UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	**Docket No. 21-CRB-0001-PR (2023-2027)**

NOTICE RE LIMITED DOWNLOADS

On December 30, 2022, the Copyright Royalty Judges ("Judges") issued a final Determination of Royalty Rates and Terms in the captioned matter ("Final Determination"). In the Final Determination, the Judges adopted proposed regulations that codified a partial settlement ("Settlement") reached by several participants regarding the rates and terms under section 115 of the Copyright Act for Licensed Activity (as defined in 37 CFR part 385, subpart A) presently addressed in subparts C & D of 37 CFR part 385 together with certain regulations of general application (*e.g.*, definitions and late fee provisions) applicable to the subpart C & D Configurations presently addressed in 37 CFR part 385, subpart A, for the 2023-2027 rate period. Final Determination, 87 FR at 80448, 80453.

In adopting the Settlement, the Judges observed that George Johnson[1], a participant who objected to 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.'" *Id.* at 80453 n.22. The Judges noted their intention to request additional briefing from the Participants as to whether and how this proceeding may address such activity. *Id.* Further to that intention, on January 5, 2023, the Judges issued Order 65 Requesting Additional Briefing from Participants (eCRB no. 27413), directing the participants to submit briefing on the issue Mr. Johnson raised regarding so-called "unlimited limited downloads."

On January 20, 2023, the Settled Participants[2] filed with the Judges a Joint Submission Pursuant to Order 65 Requesting Additional Briefing from Participants (eCRB no. 27427) ("Joint Submission"). On January 22, 2023, Mr. Johnson filed with the Judges his 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 (eCRB no. 27428) ("Johnson Response"). On January 27, 2023, the Settled Participants filed a reply. See Joint Reply Submission Pursuant to Order 65 Requesting Additional Briefing from Participants (eCRB no. 27433). On January 30, 2023, Mr. Johnson

[1] Mr. Johnson sometimes refers to himself as "GEO."

[2] The Settled Participants are National Music Publishers' Association, Nashville Songwriters Association International, Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC, and Spotify USA Inc.

replied. See GEO's Reply Brief to Order 65 On Rate-Setting for All Restricted, Limited, and 37 C.F.R. § Eligible Limited Downloads, Et Al., Request for Hearing and Add CPI-U COLA (eCRB no. 27434).

The Settled Participants contend that "no further action need be taken in this proceeding with respect to" the activity that Mr. Johnson identifies as an "unlimited, limited download." Joint Submission at 1. The Settled Participants note that Mr. Johnson does not define what he intends by the term "unlimited limited download." *Id.* The Settled Participants opine that his use of the term "may relate to a misimpression that the recently published rates and terms (the 'Published Rates') include a 'loophole' whereby royalties are not paid in connection with Eligible Limited Downloads, or that such downloads can be retained and used indefinitely." *Id.* at 1-2. The Settled Participants note, however, that "pursuant to Subpart C of the Published Rates, the Judges did set a rate for Eligible Limited Downloads, so that royalties are due for that activity, and the definition clearly sets limits on the activity." *Id.* at 2.[3] The Settled Participants contend that the lack of a rate for certain Restricted Downloads that are not Eligible Limited Downloads is not inconsistent with current industry practice in that the Settled Participants are not aware of any service offerings in the U.S. that involve Restricted Downloads that are not Eligible Limited Downloads (other than in connection with Purchased Content Locker Services, for which the Published Rates establish a rate). *Id.* The Settled Participants do not believe that the Judges at this time need to adjudicate a rate for activity that does not appear to exist in the marketplace. *Id.* From the Settled Participants' perspective, there is no "loophole" as to Eligible Limited Downloads for the Judges to address. *Id.*

The Settled Participants posit that Mr. Johnson's use of the phrase "unlimited limited download" may be a reference to a proposal included in Copyright Owners' written direct statement to address a download that is not permanent but also does not qualify as an Eligible Limited Download. *Id.* The Settled Participants also believe that no further action need be taken in this proceeding with respect to such downloads. *Id.* The Settled Participants note that the lack of a rate for certain Restricted Downloads that are not Eligible Limited Downloads (for offerings other than locker services) that Copyright Owners raised has been an aspect of the compulsory mechanical license since *Phonorecords I*. *Id.* at 3. The Settled Participants assert that they reasonably agreed to carry over that same scope in resolving the current proceeding. *Id.*

The Settled Participants note that the Copyright Act addresses rate-setting for a new covered activity in the marketplace for which no rate has been set. *Id.* The Settled Participants state that in such a situation, the Act states that a rate and terms set in a subsequent Phonorecords proceeding "shall be retroactive to the inception of activity." *Id.*, quoting 17 U.S.C.803(d)(2)(B). According to the Settled Participants, in the interim, until the Judges set a rate and terms, "the mechanical license collective and any digital music provider may agree to an interim rate and terms for such activity under the blanket license." Joint Submission at 3, quoting 17 U.S.C. 115(d)(8)(C). *See also* 17 U.S.C. 115(d)(8)(D). The Settled Participants note that any such interim rate and terms would be nonprecedential and any rate and terms later established by the Judges "shall supersede the interim rate and terms and apply retroactively to the inception of the activity under the blanket license." Joint Submission at 3, quoting 17 U.S.C. 115(d)(8)(D). The

[3] The Settled Participants cite Published Rates § 385.20. *See* Joint Submission at 2.

