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February 15, 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 further follow-up questions on February 6, 2019, my client responds as follows:

1. Do you interpret Rule 3.3.1(i) of ASCAP's Survey and Distribution Rules & Policies to apply to this dispute? If so, was it correctly applied by the ASCAP Board of Review in its decision?

The parties have disagreed from the inception of this dispute as to the applicability of Rule 3.3.1(i). Claimant's position is that this subsection of Rule 3 exists to comply with ASCAP's obligations under the Consent Decree. Specifically, the Consent Decree requires that ASCAP pay all writers and publishers, whether resigned or not, on the same basis as non-resigning members. This language is straight from the 1960 Order. What ASCAP has tried to do is wiggle out of that obligation because of an alleged "competitive disadvantage" of having to pay resigned members radio bonuses. *See S&D Comm. Mtg. PPT*, Aug. 19, 2015 (Jt. Ex. 23 at p. 27 [ASCAP0432]), referenced excerpts attached hereto as **Exhibit A**. ASCAP claims that it is not good business to pay radio premiums to its resigned members such as Mr. McAnally, so ASCAP management, and by extension, the Board of Review, created an interpretation to attack resigning members in retaliation of other societies who were "targeting" writers such as Mr. McAnally. *Id.* at pp. 5 & 28 [ASCAP0410 and 0433], attached hereto. ASCAP also very clearly

moves funding and monies around from one source to another, and even blatantly determines who the “entitled parties” are when it comes to distribution of license fees collected on behalf of its members. *Id.* at p.v38 [ASCAP0443], attached hereto.

The language of the 1960 Order provides, in part:

In carrying out the provisions of subsection (G) of Section IV of the Judgment, 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.

See 1960 Order at 2, (Jt. Ex. 2), (emphasis added).

The concept here is precisely why ASCAP’s licenses-in-effect rules exist – to prevent a particular licensee from having to pay “twice” for the same license. Put another way, if ASCAP has a license in place with the RMLC, the resigning member cannot go out and force the RMLC to enter into a new license for the same works with the new society. Further, in this case, many, if not all of Mr. McAnally’s ASCAP works are co-published by other ASCAP member publishers whose ASCAP memberships did not terminate (i.e., continuing members in interest as referenced above in the 1960 Order). For example, as we have previously illustrated, many of Mr. McAnally’s works were co-written with other ASCAP writer members. We looked at a few of those royalty distribution examples at the hearing. Further, the majority of Mr. McAnally’s works in his Crazy Water Music catalog were co-published by another ASCAP publisher member, Little Blue Egg c/o Kobalt Songs Music Publishing, while most of his Smack Ink catalog was co-published by Universal Music Corporation. See Jt. Ex. 44 at 2. Little Blue Egg, Kobalt Songs Music Publishing, and Universal Music Corporation remain ASCAP publisher members as of today.

This is the crux of the dispute. ASCAP asserts that because Mr. McAnally indicated his desire to withdraw his works from ASCAP, it is entitled to apply the four-quarter phase-out across the board to all distributions, including those associated with surveyed radio performances. Yet, all Mr. McAnally did was comply with ASCAP’s rules, which prohibited him (or any other society on his behalf) from licensing his works to any ASCAP licensee that still had a license in place as of the date of his resignation (i.e., the licenses-in-effect). Again, the extreme bulk of Mr. McAnally’s royalties are derived from surveyed radio performances. See Hearing Tr. at 109:2-21 (Baum) (testifying that the portion of McAnally’s pre-resignation distributions that were designed as “unsurveyed” performances averaged around 5%). **ASCAP maintained the sole license to radio on behalf of Mr. McAnally’s works created prior to January 1, 2017.**

Mr. McAnally disagrees with the Board of Review’s application of ASCAP management’s interpretation of Rule 3.3.1 and 3.3.2. Rule 3.3.1 requires equal payment, provided, that in the instance of a resigned writer, such is subject to a four-quarter phase-out

solely with respect to performances in unsurveyed media (i.e., bars, restaurants, etc.) as those licenses are annual licenses, unlike surveyed media (i.e., radio), which are multi-year licenses. The Board of Review claims that Rule 3.3.2 “provides a different distribution mechanism based on three categories of licenses...” and points to (1) “final licenses for surveyed media,” (2) “interim licenses for surveyed media,” and (2) “unsurveyed media licenses.” See Decision at 6-7. Mr. McAnally disagrees with this assertion as nothing pertaining to items (1) and (2) (i.e., surveyed media performances) are even remotely mentioned within the text of Rule 3.3.2.¹

