AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION TRIBUNAL

In the matter of the arbitration between:

SHANE MCANALLY, individually and o/b/o SMACK SONGS, LLC, SMACK BLUE LLC, SMACK INK, SMACK SONGS, SHANE MACK INC., CRAZY WATER MUSIC, SMACKVILLE MUSIC, SMACKSHOP MUSIC, SMACKTOWN MUSIC, SMACKSTERS MUSIC and CRAZY BLUE EGG ("Claimant")

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("Respondent")

CASE 01-18-0000-5736

FINAL AWARD OF THE ARBITRAL PANEL

We, THE UNDERSIGNED ARBITRAL PANEL, having been designated in accordance with an agreement between the parties, with both parties appearing at a hearing with their legal counsel, Jason Turner, Esq. and Jennifer Ghanem, Esq. representing Claimant, and Richard Reimer, Esq. and Jackson Wagener, Esq representing Respondent, on November 21, 2018 ("Hearing"), and having been duly sworn in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and the Arbitral Panel having fully viewed the proofs and allegations and having considered all of the evidence and testimony, do hereby state as follows:

PRELIMINARY STATEMENT

Songwriter Shane McAnally and his publishing companies (sometimes referred to herein individually as "Mr. McAnally" or collectively, as "Claimant") have had a successful relationship with their performing rights organization ("PRO"), the American Society of Composers, Authors and Publishers (sometimes referred to herein as "ASCAP" or "Respondent") for nearly twenty years. During this period Mr. McAnally has written several number #1 hits, received multiple Grammy nominations, and was named the ACM Songwriter of the Year, as well as the Billboard Country Songwriter of the Year.

Claimant submitted publisher resignations for certain of Mr. McAnally's publishing companies on December 17, 2013 (effective July 1, 2014) and certain other of Mr. McAnally's publishing companies in December 2014 (effective July 1, 2015). Mr. McAnally submitted his formal resignation as a songwriter on May 19, 2014 (effective January 1, 2015). Just prior to submitting his formal resignation, Mr. McAnally acknowledged to some of ASCAP's Nashville employees with whom he was friendly that he intended to join another PRO called Global Music Rights ("GMR"). Upon receipt of those royalty statements that followed his resignation, Mr. McAnally alleges to have learned for the first time that his post-resignation earnings would be substantially diminished compared to the amount that he believed he was entitled to receive for the performance of works that he wrote or co-wrote.

Claimant subsequently learned that this diminution in royalties was a result of Respondent's enforcement of Rule 3.3 (Distribution for Resigning Writer Members and Publishers) from ASCAP's Survey and Distribution System: Rules & Policies ("S&D Rules"). On March 23, 2016, Claimant exercised his rights under the Articles of Association of the American Society of Composers, Authors and Publishers ("ASCAP Articles"), Article XIV, Section 4, and filed a Complaint to commence a protest ("Protest") to the ASCAP Board of

Review ("Board of Review"). ASCAP filed a timely Answer to this Protest on May 9, 2016. On July 12, 2017, Mr. McAnally and his attorneys, Jason Turner, Esq. and Jennifer Ghanem, Esq. of Keller Turner Ruth Andrews & Ghanem, PLLC, appeared before the Board of Review, composed of John Bettis, Helene Blue, Stephen Culbertson, Bob Doyle, Arthur Hamilton (Chair), James DiPasquale and Keith Mardak (Vice-Chair). Respondent was represented by Richard Reimer, Esq. (ASCAP's Senior Vice President of Business and Legal Affairs) and Jackson Wagener, Esq. (ASCAP's Vice President of Business and Legal Affairs). Stefan Mentzer, Esq. and Alexander Reid, Esq. appeared as counsel to the Board of Review. At this Hearing, the Board of Review heard testimony from Mr. McAnally, Michael McAnally Baum (President of Mr. McAnally's publishing and management companies), Brian Roberts (ASCAP's Chief Operating Officer), Dr. Peter M. Boyle (ASCAP's Senior Vice President and Chief Economist), and Michael Martin (ASCAP's Vice President and Head of Membership for its Nashville office).

