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January 28, 2019

Bob Donnelly, Esq.
Judith Prowda, Esq.
Alida Camp, Esq.
VIA AAA E-Mail

Re: *McAnally v. ASCAP*; AAA Case No. 01-18-0000-5736

Dear Panel:

In response to your follow-up questions of January 14, 2019, my client understands why you are finding yourselves confused based on the parties' responses. Hopefully this helps resolve the confusion.

At the outset, we are compelled to remind the Panel about ASCAP's multiple prior objections to the introduction of new evidence in this proceeding. You may recall that in April of last year, Mr. McAnally sought to introduce certain new evidence in these "appellate" proceedings. In response to that request, ASCAP was quick to take the position that the Panel is not permitted to accept any new evidence and is confined solely to evidence that is in the Record from the underlying proceedings. See ASCAP letter dated April 27, 2018. For that reason alone, ASCAP should be held to the same standard and should not be permitted to introduce new purported evidence to support the baseless assertions made in its letter dated January 7, 2019.

The following represents what *is* in the Record (despite ASCAP's repeated misrepresentations of the Record being devoid of any such evidence) with respect to the issue of GMR's licensing (or lack thereof) of Mr. McAnally's compositions:

- The Board of Review ("BOR") continually ruled that Mr. McAnally's contract with GMR is irrelevant as to whether or not ASCAP properly paid Mr. McAnally for his

compositions that were licensed by ASCAP after his resignation due to its licenses-in-effect rules. At the very start of the BOR hearing, the BOR addressed this issue again. It stated, “[h]aving considered the issue [ASCAP’s request that Mr. McAnally produce his agreement and correspondence with GMR], the board has determined that ASCAP has not shown at the present time that a substantial need exists to produce these confidential materials, which appear to have limited relevance. Accordingly, the board declines to order the production of these materials at this time.” Hearing Tr. at 6:23-7:7.

- When Mr. Reimer attempted to get into the terms of Mr. McAnally’s contract with GMR, the BOR Secretary again ruled that the terms of the GMR contract were off limits and irrelevant to the matter before the BOR. *See* Hearing Tr. at 85:23-86:22.
- Mr. McAnally testified that he did not authorize any other performing rights society to license any of his works to radio that remained in the ASCAP repertory and subject to ASCAP’s licenses-in-effect prior to the end of 2016. Hearing Tr. at 74:19-22.
- Brian Roberts, ASCAP’s COO, testified that he had no reason to disbelieve Mr. McAnally’s testimony. Hearing Tr. at 262:8-17. This is the same testimony that Mr. Reimer characterizes as “dubious,” even though its own COO acknowledged there was no reason to disbelieve Mr. McAnally. The Panel should disregard Mr. Reimer’s personal opinions as to the weight of the testimony provided, especially in light of ASCAP’s acceptance of its truthfulness.

That is the evidence that is in the Record. That is the only evidence that the Panel is permitted to consider according to ASCAP’s own assertion in its April 27, 2018, letter to the Panel. For ASCAP to declare that Mr. McAnally had the right to license his works before ASCAP’s licenses-in-effect expired is nothing short of a smoke screen. ASCAP’s chief economist, Dr. Peter Boyle, stated as much in his testimony when he confirmed that Mr. McAnally could **not** have licensed his ASCAP works directly to radio while ASCAP still had a license in effect:

Q: So he could have in 2014 come to ASCAP and said ‘I’m resigning and I’m going to take my works and license them directly to the RMLC licensed stations’?

A: **No, he couldn’t have done that.** He was bound by the provisions of resigning members of the compendium that – for licenses in effect at the time of resignation. He was bound by that agreement...He could – you know, he could have talked to stations potentially. I’m not saying it would have worked. I’m just saying he has – legally, he has the right to do that.

Hearing Tr. at 337:11-24 (emphasis added). That is totally consistent with Mr. McAnally’s testimony, as well as his response via my January 2, 2019, letter. Mr. McAnally was unable to permit any other society to license his works that remained subject to an ASCAP license-in-effect,

in no small part due to the fact that the licensees rely on those licenses-in-effect to avoid having to pay twice for the same rights.

