

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION AND ALLOCATION OF
INITIAL ADMINISTRATIVE ASSESSMENT TO
FUND MECHANICAL LICENSING
COLLECTIVE**

Docket No. 19-CRB-0009-AA

**ORDER GRANTING PARTICIPANTS’
JOINT MOTION TO ADOPT PROPOSED REGULATIONS**

On December 4, 2019, the Participants filed with the Copyright Royalty Judges (Judges) a Joint Motion to Adopt Proposed Regulations ([Motion](#)) pursuant to the Judges’ Order Granting Joint Motion to Suspend Case Schedule and Directing Parties to Submit Proposed Regulations Implementing Settlement ([Suspension Order](#)), Order Directing Parties to Address Compliance with Title 17 of Proposed Regulations Implementing Settlement ([Order to Address Compliance](#)), and Order Granting Participants’ Joint Motion for Extension ([Extension Order](#)).

Section 115(d)(7)(D)(v) of the Copyright Act authorizes the Judges to approve and adopt a negotiated agreement that has been agreed to by the Mechanical Licensing Collective and the Digital Licensee Coordinator in lieu of a determination of the administrative assessment. An administrative assessment adopted under section 115(d)(7)(D)(v) “shall apply to all digital music providers and significant nonblanket licensees engaged in covered activities during the period the administrative assessment is in effect.” *Id.*

However, the Judges, in their discretion, may reject a proposed settlement for good cause shown. *Id.* Section 355.4(c)(4) of the Judges’ rules establishes a process for non-settling participants to comment on a proposed settlement and for the settling participants to respond. Because there were no non-settling participants in the instant proceeding, the proposed settlement was unopposed.¹ Moreover, the participants, at the Judges’ direction, explained to the Judges’ satisfaction how the Proposed Regulations comply with the provisions of the Copyright Act. *See generally* Motion. The Judges, finding no good cause to reject the proposed settlement

¹ The Judges have been advised by their staff that some members of the public sent emails to the Copyright Royalty Board seeking to comment on the proposed settlement agreement. Neither the Copyright Act, nor the regulations adopted thereunder, provide for submission or consideration of comments on a proposed settlement by non-participants in an administrative assessment proceeding. Consequently, as a matter of law, the Judges could not, and did not, consider these *ex parte* communications in deciding whether to approve the proposed settlement. Additionally, the Judges’ non-consideration of these *ex parte* communications does not: (i) imply any opinion by the Judges as to the substantive merits of any statements contained in such communications; or (ii) reflect any inability of the Judges to question, *sua sponte*, whether good cause exists to adopt a settlement and to then utilize all express or reasonably implied statutory authority granted to them to make a determination as to the existence, *vel non*, of good cause.

agreement, hereby approve and adopt it with some modifications to improve clarity and readability and to comply with Federal Register style guidelines.

Having considered the Motion and the Proposed Regulations, the Judges hereby **GRANT** the Motion. Section 802(f)(1)(D) of the Copyright Act provides that “[t]he Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges.” The Judges will submit the Proposed Regulations in Exhibit A to the Register of Copyrights for review under that provision and, upon the conclusion of that review, will cause them to be published in the Federal Register.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: December 12, 2019

Exhibit A

1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 390

[Docket No. 19-CRB-0009 AA]

Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective (Initial AA)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish final regulations that set the amount and allocation of the Initial Administrative Assessment to fund the Mechanical Licensing Collective.

DATES: *Effective Date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: *Docket:* For access to the docket to read background documents go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/>, and search for docket number 19-CRB-0009 AA.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, Program Specialist, by telephone at (202) 707-7658 or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On July 8, 2019, the Copyright Royalty Board initiated the proceeding titled *Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective*, by causing to be published a notice in the *Federal Register* at 84 FR 32475, pursuant to the Orrin G.

Hatch-Bob Goodlatte Music Modernization Act (MMA), Pub. L. 115–264, 132 Stat. 3676 (Oct. 11, 2018), 17 U.S.C. 115(d)(7)(D)(vii) and 801(b)(8) (2018). The purpose of this proceeding was to determine the initial administrative assessment that digital music providers and any significant nonblanket licensees must pay to fund the collective total costs of the Mechanical Licensing Collective.

On November 14, 2019, the Mechanical Licensing Collective and the Digital Licensee Coordinator filed with the Copyright Royalty Judges (“Judges”) a Joint Notice of Settlement and Motion to Suspend Case Schedule informing the Judges that they had reached a full settlement of all terms in the proceeding and describing in detail those terms. The Judges granted that motion and directed the participants to file proposed regulations.

