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## **The Modernization of the Framework Agreement for Reciprocal Representation**

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### **Issues to be considered when concluding reciprocal representation agreement based on BIEM Framework Contract**

#### Background on a decision to create new Guidelines (as defined below)

During the BIEM Management Advisory Committee (**MAC**) meeting in November 2018, Andy Provan (MCPS) introduced the notion of reviewing and revising the BIEM framework contract for reciprocal representation between mechanical rights societies. The BIEM Legal Committee subsequently advised that the most appropriate approach would be to create a set of suggested guidelines which its members could use, rather than formally modifying the existing BIEM framework contract (the **Guidelines**). The intention of this review and the creation of the Guidelines is to draw attention to issues which could be usefully taken into account when entering into a reciprocal representation contract (the **RRC**) in order to improve standards and efficiency between BIEM member societies and provide greater transparency and understanding of each other's processes and policies in light of advancements in market practices and regulation.

A society working group was formed. The MAC working group was chaired by Andy Provan and consisted of representatives from several BIEM member societies. During a series of meetings, the working group identified the key areas for the Guidelines to address.

Following the identification of these key areas, the working group produced the draft Guidelines, that were then subject to review by the BIEM Legal Committee.

This document contains the final Guidelines as approved by the Management Committee at its meeting on 29 November 2021.

## Guidelines

Each key area and corresponding Guideline to which attention should be drawn when entering into an RRC has been set out below.

### **1. Online**

There is no requirement under BIEM Statutes for RRCs to also provide for online exploitation.

The existing framework RRC is broadly drafted so that online rights can be considered as included unless the parties specify otherwise.

It is however preferable to be explicit as to whether or not online exploitations are included (or excluded) under Article I 2).

Therefore, BIEM members who do not wish to include online exploitations in their reciprocal representation contract should provide for an express exclusion in this respect.

On the other hand, should BIEM members choose for this type of exploitation to be expressly included, they should also clearly describe the applicable territories for online under Article III. For example, is the grant of rights for online for the same territory as for the other exploitations, under article III of the framework RRCs, or is it intended for other (more or fewer) territories, possibly subject to certain conditions?

If online is expressly included for multi-territory exploitation, then the contracting parties should clearly state whether such exploitation is subject to any conditions such as: prior approval for licences, rights in respect of withdrawal notices of either society's repertoire from the multi-territory online licences of the other, how revenue for multi-territory online is reported to the other society, rules about mechanical and performing rights splits to be applied, the territorial scope allowed for multi-territorial licences etc. These matters will be a point of negotiation between the contracting societies.

### **2. Synchronisation Rights**

In some territories, synchronisation rights exist independently from reproduction rights and, in such territories, these rights can be either entrusted to BIEM societies or be licensed by rightsholders directly.

The existence of synchronisation rights and the entity in charge of their licensing needs to be assessed on a case-by-case basis to determine whether or not they should be included, or excluded, from the RRC under Article I 2) and for which territories under Article III, which will be a point of discussion for the parties to the RRC.

### **3. Private Copying**

Not all jurisdictions provide for a levy in respect of private copying.

Here again, it will be a matter for the relevant BIEM member societies to decide whether their RRC should expressly mention private copying or whether, should either society be able to

claim private copying domestically, this would already be covered by the standard grant of rights in the framework RRC.

If there are special rules which apply to the exploitation of private copying, the RRC should reflect these to the extent such rules apply to distribution timeframes, administration deductions, information reporting, cultural deductions etc.

#### **4. Mandate of Rights Granted/Glossary of Terms**

To provide clarity in respect of the particular forms of exploitation which a BIEM member society is mandated to license by the other, the inclusion of a definitions article or glossary could be a useful addition to an RRC to avoid any confusion.

As highlighted above, different BIEM member societies will have different approaches in respect of the licensing of online exploitation, private copying exploitation and synchronisation rights.

#### **5. Data Provision**

The provision of data is an increasingly important aspect of rights management.

The existing framework RRC provides for the provision of “necessary documentation”.

Some national regulations may provide for more specific obligations, as e.g. regulations implementing EU Directive 2014/26/EU (the **CRM Directive**) which imposes the obligation to make available certain data in an electronic format at least once a year.<sup>1</sup> Such national legislation could usefully be referenced in the RRC.

The working group has also considered the helpfulness of standard formats and databases in the support of data sharing. Considering these various sources, BIEM member societies should consider expanding the scope of the current article V to:

- ensure that data relating to usage or distributions is provided in appropriate market standard formats such as the latest Common Royalty Distribution format; or such format mutually agreed by the contracting societies;
- provide complete and detailed information in respect of its members on the Interested Parties Information (or “IPI”) system;
- providing any documentation which allows the other society to correctly administer or control the rights it has been granted control over by the RRC in its territory.

