

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
Modification and Amendment of) Docket No. 18-CRB-0012-RM
Regulations to Conform to the MMA)
)

SUPPLEMENTAL COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION

The National Music Publishers' Association ("NMPA") submits these additional comments in response to the Copyright Royalty Judges' ("CRJs") proposed rule ("Proposed Rule") to establish procedures for the determination and allocation of the administrative assessment to fund the mechanical licensing collective ("MLC"), as authorized under the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA").¹

In response to the CRJs' November 5, 2018 Notice of Inquiry, NMPA, on behalf of copyright owner licensors, and DiMA, on behalf of digital music licensees, engaged in discussions to arrive at an agreed proposed framework to govern the CRJs' determination of the administrative assessment, as well as agreed amendments to conform the definitions in the CRJs' existing regulations to the MMA. NMPA and DiMA submitted the resulting proposal to the CRJs in joint comments filed on December 10, 2018 ("Joint Comments").² NMPA appreciates the CRJs'

¹ See Proposed Rule, *Copyright Royalty Board Regulations Regarding Procedures for Determination and Allocation of Assessment To Fund Mechanical Licensing Collective and Other Amendments Required by the Hatch-Goodlatte Music Modernization Act*, 84 Fed. Reg. 9053 (Mar. 13, 2019) ("Notice").

² See Joint Comments of the National Music Publishers' Association and Digital Media Association, *In the Matter of Modification and Amendment of Regulations to Conform to the MMA*,

thoughtful consideration of NMPA and DiMA’s proposal and the fact that a good deal of the agreed suggested framework and definitional changes have been adopted—albeit with some modifications—by the CRJs. NMPA respectfully submits these additional comments to address specific issues raised by the CRJs in their discussion of the Proposed Rule, as well as to highlight a handful of concerns, largely technical in nature, identified by NMPA with respect to the language of the Proposed Rule. For convenience, NMPA has highlighted its suggestions to address the modest number of concerns it has identified in the attached Appendix, consisting of a redline of NMPA’s proposed changes against relevant portions of the Proposed Rule.

I. Overall Framework for Administrative Assessment Proceedings

A. NMPA Defers to CRJs Regarding Similar But Less Structured Schedule

In the Notice, the CRJs propose a framework for the administrative assessment proceeding that is substantially similar to the one proposed by NMPA and DiMA but does not delineate the specific timing of each phase, as proposed in the Joint Comments. *See* Proposed Rule § 355.2(g)(1); Joint Comments at App’x A at iii-iv. In discussing this modification, the CRJs suggest that it will be easier to manage their overall docket if they have greater flexibility as to timing, and seek input as to whether

the Judges’ more flexible timing proposal will allow the Judges to conduct an assessment proceeding in a prompt and efficient manner or whether the Judges should instead incorporate a more structured schedule such as the one NMPA/DiMA proposed.

Docket No. 18-CRB-0012-RM (filed Dec. 10, 2018). As explained in the Joint Comments, NMPA and its members have a significant interest in any regulations to be adopted under the MMA. Since its founding in 1917, NMPA has been the principal U.S. trade association representing the interests of copyright owners of musical works, including music publishers and songwriters. Taken together, compositions owned or controlled by NMPA members account for the vast majority of the market for musical composition licensing in the United States. NMPA also played a primary role in developing and articulating the blanket licensing system enacted in the MMA, including the requirements and funding mechanism for the MLC.

Notice at 9057.

NMPA understands the CRJs' desire for flexibility and agrees that a less structured schedule can still allow the CRJs to conduct proceedings in a timely and efficient manner. As the CRJs suggest, the CRJs can establish the schedule in each particular proceeding with an eye toward commencing and completing the proceeding in accordance with the overall timetable set forth in the MMA. *See* 17 U.S.C. § 115(d)(7)(D)(iii)-(iv).

B. Retention of “Extant Assessment” Could Be Inconsistent With the MMA

The Judges also seek comment relative to proposed § 355.3, which governs submissions of the parties in assessment proceedings. *See* Proposed Rule § 355.3. Proposed § 355.3 requires the MLC to submit an opening proposal that includes the reasons why its proposed assessment fulfills the requirements in 17 U.S.C. § 115(d)(7), to which the digital licensee coordinator (“DLC”) and other parties can respond. Notice at 9057. The CRJs suggest that “[p]resumably in a proceeding to adjust the assessment, if the Judges found that the ML[C]’s proposal did not fulfill the requirements of 17 U.S.C. 115(d)(7), the Judges could simply retain the extant assessment.”

Id.

Respectfully, this suggestion would seem to be inconsistent with the responsibilities entrusted to the CRJs by Congress in relation to determining the administrative assessment. The MMA provides that the assessment be established by the CRJs in accordance with the requirements of subparagraph (D) of 17 U.S.C. § 115(d)(7). *See* 17 U.S.C. § 115(d)(7)(A)(i), (D)(ii). Among other criteria, the assessment is to be established in an amount “that is calculated to defray the reasonable collective total costs” of the MLC (as such costs are defined in 17 U.S.C. § 115(e)(6)).³

³ In full, subparagraph (D)(ii) requires that the administrative assessment determined by the CRJs:

If the MLC's proposal under § 355.3 for some reason does not fulfill the requirements of 17 U.S.C. § 115(d)(7), the CRJs are nonetheless required to establish the assessment in an amount that meets those requirements. If the correct amount happens to be the extant assessment, then retaining that assessment would be appropriate if it fulfills the requisite statutory criteria—but if it does not fulfill such criteria, then retaining the extant amount would be erroneous.