Section 115(d)(7)(D)(v) of the Copyright Act authorizes the Judges to approve and adopt a negotiated agreement that has been agreed to by the Mechanical Licensing Collective and the Digital Licensee Coordinator in lieu of a determination of the administrative assessment. An administrative assessment adopted under sec. 115(d)(7)(D)(v) “shall apply to all digital music providers and significant nonblanket licensees engaged in covered activities during the period the administrative assessment is in effect.” *Id.*

However, the Judges, in their discretion, may reject a proposed settlement for good cause shown. Section 355.4(c)(4) of 37 CFR establishes a process for non-settling participants to comment on a proposed settlement and for the settling participants to respond. Because there were no non-settling participants in the instant proceeding, the

proposed settlement was unopposed.¹ Moreover, the participants, at the Judges' direction, explained to the Judges' satisfaction how the Proposed Regulations comply with the provisions of the Copyright Act. *See generally* Motion. The Judges, finding no good cause to reject the proposed settlement agreement, hereby adopt it and publish these final regulations implementing the settlement.

List of Subjects in 37 CFR Part 390

Copyright, Licensing and registration, Music, Phonorecords, Recordings, Royalties.

For the reasons set forth in the preamble, the Copyright Royalty Judges add part 390 to chapter III of title 37 of the Code of Federal Regulations as follows:

PART 390—AMOUNTS AND TERMS FOR ADMINISTRATIVE ASSESSMENTS TO FUND MECHANICAL LICENSING COLLECTIVE

Sec.

390.1 Definitions.

390.2 Amount of assessments.

390.3 Annual minimum fees.

390.4 Annual Assessment allocation and payment.

Authority: 17 U.S.C. 115, 801(b).

PART 390—AMOUNTS OF AND TERMS FOR ADMINISTRATIVE ASSESSMENTS TO FUND MECHANICAL LICENSING COLLECTIVE

§ 390.1 Definitions.

¹ The Judges have been advised by their staff that some members of the public sent emails to the Copyright Royalty Board seeking to comment on the proposed settlement agreement. Neither the Copyright Act, nor the regulations adopted thereunder, provide for submission or consideration of comments on a proposed settlement by non-participants in an administrative assessment proceeding. Consequently, as a matter of law, the Judges could not, and did not, consider these *ex parte* communications in deciding whether to approve the proposed settlement. Additionally, the Judges' non-consideration of these *ex parte* communications does not: (i) imply any opinion by the Judges as to the substantive merits of any statements contained in such communications; or (ii) reflect any inability of the Judges to question, *sua sponte*, whether good cause exists to adopt a settlement and to then utilize all express or reasonably implied statutory authority granted to them to make a determination as to the existence, *vel non*, of good cause.

Administrative assessment has the meaning set forth in 17 U.S.C. 115(e)(3).

Aggregate Sound Recordings Count means the sum of the Unique Sound Recordings Counts of each and every Licensee, calculated over the respective Quarterly Allocation calculation period.

All Licensee Assessment Pool means an amount equaling 50% of each Annual Assessment and Quarterly Allocation.

Annual Assessment means the administrative assessment for each calendar year beginning with the calendar year 2021.

Annual Calculation Period means the calculation period for annual minimum fees, as set forth in § 390.3(b).

Annual minimum fee means the minimum amount each Licensee shall pay for each Annual Assessment period, as set forth in § 390.3.

Certified Minimum Fee Disclosure means a Licensee's certified statement setting forth its Unique Sound Recordings Count for the respective calculation period.

Digital licensee coordinator or *DLC* has the meaning set forth in 17 U.S.C. 115(e)(9).

ECI means the Employment Cost Index for Total Compensation (not seasonally adjusted), all civilian workers, as published on the website of the United States Department of Labor, Bureau of Labor Statistics, for the most recent 12-month period for which data are available on the date that is 60 days prior to the start of the calendar year.

License availability date has the meaning set forth in 17 U.S.C. 115(e)(15).

Licensee means either:

(1) A digital music provider that is engaged, in all or in part, in covered activities pursuant to a blanket license; or

(2) A significant nonblanket licensee, as those terms are defined under 17 U.S.C. 115(e).

Mechanical licensing collective or *MLC* has the meaning set forth in 17 U.S.C. 115(e)(18).

Notice of license has the meaning set forth in 17 U.S.C. 115(e)(22).

