disc, permanent digital download, ringtone).

(2) Identification and accounting of phonorecords subject to a percentage rate royalty structure.

(i) The information called for by paragraph (b)(4) of this section shall, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, include a separate listing of the information required by § 385.12(e), § 385.22(d), or other provisions of Part 385 as applicable. Statements of Account need not reflect phonorecords subject to the promotional royalty rate provided in section 385.14 or 385.24 or any similar promotional royalty rate of zero that may be provided in Part 385.

(ii) The information called for by paragraph (c)(2)(i) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) The International Standard Recording Code (ISRC) associated with the relevant sound recording if available, except that use of the ISRC shall not be required in the case of an album or other multiple sound recording product; and at least one of the following, as applicable and available for tracking sales and/or usage:

(I) The catalog number or numbers and label name or names, associated with the phonorecords;

- (II) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords; or
- (III) The sound recording identification number assigned by the compulsory licensee or a third party distributor to the relevant sound recording;
- (D) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;
- (E) The playing time of the relevant sound recording, except that playing time is not required in the case of licensed activity to which no overtime adjustment is applicable;
- (F) If the compulsory licensee chooses to allocate its payment between co-owners of the copyright in the nondramatic musical work, as described in paragraph (g)(1), and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;
- (G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Monthly Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by paragraph (c)(1) or this paragraph (c)(2);
- (H) Identification of the relevant offering for which the royalty was calculated, including, if applicable, the name of the third party distributor of the offering;
- (I) The number of plays, constructive plays or other payable units as applicable, of the relevant sound recording for the month covered by the Monthly Statement for the relevant offering; and
- (J) The total royalty payable for the month for the item described by the set of information called for, and broken down as required, by this paragraph (c)(2) (i.e., the per-work royalty allocation for the relevant sound recording and offering).

(d) *Royalty payment and accounting.*

(1) *In general.* The total royalty called for by paragraph (b)(5) of this section shall be computed so as to include every phonorecord “voluntarily distributed” during the month covered by the Monthly Statement.

(2) *Phonorecords subject to a cents rate royalty structure.* For phonorecords subject to Part 385 Subpart A or any other applicable royalties computed on a cents-per-unit basis, the amount of the royalty payment shall be calculated as follows:

(i) *Step 1: Compute the number of phonorecords shipped for sale with a privilege of return.* This is the total of phonorecords that, during the month covered by the Monthly Statement, were relinquished from possession by the compulsory licensee, accompanied by the privilege of

returning unsold phonorecords to the compulsory licensee for credit or exchange. This total does not include:

(A) Any phonorecords relinquished from possession by the compulsory licensee for purposes of sale without the privilege of return; and

(B) Any phonorecords relinquished from possession for purposes other than sale.

(ii) *Step 2: Subtract the number of phonorecords reserved.* This involves deducting, from the subtotal arrived at in Step 1, the number of phonorecords that have been placed in the phonorecord reserve for the month covered by the Monthly Statement. The number of phonorecords reserved is determined by multiplying the subtotal from Step 1 by the percentage reserve level established under GAAP. This step should be skipped by a compulsory licensee barred from maintaining reserves under § 210.15.

(iii) *Step 3: Add the total of all phonorecords that were shipped during the month and were not counted in Step 1.* This total is the sum of two figures:

(1) The number of phonorecords that, during the month covered by the Monthly Statement, were relinquished from possession by the compulsory licensee for purposes of sale, without the privilege of returning unsold phonorecords to the compulsory licensee for credit or exchange; and

(2) The number of phonorecords relinquished from possession by the compulsory licensee, during the month covered by the Monthly Statement, for purposes other than sale.

(iv) *Step 4: Make any necessary adjustments for sales revenue “recognized,” lapsed reserves, or reduction of negative reserve balance during the month.* If necessary, this step involves adding to or subtracting from the subtotal arrived at in Step 3 on the basis of three possible types of adjustments:

(A) *Sales revenue “recognized.”* If, in the month covered by the Monthly Statement, the compulsory licensee “recognized” revenue from the sale of phonorecords that had been relinquished from possession in an earlier month, the number of such phonorecords is *added* to the Step 3 subtotal.

(B) *Lapsed reserves.* If, in the month covered by the Monthly Statement, there are any phonorecords remaining in the phonorecord reserve for the ninth previous month (that is, any phonorecord reserves from the ninth previous month that have not been offset under FOFI, the first-out-first-in accounting convention, by actual returns during the intervening months), the reserve lapses and the number of phonorecords in it is added to the Step 3 subtotal.

(C) *Reduction of negative reserve balance.* If, in the month covered by the Monthly Statement, the aggregate reserve balance for all previous months is a negative amount, the number of phonorecords relinquished from possession by the compulsory licensee during that month and used to reduce the negative reserve balance is subtracted from the Step 3 subtotal.

(v) *Step 5: Multiply by the statutory royalty rate.* The total monthly royalty payment is obtained by multiplying the subtotal from Step 3, as adjusted if necessary by Step 4, by the statutory royalty rate set forth in § 385.3 or other provisions of Part 385 as applicable.

(3) *Phonorecords subject to a percentage rate royalty structure.* For phonorecords subject to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, the amount of the royalty payment shall be calculated as provided in § 385.12, § 385.22, or other provisions of Part 385 as applicable. The following additional provisions shall also apply:

(i) A compulsory licensee may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid made in accordance with GAAP. In making such an estimation, it may be considered reasonable to use the aggregate amount of public performance royalties then sought from the compulsory licensee by performing rights licensors as a basis for computing the public performance royalty component, provided such an approach is supportable under GAAP. Royalty payments based on anticipated payments or interim public performance royalty rates must be reconciled on the Annual Statement of Account for the year in which the final public performance royalty expense for the offering is paid to the relevant performing rights licensor.

(ii) When calculating the per-work royalty allocation for each work, as described in § 385.12(b)(4), § 385.22(b)(3), or any similar provisions of Part 385 as applicable, an actual or constructive per-play allocation is to be calculated to at least the ten-thousandth of a cent (i.e., to at least six decimal places) if the systems used by the compulsory licensee to make such calculations are designed to make royalty calculations to at least six decimal places, and if the systems used by the compulsory licensee do not make royalty calculations to at least six decimal places, then to at least the hundredth of a cent (i.e., to at least four decimal places).

(e) *Clear statements.* The information required by paragraphs (b) and (c) of this section requires intelligible, legible, and unambiguous statements in the Monthly Statements of Account without incorporation of facts or information contained in other documents or records.

(f) *Certification.* (1) Each Monthly Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is certifying the Monthly Statement of Account;

(ii) If the compulsory licensee is a partnership or a corporation, by the title or official position held in the partnership or corporation by the person certifying the Monthly Statement of Account;

(iii) The date of certification; and

(iv) One of the following statements:

I certify that (1) I am duly authorized to sign this Monthly Statement of Account on behalf of the compulsory licensee; (2) I have examined this Monthly Statement of Account; and (3) all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

or

[Note to the Copyright Office: The Joint Commenters agree that an additional alternative should be provided to accommodate large-scale use of the compulsory license. However, the Joint Commenters are not in a position to suggest specific language at this time. We hope to be able to do so in reply comments.]

(2) If the Monthly Statement of Account is served by mail or by reputable courier service, certification of the Monthly Statement of Account by the compulsory licensee shall be made by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if the compulsory licensee is a partnership, the signature shall be that of a partner.

(3) If the Monthly Statement of Account is served electronically, certification of the Monthly Statement of Account by the compulsory licensee shall be made by electronic signature as defined in section 7006(5) of title 15 of the United States Code.

(g) *Service.* (1) The service of a Monthly Statement of Account on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of a Statement of Account on at least one co-owner or upon an agent of at least one of the co-owners shall be sufficient with respect to all co-owners. The compulsory licensee may choose to allocate its payment between co-owners. In such a case the compulsory licensee shall provide each co-owner (or its agent) a Monthly Statement reflecting the percentage share paid to that co-owner. Each Monthly Statement of Account shall be served on the copyright owner or the agent to whom or which it is directed by mail, by reputable courier service or by electronic delivery as set forth in paragraph (g)(2) of this section on or before the 20th day of the immediately succeeding month. The royalty payment for a month also shall be served on or before the 20th day of the immediately succeeding month. The Monthly Statement and payment may be sent together or separately, but if sent separately, the payment must include information reasonably sufficient to allow the payee to match the Monthly Statement to the payment. However, in the case where the compulsory licensee has served its Notice of Intention upon an agent of the copyright owner pursuant to § 201.18 of this chapter, the compulsory licensee is not required to serve Monthly Statements of Account or make any royalty payments until the compulsory licensee receives from the agent with authority to receive the Notice of Intention notice of the name and address of the copyright owner or its agent upon whom the compulsory licensee shall serve Monthly Statements of Account and the monthly royalty fees. Upon receipt of this information, the compulsory licensee shall serve Monthly Statements of Account and all royalty fees covering the intervening period upon the person or entity identified by the agent with authority to receive the

Notice of Intention by or before the 20th day of the month following receipt of the notification. It shall not be necessary to file a copy of the Monthly Statement in the Copyright Office.

(2) A Monthly Statement of Account may be sent or made available to a copyright owner or its agent in a readily accessible electronic format chosen by the compulsory licensee or its agent (including a text file with standard delimiters, or Microsoft Excel, Open Office or other programs widely in use at the time). Reasonable measures, consistent with prevailing industry practices applicable to comparable electronic delivery of comparable financial information, shall be taken to limit access to the Monthly Statement of Account to the copyright owner or agent to whom or which it is directed.

(3) At the written request of the copyright owner or agent no more frequently than annually, a compulsory licensee that has been providing Monthly Statements of Account in paper form shall deliver or make available Monthly Statements of Account in electronic form, and a compulsory licensee that has been delivering or making available Monthly Statements of Account in electronic form shall provide Monthly Statements of Account in paper form. The compulsory licensee shall make such a change effective with the first accounting period ending more than 30 days after the compulsory licensee's receipt of the request and any information (such as a postal or email address, as the case may be) that is necessary for the compulsory licensee to make the change.