Notably, under the MMA, the parties are required to gather and produce the information necessary for the CRJs to arrive at their determination. *See id.* § 115(d)(7)(D)(iii)(III) (CRJs to

(I) be wholly independent of royalty rates and terms applicable to digital music providers, which shall not be taken into consideration in any manner in establishing the administrative assessment;

(II) be established by the Copyright Royalty Judges in an amount that is calculated to defray the reasonable collective total costs;

(III) be assessed based on usage of musical works by digital music providers and significant nonblanket licensees in covered activities under both compulsory and nonblanket licenses;

(IV) may be in the form of a percentage of royalties payable under this section for usage of musical works in covered activities (regardless of whether a different rate applies under a voluntary license), or any other usage-based metric reasonably calculated to equitably allocate the collective total costs across digital music providers and significant nonblanket licensees engaged in covered activities, and shall include as a component a minimum fee for all digital music providers and significant nonblanket licensees; and

(V) take into consideration anticipated future collective total costs and collections of the administrative assessment, including, as applicable—

(aa) any portion of past actual collective total costs of the mechanical licensing collective not funded by previous collections of the administrative assessment or voluntary contributions because such collections or contributions together were insufficient to fund such costs;

(bb) any past collections of the administrative assessment and voluntary contributions that exceeded past actual collective total costs, resulting in a surplus; and

(cc) the amount of any voluntary contributions by digital music providers or significant nonblanket licensees in relevant periods, described in subparagraphs (A) and (B) of paragraph (7).

17 U.S.C. § 115(d)(7)(D)(ii).

request relevant information from the parties).⁴ The statute further provides that the “amount and terms of the administrative assessment” determined by the CRJs be “supported by a written record”—that is, the record of the administrative assessment proceeding, consisting of documentary and testimonial evidence. *See id.* § 115(d)(7)(D)(ii), (iii)(IV). The Proposed Rule thus allows the CRJs not only to take “oral testimony of witnesses,” but to “require expert witnesses to be examined” by the CRJs and attorneys. Proposed Rule § 355.5(d). In short, the CRJs will have the benefit of a robust record in arriving at an assessment. If the MLC’s proposal for some reason did not fulfill the statutory requirements, the CRJs would nonetheless be equipped to reach a determination of the statutorily appropriate assessment based on the record before them.

C. Submission of “Counterproposals” Would Be Counterproductive

In the Notice, the CRJs make reference to “alternative” proposals, asking whether “the DLC [should] be required (rather than permitted) to submit and support a counterproposal.” Notice at 9057. NMPA believes that such a provision is not only unnecessary, but would be counterproductive. The DLC should comment on and respond to the MLC’s proposal, rather than submit a wholly separate one. This is what was contemplated by NMPA and DiMA in the Joint Comments, and for good reason. Under the MMA, it is the MLC, not the DLC or any other party, that is charged with the responsibility of ensuring that it fulfills its statutory duties. By statute, it is to be governed by music publishers and songwriters, not the DLC (which does not get a board vote). *See* 17 U.S.C. § 115(d)(3)(C), (D). Given the clear mandate of the statute, it would not be

⁴ Subparagraph (D)(iii)(III) provides that the CRJs shall “establish a schedule for submission by the parties of information that may be relevant to establishing the administrative assessment, including actual and anticipated collective total costs of the mechanical licensing collective, actual and anticipated collections from digital music providers and significant nonblanket licensees, and documentation of voluntary contributions, as well as a schedule for further proceedings, which shall include a hearing, as the Copyright Royalty Judges determine appropriate.” *Id.* § 115(d)(7)(D)(iii)(III).

productive for the DLC or any other party to produce an independent proposal or “counterproposal,” when any legitimate proposal has to be based on the needs and budget of the MLC *as reasonably determined by the MLC* and supported by evidence offered in the administrative assessment proceeding. The overarching goal of the proceeding is to determine the reasonable costs of operating the MLC, along with its collections, past and future, so that an appropriate assessment can be calculated.⁵

NMPA therefore supports § 355.3(f) of the Proposed Rule in its current form, which reflects the approach in the Joint Comments by requiring the DLC and other parties to *respond to* the MLC’s proposal rather than submit competing proposals. Proposed Rule § 355.3(f). On the other hand, as further discussed below, in light of the question regarding counterproposals posed by the CRJs, NMPA respectfully urges the CRJs to (i) modify the definition of “Discoverable” in Proposed Rule § 355.7 to ensure that it permits discovery of information relevant to both a proposal *or response thereto*, and (ii) eliminate the restriction in Proposed Rule § 355.3(g) that limits the scope of discovery taken by the MLC to discovery regarding “counterproposal[s].”⁶ In order to reply to concerns raised by the DLC or others, the MLC must be permitted to take discovery on their *responsive submissions*, regardless of the precise nature or characterization of those responses.

⁵ In this way, the administrative assessment proceeding is fundamentally different from a royalty rate proceeding, in which the CRJs typically consider competing proposals in an effort to determine the rate that best reflects the probable outcome of market-based negotiations. *See, e.g., Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Docket No. 16-CRB-0003-PR (2018-2022), 84 Fed. Reg. 1918, 1923-25 (C.R.B. Feb. 5, 2019) (describing competing rate proposals). The administrative assessment, by contrast, is not meant to emulate market negotiations or choose between competing rates, but rather to capture the actual costs of operating the MLC. *See* 17 U.S.C. § 115(d)(7)(D)(ii)(II) (rate to be “calculated to defray the reasonable collective total costs”); *id.* § 115(e)(6) (defining “collective total costs”).

