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January 23, 2019

Sent via E-Mail to AAA

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Re: *Shane McAnally, et al. v. American Society of Composers, Authors  
and Publishers (ASCAP), AAA No. 01-18-0000-5736*

Dear Members of the Arbitral Panel:

This letter is ASCAP's response to the Panel's most recent questions, set forth in the AAA's e-mail dated January 14, 2019.

ASCAP understands the Panel's confusion regarding the matter of whether Mr. McAnally – or Global Music Rights (“GMR”) – could have licensed public performances of the works at issue in this proceeding following his resignation from ASCAP effective January 1, 2015. That confusion, I respectfully submit, stems from opposing counsel's persistent attempt to persuade first the Board of Review, and now the Panel, that everyone should focus on the *results* of the application of ASCAP's resigning member rules in Mr. McAnally's case, rather than on the issue of whether those rules were applied correctly.

As for the Panel's most recent questions directed to ASCAP, first, I discuss below the additional evidence in the record that demonstrates that both Mr. McAnally and GMR did, in fact, have the right to license the works that Mr. McAnally withdrew from ASCAP at the time of his resignation. Second, the screen shots from the GMR website were proffered simply to refute Mr. Turner's unsupported assertions concerning GMR licensing of works that are subject to ASCAP's licenses-in-effect rules. Lastly, while ASCAP has no direct knowledge of what compositions Mr. McAnally licensed to GMR prior to January 1, 2017 simply because he sought to, and succeeded in, keeping the record barren of any evidence as to the terms of the arrangements between those two parties, it is a reasonable assumption that GMR had the right to

license, at the very least, any compositions Mr. McAnally wrote between January 1, 2015 and December 31, 2016.

Before providing the details with respect to ASCAP's responses to the Panel's questions, let me first explain why ASCAP believes that the entire matter of what works Mr. McAnally or GMR could – or could not – license on and after January 1, 2015 is not relevant and, indeed, beyond the purview of the Panel.

\* \* \*

The Panel will recall that ASCAP's Board of Review has a limited jurisdictional mandate. The Board's task is simply to determine whether ASCAP's distributions to a protesting member were made in accordance with ASCAP's Articles of Association, and duly-promulgated distribution rules, agreed upon by all members, including Mr. McAnally. ASCAP Articles of Association, Art. XIV, § 4 (JX 5); ASCAP Board of Review Rules of Procedure, § 1 (McAnally Decision at 2-3).

The Panel's jurisdictional mandate is similarly limited. As with any appeal, the Panel's task is to review the evidence presented before the Board of Review and either affirm, modify, or reverse the Board of Review's determinations – as set forth in a detailed, 27-page written decision – that: (i) ASCAP's distribution rules, as duly promulgated by its Board of Directors, permitted ASCAP to phase out premiums paid to members who resign and remove their works from the ASCAP repertory; and (ii) in all respects, Claimants have been treated in a manner consistent with ASCAP's survey and distribution rules and policies, applied to Claimants and other resigned members, alike.

There is no dispute that Mr. McAnally resigned from ASCAP effective January 1, 2015, and that he elected to remove his works (and his interests in co-written works) that he had written while a member of ASCAP (hereinafter the "Removed Works") as of that date. As a result, and as set forth below, there also can be no dispute that: (i) as of January 1, 2015, GMR had the right to license the Removed Works to any prospective licensee that was not subject to a final license agreement with ASCAP that was in effect on that date; and (ii) subsequently, as ASCAP licenses-in-effect with music users expired over time, GMR had the right to license the Removed Works to those music users as of the date of expiration of their respective ASCAP licenses. Whether or not GMR *actually* licensed the Removed Works after Mr. McAnally's resignation is simply irrelevant.

