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

In the Matter of	)	
Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)	)	**Docket No. 14–CRB–0001–WR (2016–2020)**

GEORGE JOHNSON'S
INITIAL BRIEF TO NOVEL MATERIAL QUESTION OF LAW REFERRED TO THE REGISTER

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Dated: Friday, October 2, 2015

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George Johnson, ("GEO") respectfully submits his INITIAL BRIEF TO NOVEL MATERIAL QUESTION OF LAW REFERRED TO THE REGISTER in support of his proposal for rates and terms for sound recording royalties under Section §114 of the Copyright Act.

I. INTRODUCTION

While this novel question of law seems to deal with *licensor* (record companies) *segmentation* and **1.)** whether "the Act prohibits the Judges from setting rates and terms that distinguish among different types of *categories* of *licensors"*, it seems Your Honors may be asking a few secondary questions as to whether or not Your Honors are permitted to **A.)** "adopt alternative fee structures (i.e., *per-performance rates* for some services and *percentage-of revenue* for other services)" in a §114 rate hearing, but also **B.)** "whether the Judges may set rates and terms that *distinguish between different types of copyright owners (creators)* as opposed to distinguishing between different types of copyright *users*", and finally **C.)** "the *quantity* and *nature* of the *use of sound recordings* and the *degree* to which the service may *substitute for* or *may promote the purchase of phonorecords by consumers."*

This last secondary question "C" goes to the heart of GEO's case that the customer must once again be part of the royalty equation in this rate proceeding to pay for the cost of copyright creation.

We have *subsidized* Pandora, Google, Youtube, Spotify, and all other streamers' so called "business models" and their *executives* long enough. It is clear that the Services' streaming of our copyrights at $.00 cents per stream *is substituting* for the *purchase of phonorecords and downloads by consumers*.

II. ARGUMENT

§ 802(f)(1)(A) explicitly states that "the Copyright Royalty Judges shall have *full independence* in making determinations"[1], not some independence, or partial independence but "full independence". The Act goes on to state that the "Judges shall have *full independence in making determinations* concerning *adjustments* and determinations of copyright royalty *rates and terms*, …".

So, Your Honors do have *full independence* in determining *rates* and *terms* but also determinations concerning *adjustments* - adjustments in general or adjustments to the royalty rate and terms that may need to be made between the 3 Major "Formerly American and Now Foreign Owned" Record Labels vs. the thousands of American Independent Record Labels and American recording artists, AFTRA singers, AFM studio players, engineers, producers and performers that create these millions of American music copyrights.

Copyright is supposed to protect my *exclusive right* to my federally *protected* music copyright and hard earned private property[2], however, the words *exclusive* and *rights* in the 1787 terminology "exclusive rights"[3] have lost all their plain and simple meaning here in 2015. GEO hopes that the terms *full* and *independence* have not lost their plain meaning since Congress wrote the "The Copyright Royalty and Distribution Reform Act of 2004" that created this rate proceeding.

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[1] § 802(f)(1)(A) In general. — (i) Subject to subparagraph (B) and clause (ii) of this subparagraph, the Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact.

[2] US. CONST., amend V

[3] U.S CONST., art. I, § 8, cl. 8

a.) NOVEL QUESTION

1.) THE ANSWER TO THE NOVEL QUESTION IS "YES" THE ACT DOES NOT PROHIBIT THE JUDGES FROM SETTING RATES AND TERMS THAT DISTINGUISH AMONG DIFFERENT TYPE OF CATEGORIES OF LICENSORS (OR COPYRIGHT OWNERS) IN THIS §114 RATE HEARING

GEO believes that it is clear the answer to the Novel Question is "YES" since the Act[4] or precedent does not prohibit the Judges from setting rates and terms that distinguish among different types of *categories* of *licensors (i.e.* 3 Major Labels vs Independent Labels or other categories of licensors like *singers* who are copyright creators, or AFTRA singers or AFM studio *players*), especially under the Judges' full independence to make *any adjustment* they see necessary under § 802(f)(1)(A).

2.) OTHER CATEGORIES OF COPYRIGHT LICENSORS

While the Register or Your Honors may define "categories of licensors" and "different types of copyright owners" to mean only *"independent record labels"* vs "*the 3 major labels",* it also seems those terms imply a series of much broader questions and definitions.

And not to complicate matters even more since the 3 Major "American" Record Labels seems self-explanatory, but it's not what it appears. To be even more specific to our actual real life situation in this current rate proceeding, the categories of licensors might be better categorized by the terms "*actual American controlled and owned independent record labels under U.S. Copyright Law*" vs. *"the formerly American owned but now foreign owned and controlled 3 Major American Record labels who now set our royalty rates"*.