⁶ These suggestions are reflected in the attached Appendix.

D. Discrepancy Regarding the Initial Voluntary Negotiation Period

NMPA notes that the Proposed Rule appears to contain a discrepancy in the time period for the initial voluntary negotiation period. Proposed Rule § 355.2(g)(1)(i) provides for “[a]n initial voluntary negotiation period of 45 days,” while Proposed Rule § 355.4(a) states that the “initial voluntary negotiation [shall] . . . last[] 60 days.” NMPA respectfully requests that the CRJs clarify the length of the initial negotiation period. In this regard, NMPA is mindful of the fact that the CRJs have determined that the voluntary negotiation period should commence *after* the parties to the proceeding have been determined, rather than at the commencement of a proceeding, as suggested by NMPA and DiMA in the Joint Comments. *See* Proposed Rule § 355.4(a) (setting the initial voluntarily negotiation period to commence “on the day after the Copyright Royalty Judges give notice of all participants in the proceeding”). NMPA recognizes that this may explain why the CRJs perhaps intended to shorten the period to 45 days in the Proposed Rule.

II. Discovery and Evidentiary Issues

A. The Proposed Framework Requires Two Comparable Discovery Periods

In the Joint Comments, NMPA and DiMA proposed two separate and distinct discovery periods: (i) the first discovery period, in which the DLC and other participants will conduct discovery related to the MLC’s proposal; and (ii) the second discovery period, in which the MLC will conduct discovery related to the DLC’s and other participants’ responses to the MLC’s proposal. *See* Joint Comments at 14; *id.* at App’x A at vi-viii. NMPA respectfully suggests that the two distinct periods are both logical and necessary to ensure fairness to both sides under the proposed framework, and that they should be maintained. The DLC and other parties must be able to request documents from and take depositions of the MLC following submission of the MLC’s proposal in order to consider and prepare their responses. Likewise, the MLC is entitled to equivalent discovery from the DLC and other responding parties to prepare a reply. To be targeted

and useful, the MLC discovery period should take place *after* the filing of such responses, as suggested in the Joint Comments and the Proposed Rule. *See id.* at App’x A at iii (providing for second discovery period for MLC after filing of responsive submissions); Proposed Rule § 355.2(g)(1)(v) (MLC discovery to take place after responsive submissions); Proposed Rule § 355.3(g) (referencing second discovery period for MLC).⁷

B. The Scope of Discovery for the MLC and DLC Should Be Equivalent

NMPA respectfully observes that the Proposed Rule could be read as unfairly limiting the scope of discovery in the second discovery period for the MLC as compared to the scope of discovery in the first period applicable to the DLC and additional parties. The Proposed Rule states that, in the first discovery period, “[a]ny document request shall be limited to documents that are Discoverable.” Proposed Rule § 355.3(d). For the second discovery period, however, discovery “requests shall be limited to documents that are Discoverable and relevant to consideration of whether any counterproposal fulfills the requirements of 17 U.S.C. 115(d)(7) or one or more of the elements of this part.” *Id.* § 355.3(g)(1).

As discussed above, the Joint Comments did not provide for any “counterproposal” and NMPA does not believe independent proposals are appropriate in the context of the assessment proceedings. For that reason alone, NMPA respectfully requests that the language “and relevant

⁷ In light of the fact that the Proposed Rule provides for a second discovery period following the filing of responsive submissions during which the MLC can seek documents and take depositions, *see* Proposed Rule § 355.3(g), NMPA is somewhat confused by the CRJs’ query concerning whether they should “adopt a discovery provision authorizing the MLC to conduct discovery subsequent to submission of oppositions to the MLC’s opening submission.” Notice at 9057. For the reasons discussed above, the answer is certainly yes. With respect to the scope of such discovery, as discussed elsewhere herein, NMPA believes it should mirror the discovery afforded the DLC during the first discovery period. In this regard, NMPA notes that Proposed Rule § 355.3(e) appears to suggest that the MLC may take up to five depositions “during the first discovery period,” while Proposed Rule § 355.3(g)(2) correctly provides that such depositions should take place in the second discovery period.

to consideration of whether any counterproposal fulfills the requirements of 17 U.S.C. 115(d)(7) or one or more of the elements of this part” be deleted from Proposed Rule § 355.3(g)(1). The resulting provision would thus be evenhanded because it would mirror the rule for discovery in the first period, which simply (and properly) provides that “[a]ny document request shall be limited to documents that are Discoverable.” *See id.* § 355.3(d).

In addition, as noted above, NMPA requests that paragraph (2) in the definition of “Discoverable” in Proposed Rule § 355.7 be changed simply to read “(2) Relevant to consideration of whether a proposal or response thereto fulfills the requirements in 17 U.S.C. 115(d)(7).” This change should eliminate confusion concerning the MLC’s ability to take discovery of the DLC and other parties regarding their respective responses to the MLC’s proposal.

