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LATHAM & WATKINS LLP

October 14, 2020

VIA EMAIL

Regan Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, D.C. 20559-6000
regans@copyright.gov

Re: *Ex Parte* Letter re: October 9, 2020 Copyright Office Virtual Meeting

Dear Ms. Smith,

This letter is to follow up on the *ex parte* meeting held with Digital Licensee Coordinator, Inc. ("DLC") to further discuss issues raised by the Office's July 17, 2020 rulemaking on the transition period transfer and reporting of royalties to the Mechanical Licensing Collective. Attending the meeting on behalf of DLC were Garrett Levin, DLC Board Member; Kevin Goldberg, VP, Legal, DLC; Lauren Danzy of DLC; Jon Cohen and Alan Jennings of Amazon; Nick Williamson and Elizabeth Miles of Apple; Sarah Rosenbaum, Jen Rosen, and Rachel Landy of Google; Tres Williams of iHeart Media; Seth Goldstein and Jeff Wallace of MediaNet; Cynthia Greer, David Ring, and Alex Winck of Pandora; Elliott Peters and Daniel Susla of Soundcloud; Kevan Choset, Emery Simon, Lucy Bridgwood, and Lisa Selden of Spotify; and DLC's outside counsel Sy Damle and Alli Stillman of Latham & Watkins. Attending for the Copyright Office were Regan Smith, Anna Chauvet, Jason Sloan, Terry Hart, John Riley, and Cassie Sciortino.

The following summarizes the discussion and follows up on particular questions asked by the Copyright Office.

Accrued Royalties and Industry Wide Liquidation Agreements

The first topic discussed related to the industry-wide agreements between certain digital services (Spotify, Google, MediaNet, and Napster/Rhapsody) and the National Music Publishers' Association ("NMPA") that predated the enactment of the Music Modernization Act ("MMA") and facilitated distribution of historic accrued royalties to copyright owners. As discussed in the DLC's earlier comments, via those agreements, copyright owners received market-share-based

distributions of royalties, and by doing so released claims for any further royalties for the relevant time periods.[1]

DLC has reviewed the October 9 *ex parte* letter submitted to the Office by Spotify. The DLC as a whole is in alignment with the points made in that letter, including the response to the MLC's proffered statutory argument, which (among other issues) would improperly read the GAAP requirement out of the law, and fail to account for voluntary licenses. The DLC made a few additional points during its *ex parte* meeting:

- The DLC's proposed regulatory approach would ensure that all non-participating copyright owners' whose works are matched by the MLC would receive the royalties they are owed. We also understand, however, that songwriter groups have expressed concern that accounting for NMPA agreements would interfere with the operation of the provision of the MMA that requires copyright owners receiving a share of unclaimed accrued royalties to pay or credit a portion of those royalties through to songwriters. *See* 17 U.S.C. § 115(d)(3)(J)(iv). But, as we explained, copyright owners participating in the NMPA agreements have released any claim to any additional royalties for the time periods covered by the agreements. Even if digital music providers were required, in contravention of the statute, to double pay the royalties that were already paid under the NMPA agreements, none of that money would be eligible for payment to the copyright owners that participated in the agreement. As a result, there are no royalties those copyright owners could share with songwriters under the terms of the MMA. Indeed, even the MLC's approach, which would have digital music providers double pay royalties, and enforce those releases through litigation after the fact,[2] would not lead to songwriters getting additional royalties. To the extent songwriters believe they did not receive a proper accounting of the royalties paid out under these agreements, those are questions best directed to the participating copyright owners for resolution.

- DLC explained that, other than the four agreements mentioned above, it is unaware of any other agreements that are structured in this way—as industry-wide agreements open to all copyright owners, and that distributed royalties on a market share basis.

- DLC also noted that the concern about digital music providers being required to "double pay" is limited to the market-share distribution of unclaimed accrued royalties. Royalties that were paid to copyright owners either because they were matched or

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[1] DLC Transition Period Comments at 11-12.

[2] MLC 10/5/20 Letter at 4-5. The MLC suggests that it "would hold . . . unmatched royalties pending the resolution of [a] dispute" between a digital music provider and a copyright owner over entitlement to accrued royalties. *Id.* at 5. That proposal envisions a procedure not contemplated by the MMA. The dispute resolution process required by the MMA is aimed at resolving disagreements *among copyright owners*. See 17 U.S.C. § 115(d)(3)(K). Thus, even the solution that the MLC has proposed would require regulatory action by the Office.

claimed are not at issue; there is no dispute that such amounts would not be accrued as unmatched royalties under the MMA.

