

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 REPLY TO DENY RECORD LABEL RESPONSE AND GRANT GEO’S
SUBPART B MOTION TO CORRECT 1.73 CENT COLA MISCALCULATION**

Participant George Johnson (“GEO”), a *pro se* Appellant songwriter respectfully submits his Reply to the Record Company Participants’ (“RCP”)¹ *Response to GEO’s Subpart B Motion*² (“Response”). GEO respectfully requests Your Honors deny the RCP’s *Response* and grant GEO’s March 9, 2023, *Motion to Amend*³ *Judgement* (the “Motion”) to correct the RCP’s unreasonable 2 year miscalculation of the Cost Of Living Adjustment (“COLA”) indexing *terms* by around 1.73 cents, from 12 cents to 13.73 cents, starting January 1, 2023, or at Your Honors’ discretion.

No COLA for 2021 and 2022 is still arbitrary and capricious while the RCP’s unfair characterization of GEO’s *Motion* as a misplaced and late-timed “motion for

¹ The “RCPs” consist of the 3 major record labels Universal Music Group (“UMG”), Warner Music Group (“WMG”), and Sony Music Entertainment (“SME”) also referred to as 3 Record Company Participants (“3RCP” or “RCP”) including their 3 “conflicted” publishing divisions.

² <https://app.crb.gov/document/download/27861> March 23, 2023, *Response to GEO* by RCPs.

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

rehearing” is *misstating the law*, but also mischaracterizing GEO’s valid *Motion*.

Most importantly, as far as I can tell as a non-lawyer, there **has been no §353.4⁴ initial determination in this proceeding as of yet**, which is normal.

It seems the RCPs are arguing their Final Rule *is* the Initial Determination.

I don’t think this is true and it seems the RCP’s *Response* may be misplaced.

The March 30, 2022 no “static rate” ruling and COLA remedy was also a Final Rule yet I don’t think counsel would define that ruling as an Initial Determination, nor a Final Determination for the entire rate proceeding?

Is the December 30, 2022 Subpart C ruling also an Initial Determination?

However, since GEO is not an attorney and as Your Honors well know I make *stupid legal mistakes* all the time — so if the RCP’s are correct in their reading of the law — that I have mistakenly missed my §353.4 “initial determination” *deadline* on December 31, 2022 to file my motion for rehearing — then I apologize to Your Honors for my honest mistake and misreading of §353.4, §352, and §803, et al.

I sincerely understood the “initial determination” to be the second to last major document the CRJs publish, as a final case summary or *full* determination of all the findings of facts, after *all* the subpart Final Rules are decided — a collection of Final Rules. It was *then* Participants had 15 days to file a motion for rehearing and if no-one filed, then a “Final Determination” was published and that was it.

I thought final rules and an initial determination were at different times.

⁴ § 353.4 Filing deadline. “A motion for rehearing must be filed within 15 days after the date on which the Copyright Royalty Judges issue an *initial determination*.” (emphasis added)

At least that's the way it's been in the 3 other CRB rate proceedings⁵ GEO has participated in, or until now it would seem. So, this is why I'm a bit confused.

I apologize if I have erred and if what the RCP's allege is true, I pray Your Honors will forgive my honest mistake in procedure, my misreading of the law, and please allow GEO to file a proper Motion for Rehearing, as the RCP's allege.⁶

As stated in my *Motion to Amend Judgment* one reason I filed my *Motion* was to avoid any motion for rehearing on this 1.73 cent COLA miscalculation. The same goes for why I requested a *Novel Material Question of Substantive Law* regarding the RCPs intentionally withholding the COLA for interactive streaming to help themselves — which GEO prays Your Honors and the Register might remedy if the law is on our side, and to again avoid any rehearing while correcting that injustice.

I believe my *Motion to Amend Judgment* is proper *as is* and once again respectfully request Your Honors deny the RCP's *Response* — that GEO's *Motion* is really a failed Motion for Rehearing, which it is not — and grant GEO's *Motion*.

The RCP's know GEO's *Motion* has real merit. They also know the *Phonorecords III* Subpart A (at the time) Regulations were published as a **Final Rule** on **March 28, 2017**, while the **Initial Determination** on **January 26, 2018**, **so they are not the same thing**. It seems the RCP's are attempting to try and fool us all into thinking these deadlines and chances to amend have already passed.

⁵ <https://app.crb.gov/document/download/2288> January 26, 2018, Initial Determination. P3

⁶ If however the RCP's *are* misstating the law to Your Honors, then there is no need for GEO to file a Motion for Rehearing *at this time*, and not until Your Honors publish your Initial Determination as per §353.4 as I understand the law and procedure, and *if* need be.