Consistent with the foregoing, the record before the Board of Review was entirely devoid of any evidence regarding the terms of Mr. McAnally's deal with GMR. To be clear, Mr. McAnally refused to produce his agreement with GMR and his counsel, Mr. Turner, refused to allow Mr. McAnally – or Mr. McAnally's business manager, Mr. Baum – to testify about the terms of that deal. *See* Transcript, Board of Review Hearing, 83:23-86:18 (hereinafter cited as "B/R Tr. \_\_\_") ("Q. And what was the offer [from GMR]?" "Mr. Turner: Objection. As we previously discussed, *the terms of that Global Music contract are completely irrelevant to the*

issue before the board today, which is whether the rules of ASCAP have been applied appropriately and correctly.” B/R Tr. 85:23-86:7) (emphasis added).<sup>1</sup>

\* \* \*

Turning next to the Panel’s observation that the parties gave “completely different answers” to the Panel’s question regarding whether McAnally had the right to license the Removed Works to GMR before ASCAP’s “License-in-Effect” for those works expired, while it is literally true that the parties gave contradicting answers to that question -- with ASCAP answering “yes” and Mr. McAnally answering “no” – it appears that this is likely because the parties interpreted the question differently.

ASCAP interpreted the Panel’s question as asking whether Mr. McAnally had the right to authorize GMR to license the Removed Works to any prospective licensee prior to the expiration of ASCAP’s various licenses in effect as of the date of his resignation.<sup>2</sup> As to this question, there

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<sup>1</sup> The only question Mr. McAnally was permitted to answer regarding the licensing of his works following resignation was one posed by his own counsel, which dealt only with GMR’s authority to license the Removed Works *to radio*: “Q. Prior to the end of 2016, so prior to the end of last year, did you authorize any other society to license the works that remained in the ASCAP repertoire to radio? A. No.” (B/R Tr. 74:17-22; emphasis added). Mr. McAnally’s refusal to provide discovery or testimony regarding the terms of his deal with GMR denied ASCAP the opportunity to test this assertion, either with respect GMR and the RMLC radio stations or any other radio stations. Regardless, as the record makes clear and the Board of Review concluded, Mr. McAnally received the royalties to which he was entitled for performances on the RMLC radio stations, calculated in accordance with ASCAP’s resigned member distribution rules.

<sup>2</sup> Mr. Turner’s negative response indicates that he interpreted the Panel’s question to be asking whether GMR had the right or authority to license the Removed Works to music users that were subject to “licenses-in-effect” on the effective date of Mr. McAnally’s resignation. That negative response was therefore predicated on a misunderstanding of the scope of Mr. McAnally’s rights. All members of ASCAP grant ASCAP only nonexclusive rights of public performance. See ASCAP Membership Agreement, ¶¶ 1(a), (b) and (c), JX 26. Therefore, upon his resignation, Mr. McAnally certainly *could* have licensed the Removed Works himself, and he *could* have authorized GMR to license the Removed Works as well. Of course, as a practical matter, a music user that had an ASCAP license that remained in effect – an RMLC radio station, for example – would have had little reason to enter into a license with GMR for the Removed Works until that user’s ASCAP license expired – unless Mr. McAnally or GMR chose to offer some incentive to sign a new license on a prospective basis. Cf. *Columbia Broad. Sys. v. Am. Soc. of Composers, Authors and Publishers*, 620 F.2d 930, 937 (2d Cir. 1980) *cert. denied*, 450 U.S. 970(1981) (CBS argued that because it had an ASCAP blanket license, it was effectively prevented from seeking direct licensing from ASCAP members “because any money spent to acquire performance rights from individual copyright owners would be wasted once CBS had already paid ASCAP . . . for performance rights to all [ASCAP] music. However, nothing

can be no dispute: *GMR absolutely had the right to license the Removed Works to music users immediately following his resignation from ASCAP.*

Joint Exhibit 55, made available to the Board of Review, lists the various licensees and services that were subject to licenses-in-effect with ASCAP as of January 1, 2015, together with the “Expiration Date” for each such license. As of January 1, 2015, Mr. McAnally had the right to authorize GMR to license – and GMR had the immediate right to license – the Removed Works to any music user not listed on JX 55. Thus, GMR immediately had the right to license the Removed Works to, among others: (i) any or all of the 500+ commercial radio stations not represented by the RMLC (B/R Tr. 301:6-13); (ii) the Pandora digital music service; and (iii) the Spotify digital music service, none of which are listed in JX 55. A copy of JX55 is attached to this letter for the Panel’s convenience.