Cumulative Statement of Account

We also discussed several issues related to the required cumulative statement of account for accrued royalties.

First, the Office asked whether the DLC had any objection to certain elements of the Office's proposed rule that the DLC had not specifically commented on or included in DLC's redline to that proposed rule. We explained that we have no objection to those elements of the proposed rule. For avoidance of doubt, we have attached an updated version of the DLC's redline that includes those elements of the proposed rule, highlighted with red text.

Second, we discussed the need for the cumulative statement of account regulations to include a provision for estimating royalty inputs and making appropriate adjustments after the fact. The need for such a provision has become particularly acute in light of the recent vacatur and remand of the Copyright Royalty Board's *Phonorecords III* decision, which means digital music providers may require significant retroactive adjustments to the amount of accrued royalties during the relevant time period depending on the resolution of that proceeding.[3] Based on feedback from the Office, we have proposed updated regulatory language that borrows from the estimate and adjustment provisions in the interim rule governing reporting under the blanket license, with appropriate modifications to allow DMPs to adjust or cure the accrued royalties paid or the cumulative statement of account when an inaccuracy is discovered, which are necessary for the reasons explained in our comments.[4]

The Office, however, mentioned concerns expressed by the MLC about giving digital music providers the unfettered ability to adjust the cumulative statements of account. However, digital music providers will have strong incentives to provide full and accurate cumulative reporting, given the connection of that reporting to the MMA's limitation on liability. Moreover, digital music providers must already certify that they are providing the information in the cumulative statement of account to the best of their knowledge, information, and belief, and in good faith. And making repeated adjustments to a cumulative statement has significant operational costs with no corresponding benefit.

In any event, in response to the MLC's stated concern, the DLC is willing to impose a reasonable restriction on digital music providers' ability to submit a report of adjustment to a cumulative statement of account, that are reflected in a redline attached to this letter. Specifically, the DLC's proposal includes a provision permitting the submission of a report of adjustment only in four scenarios.[5] In the case of a digital music provider that is submitting a report of adjustment

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[3] *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020).

[4] DLC Transition Period Comments at 5-6.

[5] During the meeting, the Office asked whether it should consider a two-staged adjustment process like that adopted in the interim blanket license rules, under which an adjustment to a

to correct an inaccuracy, it may only do so only if the adjustment is based on information that was not known at the time of the initial submission of the cumulative statement of account. That restriction should adequately address the MLC's (purely hypothetical) concern regarding abuse of the adjustment procedure.

Relatedly, the Office asked for the DLC's views regarding the MLC's request, raised in its *ex parte* meeting, to impose a "records of use" requirement for the data underlying the cumulative statement of account, akin to that in the interim rules governing the blanket license. We have not seen the MLC's ex parte letter and necessarily must reserve the right to respond when we do. But, based on what we understand of the request, there is no basis to engraft a records of use requirement onto the cumulative statement of account regulations. As an initial matter, the *MLC* has no role to play in enforcing the provisions of section 115(d)(10). The cumulative statement of account and the payment of accrued royalties in section 115(d)(10) is not a condition of the blanket license, and any failures in that regard are not a basis for terminating the blanket license.[6] Nor does it have authority to audit digital music providers' cumulative statements of account.[7] Thus, the MLC would have no use for this data that is contemplated by the MMA.

Third, we discussed the metadata requirements for the cumulative statement of account, and we informed the Office that the DLC's members continue to work closely with the MLC on a list of fields that would be reported with the cumulative statement of account. To the extent a compromise is reached, we expect to return to the Office with regulatory language that will resolve these issues.

Fourth, we discussed the DLC's views concerning the proposed treatment of an instance where an underpayment—whether in connection with obligations relating to one of the NMPA agreements at issue or an estimated input used in the royalty calculation—is identified after the expiration of the adjusted statute of limitations in section 115(d)(10). We understand the Office to be asking about two distinct but related scenarios—one related to the agreement to "back stop" any shortfall in royalties owed to copyright owners who did not participate in a NMPA agreement, and the other related to the finalization of any estimated inputs (e.g., PRO fees) in the royalty calculation. DLC explained that, consistent with its general position of ensuring that royalties are

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monthly report can be made for essentially any reason within six months of the close of the fiscal year, but an adjustment to an annual report can only be made for a specified set of reasons. *See* 37 C.F.R. § 210.27(g)(4), (k). Although we do not oppose a two-tiered mechanism like that suggested by the Office, we respectfully submit that a simpler approach may be more appropriate in this context, especially considering that the timing of any necessary adjustments is not certain.

