

Compulsory License for Making and Distributing Digital Phonorecords

and Limitations on Liability Prior to the License Availability Date (January 21, 2021)

Copyright law provides a compulsory license for making and distributing phonorecords of certain nondramatic musical works. This circular addresses the compulsory license for digital phonorecord deliveries (DPDs) and limitation on liability for making DPDs available prior to January 1, 2021.

It covers:

- When a compulsory license can be used
- Activities covered by the compulsory license and limitation on liability
- Eligibility for limitation on liability
- When royalties must be paid

For information on the compulsory license for non-DPD phonorecords, see *Compulsory License for Making and Distribution Phonorecords Other Than Digital Phonorecord Deliveries (Circular 73A)*.

Under section 115 of the Copyright Act, an individual or entity, subject to certain terms and conditions, may make digital phonorecord deliveries (DPDs) of nondramatic musical works if they have already been distributed as phonorecords to the public in the United States under the authority of the copyright owner. When this condition does not exist, a digital music provider may still make and distribute a DPD of a musical work if it satisfies three criteria:

1. the first fixation of the sound recording embodied in the DPD was made under the authority of the musical work copyright owner;
2. the sound recording copyright owner has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries of such musical work to the public; and
3. the sound recording copyright owner authorizes the digital music provider to make and distribute digital phonorecord deliveries of the sound recording to the public.

NOTE: A nondramatic musical work is an original work of authorship consisting of music—the succession of pitches and rhythm—and any accompanying lyrics not created for use in a motion picture or dramatic work.

On October 11, 2018, the Orrin G. Hatch–Bob Goodlatte Music Modernization Act updated section 115 to establish a new blanket license for **digital** music providers to engage in specific covered activities, namely, permanent downloads, limited downloads, and interactive streaming.

This blanket license is not yet available. However, the Office will no longer accept Notices of Intention to Obtain a Compulsory License (NOIs) for making a DPD of a musical work,

such as in the form of a permanent download, limited download, or interactive stream. During the current transition period, set to end on the license availability date of January 1, 2021, licensees may still serve NOIs directly on copyright owners and, as discussed further below, may in certain circumstances enjoy a limitation of liability for activity covered by section 115.

After the transition period, users will be able to obtain a blanket license covering all musical works available for compulsory licensing for DPDs by submitting a notice of license to the Mechanical Licensing Collective (MLC). Designated by the Register of Copyrights, the MLC's duties will include collecting and distributing royalties from digital musical providers, establishing a musical works database, and administering a process by which copyright owners can claim ownership of musical works (and shares of musical works).¹

What Is a Phonorecord?

A phonorecord is a material object in which sounds are fixed by any method now known or later developed and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Examples include a cassette tape, a vinyl disc, or a compact disc. Digital phonorecord deliveries are types of phonorecords. A phonorecord does not include sounds accompanying a motion picture or other audiovisual work.

What Is a Digital Phonorecord Delivery?

A digital phonorecord delivery (DPD), is the individual digital transmission of a sound recording resulting in a specifically identifiable reproduction by or for a recipient, regardless of whether the digital transmission is also a public performance of the sound recording or any underlying nondramatic musical work. The reproduction must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. The reproduction may be permanent or available to the recipient for a limited period of time or for a specified number of performances. A DPD includes all phonorecords that are made for the purpose of making the delivery. Permanent downloads, limited downloads, and interactive streams are DPDs.

What Can I Do under a Compulsory License or Limitation on Liability?

If you meet the statutory requirements, including payment of required royalties, you may engage in the following activities, known as “covered activities”:

- Make and distribute DPDs of the eligible nondramatic musical work, including in the form of a permanent download, limited download, or interactive stream, where the primary purpose is distribution to the public for private use.
- Make a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved.

You cannot engage in the following activities. You will need to seek permission from the copyright owner to:

- Make, reproduce, or distribute a sound recording publicly distributed in phonorecords.
- Distribute phonorecords intended for use in background music systems, jukeboxes, broadcasting, or any other public use (such as a concert).
- Change the basic melody or fundamental character of the work in the arrangement.
- Claim copyright protection in your arrangement as a derivative work.

Does “Covered Activity” Include Making and Reproducing a Sound Recording?

No. Section 115 does not cover sound recordings. Rather, it covers the reproduction and distribution of nondramatic musical works.

A musical work and a sound recording are two separate works for copyright purposes. The author of a musical work is generally the composer and any lyricist. A sound recording, on the other hand, is the fixation of a series of musical, spoken, or other sounds, often of a musical work. The author(s) of a sound recording is generally the performer(s) whose performance is fixed and/or the producer(s) who captures and processes the performance to make the final recording.