RATE PRECEDENT OF NORMAL CRB “INITIAL DETERMINATIONS”

While I concede I could still be wrong on the law about the December 16, 2022 Final Rule for Subpart B *being exactly the same* as an “initial determination” described in §354.3, it doesn’t seem correct or that December 31 was the “deadline”.

§354.3 clearly states, "A motion for rehearing must be filed within 15 days after the date on which the Copyright Royalty Judges issue an *initial determination.*" (*emphasis added*). A final rule was issued *not* initial determination.

That code section does *not* say “CRJs issue a *final rule*” and GEO’s argument.

While I can’t believe I’m arguing that a Subpart B Final Rule is *not the same* as an Initial Determination (nor Final Determination), here are some links to a few official Initial and Final Determinations as I’ve always understood them to be.

The clear evidence is the “Initial Determination” for *Phonorecords III* was published by the CRB on January 26, 2018, *long after the Subpart B Final Rule was first published on March 28, 2017*⁷ — so how are they the *same* using the RCP’s “logic”?

1. <https://app.crb.gov/document/download/2288> January 26, 2018 *Phonorecords III*, Page 5 of Initial Determination.
2. <https://app.crb.gov/document/download/3510> November 5, 2019, *Phonorecords III*, Final Determination PUBLIC.
3. <https://app.crb.gov/document/download/25679> June 11, 2021, *Web V* Initial Determination PUBLIC (Revised).
4. <https://app.crb.gov/document/download/25678> July 22, 2021, *Web V* Final Determination PUBLIC.

⁷ ...to freeze the static 9.1 cents for another 5 years and with no COLA inflation indexing.

The point is these initial and final determinations *are not the same* as a subpart final rule and the RCP's are attempting to conflate the two.

Next, if GEO is correct in his reading of the law, the following RCP quote is an attempt to try and claim a.) no appeal is available to GEO and that b.) a final rule for a subpart is "final", when a motion for rehearing *is still available* to GEO?

"Thus, the Subpart B rates are "final"." 2"

Footnote 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.").

"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."

Counsel also implies that I've already missed my 30 day *appeal window* on January 31, 2023 which seems be a total misstating of the law, but its also intended to mislead this Participant *to effect the outcome of this proceeding*. I understand counsel arguing the law, but their legal argument appears to be imaginary.

To falsely claim GEO doesn't still have an opportunity to file a Motion for Rehearing, *nor* Appeal to the DC Circuit, is beyond misleading and really an *attempt to sabotage GEO's case* and rights, as a Participant and person subject to the license. Additionally, GEO is not asking to change rates, but simply correct the calculation of the COLA *term*, and as per the March 30, 2022 no static-COLA ruling.

The RCPs then reveal their only real concern; “the important purpose of allowing industry participants to make plans and carry on their businesses with certainty”, yet this does not apply to *their own songwriters, all American songwriters, and their competitor music publishers’ plans and certainty* by cheating us all out of 1.73 cents per-song. These 3 record labels only care about themselves.

American songwriters should not have their valid statutory rates and COLA terms *sabotaged* and willfully miscalculated at *below-market* rates by these 3RCPs.

GEO prays Your Honors will grant GEO’s current *Motion* as is and not let the RCPs try and frame it as misplaced, or misstate the law, or falsely claim its just a very late motion for rehearing.

None of their arguments appear to be true as per the law and CRB code.

If by chance the RCP’s are correct in their legal argument that GEO’s *Motion to Amend Judgement* is invalid or actually a mis-filed Motion for Rehearing, wouldn’t the eCRB system or the CRB have *rejected my filing*, or informed me “to refile motion under a different heading” or “refile as a Motion for Rehearing”, etc.?

But none of that ever happened, nor should it have, since I filed a valid *Motion to Amend Judgement* of a *calculation* and a COLA indexing *term*, not a new or adjusted *rate, nor value increase*, ie. the *Phonorecords III* Subpart C 44% percent streaming value increase in the headline rate.

GEO respectfully requests the RCP’s *Response* also be denied for these additional good reasons, *and* for the following good reasons and good cause, so that GEO’s *Motion* may be granted.

