AMERICAN ARBITRATION ASSOCIATION

SHANE MCANALLY, et al.	)	
	)	
Claimant	)	
v.	)	**Case No. 1-18-0000-5736**
	)	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS	)	
	)	
Respondent.	)	

CLAIMANT SHANE MCANALLY'S PRE-HEARING MEMORANDUM

The issue before this Panel is whether ASCAP is permitted to phase-out and ultimately withhold radio premium payments, now called the Audio Feature Premium ("AFP"), from members who resign from ASCAP and elect to remove their works from ASCAP's repertory, even though ASCAP continues to license those same works for a period of time post-resignation in accordance with its "Licenses-in-Effect" rule.

Mr. McAnally respectfully submits that the answer to the issue before this Panel is a resounding "no," and that ASCAP is required to pay all of its members, current or resigned, the same royalties for works that ASCAP licenses to radio pursuant to its Rules and in accordance with the Consent Decree.

ASCAP and its own Board of Review believes that it may shuffle around funding sources of the AFP and corresponding "credits" on the basis that it may "exercise its business judgment" in paying the premium payments. Decision at 8, 15-16. This results in ASCAP's avoidance of having to pay resigned members the full amount of royalties that resigned member's works have actually generated, which directly contradicts the promises set out in ASCAP's rules, (Jt. Exs. 14 &16), Articles of Association (Jt. Ex. 5), Membership Affiliation Agreement (Jt. Ex. 26), and the

testimony of ASCAP's COO, Brian Roberts, who testified that ASCAP's current practice is that all works achieving a high level of feature performances receive the premium payments. (Hearing Tr. at 246:16-24); *see also* Decision at 17. The credits that are generated to calculate the AFP are based on terrestrial and satellite radio surveys, as well as streaming music services surveys. Decision at 7. Nonetheless, ASCAP has attempted to draw a direct line between those surveyed premium performances and the credits related thereto to the unsurveyed license revenues, which are conveniently subject to a four-quarter phase-out, in a slick attempt to circumvent the Consent Decree, its rules, and its contractual obligations and assurances to its writer members. This Panel should not allow such nefarious behavior, as upheld by ASCAP's internal Board of Review, to stand.

Though ASCAP wishes to run as far in the opposite direction as possible from the BMI arbitration and resulting decision in *Immel, et al v. BMI*, the Department of Justice could not have been clearer in 1986 when it found that BMI's attempt to segregate "base" payments from "bonus" payments was illegal. This was, in part, why the arbitration panel in *Immel* found that BMI had violated its contractual commitment to pay former affiliates "upon the same basis of the then current performance rates generally paid by [BMI] to our affiliated writers for similar performances of similar compositions." Arbitrators' Award (Joint Exhibit 37). The same holds true in this case. The only portion of ASCAP's rules that are publicly made available to its members provides the same – "An electing writer member shall receive a distribution each quarter which bears the same relationship to the share of distributable revenues to all electing writers as the writer member's current performance credits...." ASCAP Survey & Distribution Rule 3.1.3 (Jt. Ex. 14). In the end, ASCAP's rules, as provided to its members, do not permit ASCAP to withhold or phase out the AFP for performances of works that it has licensed to radio

pursuant to final licenses, and as such, the Board of Review's Decision should be overturned with Mr. McAnally's fees and costs being assessed against ASCAP.[1]

I. ASCAP's Contractual Relationship and Obligations

There are several documents that govern the relationship between ASCAP and its members. Beginning with the ASCAP Membership Agreement, a writer engages ASCAP to license the writer's works to various third parties, such as radio and television, pursuant to agreements negotiated between ASCAP and the third parties. After deduction of ASCAP's fees, ASCAP distributes royalties to the owners of the works (i.e., the writers and publishers) based on the number of performances, if surveyed, and/or based on a proxy, if unsurveyed. These methods are set out within additional documents that govern the ASCAP/writer relationship, such as the Articles of Association ("Articles"), the Compendium of ASCAP Rules and Regulations ("Compendium"), and ASCAP's Survey and Distribution System Rules & Policies ("S&D Rules"). Each of these governing documents are derived, in part, by language originally implemented via the Consent Decree in 1950 (as later amended in 1960, 1994, and 2001), which specifically prohibited the kind of conduct of which ASCAP now seeks to engage.