The Board of Review further attempted to re-write history by claiming, in a misleading manner, that “[t]he resigning member rules date back to at least 1960.” Decision at 7. While it is true that the text of Rule 3.3.1 dates back to the 1960 Consent Decree, it is not accurate to extrapolate an intention to phase out **surveyed media** royalties from radio performances. Recall that the original radio premium (the “Radio Feature Premium”) did not even come into existence until 1994. See Amended Consent Decree, 1994, Jt. Ex. 3. It was with the 1994 amendments that ASCAP clearly outlined how payments to resigning members would work, which resulted in the creation of what is now known as Rule 3.3.2²:

- (1) ASCAP calculates the amount based on performances recorded for each work;
- (2) ASCAP then takes that amount and breaks it into two portions:
 - a. Surveyed media
 - b. Unsurveyed media
- (3) The first portion (surveyed media) “shall be distributed to such resigning member on the basis of performances made under unexpired licenses in surveyed media made prior to the resignation of such member”; and
- (4) The second portion (unsurveyed media) is paid in four quarterly distributions subject to the four-quarter phase-out.

See Jt. Ex. 3 at 11-12.

To apply the four-quarter phase-out on surveyed media radio performances (i.e., #3 above) is simply unsupported by ASCAP’s Rules. ASCAP asserts that it is justifiable for Mr. McAnally to be subject to anywhere up to a 90% reduction in royalties simply because it could not enter into new licenses with bars, restaurants and clubs while it continued licensing those very same works for several years to the RMLC radio stations, which generated the extreme majority of performances of Mr. McAnally’s works. Mr. McAnally disagrees and the rules do not support ASCAP’s tenuous interpretation being espoused in this proceeding. Mr. McAnally submits, as set out in more detail in his prior briefing, that the answer to this dispute does not rest on the interpretation of Rule 3.3.1 or 3.3.2, but rather, the Panel must look to Rule 2.8, which is the rule governing the radio premium. Recall that Rule 2.8 expressly provides:

¹ Rule 3.3.2 refers back to Rule 1.11.3 of the Compendium, which provides that “Licenses-in-Effect” means only (1) final written agreements and (2) final orders or judgments entered into as a result of a legal proceeding.

² The text of Rule 3.3.1, which originated in the 1960 Consent Decree, remained in place with the 1994 amendments, which added the text that is now found within Rule 3.3.2 due to the creation of the radio premium.

[The premium applies to] works achieving high levels of Feature Performances in ASCAP's terrestrial radio, satellite radio and music streaming surveys, respectively...; provided, however, that [the premiums] shall be based primarily on the number of Feature Performance credits or plays received by the works for performances in each such survey quarter.

S&D Rule 2.8. When the premium came into existence in 1994, ASCAP's then-president stated that the premiums "will allow ASCAP to make larger payments, to more hit songs at radio, **and which will be funded only from revenues attributable to radio performances.**" See Corr. Jt. Ex. 27 (emphasis added). Radio performances are not unsurveyed – they are surveyed. Mr. McAnally's works achieved those high performance levels with respect to his co-writers' shares, yet somehow, his shares of the same works did not, according to ASCAP. The logic simply does not add up, nor is it supported by ASCAP's rules. Yet, what is clear from the documents and testimony is what ASCAP has presented in black and white – that management has concocted a totally unsupported interpretation of these rules solely on the basis of retaliating against resigned members to avoid "funding the competition."