C. The Vendor Information Required Under the Proposed Rule Should Be Reasonable in Scope and Consistent With the CRJs’ Responsibilities Under the MMA

As drafted, the Proposed Rule requires that, with its opening submission, the MLC provide, along with the documentation necessary to show that its proposal meets the statutory criteria for the administrative assessment set forth in 17 U.S.C. § 115(d)(7), additional documents concerning

[t]he Collective’s processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and subcontracting parties competitively (or by another method); ensuring the absence of overlapping ownership or other overlapping economic interests between the Collective or its members and any selected contracting or sub-contracting party; and

Id. § 355.3(b)(2)(iii); *see also id.* § 355.3(c)(2)(v) (requesting same information for adjusted administrative assessment proceeding). NMPA and DiMA did not propose any such added requirement in their Joint Comments, as it is not part of the stated criteria under 17 U.S.C. § 115(d)(7). The production requirements submitted by NMPA and DiMA in the Joint Comments are drawn from, and carefully track, the provisions of the MMA. *Compare* Joint Comments at App’x A at iv-vi *with* 17 U.S.C. § 115(d)(7)(D)(ii) (setting forth criteria for determining the

administrative assessment). By including a general provision requiring production of documents to support “the reasons why the proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7),” the Joint Comments appropriately address the need for relevant discovery concerning vendors and vendor contracts. Joint Comments at App’x A at iv.

Given the MLC’s overarching obligation to produce documents to show that its proposal fulfills the statutory criteria—including by demonstrating the “reasonableness of the Collective’s total costs,” Proposed Rule § 355.3(b)(2)(ii), (c)(2)(iv)—the MLC is already required to produce a wide range of information concerning its vendor contracts relevant to such reasonable costs. As such, the provision added at Proposed Rule § 355.3(b)(2)(iii) seems unnecessary and potentially onerous.

NMPA notes that the added provision could be interpreted to require production of materials concerning virtually every vendor contract of the MLC, no matter how small. Moreover, while NMPA assumes it is not the intent, some of the added language concerning “overlapping economic interests” could be read to suggest an expansion of the CRJs’ role beyond what is contemplated under the MMA. NMPA therefore respectfully requests that the proposed provision be modified.

With respect to the first clause of Proposed Rule § 355.3(b)(2)(iii) and (c)(2)(v) concerning the MLC’s choice of vendors, the focus of the inquiry at the assessment proceeding must be on whether the cost of the vendors the MLC has actually selected is reasonable in light of the services those vendors are performing. Taken at face value, the additional language in the Proposed Rule suggests that essentially every contract, proposal and bid—no matter how trivial or immaterial—would need to be produced and explored in what is supposed to be a streamlined proceeding. Apart from being enormously burdensome, such a wide-ranging inquiry could threaten timely

completion of the proceeding. To the extent the CRJs are inclined to include the additional production requirement, NMPA respectfully suggests it include a materiality threshold of ten percent of the MLC’s annual budget, which is consistent with the threshold adopted by Congress for purposes of the MLC’s annual financial reports.⁸

The second clause of Proposed Rule § 355.3(b)(2)(iii) and (c)(2)(v) addressed to “ensuring the absence of overlapping ownership or other overlapping economic interests” could be interpreted as suggesting that the CRJs are somehow responsible for policing the policies and practices of the MLC with respect to conflicts of interest. The MMA not only provides for such policies and practices, but they are of course essential to the operation of the MLC. The statute includes specific provisions and mechanisms to ensure transparency of the MLC’s operations and address conflicts of interest. These include the MLC’s publication of an annual report detailing its operations and expenditures, as well as periodic audits by a qualified auditor “to guard against fraud, abuse, waste, and the unreasonable use of funds.”⁹ But the MMA does not confer authority or responsibility to the CRJs to enforce these provisions. Rather, apart from setting royalty rates and terms pursuant to 17 U.S.C. § 115(c), the sole responsibility of the CRJs under the MMA is to establish the administrative assessment for the MLC in accordance with the criteria set forth in 17 U.S.C. § 115(d)(7). *See* 17 U.S.C. § 115(d)(7)(A)(i) (administrative assessment is to be “established by the Copyright Royalty Judges pursuant to subparagraph (D)”); *id.* §

⁸ *See* 17 U.S.C. § 115(d)(3)(D)(vii)(I)(gg) (setting forth requirements for MLC’s annual reports).

⁹ *See* 17 U.S.C. § 115(d)(3)(D)(vii) (MLC required to publish annual report with information about budgeting and expenditures); *id.* § 115(d)(3)(D)(ix) (setting forth requirements for “Oversight and accountability” of MLC, including periodic examinations by qualified auditor “to guard against fraud, abuse, waste, and the unreasonable use of funds”); *id.* § 115(d)(3)(L) (providing for mechanism by which copyright owners can audit the MLC); *see also generally id.* § 115(d)(3)(D) (describing governance of MLC).

115(d)(7)(D)(viii) (CRJs to establish procedural regulations for that purpose). Accordingly, to avoid inconsistency with the statutory framework and directives of the MMA, NMPA recommends that the second clause of the proposed § 355.3(b)(2)(iii) and (c)(2)(v) be eliminated.¹⁰

For the above reasons, NMPA suggests that the proposed provisions concerning production of vendor-related documents be modified to read (in its totality) as follows:

With respect to any vendor expense or proposed vendor expense of the Collective representing greater than 10 percent of the Collective’s annual budget, the Collective’s processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and subcontracting parties competitively (or by another method); and

D. Concurrent Evidence Approach for Experts

In the Notice, the CRJs discuss and propose a “concurrent evidence” approach for experts providing oral testimony at hearings. As described in the Notice, under a concurrent evidence rubric, experts “testifying as to a common issue would be required to testify concurrently, responding to questions posed by the Judges and/or counsel (at the Judges’ discretion).” Notice at 9058. Accordingly, the CRJs

seek comment on whether the proposed approach would be more likely than not to yield a more fulsome record The Judges also seek comments on whether the likely benefits of making the concurrent evidence approach an available option on a case-by-case basis, as the proposed regulation provides, would—whenever that option was exercised—inevitably create additional costs, in terms of money, time and inconvenience to the parties and the witnesses, that would outweigh, in all proceedings, the benefits of creating the concurrent evidence option.

