

Written By: KARINA VENCE PELAEZ

MECHANICAL LICENSING COLLECTIVE - MCL, AN OPPORTUNITY FOR THE COLLECTIVE MANAGEMENT OF MECHANICAL RIGHTS OF MUSICAL WORKS IN THE UNITED STATES OF AMERICA.

Abstract: The management of copyrights on musical works in the era of digitization and the great demand for streaming services, entail that the law and licensing agents adapt faster and faster to the ecosystem in which they find themselves, formed by providers, owners, administrators, publishers and the Government. Therefore, the enactment of the Music Modernization Act (MMA) and the establishment of a collective rights licensing system with the Mechanical licensing Collective - MLC, corresponds to a legal update of the United States of America that was in default of implementation, which will bring an effective protection to rights holders and will reduce the cumbersome task of acquiring dispersed licenses by digital music providers.

Keywords: music, management, mechanical rights, digital providers, rightholders, licensing, collective, modernization.

On October 11, 2018, the President of the United States of America, enacted the Music Modernization Act, MMA for its acronym in English, which, brings copyright in that country, to the reality of the technology market in on-demand content, in particular, mechanical reproduction rights or recording rights, leaving behind an ambiguous, diffuse and obsolete licensing system that harmed both right holders and digital service providers.

¿But what are these changes that have a positive impact on and vindicate copyright? Well, as a novelty and main advance is the creation of the collective management of mechanical rights of musical works, this, the creation of the Mechanical Licensing Collective - MLC, a collective that began the exercise of its management functions, from January 2021, and allows grouping right holders called authors, composers, music publishers or management companies in a single non-profit organization that jointly manages, licenses, collects and distributes their copyrights of this nature, and on the other hand, allows the different digital content providers such as: Apple Music, Spotify, YouTube, among others, to obtain licenses of use before a single representative, without incurring in cumbersome procedures of requesting license work by work before the thousands of rights holders.

It is necessary to mention that, prior to the MMA, the right of mechanical reproduction of musical works forced content providers to face different regulations regarding the obtaining of licenses for this economic right, and in case of not knowing the owner of the works, to go to the state copyright office to make the corresponding notification and acquire from it a license for the works to be used (1), without obtaining a license from the actual owner of the rights or his representatives, which resulted in an incomplete protection of the right.

Thus, the implementation of this collective management organization guarantees the granting of general licenses, placing the management of the mechanical right on the same level as the right of communication or public performance of musical works, the latter, which at present in the United States of America, as well as in most countries, is managed by collective management societies such as ASCAP, BMI, in that territory, or their counterparts such as SAYCO in Colombia or PRS in England, which guarantees to the owners associated

to these CMOs, an effective remuneration for the use of their protected works, and a general licensing in the different modalities of use or their representation, in order to seek the recognition of the right against those infringing users.

Thus, MLC not only becomes a guarantee platform for right holders, but also, in the words of Dr. Delia Lipszyc, an effective tool for obtaining licenses by digital content providers in the USA, reducing the costs and procedures for obtaining licenses individually (2), especially in a market of diverse ownership due to the transaction nature of copyright, thus reducing the risk of infringement of the right, an aspect of great relevance and priority of the providers (3).

Now, with the constitution of this new licensing collective, the MMA imposes three objectives to The MLC, which correspond to: "(A) identify and locate copyright owners of musical works with accrued royalties held by the collective; (B) encourage copyright owners of musical works to claim royalties from those owners; and (C) reduce the incidence of unclaimed royalties." (4), which, from the front, corresponds to generate a large information node managed by such collecting entity, information records that should not only be constituted by the musical works of authors or owners from the United States, but also by all the works that are used in such territory and whose owners are scattered all over the world.

This scenario leads us to a question: how to protect the musical works of Colombian and regional copyright holders? This situation is currently based on the actions taken by the Colombian collective management society of authors' rights related to this type of works, that is, the Society of Authors and Composers of Colombia - SAYCO, it is observed that this CMO on behalf of its owners has been dynamic in its decision making in order to guarantee the licensing and collection of the mechanical right of musical works in the United States territory, firstly, it entered into alliances with the Harry Fox Agency, the oldest organization in that country, established in 1972, which performs licensing of this type of authorizations (1). At present, this contractual relationship has been transferred to Klaim Music Company, which acts as representative of the licensees associated to SAYCO in the mentioned territory.

In this sense, the need to create a large center for the registration of works has no other purpose than to identify in a precise, suitable and correct manner the different copyright owners of the licenses subject to the MLC, so that the remunerations that correspond to them for the use of their works can be distributed in a transparent manner, otherwise, the Music Modernization Law - MMA would become a law without effect, since the money collected would be destined to a pool of resources without owners to whom to distribute it, hence the importance of promoting a clear and prompt registration of the works represented by the different administrators of the region.

