Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library
of Congress
Washington, D.C.

In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)	Docket No. 21-CRB-0001-PR (2023–2027)

GEORGE JOHNSON'S ("GEO") AMENDED SUBPART C PROPOSAL AND RESPONSE TO CRB ORDER 65 REQUESTING ADDITIONAL BRIEFING ON RATE-SETTING FOR ALL RESTRICTED DOWNLOADS AND 37 C.F.R. § 385.2 ELIGIBLE LIMITED DOWNLOADS, WITH POSSIBLE REPEAL OF "FREE" UNLIMITED OFFLINE LISTENING DOWNLOAD LOOPHOLE OR NEW RATES FOR PAID PERMANENT, PLUS ADD "LIKE" COLA

Participant George Johnson ("GEO"), a *pro se* Appellant songwriter, DIY self-publisher, and copyright author respectfully submits his amended Subpart C rate-setting proposal and response to the Judges' January 5, 2023, *Order 65 Requesting Additional Briefing From Participants*[1] regarding rate-setting activity for various Subpart C "Restricted Download"[2] configurations, including the 37 C.F.R. § 385.2 "Eligible Limited Download", et al., and rate-setting proposed by GEO in his

[1] https://app.crb.gov/document/download/27413 January 5, 2023, *Order 65 Requesting Additional Briefing From Participants* on "unlimited limited download", pursuant to §385.2.

[2] https://app.crb.gov/document/download/27410 December 30, 2022, Subpart C Final Rule. 87 Fed. Reg. 80448 (Dec. 30, 2022) "Restricted Download" quote from CRB ruling. "Restricted Downloads have been defined as any downloads that are not permanent, including Eligible Limited Downloads. However, past regulations (and seemingly those set forth in the Settlement) do not provide a rate for Restricted Downloads."

October 16, 2021 Written Direct Statement ("WDS")[3], and March 16, 2022 Amended WDS[4]. GEO also proposes a "like" Subpart B Cost of Living Adjustment ("COLA") indexing (and "non-static" adjustment) to *all* Subpart C Downloads. The "Parties"[5] in this proceeding, who proposed the most recent Subpart C Settlement, are also the *majority of the exact same* "older" Parties and same 3 "self-dealing"[6], vertically integrated Record Company Participants' ("RCP"), including RCP counsel Mr. Steve Englund, that *created* and first proposed the "Limited Download" aka. the free

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[3] https://app.crb.gov/document/download/26349 October 16, 2021, GEO's Amended Written Direct Statement and Testimony (Corrected). Originally submitted October 11th and 15th.

[4] https://app.crb.gov/document/download/26349 March 16, 2022, GEO's *Amended Written Direct Statement* proposal for "limited downloads" pursuant to §385.2. Page 14 "II. Proposed Terms" "(1) Abolish unlimited, limited downloads with no sale" and in exchange for permanent download. (Also *See* "Background" on Page 19, No. 1.) "plugging the free unlimited "limited download" loophole that lets the Services and 3 foreign corporations give away billons of songs with no payment". I would amend "millions of songs, billions of sales".

[5] The "Parties" consist of lobbyists National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI,"), who represent the 3 major record labels Universal Music Group ("UMG"), Warner Music Group ("WMG"), and Sony Music Entertainment ("SME") on the one hand, and Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC and Spotify USA Inc., also represented by lobbyist the Digital Music Association ("DiMA") (collectively, the "Service Participants" or the "Services") on the other hand — (NMPA, NSAI, RIAA, DiMA, the 3 major record labels and the Service Participants, hereafter, the "Parties"). In 1998, all of the above "Parties" (including Harry Fox Agency ("HFA") since it was owned by NMPA in 1998) created this royalty rate structure for their advantage *over their own songwriters,* all other music publishers, record labels, and have managed it for their self-interests via §385 Regulation Submissions throughout 4 *Phonorecords* rate proceedings essentially writing their own law.

[6] March 30, 2022 — CRB Declination of the Proposed Subpart B Settlement — "Conflicts of Interest" — "Vertical integration linking music publishers and record labels raises a warning flag. No party opposing the present settlement has evinced actual or implied evidence of misconduct, other than the corporate structure of the record labels on the one hand and the publishers on the other. While corporate relationships alone do not suffice as probative evidence of wrongdoing, they do provide smoke; the Judges must therefore assure themselves that there is no fire. The potential for self-dealing present in the negotiation of this proposed settlement and the questionable effects of the MOU are sufficient to question the reasonableness of the settlement at issue as a basis for setting statutory rates and terms." *March 30, 2022, Federal Register* Vol. 87, No. 61 (18348)

unlimited "offline listening" download in their 2001 "Settlement"[7]. It's definitely no coincidence and the self-dealing to maintain a "*zero rate*" for what is a *legitimately paid download through 22 years* of Settlements takes legal expertise, and *is* misconduct to any reasonable person. It's still *illegal* price-fixing by *stealing competitors' sales,* weaponizing the license at a **zero rate** to *keep <u>their access model grip</u>, <u>sabotaging our sales</u>, <u>not just innocently setting a 9.1 cent compulsory rate.</u>*

GEO respectfully submits that *all* Restricted Downloads, §385.2 Eligible Limited Downloads, even Subpart C "DPD" configurations, et al., must *have <u>known rates</u>*, since *zero is not a rate* and brazenly infringing on our basic phonorecord reproduction & distribution rights we *thought were protected*. These are *all* paid Permanent Downloads. GEO respectfully asks Your Honors for clarity as to rate-setting for *all* restricted and incidental downloads, §385.2 eligibles, et al., and repealing or amending specific flawed, harmful, or illegal regulations in the Parties' previous or new Subpart C Settlement. GEO calls offline downloads "unlimited"[8] since Spotify[9] *offered free "10,000 downloads",* then later ran ads offering free *"unlimited"* downloads for "offline listening", but it's not streaming, <u>it's *a download*</u>.

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[7] 2001 Joint Proposal and Agreement by NMPA, RIAA and Harry Fox Agency. December 6, 2001, signed by RIAA counsel Mr. Stephen Englund and NMPA/HFA counsel Carey Ramos.

[8] <u>https://community.spotify.com/t5/Community-Blog/Save-save-save/ba-p/4963349</u> Exhibit C — 2020-06-28, "…latest Spotify update that allows an unlimited quantity of downloads." "We removed the limit for how many songs you can have saved in the Your Library tab."

[9] <u>https://community.spotify.com/t5/Android/How-to-download-unlimited-songs-as-a-premium-user/td-p/4985664</u> Since 2014 Spotify subscribers could download 10,000 "tracks" or 10,000 free "eligible limited downloads", which Spotify unilaterally changed to "unlimited downloads", aka. unlimited "eligible limited downloads". Note: "Unlimited songs" is another term Spotify uses, not to be conflated with Amazon's "unlimited *access"* on their websites, or "play 100 million songs" by Apple that still *allows 100,000 free downloads*.