The essence of Claimant's Complaint is that ASCAP had improperly withheld royalty payments due to Mr. McAnally after his resignation by phasing out the so-called "Audio Feature Premium" ("AFP") payments at the rate of 100% in the first quarter following his resignation, 75% in in the second quarter, 50% in the third quarter and 25% in the fourth quarter. Mr. McAnally alleges that the phase-out of the AFP payments violated ASCAP's rules for distributing these funds and deprived him of $204,612.84 in ASCAP distributions as of his January 2016 accounting statements, plus additional unspecified amounts.

DECISION BY THE ASCAP BOARD OF REVIEW

On December 22, 2017, the Board of Review rendered its Decision ("Decision"). The Board of Review determined:

(i) ASCAP's phase-out of AFP payments to Mr. McAnally was in accordance with its rules and regulations, known as ASCAP's Survey and Distribution System: Rules & Policies ("S&D Rules"), adopted the by the Board of Directors governing distribution of royalties, and was properly executed.

(ii) Section 3.3.2(ii) of the S&D Rules that provides for a phase-out of distributions of unsurveyed media revenue to resigning members was applied correctly.

(iii) There was no evidence that ASCAP failed to exercise its business judgment in phasing out AFP distributions to Mr. McAnally as a resigned member who removed his works from the ASCAP repertory.

(iv) Because Mr. McAnally elected to remove his works from the ASCAP repertory, his resigning member distributions were appropriately calculated under Section 3.3.2. of the S&D Rules.

(v) Mr. McAnally's apparent suggestion that Section 3.1.3 of the S&D Rules prevents ASCAP from phasing out AFP payments on the grounds that the rule requires all members to be paid on the same basis without regard to whether they elected to remove works upon resignation was rejected.

(vi) ASCAP did not violate its distribution S&D Rules by paying Mr. McAnally substantially less than what his co-writers of the same ASCAP works have been paid because Mr. McAnally provided no evidence that the co-writers were resigned members who removed their works from the ASCAP repertory, or were not current members.

(vii) Mr. McAnally's argument that he effectively did not remove his works from the ASCAP repertory on the grounds that ASCAP had the exclusive right to license his works to radio for two years after his resignation was denied based upon the fact that ASCAP had only non-exclusive licensing rights.

(viii) Mr. McAnally's claim that the AFP phase-out was improper because it was not explicitly provided for or specified in ASCAP's published rules was denied because the evidence showed that ASCAP would, upon request by a member, have explained the rules, their implementation, and funding decisions, and that ASCAP would have discussed the effect of resignation upon future distribution if asked.

(ix) Mr. McAnally's claim that ASCAP manufactured an improper interpretation of its phase-out rules after he resigned was denied based upon the Board of Review's acceptance of testimony that this change was implemented in 2009.

(x) Mr. McAnally's claim that ASCAP violated the S&D Rules because some of his distributions were delayed and that ASCAP inappropriately applied new rules retroactively, effectively penalizing, ex post facto, Mr. McAnally's prior decision based upon a subsequent revision of the rules was denied.

(xi) Mr. McAnally's claim that this Protest should be resolved on the same basis as a prior dispute between BMI and its resigning member in the case of Immel v. Broadcast Music, Inc. was denied.

The Conclusion of the Board of Review was that "ASCAP made proper distributions to the protesting members in accordance with the rules and regulations duly adopted by the ASCAP Board of Directors. Mr. McAnally is not entitled to any adjustment to his ASCAP distribution."

APPEAL/ARBITRATION

Pursuant to Article XIV, Section 4 of the ASCAP Articles, "The decision of the Board of Review shall be deemed final unless either the member or the Society files a notice of appeal in writing with the Secretary of Society within thirty (30) days after receiving written notice of such decision; in such case all evidence taken before the Board of Review shall be referred to the Panel provided for in Section 6 of this Article." Section 6 specifies that the Panel "shall consist of three Arbitrators appointed as provided in the Rules of the American Arbitration Association and that "all proceedings before the Panel shall be conducted in New York City." On January 17, 2018, Mr. McAnally served the aforementioned notice on ASCAP and served a Demand for Arbitration on January 23, 2018. Pursuant to the Board of Review Rules of Procedure Rule 2.6, "The Protesting Member shall have the burden of proof of showing that the distribution to him, her or it was improper."