Subsequently, as the terms of other music users’ licenses-in-effect expired, Mr. McAnally also had the right to authorize GMR to license the Removed Works to those music users. Thus, for example, and as a practical matter, GMR could have licensed the Removed Works: (i) to Apple Music beginning on January 1, 2016; (ii) to ABC Inc., the owner of the ABC Television Network, beginning on January 1, 2017; (iii) to CBS Broadcasting Inc. beginning on January 1, 2018; and (iv) to literally thousands of bars, restaurants, retail stores and thousands of other “general licensees’ beginning at least on January 1, 2016.

\* \* \*

ASCAP’s detailed answers to the Panel’s specific questions are as follows:

*Question 1. Is the only evidence that you can produce in support of the position that Mr. McAnally licensed works to GMR (“GMR”) that were at the time still subject to ASCAP’s License-In-Effect Rule (“ALIER”) the materials contained in Attachment 1 to your submission dated January 7, 2019?*

*ASCAP’s Answer.* As explained above, with the exception of Mr. McAnally’s unsupported and dubious testimony that he did not authorize GMR to license his works to radio, the record is entirely devoid of any evidence regarding either Mr. McAnally’s agreement with GMR or the manner in which GMR has licensed, or attempted to license, the Removed Works. Thus, neither ASCAP nor Mr. McAnally can point this panel to any evidence in the record on that issue.

However, as also explained above, GMR unequivocally had the right – whether or not it exercised that right – to license the Removed Works to any of the tens of thousands of music users that were not subject to an ASCAP license in effect on January 1, 2015. Furthermore, as ASCAP’s various licenses-in-effect expired, GMR unequivocally had the right – whether or not it exercised that right – to begin licensing the Removed Works to those licensees for their music services.

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prevented CBS from attempting to obtain from the copyright owners performance rights for some interval following expiration of the term of the blanket license.”).

Question 2. *We note that the screen shots here are dated 1/3/19. How do these materials indicate that Mr. McAnally's ALIER compositions were available for license by GMR prior to 1/1/17?*

ASCAP's Answer. ASCAP proffered the GMR screenshots to respond to Mr. Turner's assertion in his January 2, 2019 letter to the panel – without citing any supporting evidence – that “McAnally's agreement with GMR contemplated that no licensing of any works could occur until the licenses-in-effect expired,” and that “no licenses were available to GMR on the works that are the subject of this dispute until the various conclusions of ASCAP's licenses.” J. Turner letter to Panel dated January 2, 2019 at 2. He went on to state – again without citing any supporting evidence – that “[t]he works licensed through GMR were limited to those compositions Mr. McAnally wrote after his resignation date at ASCAP and which were never subject to any license-in-effect.” *Id.* However, Mr. Turner also noted in his letter – and JX 55 confirms – that certain ASCAP licenses that were in effect as of the date of Mr. McAnally's resignation will remain in effect through 2019. *See* JX 55 (licenses with expiration dates in 2019 are still “licenses-in-effect”). Thus, one would expect that if Mr. McAnally has prohibited GMR from licensing the Removed Works unless and until all licenses in effect expire, as Mr. Turner appears to suggest, then GMR would not currently claim to have the authority to license such works. Yet, as the screenshots attached to ASCAP's submission make clear, GMR currently claims the right to license those works without any limitation whatsoever. It is a reasonable assumption that GMR would have been offering its license on a similar basis prior to January 1, 2017.

Question 3. *Are you aware of any instances where Mr. McAnally licensed any of his compositions to GMR prior to 1/1/17 that were not subject to ALIER? (Is it possible for ASCAP to determine this because ASCAP still controlled shares of certain McAnally compositions written by his co-writers)?*

ASCAP's Answer. At the behest of Mr. McAnally, there is no evidence in the record regarding his license arrangements with GMR. Therefore, ASCAP cannot directly identify any instances where Mr. McAnally licensed any of his compositions to GMR prior to 1/1/17. That said, the following evidence suggests that he did:

- Mr. McAnally elected to resign from ASCAP effective as of January 1, 2015 (Confidential Joint Stipulations, No. 11), and to remove his works (or his interests in works that he had co-written with other ASCAP members) from ASCAP effective as of that date. Transcript, Board of Review Hearing, 42:15-19 (McAnally).
- He did so in order “to move the representation of his repertoire to GMR from ASCAP.” As a result, GMR had the right to license the works that are the subject of this dispute effective as of January 1, 2015. *See* Additional Joint Stipulations, No. 2.
- Thus, as of January 1, 2015, GMR had the right to license the Removed Works to any music user that did not then have a final license agreement with ASCAP. Whether or not GMR was successful in licensing any music user not listed on JX 55 is known only to

GMR, and is not in the record of this proceeding because Mr. McAnally has chosen to withhold any evidence concerning GMR and its licensing activities.