JUST AS IN THE NEW SUBPART B DOWNLOAD COLA INDEXING RULING (& ADJUSTMENT), SHOULDN'T THERE ALSO BE A SUBPART C COLA INDEXING FOR *ALL* RESTRICTED AND ELIGIBLE LIMITED DOWNLOADS? PROMOTIONAL DOWNLOADS, DPDs, INCIDENTAL DPDs, AND OFFLINE LISTENING DOWNLOADS TOO?

The other issue that seems equally as important as any possible first time rate-setting for *all* Restricted and Eligible Downloads, is will there be the "like" Subpart B type **Cost of Living Adjustment ("COLA") indexing for all Subpart C Downloads**[10], including Restricted and Eligible Downloads?

As a layman, any *no* COLA indexing for both **Subpart C Restricted and Eligible Downloads** would seem to be arbitrary and capricious, or a possible due process issue, considering the recent *pro* COLA indexing ruling by the CRB for all *like* **Subpart B Downloads,** here in this same proceeding, *download* to *download*.

And while it may seem inconsequential to the Parties, or a *de minimis* throw-way, there has also never been a COLA indexing, nor a rate, to the 22 year old Limited Download[11] which I think still exists, but now dormant under or next to the Restricted Download, oddly separated from the new §385.2 Eligible Limited version.

The Limited Download *may* be GEO's path to a paid Offline Download?

There has also never been a COLA for Promotional Downloads nor the *rateless* Digital Phonorecord Delivery ("DPD") by itself, which then again may

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[10] It seems 3 primary Subpart C download definitions or categories exist either side by side or Eligible is under Restricted; 1. Eligible Limited, 2. Restricted, and 3. Permanent. (Limited?) It seems only Eligible and Permanent exist in MMA regulations. While Promotional are named "offerings", they're still a *rateless* DPD Download, and a free use.

[11] Since the original Limited Download may also still exist under Restricted Downloads, this is what GEO *may need to "convert" or "set a rate" to a paid permanent download rate for paid offline listening downloads? I'm not sure yet but it might a way to accomplish this?*

already have a "benchmark" rate, but as a Subpart B penny rate Permanent Download? GEO realizes these is not the main rate setting activity, but possible?

Lastly, while the Parties titled it "incidental", there has also never been a COLA, nor a first time rate ever set for the also rateless, static, and "incidental" DPD, which still seems to legally exist somewhere as well.

While the lack of COLA inflation indexing for Subpart C *eligible interactive streaming* is not the subject of this briefing, (and GEO prays it might be after this one) and while there *was* a Subpart B *pro* COLA Download indexing, the Parties might argue that the new *no* COLA "ruling" for Subpart C for "like" *eligible interactive streams* is now somehow "rate court precedent", which might mean *no* COLA indexing for like §385.2 *eligible limited downloads*, however;

a.) This may not be the case, just a Subpart B *Download* to C *Download*.

b.) It's still a final rule and not a final determination as of the moment,

c.) Subpart C Download rate-setting is *currently at issue* in this briefing,

d.) Most importantly, the Judges had no choice but to accept the Parties' self-dealing proposed "voluntary settlement" with *no proposed* COLA indexing for Subpart C streams nor Subpart C downloads *only* because of the way Congress has "cabined" the CRB Judges to "must publish" wildly flawed proposals, such as this Subpart C Settlement.

Moreover, these new "laws" (or proposed settlements) are re-written by these Same un-elected, self-dealing Parties through §385 Regulation Submissions over the years, and MLC lobbying, obsessively price-fixing all their U.S. songwriter and

publisher *competitors*, and with *zero rates for all* *our sales*, that they have legislated out of existence with free "offline listening" downloads, first using the *free* Subpart C "Limited Download" for over 20 years, which I pray Your Honors can make *paid*.

For years the Parties have also treated the Offline Download and Limited Download, as a "throw away", "de minimis", "inconsequential", and "incidental" digital phonorecord delivery, not to be paid the lawful download penny rate.

What is amazing to GEO is the Parties have assigned the *eligible interactive stream* the *exact same alleged "value" and "use"* as the *eligible limited download*, yet these are **two different configurations really, and at totally different rates of 12 cents and $.00012 cents, and this is the issue to GEO.**

It's also ironic that this *download* and *stream* are in the *exact same code sections pursuant to §385.2,* and reproducing the exact *same songs, same copyrights, same licensees, same licensors, same Services, and the same uses under §115, et al.*

As a songwriter, it's when the Parties give the "eligible limited download" the *exact same value* as an "eligible interactive stream" in Subpart C, this is what is epic to any songwriter when *they find out* their **download only gets $.00012 too**?

Then the Parties tell songwriters and competitor publishers to not ever ask to be *paid 9.1 cents* for their "Eligible Download", it's now just a "transmission", yet "Download" is right there in the title? Then the Parties oddly remove the word "phonorecord" from the very definition of "Eligible Limited Download", and I can't keep up with the word shell games, but this is the problem for songwriters and this constant definition changing also demonstrates an undue influence and self-dealing.

So, to GEO this is where the legal line is drawn, where a download is being used as a download, but illegally being "paid" or valued as a stream.

This is a great example of how *all* songwriters and *all* RCP's competitors are "subject to" these arbitrary and capricious "voluntary settlements" by the Parties.

It's also not Your Honors' fault whatsoever, *it's the Parties' who take advantage of their own arbitrary and capricious "proposed settlements"* — proposing CPI-U inflation indexing *for* songwriters one day in their WDS, then the next day's proposal *has no* CPI-U inflation indexing in their WDS whatsoever? This *is* where the arbitrary and capricious part *originates*, with *all* the Parties and their counsel.

The Parties not wanting to bear the COLA "costs" for songwriters, *while the 3 record labels enjoy a COLA indexing for sound recordings* in *Web V* is also arbitrary, capricious, unexplained and unsupported by substantial evidence and un-reasonable, as with this COLA issue for Subpart C Restricted and Eligible Limited Downloads, and any other relevant DPDs or downloads.

Most importantly, the real reason why the Parties and counsel minimize and diminish the Subpart C Downloads so horribly, is **they know there is nothing incidental, nor inconsequential, nor throw away, nor *de minimis* about any of these Subpart C Downloads** and that is why their value is smeared and songwriters legally bullied out of their sales by these Parties and their counsel.

The real practical reality and truth is these manipulative Parties ***could not run their billion dollar businesses with out these free Subpart C Downloads in the first place,*** and why they have *hidden* them in Subpart C at "zero rates" for

20 years, far away from any *paid* Subpart B Permanent penny rate Download legalese.

What these Parties are really doing is illegally manipulating basic copyright law to extract real *benefits to themselves*, by giving away a songwriter's lawful sale as a free "offline listening" download, *then paying them as a stream and not as a download*, which is theft, and this has been going on since the beginning of streaming!