[4] There is no §115(i) hypothetically, like the RIAA lobbying for protections from songwriters and publishers found in §114(i).

3.) THE 3 MAJOR AMERICAN RECORD LABELS ARE NO LONGER AMERICAN OWNED OR CONTROLLED AND ALL FOREIGN OWNED WHICH CREATES EVEN MORE CATEGORIES OF LICENSORS AS WELL AS "HACKING" THE AMERICAN STATUTORY RATE AT $.00 CENTS PER STREAM TO ELIMINATE ALL AMERICAN MUSIC COMPETITION THAT ISN'T UNDER THE CONTROL OF SONY, UNIVERSAL OR WARNER BROTHERS MUSIC.[5] [6]

Though mergers and acquisitions the past 5 to 10 years, Vivendi-France bought Universal Music Group which is now headquartered in Paris, France and Access Industries in Moscow bought Warner Bros. Music which is now headquartered in Russia. Of course, Sony Music bought RCA Records and Columbia Record Labels long ago and have always been in Tokyo, Japan.

The point is, *foreign owned major record labels*, primarily the 3 traditional American record labels, Universal, Warners and Sony may be a *new category of licensor* since they have all been sold off to foreign corporations under control of foreign governments, but American copyright law still applies and only applies to American citizens, not foreign corporations.

It is also worth noting that like Apple, Sony is worried about having content for all their devices *to sell more* cel phones, tablets, computers, and televisions.

Sony Music may have an office on Music Row in Nashville, TN, but it's licensors in Japan that are setting policy on exactly how the American copyright owners who created these songs *will not profit* (i.e, "digital breakage" or "non-royalty income") and what the American

[5] In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court held that the U.S. Constitution supersedes international treaties ratified by the U.S. Senate. GEO brings up this case in relation to the United Nations WIPO treaty which is basically implemented by the DMCA Digital Millennium Copyright Act and also because the 3 Major "American" Record Labels are foreign owned in addition to streamers like Spotify which are 100% foreign owned and do not set U.S. copyright law or public policy.

[6] "It is difficult to get a man to understand something, when his salary depends on his not understanding it." — Upton Sinclair

creator's rate will be. This is wrong and goes for Warner-Moscow and Universal-Paris corporate headquarters.

These 3 foreign companies may have control over the copyrights and profits of the classic "American songbook", but they clearly have NO RIGHT to SET RATES here in America through the RIAA/SoundExchange.

4.) MORE CATEGORIES OF COPYRIGHT OWNERS

So, other *categories of licensors* may include singers, studio players, engineers, producers, investors who all have a sound recording copyright interest in all the new and old records (and co-writers and co-publishers for that matter) in the Universal, Warner and Sony catalogs.

Furthermore, "categories of licensors" and "different types of copyright owners" might not just qualify as "*Singers only"* or "*Studio Players only*" who create a §114 performance that have a copyright interest in this proceeding, but "*Singer/Songwriters"* who create a §114 analog sound recording copyrights after they have created the §115 song copyright like GEO.

Also, I *invest* in my own §114 sound recordings as an independent record label, I also *sing* and *play* on these sound recordings which also "bundles" my *categories of copyright* interests.

Finally, and probably most important when it comes to categories or licensors, are the *artificial categories of licensors* that separate *analog* and *digital* sound recordings where historical benchmarks for rates and terms for sound recording copyright have been around $4 to $5 per song. Then, once digital music took over with Napster and Apple iTunes, the per song download rate went to $.00 with Napster and $1 to $2 with an iTunes download - which are now

basically gone because the federal government set streaming rates at literally $.00 cents for ALL American sound recordings copyrights the past 15 to 20 years.

GEO's argument is that "Digital" Sound Recording Copyrights have been an *artificial category* where the Copyright Office can somehow say that *analog sound recordings* no longer have any protections or profitability or control by the creators or licensors since the word "digital" was added to the front of the term "sound recording copyrights".

This "digital" loophole and new category of *license* must be fixed when it comes to all American sound recording copyrights. Besides the 385.11 "limited download", the "digital" category loophole is the worst I've every seen as a music copyright creator.

Until the "digital" loophole is fixed, I respectfully submit that category of *licensor* might not matter much at all.

b.) SECONDARY QUESTIONS

A.) THE JUDGES SHOULD "NOT" ADOPT PERCENTAGE OF REVENUE ON INDIVIDUAL COPYRIGHT PERFORMANCES UNLESS PERCENTAGE OF REVENUE IS BASED ON A PER-PERFORMANCE FEE RATE STRUCTURE FIRST

As the *only* copyright creator in this proceeding, GEO begs that Your Honors "NOT" adopt *per-performance rates* for some services and *percentage-of revenue* for other services, but *only* adopt *percentage-of revenue rates* if it is first and foremost based on a *per-performance rate,* and with 100% Data Transparency and Accountability.

