

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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)¹

RESPONSE TO GEO’S SUBPART B MOTION

Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp. respectfully submit this Response to Geo’s Subpart B 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 (the “Motion”). With all due respect to Mr. Johnson, and regardless what one might think of the merits of his Motion, the “Subpart B rates” for physical phonorecords, permanent downloads, ringtones and music bundles that the Judges published in the Federal Register on December 16, 2022 are now final, and the Judges have no power to change them. *See Final Rule*, 87 Fed. Reg. 76,937 (Dec. 16, 2022). The Motion therefore must be denied.

Congress prescribed detailed statutory procedures for rate-setting proceedings that were specifically designed to result in the determination of statutory royalty rates prior to the expiration of predecessor rates. *See, e.g.*, H.R. Rep. No. 108-408 at 34, 39 (2004). That is what happened when the Judges published on December 16, 2022 their determination of Subpart B rates dated November 30, 2022. Absent a successful appeal to the D.C. Circuit, those statutory procedures provide only one way for the Judges to change rates they have determined: a rehearing, which may

¹ By using this caption, Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. are not waiving any rights or expressing any agreement concerning the dates that any rates and terms adopted by the Judges in any rate proceeding are to be in effect.

be permitted upon a motion that “may *only* be filed within 15 days after the date on which the Copyright Royalty Judges deliver to the participants in the proceeding their initial determination.” 17 U.S.C. § 803(c)(2) (emphasis added); *see also* 37 C.F.R. § 353.4. That deadline passed more than two months ago.

“Unless a motion for a rehearing is timely filed within 15 days, the determination by the Copyright Royalty Judges pursuant to 17 U.S.C. 803(c) in a proceeding is final when it is issued.” 37 C.F.R. § 352.3. Thus, the Subpart B rates are “final.”² Once the Judges finally determine rates, they no longer have authority to change them (except on a remand from the D.C. Circuit). While the Judges retain certain continuing jurisdiction, they are only permitted “to correct any technical or clerical errors in the determination or to modify the terms, *but not the rates*, of royalty payments.” 17 U.S.C. § 803(c)(4) (emphasis added). Such finality of rates serves the important purpose of allowing industry participants to make plans and carry on their businesses with certainty about the outcome of a proceeding. *Cf. Arizona v. California*, 460 U.S. 605, 618-28 (1983) (“a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.”).

Administrative agencies such as the Copyright Royalty Board have only the powers delegated to them by Congress. “[I]f an agency action is ‘unauthorized by the statute under which [the agency] assumes to act,’ the agency has ‘violat[e]d the law.’” *Nat’l Ass’n of Postal Supervisors v. U.S. Postal Service*, 26 F.4th 960, 970 (D.C. Cir. 2022) (quoting *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); some alterations in original). Because

² *See also* 17 U.S.C. § 803(d)(1) (“If no appeal is brought within that 30-day period [after the publication of the determination in the *Federal Register*], the determination of the Copyright Royalty Judges shall be final.”).

the action sought in the Motion is not an action that the Judges are empowered to take, the Motion must be denied.³

Dated: March 23, 2023

Respectfully submitted,

/s/ Steven R. Englund

Steven R. Englund (D.C. Bar No. 425613)
JENNER & BLOCK LLP
1099 New York Avenue, N.W., Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
senglund@jenner.com

*Counsel for Sony Music Entertainment, UMG
Recordings, Inc., and Warner Music Group
Corp.*

³ To the extent that Geo’s filing entitled Novel Material Question of Substantive Law (Mar. 20, 2023) may address the Subpart B rates that are the subject matter of the Motion, *id.* at 2, that filing suffers from the same defects as the Motion. *See also* Copyright Royalty Judges’ Ability to Set Rates and Terms That Distinguish Among Different Types or Categories of Licensors, 80 Fed. Reg. 76,577, 76,581 (Dec. 9, 2015) (referral procedure limited to questions actually “presented” in a proceeding).

Proof of Delivery

I hereby certify that on Thursday, March 23, 2023, I provided a true and correct copy of the Response to Geo's Subpart B Motion to the following:

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

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

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

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

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

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

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

Signed: /s/ Steven R. Englund