

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)

**GEO’S NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW:
IS NO COLA FOR SUBPART C ARBITRARY AND CAPRICIOUS WHILE
SUBPART B HAS A COLA INDEXING AND RULING SET BY THE CRB?**

Participant George Johnson (“GEO”), a *pro se* Appellant songwriter respectfully submits this *Novel Material Question of Substantive Law* to correct the unreasonable omission of the Cost Of Living Adjustment (“COLA”) indexing by the Parties¹ for Subpart C interactive streaming and eligible limited downloads — while all Subpart B activity now enjoys a COLA ruling from the CRB in 2022.

GEO respectfully submits the following be referred to the Register:

1. In *Phonorecords IV*, the Judges applied a COLA indexing to Subpart B rates, but no COLA indexing to Subpart C rates, which raises the question of whether this differential treatment between download and streaming royalties is arbitrary and capricious to songwriters bound by the compulsory license?

¹ “Parties” consist of Amazon, Apple, Google, Pandora, Spotify, with lobbyists National Music Publisher’s Association (“NMPA”) and Nashville Songwriters Association International (“NSAI,”) representing the 3 major record labels Universal Music Group (“UMG”), Warner Music Group (“WMG”), and Sony Music Entertainment (“SME”) also known as the 3 Record Company Participants (“3RCP”) including their publishing divisions.

Section 802(f)(1) of the Act permits the Judges to refer material questions of substantive law to the Register of Copyrights (“Register”) for the Register’s interpretation. Referral to the Register is mandatory if the question is a “novel material question of substantive law concerning an interpretation of those provisions of [the Act] that are the subject of the proceeding ...” 17 U.S.C. § 802(f)(1)

The Act defines a “novel question of law” as a “question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).”¹ 17 U.S.C. § 802(f)(1)(B)(ii); see also 37 C.F.R. § 354.2(a).²

Pursuant to 37 C.F.R. § 354.1(b)(2) and 37 C.F.R. § 354.2(a) GEO respectfully submits and presents this precise legal question seeking interlocutory referral to the Register concerning an interpretation or construction of these provisions that arise in the course of proceedings.

Additionally, GEO respectfully submits that this Novel Question would apply to these 2 similar and relevant issues currently before Your Honors:

1.) 2 years of missing COLA inflation indexing to Subpart B downloads that is arbitrary and capricious argued in GEO’s March 9, 2022 *Motion for Relief to Amend 12 Cent Judgement to 13.73 Cents on January 1, 2023 To Correct No Proposed COLA by the Parties for 2021 and 2022*.³

2.) The briefed issue of no rate-setting *nor* COLA for various Subpart C downloads is arbitrary and capricious, argued in GEO’s January 30, 2023, *Reply*

² <https://www.ecfr.gov/current/title-37/chapter-III/subchapter-B/part-354> 37 C.F.R. § 354

³ <https://app.crb.gov/document/download/27507> March 9, 2023, Motion to Amend.

Brief to Order 65 on Rate-Setting for All Restricted, Limited, and 37 C.F.R. § 385.2 Eligible Limited Downloads, et al., Request for Hearing and Add CPI-U COLA. ⁴

GEO respectfully submits that the Parties willfully ignoring the highest inflation in 40 years in their Subpart C streaming royalty calculations is also differential treatment, unjustified, and unreasonable.

As Your Honors noted in your first March 30, 2022 declination for Subpart B.

“The proposed settlement did not include any adjustment to subpart B rates, not even an indexed increase.”

GEO respectfully submits this applies equally to Subpart C streaming rates, “not even an indexed increase.”

And in *Web V* the 3 major record labels asked for and got a COLA inflation indexing *for them on the §114 side*, but then arbitrarily *refused to propose it for their own songwriters, own publishing divisions, and competitors in Phonorecords IV*.

GEO respectfully requests Your Honors set a schedule at your convenience if briefing is required prior to referral to the Register, or if needed to argue the law.

As Your Honors also noted in your declination, which applies to Subpart C:

“GEO has long advocated inclusion of an inflation index in royalty rates set by the Judges, including the subpart B rates at issue here.”⁵

⁴ <https://app.crb.gov/document/download/27435> January 30, 2023. GEO’S Reply Brief.

⁵ <https://www.federalregister.gov/documents/2022/12/16/2022-27237/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv> Page 18346.

GEO prays this motion to refer this Novel Question regarding inflation will relieve the unreasonable omission of COLA indexing for Subpart C interactive streaming, and other yet undetermined Subpart C download rate-setting activities.

CONCLUSION

For the above good reasons and good cause GEO respectfully requests the Judges refer this *Novel Material Question of Substantive Law* to the Register for guidance, and to eventually correct the unreasonable omission of the Cost Of Living Adjustment (“COLA”) indexing by the Parties for Subpart C interactive streaming and eligible limited downloads, while *all* Subpart B configurations now enjoy a full COLA indexing — this being arbitrary and capricious.

Respectfully,

By: /s/ George D. Johnson

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Monday, March 20, 2023

Proof of Delivery

I hereby certify that on Monday, March 20, 2023, I provided a true and correct copy of the GEO's Novel Material Question of Substantive Law: Is no COLA for Subpart C Arbitrary and Capricious While Subpart B Has a COLA Indexing and Ruling Set By the CRB to the following:

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

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

Joint Record Company Participants, 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

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

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

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

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

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

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

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

Signed: /s/ George D Johnson