2. Has GMR licensed any of the "ASCAP Compositions" for any other purpose at any time prior to January 1, 2017?

Yes, in full compliance with ASCAP's various rules, GMR slowly took over certain licensing of Mr. McAnally's ASCAP Compositions as quickly as possible after determining that ASCAP's licenses had expired. This was in spite of ASCAP's refusal to be forthcoming and transparent with Mr. McAnally and his new society in that it refused to provide or permit the disclosure of ASCAP's licenses-in-effect list post-resignation, resulting in a wild goose chase to try to ensure that no licensee was utilizing Mr. McAnally's works without a proper license. ASCAP's response, in essence, was "go ahead and try to license – if the party still has a license with ASCAP, it will likely refuse to enter into a new one and you will have to wait." Ultimately, it was public knowledge that the major license at issue in this dispute, the RMLC license with thousands of radio stations, remained in effect through the end of 2016, so GMR did not begin licensing any of the ASCAP Compositions to those RMLC stations until January 1, 2017. To this day, ASCAP has refused to permit the disclosure of the list of "Licenses-in-Effect as of 1/1/2015" to GMR, which would enable GMR and Mr. McAnally the ability to fully license the works without any gaps in time.³

³ Without any substantiation or reasoning, ASCAP unilaterally declares that the list is highly confidential and proprietary, even though it merely contains the identity of the licensee and the expiration date. There is no proprietary information such as financial information, terms of agreement or otherwise on the list. Had ASCAP been operating in good faith, it would have immediately disclosed this list to Mr. McAnally upon his resignation to enable him and his new society the ability to enter into new licenses upon expiration, as opposed to having to contact each party, attempt to enter into a license, and wait for the licensee to refuse on the basis of an existing ASCAP license.

3. What evidence is there which demonstrates that Mr. McAnally actually removed these Removed Works or signaled his intention to remove these Removed Works?

Attached as **Exhibit B** are copies of Mr. McAnally's written resignation notification forms for two of his publishing designees (Crazy Water Music and Smack Ink). At the very bottom of the page, you will see where Mr. McAnally indicated his desire to "remove some or all of [his] works." The writer membership resignation was completed through ASCAP's online portal, as confirmed by the attached email confirmation (attached as **Exhibit C**). Consistent with the Rules, and with how ASCAP continues to operate today via its continued licensing of Mr. McAnally's works to certain licensees, Mr. McAnally could not license his ASCAP works to any licensee that maintained a license with ASCAP. Based on the information provided by ASCAP, the final license applicable to Mr. McAnally will expire at the end of this year, at which point, all of Mr. McAnally's works will finally be free from the grips of ASCAP, nearly *six years* after his resignation.

Thank you for your consideration of this matter.

Sincerely,



Jason L. Turner

Enclosures

cc: Richard Reimer
Jackson Wagener
Ryan Brain / AAA



ascap

Distribution Enhancements

Survey and Distribution Committee

August 19, 2015

Privileged and Confidential
Attorney-Client Communication



The Competitive Situation



- BMI is out paying ASCAP for radio performances of top Recurrent songs
 - PRS raised the issue during their recent technical visit
 - Received claims and evidence of outpayments from members
 - BMI bonuses works with 2.5 million or more lifetime radio plays plus 15,000 or more performances in current quarter. 50-56% out payment on certain works.
- Competition with GMR and SESAC
 - Targeting writers of recurrent songs

Future Competitive Disadvantage

- AFP: \$2.2M/year or 1.8% of AFP is currently going to resigned members
- TVP: \$.8M/year or 4.2% of TVP is currently going to resigned members today
- ASCAP won't be able to compensate our existing members relative to other PROs that do not pay resigned members
- Especially if the resignation trajectory continues, ASCAP will be at a noticeable competitive disadvantage vis a vis other PROs