A. ASCAP Membership Agreement

When a writer affiliates with ASCAP, the writer does so for the purpose of granting to ASCAP the right to license non-dramatic public performances of musical works created by the writer. ASCAP Membership Agreement (Jt. Ex. 26). This form contract, drafted solely by ASCAP and not subject to negotiation by the writer, guarantees the "equitable and accurate apportionment and distribution of royalties" collected by ASCAP as a result of its licensing of the writer's works to certain third parties and that the "methods and formulae" established by

[1] In accordance with the Panel's Order, the topic of assessment of fees and costs will be taken up at a later date.

ASCAP "will assure a fair, just and equitable distribution of royalties among the membership." *Id.* at Section 8.

B. Articles of Association

ASCAP's Articles of Association, which are incorporated into the Membership Agreement by reference, also provide that the distributions shall be "determined in a fair and nondiscriminatory manner" based on the value to ASCAP's repertory of the performances of the writer's works. Articles, Article XVII, Section 1(d) (Jt. Ex. 5). Further, "primary consideration shall be given to the performance of the compositions of members as indicated by objective surveys of performances...." *Id.* at Section 1(e).

C. Compendium

The Compendium addresses removal of works from ASCAP's repertory in Section 2.9.1. Compendium, § 2.9.1 (Jt. Ex. 16). A writer may elect to remove works; provided, however, that such removal will be subject to ASCAP's "Licenses-in-Effect" rule. Such rule, found at § 1.11.3 of the Compendium, provides that a writer's resignation shall "not affect in any manner any of the rights and/or obligations of ASCAP, or its licensees" relating to the works of the resigning member. Put another way, as it pertains to radio stations and ASCAP's license with the Radio Music License Committee ("RMLC"), a resigning member's works that existed within ASCAP's repertory as of the date of the writer's resignation will continue to be subject to any agreement that is in place as of the date of resignation until such time as the agreement expires. With regard to radio, ASCAP enters into a single multi-year agreement approximately every 5-6 years covering thousands of radio stations. *See* e.g., Jt. Ex. 63.

D. S&D Rules

Finally, ASCAP's S&D Rules set forth the distribution formula for ASCAP writer

members. First, it is important to distinguish between "surveyed" media and "unsurveyed" media. There is no dispute that, per ASCAP's Rules, radio performances of works in the ASCAP Repertory constitute "surveyed" media. *See* S&D Rules, 1.1 (Jt. Ex. 14). Additionally, there is no dispute that non-radio performances, such as performances of works occurring in bars, nightclubs, and restaurants, constitute "unsurveyed" media, credits for which are calculated using the surveyed media as a proxy. *Id.* at 1.5. Following those basic tenants, Rule 3.1.3 provides, in part:

> An electing writer member shall receive a distribution each quarter **which bears the same relationship to the share of distributable revenues to all electing writers** as the writer member's current performance credits in the applicable fiscal survey quarter year bear to the total performance credits of all electing writer members for such period.

S&D Rule 3.1.3 (emphasis added). This language was derived directly from the 1960 Order, which provided that a resigned member is entitled to the same payments he/she would have received absent resignation. Specifically, the 1960 Order provided:

> ...ASCAP shall provide that any writer or publisher member who resigns from ASCAP and whose works continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works **on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States**...In any event, a resigning member shall receive distribution from the Society on the basis of performances made under licenses in effect at the time of the member's resignation.

1960 Order

Section 3.3 further assures that ASCAP will uphold its promises as set out in the Membership Agreement and Articles by stating that the resigning writer will continue to be paid the same as he/she was paid prior to resigning. Specifically, the S&D Rules provide:

> If, in the case of a resigning writer or publisher member, ASCAP shall continue to have the right to license the performing rights in the United States to a work or works of such writer or publisher…and if no other performing rights licensing organization has any such right, distributions shall continue to be made to such resigning member subsequent to his resignation from ASCAP – for so long as ASCAP retains such licensing right, and no other performing rights licensing organization has any such right – on the basis of performance credits recorded for such work or works.