- In addition, any works written by Mr. McAnally between January 1, 2015 and January 1, 2017, including works that he co-wrote with writers who remained members of ASCAP, would presumably have been licensed by GMR. But again, as we do not know the terms of the arrangements between Mr. McAnally and GMR, there is no way to verify this. Of course, co-written works created during that period were licensed by ASCAP for the ASCAP writer members, and presumably would have been available under GMR licenses for Mr. McAnally's shares.

*Question 4. Does your client take the position that those compositions were free and clear of any obligations under Claimant's agreements with ASCAP?*

ASCAP's Answer. ASCAP's position is that on January 1, 2015, Mr. McAnally had the immediate right to authorize GMR to license the Removed Works subject to all resigned member rules. Certainly as to works written by Mr. McAnally between January 1, 2015 and January 1, 2017, such works "were free and clear of any obligations under [Mr. McAnally's] agreements with ASCAP.

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Following discovery and the submission of extensive pre-hearing briefs, ASCAP's Board of Review conducted a day-long hearing during which it heard live testimony from five witnesses. On that record, and after considering more than 60 Joint Exhibits, it issued a comprehensive written decision in which it found that ASCAP had properly applied its rules when it phased out bonus payments to Mr. McAnally after he resigned from ASCAP and elected to remove his works from the Society's repertory. Despite these detailed submissions, no evidence was presented regarding the terms of McAnally's deal with GMR, or Mr. McAnally's or GMR's post-resignation efforts to license the Removed Works. In its decision, the Board of Review gave no credence to Mr. McAnally's "exclusivity" argument predicated on the assertions opposing counsel has repeated in this proceeding. McAnally Decision at 19-20. That is, at least in part, because, as opposing counsel has successfully argued, the terms of Mr. McAnally's deal with GMR are "completely irrelevant" to his protest. For these and the other reasons previously stated, the Panel should affirm the Board of Review's decision in all respects.

Sincerely yours,

*Richard Reimer* 15W

Richard H. Reimer

RHR:  
att.

cc: American Arbitration Association (via e-mail)  
Jason L. Turner, Esq. (via e-mail)  
Jackson Wagener, Esq.

**ASCAP LICENSES-IN-EFFECT AS OF 1/1/2015**

**Broadcasting/Cable\***

<b>Licensee</b>	<b>Licensed Service(s)</b>	<b>Expiration Date</b>
A&E TV Networks, LLC	Lifetime Television Lifetime Movie Network Lifetime Real Women A+E History FYI (formerly Bio) H2 (formerly History International) CI (Crime & Investigation Networks) MHC (Military History Channel) History en Español	7/31/19
ABC Cable Networks Group	ABC Family Disney Channel Disney Junior Disney XD Soap Net Toon Disney	12/31/17
ABC Inc.	ABC Television Network	12/31/16
AMC Network Entertainment, LLC	AMC	8/31/19
Angel Christian Television Trust, Inc.	God TV	11/30/19
Azteca International Corporation	Azteca America	12/31/19
New Video Channel America, LLC	BBC America	8/31/19
BBC Global News Ltd.	BBC World News	8/31/19
BBC Worldwide Ltd	Cbeebies	8/31/19
Bloomberg L.P.	Bloomberg TV	5/31/19
CBS Broadcasting Inc.	CBS Television Network	12/31/17
CNBC LLC	CNBC CNBC World	8/31/19
Comcast Network, LLC, The	The Comcast Network	8/31/19
Comcast SportsNet California LLC	Comcast SportsNet California	8/31/19
Comcast SportsNet Chicago LLC	Comcast SportsNet Chicago	8/31/19
Comcast SportsNet Mid-Atlantic LP	Comcast SportsNet Mid-Atlantic	8/31/19
Comcast SportsNet Northwest LLC	Comcast SportsNet Northwest	8/31/19
Comcast SportsNet Philadelphia LP	Comcast SportsNet Philadelphia	8/31/2019
Corp. for Public Broadcasting, Public Broadcasting Service, Nat'l Public Radio, Inc. and other stations licensed pursuant to 17 U.S.C. § 118.	PBS TV Network NPR Radio Stations Other CPB funding-eligible television and radio stations, and other non-commercial stations	12/31/17

\*Broadcasting/Cable licenses include distribution via licensees' website(s), mobile applications and other digital properties.