Article XIV, Section 4 of the ASCAP Articles further states (in paragraph 5), "The Panel, after considering any such appeal, may reverse or modify the decision of the Board of Review by a vote of not less than two-thirds of the Panel and in its discretion may impose costs. If less than two-thirds of the Panel votes for reversal or modification, the decision of the Board of Review shall be affirmed. The decision of the Panel shall be conclusive and final, and neither the protesting member nor the Society shall have the right of any recourse, including recourse to the courts."

ISSUES IN THIS ARBITRATION

Claimant Shane McAnally's Pre-Hearing Memorandum states (on page 1), "The issue before this Panel is whether ASCAP is permitted to phase-out (sic) 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 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."

Respondent ASCAP's Pre-Hearing Memorandum (on page 7) cites Rule 1.2 of the Board of Review's Rules of Procedures, "The Board of Review does not have jurisdiction over any claims other than those set forth in Rule 1.1. The Board of Review will not entertain claims such as, but not limited to, the following: (1) that the rules and regulations adopted by the Board of Directors governing the distribution of royalties are unreasonable, improper, or unlawful; or (2) that notice of changes in the rules and regulations adopted by the Board of Directors governing distribution of royalties was improper, insufficient, or unlawful." Respondent's Pre-Hearing Memorandum continues (on page 7) that "any claim that the resigned member rules as applied to Claimants -- or any other resigned member, for that matter -- are discriminatory, unreasonable, improper or unlawful; or similarly, 'unfair, inequitable or unjust,' is not a matter that may be considered by this Panel (citation omitted). Nor may the Panel find that Claimants were not given proper notice of changes in the rules." The Arbitral Panel agrees with Respondent's interpretation of the jurisdictional powers of the Panel.

REVIEW OF ISSUES IN THIS ARBITRATION

The Arbitral Panel believes that our decision must ultimately be determined by how Section 3 ("The Writer and Publisher Distribution Formulas") of the S&D Rules was interpreted and applied by the Board of Review, given the facts and circumstances in this case. Before reviewing these Rules, it is important to distinguish between "surveyed" and "unsurveyed" media.

We believe Claimant's Pre-Hearing Memorandum properly makes this distinction (on page 5), stating, "There is no dispute that, per ASCAP's Rules, radio performances of works in the ASCAP repertory constitute 'surveyed' media. See S&D Rules, Section 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." Claimant further quotes S&D Rules, Section 3.1.3 (Current Performance Plan), which states 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." (Claimant's emphasis). Mr. McAnally asserts that this provision entitles him to receive a royalty distribution calculated in the same manner as for all other writer members.

Claimant also cites S&D Rules, Section 3.3.1(i), in support of the argument that Mr. McAnally should have received the same distributions as his co-writers who did not resign from ASCAP. This provision states in part, "If, in the case of 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."

Rule 3.3.1(i)

Paragraph 3.3.1(i), quoted above, begins, "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 as a result of continued membership in ASCAP of one (1) or more of the members in interest with respect to such work or works . . ." It is undisputed that this occurred in relation to the works that are the subject of this controversy. Hereinafter refered to as ("Works").Subsection (i) is satisfied because co-writers of the Works remained at ASCAP after Mr. McAnally resigned.

Paragraph 3.3.1(i) continues, "and if no other performing rights licensing organization has *any* such right . . ." (emphasis added). The most important word in this sentence, as far as the Panel is concerned, is "any." While it is true that Claimant's new PRO (GMR) could not license the most lucrative performing rights to those Works (because they were still controlled by Respondent pursuant to the so-called "License-In-Effect" Rule ("LIER"), certain other rights were available to license to GMR because Claimant chose to remove the Works from ASCAP. Claimant was entitled to license all rights other than those subject to the LIER to GMR. However, the Panel does not know whether any rights were, in fact, licensed to GMR, or in other words, whether GMR exercised the "right" to begin to license Claimant's Works under its blanket license (except to the radio stations bound by Respondent's LIER), as of January 1, 2015. GMR could also have licensed these Works (if given the right to do so by Claimant) to any radio station that wished to have a

direct license, or to radio stations that received interim basis licenses, or to bars and restaurants. Claimant did not point to any evidence produced at the Hearing before the Board of Review that would have established whether Claimant licensed any such rights (other than those subject to LIER) to GMR. Accordingly, Claimant failed to meet his burden of proof that Section 3.3.1 applies.

