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ROYALTIES AND THE LAW
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THE INFORMAL RESOLUTION PROCESSES OF
THE THREE DOMESTIC PROs

A BRIEF ANALYSIS

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Let's say: you're a writer-member of a domestic PRO and you have a complaint about a royalty statement or payment.

What do you do?

Each PRO has its own procedures for dealing with such complaints. You can attempt to call an executive at your PRO to complain. But, if that informal phone call fails (a likely scenario), you might have to try something else. What internal procedures do the 3 PROs have to resolve member complaints?

ASCAP: always start here, alphabetically if for no other reason.

ASCAP has the most formal of the "administrative remedy-processes" of all PROs. The procedures are set forth, principally, in its ARTICLES and the so-called Rules and Regulations, and Board of Review rules. You start with a written complaint stating that you want to complain to the Board of Review and stating why you want to complain (the "Protest"). This is sent to ASCAP's secretary, whoever that is at the time (I'd also cc ASCAP's lawyer, Richard Reimer) usually by US mail or by personal delivery--or you can e-mail it to: boardofreview@ascap.com. Keep hard copies of anything you e-mail.

Within a few days, your complaint is to be distributed to the secretary of the Board of Review and ASCAP's counsel (likely, Reimer). A hearing is to be scheduled within a "reasonable time." ASCAP should send the complainant a copy of applicable rules. The complainant, of course, has the burden of showing the error in the distribution.

At the hearing, you can have a lawyer represent you (a good idea, but be sure they know something about the music biz and about ASCAP). ASCAP can also be represented by their lawyers and employees that they designate. Your complaint letter is treated like "your first shot." You can request "discovery" (documents held by ASCAP)--nothing appears to include things like depositions, a valuable tool. ASCAP can also ask for your documents.

You have to show what you intend to introduce at the hearing. The Board determines if a request you've made to see evidence is proper.

Although meetings to determine the complaint are held in New York, they can be held by teleconference, video conference or in person, or a combination. As such, it makes no logical sense to mandate that hearings be held, physically in New York City. The hearing on the protest can be waived, as well.

The hearing is supposed to be informal, but it would be unwise to consider them as being informal as in “friendly.” Think more of an adversarial legal arbitration proceeding, with repercussions.

The evidence that may be allowed is up to the Board which is present, and doesn’t have to conform to legal rules of evidence (another good reason to have a lawyer knowledgeable about the music business and ASCAP itself with you).

There are rules for how the meeting may be conducted, which should be reviewed in detail, but consider that the Board may depart from such rules at your meeting. It is a good idea not to accept anything on trust, as ASCAP members Richard Warren and Peter Myers who have had major protests and Board of Review meetings, have learned.

ASCAP in its own rules encourages the protesting member to be represented by legal counsel (when that person is a so-called “accused member”), but this is a universally wise encouragement.

The meeting is supposed to be confidential. The decision of the Board is supposed to be final, but may be appealed to the AAA, supposedly in New York, but this may be superseded by federal law pertaining to arbitrations. The AAA rules then apply. This is also a time to be very careful as the choice of arbitrators who will rule on the appeal may be problematic (as it was in Warren’s protest).

The AAA may reverse or modify the decision of the Board of Review. The AAA’s decision is supposedly final and the member has no recourse to the courts, according to the Articles, but that may run afoul of federal law on arbitrations. In Peter Myers’s situation, he filed an action in the Los Angeles Superior Court to overturn the decision of the New York AAA, which may seem improper unless you know federal case law on the subject. Unfortunately, Myers ultimately lost his Los Angeles case on appeal to the California Appellate Court for some reasons that are at best, perplexing. Despite Myers’s situation, his fate is not necessarily one to expect in a new situation.

Despite ASCAP’s unilaterally propounded rules, it is the law that ultimately decides issues of venue and jurisdiction, not ASCAP. This is yet another good reason to have a lawyer advise you who is knowledgeable about the music business, about ASCAP, and about the law, in general, on issues such as venue and jurisdiction.

Copies of the decision of the Board of Review may be obtained for free, on request, by any member of ASCAP. The copy may be censored to extract confidential information. At least, that’s what the rules state.

BMI: next, alphabetically, does not appear to have any in-house dispute resolution procedures. Indeed, the contract between BMI and a writer member or publisher member, only provides that a dispute of any kind shall be submitted to the AAA in New York City (of course) for arbitration under AAA rules. The AAA award is final and binding and conclusive and may be confirmed by a judgment in the New York State Supreme Court (their trial court level) “or any other court having jurisdiction.” This last part is interesting enough to warrant some thinking about California’s jurisdiction over the matter.

SESAC, the last PRO, alphabetically, in the United States. SESAC, in neither its publisher member contract nor its writer member contract, appears to have any procedure, internally, or informally, for resolution of disputes of any kind between the member and SESAC. The contracts merely provide, under the “miscellaneous” provisions that the agreement is to be construed under New York law (a matter of discretion for the judge who might decide the matter) and that all claims regarding the agreement are to be submitted to the exclusive jurisdiction of the courts of the State of New York or the federal courts in New York city (also a matter of discretion on the part of a judge looking at the issue).

It is of interest to note that inasmuch as SESAC, which appears to consist of a limited liability company and a corporation, originally set up in New York, has no registration in the state of California which might preclude them from having access, as either a plaintiff or a defendant to the courts of such a state, and possibly other similar states and jurisdictions, as SESAC’s LLC and corporation are “foreign, unregistered.” This might make SESAC vulnerable to a default as well as to governmental penalties if sued in such a jurisdiction, regardless of anything said in its standard contract. Very interesting.

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This, therefore, has been a summary of the resolution processes of the three US PROs. Due to the shortened length of this article, all details of such processes could not be described, especially as some are unduly technical and filled with legalese. For further information, one should seek the advice of an attorney knowledgeable about such matters for further legal advice and counsel.

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Caveat: all statements in this article are the opinions of their author and not intended as legal advice or counsel; no warranty or representation is made as to the accuracy of such statements. Should you desire legal representation, you should hire an attorney of your own choosing. For more information, you may contact the author privately.

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Next issue: suing the PROs in California, an analysis of the pitfalls and issues.