

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

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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**  
**SUPPLEMENTAL BRIEF TO THE REGISTER OF COPYRIGHT ON**  
**THREE SPECIFIC ISSUES RELATING TO THE NOVEL MATERIAL**  
**QUESTION OF SUBSTANTIVE LAW**

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Dated: Monday, October 26, 2015

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George Johnson, (“GEO”) respectfully submits his SUPPLEMENTAL BRIEF TO THE REGISTER OF COPYRIGHT ON THREE SPECIFIC ISSUES RELATING TO THE NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW in support of his proposal for rates and terms for sound recording royalties under Section §114 of the Copyright Act.

## I. INTRODUCTION

This memorandum is in response to Three Questions from The Register of Copyrights concerning A Novel Question of Law made by The Copyright Royalty Judges regarding “*categories of licensors*” and if the Register or Judges are prohibited from distinguishing among *category of licensors* in determining rates and terms. (See GEO’s submitted RESPONSE Brief.)

## II. ARGUMENT

GEO’s said “**NO**” to the NOVEL QUESTION OF LAW<sup>1</sup>, and §802(f)(1)(A) explicitly states, “the Copyright Royalty Judges shall have ***full independence*** in making *determinations* concerning *adjustments* and determinations of copyright royalty *rates and terms*.”<sup>2</sup>

The primary question we must ask, ***is it reasonable for a customer to pay for a product?***

Additionally, GEO argues, that *not one of the objectives or functions* in Section 801(b)(1) (A through D)<sup>3</sup> are being met for copyright owners and these provisions have only applied to Licensees and The Services the past 20 years. We pray the Copyright Royalty Judges consider all 4 of these provisions, especially now since the RIAA, former Judges, and Services have had the “maximum disruptive impact” on the *structure of the industries* of songwriting, publishing, independent American record labels, singers, recording artists, studio players, producing, engineering and investing of §114 sound recordings — effectively abolishing all generally prevailing industry practices in American copyright law and music copyright royalties.

<sup>1</sup> Instead of answering “NO”, GEO mistakenly said “THE ANSWER TO THE NOVEL QUESTION IS “YES” THE ACT DOES NOT PROHIBIT THE JUDGES FROM SETTING RATES AND TERMS THAT DISTINGUISH...”.

<sup>2</sup> § 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,...

<sup>3</sup> Section 801(b)(1) (A) To maximize the availability of creative works to the public. (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions. (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication. (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. NOTE: (B) seems to say “the copyright user (has a right to) a fair income”?

## QUESTION 1

1. **QUESTION 1 - There is NO evidence to DIS-ALLOW NEW rates and terms. GEO argues §114 analog recordings are benchmarks. §114(i) is also evidence that it was “*the intent of Congress*” to dis-allow §114 category of licensor rates as benchmarks in §115 songwriter and publisher rate hearings.**

1. Is there any evidence in the legislative history of the 1909 Copyright Act, the 1976 Copyright Act, the Digital Performance Rights in Sound Recordings Act of 1995, the 1998 Digital Millennium Copyright Act, the Copyright Royalty and Distribution Reform Act of 2004, or any other legislation, an intent by Congress to allow or dis-allow the establishment of rates and/or terms that distinguish among different types or categories of licensors?

The Answer is “**NO**”, *there is no evidence to dis-allow new rates and terms* in the legislative history, the Act or any other legislation, in fact, the Copyright Office already distinguishes between rates, terms, and categories of licensors in the 1909 Copyright Act, 1972 Sound Recording Act, and all the above mentioned “digital” Acts — including 37 C.F.R. 385.1 to 385.26 and the “30-Day Limited Download” defined in 385.11 that gives away free copyrights!

As to if there is any evidence “*to an intent by Congress*” to *allow* or *dis-allow* rates among licensors, then look no further than §114(i) of the Act. §114(i) is the clearest possible evidence to this exact question that there is *clear Congressional intent in §114(i) to dis-allow and allow* rates using the exact categories of licensors and codes sections we are discussing — §114 and §115. §114(i) not only dis-allows (and allows) the establishment of rates and terms that distinguish among different types or categories of licensors, but it also verbatim says that “*it is the intent of Congress that...*”<sup>4</sup>. In §114(i), Congress *allows* owners of all §115 musical works to keep their same rate, yet *dis-allows* any increase in their income if they try and use the only other music copyright rate available to them in a §115 rate hearing, considering it’s 7 to 12 times more.

There is clear Congressional intent in §114(i), yet it failed miserably as 9.1 cents is \$.00.

If the Act prohibited the Judges from setting rates and terms that distinguish among different types or categories of licensors or copyright owners, then why does §114(i) even exist?

**§114(i) No Effect on Royalties for Underlying Works.—**

License fees payable for the *public performance of sound recordings* under section 106(6) *shall not be taken into account* in any administrative, judicial, or other governmental proceeding *to set or adjust the royalties payable to copyright owners of musical works* for the public performance of *their works*. ***It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).***

<sup>4</sup> <https://www.law.cornell.edu/uscode/text/17/114>

*Congress clearly intended* for §115 music copyright creators and licensors to take a back seat financially, and in *value*, to streaming Services and Licensors of §114 Major Label sound recordings at a 12 to 1 or 7 to 1 ratio — since that is what the evidence shows and *why analog §114 sound recordings must be used as historical and reasonable benchmarks.*

This is why the founding fathers wrote copyright and “exclusive rights” into the Constitution, not the Bill of Rights, so NOBODY in the future, especially new Congresses, future presidents, future Supreme courts and future RIAA lobbyists, **could steal or profit from each individual American’s musical copyright creations**, no matter their artistic form.

§114(i) also says “their works”, as in the copyright owner’s works, his property and his bundle of rights, ironically under §106(1), (2), (3), (4), and (5) which are all violated by §106(6)?

Not only is this severe price-fixing, it’s also a form of *eminent domain* as in (*Mrs. Suzette*) *Kelo v City of New London*<sup>5</sup> where my private property is used by the Services, literally for \$.00 cents, for their *private use*, they call a “*public use*” or “*public purpose*” long before the sound recording falls into the *public domain*. It’s *instant public domain* with *no exclusive rights*.

In addition to the above mentioned evidence of Congress and their intent to set different rates and terms among different categories of licensors, *Congress and The Copyright Office have already allowed the establishment of additional rate and terms* that distinguish among different types or categories of licensors when they allowed the RIAA to design *different rates based on percentage of revenue terms* at 45% for recording artists, 50% for record labels, 2.5% for studio musicians though AFM and 2.5% for AFTRA background singers like The Jordanaires.

Furthermore, §114 sound recording *producers and engineers have 0% of this percentage of revenue* and their copyright interests were clearly not even considered, “***not even once***”<sup>6</sup> by the RIAA. At 2.5% I would say The Jordanaires and all AFTRA background singers, 2.5% AFM

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<sup>5</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005)

<sup>6</sup> Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors from Register Marybeth Peters about how the RIAA and Services “prematurely” stopped “without *once* considering the value of the individual performance” and “Neither the services nor RIAA proposed any methodology for assigning different values to different sound recordings.” and “there was a single representative of all sound recording owners, in this case, the RIAA.” Page 18 <http://www.copyright.gov/history/mls/ML-597.pdf>

studio musicians, 0% record producers and engineers got the raw deal in the establishment of rates and terms distinguished among different categories of licensees and users the past 20 years.

Then, if §114(i)<sup>7</sup> wasn't clear evidence of the intent of Congress in allowing or disallowing rates and terms, why are the Grammys, NMPA, NSAI and other lobbyists sponsoring a songwriter bill that abolishes §114(i) so that “*rate court Judges can consider all of the relevant evidence for determining the fair value of musical works*”<sup>8</sup>, **if using categories of licensors to set rates and terms was prohibited** by the Copyright Act?

Again, as GEO argued in his INITIAL and attached (Exhibit A) RESPONSE BRIEFS, the Copyright Office has already distinguished between different types of categories of licensors for over 100 years, in 2 separate code sections and then further distinguishes by setting completely different rates for these 2 categories of music copyrights, §114 and §115 - *and for both analog and digital versions* — where the §114 category of licensor pays anywhere from 7 to 1, or 12 to 1 times the rate for the same performance the musical work. Add that Congress didn't recognize sound recording copyrights until 1972 yet they had been around for 70 or more years.

GEO also argues that during the §115 rate proceedings over the 2006 to 2010 period, the 9.1 cent mechanical side of a digital stream was reduced by the former Copyright Judges from 9.1 cents to \$.00 cents, so that only the Licensees and Services at the time could profit. Effectively, the mechanical rate is now gone. Here is another example where the former Judges changed the rate and terms mid-stream for a §115 music copyright, so Licensees could benefit.