This is *the* definition of author's exclusive rights "*riddled with exceptions and limitations, to be given away free of charge*," as per former Register Ralph Oman.

Why and how is a free "offline listening" download legally now a transmission or why is that free offline download given the exact same value as an interactive streaming "play" at $.00012 cents, and not it's lawful 9.1 cents, now 12 per song?

These *are* the exceptions and limitations that have poisoned the Copyright Act and GEO respectfully submits must be immediately repealed and repaired.

It's these exceptions and limitations that strip the song of *all* it's value, that is supposed to be "secure", and it's *only* "for a limited time", which is the point of a free offline listening download for 20 years is that 3 companies have the legal ability to *simply sabotage all their competitors' sales income* with a "zero rate" downloads, they created, by manipulating the terms and definitions in the compulsory license.

Therefore, the 2022 Subpart B COLA inflation indexing and no static rates ruling for Downloads are both *still extremely relevant and great precedent for Your Honors to add a COLA indexing to all Subpart C Downloads.*

As far as the PCLS, GEO is not as opposed to the "zero rate" for *only* the PCLS, it's paid, what GEO is opposed to is doing it through the Eligible Limited Download category, and not just declaring a "zero rate" for the PCLS *all by itself*.

In other words, do we have to have an exemption to the Eligible Limited Download, or can the exemption *only* apply to the PCLS itself, and not the Eligible?

If the "zero rate" is applied to the PCLS by itself, not the Eligible Limited Download category at all, that would be fine. However, the "zero rate" is *now an exception to the Eligible Limited Download category*, and seems like an excuse to change the Eligible definition for ulterior motives, once again to the Parties' benefit.

This may be splitting hairs, and what GEO proposes may not be legally possible or proper. The Copyright Owners may also have the best way to set the zero rate for the PCLS, however, GEO is opposed to the method proposed by the Parties *after reading all the other definition changes they made to* Restricted Downloads and to Eligible Limited Downloads, et al. So, this particular definition change seems like another way for the Parties to entwine other connected new definitions to their benefit, like the Restricted Download definition, and others they proposed where *NMPA changed their own meaning from "exclude", to "include"* to further try and game the Copyright Act in the RCP's and Services' favor. Ironically, the "exclude" version may help GEO. I know it seems like a stretch, but experience says they need this new exception and limitation to Eligible Limited Downloads, not just for PLCS, but to benefit themselves in the future, to possibly keep Offline Downloads free, or other rates low, with no COLA, static, or songwriter "cost" free?

KEEPING SONGWRITER'S CONFUSED ABOUT STREAMING AND RATES

One very important quick note and practical reality I would like to briefly raise to Your Honors specifically is *songwriters* and their layman business partners need to be able to understand *all* these music royalty categories, and *mainly rates* for every streaming activity and definition, in simple and basic terms, and no songwriter can understand them in the first place, much less now. I'm still lost.

What is the per-play rate for an eligible limited download? Nobody knows?

Most songwriters have also never heard of the Copyright Royalty Board and these streaming calculations are beyond comprehension, so there is no way songwriters will ever understand these rates, plus these rates are too buried in complex economic formulas and legal definitions that always intentionally change.

It's *also not an education problem for songwriters either*, and I realize the legal complexity is necessary to a large degree, I get it, but it's so unbelievably complicated and the language is so far removed from songwriters who this compulsory license is *supposed to benefit*, it's so far beyond any kind of simplicity or *practical value too with no real income*, that songwriters need and deserve.

That is also not Your Honors' fault either but the Parties making it as intentionally difficult to understand as they possibly can in their *lopsided proposals*.

Plus as streaming payouts get lower for songwriters, the lost sale should not be treated as a throw away, inconsequential, a *de minimis* configuration, or "lesser".

So, these rate proceedings only benefits *these* Parties, 12 to 14 corporations and counsel who run the show and control their competitors sales *and* price-fix our

rates through the compulsory license. All the while they *all do direct deals* with end runs and side deals and extra terms, get their legal fees paid for, *benefit from stock equity*, their 58% percent of revenue, late fees if an NMPA member, black boxes paid by marketshare, no MLC terminations in perpetuity, and free offline listening downloads with no payments to songwriters and competitor publishers for 20 years.

So, in the end, **no songwriter will ever understand the legalese,** the 15 step royalty pool formulas, constantly changing definitions, not even experienced music attorneys have even heard of an eligible limited download, or even care to.

CAN THE CRB MAKE PURCHASED CONTENT A ZERO RATE WITHOUT MAKING THE EXEMPTION TO ELIGIBLE LIMITED DOWNLOADS?

As mentioned above, in regards to the proposed "zero rate" exemption or exception for the §385.2 Eligible Limited Download for *only* the Purchased Content Locker Service ("PCLS") as the best solution, and may still be, I wanted to offer the other solution if legally possible for Your Honors to add the zero rate to *only* the PCLS, *outside* the Eligible Limited Download definition? Or should it have a rate?

Even if the PCLS did have a "zero rate" since the royalty is already paid for *in theory*, I could also argue it's *another giveaway* to use songwriters by 3 major record labels to sell more vinyl, and digital downloads are an entirely different configuration, once and again, given away for free. While I leave it to Your Honors' discretion, if a zero rate PCLS is possible by itself, then ok, but §385.2 is so fraught with problems it *must* either replaced with a Permanent download that *still counts offline plays*, simply repealed, or rewritten so subscription and downloads co-exist.

BACKGROUND

In their December 30, 2022, Subpart C Final Rule[12] the Judges intended to request additional briefing[13] to address rate-setting for §385.2 activity, et al.

On January 5, 2022, *Order 65 Requesting Additional Briefing* stated:

> "The Judges observed that George Johnson, a participant who was not part of the settlement, appears to have requested a rate setting for activity that may not be addressed in the settlement, which he describes as an "unlimited limited download." The Judges stated their intention to request additional briefing from the participants as to whether and how this proceeding may address such activity. Id. at 80453 n.22."

The Judges made similar comments on December 30, 2022, under "Mr. Johnson's Opposition to the Settlement" on Page (80452) and Footnote 16,

> "GEO also includes alternative rate proposals and urges the Judges to abolish what he refers to as a "free limited download loophole" or a "free and unlimited limited downloads loophole." *Id* at 2, 3. GEO further addresses this matter as an element within his WDS which proposes to plug the free and unlimited limited downloads loophole. *Id*. at 2, 11-15." (*See* Footnote 16)
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> > (Footnote 16) "GEO's opposition to the "free and unlimited limited downloads loophole" may, on its face, appear somewhat vague. However, GEO's proposal appears to relate to an issue and proposal raised more precisely in Copyright Owners' WDS, intended to close a hole in the terms that could be seen as leaving some uses without a rate. Restricted Downloads have been defined as any downloads that are not permanent, including Eligible Limited Downloads. However, past regulations (and seemingly those set forth in the Settlement) do not provide a rate for Restricted Downloads. Copyright Owners' WDS proposed revising the definitions to maintain the allowance for zero rate Restricted Downloads

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[12] https://app.crb.gov/document/download/27410 December 30, 2022, Subpart C Final Rule. 87 Fed. Reg. 80448 (Dec. 30, 2022)

[13] Footnote 22, "The Judges observe that GEO appears to have requested a rate setting for activity that may not be addressed in the Settlement, which he describes as an "unlimited limited download." The Judges intend to request additional briefing from the Participants as to whether and how this proceeding may address such activity." December 30, 2022.

