

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 MODIFY THE TERMS OF IMPLEMENTATION OF THE
INITIAL ADMINISTRATIVE ASSESSMENT**

On December 18, 2020, the Participants filed with the Copyright Royalty Judges (Judges) a Joint Motion to Modify the Terms of Implementation of the Initial Administrative Assessment ([Motion](#)) pursuant to the Copyright Royalty Judges' ongoing authority to amend a the terms of implementation of a determination of an administrative assessment for good cause. *See* 17 U.S.C. § 115(d)(7)(D)(vi).

Having considered the Motion and the Proposed Amended Regulations, and having found good cause to grant the Motion, the Judges hereby **GRANT** the Motion and will cause the Proposed Amended Regulations attached as Exhibit A to be published in the Federal Register with such changes as the Judges deem necessary to improve clarity and readability and to comply with Federal Register style guidelines.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: December 22, 2020

EXHIBIT A

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 390

[Docket No. 19-CRB-0009 AA]

Regulation Identifier Number (RIN) _____

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

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule; amended determination.

SUMMARY: The Copyright Royalty Judges are publishing amended regulations revising the allocation of the Initial Administrative Assessment to fund the Mechanical Licensing Collective.

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

ADDRESSES: The final determination is posted in eCRB at <https://app.crb.gov/>. For access to the docket to read the final determination and submitted background documents, go to eCRB and search for docket number 19-CRB-0009 AA.

FOR FURTHER INFORMATION CONTACT: [INSERT CONTACT]

SUPPLEMENTARY INFORMATION:

On July 8, 2019, the Copyright Royalty Board initiated the *Determination and Allocation of Initial Administrative Assessment To Fund Mechanical Licensing Collective* proceeding by notice published in the Federal Register at 84 FR 32475, pursuant to the Orrin G. Hatch-Bob

Goodlatte Music Modernization Act (MMA), Public Law 115–264, 132 Stat. 3676 (Oct. 11, 2018), 17 U.S.C. 115(d)(7)(D)(vi) 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. Pursuant to a settlement of that proceeding, the Copyright Royalty Judges (“Judges”) adopted a negotiated agreement that had been agreed to by the Mechanical Licensing Collective and the Digital Licensee Coordinator as to both the amount of the assessment and the method of allocation of that assessment among digital music providers and significant nonblanket licensees, and published final regulations implementing that settlement. *See* 84 FR 32475 (January 8, 2020); see also 37 C.F.R. pt. 390.

On December 18, 2020, the Digital Licensee Coordinator and the Mechanical Licensing Collective jointly filed a motion with the Judges to modify the terms of implementation of the initial administrative assessment, invoking the Judges’ authority under 17 U.S.C. 115(d)(7)(D)(vi), which gives the Judges “continuing jurisdiction to amend a determination of an administrative assessment * * * to modify the terms of implementation, for good cause.” In particular, the motion sought modification of the existing regulations to provide a revised method of allocation of the administrative assessment, to provide flat fee rates for smaller licensees and services that exclusively operate download stores under pass-through licenses received from record labels. The motion also sought certain clarifications or technical changes in terms based upon the DLC and MLC’s improved understanding of operational needs gained since the initial administrative assessment was adopted. The proposed amendments do not affect the amount of the assessment.

Based on the representations that the current allocation methodology could have “significant impacts on smaller Licensees” and the revised allocation methodology “is specifically calculated to address market participation by smaller Licensees and pass-through download stores in an equitable manner, and has support from a diverse cross-section of the Licensee industry,” and that the MLC also supports the amendments and has determined that they are administrable, the Judges hereby find good cause to amend the regulations pursuant to their authority under 17 U.S.C. 115(d)(7)(D)(vi).

List of Subjects in 37 CFR Part 390

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

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 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

1. The authority citation for Part 390 continues to read as follows:

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

2. Section 390.1 is amended as follows:
 - a. By adding in alphabetical order definitions for “Allocated Licensees”, “Blanket Licensee”, “Covered activity”, “Flat Fee Licensees”, “New Licensee”, and “Significant Nonblanket Licensee”.
 - b. In the definition of Aggregate Sound Recordings Count, by adding the word “Allocated” before “Licensee”.

- c. By revising the term “All Licensee Assessment Pool”, to read “Allocated Licensee Assessment Pool”.
- d. In the definition of “Licensee”, by adding “a Blanket Licensee or a Significant Nonblanket Licensee.” after “either” in the first sentence and by removing subparagraphs (1) and (2).
- e. In the definition of “Threshold Licensee”, by adding “n Allocated” after “means a” and “Allocated” after “all”.
- f. By revising the definition of “Unique Sound Recordings Count”.

The revisions and additions read as follows:

§ 390.1 Definitions.

