



**Comments of the MIC Coalition
in the U.S. Copyright Office Notice of Inquiry on
Music Modernization Act Blanket License Implementation Regulations
November 8, 2019**

The Music Innovation Consumers (“MIC”) Coalition is pleased to submit the following comments on behalf of the millions of businesses, both large and small, we represent. MIC members include the nation’s leading restaurants, bars, hotels, movie theatres, wineries, local radio and television broadcasters, digital music services, retailers, managers from auditoriums, arenas, convention centers, exhibit halls, stadiums, performing arts centers, university complexes, amphitheaters and numerous other venues that operate in every state, region and congressional district throughout the country.

The MIC Coalition welcomes the opportunity to provide comments in the U.S. Copyright Office notice of inquiry as directed by the Musical Works Modernization Act, Title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (MMA). As the Copyright Office considers the regulations necessary to govern the new blanket licensing regime, the MIC Coalition has specific recommendations for the information that should be included in the mechanical licensing collective’s database of musical works in order to fulfill the MMA’s promise of improving the music licensing ecosystem. The coalition is committed to building a rational, sustainable, equitable and transparent system that will drive the future of music by ensuring that businesses can legally provide music for the enjoyment of their customers and that artists are compensated when music is played, a goal which is at the heart of the MMA. A comprehensive, reliable, and searchable database of musical works is a fundamental element of such a system.

The MMA Demands a Solution to the Musical Works Data Problem

In enacting the MMA, Congress issued a clarion call for a solution to the musical works data problem. “For far too long, it has been difficult to identify the copyright owner of most copyrighted works, especially in the music industry where works are routinely commercialized before all of the rights have been cleared and documented. This has led to significant challenges in ensuring fair and timely payment to all creators even when the licensee can identify the proper individuals to pay.”¹

¹ H. Rep. No. 115-651, at 7 (2018).

Thus, a central goal of Congress in the MMA was to solve the musical works data problem once and for all. Congress directed the creation of a “database containing information relating to musical works”, not merely a “mechanical rights” database.² Any data solution must not only encompass mechanical rights, but also provide information regarding public performance rights, including PRO affiliation and splits of performance rights (which sometimes differ from splits of mechanical rights). A database that only provided data for mechanical rights would leave in place a balkanized system, with no central authoritative repository with information about all the musical works rights that need to be cleared by digital music providers and other licensees. This fragmentation would be inconsistent with the goals of Congress.

There is no question that such a requirement falls within the scope of the Copyright Office’s regulatory authority: the statute states that the database of matched works must include, without limitation “such other information as the Register of Copyrights may prescribe by regulation.”³ That language plainly encompasses the Office’s ability to require the inclusion of performance rights information in the MLC’s database. This is a clear opportunity for the Copyright Office to address a problem that it has long highlighted - the lack of transparency in music licensing for musical works. The creation of a single comprehensive, searchable and publicly accessible database will modernize the licensing process, finally making it possible for businesses across the country to easily determine which rights they need to license in order to play music in their establishments and ensuring that artists are paid what they are owed. Building a database designed to provide accurate, complete, and transparent information on music ownership and licensing information will create a more equitable system for artists, producers, songwriters and consumers alike.

As the Copyright Office is aware, this is not a new issue. We have provided additional supporting information below highlighting the significant attention that has been devoted to this problem, and further illustrating the necessity for the Copyright Office to exercise its regulatory authority to require the inclusion of performance rights information in the MLC’s database.

The Current Music Licensing Regime Suffers from a Lack of Transparency that Encourages Anticompetitive Behavior and Harms Individual Creators

Despite explosive growth in access to information online, no comprehensive and actionable database of music copyright ownership and licensing exists today. Instead, there are a small number of proprietary databases that cover only some copyrighted works, like those maintained by the performing rights organizations (PROs) that license song performances. Those databases are not only not comprehensive or interoperable, they explicitly state that users cannot rely on the information to make licensing decisions. As a result, businesses that offer music have no ability to make rational decisions about which licenses best fit their music needs.

² H. Rep. No. 115-651, at 69 (2018).

³ Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3692 (2018).

The opaqueness of the current music marketplace creates uncertainty that disproportionately harms small artists and independent publishers and stifles innovation. All stakeholders in the music marketplace benefit when current and accurate information about copyright ownership is easily accessible. We believe this transparency is a necessary baseline in creating a more sustainable and equitable system, and a good step toward supporting greater fairness in the music marketplace.