(4)(i) In any case where a Monthly Statement of Account is sent by mail or reputable courier service and the Monthly Statement of Account is returned to the sender because the copyright owner or agent is no longer located at that address or has refused to accept delivery, or the Monthly Statement of Account is sent by electronic mail and is undeliverable, or in any case where an address for the copyright owner is not known, the Monthly Statement of Account, together with any evidence of mailing or attempted delivery by courier service or electronic mail, may be filed in the Licensing Division of the Copyright Office. Any Monthly Statement of Account submitted for filing in the Copyright Office shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Monthly Statements of Account under this section.

(iii) Neither the filing of a Monthly Statement of Account in the Copyright Office, nor the failure to file such Monthly Statement, shall have effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Monthly Statements of Account submitted to the Copyright Office under this section. Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(5) Subject to paragraph (g)(6), a separate Monthly Statement of Account shall be served for each month during which there is any activity relevant to the payment of royalties under 17

U.S.C. 115. The Annual Statement of Account described in § 210.17 of this subpart does not replace any Monthly Statement of Account.

(6) Notwithstanding the foregoing, royalties under section 115 shall not be considered payable, and no Monthly Statement of Account shall be required, until the compulsory licensee's cumulative unpaid royalties for the copyright owner equal at least one cent. Moreover, in any case in which the cumulative unpaid royalties under section 115 that would otherwise be payable by the compulsory licensee to the copyright owner are less than \$50, and the copyright owner has not notified the compulsory licensee in writing that it wishes to receive Monthly Statements of Account reflecting payments of less than \$50, the compulsory licensee may choose to defer the payment date for such royalties and provide no Monthly Statements of Account until the earlier of the time for rendering the Monthly Statement of Account for the month in which the compulsory licensee's cumulative unpaid royalties under section 115 for the copyright owner exceed \$50 or the time for rendering the Annual Statement of Account, at which time the compulsory licensee may provide one statement and payment covering the entire period for which royalty payments were deferred.

(7) If the compulsory licensee is required, under applicable tax law and regulations, to make backup withholding from its payments required hereunder, the compulsory licensee shall indicate the amount of such withholding on the Monthly Statement or on or with the payment.

(8) If a Monthly Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If a Monthly Statement of Account is sent by a reputable courier, documentation from the courier showing the first date of attempted delivery shall be sufficient to prove that service was timely. If a Monthly Statement of Account or a link thereto is sent by electronic mail, a return receipt shall be sufficient to prove that service was timely. In the absence of the foregoing, the compulsory licensee shall bear the burden of proving that the Monthly Statement of Account was served in a timely manner.

(9) The copyright owner and the compulsory licensee or authorized agent may agree upon alternative methods of accounting and payment. Any Monthly Statement of Account or payment provided in accordance with such an agreement shall not be rendered invalid for failing to comply with the specific requirements of this section.

§ 210.17 Annual statements of account.

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Annual Statements of Account.

(b) *Annual period.* Any Annual Statement of Account shall cover the full fiscal year of the compulsory licensee.

(c) *General content.* An Annual Statement of Account shall be clearly and prominently identified as an "Annual Statement of Account Under Compulsory License for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

- (1) The fiscal year covered by the Annual Statement;
- (2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;
- (3) If the compulsory licensee is a business organization, the name and title of the chief executive officer, managing partner, sole proprietor or other person similarly responsible for the management of such entity;
- (4) The full address, including a specific number and street name or rural route, or the place of business of the compulsory licensee (a post office box or similar designation will not be sufficient for this purpose except where it is the only address that can be used in that geographic location);
- (5) For each nondramatic musical work that is owned by the same copyright owner being served with the Annual Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (d) of this section;
- (6) The total royalty payable for the fiscal year covered by the Annual Statement computed in accordance with the requirements of § 210.16, and, in the case of offerings for which royalties are calculated pursuant to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, calculations showing in detail how the royalty was computed (for these purposes, the applicable royalty as specified in Part 385 shall be payable for every phonorecord “voluntarily distributed” during the fiscal year covered by the Annual Statement);
- (7) The total sum paid under Monthly Statements of Account by the compulsory licensee to the copyright owner being served with the Annual Statement during the fiscal year covered by the Annual Statement;
- (8) In any case where the compulsory license falls within the provisions of § 210.15, a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that section; and
- (9) Any late fees, if applicable, included in any payment associated with the Annual Statement.

(d) *Specific content of annual statements.*

(1) *Identification and accounting of phonorecords subject to a cents rate royalty structure.*

- (i) The information called for by paragraph (c)(5) of this section shall, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart A or any other applicable royalties computed on a cents-per-unit basis, include a separate listing of each of the following items of information:

- (A) The number of phonorecords made through the end of the fiscal year covered by the Annual Statement, including any made during earlier years;
- (B) The number of phonorecords which have never been relinquished from possession of the compulsory licensee through the end of the fiscal year covered by the Annual Statement;
- (C) The number of phonorecords involuntarily relinquished from possession (as through fire or theft) of the compulsory licensee during the fiscal year covered by the Annual Statement and any earlier years, together with a description of the facts of such involuntary relinquishment;
- (D) The number of phonorecords “voluntarily distributed” by the compulsory licensee during all years before the fiscal year covered by the Annual Statement;
- (E) The number of phonorecords relinquished from possession of the compulsory licensee for purposes of sale during the fiscal year covered by the Annual Statement accompanied by a privilege of returning unsold records for credit or exchange, but not “voluntarily distributed” by the end of that year;
- (F) The number of phonorecords “voluntarily distributed” by the compulsory licensee during the fiscal year covered by the Annual Statement;
- (G) The per unit statutory royalty rate applicable to the relevant configuration; and
- (H) The total royalty payable for the fiscal year covered by the Annual Statement for the item described by the set of information called for, and broken down as required, by this paragraph (d)(1).
 - (ii) The information called for by paragraph (d)(1)(i) of this section shall also include, and if necessary shall be broken down to identify separately, the following:
 - (A) The title of the nondramatic musical work subject to compulsory license;
 - (B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;
 - (C) At least one of the following, as applicable and available for tracking sales and/or usage:
 - (I) The International Standard Recording Code (ISRC) associated with the relevant sound recording;
 - (II) The catalog number or numbers and label name or names, used on or associated with the phonorecords; or
 - (III) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords;

(D) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(E) The playing time on the phonorecords of each nondramatic musical work covered by the statement, except that playing time is not required in the case of a ringtone;

(F) If the compulsory licensee chooses to allocate its payments between co-owners of the copyright in the nondramatic musical work, and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;

(G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Annual Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by this paragraph (d)(1) or paragraph (d)(2); and

(H) Each phonorecord configuration involved (for example: compact disc, permanent digital download, ringtone).

(iii) If the information given under paragraph (d)(1)(i) of this section does not reconcile, the Annual Statement shall also include a clear and detailed explanation of the difference.

(2) Identification and accounting of phonorecords subject to a percentage rate royalty structure.

(i) The information called for by paragraph (c)(5) of this section shall identify each offering for which royalties are to be calculated separately and, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, include the number of plays, constructive plays or other payable units during the fiscal year covered by the Annual Statement, together with, and which if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) The International Standard Recording Code (ISRC) associated with the relevant sound recording if available, except that use of the ISRC shall not be required in the case of an album or other multiple sound recording product; and at least one of the following, as applicable and available for tracking sales and/or usage:

(I) The catalog number or numbers and label name or names, used on or associated with the phonorecords;

- (II) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords; or
- (III) The sound recording identification number assigned by the compulsory licensee or a third party distributor to the relevant sound recording;
- (D) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;
- (E) The playing time on the phonorecords of each nondramatic musical work covered by the statement, except that playing time is not required in the case of licensed activity to which no overtime adjustment is applicable;
- (F) If the compulsory licensee chooses to allocate its payments between co-owners of the copyright in the nondramatic musical work, and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;
- (G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Annual Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by paragraph (d)(1) or this paragraph (d)(2);
- (H) Identification of the relevant offering for which the royalty was calculated, including, if applicable, the name of the third party distributor of the offering;
- (I) The number of plays, constructive plays or other payable units as applicable, of the relevant sound recording for the fiscal year covered by the Annual Statement for the relevant offering; and
- (J) The total royalty payable for the month for the item described by the set of information called for, and broken down as required, by this paragraph (d)(2) (i.e., the per-work royalty allocation for the relevant sound recording and offering).
- (ii) If the information given under paragraph (d)(2)(i) of this section does not reconcile, the Annual Statement shall also include a clear and detailed explanation of the difference.
- (iii) In any case in which the compulsory licensee made monthly payments based on anticipated payments or interim public performance royalty rates because the final public performance royalty had not then been determined, but the final public performance royalty expense for the offering was paid to the relevant performing rights licensor during the fiscal year covered by the Annual Statement, the Annual Statement shall include any necessary adjustment and calculations showing in detail how the adjustment was computed.

(e) *Clear statement.* The information required by paragraph (c) of this section requires intelligible, legible, and unambiguous statements in the Annual Statement of Account without incorporation by reference of facts or information contained in other documents or records.

(f) *Certification.* (1) Each Annual Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is signing the Annual Statement of Account;

(ii) The date of signature;

(iii) If the compulsory licensee is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the Annual Statement of Account; and

(iv) The following statement:

I am duly authorized to sign this Annual Statement of Account on behalf of the compulsory licensee.

(2)(i) Each Annual Statement of Account shall also be certified by a licensed Certified Public Accountant. Such certification shall consist of

[Note to the Copyright Office: The Joint Commenters agree that the form of Annual Statement certification should be updated. However, the Joint Commenters are not in a position to suggest specific language at this time. We hope to be able to do so in reply comments.]

(ii) Each certificate shall be signed by an individual (in which case the references therein to “we” may be replaced by “I”), or in the name of a partnership or a professional corporation with two or more shareholders. The certificate number and jurisdiction are not required if the certificate is signed in the name of a partnership or a professional corporation with two or more shareholders.

(3) If the Annual Statement of Account is served by mail or by reputable courier service, the Annual Statement of Account shall be signed by the compulsory licensee by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if that compulsory licensee is a partnership, the signature shall be that of a partner.

(4) If the Annual Statement of Account is served electronically, the Annual Statement of Account shall be signed by the compulsory licensee by electronic signature as defined in section 7006(5) of title 15 of the United States Code.

