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CISAC and BIEM submission on the Proposed Rulemaking on the Public Musical Works Database and Transparency of the MLC

The International Confederation of Societies of Authors and Composers (“CISAC”) and the International Organisation representing Mechanical Rights Societies (“BIEM”) would like to thank the U.S. Copyright Office (“the Office”) for the opportunity to provide comments on the Proposed Rulemaking on the Public Musical Works Database (“Database”) and Transparency of the Mechanical Licensing Collective (“MLC”). This submission follows our previous comments to the Office, in particular on the Notifications of Inquiry from September 2019 and April 2020 (SG19-1116; SG19-1284; SG20-0614).

As already explained in previous submissions, CISAC and BIEM are international organisations representing Collective Management Organisations (“CMOs”) worldwide that are entrusted with the management of creators’ rights and, as such, have a direct interest in the Regulations governing the functioning of the Database and the transparency of MLC’s operations. CISAC and BIEM would like to thank the Office for highlighting the existence and particularity of entities such as CMOs that are not referred to in the MMA (page 58175 of the Proposed Rulemaking¹) and should be treated equally.

CISAC and BIEM are grateful that some of their comments were taken into account by the Office in the Proposed Rulemaking, but would like to reiterate their concerns on certain provisions which, if not adequately addressed, may affect the administration of rights of foreign rightsholders in the US, as follows:

§ 210.31 Musical works database information

This section prescribes the rules under which the MLC will provide information relating to matched and unmatched musical works in the Database. CISAC and BIEM appreciate that the Office has included international identifiers such as ISWC and IPI, among others, within the additional categories of information but urges the Office to further clarify some information as discussed below:

A/ Copyright ownership information and shares

As part of the list of mandatory information for matched works, the Office lists *“the copyright owner of the musical work (or share thereof), and the ownership percentage of that owner”* (for unmatched works, it is the same as long as the owner has been identified but not located).

For the sake of clarity, we reiterate the need to have CMOs clearly recognized as “copyright owners” under the provisions of the Proposed Rulemaking. Indeed, as already explained in several of our previous submissions, outside the U.S., the “copyright ownership” of the work is attributed to the CMOs managing the

¹ “While the MMA does not reference foreign musical works specifically, nothing in the statute indicates that foreign copyright owners should be treated differently from U.S. copyright owners under the blanket licensing regime or prevents the MLC from seeking or including data from foreign CMOs in building the public database.”

mechanical rights of the so-called BIEM repertoire. This would mean that the “copyright owner” share as defined in the Proposed Rulemaking should refer specifically to the share controlled by the CMO as administrator of the work, as opposed to the actual composer/songwriter share.

This clarification also has direct consequences with respect to the determination of sensitive and confidential information which cannot be made publicly accessible through the Database, as further argued in CISAC and BIEM’s comments to the Proposed Rulemaking on Treatment of Confidential Information (see SG20-0562).

If, however, it is considered indispensable for the DMPs and the MLC to have creators’ information and percentage shares for identification and distribution purposes, such data should not be disclosed to third-party entities or made publicly accessible in the Database for the reasons stated in our previous submission. In particular, in the 28 May 2020 comments to the Proposed Rulemaking on Treatment of Confidential Information submitted to the Office,² CISAC and BIEM explained that there seemed to be no business need to include the creator percentage shares in the musical works, as this information was not required to license or distribute musical works, and constitutes particularly sensitive and confidential financial and business information for creators and their representatives.

This issue is very much related to the need for the MLC to implement different interfaces (or different level of access) in its Database: one which could be made public without any confidential and sensitive information and another that may be accessed by interested parties on a need-to-know basis, such as the MLC employees, the DMPs and the rightsholders.