Id. at 9059.

NMPA appreciates the CRJs’ innovative thinking concerning the role of expert witnesses, and the potential benefits of the approach suggested by the CRJs, which could help to narrow and clarify issues and would permit immediate correction of testimony by one expert when mistakes

¹⁰ See *Lyng v. Payne*, 476 U.S. 926, 937 (1986) (“[A]n agency’s power is no greater than that delegated to it by Congress.”).

are identified by another. *See id.* at 9058. Accordingly, NMPA does not object to the inclusion of language within Proposed Rule § 355.5(d) to permit a concurrent evidence procedure. In light of uncertainties concerning the equities in particular proceedings, however—including those that the CRJs have identified¹¹—should the CRJs adopt this approach, NMPA believes it would be helpful if, in any given proceeding, the CRJs would solicit the views of the parties before requiring participation in a concurrent evidence procedure.

E. Admission of Deposition Transcripts

Finally, the CRJs also seek comment on the “need or usefulness of” the “wholesale admission of discovery deposition transcripts.” *Id.* at 9058. Given the streamlined nature of the proceeding, the Joint Comments proposed that complete transcripts be admitted so relevant portions would be available as needed during the hearing without undue burden or delay. At the same time, NMPA understands the concerns articulated by the CRJs. What is critical is that pertinent deposition testimony be available for use by the parties as necessary during a hearing.

III. Additional Corrections to Regulatory Definitions

The CRJs seek comment on several issues related to definitions in the Proposed Rule and conforming those definitions to the MMA. NMPA notes that the CRJs largely adopted the suggestions from the Joint Comments, but respectfully suggests a few additional modifications and technical corrections.

¹¹ *See, e.g.*, Notice at 9058-59 (CRJs’ observation that a “dominating expert may overwhelm other experts [or] . . . any wealth/income disparity between or among the parties may allow one party to engage experts better-suited to participate in a concurrent evidence proceeding”).

A. It is Unnecessary to Restate MMA Definitions in the CFR But Inconsistent CFR Terms Need to be Conformed

As an initial matter, the CRJs “seek comment on whether the rules they propose should include a restatement of terms in the MMA, and if so, which provisions should be restated and why.” *Id.* at 9057. In this regard, the CRJs elaborate that:

As an overarching proposition, the Judges’ proposed regulations do not restate definitions or other language that is part of the MMA because, preliminarily, the Judges believe that such restatement is superfluous and are concerned that slight variations from the statutory language could give rise to unnecessary debate.

Id. NMPA agrees with the CRJs that it would be superfluous to restate definitions or other language of the MMA where the relevant terms are not used or mean the same thing in the CRJs’ regulations. At the same time, as required under the MMA, where terms are used differently in the regulations, the regulatory terms need to be adapted so they are consistent with the MMA. MMA, Pub. L. No. 115-264, § 102(d), 132 Stat. 3676, 3722 (2018) (providing that “the Copyright Royalty Judges shall amend the regulations . . . to conform the definitions used in such part to the definitions of the same terms described in section 115(e) of title 17”).

In response to the CRJs’ additional query concerning the adoption of proposed modifications to various regulatory terms, NMPA believes that the changes proposed in the Joint Comments and adopted by the CRJs are consistent with the CRJs’ obligation to ensure that, to the extent the regulations employ the same terms as the MMA, the regulatory terms have the same meaning as in the MMA. As proposed in the Joint Comments, a logical way to achieve overall conformity without altering the substance of the current section 115 rates and terms is to modify the regulatory nomenclature in instances where a regulatory term is identical to a term in the MMA but has a different meaning.

B. “End User” and “Stream” Are Used Differently in Part 385 Than in the MMA

In the Notice, the CRJs

seek comment on why the definitions of the terms “end user” and “stream” should uniquely be expressly limited to part 385 and whether the language that NMPA/DiMA propose[s] to add would accomplish that goal.

Notice at 9057 n.10.

In the existing regulations in part 385, the terms “Stream” and “End User” are defined terms and are, in turn, used within a number other defined terms and provisions of part 385. *See, e.g.,* 37 C.F.R. § 385.2 (providing that “*Stream* means the digital transmission of a sound recording of a musical work to an End User” and “*End User* means each unique person that: (1) Pays a subscription fee for an Offering during the relevant Accounting Period; or (2) Makes at least one Play during the relevant Accounting Period”). Additionally, although “end user” and “stream” are not specifically defined in the MMA, they are used throughout the MMA, including as a basis for defining other terms within the MMA. *See, e.g.,* 17 U.S.C. § 115(e)(8) (defining “Digital Music Provider” as a person that, *inter alia*, “has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users”); *id.* at § 115(e)(13) (defining “Interactive Stream” as a “digital transmission of a sound recording of a musical work in the form of a stream”). The terms “end user” and “stream” are thus used differently, and in a less specific manner, in the MMA than they are in part 385. Accordingly, the Joint Comments proposed clarifying that the definitions of “End User” and “Stream” in part 385 apply only *within* that part so as to eliminate confusion and avoid any suggestion that they carry the same meaning as they do within the MMA. *See* Joint Comments at App’x B at iii, x. The addition of the qualifying clause proposed in the Joint Comments, “for the purposes of this part 385,” was intended to accomplish those goals.