GOOD REASONS TO DENY RCP RESPONSE AND GRANT GEO'S MOTION

The RCP's *Response* should be denied for the following good reasons and good cause:

1. GEO's *Motion to Amend Judgement* is valid, not late, and the RCP's seem to be wrong on the law and procedure here. For some reason they are intentionally mis-stating the law in §353.4 for a motion for rehearing, while conflating a "final rule" for a subpart with the definition and purpose of an "initial determination".
2. GEO's *Motion to Amend Judgement* is not a Motion for Rehearing as they claim.
3. The RCP's leaving out a COLA for 2 years "does not provide a reasonable basis for setting statutory rates and terms." See 17 U.S.C. § 801(b)(7)(A)(iii).
4. GEO's *Motion* is to correct this *technical error* of miscalculation and *modify the terms* of royalty payments. The RCP's admit Your Honors are 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)
5. COLA indexing is also not a *rate*, it's a *term*. Re-calculation of a term is not a new rate. GEO isn't requesting a 44% *value* increase but a hedge *against the loss of value in the dollar* to keep the royalty *at the market rate*, not below it.
6. No COLA for 2021 & 2022 *creates* a below-market rate and is also unreasonable.
7. No COLA for 2021 & 2022 is still *arbitrary* and *capricious*, ie. *Novel Question*.
8. A math error in the COLA calculation is *modifying terms*, not "modifying rates".
9. *We are still not done with this rate proceeding* and Initial Determinations are only published after *all* the rate-setting is over. As the RCP's well know, briefings are still active for possible rate-setting for Restricted Downloads,

§385.2 Eligible Limited Downloads, and maybe (§385.10) Limited Downloads *with no rates ever set*. So, rate-setting may still be necessary to satisfy Congress’s mandate — another reason why there is no initial determination yet.

10. The Judges filed a *final rule* on December 16, 2022, *not* an *initial determination* like they usually do, and why the 15 day clock in §353.4 *did not begin* for GEO. This is why the deadline did not pass “more that 2 months ago” as they assert. The only reason GEO can think of that a final rule would *be* the initial determination is since this proceeding was contested with no hearing, an initial determination is not longer needed — but that doesn’t sound right. So, rates are still not “final”, but they did “take effect January 1” by *final rule*, as they should.
11. From the RCP’s above quote that Subpart B rates “are final”, *Phonorecords III* may has proved that theory wrong since a rate *still hasn’t been set* and it’s been 7 years, considering “the expiration of predecessor rates”. It doesn’t always work out that way despite the “detailed statutory procedures” counsel references. Your Honors were brilliant to publish rates *on time* via the 2 *final rules* for Subparts B and C, and not wait until an *initial determination* for rates.
12. COLA indexing changes and updates based on Bureau of Labor Statistics (“BLS”) calculations *take place all the time* at the CRB, in between, and outside the standard 5 year rate-setting proceedings like *Phonorecords*, *Web*, or *SDARS* — *like here the 3RCPs benefit themselves with a COLA for Webcasting in 2022*⁸!

⁸ <https://www.govinfo.gov/content/pkg/FR-2021-12-01/pdf/2021-26062.pdf> A 2022 *Web V* COLA increase for the 3 Record Labels, but in this proceeding they make sure there is no COLA for all songwriters, including their own, and all their competitor publishers.

13. **How is it the RCPs made sure they got their §114 COLA for 2022 while they made sure the entire §115 side, including *their own* songwriters, did not get a COLA for 2022 here in *this* rate proceeding? This in particular is as anti-competitive, arbitrary, and capricious as it gets. This continued self-dealing and conflicts of interest by 3 RCP's is *not what Congress intended* with rate setting. GEO prays Your Honors can end their chicanery?**
14. There is no *willing buyer, willing seller* in this voluntary settlement and is once again self-dealing by these 3 vertically integrated Same Parties, for themselves.
15. The 3RCP's doing *direct deals* with DSPs and their own publishers while setting all their competitors *under the compulsory license* like now is anti-competitive.
16. The 3RCP's cheating their own songwriters, publishing companies, and all American songwriters by 1.73 cents per song is another *end run around the license to a Final Rule and COLA formulation that the RCP's proposed!*
17. On Page 5 of the *Phonorecords III, Initial Determination* the Judges state that “The Judges published the agreed subpart A regulations as a Final Rule on March 28, 2017.”⁹ So, *this* “Initial Determination” for *Phonorecords III* defines this similar Subpart activity as “the agreed subpart A regulations as a Final Rule on March 28, 2017, *not* “Initial Determination on March 28, 2017”.

A final rule on one voluntary settlement for one Subpart doesn't make a §353.4 “initial determination” for the entire rate proceeding.

⁹ <https://app.crb.gov/document/download/2288> *Phonorecords III, Initial Determination*, Page 5, Footnote 13 ¹³ See 82 Fed. Reg. 15297 (Mar. 28, 2017).”

As I understand it, initial determinations are only to be published after findings of fact and conclusions of law have been filed, and none have been filed.