Finally and unfortunately for all American music copyright creators, there's 37 C.F.R. 385.11 and all of 385.1 - .26 *which clearly differentiates between different rates* for copyright

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<sup>7</sup> Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors “without once considering the value of the individual performance” and “Neither the services nor RIAA proposed any methodology for assigning different values to different sound recordings.” and “there was a single representative of all sound recording owners, in this case, the RIAA.” Page 18 <http://www.copyright.gov/history/mls/ML-597.pdf>

<sup>8</sup> “Restrictions on the Rate Court – Performance royalty rates for songwriters and composers are set by federal rate courts. Section 114(i) of the Copyright Act prevents those courts from considering the royalty rates for sound recordings as a relevant benchmark when setting performance royalty rates. The result is an uneven playing field. Sec. 114(i) should be changed so that rate court judges can consider all of the relevant evidence for determining the fair value of musical works.”

owners<sup>9</sup>, especially since **37 C.F.R. 385.11 just gives away a 61 cent sale or download on the §114 sound recording side for FREE, as well as the 9.1 cent §115 mechanical side for FREE, ironically found in 385.3.** This is an incredible loss of income for American music creators.

This is another example of the CRB or Register distinguishing between different rates and terms for licensors and copyright owners, then different rates for the same copyright owner, i.e. the 9.1 cent or 61 cents going to \$.00 cents to benefit licensees and users only in the 30 Day “limited download” for FREE in 37 C.F.R. 385.

**So, it seems clear that Congress and the Copyright Office have already categorized by licensor and already have set different rates per-category the past 20, to 43 to 106 years?**

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 full independence and a wide range of rates, terms and adjustments to choose from as real-world benchmarks that GEO has offered<sup>10</sup> over the course this rate proceeding<sup>11</sup>, not imaginary “hypothetical benchmarks” using “voluntary negotiations” that never take place.

**GEO’s rate proposals pass on the cost of copyright creation to the customers,** who then can decide which Service has the best experience, *at a profit to the Services and authors.*

GEO argues that §114(i) violates the constitutional Article I “copyright clause” and should be declared *null and void* by The Office or Judges. Eventhough §114(i) was passed by an Act of Congress, it was clearly created by the RIAA (for the RIAA, 3FMLs, and their new creation SoundExchange) to protect §114 rates for streaming or webcasting from §115 proceedings and copyright owners who will argue musical works should pay just as much as sound recordings on streaming or in general. But these are the perils of government price-fixing rates and terms, instead of a real free market setting the price, and why we are worrying about it.

<sup>9</sup> Mechanical 9.1 cent in 385.3 for §115 rates, to non-subscription webcasting rates for §114 streams, to 30 Day Limited Downloads for of §115 sales for FREE, to every other loophole the RIAA crammed in there for the 3MLs and 3MFLs over the past 10 to 20 years.

<sup>10</sup> GEO2700 Copyright Bundle \$1 per-song, up-front, one time <http://songwritersunited.co/charts/copyrightbundle.jpg>

<sup>11</sup> GEO’s “Beatles Proposal 3” found in GEO’s AMENDED WRITTEN DIRECT STATEMENT of inflation adjusted \$1 to \$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” non-subscription and on-demand business models of Pandora, Youtube, Spotify, etc.

The beauty of GEO's rates and terms in Beatle's Proposal 3 is that it solves the false argument that "the royalty pie is only so big and if you give songwriter's and publishers more money, you take away from the sound recording profits." The old "you can't squeeze blood from a turnip" argument Pandora and Spotify constantly make, yet they REFUSE to charge the customer for "cost of copyright creation"? The Services could earn a percentage per-song.

The only logical and reasonable way to solve and finally fix the epic problem the RIAA created in 1995, 1998, etc., is **to re-introduce the individual customer back into each individual song**, and therefore, re-introduce the value of copyright creators back into the royalty equation as a bundle of copyright payment, up-front, one-time for each song. It's very simple.

The RIAA stripped away the customer that used to pay for cost of copyright creation from the §114 copyright creators and gave away their own record label customers/users to The Services in exchange for monthly subscription fees, direct payments, stock options, advertising dollars, huge salaries, retirement plans, health benefits and the promise of a future IPO, etc..

So, the only way to fix this is to put back the user/customer that the RIAA removed back into the financial royalty equation that pays for cost of copyright creation and God forbid, actual profits for copyright creators.

CONGRESS CLEARLY INTENDED TO help the copyright owners of §114 digital and analog sound recordings over §115 mechanicals songwriter and publisher copyright owners.

MOST IMPORTANTLY Congress *failed to stop streaming* from substituting for and cannibalizing phonographic, download, CD and vinyl sales the past 20 years and **why the SALE and STREAM should be merged.**

### **A FREE MARKET PROPERTY RIGHT OR EXCEPTIONS AND LIMITATIONS?**

The Constitution says a "a guaranteed *republican* form of government", which means a federal and state government organized around the principles of *individual liberty* and *protection of private property*. The *exclusive right* found in the Constitution's "copyright clause" no longer offers any protections and is filled with *exceptions* and *limitations*. See former Register's quotes below on the need for *natural rights* being re-introduced into copyright and the guaranteed exclusive rights we are supposed to have. Even the protections of the 1909 Act "minimum statutory rate" have been destroyed by massive inflation and now been stripped away completely.



GEO offers a few excerpts on the legislative history of some of the Acts and the problems with each: primarily, they all claim some “protection or right of the public” which destroys any exclusive right. The public or groups don't have rights, only individuals. As Ayn Rand wrote in *Capitalism: The Unknown Ideal*, “*The smallest minority on earth is the individual. Those who deny individual rights, cannot claim to be defenders of minorities*”. So, like all rights, with copyright there is always some new exception or limitation to it's value, now almost worthless.

## THE 1909 COPYRIGHT ACT EXCEPTIONS AND LIMITATIONS W/ NO INFLATION<sup>12</sup>

Here Congress described the main object of copyright in 1909 was just an *adequate return* for authors but *protection for the public*, which I don't really understand other than an accidental infringement?

Congress addressed the difficulty of balancing the public interest with proprietor's rights: "The main object to be desired in expanding copyright protection accorded to music has been to give the composer *an adequate return for the value of his composition*, and it has been a serious and difficult task to *combine the protection of the composer with the protection of the public*, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests" (H.R. Rep. No. 2222, 60th Cong., 2nd Sess., p. 7 [1909]).<sup>13</sup>

In other words, we have to make sure great composers give us their songs when we want them and not hold out for more money. Instead of using the free-market to negotiate, we will force them to give us their exclusive rights. Then there is the word “adequate” in *adequate return*, well, who is to say what the return or profit should be for an individual's hard earned private property? The mechanical rate sat at 2 cents for 68 years but with CPI, it's now 52 cents.

**“Inflation and Music Mechanicals, 1976 to 2010<sup>14</sup> - Abstract:** Recorded music is a commodity bundled with a number of intellectual property rights. This paper illustrates the conflict over the value of one of the most important rights of music, the so-called mechanical rate that the record labels pay to songwriters and their publishers for the reproductions, in a recorded medium, of their work. **There has been a serious devaluation of the US mechanical rate against inflation since the Copyright Act of 1976.** As Congress and the CART Tribunal are ultimately involved in setting terms, the implication is that songwriters and their publishers are losing power in the USA against the record labels. For a variety of reasons, the phenomenon seems to be particular in the USA. It has also gone unnoticed in the current music business literature. Scholars who

<sup>12</sup> <http://songwritersunited.co/charts/inflation.jpg>

<sup>13</sup> <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.Vi1SVLz5z8s>

<sup>14</sup> [https://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking\\_Music\\_Inflation\\_US\\_Music\\_Mechanicals.pdf](https://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking_Music_Inflation_US_Music_Mechanicals.pdf) by Peter Alhadeff and Caz McChrystal

succeed in clarifying musicians' legal rights should also consider basic economics as a useful analytical tool”

### **DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995**

What is even more disturbing and once again, ironic, is the Digital Performance Right in Sound Recordings Act of 1995 entire purpose was “to give sound recording copyright owners an exclusive right...by digital audio transmissions” However, the bill was clearly written by the RIAA, approved by the 3ML's, while the very next phrase is, “...exclusive rights, *subject to certain limitations.*” Even if not written by the RIAA, exclusive rights are not subject to limits.

“Certain limitations” would come to mean your analog sound recording, now in digital form, are to be price-fixed at literally \$.00 cent per song and per-performance and under 37 C.F.R. 385, your sales of phonographs and downloads will be substituted for non-subscription performances for free. Clearly, in this bill, “exclusive rights” doesn't mean exclusive rights.<sup>15</sup>

By 1995 everybody knew that computers were the future of music since the WAV files for CD's but by 1998 with Napster, mp3s, so called peer to peer file sharing or blatant copyright theft, the RIAA (since they sued Napster) and their major label partners, could see that mp3s and digital audio in general was really the future. So, they re-wrote the rules advantageous for them.

### **UNITED NATIONS WIPO TREATY IMPLEMENTED AS THE DMCA VIOLATES CONSTITUTION'S EXCLUSIVE RIGHTS, 1ST AMENDMENT, 5TH AMENDMENT PROPERTY RIGHTS AMONG OTHERS**

In an article from last month titled, “US sanctions UN agency under whistle-blower law in unprecedented move”<sup>16</sup> it detailed the scandal laden<sup>17</sup> two-term director general<sup>18</sup> of the WIPO/DMCA<sup>19</sup> treaty Mr. Francis Gurry<sup>20</sup>, which is under his control and under the United Nations/WIPO, not under U.S. Copyright Law or most importantly, supreme law, The U.S . Constitution.