> solely in connection with Purchased Content Locker Services and set a rate for other Restricted Downloads equal to the penny rate for Permanent Downloads. Copyright Owners WDS at 23-24."

GEO is unclear what is meant by the phrase "set a rate for *other*", meaning what "other" Restricted categories are there left? How many are there?

It seems that the main obstacle to the §385.2 Eligible Limited Download being counted as a paid download, and not just the number of offline plays at the value of a stream, is the definition language *requiring end users to maintain their subscription fees, to then maintain their downloads*. I now realize if an end user would buy a download, offline plays may now be a moot point since the copyright is already paid as a download. It's the Parties that took away any 9.1 cent limited download payment long ago, then created this mess of *only* offline plays at $.00012 streaming rates for limited downloads. Therefore, I'm oddly inclined to conclude that both the download and offline plays should both be paid for all offline use since the Parties have sabotaged downloads for over 22 years. This solution seems unfair, but so is not paying for downloads. It's a horrible situation to be put in by the Parties who have stripped songwriters of *all* their digital phonorecord royalties.

4 ARGUMENTS TO REPEAL FREE OFFLINE DOWNLOADS

Initial arguments and good reasons to repeal free offline downloads are:

1. This longtime free Limited Download in any form, now new free "offline limited download" definition, is *no longer just a "transmission" DPD*, but a full, free Digital Phonorecord Delivery DPD *download*, made available, with a local private copy, *repeatedly played anytime*, meeting all legal definitions of a paid permanent download at the penny rate, no longer "limited", "restricted", nor "incidental" by any definition, but still a *de minimis* "throw away" here.
2. The Parties are clearly using this disparity in the law, law they all essentially wrote and re-write to this day to benefit themselves, the RCPs and Services. All Parties have masterfully managed to keep the Limited Download, now free Offline Listening *in place*, *and at a "zero rate"* for 22 years — so this *is* the loophole. The Parties also rewriting the Limited (now §385.2) or Offline Download copyright law for 22 years inside the Copyright Office to rob songwriters of their exclusive rights, income, rates, terms, profits, et al., is truly brilliant in an evil record label kind of way. This intentional loophole also allows Apple to give away 100,000 *free downloads* (songs - copyrights - sales) per-customer, offline, under the guise of a compulsory license, *yet Apple has no right to give anybody's sale or download away, yet they do,* and **yet this use is not seen as an economic problem for songwriters to Apple or any of the Parties**, in fact, it's a premeditated plan to defraud all songwriters and competitor music publishers by *sabotaging all their competitors sales* in an

abuse of the compulsory license privilege they should now lose or be sanctioned. **The Parties have *no authority to steal our sales* under the compulsory license,** under the §385.2 Eligible Limited Download, Offline Listening, nor the old original "Limited Download" version under §385.10, Restricted or incidental.

3. A "zero rate" download is most certainly not a ***willing buyer, willing seller*** arrangement ("WBWS"), nor simulating a free market, with Same Parties, plus, WBWS has never been *put into "effect"* as promised by Participants lobbying for the MMA[14]. This price-fixing of competitors by Participants is the nature of the compulsory license process, but price-fixing of competitors by Participants at "zero rates" for our downloads is beyond the pale, and *all* copyrights is wrong.
4. NMPA and NSAI, and now all the Parties, have changed and replaced the definitions of Restricted Download, Purchased Content Locker Services, Limited Download and now Eligible Limited Download so many times, they are not only unrecognizable, but the opposite of what the old definition was or was intended to mean to protect songwriters. Now the Parties have re-written the Regulations to only their advantage and the most un-level playing field imaginable.

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[14] The Music Modernization Act ("MMA") which was originally *my idea* to do a "songwriter's bill" in April of 2013, but the Grammy "advocacy" wing executives heard of my idea, said "George what a great idea, I can't believe we never thought of that," then threatened me and screamed at me for having the idea and telling my Congressman. They stole the whole idea, called it the SEA Songwriter Equity Act, *but created a new compulsory license* on songwriters at $.00012 per stream, which turned into the MMA. Then Daryl Friedman, former CEO Neil "Step Up" Portnow, Todd Dupler, and Susan Stewart *cancelled* me out of the Grammys after 15 years for *thinking of the idea.* But as Mr. Daniel Walsh told me, the Grammys "never thought of" helping songwriters, but GEO did. Daryl Friedman attacked, threatened, and screamed at me for simply telling his lobbyist I had a great idea and met with my Congressman. I'm not the only person the Grammys and Mr. Friedman have done this to, but in my case in perfect coordination with Ms. Stewart but mostly Mr. Portnow.

NMPA & NSAI OCTOBER 2021 WDS RESTRICTED DOWNLOAD ~~REDLINE~~

On Page B-8 of Appendix B of NMPA and NSAI's Written Direct Statement on October 13, 2021, a.) no songwriter can understand it, much less most music attorneys, b.) they've changed their definitions so much it's hard to know what they now mean, c.) the next few definitions seem to *be the opposite or their original meaning* at times and it's been re-arranged too many times by Pryor Cashman, NMPA, RIAA Counsel, and now the Services. GEO is grateful to Your Honors for raising this Restricted activity to Participants since it's extremely important and needs further examination by Your Honors and the Register to set fair regulations.

In Appendix B on Page B-8 of NMPA and NSAI's ~~REDLINED~~ Regulations:

> *Restricted Download* means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download. (underlines added)

> *Restricted Download* means a Digital Phonorecord Delivery ~~in a form that cannot~~ be retained and ~~replayed~~ on a permanent basis. The term Restricted Download ~~includes an~~ Eligible Limited ~~Download.~~

> *Restricted Download* means a Digital Phonorecord Delivery ~~in a form that cannot~~that remains accessible for future listening, but may not be retained and ~~replayed~~played on a permanent basis. The term Restricted Download ~~includes an~~excludes Eligible Limited ~~Download~~Downloads and Eligible Interactive Streams.[15]

In Appendix A on Page A-5[16] is the *new* revised definition reads as follows;

> *Restricted Download* means a Digital Phonorecord Delivery that remains accessible for future listening, but may not be retained and played on a permanent basis. The term Restricted Download excludes Eligible Limited Downloads and Eligible Interactive Streams. (underlines added)

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[15] https://app.crb.gov/document/download/25858 October 13, 2021, Page B-8 of Appendix B of NMPA and NSAI's Written Direct Statement.