It is crystal clear to GEO that constitutional copyright law (and subsequent legal precedent) is only built around *individual authors*, *individual songs/copyrights* and *individual performances*, not collectivism, or imaginary "group rights" or a murky percentage of revenue scheme that never gets back to the music copyright creators here in the real world.

Since there is no legal precedent GEO knows of that he can cite on this subject, the perfect real world example that proves GEO's point as to why §114 streaming rates for sound recordings should not be built upon p*ercentage of revenue* taking precedent over a *per-performance rate* is: the manner in which percentage of revenue has been and is used by ASCAP (formerly BMI) to collect and then distribute income for songwriters' and music publishers' individual performances of each copyright.

BMI and especially ASCAP are built on p*ercentage of revenue*[7] taking precedent over a *per-performance rate* and exactly why the "legal" process of "2 week sampling"[8] is still permitted to go on at ASCAP[9]. BMI has said they've stopped "2 week sampling" years ago.

In GEO's legal opinion, it's absolute copyright infringement (See GEO2865 Chart Exhibit) by ASCAP of the worst kind since on §115 music copyrights, ASCAP buys 100% transparent per-performance data from Nielsen for terrestrial radio play for approximately 1700 stations and then cherry picks the data for only 2 weeks (on reporting stations) from each 3 month quarter - but the consent decrees allow for "percentage of revenue", and are all DOJ approved.

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[7] http://www.bmi.com/news/entry/bmi_wins_pandora_rate_court_battle "The ruling concluded that the BMI proposed rate of 2.5% of revenue was "reasonable, and indeed at the low end of the range of fees of recent licenses." Given the recent industry deals made in the free market, the Court agreed with BMI that this rate is a more appropriate reflection of the value of BMI's music. This marks an important step forward in valuing music in the digital age." (GEO notes there is no "free market" in the music copyright today and hasn't been the definition of a free market in music for over 100 years.) (There is also nothing "reasonable" about 1.75% for ASCAP and a whopping 2.5% now with BMI, just like there is nothing reasonable about $.0012 or $.0013 per performance that adds up to virtually nothing for million and millions streams, especially on the §115 side where $.0012 turns into $. 00000012 when it goes through the BMI or ASCAP laundry machine.)

[8] See Exhibit GEO2865 Chart for ASCAP 2 Week sampling terrestrial radio while buying 100% computer data - which is unbelievable to GEO.

[9] "THE ASCAP SURVEYS - THE FOLLOWING CHART OUTLINES THE VARIOUS MEDIA, INCLUDING BROADCAST, CABLE, ON-LINE, AND LIVE SHOWS, WHERE WE CONDUCT A COMPLETE COUNT OF PERFORMANCES AND WHERE WE CONDUCT A SAMPLE SURVEY. " - "All radio including commercial stations, National Public Radio, college radio stations, and satellite radio" and BLANK under PER-PERFORMANCE while BUYING 100% Data. http://www.ascap.com/members/payment/surveys.aspx

But ASCAP is "working on" greater transparency - they "have to survey and sample" here in the age of computers, they claim. Well, this is exactly why ALL music copyrights should FIRST be calculated on a per-performance basis.

To make matter worse, when you go to **ASCAP.com** or **BMI.com**, they tell you, to paraphrase, that "if you register your song and it get's played, you will get paid."[10]

Well, that is absolutely untrue and a result of *government intervention* and *legalized 2 week sampling based upon a percentage of revenue* that destroys the transparency, accuracy and primarily profitability and control for all American music copyright creators, §115 and §114.

Percentage of revenue deals only lull music copyright creators into a false sense of security and to use a legal term, "are a chicanery of fraud and deceit."

Percentage of Revenue only royalty calculations, only destroy copyright protections and destroy individual royalties for all American music creators, §114 and §115. We never see the money historically and practically, especially with our new "digital" category.

