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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:

Mr. McAnally's February 15, 2019 submission to the Panel (the "Submission") is yet another thinly veiled effort to persuade the Panel that the *results* of the application of ASCAP's duly promulgated resigned member royalty distribution rules should lead the Panel to overturn the decision of the ASCAP Board of Review. In essence, the Submission is merely a rehash of Mr. McAnally's "fairness" argument that was rejected by the Board of Review, cloaked, again, in a far-fetched, self-serving reading of ASCAP's governing documents and unsupported assertions concerning GMR's licensing authority.

The Submission's central premise – that ASCAP is required to pay resigned members on the same basis as non-resigning members pursuant to the terms of the 1960 Order entered in *United States v. ASCAP* – is simply wrong.[1] The 1960 Order was vacated on June 11, 2001 and superseded by the Second Amended Final Judgment entered in *United States v. ASCAP* in 2001("AFJ2") (AFJ2, § XV). And, as AFJ2 itself has no operative distribution rules (AFJ2, § XI(C), since its entry in 2001 ASCAP's distribution rules have been duly promulgated by the Board of Directors and separately published (the "S&D Rules"). Those rules explicitly provide that distributions for resigned members are calculated in a *different manner* than distributions for current members – by

[1] The 1960 Order, as last amended in 1994, is JX 3.

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their plain language, both Rule 3.3.1(i) *and* Rule 3.3.2 are applicable only to resigning members. *See* JX 14, Rule 3.3.[2]

Mr. McAnally's concessions that he removed the ASCAP Compositions upon his resignation (Submission at p. 5); and that GMR had the immediate right to license those compositions (Submission at p. 4) should conclusively resolve the issue of whether Rule 3.3.1(i) applies to this dispute. As the Board of Review properly concluded, it does not. *See* Board of Review Decision, p. 18. This is because, Rule 3.3.1(i) only applies when no other performing rights organization has *any* right to license the works in question. JX 14 at Rule 3.3.1(i); *see also* ASCAP letter to the Panel, dated February 15, 2019, at pp. 2-4. It simply is not true that GMR could not license Mr. McAnally's removed works to any category of music user – including "radio" – and there is no evidence in the record to the contrary.

We briefly address below the Submission's most blatant mischaracterizations of ASCAP's positions on the issues and its misstatements of the facts:

- ASCAP's phase-out of bonus payments to Mr. McAnally – and dozens of other members who resigned from ASCAP at or around the same time as he resigned – was not a newly-created interpretation of the S&D Rules designed to "attack resigning members." Rather, as Dr. Boyle testified, and as the evidence establishes, the rules and policies explicitly providing that premium payments were subject to the phase-out were adopted in 2002, and implemented in 2009. *See* Hearing Tr., 326:13-327:5 (Boyle); *see also* JX19, at ASCAP0363; Hearing Tr. 305:9-306:8 (Boyle); 322:5-14 (Boyle); and 326:25-327:25 (Boyle). The Board of Review's explicit finding that Dr. Boyle's testimony on this critical point was credible is entitled to deference from the Panel. *See United States v. ASCAP, In re: Karmen*, 708 F. Supp. 95, 97-98 (S.D.N.Y. 1989). And, the Board of Review expressly held that "[t]here was no evidence that ASCAP manufactured a 'new interpretation' of its rules." Decision, at p. 23.

- The August 2015 presentation to ASCAP's Survey & Distribution Committee, cited on p. 1 of the Submission, involved a contemplated rule change that would have discontinued payments of the Audio Feature Premium ("AFP") to resigned Members who removed their works from ASCAP's repertory *immediately upon their resignation from ASCAP* (*i.e.*, a rule that would have done away with the gradual, four-quarter phase-out of the AFP). The proposed rule change was withdrawn from consideration, and so was never implemented. *See* JX 24, at ASCAP0404. It therefore has no relevance to this dispute and any notion of ASCAP "retaliation" against resigning members is baseless.

- ASCAP does not assert that "it is entitled to apply the four-quarter phase-out across the board to all distributions." Submission at p. 2 (emphasis in original). To the contrary, as we have said repeatedly and the Board of Review found (Decision, at p. 16), the phase-out provisions of Rule

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[2] The Submission's focus on the 1960 Order is confusing for the additional reason that, even under the terms of that Order, resigning members were not paid on the same basis as current members. *See, e.g.*, JX 3 at ASCAP0150-0152 (setting forth the "Resigning Members" distribution formula).

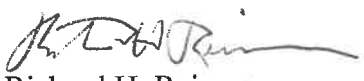
3.3.2 apply only to revenues attributable to unsurveyed media licenses. Because those revenues were at all relevant times used to fund the AFP, ASCAP appropriately phased out those premiums.

- ASCAP did not phase-out revenues attributable to surveyed radio performances. (McAnally Submission at p. 3). Pursuant to ASCAP's follow-the-dollar approach, ASCAP continued to pay Mr. McAnally the full value of all base credits for performances on the RMLC stations funded from the revenues attributable to those stations. *See* ASCAP Pre-Hearing Memorandum at p. 27 (*citing* testimony of Dr. Boyle).

- The citation on page 4 of the Submission to Corrected JX 27 (the Marilyn Bergman Affidavit dated April 18, 1994. ¶ 18 at ASCAP0071), suggesting that the Radio Feature Premium –the precursor to the Audio Feature Premium – was to be "funded only from revenues attributable to radio performances" – is entirely misleading. As the Affidavit elsewhere makes clear, the Radio Feature Premium was to be "*funded from unsurveyed general licensing revenues* which can be fairly allocated to radio performances." Corrected JX 27, ¶ 17, at ASCAP0071 (emphasis added). Because radio performances were then – and are now – considered an appropriate proxy for performances by unsurveyed licensees, it was – and remains – appropriate to fund premiums from the revenues attributable to unsurveyed licensees.

The Panel should reject Mr. McAnally's entreaties to ignore the scope of its review of the Board of Review's decision, especially in light of the concerns I expressed in my last letter to the Panel. Rather, on the entire record of this proceeding, the Panel should affirm the Board of Review's decision in all respects.

Sincerely yours,



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