If Claimant had chosen to leave his Works at ASCAP when he resigned, he would have been entitled to continue to be paid on the same basis as he was paid prior to submitting his resignation. However, that is not what occurred here. Claimant elected to remove his Works from the ASCAP repertory, requiring, as the Board of Review determined, calculation of his royalties under Section 3.3.2 of the S&D Rules.

Rule 3.3.2

Ultimately this dispute essentially comes down to the intended meaning of Rule 3.3.2, which states: "With respect to all other works of the resigning writer or publisher member, distributions shall continue to be made to such resigning member subsequent to his, her or its resignation from ASCAP 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)-(iii) (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 (as defined in Section 1.11.3 of the Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association).

3.3.2(ii). An amount shall be calculated as to each of the funds described in 3.1.2(i)-(iii) (or pursuant to 3.1.3) 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 after the resignation of such members (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."

REVIEW OF THE DECISION OF THE BOARD OF REVIEW

The following is a review of the Decision of the Board of Review using the paragraph headings contained in its Decision.

A. ASCAP's Basis to Phase Out AFP Payments

The Panel agrees with the Board of Review's Decision that "[t]here is no evidence that ASCAP failed to exercise its business judgment in phasing out AFP distribution to Mr. McAnally as a resigned member who removed his works from repertory."

B. Application of Sections 3.3.1 and 3.3.2 of the S&D Rules

This section is reviewed on pages 14-16 of this Award.

C. ASCAP's Published Rules

Claimant contends on page 16 of his Pre-Hearing Memorandum, "The language could not be clearer that the only revenues that are subject to the four-quarter phase-out are the **unsurveyed** media performances because it is solely those unsurveyed/general licenses that typically expire on an annual basis throughout each year." Claimant continues, "Moreover, it goes against logic to phase out ***surveyed*** AFP payments over four quarters when, in this case, ASCAP continued to license and collect on radio performances for over two years post-resignation." In addition, Claimant argues that the AFP phase-out was improper because ASCAP's rules and governing documents do not allow Respondent to phase out the AFP bonuses.

The Board ruled on page 20 of its Decision, "The evidence further shows that the Board of Director's funding decisions, as well as other aspects of the rules' implementation, are not published for competitive reasons because they are proprietary." The Panel accepts this explanation. The Board also stated on page 21 of its Decision that "The evidence shows that ASCAP would, upon request by a member, explain the rules, their implementation, and funding sources, and that ASCAP would discuss the effect of resignation upon future distributions if asked." The Board cited the credibility of three of its own senior employees in support of its position: Chief Operating Officer Brian Roberts, Chief Economist Dr. Peter Boyle, and Michael Martin, Vice President and Head of Membership for ASCAP's Nashville office. The Panel does not agree that this testimony is credible. When asked by Claimant's counsel during cross-examination at the Hearing, "How many times have you received a call from a member who is contemplating resignation?," Dr. Boyle replied, "Once, I think." (Hearing Tr. at 329:20-25). Dr. Boyle doubled down on his answer moments later when he stated, "I would really expect to get those calls. 1 just remember one particular member who I had dealt with on problems over time, and he called me." (Hearing Tr. At 330:8-11) Respondent's counsel later attempted to rehabilitate this testimony, including leading the witness, by suggesting that the actual answer might be "Thousands" (Hearing Tr. At 360:5-20) instead of "Once." In the Panel's view, Dr. Boyle's testimony on this issue lacks credibility.

The Board also cited the testimony of ASCAP COO Brian Roberts at the Hearing (Hearing Tr. 211:8 to 212:12) in support of the proposition that "the fact that not all applications of the ASCAP distribution rules are published does not mean they are unavailable to members." (Decision p. 21). The Panel is confounded that Respondent's choice of witness on the ease of accessibility of these rules was, at the time he supposedly sought clarification from ASCAP, the

Chief Financial Officer of Warner Music Group, one of the world's largest music companies. He was hardly a typical ASCAP songwriter or publisher like Mr. McAnally. The Panel is further surprised that the Board would deem Mr. Roberts's testimony highly credible after he was asked on cross-examination, Q: "Are you familiar with the ASCAP membership agreement?" A: "Not in detail, no. I know I've read it, but not as familiar as I am with that as some of the other things." (Hearing Tr. 222:6-10). As for Mr. Martin, the Panel wonders why Respondent bothered to call him to testify at all since he was unaware of the radio bonus phase-out at the time that he met with Mr. McAnally and Mr. Baum to discuss Claimant's resignation or, as he indicated, he would have told Messrs. McAnally and Baum of the consequences of Claimant's resignation. (Hearing Tr. 395:10 to 396:25). Indeed, Mr. Martin testified that he may have learned of the radio bonus phase-out only after Claimant's resignation (Hearing Tr. 395:17-24).