B.) THE JUDGES MAY SET RATES AND TERMS THAT DISTINGUISH BETWEEN DIFFERENT TYPES OF COPYRIGHT OWNERS (CREATORS) AS OPPOSED TO DISTINGUISHING BETWEEN DIFFERENT TYPES OF COPYRIGHT USERS

GEO's position is that many times Copyright Licensors, Copyright Owners, and Copyright Creators are one in the same. It seems like the past 15 to 20 years, Congress has

[10] "All songs must be submitted to BMI via a BMI registration form in order to receive credit for certain types of performances (e.g., all radio, commercial music services, commercial jingles and promotional announcements, live pop and classical concerts and Internet) …. a registration received from any songwriter, composer or publisher of a work will suffice to credit all participants… BMI will enter the work into its database for the shares and participants indicated on the first registration received … in order for BMI to make payment on time for the public performance of your music, it is imperative that all registrations (both songs and cue sheets) be received as close to the performance date as possible. It is essential that you register all of your works in order that BMI can provide information about your entire catalogue to foreign performing rights organizations, and so that BMI may quickly and easily identify foreign royalties received on your behalf. Late registrations and cue sheets may cause royalties to be delayed and/or lost. It is your ultimate responsibility to make sure that work registrations and cue sheets are delivered to BMI in a timely fashion, even though you may rely upon others to provide them to BMI in the normal course of business. " http://www.bmi.com/creators/royalty/general_information

passed law after law putting only the Music Licensees (Webcasters or Services) in charge of the American music copyright creators's private property.

Furthermore, the laws were clearly written to benefit Google/Youtube, Pandora, Spotify, and all webcasters. Lobbyists for the Services, like DiMA and others, have convinced Congress the past 15 to 20 years to write the music copyright "laws" so that the rates and terms are based on *copyright users* not the different types of copyright owners and creators like §115 and §114 clearly differentiate. Of course, §115 had been around for over 105 years and §114 protections for 40 + years, unless your sound recording copyright is played on terrestrial radio.

It may seem too subtle a point or not even relevant to this Novel Question of Law to some, but GEO thought it was very interesting that both the written studies and roundtables the Copyright Office sponsored last year, that GEO participated in, where called "Music Licensing 1" and "Music Licensing 2" - not Music Copyright Reform 1 and Music Copyright Reform 2.

Of course, I made this point[11] to the Copyright Office in my second round of written comments and by some magic the final study was called "Copyright and the Music Marketplace" - this is a much better name, includes the copyright owner and puts copyright first. However, if you look on the Copyright Office's website[12], it's still called the "Music Licensing Study" in

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[11] "While it may seem frivolous in a summary or oddly critical at first, and as much as we all truly appreciate the various opportunities to participate and comment this entire summer; it's unusual that all the roundtables, copyright studies and a few of the judiciary hearings all use the exact same term, "Music Licensing", yet we are supposedly engaged in massive "Copyright Reform".

"Copyright Reform" is for the copyright owners, not music licensees. I agree there needs to be great "Music Licensee Reform" but it would be great to have copyright owners first agree on what they wanted and needed to survive before ever speaking to lobbyists who represent streamers and music licensees."

I'd love to see a new round of "Copyright Reform" studies, roundtables and a hearing or two with only copyright owners, instead of 1 or 2 songwriters and publishers, then 20 music licensees, streamers, broadcasters and their lobbyists, not the actual copyright owners." http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/Geo_Music_Group_George_Johnson_Music_Publishing.pdf

[12] http://copyright.gov/policy/policy-reports.html

general. So, no big deal, and while I may have had nothing to do with the name switch, it's clear where the focus has been for the past 20 years at the Copyright Office, *helping Licensees* and *Users* quench their demand for UNLIMITED FREE MUSIC at literally $.00 cents per-streaming performance.

GEO's point is that **all** the focus of Congress and the Copyright Office the past 20 years, especially the past 10 years, seems to have been on the streaming "digital" music *licensees* wants and needs and the *users* wants and needs, but not the rights of the owners, investors and creators of music copyright and certainly not their wants and needs for their own property.

1.) THERE IS NO PROHIBITION IN USING HISTORICAL §114 SOUND RECORDING COPYRIGHTS AS BENCHMARKS FOR RATES AND TERMS IN THIS §114 SOUND RECORDING PROCEEDING

Once again, just because you put the word "digital" in front of the word "copyright", "music copyright", "sound recording" or "license agreement" does not mean in any way that copyright creators should suddenly lose all their inherent value and profit, just so a handful of licensees can profit billions by streaming substituting for download sales and all subsidized by, at §114 and §115 music copyright creators' expense.

Specifically, GEO offered the RIAA's newest 2015 data in Exhibits GEO2885, GEO2886, and GEO2887 (shown in testimony) which are completely valid and historical inflation adjusted real-world, marketplace price benchmarks for American §114 *sound recording copyrights* protected first and foremost but the "copyright clause" of the U.S. Constitution.