Licenses generally must be obtained separately from the copyright owners of the sound recording and the underlying musical work. Copyright in a sound recording is not the same as, or a substitute for, copyright in the underlying musical work.

For more general information about these works, see *Copyright Registration for Musical Compositions* ([Circular 50](#)), *Copyright Registration for Sound Recordings* ([Circular 56](#)), and *Copyright Registration of Musical Compositions and Sound Recordings* ([Circular 56A](#)).

How Do I Obtain a Compulsory License?

The Office will no longer accept Notices of Intention to Obtain a Compulsory License (NOIs) for making a digital phonorecord delivery of a musical work, such as in the form of a permanent download, limited download, or interactive stream. While the **blanket** license is not yet available, during the current transition period, licensees may still serve NOIs directly on copyright owners and, as discussed further below, may in certain circumstances enjoy a limitation of liability for activity covered by section 115.

How Do I Preserve Eligibility for the Limitation on Liability?

A digital music provider must engage in **good-faith, commercially reasonable efforts** to identify and locate musical work copyright owners. The digital music provider must also be prepared to **pay accrued royalties** to the musical work copyright owner once they are located, or transfer accrued, unmatched royalties to the MLC after the close of the transition period.

What are Good Faith Efforts to Identify Copyright Owners?

As part of engaging in good-faith, commercially reasonable efforts to identify musical work copyright owners, the digital music provider is required to use one or more bulk electronic matching processes, and must continue using these processes on a monthly basis for so long as the musical work rights owner remains unidentified.

The search must include:

- sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works they embody; and
- any available musical work ownership information, including each songwriter and publisher name, percentage ownership share, and international standard musical work code.

The digital music provider must employ at least one bulk electronic matching process. These matching efforts must be repeated at least once per month for so long as the owner remains unidentified or is not located.

What are the Payment and Reporting Requirements?

If the musical work copyright owner is identified or located during this search process, the digital music provider is required to report and pay that copyright owner any royalties owed.

If the musical work copyright owner remains unidentified between October 11, 2018, and January 1, 2021, the digital music provider must be prepared to pay accrued royalties to the musical work copyright owner once they are located, or provide these unmatched, accrued royalties to the MLC and provide a cumulative usage report and accrued royalties to MLC within forty-five days of the license availability date, January 1, 2021.

How Do I Make Royalty Payments?

Royalty payments, accompanied by a monthly statement of account, must be sent to the copyright owner or authorized agent of the owner on or before the twentieth day of each month for every phonorecord made and distributed.

NOTE: The Office will not accept royalty fee payments submitted with the statements of account.

The Office does not provide forms for the monthly or annual statements of account. For detailed instructions about the content of statements of account, see section **210** of Office regulations.

For current copyright royalty rates under the compulsory license for making and distributing phonorecords, see **Mechanical Copyright Royalty Rates** or contact the Licensing Division of the Copyright Office. The Copyright Royalty Board sets the rates and terms for use of the compulsory licenses pursuant to an administrative proceeding. For more information, visit www.crb.gov.

NOTE

1. This circular is intended as an overview of the section 115 compulsory license as it applies to digital phonorecord deliveries. The authoritative source for U.S. copyright law is the Copyright Act, codified in Title 17 of the *United States Code*. Copyright Office regulations are codified in Title 37 of the *Code of Federal Regulations*. Copyright Office practices and procedures are summarized in the third edition of the *Compendium of U.S. Copyright Office Practices*, cited as the *Compendium*. The copyright law, regulations, and the *Compendium* are available on the Copyright Office website at www.copyright.gov.

For Further Information

By Internet

The copyright law, the *Compendium*, electronic registration, application forms, and related materials are available from the Copyright Office website at www.copyright.gov.

By Email

To send a licensing related inquiry, e-mail licensing@copyright.gov. To send a general email inquiry, click the *Contact Us* link on the Copyright Office website.

By Telephone

For licensing related information, call the Licensing Division at (202) 707-8150. For general information about copyright, call the Copyright Public Information Office at (202) 707-3000 or 1-877-476-0778 (toll free). Staff members are on duty from 8:30 am to 5:00 pm, eastern time, Monday through Friday, except federal holidays. To request paper application forms or circulars by postal mail, call (202) 707-9100 or 1-877-476-0778 (toll free) and leave a recorded message.

By Regular Mail

Write to

Library of Congress
U.S. Copyright Office
Licensing Division
101 Independence Avenue, SE #6400
Washington, DC 20557-6400