The Panel finds that the Board's reliance on the testimony of Messrs. Boyle, Roberts, and Martin to demonstrate how simple it would have been for Claimant to have accessed information from ASCAP on the calculation of his AFP royalties is misplaced. On the other hand, however, the Panel believes that neither Mr. McAnally nor any members of his team made much of an effort to exercise the requisite due diligence to seek this information. The Panel finds that the testimony of Mr. Michael Baum (who described his position this way, "I handle all the business affairs . . ." (Hearing Tr. 104:3-4)) demonstrated that Claimant never properly sought to review the ASCAP rules and governing documents prior to Mr. McAnally's decision to resign from ASCAP. Although troubled by the unavailability of information to the Claimant as well as by ASCAP's utter lack of transparency, the Panel, with difficulty, finds that this does not represent a sufficient basis to overturn the Decision of the Board.

D. Targeted New Rule

Mr. McAnally claimed that ASCAP created an improper interpretation of its unsurveyed media rules after his resignation in order to deprive him of AFP bonus income. The Panel accepts the Board's finding that the applicable funding rules were put into effect in 2009. The Panel also agrees with the Board's determination that it lacks jurisdiction to consider Claimant's claim that ASCAP's rules are unreasonable, improper or unlawful or that notice of changes in the rules were improper, insufficient or unlawful.

E. Delays in Making Distribution and Changes to Distribution Rules

Mr. McAnally claims that his royalty accounting statements were not sent to him in a timely fashion (in some cases delayed by nine months). The Panel finds that Dr. Boyle's explanation for this extraordinary delay (that these statements needed to be created manually, taking up to nine months to do so) is simply not credible in an era of 2015 computer technology.

Mr. McAnally further claims that ASCAP then used this delay to apply its new Rules to retroactively diminish his AFP royalty bonuses. In its Decision (on page 24), the Board determined that "Section 2.11 of the S&D Rules provides that distributions may be delayed, and that performances are valued on the basis of the distribution rules in effect at the time in which they are processed. Mr. McAnally has not shown a violation of ASCAP's distribution rules on the basis of any alleged delay." The Panel believes that this is an unreasonable delay, but reluctantly concurs with the Board's determination here.

F. BMI Arbitration

Mr. McAnally cites the Immel v. Broadcast Music, Inc. (1989) Martin, Frankel, Mulligan, Arbitrators ("the BMI Arbitration") in support of his position. In its Decision (on page 25) the Board states, "A crucial difference between the BMI Arbitration and this protest is that resigning BMI members left their works with BMI upon resignation. Here, in contrast, Mr. McAnally

elected to remove his works from the ASCAP repertory." The Panel concurs with the Board's determination here.

B. Application of Sections 3.3.1 and 3.3.2 of the S&D Rules

The Panel believes that a review of the Board's application of Sections 3.3.1 and 3.3.2 of the S&D Rules is the single most important issue in this matter.

Claimant points on numerous occasions to the language in S&D Rules, Section 3.1.3, which states 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...." If this were the only provision of the S&D Rules which applied to Claimant, the Panel would probably render an Award in Mr. McAnally's favor. However this is simply not the case.

Mr. McAnally believes that he is entitled to be paid under the provisions of Section 3.3.1 of the S&D Rules because his resignation was subject to the LIER and accordingly he left the Works and did not permit GMR (or any other PRO) to license the rights licensed by ASCAP under the LIER until after December 31, 2016. The Board ruled (Decision on page 18) that "Under Section 3.3.1, a resigning member who leaves his or her works in the ASCAP repertory (but not a member who elects to remove the works) will continue to receive distributions calculated on the same basis as current members. Mr. McAnally, however, elected to remove his works from the ASCAP repertory, so his resigning member distributions were appropriately calculated under Section 3.3.2 of the S&D Rules." The Panel concurs with the Board of Review that Section 3.3.2. is the governing section in this instance.