(5) If the Annual Statement of Account is served electronically, the compulsory licensee may serve an electronic facsimile of the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant. The compulsory licensee shall retain the original certification of the Annual Statement of Account signed by the licensed Certified Public

Accountant for the period identified in § 210.18, which shall be made available to the copyright owner upon demand.

(g) *Service.* (1) The service of an Annual Statement of Account on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of the Statement of Account on one co-owner or upon an agent of one of the co-owners shall be sufficient with respect to all co-owners. Each Annual Statement of Account shall be served on the copyright owner or the agent to whom or which it is directed by mail, by reputable courier service or by electronic delivery as set forth in paragraph (g)(2) of this section on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. It shall not be necessary to file a copy of the Annual Statement in the Copyright Office. An Annual Statement of Account shall be served for each fiscal year during which at least one Monthly Statement of Account was required to have been served under § 210.16(g) or was deferred under § 210.16(g)(6).

(2) An Annual Statement of Account may be sent or made available to a copyright owner or its agent in a readily accessible electronic format chosen by the compulsory licensee or its agent (including a text file with standard delimiters, or Microsoft Excel, Open Office or other programs widely in use at the time). Reasonable measures, consistent with prevailing industry practices applicable to comparable electronic delivery of comparable financial information, shall be taken to limit access to the Annual Statement of Account to the copyright owner or agent to whom or which it is directed.

(3) If the copyright owner or agent has made a request pursuant to § 210.16(g)(3) to receive statements in electronic or paper form, such request shall also apply to Annual Statements to be rendered on or after the date that the request is effective with respect to Monthly Statements.

(4) In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(6) of this section (i.e., the total royalty payable) is greater than the amount stated in that Annual Statement under paragraph (c)(7) of this section (i.e., the total sum paid), the difference between such amounts shall also be served on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. The Annual Statement and payment may be sent together or separately, but if sent separately, the payment must include information reasonably sufficient to allow the payee to match the Annual Statement and the payment. The delivery of such sum does not require the copyright owner to accept such sum, or to forego any right, relief, or remedy which may be available under law. In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(6) of this section is less than the amount stated in that Annual Statement under paragraph (c)(7) of this section, the difference between such amounts shall be available to the compulsory licensee as a credit.

(5)(i) In any case where an Annual Statement of Account is sent by mail or by reputable courier service and is returned to the sender because the copyright owner or agent is no longer located at that address or has refused to accept delivery, or the Annual Statement of Account is sent by

electronic mail and is undeliverable, or in any case where an address for the copyright owner is not known, the Annual Statement of Account, together with any evidence of mailing or attempted delivery by courier service or electronic mail, may be filed in the Licensing Division of the Copyright Office. Any Annual Statement of Account submitted for filing shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Annual Statements of Account under this paragraph (g)(5).

(iii) Neither the filing of an Annual Statement of Account in the Copyright Office, nor the failure to file such Annual Statement, shall have any effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Annual Statements of Account submitted to the Copyright Office under this paragraph (g)(5). Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(6) If an Annual Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If an Annual Statement of Account is sent by a reputable courier, documentation from the courier showing the first date of attempted delivery shall be sufficient to prove that service was timely. If an Annual Statement of Account or a link thereto is sent by electronic mail, a return receipt shall be sufficient to prove that service was timely. In the absence of the foregoing, the compulsory licensee shall bear the burden of proving that the Annual Statement of Account was served in a timely manner.

(7) The copyright owner and the compulsory licensee or authorized agent may agree upon alternative methods of accounting and payment. Any Annual Statement of Account or payment provided in accordance with such an agreement shall not be rendered invalid for failing to comply with the specific requirements of this section.

(h) *Annual Statements for periods before the effective date of this regulation.* In any case in which an Annual Statement of Account for a compulsory licensee's fiscal year closing after March 1, 2009 and before the effective date of this regulation was not provided because it was impracticable for the compulsory licensee to provide it, the relevant copyright owner may, at any time before the date that is 6 months after issuance of this regulation, make a request in writing to receive an Annual Statement of Account for the relevant fiscal year conforming to the requirements of this section. If such a request is made, the compulsory licensee shall provide the Annual Statement of Account within 6 months after receiving the request. If such a circumstance and request applies to more than one of the compulsory licensee's fiscal years, such years may be combined on a single statement.

§ 210.18 Documentation.

All compulsory licensees shall, for a period of at least five years from the date of service of an Annual Statement of Account, keep and retain in their possession all records and documents

necessary and appropriate to support fully the information set forth in such Annual Statement and in Monthly Statements served during the fiscal year covered by such Annual Statement.

§ 210.19 Harmless errors.

Harmless errors in a Monthly or Annual Statement of Account that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(c)(5) shall not render that Monthly or Annual Statement of Account invalid or provide a basis for exercise of the remedies set forth in 17 U.S.C. 115(c)(6).

EXHIBIT B
MARKED PROPOSED REGULATIONS

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

Subpart A—[Reserved]

Sec.

210.1–210.10 [Reserved]

**Subpart B—Royalties and Statements of Account Under Compulsory License ~~for Physical
Phonorecord Deliveries, Permanent Digital Downloads and Ringtones~~**

210.11 General.

210.12 Definitions.

210.13 Accounting requirements where sales revenue is “recognized.”

210.14 Accounting requirements for offsetting phonorecord reserves with returned phonorecords.

210.15 Situations in which a compulsory licensee is barred from maintaining reserves.

210.16 Monthly statements of account.

210.17 Annual statements of account.

210.18 Documentation.

210.19 ~~Timing of filing statements of account.~~ Harmless errors.

**Subpart C—~~Royalties and Statements of Account Under Compulsory License for
Interactive Streaming, Limited Downloads and Other Digital Phonorecord Delivery
Services~~**

~~210.21 General.~~

~~210.22 Definitions.~~

~~210.23 Monthly statements of account.~~

~~210.24 Annual statements of account.~~

~~210.25 Amended annual statements of account.~~

~~210.26 Documentation.~~

~~210.27 Timing of filing statements of account.~~

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

Subpart A—[Reserved]

§§ 210.1–210.10 [Reserved]

**Subpart B—Royalties and Statements of Account Under Compulsory License ~~for Physical
Phonorecord Deliveries, Permanent Digital Downloads and Ringtones~~**

§ 210.11 General.

This subpart prescribes the rules pertaining to the preparation and service of Statements of Account covering compulsory licenses for the making and distribution of phonorecords, including by means of a digital phonorecord delivery, pursuant to 17 U.S.C. 115 and the regulations in 37 CFR part 385 governing rates and terms for use of musical works under compulsory license for the making and distribution of phonorecords.

§ 210.12 Definitions.

[Note to the Copyright Office: To facilitate review of the Joint Commenters' proposed changes, the definitions are kept in their original order with a new proposed definition at the end. However, the Joint Commenters believe that it would be useful to alphabetize the definitions in the final regulations. The Joint Commenters also propose removing the subsection designations from this section, as in the definition sections of Part 385, to facilitate the move to alphabetization and future changes.]

As used in this subpart:

~~(a)~~ A *Monthly Statement of Account* is a statement accompanying monthly royalty payments identified in 17 U.S.C. 115(c)(5), as amended by Public Law 94-553, and required by that section to be made under the compulsory license to make and distribute phonorecords of nondramatic musical works, including by means of a digital phonorecord delivery.

~~(b)~~ An *Annual Statement of Account* is a statement identified in 17 U.S.C. 115(c)(5), as amended by Public Law 94-553, and required by that section to be filed for every made under the compulsory license to make and distribute phonorecords of nondramatic musical works, including by means of a digital phonorecord delivery.

~~(c)~~ A “*digital phonorecord delivery*” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery. A digital phonorecord delivery does not include any transmission that, as reasonably determined by the distributor, did not result in a specifically identifiable reproduction of the entire product being transmitted, and for which the distributor did not charge, or fully refunded, any monies that would otherwise be due for the relevant transmission.

~~(d)~~ A “*ringtone*” means a phonorecord of a partial musical work distributed as a digital phonorecord delivery in a format to be made resident on a telecommunications device for use to

~~announce the reception of an incoming telephone call or other communications or message or to alert the receiver to the fact that there is a communication or message.~~

Ringtone shall have the meaning given in § 385.2.

~~(e) The term *copyright owner*, in the case of any work having more than one copyright owner, means any one of the co-owners.~~

~~(f) The service of a *Statement of Account* on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of the Statement of Account on one co-owner or upon an agent of one of the co-owners shall be sufficient with respect to all co-owners.~~

~~(g) A *compulsory licensee* is a person or entity exercising the compulsory license to make and distribute phonorecords of nondramatic musical works as provided under 17 U.S.C. 115, including by means of a digital phonorecord delivery.~~

~~(h) A digital phonorecord delivery shall be treated as a type of phonorecord configuration, and a digital phonorecord delivery shall be treated as a phonorecord, with the following clarifications:~~

~~(1) A digital phonorecord delivery shall be treated as a phonorecord made and distributed on the date the phonorecord is digitally transmitted; and~~

~~(2) A digital phonorecord delivery shall be treated as having been *voluntarily distributed* and *relinquished from possession*, and a compulsory licensee shall be treated as having *permanently parted with possession* of a digital phonorecord delivery, on the date that the phonorecord is digitally transmitted.~~

~~(i) Except as provided in paragraph (h) of this section, a A phonorecord is considered *voluntarily distributed* if the compulsory licensee has voluntarily and permanently parted with possession of the phonorecord. For this purpose, and subject to the provisions of paragraph (d) of this section, a A compulsory licensee shall be considered to have “permanently parted with possession” of a phonorecord made under the license:~~

~~(1) In the case of phonorecords relinquished from possession for purposes other than sale, at the time at which the compulsory licensee actually first parts with possession;~~

~~(2) In the case of phonorecords relinquished from possession for purposes of sale without a privilege of returning unsold phonorecords for credit or exchange, at the time at which the compulsory licensee actually first parts with possession;~~

~~(3) In the case of phonorecords relinquished from possession for purposes of sale accompanied by a privilege of returning unsold phonorecords for credit or exchange:~~

(i) At the time when revenue from a sale of the phonorecord is “recognized” by the compulsory licensee; or

(ii) Nine months from the month in which the compulsory licensee actually first parted with possession, whichever occurs first. For these purposes, a compulsory licensee shall be considered to “recognize” revenue from the sale of a phonorecord when sales revenue would be recognized in accordance with ~~generally accepted accounting principles as expressed by the American Institute of Certified Public Accountants or the Financial Accounting Standards Board, whichever would cause sales revenue to be recognized first~~GAAP.