[6] *See generally* 17 U.S.C. § 115(d)(4)(E).

[7] *See generally* 17 U.S.C. § 115(d)(4)(D). There are several provisions that make clear that the MLC's audit authority extends only to the blanket license. For example, it may only conduct an audit of " a digital music provider *operating under the blanket license*." *Id.* § 115(d)(4)(D)(i). Moreover, the audit power is limited to a three year "verification period," *Id.* § 115(d)(4)(D)(i)(I). This would be an illogical restriction for Congress to have imposed had it intended the MLC to audit cumulative statements of account covering much longer periods of time.

properly paid to copyright owners, its members would be willing to have the Office adopt appropriate regulations requiring payment of additional sums in those scenarios, notwithstanding the expiration of the adjusted statement of limitations. Any such regulations should make clear, however, that the agreement to pay these amounts does not constitute an agreement to extend the statute of limitations, or the waiver of any statute-of-limitations-based defense.

Finally, with respect to the cumulative statement of account, we discussed issues related to the MLC's request to report the copyright owners to whom partially matched and paid shares were provided.[8] We discussed the fact that one of the vendors, Music Reports, Inc., has recently expressed willingness to provide this information to the MLC on behalf of its clients, although the commercial terms are still being discussed, and any regulatory provision here should ensure that vendors are not given undue bargaining power. We also discussed to the possibility of delivering this "paid party" information to the MLC on a different timeline than the usage data. Moreover, the Office requested that the DLC provide proposed regulatory language to implement its recommendation, described in the comments,[9] permitting it to report the aggregate amount paid to partial owners, and provide a list of those partial owners, without identifying the specific shares owned by each owner. We have done so in the attached redline. (Note that it is unnecessary, and potentially problematic, to report the actual amount of accrued royalties paid; the relevant "paid" amount can be derived simply by multiplying the percentage share paid by the total amount of royalties attributable to the use of that work, which, among other things, will avoid complications from payments on partially matched works made pursuant to voluntary licensing terms that may differ from the statutory rate.)

Confidentiality Regulations

We discussed various aspects of the Office's proposed confidentiality regulations, the DLC's proposed amendments, and the MLC's concerns about those amendments.[10] In particular, we understand that the MLC has expressed concern about the restrictions on MLC Board member access to information provided by digital music providers. But it is absolutely critical that the Office maintain a strict firewall between the MLC Board and the sensitive information provided by digital music providers to the MLC. This is particularly so because, in addition to the regular usage and royalty reporting that digital music providers will provide to the MLC, the Office's

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[8] Relatedly, the Office asked, if reporting is limited to that required by the monthly statement of account rules, whether DLC takes the position that the "percentage share paid" would be reported. *See* 37 C.F.R. § 210.16(c)(3)(vi). The answer is yes, although we note that the MLC is also asking to know the copyright owners who were paid.

[9] DLC Comments at 6-7. As discussed in the DLC's comments (at 6-7) this proposal is meant to address a concern that some copyright owners regard the splits of musical works they control as confidential. We understand that the MLC may question this concern. But the MLC is not a party to these agreements, and does not purport to represent any parties to these agreements. So its views on the matter should be given no particular weight. Moreover, there is no reason that the MLC would need detailed *matched* share information in order to find the owners of *unmatched* shares.

[10] 85 Fed. Reg. 22559 (Apr. 22, 2020).

interim rule gives the MLC access to a broad range of additional information through the records of use provision.[11] It would likewise be inappropriate for the MLC Board to gain information about the identity of digital music providers' voluntary license partners, or the terms of those licenses.

