March 1, 2018

This letter is a point-by-point response to a letter that I'm told David Israelite sent around to some in the industry and some lawmakers. It made its way to my desk indirectly. I am responding here directly to the comments Mr. Israelite made to my 10 Holes analysis (**Read Here**).

In your response, Mr. Israelite, you suggest several times that I might be "confused" or "misinformed." I assure you, I am neither.

Alleged Hole 1: No Business Plans

I am not "confused," as you say, about "the difference between legislation and later regulation." Regulation needs to have its roots in clear language of a law, regulation needs to be "enabled" by the law. The MMA, as written, is filled with holes, and there's not enough guidance for what these "regulations" should be. We shouldn't have to cross our fingers and hope that the CO and the CRJs will implement regulations on important topics not even discussed by the MMA. There are plenty of examples of this below, but here's one quick one: the term "business plan" does not even appear in the MMA, so why should anyone have faith that someone will address that in regulations?

You reassure us that under the MMA, the Copyright Royalty Board will oversee proceedings to determine the administrative assessment which will fund the operation of the MLC. You further reassure us that the proceeding "contemplates" the review and approval of business plans and yearly budgets by the CRB. Well, I'm not sure what you mean by "contemplate," but actually, the MMA does not say anything close to that. It says a bunch about what will happen at the proceedings, but there is literally no mention of "budget" or "business plan." The proceeding is to establish an assessment (or a tax), not to critique the business plan Corporation A might have (or not have) to build out software and a database. Do you really think the three copyright royalty judges have signed up to do due diligence on a software company's technical plans to build a great technology system? In any event, the MMA should not "contemplate" things, it should directly address them. (see also, my discussion of "total costs" in hole # 3 below)

You also say how *100% of the cost of the new entity is paid for by digital music companies*, and you say that *none* of the cost is borne by songwriters. I would answer that under your line of logic, all of the advertising costs Unilever pays for its soap ads are paid for by Unilever; however the truth is those costs are ultimately paid by the consumers in the price we pay for a bar of soap. Similarly, Spotify isn't really paying for the collective, it's paying for it with OUR money. All of that revenue is revenue generated by the music written by the songwriter and all the musicians, producers and engineers that bring that to life. What the middle men take out of that revenue before we get the pocket lint that's left is not THEIR revenue. It's the portion of OUR revenue they have a contract right to keep. But THAT is based on these middle men doing an excellent job, and not breaching fiduciary duties (which in my opinion the publishers have done by taking equity in Spotify, and by pushing an act that's not yet ready for primetime, that will make it easier for Spotify to go public). This all *could* be a successful system, IF the governance

is correct, and IF there is adequate oversight, and IF there are enough checks and balances right in the MMA to ensure that this does not go off the rails.

Alleged Hole 2: No Requirement for Competitive Bidding

Mr. Israelite, from my viewpoint the response you gave here in no way addresses my concerns. There is no requirement in the present draft of the MMA that there be any competition for these two selected (or "designated") non-profit corporations, and in fact, the way the "requirements" sections are drafted, there couldn't possibly be any competition. The Big 3 will control Corporation A, and Spotify and Apple will control Corporation B. The "endorsed by and substantial support" language in these sections (pages 17, line 21, and page 58, line 8 of the government .pdf of the MMA) amounts to a veto power for the biggest players.

Your reassurance about the Federal Register seems to me a vague reassurance at best, and given the veto power I mention above, it may well be largely irrelevant. And your reassurance that the Register of Copyright has an opportunity to review the designation every five years falls way short; that's way too long to have an effective kill switch. Five years is forever in this industry. And most importantly, even if the government wants to pull the designation, they'd not be able to, unless the MMA requires that none of the software, data, and related code and "resultant data" be owned by Corporation A.

When you say I'm "confusing the MLC and the DLC with government-controlled corporations subject to government contracts," again, I assure you, I am not "confused." The MMA calls for the government to outsource important functions to two private corporations, and for the benefit of music creators, *while taking away key rights music creators presently have under the law*. This needs to be done on a competitive basis. The government, quite literally, does not buy toilet paper without the requirement for competitive proposals. Hopefully, this government procurement of copyright administration services will be treated with the same safeguards as we have in place for toilet paper.

I fear that you have completely missed the point of what I am saying here. What I find *important* is that the government has a *process* to pick these two non-profit corporations in a way that *maximizes* the chance they will be a *success*, and *minimizes* the chance of *conflict of interest* and *failure*.

