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November 17, 2020

Via email

Regan Smith
General Counsel
United States Copyright Office
Library of Congress
101 Independence Ave, SE
Washington, DC 20559-6000

**Re: Docket No. 2020-12
Summary of Joint Ex Parte Call regarding the USCO Supplemental Notice of
Proposed Rulemaking**

Dear Ms. Smith,

This letter summarizes the November 13, 2020 Joint Ex Parte Call (“November 13 Meeting”) that occurred via Zoom videoconference among representatives of various stakeholder groups, including the National Music Publishers’ Association (“NMPA”) and representatives of the United States Copyright Office (“USCO”), concerning the Copyright Office’s proposed Supplemental Notice of Proposed Rulemaking (“SNPRM”) on the Transfer of Royalties to the Mechanical Licensing Collective (“MLC”).

Danielle Aguirre, EVP and General Counsel, and Shannon Sorensen, VP Legal and Business Affairs, attended the call on behalf of NMPA.

During the call, parties discussed whether and how past private market settlement agreements for unlicensed uses of musical works impact the obligation of digital music providers (“DMPs”) under the Music Modernization Act (“MMA”) to remit payment of all unmatched accrued funds to the MLC in order to obtain a limitation of liability pursuant to 17 USC §115(d)(10). NMPA strongly disputed the position of the Digital Licensee Coordinator (“DLC”) and the Digital Media Association (“DiMA”) that the MMA’s reference to generally accepted accounting principles (“GAAP”) allows DMPs to subtract amounts under past settlement agreements from the total unmatched funds they are required to transfer to the MLC under Section 115(d)(10). NMPA asserted that GAAP principles do not support the conclusion that settlement payments to a private party could be construed to extinguish an obligation of payment of unmatched royalties to the MLC. NMPA expressed concern with the USCO promulgating a rule that contradicts the clear language of the MMA and lends weight to a reading of GAAP that lacks support under accounting principles. NMPA raised the further concern that the SNPRM itself may

provide a basis for DMPs to argue that positions taken by them purportedly under GAAP principles are reasonable under the MMA even where in clear contradiction to the law.

NMPA also discussed its concerns that the proposed rule would improperly shift the burden of proving compliance with the statutory requirements for the limitation on liability from the DMPs, who are seeking the limitation, to copyright owners, in violation of the statutory text. Such a shift would not only require copyright owners to prove that DMPs had *not* properly complied, it would also deprive them of their statutory rights to statutory damages and attorneys' fees. Under the proposed rule, if a DMP erroneously withheld unmatched royalties, a copyright owner would have to bring an infringement suit, and even if the DMP were found to be in violation of the law it could nevertheless *still enjoy the limitation on liability* by then paying the royalties it should have paid in the first place. In this scenario, the copyright owner would bear all of the burden of enforcement and receive none of the statutory remedies. The statute cannot be read to support such an outcome. The MMA states clearly that “[e]xcept as *expressly* provided in this paragraph” the limitation of liability provision shall not “be construed to alter, limit, or negate any right or remedy of a copyright owner with respect to unauthorized use of a musical work.” 17 U.S.C. §115(d)(10)(D).

The participants on the call discussed the issue of whether music publishers who had participated in market settlements had remitted 50% of the unmatched funds it received from DMPs to their songwriters, pursuant to the Music Modernization Act. NMPA asserted that while it understands that music publishers that participated in private market settlement did distribute funds under those settlement to their songwriters, those settlements entered into prior to the enactment date of the MMA, in some cases even years before, could not be considered to be subject to the requirements of the MMA. Furthermore, there would be no way to determine the amount or proportion of any such distributions that had been made to songwriters without reviewing every agreement between publishers and their songwriters.

NMPA appreciates the Copyright Office's time and is able to provide further information on request.

Sincerely yours,

A handwritten signature in black ink that reads "Danielle M. Aguirre". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Danielle M. Aguirre