Maintaining such a firewall is especially important because the MLC Board (unlike the boards of many nonprofits) is not comprised of entirely neutral and disinterested members. Instead, it is staffed, by law, with representatives of entities that are in competition with each other (and, crucially, with other copyright owners not represented on the Board), and in commercial relationships with digital music providers. Indeed, the MLC's insistence that the Board learn details about digital music providers that may be in default highlights the "fox in the henhouse" problem: publishers serving on the MLC Board would gain a special advantage in any commercial negotiations with that digital music provider. That harms both the digital music providers, and (crucially) publishers that do not serve on the Board, who will be at a competitive disadvantage. Indeed, the Office has specifically stated that it "expects ongoing regulatory and other implementation efforts to . . . extenuate the risk of self-interest" at the MLC.[12] This confidentiality rulemaking provides precisely that opportunity.

The MLC has had a CEO since early this year and now employs a staff of around 40. As the MLC transitions to full operations on license availability date, those personnel are the ones who should be running the day-to-day operations of the MLC,[13] and reporting high-level, anonymized, aggregate information to the Board, sufficient for the Board to engage in oversight. Indeed, the MMA *requires* the MLC's officers to be independent of the Board, prohibiting anyone serving as an officer of the MLC to simultaneously "also be an employee or agent of any member of the board of directors of the collective or any entity represented by a member of the board of directors."[14] It would be improper for MLC Board members to circumvent this restriction by becoming directly involved in the day-to-day operations of the MLC, especially if it means demanding special access to commercially sensitive information from digital music providers as a result.[15]

As for the MLC's apparent concern about the breadth of the definition of "Confidential Information" in the DLC's proposed regulation, DLC pointed out that the MMA itself defines confidential information in similarly broad terms. Section 115(d)(12) directs the Register to "to ensure that **confidential, private, proprietary, or privileged information** contained in the

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[11] *See generally* 37 C.F.R. § 210.27(m). The DLC continues to have concerns about the breadth of this provision, and will closely monitor its operation.

[12] *See* 85 Fed. Reg. 58170, 58171 (Sept. 17, 2020).

[13] *See* 17 U.S.C. § 115(d)(3)(D)(ii)(I)(ee) (requiring bylaws to establish "a management structure for daily operation of the collective").

[14] 17 U.S.C. § 115(d)(3)(D)(viii).

[15] Moreover, to the extent the MLC's bylaws permit the Board to become involved in day-to-day operations of the MLC, they are inconsistent with the statute and are not a basis for regulating in the MLC's desired manner.

records of the mechanical licensing collective . . . is not improperly disclosed or used."[16] Given that language, it would be inappropriate for the Office to further cabin the definition of confidential information by regulation.

Another issue discussed related to whether the definitions of "MLC Internal Information" and "DLC Internal Information" were sufficiently cabined. We believe they are. As discussed, both of those categories of information are defined to be a subcategory of "Confidential Information," and would (by definition) exclude "[d]ocuments and information that are public or may be made public by law or regulation," including information required to be included in the MLC's annual report.[17] Examples of confidential internal information would be items such as disciplinary files for personnel, or competing vendor bids. This information might be appropriate to share with the MLC and DLC boards, but would have to be maintained in strict confidence. We understand that the MLC has reiterated its previously rejected "trust us" approach to the confidentiality of such internal information. We believe that the Office's NPRM appropriately rejected that approach, given commenters' "concern about the MLC's ability to require NDAs for its board and committee members."[18]

Finally, the Office questioned one of the proposed edits DLC made to the proposed rules. The proposed rule included a specific provision governing the DLC's general ability to use Confidential Information (including DLC Internal Information).[19] But that provision mistakenly described the DLC's duties as "determining compliance with statutory license requirements, royalty calculation, collection, matching, and distribution."[20] Those are the *MLC's* duties. During our meeting, the Office expressed concern that the DLC's proposed replacement—"duties that are made the responsibility of the DLC, including efforts to enforce notice and payment obligations with respect to the administrative assessment"—was too broad. To be clear, in case there is confusion, the point of this provision (and the parallel one addressed to the MLC) is to prevent either entity from using Confidential Information for some purpose outside the scope of their official responsibilities. It should not be used to limit the use of Confidential Information *within* the scope of those entities' official responsibilities. In any event, to the extent the Office wishes to tie the DLC's language more closely to the statute, it would be appropriate to include an appropriate cross-reference: "duties that are made the responsibility of the DLC, under 17 U.S.C. 115(d)(5)(C), including efforts to enforce notice and payment obligations with respect to the administrative assessment."

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[16] 17 U.S.C. § 115(d)(12) (emphasis added).