S&D Rule 3.3.1(i). From there, ASCAP splits the distributions into two pots – (1) surveyed media performances and (2) unsurveyed media performances. *See* S&D Rule 3.3.2. However, it is *solely* with respect to the **unsurveyed media performances** that ASCAP's rules permit the phasing out of distributions over a four-quarter period. *Id.* This language, too, was derived directly from the 1960 Order, as amended in 1994. *See* Nov. 1994 Amended Order, at p. 11-12[2] (Jt. Ex. 3). The purpose of the four-quarter phase-out is to "account for the fact that the great majority of ASCAP's thousands of licenses for [unsurveyed media] are for one-year terms that expire on different dates during the calendar year." ASCAP Answer at ¶ 11. The 2010 ASCAP Radio License Agreement with the RMLC (the "RMLC Agreement"), was a "final" license, did not phase-out between the time of Mr. McAnally's resignation (in late 2013 and early 2014) and the end of the RMLC Agreement's term on December 31, 2016, and pertains solely to surveyed

at 6, *citing to* Hearing Tr. at 358:22-359:8 (Boyle); Hearing Tr. at 203:17-20 (Roberts); 2010 ASCAP Radio License Agreement, at § 2(A) (Jt. Ex. 63) ("All compositions written and copyrighted by ASCAP members and in the repertory on the date this Agreement is executed are included for the full term of this Agreement. Compositions written or copyrighted by ASCAP members during the license terms are included for the full balance of the term.").

In short, ASCAP's governing documents repeatedly assert that its members will receive

[2] The actual pages and the cited pages are both pages 11-12 of the document.

distributions that are fair, equitable, and on the same basis as other electing members, yet, upon Mr. McAnally's resignation, ASCAP did the exact opposite. ASCAP licensed the same works to radio via a final multi-year license but is attempting to pay the owners of those same works (in multiple instances) on a drastically different basis. *Id.*

II. Audio Feature Premiums and Funding Sources

The AFP first came into existence in 1994. *See* Nov. 1994 Amended Order, at p. 10, "Writers Distribution Formula" (Jt. Ex. 3).[3] The purpose of the AFP, as originally set forth in the Nov. 1994 Amended Order, is to compensate writers whose works "have a unique prestige value for which adequate compensation would not otherwise be received..." *Id.* at p. 3. This is accomplished by way of "additional payments" to those writers of "works achieving a high level of feature performances in [ASCAP's] radio survey...provided that such additional payments shall be based solely on the number of radio feature performance credits received by the work in such fiscal survey quarter year." *Id.* at 10.[4] Though Mr. Roberts testified that ASCAP's current practice is to pay premiums to writers who "have written works that are the most performed works in a quarter subject to the radio distribution...", such is clearly untrue – otherwise, this dispute would be moot. Hearing Tr. at 246:2-4; *see also* 246:22-24 (Roberts).

Further, it is undisputed that performances at radio generate "surveyed" performances and never constitute "unsurveyed" performances. Hearing Tr. at 244:5-15 (Roberts). Michael Baum, President of Mr. McAnally's publishing company, testified that the portion of Mr. McAnally's pre-resignation distributions that were allocated to "unsurveyed" performances was

[3] The cited language can be found on page 26 of the entire Jt. Ex. 3 (i.e., there are multiple pages identified within the document as page "10").

[4] The current language pertaining to the AFP can be found within Rule 2.8 of the S&D Rules. Currently, the AFP applies to terrestrial and satellite radio, as well as music streaming services surveys. The cited language can be found on page 26 of the entire Jt. Ex. 3.

about five percent (5%). Hearing Tr. at 109:2-21 (Baum).[5] Even Mr. Roberts testified that of ASCAP's entire domestic revenues distributions, [redacted] represents unsurveyed revenues. Hearing Tr. at 197:8-13 (Roberts).

However, ASCAP argues that because the Board of Directors recently (and after Mr. McAnally's resignation) decided to fund the AFP solely with unsurveyed general licensing revenues, it is entitled to phase out the AFP payable to resigned members despite the fact that those works still achieved the high-performance levels at radio (surveyed media). Decision at 16. Yet, when asked repeatedly for the rule permitting such conduct, ASCAP could not (and cannot) point to a single place within any of its governing documents as a basis for this position. *See* Hearing Tr. at 252:15-25 (Roberts) (confirming that this information is not made available to ASCAP members via any of the governing documents); *see also* Hearing Tr. at 255:4-6 (Roberts) ("And as I said to you, I can't point to that rule or any other rule that talks about any funding resources for ASCAP"); Hearing Tr. at

funding of the audio premium at all."). In fact, ASCAP's own Nashville executives were utterly clueless as to the alleged AFP phase-out until after this dispute arose and admitted that had they known, they certainly would have alerted Mr. McAnally as to any such phase-out due to the impact it would have on his distributions. *See* Hearing Tr. at 395:10-396:19 (Martin) (admitting he had no awareness of any radio bonus phase-out as of 2014, only learned about it post-resignation from someone in New York, and "definitely think[s]" that he would have brought up