NMPA recognizes that the Proposed Rule is meant to include introductory language to the definitions in § 385.2 providing that: “For the purposes of this part, the following definitions

apply:”. Proposed Rule § 385.2. To further avoid confusion, however, and ensure that the definitions are properly reconciled as required under the MMA, NMPA would additionally suggest modifying “End User” and “Stream” in part 385 to clearly distinguish them from the same terms as used in the MMA. An appropriate modification would be to change the defined terms “End User” and “Stream” in § 385.2 to “Relevant End User” and “Relevant Stream,” respectively. In addition to modifying the definitions themselves, conforming changes would need to be made throughout part 385 wherever the terms are employed. These proposed modifications are demonstrated in the attached Appendix.

C. Definition of “Eligible Interactive Stream”

The CRJs adopted a proposal from the Joint Comments to add the word “Eligible” before the term “Interactive Stream” to distinguish the part 385 definition from the MMA definition, but the CRJs declined to include an additional clarifying sentence in the definition as proposed in the Joint Comments: “An Eligible Interactive Stream is a digital phonorecord delivery.” *See* Notice at 9057; *id.* at 9057 n.9; Joint Comments at App’x B at iii. The CRJs stated that they rejected the additional sentence because

“Digital phonorecord delivery” is defined in 17 U.S.C. 115(d). Eligible Interactive Streams are digital phonorecord deliveries if, and only if they conform to the statutory definition. To the extent the proposed language confirms this fact, it is unnecessary. To the extent the proposed language seeks to expand the statutory definition, it is impermissible.

Notice at 9057 n.9.

As recognized in the Joint Comments, NMPA and DiMA understand “Eligible Interactive Streams” to be digital phonorecord deliveries as per the MMA definition, and therefore subject to licensing under section 115. NMPA defers to the CRJs if they do not perceive the express confirmation of this fact to be necessary or helpful.

D. Omission of the Provision on “Unauthorized Use”

In the Proposed Rule, the CRJs omitted subsection (d) from § 385.31, which addresses unauthorized uses:

(d) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner’s musical works and shall withdraw from the identified Offering any End User’s access to the subject musical work.

37 C.F.R. § 385.31(d).

The Joint Comments did not propose this change, and the CRJs did not address in the Notice why subsection (d) was removed. This provision may have been omitted in error. Thus, NMPA respectfully requests that the CRJs reinstate § 385.31(d) to the Proposed Rule (and insert “Relevant” before “Streaming” and “End User” if applicable).

IV. Redesignation of Rules

Finally, the Judges seek comment “in support of or in opposition to th[e] proposed transfer and redesignation” of rules of general application from part 350 to part 303. Notice at 9059. NMPA has no objection to the CRJs’ proposal to transfer and redesignate rules of general application as described.

Conclusion

NMPA appreciates this opportunity to assist the CRJs in adopting new and revised regulations to implement the MMA. NMPA looks forward to continuing to support the CRJs’ efforts to implement the new law.

Respectfully submitted,

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Appendix

Note: Appendix includes sections for which NMPA is proposing changes.

PART 355—ADMINISTRATIVE ASSESSMENT PROCEEDINGS

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§ 355.2 Commencement of proceedings.

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(g) *Schedules for submissions and hearing.* (1) The Copyright Royalty Judges shall establish a schedule for the proceeding, which shall include dates for:

(i) An initial voluntary negotiation period of 45~~45~~⁶⁰ days;

(ii) Filing of the opening submission by the Mechanical Licensing Collective described in § 355.3(b) or (c), with concurrent production of required documents and disclosures;

(iii) A period of 60 days, beginning on the date the Mechanical Licensing Collective files its opening submission, for the Digital Licensee Coordinator and any other participant in the proceeding, other than the Mechanical Licensing Collective, to serve discovery requests and complete discovery pursuant to § 355.3(d);

(iv) Filing of responsive submissions by the Digital Licensee Coordinator and any other participant in the proceeding, with concurrent production of required documents and disclosures;

(v) A period of 60 days, beginning on the day after the due date for filing responsive submissions, for the Mechanical Licensing Collective to serve discovery requests and complete discovery of the Digital Licensee Coordinator and any other participant in the proceeding pursuant to § 355.3(g);

(vi) A second voluntary negotiation period of 14 days, commencing on the day after the end of the Mechanical Licensing Collective's discovery period;

(vii) Filing of a reply submission, if any, by the Mechanical Licensing Collective;

(viii) Filing of a joint pre-hearing submission by the Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other participant in the hearing; and

(ix) A hearing on the record.

(2) The Copyright Royalty Judges may, for good cause shown and upon reasonable notice to all participants, modify the schedule, except no participant in the proceeding may rely on a schedule modification as a basis for delaying the scheduled hearing date. The Copyright Royalty Judges may alter the hearing schedule only upon a showing of extraordinary circumstances. No alteration of the schedule shall change the due date of the determination.

§ 355.3 Submissions and discovery.