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<sup>15</sup> “You keep using that word, I do not think it means what you think it means?” *The Princess Bride*, <https://www.youtube.com/watch?v=wujVMiYzYXg>

<sup>16</sup> <http://www.foxnews.com/world/2015/09/17/us-sanctions-un-agency-under-whistleblower-law-in-unprecedented-move/>

<sup>17</sup> <http://www.ipwatchdog.com/tag/gurry-scandals/>

<sup>18</sup> <https://www.techdirt.com/blog/?tag=francis+gurry>

<sup>19</sup> [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=337359](http://www.wipo.int/wipolex/en/text.jsp?file_id=337359)

<sup>20</sup> [http://www.wipo.int/about-wipo/en/dgo/cv/gurry\\_cv.html](http://www.wipo.int/about-wipo/en/dgo/cv/gurry_cv.html)

This also violates *Reid v Covert* overriding international treaties by the Senate that violate the U.S. Constitution and the DMCA clearly does that, implementing United Nation rules and codes to replace U.S. Copyright Law. Subsequent bills of the DMCA are all under the United Nations and WIPO: The Obama administration has taken an historic step in withholding money from WIPO and “scandal tarred” WIPO and Mr. Gurry as the should, but that won’t help U.S. copyright owners with streaming rates anytime soon..

When reading DMCA or other WIPO<sup>21</sup> treaty documents (WPPT)<sup>22</sup>, or Mr. Gurry<sup>23</sup> they only focus on *the limitations and exceptions to apply to American “exclusive rights”* and therefore null and void according to *Marbury v Madison*, *Reid v Covert* and other precedents.

### **DMCA/WIPO DIRECTOR FRANCIS GURRY OF UNITED NATIONS IS NOT US LAW**

The corrupt deputy general of WIPO or the United Nations have no rights under the Constitution or rights under the 1909, 1972 SR and 1967 Copyright Acts and the DMCA and subsequent additions to the Copyright Act should be stricken as null and void. Don’t forget the Oil for Food Scandal and why any Congressman thinks the United Nations should be in charge of my copyright, and re-define U.S Copyright Law, is beyond me. The article reads:

”The U.S. State Department has taken a symbolic step to withhold money from a United Nations organization, in order to show concern about the ethical standards and whistle-blower protection at the scandal-tarred World Intellectual Property Organization, or WIPO.

The amount of money involved is puny -- less than \$370,000 -- compared to the billions in support that the Obama administration gives to the U.N. annually. In 2010, it ceased compiling the annual total. It also doesn’t matter much to WIPO, which gets 94 percent of its \$674 million budget for 2014-2015 from fees through its patent services.

*But it is the first time that the Obama administration has decided not to certify the ethics and whistle-blower behavior of any U.N. agency as “best practices” under a section of this year’s Appropriations Act that mandates at 15 percent withholding of U.S. contributions if an agency -- or the U.N. itself -- fails to meet the test.*

The decision also turns a spotlight back onto WIPO, a little-known Geneva-based organization that safeguards and allows access to the world’s patent system and other intellectual property -- and its highly controversial two-term director general, Francis Gurry, whose autocratic behavior has increasingly ruffled feathers in Washington and other capitals.”

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<sup>21</sup> [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295477](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477) In the Preamble it says “*recognizing the need to introduce new international rules*” and to “*maintain a balance between rights of performers and the larger public interest.*” The public interest is not larger than individual copyright authorship, property and protection.

<sup>22</sup> [http://www.wipo.int/pressroom/en/articles/2011/article\\_0005.html](http://www.wipo.int/pressroom/en/articles/2011/article_0005.html)

<sup>23</sup> [http://www.wipo.int/pressroom/en/articles/2011/article\\_0005.html](http://www.wipo.int/pressroom/en/articles/2011/article_0005.html) [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295477](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477)

The U.S., by far the largest filer of international patents under the treaties administered by WIPO, has a huge stake in the welfare of the organization.

In 2012, however, an investigative committee picked by Gurry himself found “inexplicable” and “unfathomable” a WIPO decision to provide sensitive U.S.-made computers and other high-tech equipment to North Korea and Iran as part of a renovation of WIPO facilities, without informing the U.N.’s committees that monitored sanctions against the two countries.

A year later, countries participating in WIPO’s annual assembly learned that Gurry had agreed to open new offices in Russia and China without asking for approval.

Early this year, U.S. diplomats faced an uphill battle over changes in a WIPO-administered treaty known as the Lisbon Agreement for the Protection of Appellations of Origin that expanded protections favored by European interests that crimp competition from the U.S. and elsewhere. WIPO denied non-signatories of the agreement -- the U.S. among them -- the right to vote on the issue.

## WIPO DEFINED HUMAN RIGHTS ARE THE OPPOSITE OF NATURAL RIGHTS

“Delegates from 160 countries considered two treaties on international intellectual property law during a Diplomatic Conference convened in December 1996 in Geneva, Switzerland. The delegates adopted new versions of the proposed treaties resulting in a new approach to copyright issues. The Conference adopted a statement ensuring the two treaties would “permit application of fair use in the digital environment.” The treaty language emphasized “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.”

### 1998 DIGITAL MILLENNIUM COPYRIGHT ACT

President Clinton signed the Digital Millennium Copyright Act (DMCA)<sup>24</sup> into law on October 28, 1998 (P.L. 105-304). The law's five titles implemented the WIPO Internet Treaties; established safe harbors for online service providers; permitted temporary copies of programs during computer maintenance; made miscellaneous amendments to the Copyright Act, including amendments which facilitated Internet broadcasting;

## QUESTION 2

### 2. QUESTION 2 - The Register MUST adopt GEO’s up-front rates and terms OR **NEGATIVELY affect §115 royalty rates by raising §114 rates and KEEPING PIE CHART.**

2. How might the Register's decision affect other statutory *e.g.*, the statutory license in 115 for the making and distribution of phonorecords of non-dramatic musical works? How, if at all, should any such broader implications factor into the Register's analysis?

A. - If the Register ADOPTS GEO’s rates and terms, §115 and §114 will PROSPER.

GEO wishes I had more space in this Brief to describe my proposal but it is as simple as this. If the Judges or Register do not adopt an up-front, one-time, per-song §114 payment of \$.50 cents to \$1, rising to \$2.50 over the next 5 years, a streaming rate of \$.00 anything will not sustain the industry, period. I wish scaling of streaming services would work but it won’t.

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<sup>24</sup> [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=337359](http://www.wipo.int/wipolex/en/text.jsp?file_id=337359)

B. - If the Register DOES NOT ADOPT GEO's rates and terms, §114 (§115) will FAIL.

As said above, if the Copyright Office does not adopt GEO's up-front one-time copyright bundle to pay for "cost of copyright creation" and profits, both §114 and §115 streaming nano-royalties will completely destroy the American music industry, except for the 3 Foreign Major Labels, Vivendi, Access, and Sony who have hacked the American royalty system at \$.00 cents.

Considering that the "making and distribution of phonorecords" has essentially been abolished by the former Copyright Royalty Judges, the RIAA, and the Services and Licensors, it's a moot point since they've already been *affected* and sales have been destroyed. Congress went through all these phony machinations to go out of their way for SiriusXM, Clear Channel and the RIAA back in the late 1990's with the DSRPA and especially the unconstitutional DMCA, which should be abolished. The Register and The Judges are not prohibited from protecting American copyrights from foreign interlopers or Licensees

The broader implications are if the Office does not start emulating a true hypothetical free market, GEO fears a growth in "free market litigation", Turtles style, with copyright lawsuits for all music copyrights, §114 and §115. It is clear that the RIAA took the profit and control out of sound recordings (and §115) and GEO is simply here to put the profit and control back in music copyright for American creators. The copyright creators must have their value restored to pay for cost of copyright creation and their well-deserved profit or incentive that has been destroyed.

**QUESTION 3 - The Answer is YES there are Constitutional and rational issues**

**3. Are there administrative law or constitutional considerations (including rational basis or due process concerns) that would affect or should guide the Judges' ability to adopt rates and/or terms for the compensation of copyright owners, featured recording artists, and others for the use of sound recordings based on the identity of the licensor?**

Rationally, \$.00 per stream is not rational, but Your Honors and The Register's only real guide should be the "supreme law of the land"<sup>25</sup> The United State's Constitution in addition to the "Copyright Clause"<sup>26</sup>Article 1, §8, Clause 8<sup>27</sup> which commands that:

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<sup>25</sup> <https://www.law.cornell.edu/constitution/articlevi>

<sup>26</sup> <http://copyright.gov/title17/92preface.html>

<sup>27</sup> [https://www.law.cornell.edu/wex/intellectual\\_property\\_clause](https://www.law.cornell.edu/wex/intellectual_property_clause)

Article VI: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. (emphasis added)

## NATURAL RIGHTS AND THE TWO FORMER REGISTERS' OPINIONS

“I actually believe in the free market.”<sup>28</sup> — President Barack Obama, Phoenix, August 2013

On Thursday, October 22, 2015 GEO came across a news article written by authors, attorneys and scholars Mr. Randolph May<sup>29</sup> <sup>30</sup> and Mr. Seth Cooper<sup>31</sup> called, “**Why Intellectual Property Rights Matter: The Founders believed ownership of one’s labor is a natural right**”. This led me to their brand new book called “**The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective**” which GEO’s entire rate proposal is based on and the foundations of U.S. copyright law in general, the *natural rights* of all copyright owners. Natural rights are the basis of all rights and real law and the basis of the “exclusive rights” found in the “copyright clause”. As the book describes the fundamentals:

“This should not surprise anyone familiar with our nation’s constitutional foundations. The thinking of the Constitution’s framers bore the imprint of classical liberal philosophy. And it is an axiom of classic liberal philosophy that each person has a natural right to the fruits of his or her own labor. “Property” ownership is rooted in a person’s labor. And a central aim of government is to protect what belongs to each person.”<sup>32</sup>

“Criminals perpetrate much piracy of intellectual property online. Given a chance, such crooks will steal property no matter what the form. Nevertheless, a substantial amount of online piracy is attributable to the contemporary “downgrading” of IP rights by otherwise law-abiding people.”