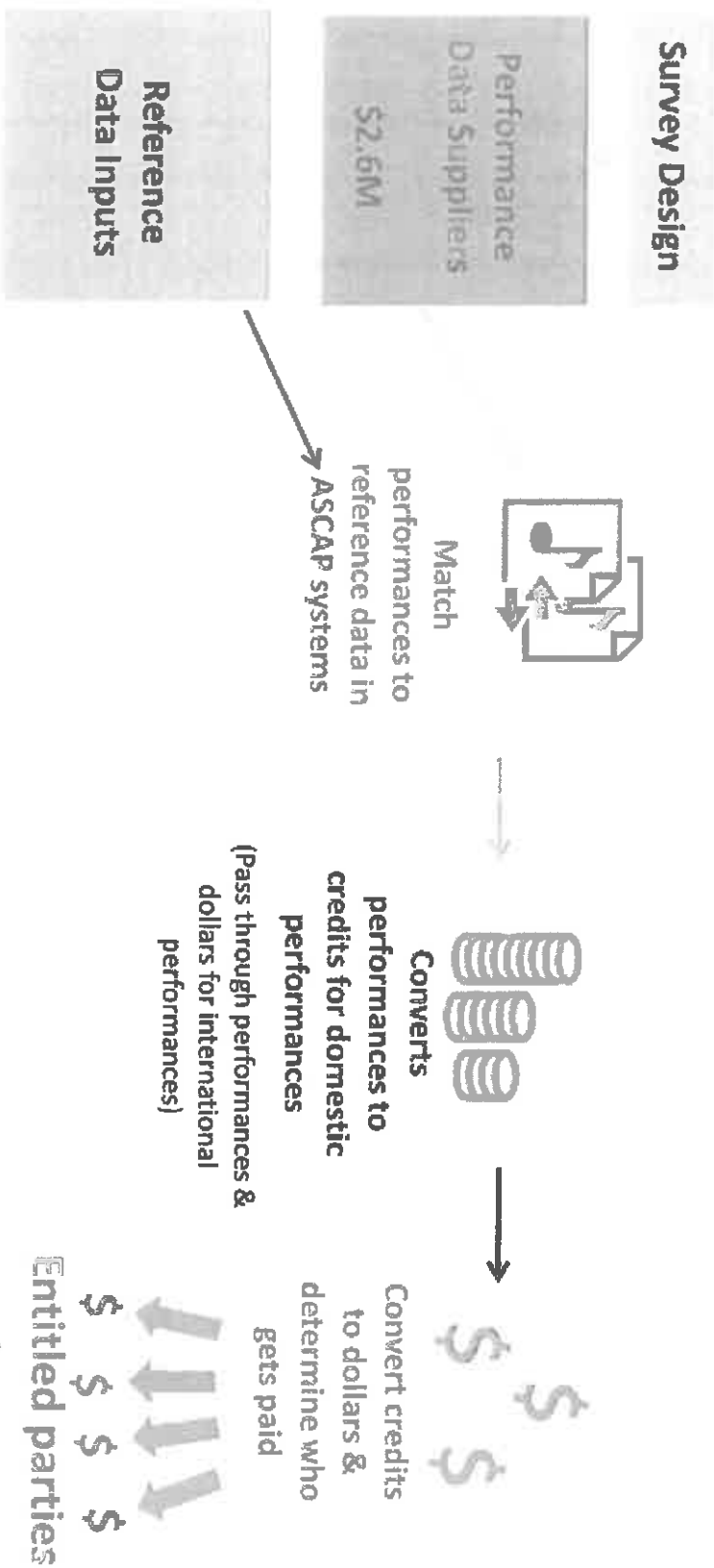
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Attorney-Client Communication



Competitive Benefits to Discontinuing Premiums to Resigned Members

- ASCAP can maintain the full bonus pool to compensate and reward current members
- Bonuses to resigned members effectively serve to fund the competition
- Preserving the bonus pool allows ASCAP to competitively compensate members thereby attracting new members to join ASCAP

High Level Distribution Flow



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Attorney-Client Communication



ASCAP PUBLISHER RESIGNATION NOTIFICATION FORM

We regret your intention to resign. As a member-owned performing rights organization, we think that there are many advantages to continuing your membership with ASCAP. If you wish to discuss continuing your membership, please call us.

INSTRUCTIONS:

1. Important Notice: Your authorized ASCAP publisher's representative must personally sign this form, and fill out all parts of Section 1. No other signature or form of notice will be accepted. This form, fully completed, accurate and timely, must be received at the address given below by the applicable deadline.
2. Deadlines: We must receive this form no more than 9 months nor less than 6 months before your effective resignation date. Your effective resignation date is the first day of the calendar quarter following the anniversary of your election date. For example, if your election date was September 15, your effective resignation date would be October 1, and we must receive this fully completed and signed form no sooner than the previous January 1 nor later than the previous April 1.
3. Further Information: All procedures related to your membership resignation and handling of your catalog are set forth in ASCAP's Compendium of Rules and Regulations, and Policies Supplemental to the Articles of Association. A complete copy can be found on ASCAP's website www.ascap.com.
4. Inquiries: Should you have any questions about how to determine the deadline for receiving this form or any other questions related to resignation, please call us at 1-800-95ASCAP, or log into your Member Access account and create a Member Service Inquiry.