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Licensee	Licensed Service(s)	Expiration Date
	not affiliated with educational institutions	
CSTV Networks, Inc.	CBS Sports Channel	9/30/19
DirecTV Sports Net Pittsburgh, LLC	Root Sports Pittsburgh	10/31/19
DirecTV Sports Net Rocky Mountain, LLC	Root Sports Rocky Mountain	10/31/19
Discovery Communications, LLC	3net American Heroes Channel Animal Planet Destination America Discovery Channel Discovery Digital Media Discovery Education Discovery En Espanol Discovery Fit & Health Discovery Video On Demand Investigation Discovery OWN: Oprah Winfrey Network Science Channel The Hub TLC Velocity	7/31/19
Studio3 Partners LLC	Epix	8/31/19
eScapes Network LLC	eScapes	11/30/19
Fox Cable Network Services, LLC	Fox Life FXM FX FXX Nat Geo Mundo Nat Geo Wild National Geographic Channel Mundo FOX FOXNET Fox College Sports Fox Soccer Plus Fox Sports 1 Fox Sports 2 Fox Deportes Fox Sports Arizona Fox Sports Detroit Fox Sports Florida Fox Sports Midwest Fox Sports North Fox Sports Ohio Fox Sports San Diego Fox Sports South Fox Sports Southwest Fox Sports West	8/31/19

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Licensee	Licensed Service(s)	Expiration Date
	Fox Sports Wisconsin Fox Sports Prime Ticket SportSouth Sun Sports Sports Time Ohio	
Fusion Media Network, LLC	Fusion	10/31/19
Gol TV Inc	Gol TV	11/30/19
Crown Media United States LLC	Hallmark Hallmark Movie	8/31/19
HDNet LLC	AXS TV HDNet Movies	12/31/19
Home Box Office Inc., a division of Time Warner Entertainment Company, L.P.	HBO HBO2 HBO Signature HBO Family HBO Comedy HBO Zone HBO Latin HBO HDTV Cinemax MoreMax ActionMax ThrillerMax 5Max OuterMax WMax HBO-On-Demand Max-On-Demand	6/30/19
Houston Sports Holdings, LLC	Root Sports Southwest	10/31/19
IFCTV, LLC	IFC	8/31/19
IN DEMAND LLC	Residential PPV/VOD via residential MSOs	5/31/19
Inspirational Network, Inc.	Inspirational Network	10/31/19
Mag Rack Entertainment, Inc.	Mag Rack	12/31/19
MSG Holdings, LP	MSG	8/31/19
Sports Channel Associates	MSG Plus	8/31/19
MSNBC Cable LLC	MSNBC	8/31/19
NBC Sports Network L.P.	NBC Sports Network	8/31/19
NBCUniversal Media LLC	Mun2	8/31/19
NBCUniversal Media LLC	NECN (formerly New England Cable News)	8/31/19
NBCUniversal Media, LLC	NBC Television Network	8/31/19
NBCUniversal Media, LLC	Bravo Chiller Network CLOO E! Entertainment Television Esquire G4 Oxygen Cable	8/31/19