Analog Sound Recording Benchmarks are proper, historic, and absolutely reasonable to use to set "Digital" Sound Recording non-subscription streaming rates, terms and other adjustments, such as a one-time, up-front streaming account as GEO has proposed - Beatles #3.

2.) **THERE IS NO PROHIBITION IN USING §115 MUSIC COPYRIGHTS AS BENCHMARKS FOR RATES AND TERMS IN THIS §114 PROCEEDING**

In GEO's legal opinion and as argued in GEO's testimony and Amended Written Direct Statement in this rate proceeding, there is no legal prohibition on using the category of §115 songwriter licensors rates and terms to be used as benchmarks for rates and terms in a §114 sound recording rate proceeding for nonsubscription streaming such as this one.

Of course, as footnoted before, §114(i) forbids the opposite, *i.e.* the use of §114 sound recording benchmarks in a §115 songwriter and music publisher copyright rate proceeding to set rates and terms, but again, GEO finds no prohibition on using §115 music copyrights as benchmarks in this §114 sound recording hearing since they both are music copyrights and many times bound together by a recording artist who writes and invests in their own analog sound recordings.

Ever since I first learned about The Copyright Act of 1976, I also thought that *nothing or nobody could ever, ever take your copyrights away*, and was I wrong.

I believed this until about about 3 years ago when I first heard of streaming rates and when I found out what the rate was at .0013 or .0023, I could not believe it.

Let's stop basing music copyright rates and terms on the *licensees* and the *users* only, lets add the copyright creators, their investors and where the users start paying per-song, back into the financial equation.

3.) THE COPYRIGHT OFFICE ALREADY DISTINGUISHES BETWEEN DIRECT TYPES OF COPYRIGHT OWNERS AND DIFFERENT RATES I.E., SONGWRITERS AND PUBLISHERS FOR §115 HEARINGS AND ARTISTS, STUDIO PLAYERS, AFTRA SINGERS, AND RECORD LABELS IN §114 HEARING SUCH AS THIS ONE

GEO argues that the Copyright Office already distinguishes between direct types of copyright owners and different rates since it:

- Has separate code sections for songwriters in §115 hearings and for recording artists/ singers in §114 hearings, then further distinguishes by holding rate proceedings to set different rates for each code section or owners/investors - publishers/labels
- Ironically and tragically, 37 C.F.R. 385.11 and all of 385.1 - .26 *clearly differentiates between different rates* for copyright owners, especially since 37 C.F.R. 385.11 just gives away a 61 cent download on the §114 sound recording side for FREE, as well as the 9.1 cent §115 mechanical side for FREE. That is an incredible loss of income for all American music creators. 37 C.F.R. 385.11 and related 30 day limited download code sections are absolutely unconstitutional and must be done away with immediately somehow. More on this below.

GEO strongly argues that in making determinations the *Judges are not limited to the deficient law or methodological evidence the parties put before them*. Your Honors have a wide range of rates, terms and adjustments to choose from as real-world benchmarks that GEO has offered over the course this rate proceeding[13], not imaginary "hypothetical benchmarks" using "voluntary negotiations" that never take place during the 3 month time frame, since we are all under the shadow of the statutory license.

Therefore, there is no willing seller and willing buyer under the shadow of the statutory license.

[13] GEO's "Beatles Proposal 3" found in GEO's AMENDED WRITTEN DIRECT STATEMENT of inflation adjusted $5 per song to be paid in an up-front copyright bundle that pays ALL the copyright owners on a per-performance basis first and foremost where the customer actually pays for the real-world market place, historical, and reasonable cost of copyright creations, no the unreasonable so-called "legal" business models of Pandora, Youtube, Spotify, etc.

THERE IS NO SUCH THING AS A "WILLING BUYER, WILLING SELLER" IN THE SHADOW OF A GOVERNMENT COMPULSORY LICENSE SINCE IT IS LITERALLY THE OPPOSITE OF AN ACTUAL WILLING BUYER AND WILLING SELLER

As mentioned in the Novel Question of Law Order, Section 114(f)(2)(B) of the Act also states that the Judges "shall establish rates and terms that most clearly represent the rates and terms that *would have been negotiated* in the marketplace between a *willing buyer and a willing seller.*" As GEO has stated before:

1. There is no such thing as a "willing buyer and willing seller" inside a federal rate proceeding, and with a compulsory, statutory government license that acts as a LFN or "Least Favored Nation" low ceiling that keeps "voluntary" agreements price-fixed at literally $.00 cents per-copyright and per-performance.
2. There is no such thing as a "hypothetical marketplace".
3. There is no such thing as a "voluntary negotiation" inside a federal rate proceeding.
4. There is no such thing as a "fair" or "free" market inside a federal rate proceeding.
5. There is no such thing as an "effectively competitive" marketplace inside a federal rate proceeding.
6. "Benchmarks" delay deals in music licensing and at below market rates and are destroying copyright and music copyright royalties.
7. None of the above is actually 'reasonable'.