“James Madison’s 1792 National Gazette essay, “On Property,” is instructive. The “Father of the Constitution” drew directly from influential 17th century philosopher John Locke. Madison offered a broad definition of property, which “in its larger and juster meaning embraces every thing to which a man may attach a value and have a right.” As Madison explained, “a man has property in his opinions and the free communication of them,” and that which his own labor, “by the sweat of his brow,” has created. And following Locke, Madison concluded, “government is instituted to protect property of every sort.”

“Madison’s “On Property” essay explains why the Founders’ concern with protecting property rights was not limited to tangible property. By including the IP Clause in the Constitution, the Founders applied to intellectual property the idea that a person has a natural right to enjoy the fruits of his of her labor. Thus, the Constitution affirmatively secures the property rights of “Authors and Inventors” in their works.”

**However, what was most stunning to GEO and a pleasant surprise was the book was endorsed by the Two Former Registers of Copyright Ms. Marybeth Peters and Mr. Ralph**

<sup>28</sup> <https://www.whitehouse.gov/the-press-office/2013/08/06/remarks-president-responsible-homeownership>

<sup>29</sup> <http://freestatefoundation.org/seniorfellowsandstaff.html>

<sup>30</sup> [http://www.amazon.com/Randolph-J.-May/e/B00DWY7EG4/ref=dp\\_byline\\_cont\\_book\\_1](http://www.amazon.com/Randolph-J.-May/e/B00DWY7EG4/ref=dp_byline_cont_book_1)

<sup>31</sup> [http://www.amazon.com/Seth-L.-Cooper/e/B016X74R8O/ref=dp\\_byline\\_cont\\_book\\_2](http://www.amazon.com/Seth-L.-Cooper/e/B016X74R8O/ref=dp_byline_cont_book_2)

<sup>32</sup> <http://www.washingtontimes.com/news/2015/sep/3/randolph-may-seth-cooper-why-intellectual-property/>  
RANDOLPH MAY, SETH COOPER: Why intellectual property rights matter - Washington Times 10/23/15

**Oman praising May and Coopers new book based on natural rights. Again, the reason why both Register's endorsed the book and authors was because it's firm stand on natural rights as the foundation of copyright and exclusive rights.**

"Finally, two talented authors add intellectual heft to the ongoing debate about the true nature of copyright—as an exclusive private property right, **or as a limited right to be doled out stingily, riddled with exceptions and limitations, to be given away free-of-charge.** It has become fashionable in some academic circles to treat copyright exclusivity as a quaint but outmoded notion, and its advocates as hopeless naïfs. But Mr. May and Mr. Cooper, by going back to first principles and natural rights, show us that an exclusive property right is at the heart of copyright protection. Their learned analysis should be widely read, especially by Members of Congress and judges, to help them understand the true nature of the debate and the deep roots of the copyright pedigree as a natural private property right—historically unique, socially revolutionary, and worth fighting for. Three cheers for Messrs. May and Cooper!" --Ralph Oman, Register of Copyrights of the United States, 1985-1993<sup>33</sup> (emphasis added)

"I loved the book, and I hope it finds a large audience. Over the years, I've had many people tell me my interpretation of the Constitution's Intellectual Property Clause was wrong. Hopefully, this new book by Randolph May and Seth Cooper, with its scholarly yet highly readable treatment, will refocus the debate about IP rights on first principles and our Founders' intentions." --Marybeth Peters, Register of Copyrights of the United States, 1994-2011

Former New Jersey Superior Court Judge, Judge Andrew Napolitano has written extensively on how natural law and natural rights are the bedrock founding law of all American jurisprudence, embedded into every lawful decision thereafter *i.e.* Marbury v. Madison.

"The core concept of Natural Law is the idea of self-ownership and limitless personal liberty ... rights, specifically natural rights, are intangible and enforceable legal choices that are inalienable and exist *a priori* to any political or economic system, and for the exercise of which one does not need government approval."<sup>34</sup>

"How can one balance a derivative against an *a priori* right? One cannot. In order to create a social arrangement that validly enacts laws or defines man's relationship to other persons and their property, the underlying premise of self-ownership and natural rights both precedes and acts as precedent to the lawful acquisition of any good ... security, like that provided by the government, is a good, which cannot be freely exchanged between persons or entities, like states, without first recognizing *a priori* natural rights. Therefore, in considering the good of security and the right of free speech, no balancing act is possible or even conceivable."

But, these are STUNNING quotes from both former Register's of Copyright, considering the quote of Ms. Peters concerning the 1995 DARPA where the RIAA "not once considered" the individual performance and copyright creators. As far as one equal rate, world renowned economist Milton Friedman has said it best, "A society that puts equality before freedom will get neither. A society that puts freedom before equality will get a high degree of both."<sup>35</sup>

<sup>33</sup> [http://www.amazon.com/Constitutional-Foundations-Intellectual-Property-Perspective/dp/1611637090/ref=sr\\_1\\_3?s=books&ie=UTF8&qid=1440509244&sr=1-3&keywords=randolph+j.+may](http://www.amazon.com/Constitutional-Foundations-Intellectual-Property-Perspective/dp/1611637090/ref=sr_1_3?s=books&ie=UTF8&qid=1440509244&sr=1-3&keywords=randolph+j.+may)

<sup>34</sup> <https://mises.org/library/judge-napolitano-self-ownership-and-national-defense>

<sup>35</sup> <https://bfi.uchicago.edu/post/milton-friedman-his-own-words#sthash.IfBhF0fQ.dpuf>

As I have written before, some streaming user once said, “I used to buy music, but now I’m a listener”. Well, that’s like walking into a restaurant and declaring to the manager “Feed me for free. I used to *buy food*, but now *I’m an eater*.”

#### **E. AS THE FORMER COPYRIGHT REGISTER MARYBETH PETERS IS QUOTED**

So, we come to an incredible excerpt from Page 9 of A2IM’s MEMORANDUM, ironically<sup>36</sup> offered as Exhibit A in SoundExchange’s October 2, 2015 INITIAL BRIEF which quoted former Register of Copyright Ms. Marybeth Peters in the Final Rule and ORDER by the 1998 Copyright Office under the DPRSRA of 1995.

GEO’s point is that we now have an opportunity in this rate hearing to consider the value<sup>37</sup> of an individual sound recording copyright and the performance and sale of it in this digital and streaming age. Unfortunately, the record is crystal clear that 20 years ago, the 3 Services around then and the RIAA caused these problems we copyright owners are facing today since it proves they never “once considered the value of the individual performance”!

Yes, the most staggering part of the former Register’s statement proves the Services and the RIAA never “once considered the value of the individual performance”, not even **once!**

No wonder we are \$.00 cents per stream.

We music copyright creators pray Your Honors will fix this problem in this rate hearing.

The Register then says that “*neither the Services nor the RIAA proposed any methodology for assigning*” any “*values to different sound recordings*” much less “different” values.

The problem is not equal value, its NO VALUE and a music royalty is no royalty at \$.00.

This revealing and honest quote show below from the former Register of Copyright Peters proves GEO’s argument: it was the RIAA and Services that set my §114 sound recording copyright at \$.00 cents for their benefits, the RIAA was in charge of setting these rates for §114

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<sup>36</sup> Ironic, since it proves that the RIAA, which created and still controls SoundExchange, could care less about individual copyrights, performances, or creators and their values. **The RIAA never considered the value to copyright owners, not even ONCE.**

<sup>37</sup> GEO has offered “Batch 3 Receipts” to Judge Strickler as evidence of 2 albums GEO has created to demonstrate the underlying work, value and cost of copyright creation per album or sound recording for an independent American music creator. This value does not include the “creativity” by the authors or their profit, only creator’s basic §114 sound recording costs. Also, all copyright creation is really only analog since no matter how many drum machines a creator uses, someone still has to sing the song, and probably play some live analog guitar to make an analog sound recording allegedly protected under §114 and §106, before it’s converted to a digital WAV or mp3 file.



non-subscription webcasting and the RIAA was the “single representative of all sound recording owners”. Again, the RIAA and Services only offered “blanket licenses” and not even “once considered the value of the individual (stream or) performance” that went into the creation of each §114 copyright by the creators and performers.

**That is powerful, powerful stuff since the RIAA and The Services at the time underhandedly made sure the rate was set at \$.00 cents with NO VALUE, no matter what, and never once offered an individual value — considering copyright law is entirely based upon the individual performance and each individual copyright.**

To GEO, the RIAA should never represent copyright owners ever again in front of the Copyright Office, for their abhorrent and unconstitutional setting of copyrights at \$.00 cents for their benefit, the Services’ benefit and ironically the 3 Major Labels’ benefit, now 100% foreign owned. Here is the quote from the A2IM Brief, quoting Register Peters in the DPRSR of 1995.

“Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Act of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:

“2. Value of an individual performance of a sound recording. The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the “blanket license” for the right to perform the sound recording, without once considering the value of the individual performance—a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, *the Register has made a determination that each performance of each sound recording is of equal value* and has included a term that incorporates this determination.

To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, *each performance of each sound recording* must be afforded equal value.<sup>38</sup>”

The rates at issue in this proceeding involved three services, and consistent with all of the Webcasting proceedings, **there was a single representative of all sound recording owners, in this case, the RIAA.**”

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<sup>38</sup> Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors “without once considering the value of the individual performance” and “Neither the services nor RIAA proposed any methodology for assigning different values to different sound recordings.” and “there was a single representative of all sound recording owners, in this case, the RIAA.” Page 18 <http://www.copyright.gov/history/mls/ML-597.pdf>

Not even **once!** There is no way that this can be overlooked again with willful ignorance and permission less innovation, let's enforce the exclusive right and property rights of U.S. Copyright Law. The solution is simple, the *sale* and the *stream need bonded together in copyright law forever*, with no exclusions, limitations as former Register explicitly said. We beg the Office to not repeat the mistakes of the past that got us here. Protect American copyright owners first - exclusive rights.

Since Thomas Jefferson offered his library to Congress<sup>39</sup> after the British burn the Capitol in 1814 to found the new library and we can say that Thomas Jefferson is literally the Father of The Library of Congress who wrote "*in the questions of power then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution...*"<sup>40 41</sup> The Copyright Office either stands with individual copyright authors and creators or it stands with Licensees. For the past 106 years, the Copyright Office has primarily favored users, and licensees, and the so-called public good.

### III. CONCLUSION

For these reasons, George Johnson (GEO) respectfully submits his answers. We American copyright creators pray for Your Honors and The Register to restore our control , profits, personal private property and rightful creations by exclusive right. Thank you.

<sup>39</sup> <http://www.loc.gov/exhibits/jefferson/jefflib.html>

<sup>40</sup> <http://www.monticello.org/site/jefferson/two-enemies-people-are-criminals-and-government> quotation Earliest appearance in print, attributed to Thomas Jefferson: see above.

**Status:** This quotation has not been found in any of Thomas Jefferson's writings. He did, however, employ the phrase "chains of the Constitution" at least once, in the Kentucky Resolutions of 1798: "...in questions of power then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution..." (from draft)<sup>2</sup> The quotation may be a conflation of Jefferson's "chains of the Constitution" comment with Ayn Rand's statement in her essay, "Man's Rights": "There are two potential violators of man's rights: the criminals and the government. The great achievement of the United States was to draw a distinction between these two — by forbidding to the second the legalized version of the activities of the first."<sup>3</sup> - Anna Berkes, 5/09; updated 9/18/14

*PTJ* 30:529-556. Also made available [online](#) by the Papers of Thomas Jefferson.

<sup>3</sup> Ayn Rand, "Man's Rights," in *The Virtue of Selfishness* (New York: Signet, 1964), 111. This essay is also available on the [Ayn Rand Institute website](#).

<sup>41</sup> <http://press-pubs.uchicago.edu/founders/documents/v1ch8s41.html> 8 Federal v. Consolidated Government [Volume 1, Page 292] CHAPTER 8|Document 41 Thomas Jefferson, Resolutions Relative to the Alien and Sedition Acts 10 Nov. 1798 Writings 17:379--80, 385--91

Dated: Monday, October 26, 2015

Respectfully submitted,

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**V. TABLE OF AUTHORITIES**  
**George Johnson (GEO)**

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17 U.S.C. § 106

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37 C.F.R. § 385.1 through 385.26

37 C.F.R. § 385.3

37 C.F.R. § 385.11

37 C.F.R. § 385.13

37 C.F.R. § 385.14

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*President George Washington’s Inaugural Address*

British *Statute of Anne*, Article IV (c.19) (1710)

**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 SUPPLEMENTAL BRIEF TO THE REGISTER OF COPYRIGHT ON THREE SPECIFIC ISSUES RELATING TO THE NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW has been served this 26th day of October, 2015 by electronic mail upon the following parties:

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*Geo Music Group (GMG)*

# **Exhibit A**

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 )	Docket No. 14–CRB–0001–WR
Recordings and Ephemeral Recordings )	(2016–2020)
(Web IV) )	
_____ )	

**GEORGE JOHNSON’S**  
**REPLY BRIEF TO NOVEL MATERIAL QUESTION OF LAW**  
**REFERRED TO THE REGISTER**

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Dated: Friday, October 16, 2015

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George Johnson, (“GEO”) respectfully submits his REPLY BRIEF TO A 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

This memorandum is in response to certain arguments made by all the participants and non-participants UMG Recordings, Inc., Capitol Records, LLC and Sony Music Entertainment (collectively, “UMG-SME”), non-participants The American Association of Independent Music (“A2IM”), plus interested parties the American Federation of Musicians of the United States and Canada (“AFM”) and Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), as individual constituents of SoundExchange (collectively, “A2IM-Unions”).

Participants Pandora Media, iHeartRadio, SiriusXM, NAB-NRBNMLC, and non-participants A2IM-Unions answered “YES” to the Novel Question, participant GEO and non-participants UMG-SME answered “NO” (GEO mistakenly answered YES in INITIAL BRIEF but meant “NO”), and amazingly participant SoundExchange answered “NO POSITION”.

GEO respectfully disagrees with the conclusions put forth by all participants and non-participants, with the exception of partially agreeing with non-participants UMG-SME’s legal arguments, citations, and precedents in regards to their “NO” answer to the Novel Question.

## II. ARGUMENT

### A. THE ANSWER TO THE NOVEL QUESTION IS “NO” - GEO MISTAKENLY ANSWERED “YES” IN THE INITIAL BRIEF BUT MEANT “NO”

As argued in GEO’s Initial Brief, the Answer to the Novel Question is still “**NO**”. GEO mistakenly said YES in the Initial Brief, but meant “**NO**” to the NOVEL QUESTION OF LAW<sup>1</sup>:

“Does Section 114 of the Act (or any other applicable provision of the Act) prohibit the Judges from setting rates and terms that distinguish among different types or categories of licensors, assuming a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace?”

Of course, as § 802(f)(1)(A) explicitly states, “the Copyright Royalty Judges shall have full independence in making *determinations* concerning *adjustments* and determinations of copyright royalty *rates and terms*, ...”<sup>2</sup>

**B. NO CANON OR STATUTORY CONSTRUCTION SUPPORTS A CONCLUSION THAT THE JUDGES ARE PROHIBITED FROM DISTINGUISHING AMONG LICENSORS, COPYRIGHT CREATORS, OR COPYRIGHT OWNERS—§114 ANALOG SOUND RECORDING ARE BENCHMARKS TOO**

The Act, or any other provision, does not prohibit Your Honors from setting rates and terms that distinguish among different types or categories of licensors. There is no evidence, statute, or precedent that prohibits Your Honors from distinguishing, not only among different types or Categories of Licensors (record labels), which *includes* Copyright Creators and Copyright Owners, but also by Licensee or Users. This includes §114 analog sound recordings.

“Categories of licensors” and “different types of copyright owners” could not only mean “*independent record labels*” vs. “*the 3 major labels*”, but also other *categories of licensors*

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<sup>1</sup> It made sense in the sentence. Instead of answering “NO”, GEO said “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”. I apologize for the rookie mistake.

<sup>2</sup> § 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.

which includes §114 *recording artists, singers, studio players, engineers, producers, investors* who all have a sound recording copyright interest in every new and old sound recording (plus co-writers and co-publishers for that matter) which are now owned and controlled by 3 foreign corporations — Vivendi, Access Industries, and Sony. More importantly, the “3 Foreign Major Labels” or (“3FML’s”) essentially help set all American §114 copyright creator’s rates at the lowest government compulsory, statutory rate possible and literally less than \$.00 cents.

Unlike MFNs<sup>3 4</sup> for the 3FMLs, GEO calls the government compulsory rate the LFN<sup>5</sup> or “Least Favored Nation”, which is always the lowest possible rate that everybody gets, way below market rate, not adjusted for inflation for decades, yet this lowball rate acts as a top-ceiling for rates for all other American independents, singers, players, producers, engineers, and investors.

GEO respectfully submits that the 3 “Foreign Owned Major (former American) Record Labels”, *be considered a new category of licensor* since it would be difficult to dispute the fact that the majority of all American copyrights are ultimately being controlled and managed from 3 foreign corporations in Moscow, Paris and Tokyo — for their profit and not the American music copyright creator’s profit or interest.

Sure, UMG-SME or WMG’s American subsidiaries can argue they are technically registered as U.S. corporations and were once American created or owned, but the hard fact is the 3 Major “American” record labels are nothing but foreign shells of their former selves.

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<sup>3</sup><http://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract>

<sup>4</sup> <https://www.scribd.com/doc/266262470/Sony-Spotify-2011-Contract>

<sup>5</sup> As opposed to the MFN Most Favored Nation clause that the 3FML’s have in their contracts that if one of the foreign majors get an increase in rates, the other majors get the same rate increase. Of course, we copyright creators are stuck with LFN government low rate and don’t see the profits for the 3FML’s MFN rate increases.