Alleged Hole 3: No Ongoing Government Oversight

Mr. Israelite, when you speak of the substantial oversight by the CRB and Copyright Office, and go on to talk about the review of budgets and business plans every two years, well, I think that's a fundamentally flawed interpretation. First, take note that the words " business plan" don't appear anywhere in the MMA. Second, I think your reference to "every two years" is not entirely clear. As I read it, the MMA says one can only "ASK" for a reassessment, if *at least* 2 years has passed, but you won't actually get a new one for at least another year. So as I count, that's every 3 years.

More importantly, as I read it, the MMA doesn't give the CRJs a "line item veto," it actually expressly limits the CRJ's review to approving "total costs," which is a carefully defined term. And interestingly, that term doesn't not mention a "business plan" or anything like a business plan. By definition, the CRJs are undertaking a limited *quantitative* assessment, not a *qualitative* assessment. Meaning, it's not about digging into the reasonableness and/or adequacy of the actual business plan. If you're telling me that you expect the CRJs to dig in to the weeds, and apply their "business judgement" to the *actual business activities* themselves (e.g., why a software vendor has delayed delivery, or requested six change orders), then the MMA should actually say that at the beginning of Section-2(d)(7)(A). Right now, it says the opposite. As I read it, there is simply no oversight at all, and that's why these 10 holes I have identified need to be plugged if the MMA is to be a success—not a success because it "passed" but a success *because it works*.

Mr. Israelite, your letter implies that the manner in which the administrative assessment is set, and the Collective is funded, will assure us of "maximum protection of royalties, matched and unmatched, due to copyright owners." In my opinion, this is not accurate; as I read it, the MMA says (in Sec. 2(d)(7)(D)(V)) that the proceedings can be bypassed altogether, and that the CRJs "shall approve and adopt" any assessment privately agreed to by Corporation A and B. So in those instances, I think there is ZERO meaningful oversight by the CRJs or anyone else for that matter.

Furthermore, when you say the CRB must take into consideration the prior budgets when determining administrative assessments, this misses the point I am making, because the nature of the CRB review is financial only, and is not intended to be a technical review of whether the system development is feasible, or on track. Even if the MMA made it clear that the scope of CRB expressly includes the assessment of the adequacy of the entity's technology plans and development activities, I think it's still lacking because the infrequent nature of their review leaves too much room for the train to go off the tracks, and this is not the forte or job of the CRB. It's like like using a hammer to twist in a screw. The right tool is adequate and ongoing corporate board governance with an equitable and well-balanced board, not backstopping by 3 judges to do clean-up after the fact.

And when you speak about "borrowing" from the unclaimed royalties pool due to a budget shortfall, I have to repeat my concerns about an unproven private corporation "borrowing" from songwriters' royalties to pay a shortfall for poor business planning. I think that's just a terrible idea, especially when, in my view, there is no adult supervision (*see my Lessons 1 & 2 from my cover letter*). To borrow from those who are least represented and educated on these matters is more of the same. It hurts the weakest the most. Where's the incentive here to stay to budget and be a success? And when you try to reassure us that various parties can petition for and participate in a proceeding to adjust the administrative assessment, I can only answer that the time limitations referenced above, and the scope limitations reverenced above (not to mention the costs), make this a meaningless option. When we need an ambulance, we don't call a snail.

Alleged Hole 4: Governance of These Outsourced Corporations Is Controlled by Those Who Stand to Benefit

In response to what I've written, you've said how for the first time, songwriters, independent publishers and major publishers "will have a seat at the table and representation on the board" that governs the MLC, saying what a benefit that is. I can only respond that if the definition of "songwriter" (page 104, line 7of the government .pdf) has not been *dramatically* re-drafted, and unless the board is *50/50 as between publishers and independent music creators*, then in my opinion this talk about being "at the table" is an illusion, because the music creators could never carry the day on any issue, even though it's *THEIR* revenue and *THEIR* work product at issue.

You say that the board will now expand from 2/10 to 4/14, independent songwriters/publishers. Proportionately, this essentially changes nothing. Why does a technology company need 10 publishers (72%) on the board anyway? The MMA should also include outside technology experts, and *not employees or stockholders of Spotify, or employees of Apple and Google*.

Then you go on to talk about, "songwriters have substantial representation on two of the board's subcommittees." I don't see that language in the bill and I assume you must be referring to press reports of recent changes in committee composition. I'll look forward to seeing those changes in the bill itself. But in the version of the MMA that is now publicly available, it talks only about "copyright owners of musical works" being members, which we all know, can also be a publisher (page 26, line 20, and page 27, line 20 of government .pdf).

In any event, having representation on advisory committees is no consolation at all for giving up an equal voice for *true governance* decisions. If the ratios were reversed, I am sure you'd get my point.