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

Allocated Licensees mean licensees as set forth as set forth in §390.3(a), who are allocated an additional share of assessments beyond the annual minimum fee.

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

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Blanket Licensee means a digital music provider that is engaged, in all or in part, in covered activities pursuant to a compulsory blanket license described in 17 U.S.C. 115(d).

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Covered activity has the meaning set forth in 17 U.S.C. 115(e)(7).

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Flat Fee Licensees mean licensees as set forth in §390.3(a), who are not allocated an additional share of assessments beyond the annual minimum fee.

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Licensee means either a Blanket Licensee or a Significant Nonblanket Licensee.

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New Licensee means a Licensee that begins engaging in covered activities on or after the license availability date.

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Significant Nonblanket Licensee has the meaning set forth in 17 U.S.C. 115(e)(31).

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

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Unique Sound Recordings Count means, for each Licensee, the number of unique sound recordings used and reported 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, except that a sound recording of a musical work that is in the public domain and designated as such in a monthly report of use shall not count towards the Licensee's Unique Sound Recordings Count. 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 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 sound recordings reported by such Licensee to the MLC during each month of that twelve-month period, and dividing that sum by twelve. In the case of a Licensee that was engaged in covered activities only for part of a Quarterly Allocation calculation period or Annual Calculation Period, the monthly average shall be calculated using only the calendar months that the Licensee was engaged in covered activities. In the case of a Licensee that was not engaged in covered activities during any part of a Quarterly Allocation calculation period or Annual Calculation Period, the monthly average shall be zero. 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.

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3. Section 390.3 is revised as follows:
 - a. By revising paragraph (a);
 - b. In paragraph (c)(1), by removing “accompanying its notice of license under Section 115(d)(2)(A) or its notice of nonblanket activity under Section 115(d)(6)(A), and”, by adding “annual” after “appropriate”, and by removing “(i.e., 5,000 or \$60,000)” and adding “as calculated under paragraph (a)” in its place;
 - c. In paragraph (d):
 - i. By removing paragraph (d)(2);
 - ii. By removing “(1)”;

- iii. By redesignating paragraph (d)(1)(i) as paragraph (d)(1); and
 - iv. By redesignating paragraph (d)(1)(ii) as paragraph (d)(2);
- d. By adding a new paragraph (e).

The additions and revisions read as follows:

§390.3 Annual minimum fees.

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(a) *Amounts.* Subject to paragraph (e), Licensees shall pay annual minimum fees as follows—

(1) *In general.* Except as provided in paragraph (a)(2)—

(i) Licensees that have a Unique Sound Recordings Count of 10,000 or less during the relevant Annual Calculation Period shall pay \$2,500 and shall be Flat Fee Licensees for the respective Annual Assessment;

(ii) Licensees that have a Unique Sound Recordings Count of between 10,001 and 25,000 during the relevant Annual Calculation Period shall pay \$5,000 and shall be Flat Fee Licensees for the respective Annual Assessment;

(iii) Licensees that have a Unique Sound Recordings Count of between 25,001 and 50,000 during the relevant Annual Calculation Period shall pay \$10,000 and shall be Flat Fee Licensees for the respective Annual Assessment, where such Annual Calculation Period is for the Annual Assessment for the calendar year 2024 or earlier; otherwise such Licensees shall pay \$60,000 and shall be Allocated Licensees for the respective Annual Assessment;

(iv) Licensees that have a Unique Sound Recordings Count of between 50,001 and 100,000 during the relevant Annual Calculation Period shall pay \$20,000 and shall be Flat Fee Licensees for the respective Annual Assessment, where such Annual Calculation Period is for

the Annual Assessment for the calendar year 2024 or earlier; otherwise such Licensees shall pay \$60,000 and shall be Allocated Licensees; and

(v) Licensees that have Unique Sound Recordings Count greater than 100,000 during the relevant Annual Calculation Period shall pay an annual minimum fee of \$60,000 and shall be Allocated Licensees for the respective Annual Assessment.

(2) *Download store annual fee.* Licensees that engage in covered activities exclusively under authority obtained from licensors of sound recordings to make and distribute permanent downloads of musical works embodied in such sound recordings pursuant to individual download licenses or voluntary licenses shall be Flat Fee Licensees and pay the following amounts;

(i) \$2,500 if the Licensee has a Unique Sound Recordings Count of 50,000 or less during the relevant Annual Calculation Period.

(ii) \$5,000 if the Licensee has a Unique Sound Recordings Count of between 50,001 to 100,000 during the prior Annual Calculation Period.

(iii) \$10,000 if the Licensee has a Unique Sound Recordings Count of between 100,001 to 250,000 during the prior Annual Calculation Period.

(iv) \$20,000 if the Licensee has a Unique Sound Recordings Count of between 250,001 to 500,000 during the prior Annual Calculation Period.