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<sup>1</sup> Article 19: (a) rights revenue attributed, amounts paid per category of rights managed and per type of use for the rights managed under the representation agreement and any rights revenue attributed which is outstanding for any period; (b) deductions made in respect of management fees; (c) deductions made for any other purpose other than in respect of management fees; (d) information on any licenses granted or refused with regard to works covered by the representation agreement; (e) resolutions adopted by the general assembly of members in so far as those resolutions are relevant to the management of the rights under the representation agreement.

## **6. Distribution Rules**

The regulations to which each BIEM member society is subject in respect of (i) keeping up to date distribution rules and methods, (ii) distribution principles<sup>2</sup> and (iii) distribution dates<sup>3</sup>, could be usefully incorporated into the RRC, whatever their source: the societies' own rules and regulations, national regulations pertaining to collective management organisations' transparency, CISAC rules, etc.

## **7. Treatment of Unidentified works**

Market standard rules and best practices for the treatment of unidentified works are emerging.

To the extent that a BIEM member society implements these best practices, whether on a voluntary or compulsory basis (CISAC binding resolutions; regulatory requirements<sup>4</sup>), it may want to expand its RRCs to include articles reflecting these best practices.

## **8. Disputes**

Currently, in case of a dispute, BIEM members societies can, under Article 26.13) of the BIEM Statutes, refer it to the Management Committee so that it draws up an arbitration procedure.

A reference to such provision as well as an undertaking to try and settle any dispute amicably, and failing that, possibly, recourse to a standard arbitration procedure, could help to manage any disputes which arise between BIEM society members in respect of their RRCs.

## **9. Non-Discrimination Article**

BIEM members must not discriminate between the rightsholder groups whose rights they represent. This means that BIEM society members and affiliated society members must be treated fairly and equally.

This is a regulatory requirement, imposed in particular by competition law (unless a BIEM society member is happy to operate differently subject to it seeking its own independent legal advice) and can be usefully recalled in the RRC.

## **10. Cooperation Obligation**

The BIEM framework contract currently does not include any obligations on either of the parties to support the other through a general "cooperation" obligation. This will be a point

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<sup>2</sup> Distribution rules should be based on the fundamental principle that distributions should be based on actual usage to the extent such usage information is available across all forms of exploitation.

<sup>3</sup> E.g. Article 15 of the CRM Directive provides that payments should be made no later than nine months from the end of the financial year in which the relevant royalties were collected unless reasonable business justifications exist.

<sup>4</sup> E.g. Article 13 of the CRM Directive which provides for a multi-step process as follows: "In particular, at the latest three months after the expiry of the deadline set [to distribute], the collective management organisation shall make available information on works and other subject-matter for which one or more rights holders have not been identified or located to: (a) the rights holders that it represents (...); (b) the collective management organisations with which it has concluded representation agreements. The information referred to (...) shall include, where available, the following: (a) the title of the work or other subject matter; (b) the name of the rights holder; (c) the name of the relevant publisher or producer; and (d) any other relevant information available which could assist in identifying the rights holder. The collective management organisation shall also verify the records (of its members) and other readily available records. If the abovementioned measures fail to produce results, the collective management organisation shall make that information available to the public at the latest one year after the expiry of the three-month period".

for negotiation between the parties but the parties may decide to include general obligations of cooperation or good faith into their RRC to support the relationship that the RRC will reflect.

#### **11. Audit Provision**

Under the BIEM model contract, the right to information could be expanded over what is provided in the current Article VIII to expressly provide for a right of audit. The inclusion of any audit right is a point of negotiation for the relevant parties as there are currently no regulatory requirement for BIEM member societies to be subject to audits. BIEM members should consider best practice in terms of transparency however and committing to be open to audits in its RRCs would provide evidence of a BIEM member society doing just that.

#### **12. Data Protection**

The performance of the RRC will likely involve the transfer of personal data between the parties. This will either be in respect of any personal data identified in the repertoire of the other society (such as individual names) which each society will then control and manage in its own territory or it could even be just the personal data of the employees who communicate between societies. In the RRC relationship, it is likely that each society will be a data controller (as such term is considered under the EU General Data Protection Regulation EU Reg 2016/679 (the **GDPR**)). The parties should consider how to best reflect the requirements of their respective data protection regulations in their RRC based on the types of personal data expected to be transferred and the services which each is expected to provide the other as well as the control which each party will have over that personal data it receives. Data protection clauses can be included either in the RRC between the parties or the parties enter into a separate data protection agreement in respect of how personal data shared between the parties is managed.

Each society may want to ensure that the other society has appropriate justifications in place to transfer personal data to it (legal basis, consent, to perform a contract with the data subject, legitimate interest etc.).

Where any transfer of personal data is from inside the European Union to a BIEM member society outside of the European Union, the society exporting the personal data will want to ensure that the importing BIEM member society can comply and will enter into the “Standard Contractual Clauses” under the GDPR as well as comply with its own domestic data protection legislation.

Due to the complex nature of data protection regulation compliance, each party should seek its own legal advice and review its own standard commercial contracting provisions which it implements in respect of data protection obligations.