Claimant alleges that because GMR did not license the Works (because they were subject to the LIER), he complied with the provision in Rule 3.3.1(i) that "no other performing rights licensing organization has any such right" and should be paid in the same manner post-resignation

as he was paid pre-resignation. However, the Panel finds the last four words "has any such right" in Rule 3.3.1(i) somewhat ambiguous. Should the word "has" in this sentence be read to mean that GMR must be specifically granted these rights by the Claimant? Should the word "has" be read to mean that GMR is actually exerting these rights? Does another performing rights organization automatically have "any such right" upon Mr. McAnally's removal of the Works from ASCAP even if he never specifically granted those rights to GMR and GMR never exercised them? In a letter to the Panel from Respondent's counsel dated January 23, 2019, Mr. Reimer addresses this issue this way (on page two, paragraph 4(ii)): "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." The Panel agrees that whether GMR actually licensed the Works to a music licensee is irrelevant. What is relevant, however, is whether any such rights were licensed to GMR that it could have exercised.

Rule 3.3.1 provides that "ASCAP may require a resigning member to acknowledge that ASCAP retains the right to license the resigning member's works as provided above, and that no other performing rights licensing organization has any such right. In the event such resigning member fails so to acknowledge, such resigning member shall not be entitled to any payment pursuant to these provisions." The Panel finds this provision also to be somewhat ambiguous. For example, what happens if, as occurred here, a writer removes works but there are continuing members-in-interest remaining at ASCAP and ASCAP does not ask for a resigning member's acknowledgement that he/she/it has not licensed his/her/its rights to another PRO? In this case, ASCAP has assumed that because the licensable rights to the Works were removed from ASCAP,

they were necessarily licensed to a third party. The Panel believes this is a questionable assumption.

However, any ambiguity which may have existed on the part of the Panel in relation to this issue was resolved in Respondent's favor based upon Claimant's counsel's letter to the Panel dated February 15, 2019. Responding to the Panel's question, "Has GMR licensed any of the 'ASCAP Compositions' for any other purpose at any time prior to January 1, 2017?" Mr. Turner replied (on page 4), "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." Accordingly, the Panel concurs with the Board's Decision that Claimant's AFP royalties were properly phased out pursuant to the provisions of Rule 3.3.2(ii).

AWARD

The Arbitral Panel, pursuant to the authority given to us under Section 4 of the ASCAP Articles, hereby affirms the Decision made by the ASCAP Board of Review in this matter on December 22, 2017.

COMMENT

The Arbitral Panel recognizes our limited mandate as an appellate body under Section 4 of the ASCAP Articles to "reverse or modify the decision of the Board of Review by vote of not less

than two-thirds of the Panel and in its discretion [to] impose costs. If less than two-thirds of the Panel vote for reversal or modification, the decision of the Board of Review shall be affirmed." We have fulfilled our limited mandate. However, we see nothing in the ASCAP Articles that prevents us from commenting on the manner in which the Respondent's rules were applied here – and we feel compelled to do so. Respondent won this case because a strict interpretation of the rules indicates that ASCAP was correct in the way that it chose to pay Mr. McAnally. But ASCAP should take no joy in this Award, because of the inequitable manner in which it treated Mr. McAnally, one of its most successful songwriters for the past 17 years. The Panel is basing its decision on a technical reading of the Board's interpretation of the rules, not on what the Panel believes is fair and equitable. We cannot exceed our jurisdiction.

We have acknowledged in this Award that Mr. McAnally and his representative did not undertake the requisite due diligence in relation to ASCAP's rules prior to submitting his resignation. Claimant has paid a high price for failing to ask a simple question: "How will Mr. McAnally's resignation and decision to take his repertory to another PRO affect his royalty and other payments?" The Panel believes, however, that ASCAP's treatment of Claimant and documentation regarding payment of even those monies due Claimant do not comport with Section 1.1 of its S&D Rules.

Section 1.1 of ASCAP's S&D Rules states in part, "The ultimate purpose of the survey and distribution system is to ensure that royalty payments to members reflect fairly the value of performances in the various surveyed media, and that the methods and formulas employed for such distributions are disclosed fully and clearly to all members." (Panel's emphasis). If the Panel had been allowed to make its Award on equitable grounds, i.e., whether "the royalty payments to members reflect fairly the value of performances in the various surveyed media" of Mr.