GEO would like to see new American record labels be given the opportunity, first by their own government, to someday become Major American Record Labels, which are all now sadly *gone* — sold to foreign investors and now foreign governments overseas that are anti-capitalist, anti-liberty, anti-constitution, and even anti-American in some cases.

**C. THE COPYRIGHT OFFICE ALREADY DISTINGUISHES BETWEEN DIRECT TYPES OF COPYRIGHT OWNERS AND DIFFERENT RATES FOR §115 AND §114 LICENSORS**

So, as GEO argued in his INITIAL BRIEF, the Copyright Office *already distinguishes between different types of categories of licensors and has for over 100 years, in 2 separate code sections* AND then further distinguishes by setting completely different rates for these 2 categories of music copyrights, §114 and §115 - *and for both analog and digital versions*.

Also, “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, but “*singer/songwriters*” who create a §114 analog sound recording copyrights after they have created the §115 song copyright like GEO — or at the same time for a well done guitar-vocal demo of the finished §115 song, which then serves as a §114 sound recording master.

Which leads us to the difference in rates for each type or category of licensor (§115 songwriters and §114 singers) that are anywhere from 7 to 1, or 12 to 1 times the rate for the same performance of the song - streaming sound recording rate vs. the rate for the musical work.

**So, it seems clear that Congress and the Copyright Office have already categorized by licensor and already have set different rates per-category the past 20, to 43 to 106 years?**

In GEO’s case, I’m the same copyright creator for §115 and §114, so I issue different **Licenses** from the same Licensor - Me, therefore GEO does not create musical copyrights

*determined by category or type of Licensors, Licensees or Users.* I create copyrights based upon the individual musical copyright I'm currently working on, not based on who is going to use it for free when I'm finished working on it?

This seems like an odd point but it's a good one since no Licensee or Service actually cares about the careful creation of the *song* or the effort or money it takes to make a quality *sound recording*. Licensees' only concern is, "Let me use government force to make you give me your song for free right now so I can monetize my Silicon Valley/Wall St. "business model" — based solely on the "legalized" copyright infringement of American music, which is now primarily owned and controlled by my good friends at the 3 foreign major licensors"

**D. THE COPYRIGHT OFFICE ALREADY FURTHER DISTINGUISHES BETWEEN DIFFERENT RATES IN 37 C.F.R. 385 WITH THE "30-DAY LIMITED DOWNLOAD" FOR \$.00 CENTS - AND OTHER EXAMPLES OF DISTINGUISHING BETWEEN DIFFERENT RATES.**

Then, unfortunately for all American music copyright creators, there's 37 C.F.R. 385.11 and all of 385.1 - .26 *which clearly differentiates between different rates* for copyright owners<sup>6</sup>, especially since **37 C.F.R. 385.11 just gives away a 61 cent sale or download on the §114 sound recording side for FREE, as well as the 9.1 cent §115 mechanical side for FREE, ironically found in 385.3.**

**That is an incredible loss of income for all American music creators and copyright infringement found right in the Copyright Act?**

While we currently have an opportunity in these Reply Briefs to discuss the §115 music copyright as a possible "category of licensor", and as an example of the former Judges changing

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<sup>6</sup> Mechanical 9.1 cent in 385.3 for §115 rates, to non-subscription webcasting rates for §114 streams, to 30 Day Limited Downloads for of §115 sales for FREE, to every other loophole the RIAA crammed in there for the 3ML's and 3MFL over the past 10 to 20 years.

rates and terms midstream and setting different rates and terms, GEO also argues that during the §115 rate proceedings over the 2006 to 2010 period, the 9.1 cent mechanical side of a digital streaming performance, which still exists, was ruled that the mechanical side only applied to “on-demand” streams.

So, this another example of the “minimum statutory rate” for all mechanicals rates and terms being reduced by the former Copyright Judges from 9.1 cents to \$.00 cents, so that only the Licensees and Services at the time could profit.<sup>7</sup> Effectively, the mechanical rate was gone.

The point is, here is another example where the former Judges changed the rate mid-stream for a §115 music copyrights, so Webcasters didn’t have to pay 9.1 cents a stream.

As crazy as it may sound to some, 9.1 cents per-stream *is still the law according to the 1909 and 1976 Copyright Acts* if your read “minimum statutory rate” for its plain meaning. That plain meaning has *historically been our law the past 100 years* and it was changed forever when the former Judges decided they had the authority, to take the “*minimum*” and “*the rate*” out of the “minimum statutory rate” going from 9.1 cents to \$0 cents.

The reason for this is that *a stream* has a *mechanical side* and a *performance side* to it, otherwise the former Judges would have never ruled on this issue, making only on-demand streams subject to the mechanical “minimum statutory rate” which was crushed to \$.00, ignoring the statutory minimum \$.091 and income from download mechanical “sales”. Again,

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<sup>7</sup> Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors “without once considering the value of the individual performance” and “Neither the services nor RIAA proposed any methodology for assigning different values to different sound recordings.” and “there was a single representative of all sound recording owners, in this case, the RIAA.” Page 18 <http://www.copyright.gov/history/mls/ML-597.pdf>

just because the word “digital” is placed in front of the words *copyright* or *mechanical*, or *sound recording*, etc. doesn’t mean it loses it’s fundamental constitutional and §106 protections, etc.

At the very least, the way GEO reads pre-webcasting copyright law, and considering the FREE download with the atrocious 30 Day “limited” download, a stream should pay the per-stream nano-royalty AND the 9.1 cent per-song for the §115 side one-time — then pay the 61 cents or more on the §114 sound recording one time - as GEO Rate Proposals 1 and 2 and 3 estimate in GEO’s Written Direct and Amended Written Direct Statements.

This is part of GEO’s case, without the inflation<sup>8</sup> adjustment, especially with a now guaranteed government approved FREE 30-day limited download with no sale, there are no more payments for the sound recordings or musical works at the standard \$.99 cent download price.

But, imagine the nightmare for Pandora or even on-demand Youtube if they were forced to pay 9.1 cent per-stream for a non-subscription performance or an on-demand version of the same exact musical copyrights/performances.

This is why GEO’s rate proposals pass on the cost of copyright creation to the customers, who then can decide which Service give’s them the best experience, but no longer for free.

So, here is another example of the CRB distinguishing between different rates for licensors and copyright owners, then different rates for the same copyright owner, *i.e.* the 9.1 cent going to \$.00 cents to benefit licensees and users only, or the 30 Day limited download for FREE in 37 C.F.R. 385.

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 full

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<sup>8</sup> GEO2853 Exhibit Mechanical Inflation Chart <http://songwritersunited.co/charts/inflation.jpg>

independence and a wide range of rates, terms and adjustments to choose from as real-world benchmarks that GEO has offered<sup>9</sup> over the course this rate proceeding<sup>10</sup>, not imaginary “hypothetical benchmarks” using “voluntary negotiations” that never take place during the 3 month time frame.

**E. AS THE FORMER COPYRIGHT REGISTER MARYBETH PETERS IS QUOTED IN THE CARP RECORD PROVES BEYOND ANY DOUBT, THE ONE THING THE RIAA (AND CONGRESS) COULD CARE LESS ABOUT WAS THE INDIVIDUAL SOUND RECORDING (& 115) & COPYRIGHT CREATORS**

So, we come to an incredible excerpt from Page 9 of A2IM’s MEMORANDUM, ironically<sup>11</sup> offered as Exhibit A in SoundExchange’s October 2, 2015 INITIAL BRIEF which quoted former Register of Copyright Ms. Marybeth Peters in the Final Rule and ORDER by the 1998 Copyright Office under the DPRSRA of 1995.

Now, A2IM offers this quote from Register Peters as evidence that the rate Your Honors must decide on be an equal and singular rate for all participants. In theory, this should be true, as Mr. Rich, Mr. Joseph and others rightly point out that all the participants offered a single rate for everyone, which seemed to be our task at the time, all things being equal, fair and above board.

Now, unfortunately, all the Services, Counsel, Participants and even SoundExchange’s definition of a “fair rate” is \$.00 cents, while their definition of an equal rate or “equality” is

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<sup>9</sup> GEO2700 Copyright Bundle \$1 per-song, up-front, one time <http://songwritersunited.co/charts/copyrightbundle.jpg>

<sup>10</sup> GEO’s “Beatles Proposal 3” found in GEO’s AMENDED WRITTEN DIRECT STATEMENT of inflation adjusted \$1 to \$5 per song to be paid in an up-front copyright bundle that pays ALL the copyright owners on a 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” non-subscription and on-demand business models of Pandora, Youtube, Spotify, etc.

<sup>11</sup> Ironic, since it proves that the RIAA, which created and still controls SoundExchange, could care less about individual copyrights, performances, or creators and their values. **The RIAA never considered the value to copyright owners, not even ONCE.**



where 99.99 percent of the American songwriters make \$100 per year from all streaming services, while they make billions from our property without our consent.

So, while the only solution that all the participants offer in this rate hearing for music rights copyright is literally \$.00 cents per sound recording, GEO offered the singular and equal rate of \$1 per-song, one-time, up-front, except **the CUSTOMER must pay per-song for their streaming playlist which does not cost webcasters any money, in fact, it is a profit center.**

Is it reasonable for the customer to pay for the cost of a product? Of course it is.