Settled Participants contend that these provisions would apply in the event a service provider engaged in covered activity for which no rate has been set. Joint Submission at 3.

For his part, Mr. Johnson, who identifies himself as a "*pro se* Appellant songwriter, DIY self-publisher, and copyright author" asks that the Judges provide "clarity as to rate-setting for *all* restricted and incidental downloads."[4] Johnson Response at 3. Regrettably, the Judges did not expressly limit the number of pages for responses to Order 65 and Mr. Johnson submitted a 35-page Response, followed by a 15-page Reply (approximately ten times the length of the Settled Participants' briefing), which he used to opine on all manner of issues that he believes to be important, many of which are beyond the scope of the narrow issue on which the Judges sought briefing.[5]

After reviewing Mr. Johnson's filings, the Judges have determined that he believes there is some type of limited download that should be treated, for royalty purposes, as a permanent download. *See* Johnson Response at 31 ("replace the term 'eligible limited' with 'permanent' so this free [Copyright Act] § 106 reproduction is a paid Permanent Download."). Mr. Johnson also believes that such downloads, if any, should include a cost of living increase. *Id.* at 4. Mr. Johnson does not appear to oppose the royalty treatment in the Settlement with respect to Purchase Content Locker Services, which, according to the Settled Participants, is the only service offering in the U.S. that involves Restricted Downloads that are not Eligible Limited Downloads. *See* Johnson Response at 9 ("GEO is not as opposed to the 'zero rate' for *only* the PCLS, it's paid, what GEO is opposed to is doing it [sic] through the Eligible Limited Download category, and not just declaring a 'zero rate' for the PCLS *all by itself*.").

Mr. Johnson acknowledges that his proposal "may be splitting hairs [and] may not be legally possible or proper." *Id.* Ultimately, Mr. Johnson concedes that he does not understand the rates he has proposed that the Judges change. *Id.* at 10 ("no songwriter can understand

[4] Throughout his filings, Mr. Johnson professes to represent the interests of the broader songwriting community. He also opines on various legal matters that he believes are relevant to the proceeding. *See, e.g.*, GEO's Response at 7 ("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* [Record Company Participant's] competitors are 'subject to' these arbitrary and capricious 'voluntary agreements' by the Parties."). Only attorneys may represent parties other than themselves in CRB proceedings. *See* 37 CFR 303.2 ("Individual parties in proceedings before the Judges may represent themselves or be represented by an attorney. All other parties must be represented by an attorney.") Mr. Johnson, admittedly, is not an attorney. As such, the Judges place little weight on his legal opinions.

[5] Among other things, Mr. Johnson requests that the Judges provide "clarification on legal regulations and new rate-setting procedures arising from the Parties' Subpart C Final Rule." GEO's Response at 22. He then poses nineteen questions on which he would like the Judges to opine (*e.g.*, "Is a zero download rate set by competitors *lawful* as per the CRB code or law?"; "Is a zero download rate for free 'offline listening' reasonable?"; "Is a zero download rate *reasonable* for songwriters *bound* by compulsory license?"; "Is there an *actual value* for limited downloads in the royalty pool calculations?"). *Id*. The Judges know no authority under the Copyright Act that would permit them to provide such broad-based legal and philosophical guidance and therefore must respectfully decline Mr. Johnson's requests. For the same reason, the Judges decline to address the questions posed by GEO's "Clarification Motion on Retroactive Inflation Indexing for Subpart B" filed June 3, 2022.

[music royalty categories and rates for every streaming activity and definition]. I'm still lost. What is the per-play rate for an eligible limited download? Nobody knows? [sic]").

Conclusion and Notice

After reviewing the parties' briefings, the Judges conclude that they need take no further action at this time in response to Mr. Johnson's concerns regarding the rates and terms for any Restricted Downloads that are not Eligible Limited Downloads. The Settled Participants represent that they are unaware of any such service offerings in the U.S. (other than in connection with Purchased Content Locker Services, for which the Published Rates establish a rate). Joint Submission at 2.[6] Mr. Johnson provides no credible evidence to the contrary. Should such an offering arise before the next rate-making proceeding, there is a mechanism in the Copyright Act for establishing interim rates and terms for such activity. *See* 17 U.S.C. 115(d)(8)(C) and (D). Therefore, the Judges hereby give notice that, at this time, no further action on their part is necessary or warranted.

SO ORDERED.

Shaw, David

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David P. Shaw
Chief Copyright Royalty Judge

Dated: January 25, 2024

[6] To avoid confusion in future rate-making proceedings, the Judges strongly encourage participants to refrain from proposing rates and terms for service offerings unless they reasonably believe that such offerings are likely to be offered in the U.S. during the applicable rate period.