Also, as far as the exchange format is concerned, CISAC and BIEM welcome the work undertaken at DDEX level to define the appropriate exchange format with copyright owners. However, it is CISAC and BIEM’s understanding that the use of DDEX as a format of exchange by the MLC, shall not impact in any way which fields are considered as mandatory or not in the Database. In addition, if certain data are required in the DDEX format for the sake of business needs between the DMPs and the MLC or the MLC and the foreign CMOs, this does not entail that such data should be made available to the public through the Database.

B/ Songwriter names

Songwriters’ information is currently not mandatory in the Database, both for matched and unmatched works.

As already highlighted in a previous submission (see SG20-0614), CISAC and BIEM further recommend making the songwriter and composers’ information mandatory, as this is unique, stable information that remains unchanged during the entire life of the work and is essential for identification purposes. CISAC and BIEM further agree with the Proposed Rulemaking allowing songwriters’ information to be listed anonymously or pseudonymously.

C/ Data provenance information, Historical Data and Disclaimer

In the current Proposed Rulemaking, it is not clear whether data provenance information, historical data and the disclaimer would be provided both for the sound recording and the musical works information. As already stated in our submission SG20-0614, this information is of equal importance for the sound recording and the musical works information and needs to be recorded in the Database for the following reasons:

- information on the source/provenance of the musical works information: submitters of information should be identified, and when the information is derived from copyright owners (creators, publishers, CMOs, etc.), it should be labelled and prevail over other sources of information;

² SG20-0562-BIEM20-0028

- historical data: the licensing/administration shares may change over time (e.g. publishing agreements), and the MLC should keep track of any historical updates. This would facilitate both MLC and rightsholders operations, in particular in case of back claims;
- disclaimer: information from labels have proved to be incomplete, particularly as far as foreign repertoire is concerned, thus an appropriate disclaimer language in regard to the legal authoritativeness of the musical works information data represented in the Database is required.

D/ Personal identifiable information

CISAC and BIEM fully agrees with the Office with regards to the withdrawal of the date of birth from the list of mandatory public information to be included in the Database. However, CISAC and BIEM continue to be very much concerned with the general compliance of MLC's operations, including the Database, with data protection laws. As for now, the Proposed Rulemakings are silent on this, although this is a key issue for CMOs worldwide and probably also for other rightsholders.

CISAC and BIEM thus respectfully suggest that the Regulations include clear language on the MLC's full compliance with data protection laws, and in particular with the European General Data Protection Regulation, as the MLC will process personal data of EU creators. This means that the Database shall be construed in compliance with the GDPR requirements from the building-up of the system (i.e. privacy by design) until the processing operations, providing the requisite security guarantees.

§ 210.32 Musical works Database usability, interoperability and usage restrictions

This section prescribes rules under which the MLC shall ensure the usability, interoperability and proper usage of the Database. CISAC and BIEM would like to emphasize again three points of particular importance for CMOs as regards the access and use of the Database:

A/ Access to the Database in bulk format

Article 210.32 A) lists the entities which will have access to the Database in a bulk machine-readable format free of charge. Unfortunately, copyright owners (and as previously suggested, CMOs should be qualified as copyright owners) have been omitted from this list, therefore CMOs may be subject to pay a potential marginal cost.

In addition, CISAC and BIEM have serious concerns that copyright owners such as CMOs, with such significant repertoires, shall also be subject to marginal costs when accessing the unmatched royalties files (UP files).

This interpretation, if confirmed, would be quite unusual and unjustified with respect to the exchange of repertoire information of common interest among copyright owners. Copyright owners and the MLC share similar goals: identifying and distributing royalties to the relevant rightsholders and avoiding as much as possible unmatched or unclaimed royalties. Therefore, CISAC and BIEM strongly encourage the Office to revisit this rule and include CMOs as significant copyright owners among the entities which will have access to the Database and UP files in bulk format free of charge, as is currently the proposed rule for "significant licensees".

B/ Terms of Use

As already underlined in several submissions and again in the first section of this paper, the Office shall balance the interests of building a useful Database with the business needs to protect private and commercially-sensitive information from public disclosure or misuse by authorized parties (e.g. DMPs, DLC, etc.).