Difference between ASCAP Compositions and Post-ASCAP Compositions

As ASCAP noted in its letter, it is important to recognize that there are essentially two groups of compositions written by Mr. McAnally. The first group are all compositions that were composed *prior to* the effective date of resignation from ASCAP (the “ASCAP Compositions”)¹. ASCAP continues, to this day, to license the ASCAP Compositions to a handful of licensees. As referenced by ASCAP’s attachment titled “ASCAP LICENSES-IN-EFFECT AS OF 1/1/2015,” the list contains all of the licensees that ASCAP maintained rights to with respect to Mr. McAnally’s ASCAP Compositions until such time as each individual license expired/expires. As those licenses expire, of course, Mr. McAnally’s new society will have the right to license his works to that particular licensee. But again, this is all just a red herring because the primary licensee at issue is the RMLC. According to ASCAP’s own testimony, that sole license represented around 90% of the royalties paid to Mr. McAnally prior to his resignation. No other society (other than ASCAP) had the ability to license the ASCAP Compositions to the RMLC stations until January 1, 2017. As noted in my prior letter, and as substantiated by Mr. McAnally’s testimony, such was the case. You will see that the last license on the list will expire by the end of this year, which means ASCAP still licenses the ASCAP Compositions to these remaining licensees through the end of 2019 and no other society may license those same ASCAP Compositions to those licensees until ASCAP’s licenses expire. Ultimately, all of these lingering licenses-in-effect have little impact whatsoever on Mr. McAnally’s royalties in light of the fact that the RMLC license has expired, and, as of January 1, 2017, Mr. McAnally’s entire repertoire is being handled by GMR with respect to radio.


The second group of compositions are those that Mr. McAnally composed *after* the effective date of resignation (the “GMR Compositions”). ASCAP never had (and never will have) any rights to license the GMR Compositions because none of these compositions existed before the ASCAP resignation effective date. It is the GMR Compositions that GMR initially entered into an agreement with Mr. McAnally to license on his behalf. Only after ASCAP’s licenses expire can GMR take over licensing on Mr. McAnally’s behalf with respect to the ASCAP Compositions. To use an example, “Leave the Night On,” which constitutes an ASCAP Composition, ASCAP still has a license in place with AMC Network Entertainment, LLC through August 31, 2019. GMR cannot license Mr. McAnally’s share in “Leave the Night On” to AMC Network Entertainment, LLC until September 1, 2019. But, GMR would now be permitted to license that song to CBS Broadcasting, Inc., since ASCAP’s license with CBS Broadcasting, Inc. expired on December 31, 2017. Put another way, it is now possible for GMR to license the ASCAP Compositions to certain licensees, *so long as ASCAP does not still have a license in place that was*

¹ These are the same compositions that ASCAP refers to in its letter as the “Removed Works.”

*in place as of December 31, 2014.*² Ultimately, because the dispute revolves around distributions made with respect to Mr. McAnally's **radio** performances, we reiterate that ASCAP, and only ASCAP, licensed Mr. McAnally's interest in the ASCAP Compositions through December 31, 2016, to the RMLC stations – the source of approximately 90% of the revenues attributable to the domestic surveyed media distributions. It is the period of time between 2014 and 2016 when ASCAP drastically underpaid Mr. McAnally for the ASCAP Compositions that were performed on radio in accordance with ASCAP's RMLC license.

On the other hand, GMR Compositions may only be licensed by GMR because those compositions were not created while Mr. McAnally was an active member at ASCAP. None of Mr. McAnally's testimony is inconsistent with this and ASCAP has previously acknowledged that it has no reason to disbelieve Mr. McAnally's truthful representations. ASCAP's post-hearing submissions do nothing more than attempt to confuse the Panel with red herring arguments that are irrelevant to the underlying dispute between the parties, as recognized by the BOR. The fact remains that ASCAP was the only society that licensed Mr. McAnally's works (created before his effective date of resignation) to radio, yet ASCAP chose to penalize him by paying him substantially less than it paid his co-writers for the exact same radio performances during the exact same time periods.

Should you have any follow up questions or need further clarification, I am most happy to make myself available for a conference call or to provide additional written responses. Thank you for your consideration of this matter.

Sincerely,

Jason L. Turner

Enclosures

cc: Richard Reimer
Jackson Wagener
Ryan Brain / AAA

² As an aside, ASCAP has vehemently refused to permit the disclosure of the list of licenses to GMR claiming that it is highly proprietary, even though it merely includes the identity of the licensee and the expiration date. ASCAP's position has been that if GMR wants to attempt to license Mr. McAnally's works with a particular licensee who still has a license-in-effect at ASCAP, it can try, but the licensee will refuse. It is another example of the vicious handling of this matter by not permitting logical exchange of information to ensure full licensing of Mr. McAnally's works.