* * * * *

(b) *Submission by the Mechanical Licensing Collective in the initial Administrative Assessment proceeding.* (1) The Mechanical Licensing Collective shall file an opening submission, in accordance with the schedule the Copyright Royalty Judges adopt pursuant to § 355.2(g), setting forth and supporting the Mechanical Licensing Collective's proposed initial Administrative Assessment. The opening submission shall consist of a written statement, including any written testimony and accompanying exhibits, and include reasons why the proposed initial Administrative Assessment fulfills the requirements in 17 U.S.C. 115(d)(7).

(2) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall file with the Copyright Royalty Judges and deliver by email to the other participants in the proceeding documents that identify and demonstrate:

(i) Costs, collections, and contributions as required by 17 U.S.C. 115(d)(7);

(ii) The reasonableness of the Collective Total Costs;

(iii) ~~The Collective's processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and sub-contracting parties competitively (or by another method); ensuring the absence of overlapping ownership or other overlapping economic interests between the Collective or its members and any selected contracting or sub-contracting party~~ With respect to any vendor expense or proposed vendor expense of the Collective representing greater than 10 percent of the Collective's annual budget, the Collective's processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and subcontracting parties competitively (or by another method); and

(iv) The reasons why the proposal fulfills the requirements in 17 U.S.C. 115(d)(7).

(3) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall provide electronically and deliver by email to the other participants in the proceeding written disclosures that:

(i) List the individuals with material knowledge of, and availability to provide testimony concerning, the proposed initial Administrative Assessment; and

(ii) For each listed individual, describe the subject(s) of his or her knowledge.

(c) *Submission by the Mechanical Licensing Collective in proceedings to adjust the Administrative Assessment.* (1) The Mechanical Licensing Collective shall file an opening submission according to the schedule the Copyright Royalty Judges adopt pursuant to § 355.2(g). The opening submission shall set forth and support the Mechanical Licensing Collective's proposal to maintain or adjust the Administrative Assessment, including reasons why the

proposal fulfills the requirements in 17 U.S.C. 115(d)(7). The opening submission shall include a written statement, any written testimony and accompanying exhibits, including financial statements from the three most recent years' operations of the Mechanical Licensing Collective with annual budgets as well as annual actual income and expense statements.

(2) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall produce electronically and deliver by email to the other participants in the proceeding documents that identify and demonstrate:

(i) Costs, collections, and contributions as required by 17 U.S.C. 115(d)(7) for the preceding three calendar years and the three calendar years following thereafter, including Collective Total Costs;

(ii) For the preceding three calendar years, the amount of actual Collective Total Costs that was not sufficiently funded by the prior Administrative Assessment, or the amount of any surplus from the prior Administrative Assessment after funding actual Collective Total Costs;

(iii) Actual collections from Digital Music Providers and Significant Nonblanket Licensees for the preceding three calendar years and anticipated collections for the three calendar years following thereafter;

(iv) The reasonableness of the Collective Total Costs; and

~~(v) The Collective's processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and sub-contracting parties competitively (or by another method), including processes for ensuring the absence of overlapping ownership or other overlapping economic interests between the Collective or its members and any selected contracting or sub-contracting party. With respect to any vendor expense or proposed vendor expense of the Collective representing greater than 10 percent of the Collective's annual budget, the Collective's processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and subcontracting parties competitively (or by another method).~~

(3) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall provide electronically and deliver by email to the other participants in the proceeding a list of individuals with material knowledge of the proposed adjusted Administrative Assessment, including the subject(s) of his or her knowledge and availability to provide testimony regarding the proposal.

* * * * *

(e) *Depositions.* The Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees, acting separately, or represented jointly to the extent permitted by the concurrence of their interests, may give notice of and take up to five depositions collectively during the first discovery period. The Mechanical Licensing Collective may give notice of and take up to five depositions during the first [second] discovery period. Any deposition under this paragraph (e) shall be no longer than seven hours in duration (exclusive of adjournments for lunch and other personal needs),

with each deponent subject to a maximum of one seven-hour deposition in any Administrative Assessment proceeding, except as otherwise extended in this part, or upon a motion demonstrating good cause to extend the hour and day limits. Any parties to the proceeding may attend any depositions and shall have a right, but not an obligation, to examine the deponent, provided that any participant exercising its right to examine a deponent provides notice of that intent no later than two days prior to the scheduled deposition date. The initial notice of deposition under this paragraph (e) must be delivered by email or other electronic means to all participants in the proceeding no later than seven days prior to the scheduled deposition date, absent agreement of the deponent or good cause shown. An individual is properly named as a deponent if that individual likely possesses information that meets the standards for document production under this part.

* * * * *

(g) *Second discovery period.* (1) During the discovery period described in § 355.2(g)(1)(v), the Mechanical Licensing Collective may serve requests for additional documents on the Digital Licensee Coordinator and other parties to the proceeding. Such requests shall be limited to documents that are Discoverable ~~and relevant to consideration of whether any counterproposal fulfills the requirements of 17 U.S.C. 115(d)(7) or one or more of the elements of this part.~~

(2) The Mechanical Licensing Collective may note and take depositions as provided in paragraph (e) of this section.

* * * * *

§ 355.4 Voluntary negotiation periods.

(a) *Initial voluntary negotiation period.* The Mechanical Licensing Collective, the Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees shall participate in good faith in an initial voluntary negotiation, commencing on the day after the Copyright Royalty Judges give notice of all participants in the proceeding and lasting 60[45] days. By the close of the initial voluntary negotiation period, the parties shall file a joint written notification with the Copyright Royalty Judges indicating whether they have reached a settlement, in whole or in part, with respect to determination of the Administrative Assessment.

