National
Music Publishers'
Association

1900 N St, NW
Suite 500
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Tel: 202-393-NMPA (6672)

November 3, 2020

VIA EMAIL

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

Re: Letter Summarizing *Ex Parte* Call With Copyright Office

Dear Ms. Smith,

This letter is to follow up on the *ex parte* telephone call on October 29, 2020 held with the National Music Publishers' Association ("NMPA") concerning various issues and misstatements made by Google in the letter submitted on October 23, 2020 (the "Google Letter") by Latham and Watkins, counsel for the Digital Licensee Coordinator (the "DLC"), purporting to summarize an October 16, 2020 meeting among three in-house attorneys for Google, the DLC's outside counsel, and the Office.

Danielle Aguirre, EVP and General Counsel, attended the call on behalf of NMPA. Regan Smith, Jason Sloan, John Riley, and Cassie Sciortino attended the call on behalf of the Copyright Office.

During the meeting, we discussed the Google Letter. The NMPA flatly disputed the assertion that, during the negotiation of the MMA, the NMPA "stated that it was 'obvious' that the intent of" the MMA's limitation on liability provisions (in 17 U.S.C. § 115(d)(10)(B)) "was *not* to require double payment and that no further legislative clarification was necessary." (October Google Letter, at 3, emphasis in original). The Google Letter asserts that these alleged assertions by NMPA were made in response to Google's efforts "to ensure that stakeholders shared an understanding about relationship between the limitation of liability regime and the [YouTube Accrued Royalties Payment program ("ARP")] releases." *Id.*

First, no one at NMPA ever made such a statement – not to Google, not to DiMA, and not to anyone else. Google's assertion—that an unnamed person at NMPA made such a statement to an unnamed person at DiMA that was "reported back" to an unnamed person at Google— is simply false.

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Second, the statement is just not credible. The MMA was a heavily negotiated, landmark piece of copyright legislation that required input and agreement from stakeholders across the music industry, including Google and other digital services ("DSPs"). Critically, the language in the Section 115(d)(10)(B) limitation on liability provision was *proposed by Google and the other DSPs*, who were represented by multiple teams of sophisticated lawyers. If any of the DSPs or their numerous lawyers had concerns regarding the interaction between unmatched royalties due under Section 115(d)(10(B) and amounts paid pursuant to voluntary settlement agreements, then they would have raised that issue with legislative counsel in Congress, incorporated it into their proposed language, or pushed for revisions to address those concerns. And yet none of those actions were taken. It is not credible to think that they would have left the statutory language *that they were proposing to Congress* in contradiction with what they actually were seeking, and rely on an alleged vague and off the record comment from NMPA that was allegedly relayed through a third party intermediary. Certainly, none of Google's many in house or outside attorneys would have counseled such action.

Finally, Google indicates in its letter that requiring DSPs to follow the language and intent of the MMA on this issue by paying to the MLC all accrued unmatched royalties, and to get letters of direction from any copyright owners with whom such DSPs have voluntary agreements that cover previously unmatched uses that are later matched to such copyright owners, will generate litigation. But, in fact, the opposite is true. Music publishers frequently use letters of direction to address the payment of royalties related to changes in catalogue ownership and are familiar and comfortable with that process. However, if the Office issued a regulation blessing GAAP interpretations that contradict the MMA and permit DSPs to not pay all of the accrued unmatched royalties that songwriters and copyright owners are expecting to be paid to the MLC, that will undoubtedly result in litigation that is far broader and more fundamental than an action to simply enforce a contract right. Google's claim that it is too complicated to enforce its own basic contractual arrangements is not persuasive.

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

Sincerely yours,

Danielle M. Aguirre