Under the current Proposed Rulemaking, the MLC is able to “(...) *suspend access to any individual or entity attempting to bypass the MLC’s right to charge a fee to recover its marginal costs for bulk access through repeated queries, or to otherwise be engaging in unlawful activity with respect to the database (including, without limitation, seeking to hack or unlawfully access confidential, non-public information contained in the database) or misappropriating or using information from the database for improper purposes.*”

This current wording provides sufficient flexibility to the MLC to define the terms of use of the Database. While we understand the Office considers that restrictions on use are already covered under “*misappropriating or using information from the Database for improper purposes*”, CISAC and BIEM urges the Office to implement more detailed and strict rules for the use of data available on the MLC database by the public, prohibiting commercial uses and allowing exclusively lookup functions. It shall be made clear that the public can use the Database only to obtain information on particular works.

CISAC and BIEM have provided examples of restrictions that could be included in its Terms of Use, which need to be accepted by Users when accessing the Database, in its submission SG20-0614. For ease of convenience, we reiterate them below:

- not to access, display and use the Database for any purpose other than research and information purposes (i.e. facilitate the identification of musical works and sound recordings, look up for metadata related to an ISWC or ISRC, identify the ISWC or ISRC related to a given musical work/sound recording, etc.);
- only to run manual queries, and not develop or run scripts or any other tools to generate queries or capture and/or download and store the results automatically. Users may not systematically or automatically collect, scrape, harvest or use other means to copy data from the Database;
- not to sell, offer for sale, market, promote, advertise or commercialize any information obtained from the Database or use it for any other purpose, for instance, as the basis to create derivative works, directly or indirectly, in any manner;
- not to reproduce, modify, create derivative works from, display, publish, distribute, disseminate, broadcast or circulate any information found on the Database to any third party (including, without limitation, the display and distribution of such content via a third-party website);
- not to disassemble, decompile, reverse engineer or otherwise modify the information available on the Database in any way at any time;
- to lawfully use the database and the information available on the Database and comply with the relevant data protection laws.

As regards the use of the data by DMPs operating under valid NOLs or compliant SNBLs (and their authorized vendors), CISAC and BIEM would also favour regulations defining strict terms and conditions, including prohibition for DMPs to use data for purposes other than processing uses and managing licenses and collaborating with the MLC in data collection.

C/ Point of contact for inquiries and Complaints

CISAC and BIEM welcome the inclusion of the need for the MLC to provide a point of contact for inquiries or Complaints. However, as requested in our submission SG20-0614, the Proposed Rulemaking should go further and also make mandatory the publication of the rules that will be applied by the MLC’s dispute resolution committee. This will help to streamline and give more transparency to the dispute resolution process, which will benefit both copyright owners and DMPs.

§ 210.33 Annual reporting by the mechanical licensing collective

This article sets the list of required information to be included in the MLC’s annual report. The list already reflects the MLC’s efforts to locate and identify copyright owners of unmatched works and shares of works, but, as already underlined in our submission SG20-0614, the Annual Reports must also include aggregate information on the total amounts of unclaimed royalties by the MLC. This information is of utmost importance to all copyright owners to make claims and must be made transparent and easily accessible.

Furthermore, CISAC and BIEM would like to take this opportunity to emphasize the need for the MLC to publish information on the amounts of the accrued unclaimed or unmatched royalties transferred by the DMPs to the MLC at the end of the transition period that ends on 15 February 2021, with details concerning the DMPs and the period covered. In case DMPs have signed specific agreements with copyright owners, they will also have to provide the details of this agreement. This complies with the Statutes’ demonstrative actions to “ensure that the policies and practices of the collective are transparent and accountable”. This type of information is of utmost importance to enable CMOs to collaborate in the collective effort to identify works, make claims and distribute the accrued royalties. This is also of paramount importance in light of the reduced liability regime which will apply to DMPs when they have chosen to transfer the accrued royalties to the MLC.

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