~~(j) To the extent that the terms *reserve*, *credit* and *return* appear in this section, such provisions shall not apply to digital phonorecord deliveries.~~4) In the case of a digital phonorecord delivery, the phonorecord shall be treated as having been made, voluntarily distributed and relinquished from possession, and a compulsory licensee shall be treated as having permanently parted with possession of the digital phonorecord delivery, on the date that the phonorecord is digitally transmitted.

~~(k) A *phonorecord reserve* comprises the number of phonorecords, if any, that have been relinquished from possession for purposes of sale in a given month accompanied by a privilege of return, as described in paragraph (i)(3) of the definition of “voluntarily distributed” in this section, and that have not been considered voluntarily distributed during the month in which the compulsory licensee actually first parted with their possession. The initial number of phonorecords comprising a phonorecord reserve shall be determined in accordance with generally accepted accounting principles as expressed by the American Institute of Certified Public Accountants or the Financial Accounting Standards Board~~GAAP.

~~(l) A *negative reserve balance* comprises the aggregate number of phonorecords, if any, that have been relinquished from possession for purposes of sale accompanied by a privilege of return, as described in paragraph (i)(3) of the definition of “voluntarily distributed” in this section, and that have been returned to the compulsory licensee, but because all available phonorecord reserves have been eliminated, have not been used to reduce a phonorecord reserve.~~

~~(m) An *incomplete transmission* is any digital transmission of a sound recording which, as determined by means within the sole control of the distributor, does not result in a specifically identifiable reproduction of the entire sound recording by or for any transmission recipient.~~

~~(n) A *retransmission* is a subsequent digital transmission of the same sound recording initially transmitted to an identified recipient for the purpose of completing the delivery of a complete and usable reproduction of that sound recording to that recipient.~~

GAAP means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally

Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

§ 210.13 Accounting requirements where sales revenue is “recognized.”

[Note to the Copyright Office: The Joint Commenters were not able to reach agreement concerning the proper treatment of negative reserve balances. Resolution of that issue ultimately might affect this section and other sections of this subpart. To provide the Office a complete and comprehensible set of regulations reflecting the issues on which the Joint Commenters do agree, we have generally preserved and made only technical and conforming changes to the provisions relevant to negative reserve balances. Neither retention of such provisions nor agreed-upon changes to them implies agreement concerning any aspect of the negative reserve balance issue. The Joint Commenters reserve the right to submit separate comments, and separately to propose further changes to the regulations, concerning that issue.]

Where under ~~§ 210.12(i)(3)(i), paragraph (3)(i)~~ of the definition of “voluntarily distributed” in § 210.12, revenue from the sale of phonorecords is “recognized” during any month after the month in which the compulsory licensee actually first parted with their possession, said compulsory licensee shall reduce particular phonorecord reserves by the number of phonorecords for which revenue is being “recognized,” as follows:

(a) If the number of phonorecords for which revenue is being “recognized” is smaller than the number of phonorecords comprising the earliest eligible phonorecord reserve, this phonorecord reserve shall be reduced by the number of phonorecords for which revenue is being “recognized.” Subject to the time limitations of ~~§ 210.12(i) paragraph (3)(ii), of the definition of “voluntarily distributed” in § 210.12,~~ the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(b) If the number of phonorecords for which revenue is being “recognized” is greater than the number of phonorecords comprising the earliest eligible phonorecord reserve but less than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall first eliminate those phonorecord reserves, beginning with the earliest eligible phonorecord reserve and continuing to the next succeeding phonorecord reserves, that are completely offset by phonorecords for which revenue is being “recognized.” Said compulsory licensee shall then reduce the next succeeding phonorecord reserve by the number of phonorecords for which revenue is being “recognized” that have not been used to eliminate a phonorecord reserve. Subject to the time limitations of ~~§ 210.12(i)(3)(ii), paragraph (3)(ii)~~ of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(c) If the number of phonorecords for which revenue is being “recognized” equals the number of phonorecords comprising all eligible phonorecord reserves, the person or entity exercising the compulsory license shall eliminate all of the phonorecord reserves.

[Note to the Copyright Office: As an organizational matter, the Joint Commenters propose removing the provision below from the definitions section, because it is not really a definition, and including it here if it is to be included anywhere. This organizational move does not imply any agreement by the Joint Commenters concerning the proper treatment of negative reserve balances, including in this provision.]

(d) To the extent that the terms *reserve*, *credit* and *return* appear in this part, such provisions shall not apply to digital phonorecord deliveries.

§ 210.14 Accounting requirements for offsetting phonorecord reserves with returned phonorecords.

(a) In the case of a phonorecord that has been relinquished from possession for purposes of sale accompanied by a privilege of return, as described in § 210.12(i)(3), paragraph (3) of the definition of “voluntarily distributed” in § 210.12, where the phonorecord is returned to the compulsory licensee for credit or exchange before said compulsory licensee is considered to have “permanently parted with possession” of the phonorecord under § 210.12(i), as described in the definition of “voluntarily distributed” in § 210.12, the compulsory licensee may use such phonorecord to reduce a “phonorecord reserve,” as defined in § 210.12(k), 210.12.

(b) In such cases, the compulsory licensee shall reduce particular phonorecord reserves by the number of phonorecords that are returned during the month covered by the Monthly Statement of Account in the following manner:

(1) If the number of phonorecords that are returned during the month covered by the Monthly Statement is smaller than the number comprising the earliest eligible phonorecord reserve, the compulsory licensee shall reduce this phonorecord reserve by the total number of returned phonorecords. Subject to the time limitations of § 210.12(i)(3), in paragraph (3) of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(2) If the number of phonorecords that are returned during the month covered by the Monthly Statement is greater than the number of phonorecords comprising the earliest eligible phonorecord reserve but less than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall first eliminate those phonorecord reserves, beginning with the earliest eligible phonorecord reserve, and continuing to the next succeeding phonorecord reserves, that are completely offset by returned phonorecords. Said compulsory licensee shall then reduce the next succeeding phonorecord reserve by the number of returned phonorecords that have not been used to eliminate a phonorecord reserve. Subject to the time limitations of § 210.12(i)(3)(ii), paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12, the number of phonorecords remaining in this reserve shall be available for use in subsequent months.

(3) If the number of phonorecords that are returned during the month covered by the Monthly Statement is equal to or is greater than the total number of phonorecords comprising all eligible phonorecord reserves, the compulsory licensee shall eliminate all eligible phonorecord reserves. Where said number is greater than the total number of phonorecords comprising all eligible

phonorecord reserves, said compulsory licensee shall establish a "negative reserve balance," as defined in § 210.12(i), 210.12.

(c) Except where a negative reserve balance exists, a separate and distinct phonorecord reserve shall be established for each month during which the compulsory licensee relinquishes phonorecords from possession for purposes of sale accompanied by a privilege of return, as described in § 210.12(i)(3) of this section, paragraph (3) of the definition of "voluntarily distributed" in § 210.12. In accordance with paragraph (3)(ii) of § 210.12(i)(3), the definition of "voluntarily distributed" in § 210.12, any phonorecord remaining in a particular phonorecord reserve nine months from the month in which the particular reserve was established shall be considered "voluntarily distributed"; at that point, the particular monthly phonorecord reserve shall lapse and royalties for the phonorecords remaining in it shall be paid as provided in § 210.16(d)(2).

(d) Where a negative reserve balance exists, the aggregate total of phonorecords comprising it shall be accumulated into a single balance rather than being separated into distinct monthly balances. Following the establishment of a negative reserve balance, any phonorecords relinquished from possession by the compulsory licensee for purposes of sale or otherwise, shall be credited against such negative balance, and the negative reserve balance shall be reduced accordingly. The nine-month limit provided by paragraph (3)(ii) of the definition of "voluntarily distributed" in § 210.12(i)(3)(ii) shall have no effect upon a negative reserve balance; where a negative reserve balance exists, relinquishment from possession of a phonorecord by the compulsory licensee at any time shall be used to reduce such balance, and shall not be considered a "voluntary distribution" within the meaning of § 210.12(i), 210.12.

(e) In no case shall a phonorecord reserve be established while a negative reserve balance is in existence; conversely, in no case shall a negative reserve balance be established before all available phonorecord reserves have been eliminated.

§ 210.15 Situations in which a compulsory licensee is barred from maintaining reserves.

Notwithstanding any other provisions of this section, in any case where, within three years before the phonorecord was relinquished from possession, the compulsory licensee has had final judgment entered against it for failure to pay royalties for the reproduction of copyrighted music on phonorecords, or within such period has been definitively found in any proceeding involving bankruptcy, insolvency, receivership, assignment for the benefit of creditors, or similar action, to have failed to pay such royalties, that compulsory licensee shall be considered to have "Permanently parted with possession" of a phonorecord made under the license at the time at which that compulsory licensee actually first parts with possession. For these purposes the "compulsory licensee," ~~as defined in § 210.12(g),~~ shall include:

(a) In the case of any corporation, the corporation or any director, officer, or beneficial owner of twenty-five percent (25%) or more of the outstanding securities of the corporation;

(b) In all other cases, any entity or individual owning a beneficial interest of twenty-five percent (25%) or more in the entity exercising the compulsory license.

§ 210.16 Monthly statements of account.

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Monthly Statements of Account.

(b) *General content.* A Monthly Statement of Account shall be clearly and prominently identified as a “Monthly Statement of Account Under Compulsory License for Making and Distributing Phonorecords,” and shall include a clear statement of the following information:

(1) The period (month and year) covered by the Monthly Statement;

(2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(3) The full address, including a specific number and street name or rural route, of the place of business of the compulsory licensee. A post office box or similar designation will not be sufficient for this purpose, except where it is the only address that can be used in that geographic location;

~~(4) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the Monthly Statement and the name of the author or authors of such work or works, if known;~~

~~(54)~~ For each nondramatic musical work that is owned by the same copyright owner being served with the Monthly Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (c) of this section;

~~(65)~~ The total royalty payable to the relevant copyright owner for the month covered by the Monthly Statement, computed in accordance with the requirements of this section and the formula specified in paragraph (d) of this section, ~~together with a Statement of Account showing in detail how the royalty was computed;~~

(6) Any late fees, if applicable, included in the payment associated with the Monthly Statement;
and

(7) In any case where the compulsory licensee falls within the provisions of § 210.15, a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that ~~paragraph~~section.