SECTION 1 – MEMBERSHIP INFORMATION (COMPLETE ALL SPACES)

CRAZY Water Music

PUBLISHER MEMBER NAME

[REDACTED]

SOCIAL SECURITY NUMBER OR TAX I.D. NUMBER

[REDACTED]

ASCAP MEMBERSHIP ID CODE

05/09/2008

MEMBERSHIP ELECTION DATE (MM/DD/YY)

SHANE McAnally

AUTHORIZED PUBLISHER REPRESENTATIVE (PRINT)

[REDACTED]

E-MAIL ADDRESS

[Signature]

SIGNATURE OF PUBLISHER REPRESENTATIVE

12/17/2013

DATE

SECTION 2 – FUTURE LICENSING OPTIONS

If you would like ASCAP to continue to license all of the works you have published that are assigned to ASCAP, and continue to pay royalties to you for surveyed performances of those works, you do not need to complete this section of the form.

If, however, you would like to remove some or all of your works from the ASCAP repertory, you may do so, subject to ASCAP's rules and regulations pertaining to resignation including those concerning continuing members-in-interest and licenses-in-effect.

Please check here if you would like to remove some or all of your works. We will then send you further instructions.

PLEASE MAIL COMPLETED FORM TO:
ASCAP Resignation Notification
7920 Sunset Blvd., Third Floor
Los Angeles, CA 90046



For ASCAP Office Use: Resignation Effective ____/____/____

April 2011



ASCAP PUBLISHER RESIGNATION NOTIFICATION FORM

We regret your intention to resign. As a member-owned performing rights organization, we think that there are many advantages to continuing your membership with ASCAP. If you wish to discuss continuing your membership, please call us.

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1. Important Notice: Your authorized ASCAP publisher's representative must personally sign this form, and fill out all parts of Section 1. No other signature or form of notice will be accepted. This form, fully completed, accurate and timely, must be received at the address given below by the applicable deadline.
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SECTION 1 – MEMBERSHIP INFORMATION (COMPLETE ALL SPACES)

Smack Ink
PUBLISHER MEMBER NAME

[REDACTED] SOCIAL SECURITY NUMBER OR TAX I.D. NUMBER [REDACTED] ASCAP MEMBERSHIP ID CODE 06/25/2012 MEMBERSHIP ELECTION DATE (MM/DD/YY)

Shane McNally AUTHORIZED PUBLISHER REPRESENTATIVE (PRINT) [REDACTED] E-MAIL ADDRESS

[Signature] SIGNATURE OF PUBLISHER REPRESENTATIVE 12/17/2013 DATE

SECTION 2 – FUTURE LICENSING OPTIONS

If you would like ASCAP to continue to license all of the works you have published that are assigned to ASCAP, and continue to pay royalties to you for surveyed performances of those works, you do not need to complete this section of the form.

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Please check here if you would like to remove some or all of your works. We will then send you further instructions.

PLEASE MAIL COMPLETED FORM TO:
ASCAP Resignation Notification
7920 Sunset Blvd., Third Floor
Los Angeles, CA 90046

For ASCAP Office Use: Resignation Effective ____/____/____

Begin forwarded message:

From: ASCAP Member Services <donotreply@ascap.com>
Date: May 19, 2014 at 3:54:44 PM CDT
To: [REDACTED]
Subject: Your request for resignation from ASCAP Membership has been received



THIS EMAIL WAS GENERATED AUTOMATICALLY - PLEASE DO NOT REPLY

Dear SHANE MC ANALLY,

Your notification requesting resignation from ASCAP membership was received, and assigned Transaction ID **25188** when it was submitted through Member Access.

In your resignation notification you indicated that you do not want ASCAP to license your interest for some or all works represented by ASCAP during your membership.

Your resignation is being processed and the effective date will be: **01/01/2015**

Please retain or print this e-mail for your records.

Sincerely,

ASCAP
Member Services