GEO'S MOTION IS VALID AS IS "PRESENTED" NOVEL QUESTION

To quickly address the RCP's concerns in Footnote 3, Page 3 of their *Response* to GEO's *Novel Question* regarding COLA indexing for interactive streaming, et al., GEO disagrees "that filing suffers from the same defects as the Motion" since what the RCPs claim the filing suffers from may be completely made up by the RCPs.

And as to if GEO has actually "presented" the Subpart C COLA for streaming question in this proceeding, *See* Proposal 6¹⁰ on Page 12 of GEO's Amended Written Direct Statement ("WSD"). So, COLA for streaming has been presented by GEO.

Next, I've repeatedly presented this question of the RCP's not offering COLA for the missing 2 years as presented in this *Motion* on July 22, 2022¹¹, but also no COLA on Subpart C interactive streaming in the *Novel Question*, and in many other filings. Several attorney Commenters and those representing thousands of songwriters have brought up all these same questions as outlined in GEO's *Motion*.

So, not only has GEO properly presented his no Subpart C streaming COLA question in this proceeding, and no Subpart B COLA question, the CRB ruled for a

¹⁰ <https://app.crb.gov/document/download/26349> GEO's *Amended WDS* Proposal 12.

¹¹ <https://app.crb.gov/document/download/27057> July 22, 2022, *Revised Rates and Terms to GEO'S WDS Using 44% Phonorecords III Subpart C Increase as a New Subpart B Benchmark*.

COLA remedy in this proceeding *because of the RCP's doing the exact same thing* they are doing *now*, which is still relevant to both Subparts B and C and this filing.

If the *Novel Question* is hopefully referred to the Register, then the initial determination and final determination might be delayed a few more weeks, but worth the wait and for the sake of *all* American songwriters and music publishers;

§354.1(d) *Binding effect; time limit.* The Copyright Royalty Judges will not issue a final determination in a proceeding where the discretionary referral of a question to the Register of Copyrights under this part is pending, unless the Register has not delivered the decision to the Copyright Royalty Judges within 14 days after the Register receives all of the briefs of the participants. If the decision of the Register of Copyrights is timely delivered to the Copyright Royalty Judges, the decision will be included in the record of the proceeding. The legal interpretation embodied in the timely delivered response of the Register of Copyrights in resolving material questions of substantive law is binding upon the Copyright Royalty Judges and will be applied by them in their final determination in the relevant proceeding.¹²

Why don't the RCPs just join GEO's reasonable *Motion* and help their own songwriters and publishing divisions, and themselves with more gross profits?

If GEO's *Motion to Amend Judgement* was a Motion for Rehearing, it would have been labeled just that, *but it's not* since it's a *Motion* to amend a *calculation*, and as far as I can tell reading the codes, *I did not miss a rehearing opportunity as of yet* nor a non-existent "initial determination", "determination", nor final determination since there has not been one yet.

Therefore, GEO's *Motion* is not asking for rehearing on the 1.73 cents, but a *re-calculation* of the true and honest COLA *since 2006 — to include every year since*

¹² <https://www.ecfr.gov/current/title-37/chapter-III/subchapter-B/part-354/section-354.1>

2006, not a cherry picked calculation minus 2 years at peak inflation to suit the RCP's songwriter "costs" at their own publishing divisions and against competitors.

The RCP's don't follow the "final" rule on no static rates and COLA indexing as the best remedy, but *insist everyone else* must follow their "final" rule at 12 cents.

Please don't let my bad lawyering stop our dire need for relief here and thank you Your Honors!

CONCLUSION

For the above good reasons and good cause GEO respectfully requests that Your Honors deny the RCP's *Response* and grant GEO's March 9, 2023, *Motion to Amend Judgement* to correct the RCP's *unreasonable* 2 year miscalculation of the Cost Of Living Adjustment ("COLA") indexing terms by 1.73 cents, from 12 cents to a total of 13.73 cents for all Subpart B physical and digital downloads in §115, starting January 1, 2023 or at Your Honors' discretion.

Respectfully,

By: /s/ George D. Johnson

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Wednesday, March 29, 2023

Proof of Delivery

I hereby certify that on Wednesday, March 29, 2023, I provided a true and correct copy of the 2023-03-29 GEO's Reply to Deny Record Label Response and Grant GEO'S Subpart B Motion to Correct 1.73 Cents COLA Miscalculation.pdf to the following:

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

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

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

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

UMG Recordings, Inc., 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

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

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

Joint Record Company Participants, represented by Steven R. Englund, served via
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Signed: /s/ George D Johnson