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Licensee	Licensed Service(s)	Expiration Date
	Sprout Syfy Universal HD USA Network	
NCTA (National Cable and Telecommunications Association)	Cable TV System Operators	12/31/16
Network Creative Group LLC	Blue Highways TV	11/31/19
Newsmax Media Inc.	Newsmax TV	11/30/19
NW Sports Net, LLC	Root Sports Northwest	10/31/19
Oral Roberts University (d/b/a Golden Eagle Broadcasting)	Golden Eagle Broadcasting	12/31/19
RMLC (Radio Music License Committee)	Commercial Radio Stations	12/31/16
Scripps Networks, LLC	Home and Garden Television (HGTV) Food Network DIY Network Fine Living Network Cooking Channel Great American Country (GAC) Network Travel Channel	5/31/19
Showtime Networks, Inc.	Showtime The Movie Channel Flix Smithsonian Channel	6/30/19
Sirius XM Radio Inc.	SiriusXM satellite radio	12/31/16
Sports Channel New England LLC	Comcast SportsNet New England	8/31/19
Sports Channel Pacific Associates	Comcast SportsNet Bay Area	8/31/19
Sterling Entertainment Enterprises LLC	SportsNet New York	8/31/19
SundanceTV LLC	Sundance Channel	8/31/19
Tennis Channel, Inc., The	Tennis Channel	10/31/19
TGC, LLC	Golf Channel	8/31/19
TMLC (Television Music License Committee)	Commercial Television Stations	12/31/16
Turner Broadcasting System, Inc.	Boomerang Network Cartoon Network/Adult Swim TBS TruTV Turner Classic Movies (TCM) Turner Network Television (TNT) Airport Network CNN.com/CNNMoney.com CNN Espanol CNN International (domestic feed) Cable News Network (CNN) HLN	8/31/19

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Licensee	Licensed Service(s)	Expiration Date
TV Guide Networks, LLC	TV Guide Network	8/31/19
Up Entertainment LLC (FKA Gospel Music Channel)	UP	10/31/19
Verizon FiOS	MVPD	9/30/19
Viacom Inc.	BET BET Gospel BET HD BET Hip Hop Centric CMT CMT HD Comedy Central Comedy Central HD LOGO Mobile Comedy Mobile MTV Mobile MTV Tr3s Mobile Nick MTV MTV HD MTV Hits MTV Jams MTV Tr3s MTV2 mtvU Nick Jr Nick Too Nick Toons Nickelodeon Nickelodeon HD Palladia Spike Spike HD Teen Nick Tr3sB TVLand VH1 VH1 Classic VH1 HD VFH1 Pure Country VH1 Soul	8/31/19
WE TV, LLC	WE	8/31/19

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## Digital Platforms and Services<sup>†</sup>

Licensee	Licensed Service(s)	Expiration Date
Apple Inc.	Apple iTunes Radio	12/31/15
Apple Inc.	The following as made available solely on the iTunes Store and Apple websites or applications: <ul style="list-style-type: none"> <li>• Previews of content sold through iTunes Store</li> <li>• Short videos, music videos and movie trailers available solely on a free-to-the-user basis</li> <li>• Audio-visual content promoting Apple products and services</li> <li>• Streams in connection with "iTunes Match" service</li> <li>• Concerts made available solely on a free-to-the-user basis</li> </ul>	12/31/15
Christian Copyright Solutions, Inc.	Christian Copyright Solutions and its affiliates	12/31/16
Cricket Communications, Inc.	Muve Music	3/31/15
Disney Interactive	Disney/ABC internet sites and services	12/31/15
Guvera USA, Inc.	Guvera	12/31/15
Omnifone S.A.R.L.	Sony Music Unlimited	3/31/15
StreamLicensing, Inc.	StreamLicensing and its affiliates	12/31/15

## Other Licenses<sup>‡</sup>

Licensee	Licensed Service(s)	Expiration Date
AMI Entertainment, Inc.	Digital Jukeboxes	12/31/15
	Hotels/Motels/Resorts	12/31/18
NBA Properties, Inc. (NBA Entertainment Division)	NBA Games, Events and NBA Stores	7/31/18
Sonifi Solutions, Inc. (formerly Lodgenet Interactive Corp.)	Hotel PPV Service and Hospital Inpatient Service	12/31/18
TouchTunes Music Corp.	Digital Jukeboxes & TouchTunes Website	12/31/15

<sup>†</sup>ASCAP licenses many digital platforms, such as websites and Internet services, for a term of one year that renews automatically unless terminated by either party.

<sup>‡</sup>ASCAP licenses many venues and businesses for a term of one year that renews automatically unless terminated by either party. A list of many such venues and businesses is available on the ASCAP website at <http://www.ascap.com/licensing>.

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