Now then, in view of the update of the Copyright Act in the United States of America, regarding the new licensing system aimed at the mechanical right of musical works for digital providers, it is imperative to review the processes of rights management on this right and providers in Latin America, for this, we must refer to the cooperation that the copyright collective management societies have made materializing in the constitution of the Ibero-American Copyright Organization - LATINAUTOR, which is constituted by fifteen societies such as SAYCO of Colombia, SCD of Chile, SADAIC of Argentina, APDAYC of Peru, among others, an organization that was conceived as a single licensing window for

digital music providers such as Spotify, Apple Music, YouTube, which, in this organization, not only find the possibility of acquiring licenses related to public communication, but, in turn, acquire licenses for the mechanical right of the same (5).

It should be noted that in this organization -LATINAUTOR-, not only the GSCs participate, but also large music publishers such as Universal Música, Sony ATV, Warnner Music, and associations of publishers such as the Colombian Association of Music Publishers - ACODEM, who, as a general rule, manage, license, collect and distribute the mechanical right of musical works, leaving the GSCs exclusively to the GCOs, notwithstanding the participation that these companies have according to the representation of the mechanical right of those authors who have the right of public communication, collect and distribute the mechanical right of musical works, leaving exclusively the management of public communication to the CMOs, without prejudice of the participation that these societies have according to the representation of the mechanical right of those authors who have not signed contracts with music publishers or delegated this management exclusively to these organizations.

It is appropriate to point out that the collective management of mechanical rights has always been present in Latin countries, which has its origin in the mandate that the right holders grant to this type of societies, contrary to what happened in the United States, whose management of mechanical rights carried out by OGCs such as ASCAP and BMI is limited to the right of public performance or communication, This, taking into account the consent agreements acquired by these societies, which expressly determine the prohibition of management of rights other than public performance (6), a situation that led digital music providers to seek and acquire licenses with different representatives, administrators or copyright holders.

This great step of constitution of collective licenses of mechanical right, reaffirms the relevance of this rights management system in the digital environment, which has been renewed according to the circumstances and needs of digital users (7), facilitating in this way, the obtaining of licenses and effective remunerations, resulting in a harmonized ecosystem between users, owners and representatives. Thus, it can be seen how in an advanced manner and under the principle of collaboration, the collecting societies, publishers and other right holders in our region -Latin America-, seem to be ahead of the U.S. regulations, in the protection and effective guarantee of remuneration of authors and composers for the use of musical works in the digital environment.

Notwithstanding the delay in updating the U.S. Copyright Act, it is also appropriate to point out the work done by the U.S. Copyright Office, which constantly recognized the flaws in the processes for obtaining licenses for digital services of section 115 of that law, which made it anachronistic and not adapted to the needs of the XXI century market, being in this way the Office, a standard bearer and precursor of the enactment of the MMA (8).

Understanding the previous licensing system of mechanical rights of musical works, which imposed the burden on the content provider to acquire a license for each right holder or right holders and in case the right holder is not identified, to go to the Copyright Office, it is necessary to express that at this stage there were predetermined rates which ranged between 9.1 cents and 24 cents (1), now with the modernization of the Law, the rates to be

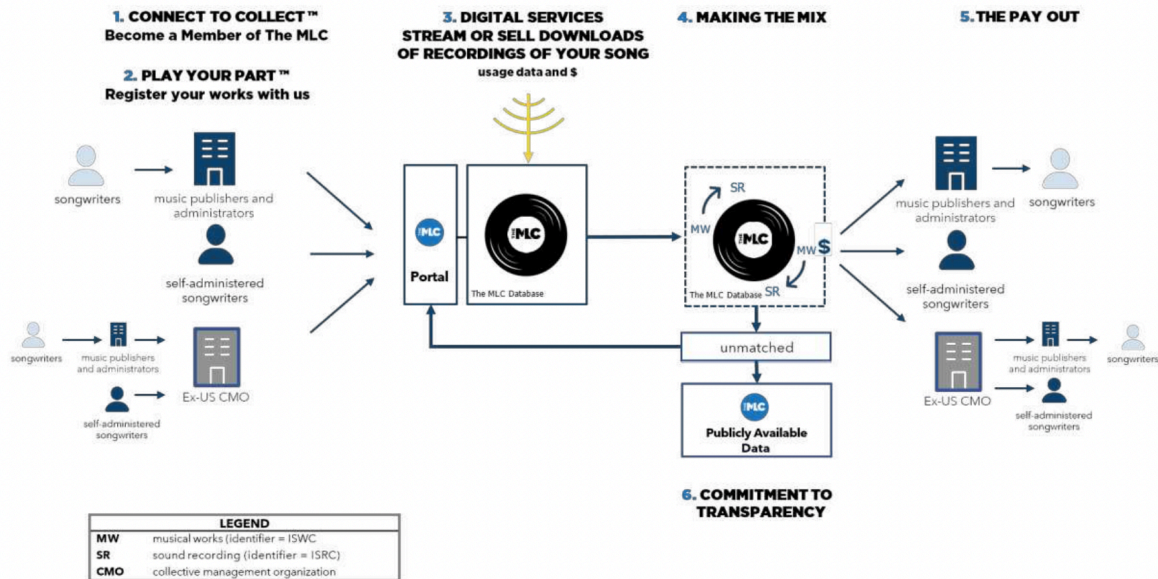
applied between MLC and the digital music suppliers will be subject to the rule of willing buyer and willing seller (8), which means that the rates derived from the licenses of use for this right will be subject to the agreement of the interested parties, without the copyright authority of such country being immersed in this private negotiation.