[5] McAnally's Demonstrative D-13, which is part of the Record, shows that over the twelve quarterly pre-resignation distribution statements, an average of merely 4.6% of his total earnings were allocated to unsurveyed media revenues, yet, post-resignation, his first three quarterly statements revealed an average reduction of over 40% as being allocated to unsurveyed revenues (or as ASCAP now calls it, the AFP, since it claims to not pay out ***any*** unsurveyed revenues at all, except via the AFP). *See* McAnally Demonstrative D-14; *see also* Hearing Tr. at 347:23-348:7 (Boyle) ("Once all of the funding from unsurveyed general was shifted to the [AFP]…they're zeros…All of the money is under the [AFP] column now.").

the alleged radio bonus phase-out at the parties' earlier meetings in late 2013 and early 2014 had he known it actually existed); *see also* Hearing Tr. at 120:25-121:12 (Baum) (noting that Martin and the other Nashville office's co-head, LeAnn Phelan, never mentioned anything about a premium phase-out and only discussed the "5%" general licensing reduction); *see also* Hearing Tr. at 129:9-12 (Baum) ("No, I still can't find it [anything in the rules that point to the reduction of radio premiums].").

In fact, the Board of Review specifically (and wrongly) held that the AFP payments are eligible for phase-out ***because*** ASCAP now uses unsurveyed media revenues to fund the AFP **and generate AFP credits**. Decision at 16, *citing to* Hearing Tr. at 322:21-323:7 (Boyle). Yet, this is expressly ***not*** how the AFP credits are to be generated in accordance with ASCAP's rules, which specifically state that the AFP credits are generated based on performance surveys at terrestrial and satellite radio, as well as music streaming services – all of which are surveyed media, which are not subjected to a phase-out of any kind, regardless of whether the works have been removed from the repertory. Decision at 7; S&D Rule 2.8.

Moreover, since this dispute, ASCAP claims that had Mr. McAnally not elected to remove his works from the ASCAP repertory following his resignation, he would have maintained the right to receive all of the AFP payments that ASCAP phased out. Nevertheless, even ASCAP's Chief Economist, Peter Boyle, could not point to any such rule or policy, showing yet another example of ASCAP's management making up policies as they go. *See* Hearing Tr. at 262:18-263:9 (Boyle) ("No, I don't think I could point you to that [where in the rules it provides that if a resigning member does not remove works, he will still receive premium payments], no.").

ARGUMENT

ASCAP IS OBLIGATED TO PAY ITS MEMBERS EQUAL PAYMENTS REGARDLESS OF AFFILIATION STATUS

A. ASCAP's Governing Documents Unequivocally Require that All Shares of the Works Licensed by ASCAP Receive Equal Credits and Corresponding Payments.