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§ 355.7 Definitions.

Capitalized terms in this part that are defined terms in 17 U.S.C. 115(e) shall have the same meaning as set forth in 17 U.S.C. 115(e). In addition, for purposes of this part, the following definitions apply:

Discoverable documents or deposition testimony are documents or deposition testimony that are:

- (1) Nonprivileged;

(2) Relevant to consideration of whether a proposal or response thereto fulfills the requirements in 17 U.S.C. 115(d)(7); and

(3) Proportional to the needs of the proceeding, considering the importance of the issues at stake in the proceeding, the requested participant’s relative access to responsive information, the participants’ resources, the importance of the document or deposition request in resolving or clarifying the issues presented in the proceeding, and whether the burden or expense of producing the requested document or deposition testimony outweighs its likely benefit. Documents or deposition testimony need not be admissible in evidence to be Discoverable.

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PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

* * * * *

§385.2 Definitions.

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Bundled Subscription Offering means a Subscription Offering providing Licensed Activity consisting of Relevant Streams or Eligible Limited Downloads that is made available to Relevant End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price).

* * * * *

Eligible Interactive Stream means a Relevant Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an Relevant End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the Relevant End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the Relevant End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

~~End User means each unique person that:~~

~~(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or~~

~~(2) Makes at least one Play during the relevant Accounting Period.~~

* * * * *

Free Trial Offering means a subscription to a Service Provider’s transmissions of sound recordings embodying musical works when:

(1) Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering;

(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;

(3) In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;

(4) Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;

(5) The Free Trial Offering is made available to the Relevant End User free of any charge; and

(6) The Service Provider offers the Relevant End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider.

* * * * *

Limited Offering means a subscription plan providing Eligible Interactive Streams or Eligible Limited Downloads for which—

(1) A Relevant End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the Relevant End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (e.g., a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the Relevant End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the Relevant End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to Relevant End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

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Paid Locker Service means a Locker Service for which the Relevant End User pays a fee to the Service Provider.

* * * * *

Play means an Eligible Interactive Stream, or play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or play of an Eligible Limited Download that has not been initiated or requested by a human user. If a single Relevant End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

(1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

(2) For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;

(3) For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(4) The Promotional Offering is made available to an Relevant End User free of any charge; and

(5) The Service Provider provides to the Relevant End User at the same time as the Promotional Offering Relevant sStream an opportunity to purchase the sound recording or the Service Provider periodically offers Relevant End Users the opportunity to subscribe to a paid Offering of the Service Provider.

Purchased Content Locker Service means:

(1) A Locker Service made available to Relevant End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an Relevant End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(2) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant End User means each unique person that:

(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Relevant Streams or Eligible Limited Downloads is directly available to Relevant End Users, but only when the Offering and content directly relating to the Offering (e.g., an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to Relevant End Users from a page if Relevant End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Relevant Stream means the digital transmission of a sound recording of a musical work to an Relevant End User—

(1) To allow the Relevant End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

* * * * *

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with Relevant End Users or otherwise controls the content made available to Relevant End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, Service Provider Revenue shall mean:

(i) All revenue from Relevant End Users recognized by a Service Provider for the provision of any Offering;

(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of any Offering, *i.e.*, advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to Relevant End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

(i) Include revenue recognized by the Service Provider, or by any associate, affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and

(ii) Include the value of any barter or other nonmonetary consideration; and

(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to Relevant End Users for Offerings that the Relevant End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to Relevant End Users in the ordinary course of business.

(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.

(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a Service Provider provides an Offering to Relevant End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from Relevant End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the lesser of

the revenue recognized from Relevant End Users for the bundle and the aggregate standalone published prices for Relevant End Users for each of the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for Relevant End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

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~~Stream means the digital transmission of a sound recording of a musical work to an End User~~

~~(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;~~

~~(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and~~

~~(3) That is subject to licensing as a public performance of the musical work.~~

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an Relevant End User who has previously received a Relevant Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the Relevant End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

* * * * *

Subscription means an Offering for which Relevant End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the Relevant End User makes payment for access to the Offering on a standalone basis or as part of a Bundle with one or more other products or services.

* * * * *

§ 385.22 Royalty floors for specific types of offerings.

(a) *In general.* The following royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Offerings.

(1) *Standalone non-portable Subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which a Relevant End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Relevant Streams are originally transmitted while the device has a live network connection, the royalty floor is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable Subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which a Relevant End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Relevant Streams or Eligible Limited Downloads are originally transmitted, the royalty floor for use in step 3 of §385.21(b)(3)(ii) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable Subscription Offering.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which a Relevant End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor for use in step 3 of §385.21(b)(3)(ii) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled Subscription Offerings.* In the case of a Bundled Subscription Offering, the royalty floor for use in step 3 of §385.21(b)(3)(ii) is the royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis for each Relevant End User who has made at least one Play of a licensed work during that month (each such Relevant End User to be considered an “active subscriber”).

(b) *Computation of royalty rates.* For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all Relevant End Users who were subscribers for complete calendar months, prorating in the case of Relevant End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for Relevant End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan Relevant End User who subscribed for only part of a calendar month.

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§385.31 Royalty rates.

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(d) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Relevant Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any Relevant End User's access to the subject musical work.