The foregoing can be brought to the reality of the market and compared with the rules applicable in Colombia, taking as an analogy the provisions of Article 73 of Law 23 of 1982, which determined the figure of a supplementary tariff, being this determined by the National Directorate of Copyright - DNDA, through Resolutions 009 and 0010 of 1985, tariffs that in application of the entry into force of the Andean Decision 351 of 1993, were suspended due to the immediate application of the rules and provisions issued by the Andean Community - CAN, in particular, the provisions of Article 54 of said Decision (9). In such a way that, at present, the rates for use agreed by the copyright and related rights GSCs, with the different users of music, for this case, are subject to the principle of agreement (willing buyer and willing seller) contained in article 2.6.1.1.2.6 of Decree 1066 of 2015.

In this sense, by applying the principle of agreement or negotiation of the intervening parties both in Colombia and in the USA, it is guaranteed that the legal business of licensing between private parties and on works governed by private standards, is regulated between them without any wear and tear of the administration and without greater intervention by the State.

Now, taking into account the creation of the collective management of mechanical rights in digital use of musical works, the need to generate a large documentary collection of musical works, the requirement to fully identify the different copyright holders and the principle of negotiation or agreement of the rates by the interested parties, it is relevant to have a clear picture of how the process to be carried out by the MLC will take place, for which I refer to the following image extracted from the website of this organization (10), as follows:

The Process



This image details in a clear and practical way the agents and stages of the process that is expected from the management of the MLC, firstly we have the licensing input, that is, the right holders who are grouped directly or through their representatives or administrators; The second stage prior to licensing corresponds to the conformation of the catalog to be managed, for this step it is of vital importance to obtain the internationally standardized codes for the identification of musical works such as the ISWC (International Standard Work Code) and the ISRC (International Standard Recording Code), the former allows the identification of each of the owners of the musical work, and the latter, the identification of the work in a sound recording (11).

Once the stage of unification of owners and works has been completed, which is of constant feeding, the licensing process proceeds, that is, to initiate the agreement of rates between MLC and the digital music providers, with such license, the providers will have the obligation to periodically send not only the agreed rate, This is the most relevant input, since it will allow to cross-reference the works used with the works of the documentary collection, in order to reach the last stage of the management, i.e. the payment of remunerations to the owners.

The last phase corresponds to the payment of the collected remunerations to the owners or administrators, this is done after carrying out the distribution process obtained from the process of identification of works and databases submitted by the suppliers, it should be mentioned that from the collections obtained the MLC organization will deduct for the management a percentage destined to finance the costs and expenses that the management entails, Once this deduction has been made, the net amount will be paid to the owners. For this stage, it is essential for MLC to have a large pool of owners and registered

works in order to prevent the money obtained from being seen as a collection without the possibility of distribution, thus reducing the number of works pending identification, as stated by the US Copyright Office (4).

In this way, and in a general description, the licensing process is carried out, which we hope will bring down the obstacles for an effective protection of right holders and content providers.

In this sense, the MMA and MLC, correspond to a necessary and required update for the current market system of musical works, which its current boom and even more the pandemic state has increased the digital use of musical platforms, either by reinforcing the existing ones or the generation of new alternatives for the enjoyment of this type of works. Likewise, it moves the copyright protection from the USA to other regions of the world such as our Latin American region, which, at a glance, it can be seen that Latin countries have adapted more quickly and efficiently to the needs of technology, either by the rule of law or by the cooperation of the agents that make up the music business.

Finally, the challenges that await the countries that make up the region is none other than to adapt diligently and promptly to the new American management system and the best way to do so begins with the unification of catalogs of works to be registered before the MLC, in order to enjoy from the beginning of its implementation, the guarantees of an effective remuneration for the exploitation of mechanical reproduction rights of musical works in interactive services in the United States.

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