(c) *Specific content of monthly statements:*

(1) Identification and accounting of phonorecords subject to a cents rate royalty structure.

~~(41)~~ The information called for by paragraph (b)(~~54~~) of this section shall, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed

phonorecords subject to Part 385 Subpart A or any other applicable royalties computed on a cents-per-unit basis, include a separate listing of each of the following items of information:

~~(iA)~~ The number of phonorecords, ~~including digital phonorecord deliveries,~~ made during the month covered by the Monthly Statement;

~~(iiB)~~ The number of phonorecords that, during the month covered by the Monthly Statement and regardless of when made, were either:

~~(A)~~ Relinquished from possession for purposes other than sale;

~~(B)~~ Relinquished from possession for purposes of sale without any privilege of returning unsold phonorecords for credit or exchange;

~~(C)~~ Relinquished from possession for purposes of sale accompanied by a privilege of returning unsold phonorecords for credit or exchange;

~~(D)~~ Returned to the compulsory licensee for credit or exchange; or

~~(E)~~ Placed in a phonorecord reserve (except that if a negative reserve balance exists give either the number of phonorecords added to the negative reserve balance, or the number of phonorecords relinquished from possession that have been used to reduce the negative reserve balance);

~~(F)~~ Never delivered due to a failed transmission; or

~~(G)~~ Digitally retransmitted in order to complete a digital phonorecord delivery.

~~(iiiC)~~ The number of phonorecords, regardless of when made, that were relinquished from possession during a month earlier than the month covered by the Monthly Statement but that, during the month covered by the Monthly Statement either have had revenue from their sale “recognized” under § 210.12(i)(3)(i); paragraph (3)(i) of the definition of “voluntarily distributed” in § 210.12, or were comprised in a phonorecord reserve that lapsed after nine months under paragraph (3)(ii) of the definition of “voluntarily distributed” in § 210.12(i)(3)(ii);

(D) The per unit statutory royalty rate applicable to the relevant configuration; and

(E) The total royalty payable for the month covered by the Monthly Statement (i.e., the result in paragraph (d)(2)(v)) for the item described by the set of information called for, and broken down as required, by this paragraph (c)(1).

(2ii) ~~Each of the items of~~ The information called for by paragraph (c)(1)(i) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) At least one of the following, as applicable and available for tracking sales and/or usage:

(I) The International Standard Recording Code (ISRC) associated with the relevant sound recording;

(iII) The catalog number or numbers and label name or names, used on or associated with the phonorecords; or

(III) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords;

(iiD) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(iii) The playing time on the phonorecords of each nondramatic musical work covered by the statement; andE) The playing time of the relevant sound recording, except that playing time is not required in the case of a ringtone;

(F) If the compulsory licensee chooses to allocate its payment between co-owners of the copyright in the nondramatic musical work, as described in paragraph (g)(1), and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;

(G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Monthly Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by this paragraph (c)(1) or paragraph (c)(2); and

(ivH) Each phonorecord configuration involved (for example: ~~single disk, longplaying disk, cartridge, cassette, reel-to-reel, digital phonorecord delivery, or a combination of them~~compact disc, permanent digital download, ringtone).

(v) The date of and a reason for each incomplete transmission.

(2) Identification and accounting of phonorecords subject to a percentage rate royalty structure.

(i) The information called for by paragraph (b)(4) of this section shall, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, include a separate listing of the information required by § 385.12(e), § 385.22(d), or other provisions of Part 385 as applicable. Statements of Account need not reflect

phonorecords subject to the promotional royalty rate provided in section 385.14 or 385.24 or any similar promotional royalty rate of zero that may be provided in Part 385.

(ii) The information called for by paragraph (c)(2)(i) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) The International Standard Recording Code (ISRC) associated with the relevant sound recording if available, except that use of the ISRC shall not be required in the case of an album or other multiple sound recording product; and at least one of the following, as applicable and available for tracking sales and/or usage:

(I) The catalog number or numbers and label name or names, associated with the phonorecords;

(II) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords; or

(III) The sound recording identification number assigned by the compulsory licensee or a third party distributor to the relevant sound recording;

(D) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(E) The playing time of the relevant sound recording, except that playing time is not required in the case of licensed activity to which no overtime adjustment is applicable;

(F) If the compulsory licensee chooses to allocate its payment between co-owners of the copyright in the nondramatic musical work, as described in paragraph (g)(1), and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;

(G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Monthly Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by paragraph (c)(1) or this paragraph (c)(2);

(H) Identification of the relevant offering for which the royalty was calculated, including, if applicable, the name of the third party distributor of the offering;

(I) The number of plays, constructive plays or other payable units as applicable, of the relevant sound recording for the month covered by the Monthly Statement for the relevant offering; and

(J) The total royalty payable for the month for the item described by the set of information called for, and broken down as required, by this paragraph (c)(2) (i.e., the per-work royalty allocation for the relevant sound recording and offering).

(d) *Royalty payment and accounting.*

(1) *In general.* The total royalty called for by paragraph (b)(65) of this section shall be payable ~~for~~ computed so as to include every phonorecord “voluntarily distributed” during the month covered by the Monthly Statement.

(2) *The Phonorecords subject to a cents rate royalty structure.* For phonorecords subject to Part 385 Subpart A or any other applicable royalties computed on a cents-per-unit basis, the amount of the royalty payment shall be calculated ~~in accordance with the following formula~~ as follows:

(i) *Step 1: Compute the number of phonorecords shipped for sale with a privilege of return.* This is the total of phonorecords that, during the month covered by the Monthly Statement, were relinquished from possession by the compulsory licensee, accompanied by the privilege of returning unsold phonorecords to the compulsory licensee for credit or exchange. This total does not include:

(A) Any phonorecords relinquished from possession by the compulsory licensee for purposes of sale without the privilege of return; and

(B) Any phonorecords relinquished from possession for purposes other than sale.

(ii) *Step 2: Subtract the number of phonorecords reserved.* This involves deducting, from the subtotal arrived at in Step 1, the number of phonorecords that have been placed in the phonorecord reserve for the month covered by the Monthly Statement. The number of phonorecords reserved is determined by multiplying the subtotal from Step 1 by the percentage reserve level established under ~~Generally Accepted Accounting Practices~~ GAAP. This step should be skipped by a compulsory licensee barred from maintaining reserves under § 210.15.

(iii) *Step 3: Add the total of all phonorecords that were shipped during the month and were not counted in Step 1.* This total is the sum of two figures:

(1) The number of phonorecords that, during the month covered by the Monthly Statement, were relinquished from possession by the compulsory licensee for purposes of sale, without the privilege of returning unsold phonorecords to the compulsory licensee for credit or exchange; and

(2) The number of phonorecords relinquished from possession by the compulsory licensee, during the month covered by the Monthly Statement, for purposes other than sale.

(iv) *Step 4: Make any necessary adjustments for sales revenue “recognized,” lapsed reserves, or reduction of negative reserve balance during the month.* If necessary, this step involves adding to

or subtracting from the subtotal arrived at in Step 3 on the basis of three possible types of adjustments:

(A) *Sales revenue "recognized."* If, in the month covered by the Monthly Statement, the compulsory licensee "recognized" revenue from the sale of phonorecords that had been relinquished from possession in an earlier month, the number of such phonorecords is *added* to the Step 3 subtotal;

(B) *Lapsed reserves.* If, in the month covered by the Monthly Statement, there are any phonorecords remaining in the phonorecord reserve for the ninth previous month (that is, any phonorecord reserves from the ninth previous month that have not been offset under FOFI, the first-out-first-in accounting convention, by actual returns during the intervening months), the reserve lapses and the number of phonorecords in it is added to the Step 3 subtotal.

(C) *Reduction of negative reserve balance.* If, in the month covered by the Monthly Statement, the aggregate reserve balance for all previous months is a negative amount, the number of phonorecords relinquished from possession by the compulsory licensee during that month and used to reduce the negative reserve balance is subtracted from the Step 3 subtotal.

~~(D) *Incomplete transmissions.* If, in the month covered by the Monthly Statement, there are any digital transmissions of a sound recording which do not result in specifically identifiable reproductions of the entire sound recording by or for any transmission recipient, as determined by means within the sole control of the distributor, the number of such phonorecords is subtracted from the Step 3 subtotal.~~

~~(E) *Retransmitted digital phonorecords.* If, in the month covered by the Monthly Statement, there are retransmissions of a digital phonorecord to a recipient who did not receive a complete and usable phonorecord during an initial transmission, and such transmissions are made for the sole purpose of delivering a complete and usable reproduction of the initially requested sound recording to that recipient, the number of such retransmitted digital phonorecords is subtracted from the Step 3 subtotal.~~

(v) *Step 5: Multiply by the statutory royalty rate.* The total monthly royalty payment is obtained by multiplying the subtotal from Step 3, as adjusted if necessary by Step 4, by the statutory royalty rate of 9.1 cents or 1.75 cents per minute or fraction of playing time, whichever is larger for every physical phonorecord delivery and permanent digital download, and by the statutory royalty rate of 24.0 cents for every ringtone made and distributed set forth in § 385.3 or other provisions of Part 385 as applicable.

(3) Each step in computing the monthly payment, including the arithmetical calculations involved in each step, shall be set out in detail in the Monthly Statement.

(3) *Phonorecords subject to a percentage rate royalty structure.* For phonorecords subject to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, the amount of the royalty payment shall be calculated as provided in § 385.12, § 385.22, or other provisions of Part 385 as applicable. The following additional provisions shall also apply:

(i) A compulsory licensee may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid made in accordance with GAAP. In making such an estimation, it may be considered reasonable to use the aggregate amount of public performance royalties then sought from the compulsory licensee by performing rights licensors as a basis for computing the public performance royalty component, provided such an approach is supportable under GAAP. Royalty payments based on anticipated payments or interim public performance royalty rates must be reconciled on the Annual Statement of Account for the year in which the final public performance royalty expense for the offering is paid to the relevant performing rights licensor.