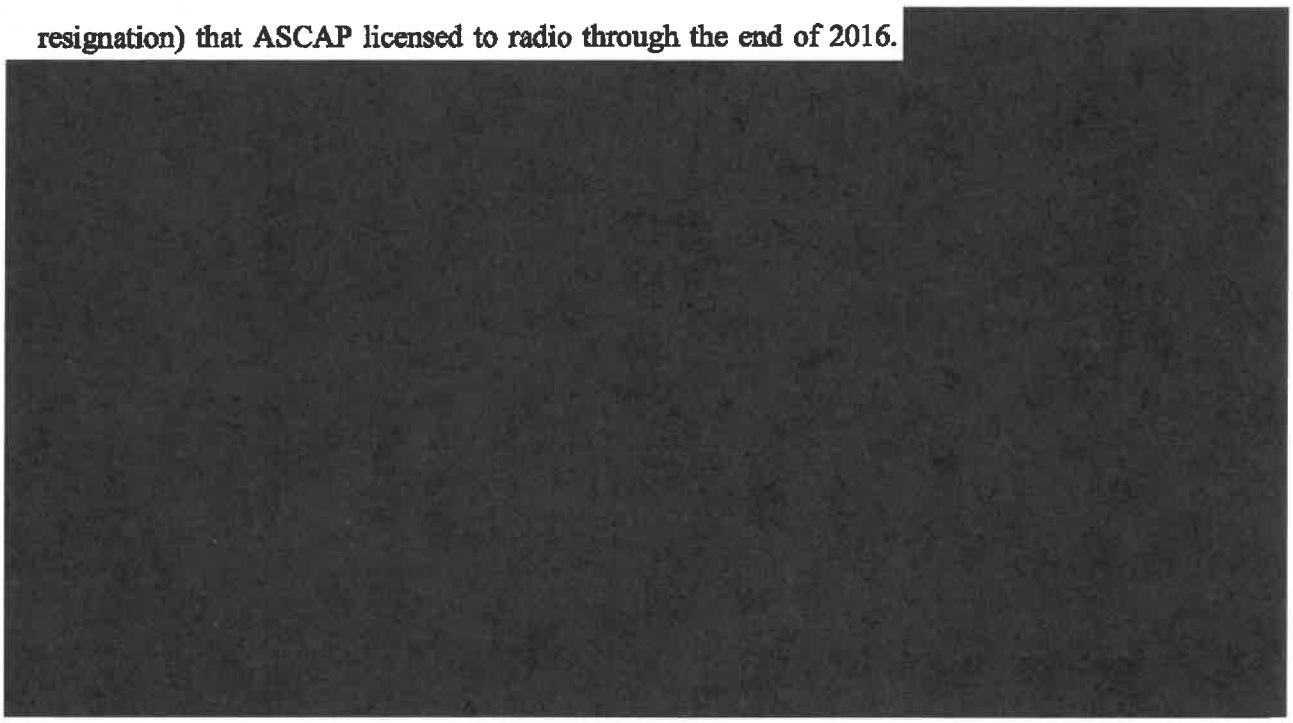
With Mr. McAnally's resignation, along with nearly a dozen others around the same time period, ASCAP has attempted to completely re-write the history and intent of the Consent Decree, as well as the plain language found within its Membership Agreement and corresponding governing documents by claiming that it has the right to pay different classes of ASCAP members (current vs. resigned) different rates for the exact same performances of the same works at radio. The entire point of the Consent Decree is to ensure that ASCAP does not unilaterally discriminate or unjustly pay its members. ASCAP's Membership Agreement is presented to prospective members on a "take it or leave it" basis, and individual members certainly do not have the power to negotiate terms incorporated into the Membership Agreement via the other ASCAP governing documents.[6] Nonetheless, "a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." HGCD Retail Servs., LLC v. 44-45 Broadway Realty Co., 37 AD App. Div. 1st Dep't., 2006). Mr. McAnally respectfully submits that it would be absurd and contrary to his "reasonable expectations" at the time he entered into ASCAP's non-negotiable Membership Agreement for his works to be paid substantially less than what his fellow ASCAP co-writers have been paid for the same works. Hearing Tr. at 63:16-19

[6] Mr. Roberts testified that the process by which ASCAP changes its rules is first through a committee of the Board of Directors, followed by a recommendation from the committee to the Board of Directors either via (1) the committee going to ASCAP Management asking Management to consider a change, or (2) Management going to the committee suggesting changes based on market factors. Hearing Tr. at 198:5-25 (Roberts).

documents assure the exact opposite.

B. ASCAP is Improperly Phasing Out Radio Premiums.

The heart of this dispute is ASCAP's phasing out of radio premiums to Mr. McAnally relating to multiple works (many of which went #1 on the Country Airplay Charts post-resignation) that ASCAP licensed to radio through the end of 2016. [redacted]



A Shift in Funding

[redacted] Bear in mind, that prior to 2014 (the year Irving Azoff launched Global Music Rights, the PRO that Mr. McAnally affiliated with following his resignation from ASCAP), Peter Boyle, the sole individual who created manual statements for resigned members, could not recall a single instance when ASCAP imposed the radio premium reduction to a resigned member. Hearing Tr. at 324:16-325:2 (Boyle). Furthermore, he confirmed that there was no "rule change" implemented to phase out the AFP to resigned members, but that it was the Board of Directors who "defin[ed], based on the

recommendation from management, that...these were the credits [credits attributable to unsurveyed media] that were to be used in that calculation," which went into effect in 2009. Hearing Tr. at 324:2-15; 322:18-19 (Boyle) ("I don't recall having to [create a resigned member statement] since the rule changed – went into effect in 2009"). Yet, ASCAP produced no such supporting documentation of any "rule change" in 2009, despite Dr. Boyle's inconsistent statements about whether there was, in fact, a "rule change."