McAnally's Works or "whether the methods and formulas employed for such royalty distribution [were] disclosed fully and clearly" to Mr. McAnally, our Award would have been overwhelmingly in favor of Claimant.

ASCAP's Pre-Hearing Memorandum states (on page 11), "because the rules are complex, however, it is not possible -- nor does ASCAP endeavor -- to set forth every nuance of the manner in which those rules are implemented in practice." The Panel regards this as the single greatest understatement contained in the hundreds of pages that constitute the record for this matter. The Panel believes ASCAP made very little, if any, effort to shed any light on how AFP bonus royalties would be calculated for a member who chose to resign under circumstances comparable to those of Mr. McAnally. In fact, ASCAP did not produce a single memo or letter to its membership which disclosed how this process would work if a member were to resign. The Panel finds it impossible to reconcile this to the ASCAP's mission statement that these rules are disclosed "fully and clearly." Indeed, the rules were not disclosed at all.

The Panel understands why Mr. McAnally read the words "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" (S&D Rules 3.1.3, with Panel's emphasis) and reasonably believed that the royalties to his compositions (including AFP premium bonuses) would be calculated in the same fashion for him as for his co-writers who remained at ASCAP. The Panel also understands why Mr. McAnally believed that his songs, which were still subject to ASCAP's LIER post-resignation, would earn for him the same amount of royalties as they earned for his co-writers of those works who remained at ASCAP. It is the same common sense conclusion that the Panel believes would be reached by most ASCAP members.

The Panel understands why Mr. McAnally believed that AFP credits should be generated based upon surveyed media and therefore not subject to phase-out since the typical purpose of the four-quarter unsurveyed media phase-out is to "account for the fact the great majority of ASCAP's thousands of licenses for bars, restaurants, nightclubs, retail stores and most other general licensees are for one-year terms that expire on different dates during the calendar year." (ASCAP's Answer on page 11). After all, ASCAP continued to receive licensee payments that generated those AFP credits well after the unsurveyed media phase-outs had taken place.

The Panel is composed of three individuals who cumulatively have more than ninety years of entertainment law experience. Nevertheless, it took the Panel countless readings of Section 3.3 of the S&D Rules to ascertain how it should be interpreted. Brian Roberts was asked by Mr. Turner during the Board of Review Hearing, "...by the way, if you don't remove your works, you can still get your premium payments. Can you show me where that's in the rules?" (Hearing Tr. 262:20-23, 263:5-7), to which Mr. Roberts replied, "No, I don't think I could point you to that, no." (Hearing Tr. 263:8-9). Brian Roberts is the Chief Operating Officer of ASCAP!

ASCAP's frequent responses to the fact that its rules were not fully and clearly stated was best summed up in ASCAP's Pre-Hearing Memorandum (on page 11). Citing the testimony of Mr. Roberts and Dr. Boyle, it states, "most importantly, however, ASCAP makes such information available to its members, when asked." In its Award, the Panel has previously stated how unconvinced we are by Dr. Boyle's testimony that he remembered thousands of calls for such information, when prior to ASCAP counsel's prompting, he could only remember one such call.

The Panel also finds it odd that the best evidence ASCAP could produce in support of its contention that this information was readily available to its members were: (i) Mr. Roberts, who testified that he made such a call when he was the Chief Financial Officer for Warner Music, one

of the world's largest music companies (hardly a typical ASCAP member) and (ii) Michael Martin, Vice President and Head of Membership in ASCAP's Nashville office, who testified at the Board of Review Hearing that he was unaware of the radio bonus phase-out at the time he met with Mr. McAnally and Mr. Baum to discuss the resignation. Mr. Martin continued that he would have told Messrs. McAnally and Baum of the consequences of Mr. McAnally's resignation, had he known what they were (Hearing Tr. 395:10 to 396:25). The Panel is troubled that ASCAP's own Vice President and Head of Membership in Nashville, the office where the Mr. McAnally was affiliated, was incapable of explaining the AFP phase-out Rule to him because he didn't know such a Rule existed. We wonder how Mr. McAnally would have been expected to discover the information ASCAP states is so readily available, and why ASCAP asserts that it would have taken but a phone call to learn of the Rules' application and the potential consequences of resigning and removing works from the ASCAP repertory.

The Panel understands why Mr. McAnally believed that ASCAP's decision to fund AFP bonuses solely with unsurveyed licensing revenues after his resignation was unfair.