(ii) When calculating the per-work royalty allocation for each work, as described in § 385.12(b)(4), § 385.22(b)(3), or any similar provisions of Part 385 as applicable, an actual or constructive per-play allocation is to be calculated to at least the ten-thousandth of a cent (i.e., to at least six decimal places) if the systems used by the compulsory licensee to make such calculations are designed to make royalty calculations to at least six decimal places, and if the systems used by the compulsory licensee do not make royalty calculations to at least six decimal places, then to at least the hundredth of a cent (i.e., to at least four decimal places).

(e) *Clear statements.* The information required by paragraphs (b) and (c) of this section requires intelligible, legible, and unambiguous statements in the Monthly Statements of Account without incorporation of facts or information contained in other documents or records.

(f) *Certification.* (1) Each Monthly Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is ~~the licensee~~ certifying the Monthly Statement of Account;

(ii) If the compulsory licensee is a partnership or a corporation, by the title or official position held in the partnership or corporation by the person certifying the Monthly Statement of Account;

(iii) The date of certification; and

(iv) ~~A statement~~ One of the capacity of the person making the certification; and (v) ~~The following statement; statements;~~

I certify that (1) I am duly authorized to sign this Monthly Statement of Account on behalf of the compulsory licensee; (2) I have examined this Monthly Statement of Account; and that (3) all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

or

[Note to the Copyright Office: The Joint Commenters agree that an additional alternative should be provided to accommodate large-scale use of the compulsory license. However, the

Joint Commenters are not in a position to suggest specific language at this time. We hope to be able to do so in reply comments.

(2) If the Monthly Statement of Account is served by mail or by reputable courier service, certification of the Monthly Statement of Account by the compulsory licensee shall be made by handwritten signature. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if the compulsory licensee is a partnership, the signature shall be that of a partner.

(3) If the Monthly Statement of Account is served electronically, ~~the licensee and the copyright owner shall establish a procedure to verify that the certification of the Monthly Statement of Account by the compulsory licensee is made upon proper authority~~ shall be made by electronic signature as defined in section 7006(5) of title 15 of the United States Code.

(g) *Service.* (1) The service of a Monthly Statement of Account on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of a Statement of Account on at least one co-owner or upon an agent of at least one of the co-owners shall be sufficient with respect to all co-owners. The compulsory licensee may choose to allocate its payment between co-owners. In such a case the compulsory licensee shall provide each co-owner (or its agent) a Monthly Statement reflecting the percentage share paid to that co-owner. Each Monthly Statement of Account shall be served on the copyright owner or the agent with authority to receive Monthly Statements of Account on behalf of the copyright owner to whom or which it is directed, together with the total royalty for the month covered by the Monthly Statement, by mail or by mail, by reputable courier service or by electronic delivery as set forth in paragraph (g)(2) of this section on or before the 20th day of the immediately succeeding month. The royalty payment for a month also shall be served on or before the 20th day of the immediately succeeding month. The Monthly Statement and payment may be sent together or separately, but if sent separately, the payment must include information reasonably sufficient to allow the payee to match the Monthly Statement to the payment. However, in the case where the compulsory licensee has served its Notice of Intention upon an agent of the copyright owner pursuant to § 201.18 of this chapter, the compulsory licensee is not required to serve Monthly Statements of Account or make any royalty payments until the compulsory licensee receives from the agent with authority to receive the Notice of Intention notice of the name and address of the copyright owner or its agent upon whom the compulsory licensee shall serve Monthly Statements of Account and the monthly royalty fees. Upon receipt of this information, the compulsory licensee shall serve Monthly Statements of Account and all royalty fees covering the intervening period upon the person or entity identified by the agent with authority to receive the Notice of Intention by or before the 20th day of the month following receipt of the notification. It shall not be necessary to file a copy of the Monthly Statement in the Copyright Office.

(2) A Monthly Statement of Account may be sent or made available to a copyright owner or its agent in a readily accessible electronic format chosen by the compulsory licensee or its agent (including a text file with standard delimiters, or Microsoft Excel, Open Office or other programs widely in use at the time). Reasonable measures, consistent with prevailing industry practices

applicable to comparable electronic delivery of comparable financial information, shall be taken to limit access to the Monthly Statement of Account to the copyright owner or agent to whom or which it is directed.

(3) At the written request of the copyright owner or agent no more frequently than annually, a compulsory licensee that has been providing Monthly Statements of Account in paper form shall deliver or make available Monthly Statements of Account in electronic form, and a compulsory licensee that has been delivering or making available Monthly Statements of Account in electronic form shall provide Monthly Statements of Account in paper form. The compulsory licensee shall make such a change effective with the first accounting period ending more than 30 days after the compulsory licensee's receipt of the request and any information (such as a postal or email address, as the case may be) that is necessary for the compulsory licensee to make the change.

(4)(i) In any case where a Monthly Statement of Account is sent by mail or reputable courier service and the Monthly Statement of Account is returned to the sender because the copyright owner or agent is no longer located at that address or has refused to accept delivery, or the Monthly Statement of Account is sent by electronic mail and is undeliverable, or in any case where an address for the copyright owner is not known, the Monthly Statement of Account, together with any evidence of mailing or attempted delivery by courier service or electronic mail, may be filed in the Licensing Division of the Copyright Office. Any Monthly Statement of Account submitted for filing in the Copyright Office shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Monthly Statements of Account under this section.

(iii) Neither the filing of a Monthly Statement of Account in the Copyright Office, nor the failure to file such Monthly Statement, shall have effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Monthly Statements of Account submitted to the Copyright Office under this section. Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(3) A5) Subject to paragraph (g)(6), a separate Monthly Statement of Account shall be served for each month during which there is any activity relevant to the payment of royalties under 17 U.S.C. 115, and under this subpart. 115. The Annual Statement of Account identified described in § 210.17 of this subpart does not replace any Monthly Statement of Account.

(46) Notwithstanding the foregoing, royalties under section 115 shall not be considered payable, and no Monthly Statement of Account shall be required, until the compulsory licensee's cumulative unpaid royalties for the copyright owner equal at least one cent. Moreover, in any case in which the cumulative unpaid royalties under section 115 that would otherwise be payable by the compulsory licensee to the copyright owner are less than \$50, and the copyright owner has not notified the compulsory licensee in writing that it wishes to receive Monthly Statements of

Account reflecting payments of less than \$50, the compulsory licensee may choose to defer the payment date for such royalties and provide no Monthly Statements of Account until the earlier of the time for rendering the Monthly Statement of Account for the month in which the compulsory licensee's cumulative unpaid royalties under section 115 for the copyright owner exceed \$50 or the time for rendering the Annual Statement of Account, at which time the compulsory licensee may provide one statement and payment covering the entire period for which royalty payments were deferred.

(7) If the compulsory licensee is required, under applicable tax law and regulations, to make backup withholding from its payments required hereunder, the compulsory licensee shall indicate the amount of such withholding on the Monthly Statement or on or with the payment.

(8) If a Monthly Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If a Monthly Statement of Account is delivered sent by a reputable courier, documentation from the courier showing the first date of attempted delivery shall also be sufficient to prove that service was timely. If a Monthly Statement of Account or a link thereto is sent by electronic mail, a return receipt shall be sufficient to prove that service was timely. In the absence of a receipt from the United States Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier the foregoing, the compulsory licensee shall bear the burden of proving that the Monthly Statement of Account was served in a timely manner.

(5) If a Monthly Statement of Account covers reporting for more than 50 works that are embodied in phonorecords made under the compulsory license, the copyright owner or the authorized agent may send the licensee a demand that the Monthly Statement of Account be resubmitted in an electronic format and that future Statements of Account be submitted in an electronic format. The statement may be submitted on a data storage medium widely used at the time for electronic storage of data, in the form of a flat file, word processing document or spreadsheet readable with computer software in wide use at such time, with the required information identified and/or delimited so as to be readily discernible. The Statement of Account may be submitted by means of electronic transmission (such as email) if the demand from the copyright owner or authorized agent states that such submission will be accepted. As provided in paragraph (f) of this section, the licensee and the copyright owner shall establish a procedure to verify that the certification portion of the statement is made upon the authority of the licensee.(6) The copyright owner and the licensee or authorized agent may agree upon alternative methods of payment, provided that when the Monthly Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Monthly Statements of Account shall be sent and payment shall be made on or before the 20th day of each month and shall include all royalties for the month next proceeding. Any Monthly Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g)(1) of this section regarding service by mail or by reputable courier service of the Monthly Statements of Account together with the total royalty for the month covered by the Monthly Statement.(7) For purposes of this section, a copyright owner or an agent of a copyright owner with authority to receive a Monthly Statement of Account may make public a written policy that it will accept a Monthly Statement of Account by means of electronic transmission and include in that written policy procedures for making royalty payments. When the Monthly

~~Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Monthly Statements of Account shall be sent and payment shall be made on or before the 20th day of each month and shall include all royalties for the month next proceeding. Any Monthly Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g)(1) of this section regarding service by mail or by reputable courier service of the Monthly Statements of Account together with the total royalty for the month covered by the Monthly Statement.~~

(9) The copyright owner and the compulsory licensee or authorized agent may agree upon alternative methods of accounting and payment. Any Monthly Statement of Account or payment provided in accordance with such an agreement shall not be rendered invalid for failing to comply with the specific requirements of this section.

§ 210.17 Annual statements of account.

(a) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Annual Statements of Account.

(b) *Annual period.* Any Annual Statement of Account shall cover the full fiscal year of the compulsory licensee.