[17] DLC Confidentiality Comments at A-1 to A-2.

[18] 85 Fed. Reg. at 22,566.

[19] Proposed Rule § 210.33(c)(2).

[20] *Id.*

Thank you for your time and continued engagement on these matters.

Best regards,

Sarang V. Damle

DLC Revisions to <u>Proposed</u> 37 C.F.R. § 210.20 (in bold)

<u>§ 210.20 Statements required for limitation on liability for digital music providers for the transition period prior to the license availability date.</u>

This section specifies the requirements for a digital music provider to report and pay royalties for purposes of being eligible for the limitation on liability described in 17 U.S.C. 115(d)(10). Terms used in this section that are defined in 17 U.S.C. 115(e) shall have the meaning given those terms in 17 U.S.C. 115(e).

(a) If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall provide statements of account and pay royalties to such copyright owner as a compulsory licensee in accordance with this subpart.

(b) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(1) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.

(2) If a copyright owner of an unmatched musical work (or share thereof) is identified and located by or to the digital music provider before the license availability date, the digital music provider shall—

(i) Not later than 45 calendar days after the end of the calendar month during which the copyright owner was identified and located, pay the copyright owner all accrued royalties, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been providing Monthly Statements of Account as a compulsory licensee in accordance with this subpart to the copyright owner from initial use of the work, and including, in addition to the information and certification required by §210.16, a clear identification of the total period covered by the cumulative statement and the total royalty payable for the period;

(ii) Beginning with the accounting period following the calendar month in which the copyright owner was identified and located, and for all other accounting periods prior to the license availability date, provide Monthly Statements of Account and pay royalties to the copyright owner as a compulsory licensee in accordance with this subpart; and

(iii) Beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such reporting period and reporting periods thereafter to the mechanical licensing collective, as required under 17 U.S.C. 115(d) and applicable regulations.

(3) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall—

(i) Not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective (as required by paragraph (e)(2) of this section), such payment to be accompanied by a cumulative statement of account that**:**

(A) Includes all of the information required by **paragraphs (c) and (d)** of this section;

(B) Is delivered to the mechanical licensing collective as required by paragraph (**e**) of this section; and

(C) is certified as required by paragraph (**f**) of this section.

(ii) Beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such period and reporting periods thereafter to the mechanical licensing collective, as required under 17 U.S.C. 115(d) and applicable regulations.

(c) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be clearly and prominently identified as a "Cumulative Statement of Account for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(1) The period (months and years) covered by the cumulative statement of account.

(2) The full legal name of the digital music provider and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the digital music provider engages, or has engaged at any time during the period identified in paragraph (c)(1) of this section, in covered activities. If the digital music provider has a unique DDEX identifier number, it must also be provided.

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

(4) For each sound recording embodying a musical work for which accrued royalties must be transferred to the mechanical licensing collective under paragraph (b)(3)(i) of this section, a detailed cumulative statement, from which the mechanical licensing collective may seperate reported information for each month and year for each applicable activity or offering including as may be defined in part 385, for all of:

(i) The royalty payment and accounting information required by paragraph (d) of this section; and

(ii) **The sound recording and musical work information referenced in § 210.16(c)(3) that would have been provided to the copyright owner had the digital music provider been serving Monthly Statements of Account as a compulsory licensee in accordance with this subpart on the copyright owner from initial use of the work.**

(5) The total royalty payable by the digital music provider for the period identified in paragraph (c)(1) of this section for the sound recordings embodying musical works identified in paragraph (c)(4) of this section, computed in accordance with the requirements of this section and part 385 of this title, and including detailed information regarding how the royalty was computed, with such total royalty payable broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title.

(6)(i) Subject to paragraph (6)(ii), in calculating the amount of accrued royalties to be maintained under paragraph (b)(1), a digital music provider need not re-accrue royalties for any period covered by an agreement between the digital music provider and the National Music Publishers' Association pursuant to which royalties were paid or are required to be paid to copyright owners of musical works, or to representatives of copyright owners of musical works, for usage of unmatched works and that—

(A) established a mechanism for copyright owners or their representatives to claim ownership or control of unmatched musical works, or shares thereof, and obtain royalties for any claimed works or shares; and

(B) required distribution of any remaining accrued royalties for usage of unmatched musical works on a market-share basis to copyright owners or their representatives; and

(C) provided a release by the participating copyright owners to claims for accrued royalties for the time periods covered by the agreement.