GEO is certainly not a willing seller at $.00 cents in the real world and real marketplace, and a so called willing buyer who demands my copyright for literally free, is why I am in this rate proceeding and further evidence that *this imaginary construct of a "willing buyer and willing seller"* in the multiple "shadows" or federal law, is unsustainable as a criterion and clearly unconstitutional.

To GEO, the whole reason we are here in this proceeding is to find out what an actual *willing seller of music copyrights* *needs to profit*, not just the bare minimum to lose money or scrape by, but actually pay for the cost of copyright creation in the real world, not this hypothetical marketplace utopia nonsense.

C.) EVIDENTIARY RECORD BY GEO AND SOUNDEXCHANGE PROVES THE QUANTITY AND NATURE OF THE USE OF SOUND RECORDINGS AND DEGREE

TO WHICH THE SERVICES' WEBCASTING, INTERNET RADIO AND NONSUBSCRIPTION STREAMING SUBSTITUTES FOR PHONOGRAPHIC/ DOWNLOAD SALES AND DOES NOT PROMOTE SALES BUT ONLY "CANNIBALIZES" SALES

As the Copyright Office stated in the executive summary of it's most recent copyright reform study, "*There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works*"[14]. GEO realizes we are supposed to argue points of law and not fact in this brief, but the Judge's Novel Question of Law raised this exact point:

> "the *quantity* and *nature* of the *use of sound recordings* and the *degree* to which the service may *substitute for* or *may promote the purchase of phonorecords by consumers.*"

A.) STREAMS CLEARLY SUBSTITUTE FOR PHONOGRAPHIC & DOWNLOAD SALES

Like the old saying goes, *why buy the cow when you can get the milk for free*? The same goes for music, *why buy the song when you can listen for free*?

It is also clear that the *quantity* of performances on streaming in the ***millions***, and the nature of the performance without payment, is absolutely substituting for download sales.

SoundExchange and GEO both spent a majority of our time proving beyond any shadow of doubt that streaming services of any kind, subscription, on-demand, non-subscription, etc. "cannibalizes" or as the code says "substitute for" downloads/phonographic sales.

To say that this is self-evident is an understatement.

It is ironic and predictable, that the worst fear of Congress when passing Section 114(f)(2)(B), where streaming will substitute for sales, ***came true.***

[14] Copyright and the Music Marketplace http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf

Furthermore, Congress at the time clearly knew sales substitution was the number one concern of all Copyright Owners and it proves how Congress failed the American music creator so miserably and why we so desperately need your intervention Your Honors in this hearing to adjust the rate for the now "starved" creators, thanks to Congress.

While it's self-evident that streaming has and continues to cannibalize phonographic/ download sales, SOUNDEXCHANGE also provided expert testimony from witnesses Dr. David Blackburn and Dr. Daniel L. Rubinfeld as well as employees from independent and major record labels. See, e.g., Test of Daniel L. Rubinfeld, Page 161 (Oct. 6, 2014) ("Rubinfeld Test.") ("the notion of promoting sales of music is quickly becoming an anachronism"); Report of David Blackburn Page 89 (Oct. 6, 2014) (Blackburn Test.) ("there is little evidence that statutory webcasting promote the sales of digital or physical media"); Test. of Dennis Kooker at 18-19 (Oct. 6, 2014) ("Kooker Test.") ("The concept of promotion is a misnomer when applied to streaming through statutory services.").

GEO also believes that the factual basis presented by GEO and SOUNDEXCHANGE in the evidentiary record before Your Honors demonstrates such a distinction in the marketplace

So again, as the only way GEO can see to stop "cannibalization" of sales by the Services, GEO offers the RIAA's newest 2015 data in Exhibits GEO2885, GEO2886, and GEO2887 which are completely valid and historical inflation adjusted real-world, marketplace price benchmarks for American §114 *sound recording copyrights.* See GEO's Beatle's Proposal 3 at $5 per song.

The cannibalization of §114 sound recordings isn't just a problem created by Napster style peer-to-peer piracy and streaming services substituting for the promotion and purchase of phonorecords anymore, its enshrined in 37 CFR 385.11 that gives away "sound recordings", yes

analog sound recordings *as it is defined* above in 14(f)(2)(B) as the **"*use of sound recordings*"** and not digital sound recordings or "eligible non subscription transmission", and this is the point.