The Panel further understands why Mr. McAnally believed that ASCAP treated him unfairly when it took up to nine months to provide an accounting statement. Dr. Boyle's explanation that he needed this much time to produce the statement manually did not seem at all credible, or reasonable, to the Panel.

In ASCAP's Pre-Hearing Memorandum (on page 9) ASCAP's Board of Review was described as "a quintessential jury of peers." The Panel believes that while this is essentially true, a finding for ASCAP in cases like this one can have the awkward result that any AFP bonus monies not distributed to members like Mr. McAnally then become part of the funding which is ultimately distributed to ASCAP's full membership, including ASCAP's Board of Review songwriter and

publisher members. For the sake of clarification, the Panel does not believe the Board's Decision was driven by any desire for personal gain or any animus toward Mr. McAnally. The Panel believes that even if the Board wanted to make the comments and take the actions that the Panel feels were warranted here, it was powerless to do so. As indicated in the Board of Review's Decision (on page 2), "The Board lacks jurisdiction to hear claims that ASCAP's rules and regulations are unreasonable, improper, or unlawful or that notice of changes in the rules and regulations was improper, insufficient or unlawful." The same is true for the Arbitral Panel. In his letter to the Panel dated January 7, 2019, Mr. Reimer reminded the Panel, "the mere consideration of fairness is beyond the scope of these proceedings." The Panel agrees that we are barred from fairness considerations in reaching a determination as to whether the Decision of the Board of Review should be affirmed, reversed or modified, and have acted accordingly. However, as noted above, we find nothing in the Rules which prevents the Panel from commenting on the question of fairness to a resigning member and we have taken that liberty in this Comment section.

Monetary Award to Claimant

Article XIV, Section 4, Paragraph 5 of the ASCAP Articles states, "The Panel, after considering any such appeal, may reverse or modify the decision of the Board of Review by vote of not less than two-thirds of the Panel and in its discretion may impose costs." For the reasons stated in the Comment section of this Award, the Panel has decided to award $204,612.84 to Claimant as costs incurred in relation to its claims which are the subject of this Arbitration. As provided in Article XIV, Section 4, Paragraph 6, of the ASCAP Articles, this amount "shall be paid to the member promptly after the rendering of such decision."

FINAL AWARD

Accordingly, the Arbitral Panel does hereby AWARD as follows:

(1) The Decision of the ASCAP Board of Review whereby it found (on page 27 of its Decision) "that ASCAP made proper distributions to the protesting members in accordance with the rules and regulations duly adopted by the ASCAP Board of Directors" and that "Mr. McAnally is not entitled to any adjustment to his ASCAP distributions" is hereby AFFIRMED.

(2) A payment in the amount of $204,612.84 as costs incurred in relation to its claims which are the subject of this Arbitration, shall be made by Respondent to Claimant within thirty (30) days of receipt of this Award.

The administrative fees of the American Arbitration Association totaling $7,500.00 shall be borne as incurred by Claimant. The compensation and expenses of the arbitrators totaling $68,318.00 shall be split equally by the parties.

This Final Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date	Bob Donnelly, Arbitrator
Date	Judith Prowda, Arbitrator
April 12, 2019 Date	s/s Alida Camp Alida Camp, Arbitrator

We, the Arbitral Panel composed of Bob Donnelly, Judith Prowda and Alida Camp, do hereby affirm upon our oaths as Arbitrators that we are the individuals described in and who execute this instrument which is our Final Award.

Date	Bob Donnelly, Arbitrator
Date	Judith Prowda, Arbitrator
April 12, 2019 Date	s/s Alida Camp Alida Camp, Arbitrator

Date

Bob Donnelly, Arbitrator

April 12, 2019
Date

Judith Prowda, Arbitrator

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Alida Camp, Arbitrator

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Bob Donnelly, Arbitrator

April 12, 2019
Date

Judith Prowda, Arbitrator

Date

Alida Camp, Arbitrator

April 12, 2019 — Bob Donnelly
Date — Bob Donnelly, Arbitrator

Date — Judith Prowda, Arbitrator

Date — Alida Camp, Arbitrator

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April 12, 2019 — Bob Donnelly
Date — Bob Donnelly, Arbitrator

Date — Judith Prowda, Arbitrator

Date — Alida Camp, Arbitrator