[16] https://app.crb.gov/document/download/25858 October 13, 2021, Page A-4 of Appendix A of NMPA and NSAI's Written Direct Statement.

NMPA AND NSAI OCTOBER 2021 WDS PURCHASED CONTENT LOCKER

In Appendix B on Page B-6 of NMPA and NSAI's ~~REDLINED~~ Regulations:

Purchased Content Locker Service means ~~a Locker Service made available to End User purchasers of~~ an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, ~~Ringtones, or physical phonorecords~~or Restricted Downloads at no incremental charge above the otherwise applicable purchase price of the ~~Permanent~~digital downloads, ~~Ringtones,~~ or physical phonorecords ~~acquired~~**,** for which the Service has reasonably determined that the End User has purchased from a qualifying seller. ~~With a~~ phonorecords of the applicable sound recordings prior to the End User's first request to have access to the sound recordings by means of the Service. The term Purchased Content Locker Service, ~~an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.~~ does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.[17]

In Appendix A on Page A-4[18] the new revised definition reads as follows;

Purchased Content Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, or Restricted Downloads <u>at no incremental charge</u> above the otherwise applicable purchase price of the digital downloads, or physical phonorecords**,** for which the Service has reasonably determined that the End User has purchased from a qualifying seller phonorecords of the applicable sound recordings prior to the End User's first request to have access to the sound recordings by means of the Service. The term Purchased Content Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license. (underline emphasis added)

Limited Downloads aren't charged 12 cents, yet no *paid incremental* streams?

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[17] Page B-6 and B-7 Copyright Owners' Proposed Rates and Terms Dkt No. 21-CRB-0001-PR (2023-2027)

[18] <u>https://app.crb.gov/document/download/25858</u> October 13, 2021, Page A-4 of Appendix A of NMPA and NSAI's Written Direct Statement.

NMPA & NSAI OCTOBER 2021 WDS ELIGIBLE LIMITED ~~REDLINE~~

On Page B-2 of Appendix B of NMPA and NSAI's Written Direct Statement;

Eligible Limited Download means ~~a~~the transmission of a ~~sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a~~specifically identifiable, protected and tethered (but obfuscated) Digital Phonorecord Delivery ~~of that sound recording~~to a Subscriber that is only accessible for listening for~~—~~ an amount of time not to exceed thirty-one (31) days from the time of the Subscriber's latest transmission. Such time period may be extended up to another 31 days each time a Subscriber makes a specific request through a live network connection.

~~(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or~~

~~(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.~~

In Appendix A on Page A-2[19] is the new revised definition reads as follows;

Eligible Limited Download means the transmission of a specifically identifiable, protected and tethered (but obfuscated) Digital Phonorecord Delivery to a Subscriber that is only accessible for listening for an amount of time not to exceed thirty-one (31) days from the time of the Subscriber's latest transmission. Such time period may be extended up to another 31 days each time a Subscriber makes a specific request through a live network connection.

To GEO, it's amazing the Parties took out the word "digital phonorecord", since that is the definition of a download, but that it's *just* a "transmission" is rich.

[19] https://app.crb.gov/document/download/25858 October 13, 2021, Page A-2 of Appendix A of NMPA and NSAI's Written Direct Statement.

NMPA & NSAI OCTOBER 2021 MMA LIMITED DOWNLOAD ~~REPLACED~~

This shows *the replacement of the "limited download" definition* with the new and improved "eligible limited" revision by NMPA and NSAI's counsel, and MMA counsel, Pryor Cashman, so another definition change or replacement, here in the July 08, 2019, Music Modernization Act ("MMA"). It's unclear where Limited "is"?

The new revised definition reads as follows of the MMA on July 08, 2019.

> "iii. Remove the term "limited downloads" and add in its place the term "Eligible Limited Downloads"; and"[20]

§115 Limited Download (16) — a Limited Download *is* also a Restricted Download and "means a digital "transmission…in the form of a download." "only for a limited amount of time or specified number of times".

Does this Limited Download still exist under, or next to, Restricted and why do the Parties keep changing the meanings of the terms ever couple of years?

According to the 2021 code the Limited Download is defined as:

> (16) LIMITED DOWNLOAD —The term "limited download" means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times.[21]

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[20] https://www.federalregister.gov/documents/2019/07/08/2019-13292/copyright-royalty-board-regulations-regarding-procedures-for-determination-and-allocation-of July 08, 2019 Bob Goodlatte Music Modernization Act, Mechanical License Collective CRB Regulations Regarding Procedures.

[21] https://www.govinfo.gov/content/pkg/USCODE-2021-title17/pdf/USCODE-2021-title17-chap1-sec115.pdf Title 17 U.S.C.

The above Redline changes show significant differences in the basic meanings in the 4 main definitions of the following terms including the 1.) Restricted Download, 2.) Purchased Content Locker Services 3.) Eligible Limited Download, including the 4.) Limited Download replacement, with Eligible now either being moved to it's own category, either beside or underneath Restricted Downloads.

All these changes seem normal to counsel, but are disturbing to GEO for all of the good reasons and good cause in this brief. All these Redlined definitions are very difficult to understand to any reasonable person, any layman, **but to any songwriter**, and we pray Your Honors can clarify all these Redline definitions to remove all their legal loopholes that only benefit them.

§106 (1) TO REPRODUCE AND (3) TO DISTRIBUTE PHONORECORDS

Next to Article 1, §8, Cl.8 of the Constitution, Section §106 of the U.S. Copyright Act is the most fundamental copyright law protection available which states, "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following," **(1) "to reproduce the copyrighted work…in phonorecords" and (3) "to distribute copies or phonorecords of the copyrighted work to the public by sale".**[22] GEO still has the absolute right to **distribute phonorecords "to the public by sale"** which means no person or corporation, or even government has the right to take away my right to distribute "to the public by sale", *by rewriting the law* to stop *our sale* for *their access* model.

> 106. Exclusive rights in copyrighted works
>
> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

[22] https://www.copyright.gov/title17/92chap1.html#106 Section §106(1), (3), (4), & (5)

CLARIFICATION OF SUBPART C DOWNLOAD RATE-SETTING, ET AL.