Additionally, ASCAP is attempting to use the funding source as a means of taking away the AFP from resigned members. Dr. Boyle testified that ASCAP did not pay all of the premiums Mr. McAnally would have received had he not removed his works because ASCAP has chosen to fund the surveyed premiums with unsurveyed money. Hearing Tr. at 341:5-17 (Boyle). ASCAP is, in a sense, shifting the "credits" for highly performed works at radio *away* from the surveyed/radio column where they are actually generated and moving them into the unsurveyed column. This completely guts the purpose of rewarding high performing works at radio and cuts against ASCAP's original purpose for implementing the premium – because it acknowledged that the "base" payments do not adequately compensate the writers. *See* Nov. 1994 Amended Order, at p. 3 (Jt. Ex. 3). It also directly contradicts the Articles, which assure that "**primary consideration shall be given** to the performance of compositions...as indicated by objective surveys of performances...." Articles at Article XVII, §1(e). Here, ASCAP appears to be giving little to *no* consideration to what is supposed to be the basis for determining a "fair and nondiscriminatory" value to ASCAP's repertory. *Id.* at Article XVII, §1(d). If one were to accept ASCAP's position that the "value" of a work in ASCAP's repertory is heavily derived from what it generates from its unsurveyed general licensees (i.e., bars, night clubs and restaurants), then what sense does it make that those unsurveyed licensees only represent

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[redacted] of ASCAP's domestic distributions overall? It is simply not logical.

McAnally Should have "Phoned a Friend"

The position that ASCAP has taken is that, even though the alleged "policy" is nowhere to be found within the governing documents that apply to its members, if Mr. McAnally had questions, he simply should have called someone at ASCAP. Hearing Tr. at 252:25-253:5 in you had a question about where things are being funded from, you picked up the phone and you called ASCAP to make sure you understood."). Aside from that notion being preposterous, it was proven at the hearing that doing so would have gotten Mr. McAnally nowhere. When he and Mr. Baum met with ASCAP's Nashville executives, the Nashville executives were completely unaware of any such policy. Hearing Tr. at 395:10-396:19 (Martin) (admitting he had no awareness of any radio bonus phase-out as of 2014 and only learned about it post-resignation from someone in New York); *see also* Hearing Tr. 121:12 (Baum) (noting that Martin and the other Nashville office's co-head, LeAnn Phelan, never mentioned anything about a premium phase-out and only discussed the "5%" general licensing reduction).[7] It was further shown that it was *beyond* incredibly rare for such calls to be made to ASCAP. Hearing Tr. at 329:20-330:11 (Boyle) (acknowledging that in his 30 years, he has received one call from a potentially resigning member). Hiding any purported "policy" or "rule" from members and putting the onus on the members to figure out which questions to ask is the epitome of going beyond a contracting party's reasonable expectations and is the type of

[7] To further understand the gravity of the lack of Mr. Martin's warning to Mr. McAnally, one must understand that the two individuals have a long-standing relationship outside of the music industry. The two grew up in the same small town in Texas and have known each other their entire lives. Hearing Tr. at 63:8-13 (McAnally). Quite simply, if the AFP phase-out had actually existed before Mr. McAnally's resignation, Mr. Martin most certainly would have raised the issue to Mr. McAnally and Mr. Baum during their pre-resignation meetings.

absurdity referred to in HGCD Retail Svs., 37 AD 3d at 49-50.

