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October 23, 2020

VIA EMAIL

Regan Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. SE
Washington, D.C. 20559-6000
regans@copyright.gov

Re: *Ex Parte* Letter re: October 16, 2020 Copyright Office Virtual Meeting

Dear Ms. Smith,

This letter is to follow up on the *ex parte* meeting held with Google on October 16, 2020. Attending the meeting were in-house counsel Sarah Rosenbaum and Leo Lipsztein, and Jen Rosen and Rachel Landy of Google, and outside counsel for Digital Licensee Coordinator, Inc. ("**DLC**") Sy Damle of Latham & Watkins. Attending for the Copyright Office were Regan Smith, Anna Chauvet, Jason Sloan, John Riley, and Cassie Sciortino. During the meeting we addressed questions raised by the Office with respect to the Office's rulemaking on transition period cumulative reporting and transfer of royalties to the Mechanical Licensing Collective ("**MLC**").

The following summarizes the discussion and follows up on particular questions asked by the Copyright Office. During the discussion, Google provided details regarding its YouTube Accrued Royalties Payment program for the U.S. ("**ARP**"). Some of the details are addressed in a separate confidential ex parte letter being delivered to the Copyright Office.

Inception and Operation of the ARP

The ARP was established in 2016 as part of a collaboration between Google and the National Music Publishers' Association ("**NMPA**"). Through the program, Google distributes to music publishers accrued royalties relating to musical works for which YouTube lacks complete ownership information ("**Unmatched Works**"). To date, the program has been enormously successful: hundreds of music publishers participate in the program, and those publishers represent the majority of music consumed on YouTube, on a matched basis.

Google described the program as follows: the ARP covers royalties accrued by Google for Unmatched Works during the period beginning August 1, 2012 to the present. The ARP commenced with an initial four-month claiming period in 2017, during which participating music

publishers were given an opportunity to assert ownership in Unmatched Works for which Google had accrued royalties during the period beginning August 1, 2012 to December 31, 2015. Publishers claiming such Unmatched Works were paid any associated accrued royalties, and after that claiming period ended, the remaining royalties—save a "legal reserve" amount representing the estimated share of copyright owners *not* covered by the program—were paid to copyright owners based on each publisher's market share (which was calculated based on each publisher's known usage on YouTube during the initial 2012-2015 accrual period). Google has repeated the same process every calendar year since 2017.[1] Although the claiming windows were generally three months long (after the initial four month claiming period), Google has accepted requests for extensions of those claiming windows.[2]

With respect to legal reserve amounts: the program provides for eventual distribution of such amounts to participating publishers. Those distributions however, occur after an additional two-year holdback period. By way of example: the legal reserve for royalties accrued by Google for Unmatched Works in 2015 was ascertained in 2017 and distributed in 2019. During these periods, Google has continued to search for copyright owners and pay out based on matched usage. And Google is currently holding legal reserve amounts that, consistent with the DLC's proposal, it would plan to deliver to the MLC. The Office asked about the level of claiming through the claiming portal established under the ARP. As we discussed, of the unmatched usage (a small portion of the total usage) that is placed into the claiming portal, about 18% to 20% is eventually claimed, with the remainder distributed on a market share basis.

Google echoes the concern that has been expressed by songwriter groups about amounts that were liquidated to publishers under the ARP. Google entered into the arrangement with the NMPA with the understanding that the accrued royalties sent to publishers would be shared with songwriters; this is consistent with Google's general understanding that publishers pay their songwriters appropriately. Indeed, in the joint press release announcing the agreement, NMPA President and CEO David Israelite emphasized this point, stating "We appreciate YouTube's willingness to work with us on behalf of the industry to help pay out millions of dollars in previously unclaimed royalties to publishers *and songwriters*."[3] To the extent songwriters have

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[1] The payment of accrued royalties on a market share basis thus operates on a two-year lag. For example, in 2019, Google paid out accrued royalties that related to usage in 2017. That lag provides music publishers with ample time to make claims against actual usage.

[2] The ARP encompasses more than section-115-eligible uses; rather, it covers usage on YouTube more generally, and Google intends to maintain that program for uses that are outside the scope of the compulsory license. The program did not extend, however, to accrued royalties under the Google Play Music service, and those royalties remain available to be turned over to the MLC after license availability date.

[3] Press Release, *NMPA and YouTube Reach Agreement to Distribute Unclaimed Royalties*, Dec. 6, 2016, http://nmpa.org/press_release/nmpa-and-youtube-reach-agreement-to-distribute-unclaimed-royalties/ (emphasis added).

questions about whether Google's payments to publishers were appropriately shared with them, Google strongly encourages them to continue to look to their publishers for answers.

The Relationship Between The ARP and the Music Modernization Act

As with the NMPA agreement that Spotify described to the Office earlier this month, publishers that participated in the ARP released any claims to further payment of royalties from the relevant period of time.[4] During the negotiations for the MMA, Google sought to ensure that stakeholders shared an understanding about relationship between the limitation of liability regime and the ARP releases. Accordingly, Google asked the Digital Media Association to raise that issue with the NMPA. As discussed at the meeting, it was reported back to Google that the NMPA had stated that it was "obvious" that the intent of the provision was *not* to require double payment, and that no further legislative clarification was necessary.

In addition, contrary to the MLC's assertions, the ARP was not established to resolve any pending or even threatened litigation. Rather, it was born out of a joint effort by Google and NMPA to ensure that royalties flowed to copyright owners. Regardless, publishers that entered into these agreements released their entitlement to further royalties from these periods of time, and those releases are what define the scope of Google's obligation to maintain accrued royalties "in accordance with generally accepted accounting principles." 17 U.S.C. § 115(d)(10)(B)(iv)(I).

The Office also asked about the interaction of the transitional provision requiring efforts to find and pay copyright owners of musical works,[5] and the agreement governing the ARP. As explained during our conversation, that agreement defines the terms of payment for all publishers, either by referencing a direct license agreement with Google, or referencing an exhibit that borrows terms of Google's Content Identification and Management Agreement. In that sense, the ARP agreement effectively acts as a voluntary license that applies in lieu of the terms of the MMA. For instance, the referenced terms of the Content Identification and Management Agreement includes its own payment terms that are distinct from those required under the MMA's transitional provisions.

The Office also asked for Google's view regarding the MLC's proposal to obtain letters of direction from publishers or, alternatively, litigate and seek declaratory judgments that the publishers are not entitled to further royalties. As we explained, this solution is so unworkable as to be a complete non-starter. As noted there are hundreds of publishers that have signed up for the ARP. Even if 90% of them were to agree to letters of direction, that still leaves the need to file a significant number of separate declaratory judgment actions in courts around the country. Simply put, the MLC's solution would turn a provision that was meant to eliminate litigation[6] into something that generates an expansive set of *new* litigation.

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[4] Google has reviewed the ex parte letters filed by Spotify on October 9 and DLC on October 14, and agrees with all of the legal points made therein.

[5] 17 U.S.C. § 115(d)(10)(B)(i), (iii).

[6] *See generally* H. Rep. No. 115-651, at 13-14 (2018).

Thank you for your time and continued engagement on these matters.

Best regards,

Sarang V. Damle