(v) \$60,000 if the Licensee has a Unique Sound Recordings Count of greater than 500,000 during the prior Annual Calculation Period.

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(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, 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 annual minimum fee as calculated under paragraph (a) for the 2021 Assessment simultaneously with its Certified Minimum Fee Disclosure .

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(d) *Calculation by the MLC (2023 and subsequent years)*. 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:

- (1) 30 days from receipt of the invoice from the MLC; or
- (2) January 15th of the respective Annual Assessment year.

(e) *New licensees*.

(1) Any Licensee that begins engaging in covered activities on or after the license availability date (“New Licensee”), shall remit the lowest annual fee set forth in paragraph (a)(1) or paragraph (a)(2), as applicable, along with its notice of license or notice of nonblanket activity to be attributable to the calendar year in which such Licensee begins engaging in covered activities .

(2) A New Licensee shall initially be deemed a Flat Fee Licensee. When the mechanical licensing collective calculates the Quarterly Allocation with the first calculation period pursuant to section 390.4(b) during which the New Licensee was engaged in covered activities, whether such activities were for all or part of the calculation period, the mechanical licensing collective shall calculate the New Licensee’s Unique Sound Recording Count for that calculation period.

In the event that such New Licensee has not provided timely reporting, the MLC may instead, in its discretion, use the most recent reporting from that New Licensee for such calculation. If such New Licensee is calculated to have a Unique Sound Recordings Count that exceeds the amount that would qualify it to be a Flat Fee Licensee under section 390.3(a)(1), it shall be deemed an Allocated Licensee for that Quarterly Allocation and the remainder of the calendar year and shall be invoiced and pay the assessment as calculated in section 390.4 for the respective quarters, with such New Licensee's Unique Sound Recordings Count to be included in the Aggregate Sound Recording Count for such quarters.

(3) A New Licensee shall be subject to the provisions of paragraphs (a) through (d), as applicable, to determine the amount and timing of the annual minimum fees owed, for the calendar year following the year when the Licensee begins engaging in covered activities, and for such purposes a New Licensee shall be treated as having a Unique Sound Recordings Count of zero for the Annual Calculation Period if it began engaging in covered activities after the end of the Annual Calculation Period. A New Licensee that has been deemed an Allocated Licensee pursuant to paragraph (2) shall be subject to the provisions of paragraphs (a) through (d), as applicable, to determine its status as a Flat Fee Licensee or Allocated Licensee, for calendar years following the calendar year in which it is first deemed an Allocated Licensee.

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4. Section 390.4 is revised as follows:

- a. By revising paragraph (a).
- b. By revising paragraph (c)(1)(i).
- c. In paragraph (c)(2)(i)(C), by removing "All" and adding "Allocated" in its place.
- d. In paragraph (f):

- i. By adding “Allocated” after “Each” in the first sentence;
 - ii. By adding “, if any,” after “against its Quarterly Allocation shares” in the first sentence;
 - iii. By removing “a Licensee’s” and adding “an Allocated Licensee’s” in its place in the second sentence; and
 - iv. By adding “Allocated” after “to all” in the second sentence.
- e. In paragraph (h), by adding “Pursuant to § 390.3, a single annual minimum fee shall be assessed for the 2021 Annual Assessment, and no additional annual minimum fee shall be assessed for the Startup Assessment.” after the first sentence.

The revisions and additions read as follows:

A. §390.4 Annual Assessment allocation and payment.

(a) *Allocation formula.* Each Annual Assessment shall be divided into four equal Quarterly Allocations, after first subtracting annual fees payable by Flat Fee Licensees. The MLC may adjust Quarterly Allocations to compensate for any adjustments to the Flat Fee Licensee annual fees that occur after the initial division of the Annual Assessment. Each Quarterly Allocation, 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) *Allocated Licensee Assessment Pool.* The Allocated Licensee Assessment Pool shall be allocated on a pro rata basis across all Allocated 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. In the event that no Threshold Licensees exist for a Quarterly Allocation, the Threshold Licensee Assessment Pool shall become payable by all Allocated Licensees in the same manner as the Allocated Licensee Assessment Pool.

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(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 no later than 45 days after receipt of the invoice from the MLC.

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(2) * * *

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

* * * * *

(f) *Recoupment of minimum-fee.* Each Allocated Licensee's minimum fee will be offset against its Quarterly Allocation shares, if any, 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 an Allocated Licensee's 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 Allocated Licensees based on the Quarterly Allocation shares for the first quarter of the following year.

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(h) Startup Assessment allocation and payment. * * * Pursuant to § 390.3, a single annual minimum fee shall be assessed for the 2021 Annual Assessment, and no additional annual minimum fee shall be assessed for the Startup Assessment.

Dated: _____

Jesse M. Feder
Chief Copyright Royalty Judge