(ii) Any amounts of unmatched royalties that were required by such agreement to be held back in reserve for any period of time shall be included in the calculation of accrued royalties under paragraph (b)(1), and paid over to the mechanical licensing collective.

(iii) If a digital music provider has not re-accrued royalties pursuant to paragraph (c)(6)(i), the digital music provider shall, when it transfers any accrued royalties and cumulative statement to the mechanical licensing collective pursuant to paragraph (b)(3), provide to the mechanical licensing collective (or, if that information is held by a third party, authorize that third party to provide to the mechanical licensing collective) the identity of and contact information for copyright owners or their representatives to whom such royalties have been paid, and the usage periods covered by the associated release.

(iv) Any copyright owner who received payment and released royalty claims pursuant to an agreement identified in paragraph (6)(i) shall not receive any portion of the accrued royalties transferred to the mechanical licensing collective from the released digital music provider for those usage periods covered by the release.

(v) If a digital music provider has not re-accrued royalties pursuant to paragraph (c)(6)(i), and if the mechanical licensing collective has received insufficient funds from such digital music provider to pay royalties that are owed to a copyright owner who has not previously released claims to such royalties pursuant to an agreement referenced in paragraph (c)(6)(i), the mechanical licensing collective shall issue an invoice and/or response file consistent with paragraph (h), and the digital music provider shall pay the additional royalties to the MLC within 45 days of receipt of such invoice.

(7) If the total royalty payable under paragraph (c)(5) of this section does not reconcile with the royalties actually transferred to the mechanical licensing collective, **due to the GAAP treatment of previously-distributed royalties or for any other reason**, a clear and detailed explanation of the difference and the basis for it.

(d) The royalty payment and accounting information called for by paragraph (c)(4)(i) of this section shall consist of the following:

(1) A detailed and step-by-step accounting of the calculation of royalties payable by the digital music provider under applicable provisions of this section and part 385 of this title, sufficient to allow the mechanical licensing collective to assess the manner in which the digital music provider determined the royalty owed and the accuracy of the royalty calculations, including but not limited to the number of payable units, including, as applicable, permanent downloads, plays, and constructive plays, for each reported sound recording.

(2) ~~A digital music provider may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim public performance royalty rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid in accordance with GAAP.~~**Where computation of the royalties payable under this section depends on an input that is unable to be finally determined at the time the report of usage is delivered to the mechanical licensing collective and where the reason the input cannot be finally determined is outside of the digital music provider's control (*e.g.*, the amount of applicable public performance royalties and the amount of applicable consideration for sound recording copyright rights), a reasonable estimation of such input, determined in accordance with GAAP, may be used or provided by the digital music provider. Royalty payments based on such estimates shall be adjusted pursuant to paragraph (f) of this section after being finally determined. A report of usage containing an estimate permitted by this paragraph (d)(2)(i) should identify each input that has been estimated, and provide the reason(s) why such input(s) needed to be estimated and an explanation as to the basis for the estimate(s).**

(3) All information and calculations provided pursuant to paragraph (d) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief of the digital music provider at the time the cumulative statement of account is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section.

(e)(1) **To the extent practicable, e**ach cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be delivered in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective as reasonably determined by the mechanical licensing collective and set forth on its website, taking into consideration relevant industry standards and the potential for different degrees of sophistication among digital music providers. ~~**The mechanical licensing collective must offer at least two options, where one is dedicated to smaller digital music providers that may not be reasonably capable of complying with the requirements of a reporting or data standard or format that the mechanical licensing collective may see fit to adopt for larger digital music providers with more sophisticated operations.**~~ Nothing in

this section shall be construed as prohibiting the mechanical licensing collective from adopting more than two reporting or data standards or formats.

(2) **To the extent practicable, r**oyalty payments shall be delivered to the mechanical licensing collective in such manner and form as the mechanical licensing collective may reasonably determine and set forth on its website. A cumulative statement of account and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the cumulative statement of account to the payment, **including any explanation of discrepancy pursuant to subparagraph (c)(7).**

(~~3~~f) ***Adjustments.*** **(1) A digital music provider may adjust a cumulative statement of account, including related royalty payments, by delivering to the mechanical licensing collective a report of adjustment.**

(2) A report of adjustment shall be clearly and prominently identified as a "Report of Adjustment of a Cumulative Statement of Account."