GEO respectfully requests Your Honors for clarification on legal regulations and new rate-setting procedures arising from the Parties' Subpart C Final Rule.[23]

1. Is a zero download rate for free "offline listening" *reasonable*?
2. Is the zero rate *lawful* as offline downloads as per the CRB code or federal law?
3. Is a zero download rate set by competitors *lawful* as per the CRB code or law ?
4. Is a zero download rate *reasonable* for songwriters *bound* by compulsory license?
5. Is a zero download rate *due process* for U.S. songwriters? Arbitrary?
6. Should any new "Restricted" rates and activity be set by briefing or by *hearing*?
7. Must Subpart C "Restricted" download "zero rates" now be set for the *first time*?
8. Must *all* configurations/categories of Subpart C "download" *uses* be set *de novo*?
9. Is a no "*static*" rate now required, and since a "zero rate" for 22 years *is* static?
10. If no "static" rate is now precedent for downloads, is *inflation* indexing required?
11. Would the *absence* of COLA indexing for §385.2, or Restricted, also be arbitrary?
12. Could inflation indexing for §385.2 be retroactive for 22 years, or partial years?
13. Must all *other* "no rate" Subpart C Restricted downloads also have a rate set?
14. What *other legal authority* allows a "zero rate" for a download or DPD use?
15. Do "zero rate" proposals created by *competitors* void "*secure* for limited times"?
16. Should Promotional Downloads or "Offerings" at "zero rates" be set *de novo?*
17. Is there an *actual value* for limited downloads in the royalty pool calculations?
18. Should Eligible Limited Downloads be counted as Downloads or Streams?
19. Can the new 44% *Phono III* benchmark in *value* be applied to §385.2, et al.?

[23] These are general questions GEO hopes Your Honors weigh in deliberations and orders.

5 STEP AMENDED SUBPART C RATE PROPOSAL - §385.2 REGULATION

1. Most urgently, *repeal* the current §385.2 "eligible limited download" definition, term, category, and configuration from the Subpart C *regulations* altogether,
   A. since it's mass run of the mill copyright infringement in it's current form, and
   B. so that download sales no longer substitute for streaming as a *de minimus,* and other, like Subpart B configurations sales for physical vinyl, CDs, et al.

2. After repealing the "*eligible limited*" term, it appears the best and only reasonable solution would be to simply *replace* that term with "*permanent*" with the same definition as a voluntary Subpart B Permanent Download (all offline listening would now be paid) using the current 12 cent penny rate and CPI-U inflation indexing. Create a new Subpart C Permanent Download if needed.

3. Adding a "disappearing" BUY button next to *every* song, album, and playlist to *every* Service would be the most logical and eloquent solution to payment. The disappearing button is mainly for aesthetics on the app, but to indicate the BUY.

4. The only other problem left would be rate setting for *all* the other Subpart C configurations, ie. Restricted Downloads, or Incidental Downloads, the regular Limited Download, even *de novo* Promotional Offering Downloads should not be ignored under the Restricted Download umbrella configuration. Clarifying these legal issues and proposals for any additional rate-setting hearings or additional briefings is very important for all songwriters and the purpose of this brief.

5. The CRB must stop the Parties from *wasting* all their *competitors' sales income.*

FREE LIMITED DOWNLOADS *ARE* PAID PERMANENT DOWNLOADS

There is *no difference* between *offline listening* of an "eligible limited" download under §385.2 and the definition of a Permanent Download (24), on Page 99 of the October 21, 2021 updated definition 17 U.S.C. 115(e) which is.

> (24) PERMANENT DOWNLOAD.—The term "permanent download" means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening without restriction as to the amount of time or number of times it may be accessed.[24] (underline added)

So, a Limited Download, but specifically the §385.2 Eligible Limited Download that is used for "offline listening", becomes the very *definition of a paid Permanent Download* according to the Copyright Act's own Permanent Download definition since the sound recording of a musical work "is accessible for listening without restriction as to the amount of time or number of times it may be accessed."

Yet a Limited Download is defined as only a limited amount of time or specific number of times, yet offline listening *is* a full Permanent Download to the end user who can listen whenever they want, for however long they want, and with no restriction to the number of times they play a musical work, yet it's not paid:

> (16) LIMITED DOWNLOAD.—The term "limited download" means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times. (underline added)

So, the Parties have found a way to get out of paying *all* songwriters and publishers for the use of *all* paid Permanent downloads, *disguised* as a limited use.

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[24] 17 U.S.C. 115(e) October 12, 2021 Version on Gov Info Gov.

LIMITED DOWNLOAD NOW PRIVATE COPY, NOT JUST TRANSMISSION

I Googled the Limited Download legal issue and found a Bloomberg Law article from October 18, 2017, written by Senior Legal Editor Mr. Anandashankar Mazumdar, Esq.. While not caselaw or rate court precedent, he does eloquently frame and summarize some fundamental legal issues *as an attorney* who is familiar with the CRB process and copyright law. Mr. Mazumdar correctly defines the legal terms and configurations, correctly implicating the reproduction and distribution rights which are relevant here at a proposed "zero rate" Download here in 2023.

In short, Limited Downloads are stored, private copies *after* transmission, can be listened to endlessly, anywhere, and are definite *deliveries* of a phonorecord DPD that clearly implicates the §106 reproduction and distribution exclusive rights.

> *"*The second form of on-demand delivery is what traditionally has been referred to as "limited" or "conditional" downloads. Here, the service delivers a full copy of the song that remains resident on the user's device, **not unlike a download offered by iTunes or Amazon** except that the track is deleted and/or disabled when the user's subscription ends (and hence is "limited" rather than permanent). When the user chooses to listen to that song, she listens **from that local copy**, not from a stream delivered by the service. (This innovation was originally intended to accommodate bandwidth limitations and slow internet streaming speeds, and now allows users to avoid data charges and to enjoy their playlists while on subways, planes, and in other offline locations.) (**bold added**)
>
> It is imperative to separate these two activities in any analysis of copyright license requirements. **Limited downloads constitute private copies stored on user devices that can be listened to repeatedly after being transmitted. They are deliveries of a phonorecord—DPDs—that clearly implicate the reproduction and distribution rights.** (They do *not* implicate the performance right, but that's a topic for another day.)"[25] (**bold added**)

[25] https://news.bloomberglaw.com/ip-law/dont-believe-the-hype-spotify-is-right-to-challenge-mechanical-license-demands-for-interactive-streaming October 18, 2017, Bloomberg Law, *Don't Believe The Hype*, by Senior Editor Anandashankar Mazumdar.

Again, the limited download *is* a permanent download *after* transmission that *is not paid* for it's offline listening uses, yet offline listening meets the definitions of a Subpart B paid Permanent Download, repeatedly listened to from a local copy.

Mr. Mazumdar now works at the Copyright Office of Public Affairs[26].

One last important factor, Mr. Mazumdar says "(and hence is "limited" rather than permanent)", which makes the reader, *but what most songwriters think*, or any reasonable person would think — that the word "limited" means a "limited permanent download" — *and* to us music copyright fans, permanent download clearly implicates Subpart B. This may seem like no big deal, but from the songwriter side, it's a very clever trick and play on words that is deceiving and very relevant to this §385 issue since a "limited" Subpart B download doesn't exist.