B.) 30 DAY LIMITED DOWNLOAD WITH NO PAY LOOPHOLE IN 37 CFR 385 MUST BE CLOSED SINCE IT IS THE COPYRIGHT OFFICE THAT IS DIRECTLY CAUSING "CANNIBALIZATION" OF BOTH §114 AND §115 PHONOGRAPHIC SALES AND THIS LOOPHOLE MUST BE ELIMINATED IMMEDIATELY. [15]

37 CFR 385.11 defines limited download as:

> *Limited download* means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—
>
> (1) An amount of time not to exceed 1 month from the time of the transmission (unless the service provider, in lieu of retransmitting the same sound recording as another 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 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or
>
> (2) A specified number of times not to exceed 12 (unless the service provider, in lieu of retransmitting the same sound recording as another 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.
>
> (3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

We see here the former CRB included this limited download as a 'private settlement':

> In October of 2008, U.S. Copyright Royalty Judges, "In the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding," set the physical and download statutory license rate to be paid to songwriters and music publishers for the period 2008-2012 at the larger of 9.1 cents or 1.75 cents per minute of playing time with the ringtone rate at 24 cents. In addition, a late payment fee of 1.5% per month was put into effect. Both the ringtone rate as well as the late payment fee were appealed with a June, 2010 decision by the U.S. Court of Appeals for the D.C. Circuit affirming both.
>
> The Royalty Judge proceeding decision was interesting as it incorporated a private settlement between the parties regarding the rates for limited downloads and interactive streaming (on demand streams). This settlement took into account a service's revenue, applicable service type minimums, PRO royalties (ASCAP, BMI, and SESAC) and a per subscriber fee to arrive at a per work royalty allocation.[16]

[15] Title 37, Chapter III, Subchapter E, Part 385.1 through .26 http://www.ecfr.gov/cgi-bin/text-idx?SID=ae7db52b15c1c7b890959fbe35f4a9f4&mc=true&node=pt37.1.385&rgn=div5#sp37.1.385.b

[16] DOJ Consent Decree Review 2014. Attorney Todd Brabec. http://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307590.pdf

D.) ARTICLE 1, SECTION 8, CLAUSE 8 IS THE SUPREME LAW OF THE LAND AND TRUMPS ALL OTHER LEGAL STATUTES AND ACTS OF CONGRESS THAT VIOLATE THIS "COPYRIGHT CLAUSE"[17] - PLAIN MEANING OF THE LAW, CONSTITUTION & COPYRIGHT CLAUSE

The U.S. Constitution is still the "supreme law of the land", as per the "supremacy clause" and therefore, is the definitive law that guides our legal process. This also includes "the Progress of Arts and Sciences" Copyright Clause.

Setting my sound recording rate at $.00 cents and then preventing me from investing in more Art, or simply make a profit, is not the intention of The Progress of Arts and Sciences or the role of the federal government - it is to protect private property exactly like music copyrights.

The Natural Rights and Common Law background of the U.S. Constitution, the Copyright Clause in Article I, Section 8, Clause 8 of the U.S. Constitution specifically *empower the The Copyright Office and Copyright Royalty Board Judges to encourage and protect*

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[17] "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument. The rule must be discharged." -Supreme Court Justice John Marshall in Marbury v Madison (1803) 5 U.S. 137 http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html

"Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void." (**Thomas Jefferson**, *Elliot*, p. 4:187-88

"…the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding. In the same manner the states have certain independent power, in which their laws are supreme." (**Alexander Hamilton**, *Elliot*, 2:362

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid." (**Alexander Hamilton**, *The Federalist Papers*, #78 http://thomas.loc.gov/home/histdox/fed_78.html

individual[18] artistic creations[19] through federal copyright law over those who wish to profit from our works.

Any Wall St. "pump and dump" internet start-up that "legally" steals and circumvents my exclusive rights[20], my copyright, my art, my work[21], my speech[22] and my 5th amendment

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[18] "The 'constitutional command,' we have recognized is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.' We have also stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (internal citations omitted) (rejecting Petitioner's constitutional argument that the CTEA's extension of existing copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause).

- "Rewarding authors for their creative labor and promoting Progress are thus complementary; as James Madison observed, in copyright '[t]he public good fully coincides . . . with the claims of individuals.' Justice Breyer's assertion that 'copyright statutes must serve public, not private, ends, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones." *Id.* at 212 n. 18 (2003) (responding to Justice Breyer's dissent).

[19] "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

- "[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." *Id.* at 156 n. 6 (quoting *Cary v. Longman*, 1 East *358, 362 n. (b), 102 Eng. Rep. 138, 140 n. (b) (1801).