Notice of nonblanket activity has the meaning set forth in 17 U.S.C. 115(e)(23).

Quarterly Allocation means each of four equal parts of each Annual Assessment, to be paid on a calendar quarterly basis.

Startup Assessment means the one-time administrative assessment for the startup phase of the Mechanical licensing collective.

Threshold Licensee means a Licensee that reports at least 7.5% of the Aggregate Sound Recordings Count of all Licensees.

Threshold Licensee Assessment Pool means an amount equaling 50% of each Annual Assessment and Quarterly Allocation.

Unique Sound Recordings Count means, for each Licensee, the number of unique and royalty-bearing sound recordings used per month by such Licensee in Section 115 covered activities, such as would be reflected in the information required to be reported under Section 115(d), calculated as a monthly average over the respective calculation period. For example, a Licensee's Unique Sound Recordings Count for a Quarterly Allocation calculation period will be calculated by adding together the counts of unique and royalty-bearing sound recordings reported by such Licensee to the MLC during each

month of that quarter, and dividing that sum by three. A Licensee's Unique Sound Recordings Count for an Annual Calculation Period will be calculated by adding together the counts of unique and royalty-bearing sound recordings reported by such Licensee to the MLC during each month of that twelve-month period, and dividing that sum by twelve. Within each month's usage reports from a particular Licensee, a sound recording reported multiple times with the same metadata would be counted as a single sound recording, and a sound recording reported multiple times each with different metadata would be counted multiple times, once for each reporting with new or different metadata.

§ 390.2 Amount of assessments.

(a) *Startup Assessment.* The Startup Assessment shall be in the amount of \$33,500,000.

(b) *2021 Annual Assessment.* The Annual Assessment for the calendar year 2021 shall be in the amount of \$28,500,000.

(c) *Other Annual Assessments.* (1) For the calendar year 2022 and all subsequent years, the amount of the Annual Assessment will be automatically adjusted by increasing the amount of the Annual Assessment of the preceding calendar year by the lesser of:

- (i) 3 percent; and
- (ii) The percentage change in the ECI.

(2) The MLC shall publish notice on its website of each year's automatic adjustment to the Annual Assessment. The Annual Assessment shall continue from year to year unless and until the Copyright Royalty Judges cause to be published an adjusted administrative assessment pursuant to 17 U.S.C. 115(d)(7)(D)(iv) or (v).

§ 390.3 Annual minimum fees.

(a) *Amount.* All Licensees shall pay the following annual minimum fee for each Annual Assessment period:

(1) For Licensees that have a Unique Sound Recordings Count of less than 5,000 during the relevant Annual Calculation Period, the annual minimum fee shall be \$5,000.

(2) For Licensees that have a Unique Sound Recordings Count of 5,000 or more during the relevant Annual Calculation Period, the annual minimum fee shall be \$60,000.

(b) *Annual Calculation Period.* The calculation period for annual minimum fees shall be the 12-month period that ends on the September 30th immediately preceding the start of the assessment period (*e.g.*, the annual minimum fee calculation period for the 2021 Annual Assessment shall be October 1, 2019 to September 30, 2020).

(c) *Calculation by Licensee certification (2021 and 2022)--(1) 2021.* Each Licensee in operation on or before the license availability date shall submit to the MLC, accompanying its notice of license under Section 115(d)(2)(A) or its notice of nonblanket activity under Section 115(d)(6)(A) and no later than February 15, 2021, its Certified Minimum Fee Disclosure for the 2021 annual minimum fee (*i.e.*, for the period from October 1, 2019 to September 30, 2020). Each Licensee shall submit the appropriate minimum fee (*i.e.*, \$5,000 or \$60,000) for the 2021 Assessment simultaneously with its Certified Minimum Fee Disclosure.

(2) *2022.* Each Licensee shall submit to the MLC by November 1, 2021, a Certified Minimum Fee Disclosure for the 2022 Assessment, and shall pay the appropriate annual minimum fee by January 15, 2022.

(b) *Calculation by the MLC (2023 and subsequent years).* (1) Beginning with the 2023 Assessment and continuing in subsequent years, the MLC will calculate each

Licensee's annual minimum fee based on usage reporting received from Licensees pursuant to Section 115(d)(4). The MLC shall send invoices for the appropriate annual minimum fee to each Licensee. Licensees shall pay the annual minimum fee invoices from the MLC by the later of:

- (i) 30 days from receipt of the invoice from the MLC; or
- (ii) January 15th of the respective Annual Assessment year.