For years I could never understand why the limited download was in Subpart C until I recently realized it was ***not*** a legal offshoot of a Subpart B Permanent Download, but a new, free download *creation* of Subpart C. I then was devastated to learn the limited download has no download *value* in the 15.1% percent royalty pool calculations, and essentially no *rate* for 22 years — plus the fact that the Limited Download is lumped in with the below-market 15.1% percent headline percentage of revenue pool calculation, *is horrible,* and when the RCPs take 58% percent. Nobody out there really notices the "limited download" in Subpart C but it's hidden right there in plain sight in black and white for over 20 years. So, using "limited" *with* "permanent download" in Subpart B tricks the reader, like

[26] https://blogs.loc.gov/copyright/author/amazu/ Mr. Anandashankar Mazumdar, Esq.,

"Copyright Owners" who *own no copyrights*. The point is Mr. Mazumdar rightly says limited comes from permanent, and he is correct, and GEO's argument, that the "limited" term *did* come from a Subpart B "limited" Permanent Download, but where we are both "wrong" is since the Limited Download lives free in Subpart C.

The reason is the RIAA, NMPA, RCPs, DiMA, et al., did a bait and switch and stuck this "Limited" Permanent Download in Subpart C where nobody could see or find it, and brilliantly for 22 years, but it's copyright infringement inside the Copyright Act and really the No. 1 issue in these proceedings: the Parties using the compulsory license, and then using their marketplace share in the CRB to **sabotage their competitors' sales, not just use the compulsory license to set a reasonable interactive streaming rate for "themselves" and competitors**.

From 1998 to 2001, Mr. Cary Sherman of the RIAA, his counsel Mr. Englund, and others decided they would re-name this newly created Subpart B style raw Digital Phonorecord Delivery or ("DPD") or download, an "incidental" download or "incidental digital download delivery", which in reality it's still just a paid Permanent Download or non-incidental DPD.

But as Mr. Sherman and Mr. Englund wrote at the time into their settlement agreements that they, the RIAA and RCPs, **had to help the Services get their streaming business models off the ground**, ***with no rate set for both interactive streaming nor limited downloads***, *no time frame to when an actually rate would be set*, and *no accountability or responsibility for not setting one*. This is simultaneously amazing they got away with it, but terrifying and explains

everything as to *how* the **paid download** *was forced out* by the Parties for a newly created free "limited download". The *why* is RIAA needed to get the Services going?

Where does it say in the *compulsory license* I have to give up all my sales at "zero rates" if the Parties re-name "permanent" or a DPD to "eligible limited"?

The Parties will claim that the Limited Download is not a Permanent Download *since all downloads are cancelled if an end user cancels their subscription*.

But the problem with that argument is the customer *still got the full benefit* of the song, really the first time they heard it, so whether they subscribe for 2 months, 6 months, 1 year, or 5 years, the end user still got the benefit of that song, *all* the offline listening benefits, and the full benefit for the months and years they performed that song for free, and never paid a lawful mechanical or the download under the compulsory license. These Parties do not have the right to legislate sales.

The Limited Download and now §385.2 (and with it's subscription fee mandates) are simply a way to skirt the Copyright Laws exclusive rights and **ensure no download costs for the record companies**. Again, it goes back to the record label's 58% revenue share vs. the *de minimis* 15.1% percent share for songwriter hierarchy. The *de minimis* songwriter only being "a cost" to the 3 major record labels', who own the 3 major publishing companies under their control. The entire purpose of a major record company is not to have any costs, except for them, and keep the costs they do have stable and compliant. After that, make sure that stock prices, shareholder equity, and bonuses and executive salaries are on the rise, but all songwriters must be at $.00012 per stream, with no sales, under §385.2.

MCNA, SGA, SLC, ET AL, SUPPORT FOR LIMITED DOWNLOAD ISSUE

In the November 7, 2022 Comments[27] by MCNA, SGA, SLC's, music creators Rick Carnes and Ashley Irwin, and other music creator organizations in opposition to the Subpart C proposed Settlement, showed support for the "limited download/ buy button issue" which GEO is very grateful. They joined with music creator organization worldwide representing hundreds of thousands of working and professional songwriters, publishers, DIY self-publishers, composers, lyricists, and investors.

> Footnote "8 Our support for the comments and submissions of Phonorecords IV participant George Johnson extends beyond his suggestions regarding cost-of-living increases and related rate-setting matters, and includes his references to the limited download/buy button issue and his points related to the limited nature of copyright protection in both time and scope pursuant to Article I Section 8 of the US Constitution, which make copyright matters more urgent to timely resolve."

GEO also joined with all of the above mentioned MCNA "family" of creators worldwide[28] and in all of North America and the United States in my December 7, 2022 Comments by GEO on the Subpart C proposed settlement.

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[27] https://app.crb.gov/document/download/27358 November 7, 2022, Subpart C *Comments Submitted by the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, Music Creators North America, and the individual music creators Rick Carnes and Ashley Irwin, and endorsed by the Music Creator Groups Noted on the Appended Listing.*

[28] GEO also joined with the affiliated organizations of the MCNA which were also crucial to the declination of the March 30, 2022 Subpart B proposed rule. These affiliated organizations are the Alliance for Women Film Composers (AWFC). https://theawfc.com, Screen Composers Guild of Canada (SCGC), https://screencomposers.ca, Songwriters Association of Canada (SAC), http://www.songwriters.ca, Asia-Pacific Music Creators Alliance (APMA), https://apmaciam.wixsite.com/home/news, Music Answers (M.A.), https://www.musicanswers.org, Fair Trade Music International (FTMI), https://www.fairtrademusicinternational.org/, Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org, and the Alliance of Latin American Composers & Authors (AlcaMusica) https://www.alcamusica.org.

***DE MINIMIS*, THE INCONSEQUENTIAL DOWNLOAD**

From Your Honors' rulings under "Royalties from Subpart B Configurations" on December 16, 2022, Subpart B Final Rule (76941) under Judges' Analysis and Conclusions (and also in your March 30, 2022, Declination Ruling on Page (18347)).

> "The Judges find no reason in the record to depart from their previous finding that Royalties from Subpart B Configurations are not inconsequential to the rightsholders. Subpart B Configurations are qualitatively different from the digital streaming configurations; consequently, the Judges can and do set separate rates for the Subpart B Configurations. Even though the physical and "permanent" download products are different in character from streaming uses, the Judges cannot and do not treat them with any less care and attention.[8] Subpart B Configurations, in particular vinyl recordings, are a significant source of income for section 115 rightsholders. The royalties they generate should not be treated as *de minimis,* or as a "throw away" negotiating chip to encourage better terms for streaming configurations."[29]

GEO argues this *de minimis* ruling now applies even more so to *all* Subpart C downloads including "restricted", "limited", "eligible limited", "incidental", or "incidental digital phonorecord delivery", et al. A zero rate download by the Parties is as *de minimis* as a configuration can get, and a *root cause* of 22 years of lost income and Permanent Download sales for *all* songwriters, to help an *access* model.