What the Rules Actually Say

ASCAP, through a journey of twisting, turning and slight of hand, relies on Rule 3.3.2(ii) as the primary basis for phasing out the AFP to resigned members who elect to remove works upon resignation. Decision at 18. Yet, this is without any foundation whatsoever. Hearing Tr. at 344:11-16 (Boyle) (acknowledging that the rules are not clear in that they do not discuss funding of AFP). Rule 3.3.2(ii) is a direct result of the 1960 Order, which pre-dated the creation of the radio premium by 34 years, so it is disingenuous for ASCAP to point to that rule as its reasoning for phasing out a resigned member's premium payments. The "Writer's Distribution Formula," which originally set forth the two-pool concept (surveyed vs. unsurveyed), clearly provides that it is ***solely*** the unsurveyed media performances that are subject to the four-quarter phase-out. 1960 Order at 27-28 (Jt. Ex. 2). This language remained in the Consent Decree, as amended in 1994. *See* Nov. 1994 Amended Order at 11-12. (Jt. Ex. 3).[8] It is this formula that plainly states the following:

> 3.3.2 With respect to all other works of the resigning writer…distributions shall continue to be made to such resigning member subsequent to his resignation from the Society on the following basis:
>
> 3.3.2(i) An amount shall be calculated as to each of the funds described in Sections 3.1.2(i)-(iv) (or pursuant to 3.1.3) based on performance credits recorded for such works attributable to performances made in **surveyed media** under Licenses-in-Effect…;
>
> 3.3.2(ii) An amount shall be calculated as to each of the funds described in 3.1.2(i)-(iv)…based on performance credits recorded for such works attributable to performances in media used as proxies for performances made under unexpired licenses **in media not surveyed** by the Society for four (4) quarterly distributions

[8] *See also* McAnally Demonstrative 9, which is a compare of the various iterations of Rule 3.3.2 from the "First Version" through the most recent September 2015 version.

> after the resignation of such member (and not thereafter), the first such distribution to be equal to the full amount of such performance credits, the second such distribution to be equal to 75% of such performance credits, the third such distribution to be equal to 50% of such performance credits, and the fourth such distribution to be equal to 25% of such performance credits.

S&D Rule 3.3.2 (Jt. Ex. 14). The language could not be clearer that the only revenues that are subject to the four-quarter phaseout are the **unsurveyed** media performances because it is solely those unsurveyed/general licenses that typically expire on an annual basis throughout each year. ASCAP Answer at ¶ 11. As ASCAP executives confirmed and as noted hereinabove, nowhere within ASCAP's rules or governing documents is there a provision permitting the phasing out of the AFP – which is supposed to be for **surveyed** media and to make up for the lack of base payments for those high performing works. Moreover, it goes against logic to phase out ***surveyed*** AFP payments over four quarters when, in this case, ASCAP continued to collect on radio performances for over two years post-resignation.[9]

The RLMC License, which covers a substantial portion of Mr. McAnally's radio performances, was a final license, which locked up his works through the end of 2016 with respect to radio exploitations. These uses did not "phase out" over the course of his resignation, yet ASCAP phased out what it should have paid to Mr. McAnally for those radio performances. Such is disallowed by the rules, governing documents and the Consent Decree, and as such, the Panel should overturn the Decision.

C. It Is Illogical That One Singular Work Can Achieve a "High Performance Level" for One ASCAP Member but not for Another ASCAP Member.

Despite ASCAP's contractual obligation to treat its writers in a fair, just, and equitable

[9] To further illustrate just how illogical ASCAP's position is, the more egregious scenario would be a writer member resigning and electing to remove works (subject to licenses-in-effect) at or near the beginning of a new five to six-year RMLC license, which could leave the writer exposed to little to no AFP monies for five or more years post-resignation.

manner, and to pay its members "on the same basis and with the same elections as a member would have" had that member not resigned, ASCAP has done the direct opposite by creating two classes of writers within its distribution system – resigned members and members that have not resigned. To accept ASCAP's current position on phasing out AFP payments to resigned members would be to accept the irrational suggestion that one portion of a particular song that ASCAP has licensed to radio holds a dramatically different value to ASCAP than another portion of the same work, even though [redacted] of its domestic distributions are derived from surveyed media. *See* Hearing Tr. at 197:8-13 (Roberts). On that basis alone, on ASCAP's best day, a work removed from ASCAP's repertory should only "diminish the value" to ASCAP by no more than [redacted] Mr. McAnally respectfully suggests that this is yet another basis for the Panel to overturn the Board of Review's ill-reasoned Decision.