Licensees have a right to know precisely what they are (and are not) licensing and to decide whether a particular blanket license actually fits their needs BEFORE they purchase that license. Currently, business owners, lacking a complete, reliable, and impartial source of information upon which to make licensing decisions, are faced with a Hobson's Choice: either take every PRO license in order to perform ANY music, or take no license at all and forego live music. The implementation of the MMA provides an opportunity to change this situation.

Congress, in passage of the MMA recognized the need for transparency in music licensing and chose to address this flawed system. The Copyright Office now faces the opportunity to chart the course for a fully transparent, comprehensive, searchable and easily navigable database which will benefit both music licensees and music rightsholders equally.

Private Sector Approaches to Build a Database Have Failed

In the years leading up to enactment of the Music Modernization Act, the lack of reliable, authoritative data regarding ownership of musical compositions has been an impediment for the entire music industry, causing inefficiencies and significant litigation, none of which inured to the benefit of creators.

Multiple private industry solutions to address transparency have been universal failures. Although several music rights databases exist on a national level, such as the registration database maintained by this office and the individual databases of the PROs, these offer a piecemeal solution at best, since they are difficult to access and the information they contain is only a small fraction of existing works and entries are frequently inaccurate. We know that multiple databases lead to data conflicts. At any given time, a significant percentage of a PRO's repertoire (15 percent according to ASCAP) is in flux. Especially in the world of songwriting where it is typical to have more than one songwriter on any given song and writers change PRO affiliations frequently, multiple databases will result in conflicting data. Additionally, multiple databases, each with its own user interfaces and other operational differences, will likely create major inefficiencies and confusion among users (and potentially among songwriters).

Over the years there have been attempts to develop a private, comprehensive database of music licensing rights and distribution information. In 2008, EU Commissioner Neelie Kroes launched the Global Repertoire Database Working Group (GRD WG), bringing together a diverse group of music industry stakeholders to explore the legal, administrative and technological barriers for more efficient licensing. In 2010 the group issued a set of

recommendations which suggested that the GRD should provide access to authoritative, comprehensive, multi-territory information about the ownership and control of musical works. It recommended the International Copyright Enterprise (“ICE”) as a solution provider, and business-consulting firm Deloitte to manage the effort to build the GRD.

Over 80 organizations and more than 450 individuals across 6 continents participated in the Deloitte study, representing publishers, authors, societies, music service providers, consumers, recording artists, managers, record companies, legislative bodies, and information management companies. However, by 2014, plans for the global database had been abandoned, reportedly due to a combination of causes, including the collective societies’ decisions to pull funding for the project, disputes over control of the database and competing national data standards. In short, the GRD was a colossal failure.

In July of 2017, the two largest PROs, ASCAP and BMI, announced that they are working to develop a joint database of their collective works. Even if the two PROs roll out a workable solution, it will suffer from a significant shortcoming; the ASCAP and BMI database will not contain data from all the PROs, resulting in licensees scrambling to determine how to access data for the non-participating PROs. SESAC and GMR also aggressively license with MIC Coalition members and information covering their repertoires would not be included in that database. Unlike ASCAP and BMI, SESAC and GMR do not operate under consent decrees with the Department of Justice, although the MIC coalition believes that they should, so there is no requirement that they make their catalogs available, nor a meaningful backstop to prevent them from using the lack of data available to businesses in an anti-competitive manner. A database that is incomplete perpetuates the ability of any PROs not participating in the database to strong-arm businesses into paying for licenses they may not want or need, simply out of fear and uncertainty about their exposure to crippling infringement suits. A system must include all the licensing organizations.

In addition, both ASCAP and BMI clearly state on their websites that their electronic, downloadable catalogs cannot be relied upon, making them useless for purposes of making an informed decision about which blanket license to purchase, and tantamount to a game of Russian Roulette. There is no reason to believe that ASCAP and BMI will indemnify those who rely on a new combined database. Businesses need the meaningful ability to choose the blanket license (or licenses) that best suits their needs, both in terms of musical repertoire and cost, and not be forced to take a license from “all the PROs who come knocking” (currently 4, but a number that will only continue to climb in the future).

A Comprehensive Solution Developed Through Government Incentives is the Only Answer

Given the failure of past private sector attempts, both the Congress and the Copyright Office have recognized that a comprehensive solution in partnership with the government is necessary. During the 115th Congress, the House Judiciary Committee undertook a comprehensive review of copyright law led by then-Chairman Bob Goodlatte and then-Ranking Member John Conyers to determine whether changes should be made to improve the law. The

Committee spent years learning about the music marketplace from industry stakeholders through hearings, listening sessions and site visits. After significant stakeholder input, the Committee specifically recommended that the Copyright Office “maintain an up-to-date digital, searchable database of all copyrighted works and associated copyright ownership information.”⁴ Notably, the establishment of such a database was a core component of recommendations included in the House Judiciary Committee’s December 2016 White Paper containing proposed reforms to the U.S. Copyright Office — the natural home for public records of copyright information.