What this is is manipulating government regulations with a loophole to give away all *competitors'* download sales. Every word of the above *de minimis* ruling is applicable and relevant to this free and unlimited §385.2 Eligible Limited Download give away of all their competitors' sales, for 22 years, and §385.2 is nothing more than another loophole created by RIAA, NMPA, DiMA, and Mr. Englund since 1998,

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[29] https://app.crb.gov/document/download/27390 December 16, 2022, Subpart B Final Rule at 12 Cents with CPI-U inflation Indexing, *Federal Register* (87 FR 76937)

et al.,. All of these Parties have literally managed this loophole thru dozens of rate proceedings, pre-CRB, to give away *all* of our millions of Permanent Downloads, songs, art, copyrights, sales, profits, for the *benefit of* 3 major record labels, now 5 streaming Services. The Parties need these free downloads to run their businesses.

I now jokingly refer to any Incidental Digital Phonorecord Delivery, Restricted Download, Limited Download, Eligible Download, or Promotional Download as an "Inconsequential Download", appropriately named *De Minimis.*

There would be no Subpart C Limited Download for 22 years if the Parties didn't have a payment or copyright infringement problem with this free download, now an Offline Listening Download or Eligible. It's why they turned the limited download into an interactive stream, to stop any 9.1 cent payment per musical work.

To summarize this briefing, GEO respectfully proposes the best way to address such activity would be to *repeal* the 37 C.F.R. § 385.2 "Eligible Limited Download" then simply *replace* it with a Subpart B Permanent Download at the new penny rate with indexing. In other words, replace the term "eligible limited" with "permanent" so this free §106 reproduction is a paid Permanent Download.

If a new and separate rate must be set for a §385.2 Eligible Limited Download, or a new paid Subpart C Permanent Download, they should be set at the exact same 12 cent penny rate and CPI-U inflation indexing terms as it's Subpart B counterpart. This includes the *per-play interactive streaming rate online, plus off.*

Otherwise set *all* Subpart C Downloads at a Subpart B paid Permanent Download rate, except for maybe the PCLS offering, might be the best way overall.

POSSIBLE CATEGORIES OF SUBPART C DOWNLOAD, ET AL.

Here's GEO's general list of possible categories, definitions, or configurations;

1. Eligible Limited Download ("ELD") in §385.2, Eligible is Restricted
2. Limited Download ("LD") from original in 2001 to MMA era, still here
3. Restricted Download ("RD") is a §385.2, Limited may be under this.
4. Promotional "Offering" Download ("POD") or promotional use
5. Digital Phonorecord Delivery ("DPD") definition of rateless Download
6. Incidental Download DPD ("IDPD") (*See* December 4, 1998 Petition)
7. New Paid Permanent Download ("PD") for Subpart C (if needed)

Furthermore, the first 6 configurations or download categories are *all* frozen;

a.) at *zero cents*, "zero rate", or "royalty free"

b.) at a *static rate*,

c.) with no COLA or CPI-U *inflation* indexing,

d.) nor set *de novo* as per regulations

e.) with no *value increases* like new 44% Subpart C benchmark

f.) treated as "throw away" or *de minimus* configurations

g.) and the totality of all of the above, and combined for *22 years*.

All this "no rate" or "zero rate" activity must have rates set for the very first time in 22 years, and for all the good reasons from, a. to g., and why these activities, categories, or configurations require *de novo*, *non-static*, and CPI-U *indexed* rate-setting with any *value* increases, and the §385.2 *loophole fixed to add a 12 cent sale*.

CONCLUSION

GEO respectfully submits this briefing and prays Your Honors can stop the Parties from **short circuiting the process** using the voluntary settlement process **against all their competitors** by the Parties giving away *our* free sale disguised as a "restricted", "incidental", "inconsequential", "limited", "eligible limited", "promotional" download, or primarily "offline listening download", paid as a stream.

GEO respectfully submits Your Honors consider converting all Restricted Downloads and §385.2 Eligible Limited Downloads to full Paid Permanent Downloads like Subpart B, or simply repeal the §385.2 Eligible Limited Download in exchange for a full Paid Permanent Download for all Offline Listening Downloads, Restricted, and Eligible Limited Downloads. Then please look at DPDs.

De novo proceedings and first time rate setting, including COLA indexed, non-static rates for all Subpart C Download configurations is vital for all American songwriters and music publishers subject to the compulsory license.

As always, I hope Your Honors will be sympathetic to the issue of a layman like GEO providing proof to Copyright Judges on complicated matters of economics and law when the very people whose interests (and lives) are *burdened* by these rates and terms don't have the money to hire the very economists or lawyers needed to make that proof. As a layman making complex legal arguments with no law degree, I would respectfully add:

Baron Parke's Rule Law and Legal Definition:

> "Baron Parke's rule is a principle of statutory construction that allows a judge to depart from a word's normal or literal meaning in order to *avoid some manifest absurdity*. Generally, while construing written instruments, a court should adhere to the grammatical and ordinary sense of the words. However, if the literal interpretation leads to an absurd or *unjust result,* or even to an *inconsistency within the statute itself*, *the statute should be interpreted* in a way that *avoids such a result* or inconsistency. This is also known as the Golden Rule." [30] (emphasis added)

While GEO's arguments are not those of a polished lawyer, they can be recast and distilled as legal arguments, which is the purpose of this Brief. *See, e.g.*, *Macklin v. Spector Freight Sys.*, 156 U.S. App. D.C. 69, 78, 478 F.2d 979, 988 (D.C. Cir. 1973) ("It should be remembered that the jurisdictional requirements we are applying here are not aimed at polished lawyers' pleadings, but rather at charges brought, initially, by laymen usually unassisted by attorneys. Thus it makes sense, in our view, to avoid reading them as Baron Parke might have, but rather to read them with considerably more latitude and with weight to the construction given them by the Commission in the matters it proceeds to investigate." (citation omitted)), *disapproved on other grounds by Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975).

[30] http://definitions.uslegal.com/. Baron Parke's Rule of Law and Legal Definition.

Respectfully,

By: */s/ George D. Johnson*

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Sunday, January 22, 2023

Proof of Delivery

I hereby certify that on Sunday, January 22, 2023, I provided a true and correct copy of the CORRECTED GEO's Amended Subpart C Proposal and Response to CRB Order 65 Requesting Additional Briefing On Rate-Setting For All Restricted Downloads and 37 CFR 385.2 Eligible Limited Downloads, With Possible Repeal of "Free" Unlimited Offline Listening Download Loophole Or New Rates For Paid Permanent, Plus Add "Like" COLA to the following:

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at joe.wetzel@lw.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at jbranson@kellogghansen.com

Joint Record Company Participants, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at

senglund@jenner.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Signed: /s/ George D Johnson