In this case, ASCAP takes the position that the "value" of Mr. McAnally's works in ASCAP's repertory is substantially less than the "value" of that same work as it relates to Mr. McAnally's co-writers who are ASCAP members. ASCAP received the "value" of those works when it entered into the final license agreement and locked up the performance rights relating to Mr. McAnally's works with respect to radio performances. In fact, ASCAP lost ***nothing*** by virtue of Mr. McAnally's desire to "remove" his works following the end of the licenses-in-effect. Specifically, Mr. Robers explained:

Q: ...with respect to [the 2010 RMLC License], ASCAP didn't lose anything by virtue of his resignation and removal?

A: No. For all the works that existed at the time of his resignation, they remained...part of that license because they were licensed, correct.

Hearing Tr. at 224:21-225:9 (Roberts). In fact, ASCAP did not have to tell the RMLC stations that they had to stop performing Mr. McAnally's works following his resignation.

Hearing Tr. at 335:22-336:10 (Boyle). That is because a resigned member's works are bound by ASCAP's Licenses-In-Effect rule as ASCAP wants to ensure that its licensees "know that they have a license for that work" because those licensees "pa[y] good value for it." Hearing Tr. at 203:17-20 (Roberts); *see also* Hearing Tr. at 358:22-359:8 (Boyle) ("...they wanted to know that they were going to get the repertory they paid for.").

Following Mr. McAnally's resignation, ASCAP (i) permitted those thousands of RMLC radio stations to continue performing Mr. McAnally's works and (ii) continued collecting revenues for those performances through the end of 2016. Hearing Tr. at 336:14-18 (Boyle).[10]

[redacted]

Dating back to 1994, the plain language of ASCAP's rules (and the Consent Decree) is that the purpose of the premium payments is to reflect the **actual value** of highly-performed works. On that plain language alone, there is simply no reasonable basis for ASCAP to take away those premiums from one writer while paying to others, especially when ASCAP is preventing resigned members from fully removing works and licensing directly or via another performing rights society. The resulting effect is that a particular song now has one value to one member and a drastically lower value to another member – simply on the basis that ASCAP could not enter into ***new*** licenses with bars, restaurants and night clubs, which represent no more than [redacted] of ASCAP's domestic distributions across the board (and

[10] While trying to split hairs over whether ASCAP has exclusive or non-exclusive rights, Dr. Boyle confirmed that Mr. McAnally was prevented from resigning and removing his works from ASCAP and then licensing directly to the RMLC stations. Hearing Tr. at 337:2-19 (Boyle). Thus, ASCAP had a lock on Mr. McAnally's works as it related to radio, all while choking him out of his AFP monies for multiple #1 songs.

[redacted] within the country music genre where Mr. McAnally's hit songs are predominantly performed). ASCAP's conduct and wretched self-interpretation of its rules should not be permitted.

CONCLUSION

Mr. McAnally respectfully requests that this Panel reverse the Decision of ASCAP's Board of Review, and require ASCAP to remit 100% of the AFP that was otherwise credited to his co-writers of the same works, as well as the AFP that should have been credited to Mr. McAnally on other works. As a member who exercised his right to resign and eventually remove his works from ASCAP, ASCAP has tried to finagle its way out of paying premiums to resigned members. It has done so by (1) secretly shifting around the funding sources of the premiums and (2) coming up with on-the-fly convenient internal interpretations of its rules. The source of funding of the premium should be totally irrelevant. The rules do not provide ASCAP with any right to reduce the premium payment entitlement just because a particular type of revenue may fund it. More importantly, ASCAP cannot be permitted to come up with its own secret interpretations of its rules, withhold substantial monies from its members, and then lay the blame at the feet of its members for failing to call and ask questions ahead of time that its own executives did not even know needed to be asked. ASCAP's actions have been harmful to the songwriting community and cannot go unchecked. Anything short of reversal of the Decision will result in (1) ASCAP failing to live up to the promises set forth in the Membership Agreement and corresponding governing documents, which repeatedly provide for payments to all members on the same basis in a fair, equitable, and just manner, (2) permitting ASCAP to not have to abide by the clear and plain reading of the existing rules; and (3) the elimination of a songwriter's right to choose with which performing rights society to freely affiliate without the

danger of losing hundreds of thousands of dollars.

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ectfully submitted,

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