Alleged Hole 5: Conflicts of Interest Abound in Funding This Outsourcing Scheme

It seems you've tried to help me out of my "confusion" by comforting me with the requirement that the CRJs look things over every 5 years. I will say it again – 5 years in this business is an eternity. 5 years ago, Spotify had just given equity to the Big 3. Now, a few years later, the MMA as written would pave the way for Spotify to go public and the equity for the Big 3 is already worth billions.

I'm also not comforted when you say the CRB has the ultimate power to set the administrative assessment to fund the estimated budget of the MLC. As I said before, even if the MMA said this (and I don't read it that way), there's a lack of logic in having *copyright royalty judges* micro-managing the *technology business plan* of a *software and database company*. Furthermore, I invite everyone to kick the tires of Section 2(d)(7)(D)(ii)(V) of the MMA: the fact that the assessment is allowed to be expressed as a percentage of royalties and with a required "minimum fee" seems to raise a myriad of complex questions about how this could disadvantage small publishers and music creators. And many of these small publishers might be seeing royalty distributions that are (*as our beloved Tommy LiPuma described*) smaller than an insect's genitalia. Is it really fair to have all publishers pay the same minimum fee? And then, when the

MLC goes over-budget, just "borrow" from those that don't even know they're being used? Wow. Really?

Alleged Hole 6: MMA Has Nothing in Place To Assure The Public That These Outsourcing Corporations Claim Nothing Proprietary

Mr. Israelite, when you sent out your response, in my opinion, you diverted the recipients of your letter from the subject at hand. Your response is laser focused on the subject of "transparency of and access to ownership data." But you missed my point: *"Access"* to data is one thing, but *ownership of the system itself* is what I am talking about. This non-profit corporation controlled by industry *should not OWN the system it creates for the benefit of others and pursuant to the government's direction*. The MMA says nothing at all about this key point, and it would be so easy to clarify it (page 31, line 16 of government .pdf).

If either of these two private non-profit corporations fails, or is otherwise "de-designated," it should be C.L.E.A.R., right in the MMA, that all of the data is owned by the people who submitted it, and all of the software, the data analytics, all of it, should held in trust by the government for the benefit of songwriters, and that the entity would not assert any proprietary rights over ANYTHING, including in bankruptcy. That should be an easy thing to confirm. But as I read it the MMA definitely does NOT say that.

What this legislation does is to create two private corporations that apparently would have the right to hold software and data analytics, and "resultant data" as trade secret. If that is not what is intended, what harm is there in expressly saying that in the MMA?

Alleged Hole 7: Independent Creators Aren't Being Given Real Audit Rights

Mr. Israelite, despite what you have written to me about audit rights, the simple reality lies in the laborious "audit provisions" in this bill. They are one of THE most detailed sections of the MMA (page 42, line 5, through page 45, line 20 of the government .pdf). Give us spot audit rights, and give small artists a simplified audit right. Do we really need to hire Deloitte for a guaranteed four-month engagement in order to determine whether Spotify paid us $12.00 instead of $22.00?

Also, here you also so proudly say how "fifty percent of all royalties that remain unclaimed after a three-year identification period are paid to writers." Actually, as I read it, all of the unclaimed is paid to publishers on a market share basis, and then 50% of that payment is allocated to songwriters (presumably also on a percentage basis by their publisher). There is so much in the MMA that gets my shackles up, but what you wrote here maybe did it more than anything. You perfectly illustrate what, in my opinion, is the disconnect between the NMPA and music creators. As I said in my cover letter: I will bet my life that there isn't one person among Lady Gaga, Kendrick Lamar, Taylor Swift, Bruno Mars, Pink, etc., that would want to take money that rightfully belongs to yet unknown, unaware, disadvantaged, young upcoming artists, or *foreign artists.* Creative people know the struggle, and appreciate that great undiscovered songwriters often are completely uninformed about things like copyright.

I think our supportive community is based on mentoring, not on cannibalism. Every creator respects what it takes to create something. I cannot imagine any artist feeling good about this bill siphoning this black box into their own pockets. And while "market share" has its place, it has ABSOLUTELY NO place here. In addition, not a penny should belong to publishers who don't own the unmatched copyrights. To include publishers in this market share redistribution of wealth creates an unacceptable conflict of interest, and does not not serve the greater mission of the MMA, which is purportedly to help creators. Market share black box redistribution does the opposite in my view.

Alleged Hole 8: The MMA Doesn't Require Respect for International Standards for Data and Metadata

If, as you say, all writer, publisher and digital parties involved in the drafting of the MMA recognize and respect the importance of data (and metadata) and of working with other U.S. and foreign entities to improve data standards and operations, then that concept should be expressly stated in the MMA, so that several years from now, if China's Tencent owns all of Spotify (instead of the substantial part it already does), it is clear what Congress's expectations were in this regard.