(2) Each Licensee in operation during any portion of an annual minimum fee calculation period shall pay the full amount of the respective annual minimum fee.

§ 390.4 Annual Assessment allocation and payment.

(a) *Allocation formula.* Each Annual Assessment shall be divided into four equal Quarterly Allocations, each of which shall be allocated and paid on a calendar quarterly basis. Each Quarterly Allocation shall be divided into two equal parts, allocated among Licensees according to the following formula:

(1) *All Licensee Assessment Pool.* The All Licensee Assessment Pool shall be allocated on a pro rata basis across all Licensees based on each Licensee's share of the Aggregate Sound Recordings Count.

(2) *Threshold Licensee Assessment Pool.* The Threshold Licensee Assessment Pool shall be allocated on a pro rata basis across Threshold Licensees based on each Threshold Licensee's share of the aggregate Unique Sound Recordings Counts of all Threshold Licensees.

(b) *Calculation periods and timing.* The calculation period for each Quarterly Allocation shall be the three-month period that ends three months prior to the start of the respective quarter, except that the calculation period for the Quarterly Allocation for the

first and second quarters of 2021 shall be the same as for the annual minimum fee for the 2021 Annual Assessment, and shall be calculated based upon the information provided in the Certified Minimum Fee Disclosures, as required hereunder. The MLC shall make all calculations for each respective period based upon the reporting for such period received from Licensees as of the time of calculation by the MLC, which calculation time shall not be earlier than the legal deadline for submission of reporting by Licensees for the respective period. In the event that a Licensee has not provided timely reporting for the respective calculation period at the time the MLC calculates a Quarterly Allocation, the MLC may instead, in its discretion, use the most recent reporting from that Licensee to determine that Licensee's Unique Sound Recordings Count, for the purposes of calculating the Quarterly Allocation.

(c) *Invoicing and payment of allocation--(1) Deadline for payment.* (i) Invoices from the MLC for Quarterly Allocation shares shall be payable pursuant to the MLC invoice, but no earlier than the later of:

- (A) 30 days from receipt of the invoice from the MLC; or
- (B) The first day of the next calendar quarter.

(ii) Invoices from the MLC to Licensees shall be deemed received on the business day after electronic transmission.

(2) *Format of invoices.* (i) The quarterly invoices issued by the MLC shall include at least the following information, where applicable:

- (A) Invoice issuance date;
- (B) Invoice payment due date;

(C) Amount owed, by share of All Licensee Assessment Pool and Threshold Licensee Assessment Pool;

(D) Allocation of Startup Assessment;

(E) Offset of minimum fee payment against quarterly assessment; and

(F) Amount of credit for un-recouped minimum fee.

(ii) Invoices issued as a result of an allocation adjustment shall include all of the information set forth in paragraphs (c)(2)(i)(A) through (F) of this section that may be relevant, as well as an explanation of the change from the prior invoices that are affected, and the reason(s) for the adjustment.

(d) *Late reporting.* The MLC shall promptly notify the DLC of any known Licensees who have not timely submitted reports of usage as required each month pursuant to Section 115(d) and associated regulations.

(e) *Recalculation of Allocated Assessment invoices.* The MLC may, in its discretion, recalculate allocations and adjust prior invoices, with the written consent of the DLC, within twelve months after the initial issuance of such invoices, in circumstances including, but not limited to, where new usage reporting is received or where a correction would alter one or more of any Licensee's Quarterly Allocation shares by at least 10%.

(f) *Recoupment of minimum fee.* Each Licensee's annual minimum fee will be offset against its Quarterly Allocation shares, and additional payment will not be due from a Licensee unless and until its total Quarterly Allocation shares exceed its annual minimum fee payment. To the extent that a Licensee's annual minimum fee exceeds that Licensee's Quarterly Allocation shares for a given Assessment period, the excess

amounts will be pooled and credited pro rata to all Licensees based on the Quarterly Allocation shares for the first quarter of the following year.

(g) *Reports to DLC.* The MLC shall report to the DLC no later than 75 days after the end of every quarter the Aggregate Sound Recordings Count for that quarter.

(h) *Startup Assessment allocation and payment.* The Startup Assessment shall be allocated and paid in the same manner and on the same dates as the 2021 Annual Assessment, including as to each of the applicable provisions above, and shall be separately itemized in invoices from the MLC to Licensees.

Dated: December __, 2019

Jesse M. Feder
Chief Copyright Royalty Judge.

Approved by:

Carla D. Hayden
Librarian of Congress.