Otherwise every streaming executive and every attorney in this rate proceeding should be forced to make \$.00 cents per-billable hour which would only be fair play<sup>12</sup> Your Honors .

GEO's point is that we now have an opportunity in this rate hearing to consider the value<sup>13</sup> of an individual sound recording copyright and the performance and sale of it in this digital and streaming age. Unfortunately, the record is crystal clear that 20 years ago, the 3 Services around then and the RIAA caused these problems we copyright owners are facing today since it proves they never "*once considered the value of the individual performance*"!

Yes, the most staggering part of the former Register's statement proves the Services and the RIAA never "*once considered the value of the individual performance*", not even **once!**

No wonder we are \$.00 cents per stream.

We music copyright creators pray Your Honors will fix this problem in this rate hearing.

The Register goes on to say that "*neither the Services nor the RIAA proposed any*

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<sup>12</sup> [http://songwritersunited.co/charts/lrb\\_act.jpg](http://songwritersunited.co/charts/lrb_act.jpg) and [http://songwritersunited.co/charts/lrb\\_act\\_atla.jpg](http://songwritersunited.co/charts/lrb_act_atla.jpg) - LRB Act

<sup>13</sup> GEO has offered "Batch 3 Receipts" to Judge Strickler as evidence of 2 albums GEO has created to demonstrate the underlying work, value and cost of copyright creation per album or sound recording for an independent American music creator. This value does not include the "creativity" by the authors or their profit, only creator's basic §114 sound recording costs. Also, all copyright creation is really only analog since no matter how many drum machines a creator uses, someone still has to sing the song, and probably play some live analog guitar to make an analog sound recording allegedly protected under §114 and §106, before it's converted to a digital WAV or mp3 file.

*methodology for assigning” any “values to different sound recordings” much less “different” values.*

So, the problem is not equal value, its NO VALUE and a music royalty is no royalty at all if it's always \$.00 cents.

This revealing and honest quote shown below from the former Register of Copyright Peters proves GEO's argument: it was the RIAA and Services that set my §114 sound recording copyright at \$.00 cents for their benefits, the RIAA was in charge of setting these rates for §114 non-subscription webcasting and the RIAA was the “single representative of all sound recording owners”. Again, the RIAA and Services only offered “blanket licenses” and not even “once considered the value of the individual (stream or) performance” that went into the creation of each §114 copyright by the creators and performers.

**That is powerful, powerful stuff since the RIAA and The Services at the time underhandedly made sure the rate was set at \$.00 cents with NO VALUE, no matter what, and never once offered an individual value — considering copyright law is entirely based upon the individual performance and each individual copyright.**

To GEO, the RIAA should never represent copyright owners ever again in front of the Copyright Office, for their abhorrent and unconstitutional setting of copyrights at \$.00 cents for their benefit, the Services' benefit and ironically the 3 Major Labels' benefit, now 100% foreign owned. Here is the quote from the A2IM Brief, quoting Register Peters in the DPRSR of 1995.

“Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Act of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:

“2. Value of an individual performance of a sound recording.

The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the “blanket license” for the right to perform the sound recording, without once considering the value of the individual performance— a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, *the Register has made a determination that each performance of each sound recording is of equal value* and has included a term that incorporates this determination.

To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. *Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings.* In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, *each performance of each sound recording* must be afforded equal value.<sup>14</sup>

The rates at issue in this proceeding involved three services, and consistent with all of the Webcasting proceedings, there was a single representative of all sound recording owners, in this case, the RIAA.”

Not even once!

**F. IF THE ACT PROHIBITED THE JUDGES FROM SETTING RATE AND TERMS THAT DISTINGUISH AMONG DIFFERENT TYPES OR CATEGORIES OF LICENSORS OR COPYRIGHT OWNERS, THEN WHY DOES §114(I) EVEN EXIST?**

It is clear that if the Act already prohibited the Judges from setting rates and terms that distinguish among different types or categories of licensors, then why does §114(i) even exist?

§114(i) states that:

“(i) No Effect on Royalties for Underlying Works.—

License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to

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<sup>14</sup> Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors -“stopped prematurely”, without once considering the value of the individual performance” and “Neither the services nor RIAA proposed any methodology for assigning different values to different sound recordings.” and “there was a single representative of all sound recording owners, in this case, the RIAA.” Page 18 <http://www.copyright.gov/history/mls/ML-597.pdf>

copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).”<sup>15</sup> <sup>16</sup>

**G. §114(I) OF THE COPYRIGHT ACT CLEARLY PREVENTS COURTS FROM CONSIDERING THE ROYALTY RATES FOR SOUND RECORDINGS AS A RELEVANT BENCHMARK WHEN SETTING PERFORMANCE ROYALTY RATES AND TERMS FOR §115 MUSICAL WORKS AKA TYPES OR CATEGORIES OF LICENSORS OR COPYRIGHT CREATORS AND OWNERS**

As GEO keeps reading in almost all the Initial and Reply Briefs of participants and non-participants except for UMG-SME, and I paraphrase, *“it’s clear that Congress did not intend to allow the Judges to set rates and terms based on types or categories of licensors or copyright owners (creators).”*

As GEO points out above, if Congress did not intend Your Honors from considering or distinguishing among types or categories of licensors, *then why was §114(i) even written, and then passed by Congress?*

Congress clearly indented for §115 music copyright creators and licensors to take a back seat financially to streaming Services and Licensors of §114 Major Label sound recordings at a 12 to 1 or 7 to 1 ratio — since that is what the evidence shows.

The entire purpose of §114(i) was to keep the 3 Major Record Labels and gradually 3 Foreign Major Labels’ §114 sound recordings paying more from Webcasters than stupid,

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<sup>15</sup> <http://www.copyright.gov/title17/92chap1.html#114>

<sup>16</sup> <sup>48</sup>The Digital Performance Right in Sound Recordings Act of 1995 amended section 114 as follows: 1) in subsection (a), by striking “and (3)” and inserting in lieu thereof “(3) and (6)”; 2) in subsection (b) in the first sentence, by striking “phonorecords, or of copies of motion pictures and other audiovisual works,” and inserting “phonorecords or copies”; and 3) by striking subsection (d) and inserting in lieu thereof new subsections (d), (e), (f), (g), (h), (i), and (j). Pub. L. No. 104-39, 109 Stat. 336. In 1997, subsection 114(f) was amended in paragraph (1) by inserting all the text that appears after “December 31, 2000” and in paragraph (2) by striking “and publish in the Federal Register.” Pub. L. No. 105-80, 111 Stat. 1529, 1531.

worthless §115 songwriters and music publishers — the 3 Major record companies have never, ever wanted to pay creators unless they absolutely had to.

These are decisions made by people who never held a guitar in their hand at the RIAA.

This is why the founding fathers wrote copyright into the Constitution and not the Bill of Rights in the first place, so NOBODY in the future, especially new Congresses, future presidents, future Supreme courts and future RIAA lobbyists, could steal or profit from each individual American's copyright creations, no matter their artistic form.

The Copyright Office either stands with individual copyright authors and creators or it stands with Licensees. For the past 106 years, the Copyright Office has only favored users, licensees and their profits, and the so-called public good.

Register Peter's quote proves beyond any doubt that individual copyright owners and their value aren't even in the streaming royalty equations the past 20 years, literally.

**H. WHY ARE THE GRAMMYS, NMPA, NSAI, ADVOCATING FOR §114(I) TO BE ABOLISHED SO THAT RATE COURT JUDGES CAN CONSIDER ALL OF THE RELEVANT EVIDENCE FOR DETERMINING THE FAIR VALUE OF MUSICAL WORKS, IF CATEGORIES OF LICENSORS WAS PROHIBITED BY THE COPYRIGHT ACT?**

For the past 2 years (The Grammys) The Recording Academy, (NMPA) National Music Publishers Association, and (NSAI) Nashville Songwriter Association International have created and publicly supported a new “songwriter bill” called the Songwriter's Equity Act<sup>17</sup>. Among other provisions, will abolish §114(i) so that sound recording royalty rates can be used as benchmarks in setting rates and terms in future §115 rate proceedings. So, its already been done.

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<sup>17</sup> <https://www.congress.gov/bill/113th-congress/house-bill/4079>

As The Grammys wrote about the SEA bill in their current toolkit for Grammy In My District taking place on October 14, 2015,

“Restrictions on the Rate Court – Performance royalty rates for songwriters and composers are set by federal rate courts. Section 114(i) of the Copyright Act prevents those courts from considering the royalty rates for sound recordings as a relevant benchmark when setting performance royalty rates. The result is an uneven playing field. Sec. 114(i) should be changed so that rate court judges can consider all of the relevant evidence for determining the fair value of musical works.”<sup>18</sup>

Of course, it’s way too late for Congress to pass the SEA bill for next year’s §115 proceedings that starts in January of 2016, but GEO argues that §114(i) violates the constitutional Article I “copyright clause”. Even though §114(i) was passed by an Act of Congress, it was clearly created by the RIAA (for the RIAA, 3FMLs, and their new creation SoundExchange) to protect §114 rates for streaming or webcasting from §115 proceedings and copyright owners who will argue musical works should pay just as much as sound recordings on streaming or in general. But these are the perils of government price-fixing and why we are here today.

