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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 23, 2020 Copyright Office Virtual Meeting

Dear Ms. Smith,

This letter is to follow up on the *ex parte* meeting held with MediaNet, Inc. on October 23, 2020. Attending the meeting were Seth Goldstein and Jeff Wallace of MediaNet and Sy Damle of Latham & Watkins as outside counsel for MediaNet. 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 our discussion. Some of the details are addressed in a separate confidential *ex parte* letter being delivered to the Copyright Office together with this letter.

History of MediaNet

MediaNet was founded in 2001 (under the name MusicNet), as a venture of several record labels—BMG, EMI, and Warner Music Group—and RealNetworks to provide a legal alternative to free peer-to-peer music services. Given its roots, MediaNet has always been at the forefront of ensuring that copyright owners are paid for use of their music. It was a party to the 2001 industry agreement between the Recording Industry Association of America and the National Music Publishers' Association ("NMPA") to license the publishing rights for streaming services, before there was even a formal statutory royalty rate in place.[1] Indeed, MediaNet may be uniquely positioned in the marketplace, as it is owned by an entity—the Society of Composers, Authors and

[1] See *Joint Statement of the Recording Industry Association of America, Inc., National Music Publishers' Association, Inc., and The Harry Fox Agency*, Docket No. RM 2000-7 (Dec. 6, 2001), at https://www.copyright.gov/docs/section115/industry_agreement.pdf

Music Publishers of Canada ("SOCAN")—that represents the interests of songwriters, composers, and music publishers.

MediaNet launched a subscription streaming service in the 2000s, and at the time worked with a third-party vendor, Music Reports, Inc. (to clear the necessary mechanical rights. In 2010, MediaNet switched vendors to the Harry Fox Agency ("HFA"). Then in 2013, MediaNet developed an in-house platform for publishing administration, which it offers to other digital streaming services.

The NMPA Pending & Unmatched Agreement

In 2013, MediaNet recognized that it had accrued significant royalties on its books related to unmatched usage, and in December of that year approached Universal Music Publishing Group ("UPMG") to pay out their portion of the balance of those royalties. UPMG directed MediaNet to work with NMPA to establish a mechanism for paying out unmatched royalties. MediaNet worked with NMPA to develop this program, including by sharing internal data. NMPA provided a preliminary framework for the settlement agreement in November 2015, and followed up in July 2016 with an initial draft agreement. Negotiations over that agreement ensued, and in December 2017, as NMPA was negotiating the legislation that would become the Music Modernization Act, pressed MediaNet to finalize the agreement. On December 20, 2017, MediaNet entered into an umbrella Pending and Unmatched Usage Agreement ("P&U Agreement") with the NMPA.

As we discussed, the initial royalty accrual period covered inception of the service to December 31, 2016. However, publishers could only claim usage going back to January 1, 2013 to December 31, 2016, because MediaNet was not in possession of usage data from that period of time, due to the changes in vendor relationships discussed above. At the end of 2018, MediaNet made a market-share-based distribution of unclaimed royalties to participating publishers, holding back only a reserve fund. MediaNet has also made such distributions for subsequent years, although as discussed in greater detail in the confidential letter, the accrued amounts were modest because of changes in MediaNet's service offerings.

The Relationship Between P&U Agreement and the Music Modernization Act

As with the agreements discussed in the letters from Spotify and Google, publishers that participated in the MediaNet P&U Agreement released any claims to further payments of royalties from the relevant period of time. We understand now that at least one major publisher, Warner Chappell, has agreed with that understanding. In addition, we note that MediaNet discussed the interaction of the requirements of the limitation on liability and the P&U Agreement directly with NMPA, and was told by the NMPA that the intention of the agreement was *not* to require double payment of the liquidated unmatched accruals.

Usage Data Prior to 2013 in Cumulative Statement of Account

As noted above, before 2013, MediaNet used two different third-party vendors for clearance of mechanical rights. Those vendors maintained all of the relevant royalty and usage data for MediaNet at the time. After those arrangements were terminated, however, the relevant

data was not transferred to MediaNet. We have reached out to both MRI and HFA to determine whether any of that data still exists, but are still waiting for responses.

We understand that the Office is contemplating that the cumulative report will provide data on unmatched usage back to the launch of the service. MediaNet, however, launched its service nearly *20 years ago*. In light of that, and the change in vendors, we are requesting the Office adopt a narrow exception in the cumulative reporting regulations. We think such a regulation would be consistent with the overall statutory scheme. Notably, the statute references reporting pursuant to the "applicable regulations," when discussing the information that must be provided to the MLC.[2] That is a reference to the pre-existing reporting regulations.[3] Significantly, those regulations provided that documentation related to royalties and usage for a particular period of time needed to be preserved only for a period of five years.[4]

To be clear, MediaNet is not asking the Office adopt a regulation that allows a digital music provider to exclude *all* data from periods of time more than five years prior to license availability date (though such a rule would be consistent with the statute). Instead it is seeking a narrower provision that will provides all available data to the MLC. This would be in the form of a new paragraph in 37 C.F.R. § 210.20(c)(4) of the proposed rule:

> **(iii) The digital music provider shall be excused from providing the information set forth in paragraphs (i) and (ii) where the usage is from a period of time more than five years prior to license availability date, and the digital music provider certifies the following: that the information was solely held by a vendor with whom the digital music provider no longer has a business relationship, the digital music provider has requested that information from such vendor, and the vendor has informed the digital music provider that it cannot or will not provide that information.**

Absent this narrow exception, MediaNet may decline to take advantage of the limitation on liability,[5] which may deprive copyright owners of additional accrued royalties.

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

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[2] *See* 17 U.S.C. § 115(d)(10)(B)(iv)(III)(aa).

[3] *See* 37 C.F.R. § 210.11 et seq.

[4] *See* 37 C.F.R. § 210.18.

[5] To be clear, by making this narrow request of the Office, MediaNet is reserving all of its rights and alternate defenses in the event that the Office declines to adopt a regulatory solution.

Best regards,

Sarang V. Damle