(3) A report of adjustment shall include a clear statement of the following information:

(i) The previously delivered cumulative statement of account, including related royalty payments, to which the adjustment applies.

(ii) The specific change(s) to the previously delivered cumulative statement of account, including a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the digital music provider depends. Such description shall include the adjusted royalties payable, all information used to compute the adjusted royalties payable in accordance with the requirements of this section and part 385 of this title, such that the mechanical licensing collective can provide a detailed and step-by-step accounting of the calculation of the adjustment under applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the digital music provider determined the adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2) of this section.

(iii) Where applicable, the particular sound recordings and uses to which the adjustment applies.

(iv) A description of the reason(s) for the adjustment.

(4) In the case of an underpayment of royalties, the digital music provider shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the report of adjustment or promptly after being notified by the mechanical licensing collective of the amount due. A report of adjustment and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the report of adjustment to the payment.

(5) In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the digital music provider's account, or upon request, issue a refund within a reasonable period of time.

(6) A report of adjustment adjusting the cumulative statement of account must be delivered to the mechanical licensing collective no later than 6 months after the occurrence of any of the scenarios in specified in paragraph (f)(7). Where more than one scenario applies to the same cumulative statement of account at different points in time, a separate 6-month period runs for each triggering event.

(7) A report of adjustment of a cumulative statement of account may only be made in the following scenarios:

(i) Where the digital music provider discovers an inaccuracy in the cumulative statement of account, or in the amounts of royalties owed, based on information that was not previously known to the digital music provider;

(ii) When making an adjustment to a previously estimated input under paragraph (d)(2) of this section;

(iii) Following any audit of a blanket licensee that concludes after the annual report of usage is delivered and that has the result of affecting the computation of royalties payable by the blanket licensee under the blanket license (e.g., as applicable, an audit by a sound recording copyright owner concerning the amount of applicable consideration paid for sound recording copyright rights); or

(iv) In response to the publication in the Federal Register of a change in the applicable rates or terms under part 385 of this title.

(8) A report of adjustment adjusting a cumulative statement of account must be certified in the same manner as a monthly report of usage under paragraph (g) of this section. ~~In any case where the digital music provider finds that the content of the cumulative statement of account, or the amount of accrued royalties paid to the mechanical licensing committee, is inaccurate, the digital music provider shall cure such inaccuracy by promptly delivering a corrected cumulative statement of account and/or any additional royalties to the mechanical licensing committee. In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the digital music provider's account. As an alternative to a credit, a digital music provider may request a refund for an overpayment of royalties, which the mechanical licensing collective shall pay within 45 days.~~

(9) For each track for which a share of a musical work has been matched and for which accrued royalties for such share have been paid, but for which one or more shares of the musical work remains unmatched and unpaid, the digital music provider must provide a clear identification of the total aggregate percentage share that has been matched and the owner(s) of the aggregate matched share; provided that, in the event such information is

maintained by a third-party vendor, that information is made available to the digital music provider on commercially reasonable and non-discriminatory terms.

(~~f~~g) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be accompanied by:

(1) The name of the person who is signing and certifying the cumulative statement of account.

(2) A signature, which in the case of a digital music provider that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(3) The date of signature and certification.

(4) If the digital music provider is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the cumulative statement of account.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider; (2) I have examined this cumulative 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.

(ii) Statement two:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider, (2) I have prepared or supervised the preparation of the data used by the digital music provider and/or its agent to generate this cumulative statement of account, and (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this cumulative statement of account was prepared by the digital music provider and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly reports of usage that accurately reflect, in all material respects, the digital music provider's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(6) A certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner.

(f) The information required by paragraphs (c) through (e) of this section requires intelligible, legible, and unambiguous statements in the cumulative statements of account, without incorporation by reference of facts or information contained in other documents or records.

(g) References to part 385 of this title, as used in paragraphs (c) and (d) of this section, refer to the rates and terms of royalty payments as in effect as to each particular reported use based on when the use occurred.

(h) If requested by a digital music provider, the mechanical licensing collective shall deliver an invoice and/or a response file to the digital music provider within a reasonable period of time after the cumulative statement of account and related royalties are received. The response file shall contain such information as is common in the industry to be reported in response files, backup files, and any other similar such files provided to digital music providers by applicable third-party administrators.