(c) *General content.* An Annual Statement of Account shall be clearly and prominently identified as an "Annual Statement of Account Under Compulsory License for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(1) The fiscal year covered by the Annual Statement;

(2) The full legal name of the compulsory licensee, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(3) If the compulsory licensee is a business organization, the name and title of the chief executive officer, managing partner, sole proprietor or other person similarly responsible for the management of such entity;

(4) The full address, including a specific number and street name or rural route, or the place of business of the compulsory licensee. ~~A~~ (a post office box or similar designation will not be sufficient for this purpose except where it is the only address that can be used in that geographic location);

~~(5) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the Annual Statement and the name of the author or authors of such work or works, if known;~~

~~(6) The playing time of each nondramatic musical work on such phonorecords;~~

(75) For each nondramatic musical work that is owned by the same copyright owner being served with the Annual Statement and that is embodied in phonorecords covered by the compulsory license, a detailed statement of all of the information called for in paragraph (d) of this section;

(86) The total royalty payable for the fiscal year covered by the Annual Statement computed in accordance with the requirements of ~~this section, together with a statement of account~~ § 210.16, and, in the case of offerings for which royalties are calculated pursuant to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, calculations showing in detail how the royalty was computed. ~~For~~ (for these purposes, the applicable royalty as specified in ~~§ 385.3~~ Part 385 shall be payable for every phonorecord “voluntarily distributed” during the fiscal year covered by the Annual Statement);

(97) The total sum paid under Monthly Statements of Account by the compulsory licensee to the copyright owner being served with the Annual Statement during the fiscal year covered by the Annual Statement; ~~and~~

(108) In any case where the compulsory license falls within the provisions of § 210.15, a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that ~~paragraph~~ section; ~~and~~

(9) Any late fees, if applicable, included in any payment associated with the Annual Statement.

(d) *Specific content of annual statements:*

(1) Identification and accounting of phonorecords subject to a cents rate royalty structure.

(1i) The information called for by paragraph (c)(75) of this section shall, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart A or any other applicable royalties computed on a cents-per-unit basis, include a separate listing of each of the following items of information separately stated and identified for each phonorecord configuration (for example, single disk, long playing disk, cartridge, cassette, or reel-to-reel) made:

(iA) The number of phonorecords made through the end of the fiscal year covered by the Annual Statement, including any made during earlier years;

(iiB) The number of phonorecords which have never been relinquished from possession of the compulsory licensee through the end of the fiscal year covered by the Annual Statement;

(iiiC) The number of phonorecords involuntarily relinquished from possession (as through fire or theft) of the compulsory licensee during the fiscal year covered by the Annual Statement and any earlier years, together with a description of the facts of such involuntary relinquishment;

(ivD) The number of phonorecords “voluntarily distributed” by the compulsory licensee during all years before the fiscal year covered by the Annual Statement;

(vE) The number of phonorecords relinquished from possession of the compulsory licensee for purposes of sale during the fiscal year covered by the Annual Statement accompanied by a privilege of returning unsold records for credit or exchange, but not “voluntarily distributed” by the end of that year;

(vF) The number of phonorecords “voluntarily distributed” by the compulsory licensee during the fiscal year covered by the Annual Statement, ~~together with:~~

(G) The per unit statutory royalty rate applicable to the relevant configuration; and

(H) The total royalty payable for the fiscal year covered by the Annual Statement for the item described by the set of information called for, and broken down as required, by this paragraph (d)(1).

(ii) The information called for by paragraph (d)(1)(i) of this section shall also include, and if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) At least one of the following, as applicable and available for tracking sales and/or usage:

(I) The International Standard Recording Code (ISRC) associated with the relevant sound recording;

(AII) The catalog number or numbers; and label name or names, used on such or associated with the phonorecords; and/or

(III) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords;

(BD) The names of the principal recording artists~~artist~~ or groups~~group~~ engaged in rendering the performances fixed on such~~the~~ phonorecords;

(E) The playing time on the phonorecords of each nondramatic musical work covered by the statement, except that playing time is not required in the case of a ringtone;

(F) If the compulsory licensee chooses to allocate its payments between co-owners of the copyright in the nondramatic musical work, and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;

(G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Annual Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by this paragraph (d)(1) or paragraph (d)(2); and

(H) Each phonorecord configuration involved (for example: compact disc, permanent digital download, ringtone).

(iii) If the information given under paragraph (d)(1)(i) of this section does not reconcile, the Annual Statement shall also include a clear and detailed explanation of the difference.

(2) Identification and accounting of phonorecords subject to a percentage rate royalty structure.

(i) The information called for by paragraph (c)(5) of this section shall identify each offering for which royalties are to be calculated separately and, with respect to each nondramatic musical work as to which the compulsory licensee has made and distributed phonorecords subject to Part 385 Subpart B or C or any other applicable royalties computed on a percentage-rate basis, include the number of plays, constructive plays or other payable units during the fiscal year covered by the Annual Statement, together with, and which if necessary shall be broken down to identify separately, the following:

(A) The title of the nondramatic musical work subject to compulsory license;

(B) A reference number or code identifying the relevant Notice of Intention, if the compulsory licensee chose to include such a number or code on its relevant Notice of Intention for the compulsory license;

(C) The International Standard Recording Code (ISRC) associated with the relevant sound recording if available, except that use of the ISRC shall not be required in the case of an album or other multiple sound recording product; and at least one of the following, as applicable and available for tracking sales and/or usage:

(I) The catalog number or numbers and label name or names, used on or associated with the phonorecords;

(II) The Universal Product Code (UPC) or similar code used on or associated with the phonorecords; or

(III) The sound recording identification number assigned by the compulsory licensee or a third party distributor to the relevant sound recording;

(D) The names of the principal recording artist or group engaged in rendering the performances fixed on the phonorecords;

(E) The playing time on the phonorecords of each nondramatic musical work covered by the statement, except that playing time is not required in the case of licensed activity to which no overtime adjustment is applicable;

(F) If the compulsory licensee chooses to allocate its payments between co-owners of the copyright in the nondramatic musical work, and thus pays the copyright owner (or agent) receiving the statement less than one hundred percent of the applicable royalty, the percentage share paid;

(G) The writer or writers of the nondramatic musical work, if known, except that identification of writers shall not be required on any Annual Statement covering fewer than 50 items described by a set of information called for, and broken down as required, by paragraph (d)(1) or this paragraph (d)(2);

(H) Identification of the relevant offering for which the royalty was calculated, including, if applicable, the name of the third party distributor of the offering;

(I) The number of plays, constructive plays or other payable units as applicable, of the relevant sound recording for the fiscal year covered by the Annual Statement for the relevant offering; and

(J) The total royalty payable for the month for the item described by the set of information called for, and broken down as required, by this paragraph (d)(2) (i.e., the per-work royalty allocation for the relevant sound recording and offering).

(2ii) If the information given under paragraph (d)(1)(i) through (vi) of this section does not reconcile, the Annual Statement shall also include a clear and detailed explanation of the difference. For these purposes, the information given under such paragraphs shall be considered not to reconcile if, after the number of phonorecords given under paragraphs (d)(1)(ii), (iii), (iv) and (v) of this section are added together and that sum is deducted from the number of phonorecords given under paragraph (d)(1)(i), the result is different from the amount given under paragraph (d)(1)(vi).

(iii) In any case in which the compulsory licensee made monthly payments based on anticipated payments or interim public performance royalty rates because the final public performance royalty had not then been determined, but the final public performance royalty expense for the offering was paid to the relevant performing rights licensor during the fiscal year covered by the Annual Statement, the Annual Statement shall include any necessary adjustment and calculations showing in detail how the adjustment was computed.

(e) *Clear statement.* The information required by paragraph (c) of this section requires intelligible, legible, and unambiguous statements in the Annual Statement of Account without incorporation by reference of facts or information contained in other documents or records.

(f) *Certification.* (1) Each Annual Statement of Account shall be accompanied by:

(i) The printed or typewritten name of the person who is the licensee certifying signing the Annual Statement of Account;

(ii) The date of ~~certification~~signature;

(iii) If the compulsory licensee is a partnership or a corporation, the title or official position held in the partnership or corporation ~~who is making the certification;~~by the person signing the Annual Statement of Account; and

(iv) ~~A statement of the capacity of the person making the certification;~~ and (v) The following statement:

I certify that I have ~~examined~~am duly authorized to sign this Annual Statement of Account and that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith on behalf of the compulsory licensee.

(2)(i) Each Annual Statement of Account shall also be certified by a licensed Certified Public Accountant. Such certification shall consist of ~~the following statement.~~

[Note to the Copyright Office: The Joint Commenters agree that the form of Annual Statement certification should be updated. However, the Joint Commenters are not in a position to suggest specific language at this time. We hope to be able to do so in reply comments.]

We have examined the attached “Annual Statement of Account Under Compulsory License For Making and Distributing Phonorecords” for the fiscal year ended (date) of (name of the compulsory licensee) applicable to phonorecords embodying (title or titles of nondramatic musical works embodied in phonorecords made under the compulsory license) made under the provisions of 17 U.S.C. 115, as amended by Public Law 94-553, and applicable regulations of the United States Copyright Office. Our examination was made in accordance with generally accepted auditing standards and accordingly, included tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion the Annual Statement of Account referred to above presents fairly the number of phonorecords embodying each of the above-identified nondramatic musical works made under compulsory license and voluntarily distributed by (name of the compulsory licensee) during the fiscal year ending (date), and the amount of royalties applicable thereto under such compulsory license, on a consistent basis and in accordance with the above cited law and applicable regulations published thereunder.

(City and State of Execution)

(Signature of Certified Public Accountant or CPA Firm)

Certificate Number

Jurisdiction of Certificate

(Date of Opinion)

(ii) ~~The~~Each certificate shall be signed by an individual (in which case the references therein to “we” may be replaced by “I”), or in the name of a partnership or a professional corporation with two or more shareholders. The certificate number and jurisdiction are not required if the certificate is signed in the name of a partnership or a professional corporation with two or more shareholders.

(3) If the Annual Statement of Account is served by mail or by reputable courier service, the ~~certification of the Annual Statement of Account~~ shall be signed by the compulsory licensee ~~shall be made by handwritten signature~~. If the compulsory licensee is a corporation, the signature shall be that of a duly authorized officer of the corporation; if that compulsory licensee is a partnership, the signature shall be that of a partner.

(4) If the Annual Statement of Account is served electronically, the Annual Statement of Account shall be signed by the compulsory licensee ~~may serve an~~ by electronic signature as defined in section 7006(5) of title 15 of the United States Code.

(5) If the Annual Statement of Account is served electronically, the compulsory licensee may serve an electronic facsimile of the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant. The compulsory licensee shall retain the original certification of the Annual Statement of Account signed by the licensed Certified Public Accountant, for the period identified in § 210.18, which shall be made available to the copyright owner upon demand.