And as I said earlier, there is no provision in the MMA that makes it clear that the system, including all of the software and "resultant data" created by these private non-profits are open, and held in trust by the government for the benefit of those who create the music. Is there something controversial about amending the MMA to add such protections?

Alleged Hole 9: The MMA Strips Away Individuals' Rights to Protect Their Copyright Rights

Mr. Israelite, you talk here about all those NOIs that are rate-less and that don't get anyone paid. I agree, of course. But then you say how the MMA now creates a process for unmatched music works with which each digital service must comply. That all sounds great on its face. But let's talk about those NOIs. The money that didn't go to deserving unidentified music creators, will now, going forward, go into a "black box." It's been said there have been 60 million NOIs filed. Wow, if that number is even close to correct, just imagine the size that black box could become. With the way the MMA is drafted, clearly there were a few folks doing that *imagining.*

But it must be said that just because money for those works now goes to the collective, doesn't mean it's going to find its way to its rightful creators, and I don't think you have some magic solution to a situation that shouldn't have happened in the first place. And having a bill that sends 50% of that money to the biggest publishers (distributed by "market share"), is one huge disincentive for the Collective to get those funds to every rightful creator. As I opine above regarding Hole #7, this provision in the bill paves the way for an unfair redistribution of wealth benefitting the companies that are themselves running the show, and who have nothing to do with those "address unknown" creative works by definition.

Additionally, I believe the MMA should not "retroactively" absolve any company from previous copyright infringement. It is not up to Congress to bargain away a creator's right to sue for

copyright infringement. But certainly, if that grand bargain is made, these other holes better be patched up, tighter than tight.

Alleged Hole 10: The MMA Strips Workaday Music Creators of Their Rights Under International Treaties Adopted World-wide

You cite entities representing songwriters that have endorsed the MMA legislation. You say, they "would not support any legislation that would negatively impact the rights of musicians who choose not to formally register works with the Copyright Office." I agreed, they would not do this *knowingly* to songwriters. It's clear that the law is extremely difficult to digest, but the language here looks pretty clear to me: "To be entitled to receive royalties under a compulsory license obtained under subsection (b)(1) the copyright owner must be identified in the registration or other public records of the Copyright Office."

As I wrote in my cover letter: What happens if a band of young kids in Peru, the UK, Nigeria or Canada, Australia records 10 of their songs, submits them to Spotify, and gets a huge amount of play? As I read the MMA, they won't get paid their mechanical until they figure out that they need to first file the papers and possibly pay hundreds of dollars in fees to the U.S. CO to register the songs in the U.S.? And what about the many creators worldwide that won't make enough in mechanicals to justify paying the CO registration fee at all? Collectively, that could amount to a massive amount of money sitting in that black box just waiting to be snatched up by the top of the food chain. Can it be that we'd require the entire world to pay U.S. CO registration fees before they are allowed to get their first dime from Spotify? In addition to possibly being unconstitutional and in violation of rights under the Berne convention, it smacks of musical colonialism. I suggest the MMA "modernize" the current "address unknown" loophole, so songwriters aren't left with the short stick.

As for all the other issues I have raised, the solutions are not complicated. They could all be addressed with simple fixes to the current draft. Asking the NMPA to give actual songwriters at least equal governance is not a concept I would call "complex." I'd call it "obvious." It's our music. It's our economic future, and we've been taken advantage of in the streaming market by the very players "at the table."

You say in your letter that "the MMA is a bill that makes enormous progress for all songwriters and music publishers, and it is a bill that can pass – something that has eluded the music industry for over a generation." We shouldn't be looking for "a bill that *can* pass," we should be looking for a bill that passes because it serves the needs of those who create the music, and that serves all publishers equally, not just the most powerful. Those who profit from that music need to recognize that they themselves would not exist if not for the creator. That means we all need to look for sustainability. The industry needs to recognize at this point, that what serves the creator, serves us all. I feel that goal is within reach, and I'd love for the NMPA and DiMA to step up, roll up their sleeves, and reach out to address the important points I've raised.

You also said you are "hopeful that all creators will appreciate the significant gains present in this legislation and will not let their version of the perfect (that can't pass) be the enemy of the very, very good (that can)." I would answer, if what I have proposed can't pass, it's because

your own “vision of perfect” is a vision that insufficiently values transparency, accountability and oversight – after all, those three things are essentially all I’m asking for.

I’m asking for a bill that gives the young music creator a fighting chance. Who should compromise for anything less?

Sincerely,

Maria Schneider