[20] "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Mazer v. Stein*, 437 U.S. 201, 219 (1954) (internal citations omitted) (holding that the original expression embodied within a statue intended to be used as a base for table lamps was entitled to copyright protection).

[21] "This limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (internal citations omitted) (finding that the use of an unpublished manuscript in a political commentary magazine was not fair use).

- "We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Id.* at 545-46.
- "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 558.

[22] "Nothing in the text of the Copyright Clause confines the 'progress of Science' exclusively to 'incentives for creation.' Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (citations omitted).

property rights is most certainly repugnant to the U.S. Constitution Clause and the entire Constitution in general, especially foreign licensors and licensees helping set the rates at $.00 for all their American competition. All the Services in this proceeding profit in the billions by selling advertising off of our songs, but their ad rates aren't price fixed at .0013 or $.0023 cents per ad.

Furthermore, just because Congress didn't recognize a sound recording as a copyright until 1972 doesn't mean it still isn't protected under the *exclusive rights* found in Article I, Section 8, Clause 8 or the moment the sound recording is fixed as a new work or creation - or by State Law, Common Law, Natural Law or Moral Law for that matter.

As I sit here and listen to the great band America, the lyrics say, "No, Oz never did give nothing to the Tin Man that he didn't already have." In other words, I already have my Natural Rights for any Art I produce, before the Constitution, before any 1972 Sound Recording Act or certainly before any subsequent streaming or webcasting legislation in the past 20 years. And just like the Copyright Act of 1976 finally recognizes that 'copyright protection is from the moment of creation" that still applies to any sound recording I create. My §106 protections apply, my exclusive rights still apply and my right to reproduction and distribution still apply to my sound recordings, even digital performances.

Any legal statute, federal code, Act of Congress that contradicts Article I, Section 8, Clause 8 is null and void as Marbury v Madison 1803 famously ruled, "All laws which are repugnant to the Constitution are null and void."

Some say James Madison, George Washington, Thomas Jefferson, Ben Franklin, Alexander Hamilton and other founding fathers are outdated and could have never predicted the

future of copyright, but they are wrong and right at the same time since almost nobody could have predicted a computer 225 years ago or a telephone or one that plays music thought the air.

However, what Madison and Washington did predict and understood better than probably any of us was "future" human nature will *always include thieves and looters who use government intervention to steal other peoples property and destroy their Natural rights*, and the precise reason why they made sure that *federal Copyright protection was already enshrined in the 1787 Constitution and the supreme law of the land,* a few years before the Bill of Rights.

If anything, the entire American music copyright negotiation process for so called "voluntary or private" direct deals are *all* done under "the shadow" of the §114 (§115 too) statutory and compulsory government rates and the rates are a "boat anchor" or lowest rate possible, well below marketplace value in 1976 (for §115 works) much less 2015, much less the past 100 years. Simply, use CPI inflation.

Yet, while being *the lowest rate possible*, the government compulsotry, statutory rates have always acted as a ceiling in "voluntary negotiations" which is why we music copyright creators, licensors, singers, investors, independent American record labels respectfully ask that Your Honors correct and adjust the streaming royalty rates and terms for "digital" analog sound recordings once and for all.

III. CONCLUSION

For these reasons, George Johnson (GEO) respectfully requests that the Copyright Office answer a resounding "YES" to the Referred Novel Question of Law.

Dated: Friday, October 2, 2015

Respectfully submitted,

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IV. QUOTE FROM MARBURY V MADISON - JUSTICE MARSHALL

(This larger quote includes the ending of Justice Marshall's opinion in Marbury v Madison for reference.) [23]

"So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution. **[p179]**

Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares that "no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it, must the Court condemn to death those victims whom the Constitution endeavours to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here. the language of the Constitution is addressed especially to the Courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

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[23] Marbury v Madison (1803) 5 US 137 http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html

From these and many other selections which might be made, it is apparent that the framers of the Constitution **[p180]** contemplated that instrument as a rule for the government of courts, as well as of the Legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:

I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime.
It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged." -Supreme Court Justice John Marshall (1803)

V. TABLE OF AUTHORITIES
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CERTIFICATION OF SERVICE

I, George D. Johnson, ("GEO") an individual and digital sound recording copyright creator, hereby certify that a copy of the foregoing GEORGE JOHNSON'S INITIAL BRIEF TO NOVEL MATERIAL QUESTION OF LAW REFERRED TO THE REGISTER has been served this 5th day of October, 2015 by electronic mail upon the following parties:

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