~~(5) If the Annual Statement of Account is served electronically, the licensee and the copyright owner shall establish a procedure to verify that the certification of the Annual Statement of Account by the licensee is made upon proper authority.~~

(g) *Service.* (1) The service of an Annual Statement of Account on a copyright owner under this subpart may be accomplished by means of service on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner. In the case where the work has more than one copyright owner, the service of the Statement of Account on one co-owner or upon an agent of one of the co-owners shall be sufficient with respect to all co-owners. Each Annual Statement of Account shall be served on the copyright owner or the agent with authority to receive Annual Statements of Account on behalf of the copyright owner to whom or which it is directed by mail or, by reputable courier service or by electronic delivery as set forth in paragraph (g)(2) of this section on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. It shall not be necessary to file a copy of the Annual Statement in the Copyright Office. An Annual Statement of Account shall be served for each fiscal year during which at least one Monthly Statement of Account was required to have been served under § 210.16(g) or was deferred under § 210.16(g)(6).

(2) An Annual Statement of Account may be sent or made available to a copyright owner or its agent in a readily accessible electronic format chosen by the compulsory licensee or its agent (including a text file with standard delimiters, or Microsoft Excel, Open Office or other programs widely in use at the time). Reasonable measures, consistent with prevailing industry practices applicable to comparable electronic delivery of comparable financial information, shall be taken to limit access to the Annual Statement of Account to the copyright owner or agent to whom or which it is directed.

(3) If the copyright owner or agent has made a request pursuant to § 210.16(g)(3) to receive statements in electronic or paper form, such request shall also apply to Annual Statements to be rendered on or after the date that the request is effective with respect to Monthly Statements.

(24) In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(86) of this section (i.e., the total royalty payable) is greater than the amount stated in that Annual Statement under paragraph (c)(97) of this section (i.e., the total sum paid), the difference between such amounts shall be delivered to the copyright owner together with the service of also be served on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. The Annual Statement and payment may be sent together or separately, but if sent separately, the payment must include information reasonably sufficient to allow the payee to match the Annual Statement and the payment. The delivery of such sum does not require the copyright owner to accept such sum, or to forego any right, relief, or remedy which may be available under law. In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(6) of this section is less than the amount stated in that Annual Statement under paragraph (c)(7) of this section, the difference between such amounts shall be available to the compulsory licensee as a credit.

(35)(i) In any case where an Annual Statement of Account is sent by mail or by reputable courier service and is returned to the sender because the copyright owner or agent is ~~not~~no longer located at that address or has refused to accept delivery, or the Annual Statement of Account is sent by electronic mail and is undeliverable, or in any case where an address for the copyright owner is not known, the Annual Statement of Account, together with any evidence of mailing or attempted delivery by courier service or electronic mail, may be filed in the Licensing Division of the Copyright Office. Any Annual Statement of Account submitted for filing shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender.

(ii) The Copyright Office will not accept any royalty fees submitted with Annual Statements of Account under this paragraph (g)(35).

(iii) Neither the filing of an Annual Statement of Account in the Copyright Office, nor the failure to file such Annual Statement, shall have any effect other than that which may be attributed to it by a court of competent jurisdiction.

(iv) No filing fee will be required in the case of Annual Statements of Account submitted to the Copyright Office under this paragraph (g)(35). Upon request and payment of the fee specified in § 201.3(e) of this chapter, a Certificate of Filing will be provided to the sender.

(46) If an Annual Statement of Account is sent by certified mail or registered mail, a mailing receipt shall be sufficient to prove that service was timely. If an Annual Statement of Account is delivered~~sent~~ by a reputable courier, documentation from the courier showing the first date of attempted delivery shall also be sufficient to prove that service was timely. If an Annual Statement of Account or a link thereto is sent by electronic mail, a return receipt shall be sufficient to prove that service was timely. In the absence of a receipt from the United States Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier~~the foregoing~~, the compulsory licensee shall bear the burden of proving that the Annual Statement of Account was served in a timely manner.

~~(5) If an Annual Statement of Account covers reporting for more than 50 works that are embodied in phonorecords made under the compulsory license, the copyright owner or the authorized agent may send the licensee a demand that the Annual Statement of Account be resubmitted in an electronic format and that future Annual Statements of Account be submitted in an electronic format. The statement may be submitted on a data storage medium widely used at the time for electronic storage of data, in the form of a flat file, word processing document or spreadsheet readable with computer software in wide use at such time, with the required information identified and/or delimited so as to be readily discernible. The Statement of Account may be submitted by means of electronic transmission (such as email) if the copyright owner or authorized agent states that such submission will be accepted. As provided in paragraph (f) of this section, the licensee and the copyright owner shall establish a procedure to verify that the certification portion of the statement is made upon the authority of the licensee.~~

(7) The copyright owner and the compulsory licensee or authorized agent may agree upon alternative methods of accounting and payment. Any Annual Statement of Account or payment provided in accordance with such an agreement shall not be rendered invalid for failing to comply with the specific requirements of this section.

~~(6) The copyright owner and the licensee or authorized agent may agree upon alternative methods of payment, provided that when the Statement of Account and payment are not sent together by mail or courier service, they shall be sent contemporaneously. Annual Statements of Account shall be sent and any additional payment shall be made on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. Any Annual Statement of Account or payment provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of paragraph (g) of this section regarding service by mail or by reputable courier service of the Annual Statements of Account together with the total additional royalty covered by the Annual Statement.~~

~~(7) For purposes of this section, a copyright owner or an agent of a copyright owner with authority to receive an Annual Statement of Account may make public a written policy that it will accept an Annual Statement of Account by means of electronic transmission and include in that written policy procedures for making any additional royalty payments. When the Annual Statement of~~

Account and any additional payment are not sent together by mail or courier service, they shall be sent contemporaneously. Annual Statements of Account shall be sent and payment shall be made on or before the 20th day of the sixth month following the end of the fiscal year covered by the Annual Statement. Any Annual Statement of Account provided in accordance with such policy shall not be rendered invalid for failing to comply with the specific requirements of this paragraph (g) regarding service by mail or by reputable courier service of the Annual Statement of Account together with any additional royalty payment.

(h) Annual Statements for periods before the effective date of this regulation. In any case in which an Annual Statement of Account for a compulsory licensee's fiscal year closing after March 1, 2009 and before the effective date of this regulation was not provided because it was impracticable for the compulsory licensee to provide it, the relevant copyright owner may, at any time before the date that is 6 months after issuance of this regulation, make a request in writing to receive an Annual Statement of Account for the relevant fiscal year conforming to the requirements of this section. If such a request is made, the compulsory licensee shall provide the Annual Statement of Account within 6 months after receiving the request. If such a circumstance and request applies to more than one of the compulsory licensee's fiscal years, such years may be combined on a single statement.

§ 210.18 Documentation.

All compulsory licensees shall, for a period of at least five years from the date of service of an Annual Statement of Account, keep and retain in their possession all records and documents necessary and appropriate to support fully the information set forth in such Annual Statement and in Monthly Statements served during the fiscal year covered by such Annual Statement.

§ 210.19 ~~Timing of statements of account~~Harmless errors.

~~Statements of Accounts for an accounting period which closes after the effective date of this regulation shall be due as provided in §§ 210.16(g)(1) and 210.17(g)(1). Statements of Account for any prior reporting period shall be due 180 days after the effective date of this regulation.~~ Harmless errors in a Monthly or Annual Statement of Account that do not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 115(c)(5) shall not render that Monthly or Annual Statement of Account invalid or provide a basis for exercise of the remedies set forth in 17 U.S.C. 115(c)(6).

EXHIBIT C

COMMENTS CONCERNING ADDITIONAL DRAFTING ISSUES

The following table contains brief comments concerning certain of the more material or less self-explanatory changes to the Proposed Rule reflected in the Joint Commenters' proposed regulations and not discussed elsewhere in these Joint Comments.

Section of Proposed Regulations ¹	Comment
210.12	We propose deleting references to Public Law 94-553 throughout the Proposed Rule. While it once may have been useful to distinguish the 1976 Act from the 1909 Act in these regulations, these references now raise questions as to whether subsequent amendments to Section 115 are meant to be excluded.
210.12	The current definitions section incorporates certain paragraphs that are not actually definitions. We propose moving them to other definitions or substantive provisions.
210.16(b)	We propose moving work titles from paragraph (b) to paragraph (c) because this is line-level rather than statement-level data.
210.16(b)(5)	We propose deleting the last clause because the reference to a Statement of Account is circular, and it is not necessary to require here a further showing of detail, because detail is sufficiently required by paragraph (c).
210.16(c)(1)(ii)(F)	Where a work has multiple co-owners, the accounting regulations have historically permitted sending payment to one of them. No mandatory change to that arrangement is proposed. However, some licensees have agreed to split their payments between co-owners, and the Joint Commenters agree that it is appropriate to contemplate that possibility in the regulations.
210.16(c)(1)(ii)(G)	Writer name can be a helpful data point in automated matching of large statements to databases of repertoire, so it is proposed to be added as an additional field in statements with more than 50 lines of data.
210.16(c)(2)(ii)(C)	Having ISRC plus an additional identifier can be helpful in automated matching of individual tracks on statements from services, so it is proposed that both be required in this context (as available). This was not judged to be necessary for cents rate uses or for multi-recording products in a music bundle.
210.16(d)(2)	The requirement formerly appearing at the end of this section to present step-by-step calculations is unnecessary for cents rate uses, because the relevant steps are already set forth specifically above.
210.16(f)(1)	We propose merging the statement of capacity into the prescribed certification because, in the absence of specific text, there has been confusion about what is contemplated as a statement of capacity.

¹ Just one section reference is given for each issue, but similar issues may be presented, or language repeated, elsewhere in the proposed regulations.

210.17(c)	We propose moving both work titles and playing time from paragraph (c) to paragraph (d) because this is line-level rather than statement-level data.
210.17(d)(1)	Because the auditor certifying the annual statement will apply professional judgment to determine whether the reported information reconciles, a detailed definition of what it means for the information to reconcile is unnecessary.
210.17(f)(1)	Historically, annual statements have been signed, but not certified, by the licensee. The Proposed Rule proposed adding a requirement of licensee certification. Because the principal purpose of the annual statement is to convey the auditor's certification, licensee certification is unnecessary.