The U.S. Copyright Office has also recommended a comprehensive database. In its report *Copyright and the Music Marketplace*, the U.S. Copyright Office noted limitations of the databases offered by the PROs and other private organizations:

“While each of these databases represents an important and valuable component of the U.S. music marketplace, because they are separate and separately controlled, they do not offer a comprehensive licensing resource. The HFA and PRO databases are currently searchable by the public only manually, on an individual song basis. In addition, these organizations do not warrant the accuracy or completeness of the information they provide (perhaps because they are relying upon representations by third parties concerning authorship and ownership).”⁵

In the Report’s final recommendations, the Copyright Office concluded “any solution to the music data problem should not compete with, but instead draw upon, existing industry resources. As a threshold matter, any centralized database should be closely tied to the interests of the copyright owners and the licensees it serves. That said, the government should establish incentives through the statutory licensing regime to encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database. In other words, there is a role for both the government and private sector alike.”⁶

While the database created by the MMA would be run by the MLC, the ability of the Office to ensure, through regulation, the full utility of the database is essential and should be exercised in this rulemaking.

The Transparency in Music Licensing and Ownership Act

In response to the Copyright Office recommendations, Representative Jim Sensenbrenner introduced the Transparency in Music Licensing and Ownership Act, H.R. 3350, in July of 2017, which was cosponsored by several members of the House Judiciary Committee. The bill would provide for a database, housed at and overseen by the U.S. Copyright Office, to aid businesses and establishments that publicly perform musical works and sound recordings in identifying and compensating the holders of rights in those works. As noted earlier, currently, no such

⁴ U.S. House of Representatives Judiciary Committee. (2016, December 8). *Proposal on Copyright Reform* [Press release].

⁵ U.S. Copyright Office, *Copyright and the Music Marketplace* 64 (2015).

⁶ U.S. Copyright Office, *Copyright and the Music Marketplace* 183-184 (2015).

authoritative and comprehensive database exists, creating uncertainty and opaqueness in the music licensing marketplace. The MIC coalition strongly supports this functional solution that:

- Mandates one comprehensive database that is publicly accessible and easily searchable
- Ensures that licensees can rely on the information in the database to make licensing decisions and be protected from threats of statutory damages as to any copyright owner or potential licensor. That protection is based on the accuracy of the information in the database, rather than requiring a license with any or all PRO(s).
- Ensures that the database is made publicly accessible by the Copyright Office, in its entirety and without charge, and in a format that reflects current technological practices, and that is updated on a real-time basis.
- Limits the remedies available to a copyright owner or authorized party to bring an infringement action for violation of the exclusive right to perform publicly, reproduce or distribute a musical work or sound recording if that owner/ authorized party has failed to provide or maintain the minimum information required in the database.
- The database would collect the basic music ownership and licensing information, including:
 - authors(s), publisher(s), associated Performing Rights Organizations (PRO(s)), and record labels which own or control any interest in the work;
 - the names of the recording artist or artists featured on the work;
 - the identity of all owners and licensors of the copyright in the work; and
 - standard identifiers including the international standard musical work code (“ISWC”) or international standard recording code (“ISRC”).

Conclusion

The MIC Coalition welcomes the chance to submit these comments and appreciates the Copyright Office’s careful review.

Across the country, businesses, public assembly venues, and other establishments play or perform music for the enjoyment of their patrons. However, business owners often struggle to obtain the correct licenses for that music, leaving them vulnerable to enterprise-killing lawsuits. The current system of licensing musical works relies on a take-it or leave-it model of contracting with the PROs, which is forcing small businesses such as bars, restaurants, breweries and wineries across the country to eliminate live music from their offerings, and creating significant difficulties for other licensees, including digital music services and local broadcasters. Ironically, this also hurts songwriters and performing artists.

Although it would not solve all the issues in this space, a comprehensive musical works database would provide needed transparency and be a significant step in the right direction. As the MMA’s statutory text and legislative history indicates, and as the additional background discussed above illustrates, a musical works database is long overdue, and half measures will

not solve this issue. We appreciate the Copyright Office's continued review and attention to this issue.

Respectfully submitted,

Elizabeth Frazee, Director
Gregory Alan Barnes, Counsel
MIC Coalition
1155 F Street NW, Ste 975
Washington, DC 20004
(202) 621-8546