The point of all this and the beauty of GEO’s rates and terms in Beatle’s Proposal 3 is that it solves the false argument that “the royalty pie is only so big and if you give songwriters and publishers more money, you take away from the sound recording profits.” The old “you can’t squeeze blood from a turnip” argument Pandora and Spotify constantly make, yet it’s phony since they REFUSE to charge the customer for “cost of copyright creation”!

Well, the only logical and reasonable way to solve and finally fix this *epic problem the RIAA created* in 1995, 1998, etc., is to re-introduce the individual customer back into each

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<sup>18</sup> [https://www.grammypro.com/sites/default/files/pages/grammys\\_in\\_my\\_district\\_toolkit.pdf](https://www.grammypro.com/sites/default/files/pages/grammys_in_my_district_toolkit.pdf)

individual song, and therefore, re-introduce the value of copyright creators back into the royalty equation as a bundle of copyright payments, up-front, one-time for each song. It's very simple.

The RIAA stripped away the customer that *used to pay for the cost of copyright creation* away from the §114 copyright creators, then gave away their own customers/users to The Services in exchange for monthly subscription fees, direct payments, stock options, huge above market salaries, retirement plans, health benefits and the promise of a future IPO, etc..

So, the only way to fix this is to put back the user/customer that the RIAA removed back into the financial royalty equation that pays for cost of copyright creation and God forbid, actual *profits* for copyright creators. The primary question we have to ask, ***“is it reasonable for a customer to pay for a product?”***

Section 801(b) makes it clear that not one of the following objectives are being met for American music copyright owners, these provisions have only applied to Licensees and The Services. It's time for the Copyright Royalty Judges to consider all 4 of these provisions, especially now since the RIAA, the Copyright Offices, former Judges, and Services have had the “maximum disruptive impact” on the structure of the industries of songwriting, publishing, independent American record labels, singers, recording artists, studio players, producers, engineers and investors of §114 sound recordings. All the while *abolishing all generally prevailing industry practices concerning American copyright law and music copyright royalties.*

**§ 801. Copyright Royalty Judges; appointment and functions<sup>19</sup>**

(b) Functions. — Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

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<sup>19</sup> In 2006, the Copyright Royalty Judges Program Technical Corrections Act amended chapter 8 throughout. Pub. L. No. 109-303, 120 Stat. 1478. Section 6 of that Act states, “Except as provided under subsection (b), this Act and the amendments made by this Act shall be effective as if included in the Copyright Royalty and Distribution Reform Act of 2004.” *Id.* at 1483. <http://copyright.gov/title17/92chap8.html>

(1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f) (1)(B), 115, and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user<sup>20</sup> in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

**I. WHILE GEO AGREES WITH ALL PARTICIPANTS THAT FOREIGN OWNED UMG-SME (AND SADLY AFM AND AFTRA) HAVE NO STANDING IN THIS PROCEEDING, FOR SIMPLY NOT FILING A PETITION TO PARTICIPATE, YET THEIR OWN RECORDING ARTISTS, AFM STUDIO PLAYERS, AFTRA SINGERS ON MAJOR LABEL SOUND RECORDINGS, (AND EVEN UMG-SME §115 WRITERS, CO-WRITERS AND CO-PUBLISHERS MARRIED TO §114 RECORDINGS), ALL HAVE FULL STANDING AS AMERICAN COPYRIGHT OWNERS IN THIS RATE PROCEEDING**

UMG-SME and WMG Warner Music Group, aka, The 3 Foreign Major “American” Record Labels, plus AFM and AFTRA *and unfortunately for their members*, did NOT file a Petition to Participate in February of 2014 or Written Direct or Rebuttal statements which the code demands and therefore do not have standing in this rate proceeding. Apparently, they thought that the RIAA/SoundExchange would handle it for them, yet SoundExchange didn’t even list the 3 Foreign Majors as joint petitioners under 37 C.F.R. § 351.1(b)(1)(ii) and then argued that its individual members were not participants in their initial Petition to Participate which seems odd?

If SoundExchange isn’t Petitioning for their participants, then who are they Petitioning for then, just themselves?

It is also clear to GEO that the 3 Foreign Majors Labels do not have standing in this proceeding since they are foreign corporations and not American citizens with individual rights.

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<sup>20</sup> see



As GEO has put in his Exhibits, specifically (GEO2860) the 3 Foreign Major Labels or 3FMLs = RIAA = SoundExchange = \$.00 Cents. GEO is not sure if Einstein himself could craft a truer equation.

So, who are we helping, foreign corporations who partner with foreign governments and yes, socialists governments in a classic corporatist scheme that sets and determines the “reasonable” rates and terms for all American copyright owners — who used to have and allegedly still have “exclusive rights” under U.S. law and the U.S. Constitution?

The question then becomes, *who is SoundExchange representing* since their only function seems to be literally setting all American §114 copyright creators rates at \$.00 for the benefit of the 3FML’s located in Russia, France and Japan?

The Copyright Office is now forced to decide, finally, if the “exclusive right” enshrined in the U.S. Constitution is for the benefit and progress of American §114 copyright authors or foreign streamers, the RIAA and 3 foreign record companies.

**J. THE COPYRIGHT OWNER AND CUSTOMER MUST BE PUT BACK INTO FINANCIAL ROYALTY EQUATION SINCE THE RIAA REMOVED BOTH FROM RATES AND TERMS IN 1998**

It is clear that the RIAA took the profit and control out of sound recordings (and §115) and GEO is simply here to put the profit and control back in music copyright for American creators. The copyright creators must have *their value restored* to pay for *the cost of copyright creation* and their *well-deserved profit or incentive* that has been destroyed.

**K. FOREIGN OWNED AND CONTROLLED “AMERICAN MAJOR RECORD LABELS” SHOULD BE A NEW TYPE OR CATEGORY OR LICENSOR FOR VIVENDI, WMG, AND SONY PLUS OTHER FOREIGN INFLUENCE ON AMERICAN COPYRIGHT RATES AND TERMS**

GEO respectfully submits that Your Honors may consider “Foreign Owned Major Record Label” (“FOMRL” aka “3FML”) as a new category of Licensor as opposed to a new or future “American Record Label” (“ARL”) that may emerge.

If Your Honors raise the streaming rates and terms to their historical norms the past 125 years, then a new Major American Record Label would be a real possibility. At least for a while, there would only be new American Independent Record Labels until they grew, but that is impossible at \$.00 cents per-stream and with no way to sell downloads.

The only real prohibition GEO can find, is not on Your Honors, or various categories.

Unfortunately, the real prohibitions should be on Vivendi-France, Access Industries-Moscow and Sony Corp-Japan that own and control the three former American (really a lot more former majors that have been bought over the decades), now *foreign major record labels*, re-named by GEO the “3 Foreign Major Labels” (3FML’s) are a new category of licensor and have no right or authority to set rates or terms for American copyright owners<sup>21</sup> as in *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court held that the U.S. Constitution<sup>22</sup> supersedes international treaties ratified by the U.S. Senate.

Therefore, GEO’s Art. 1 § 8 Cl. 8 and 5th Amendment protections in the Constitution “supersede international treaties” including the 1998 Digital Millennium Copyright Act which

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<sup>21</sup> *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 basically implemented foreign “law into U.S. law through the passing of the 1998 DMCA Digital Millennium Copyright Act. Therefore, because the 3 Major “American” Record Labels are all now foreign owned, in addition to streamers like Spotify which are 100% foreign owned, they do not set U.S. copyright law or public policy, do not have standing, and some measure might be taken by Your Honors to correct what GEO calls “the foreign hacking” of American copyright rates, terms and profits.

<sup>22</sup> Copyright Clause authors supersede international treaties, foreign corporations like Vivendi, Sony, and Access Ind.

implemented the United Nations controlled (WIPO) World Intellectual Property Organization rules, clearly against Art. 1 § 8 Cl. 8, the supremacy clause, and the ruling in *Reid v Covert*.

So, instead of UMG-SME and SoundExchange or RIAA arguing their case, it seems that *Vivendi-France, Access Industries-Moscow* and *Sony Corp-Japan* who ultimately profit from and control these millions of American copyrights, which make up the “*America’s songbook*”, should be the ones Your Honors should be speaking to — the 3 foreign owned and foreign controlled, former American Major Record Labels — over the past 15 to 20 years, and now continuing to set our American copyright rates and terms.

Let those 3 foreign corporations argue to Your Honors that American music copyright owners should still be incentivized and content with a *reasonable* \$.00 cents per-performance with no sales, while these 3FMLs should still profit from advertising dollars, subscription fees, stock option, stock disbursements, IPO’s, direct payment from The Services which these foreign corporations and governments consider “non-royalty income” and “digital breakage”?

This does not include foreign licensee Spotify headquartered in Luxembourg with offices in London and Stockholm.

Then Pandora<sup>23</sup> <sup>24</sup> is partially funded by another corporatist Chinese investment fund GGV Capital, partially run by the Chinese communist government. Some might say that this is fine, as a “free market person”, but the problem is, it is in GGV Capital’s absolute self-interest to make sure that ALL American music copyright creators are price-fixed at \$.00 (ironically, by our

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<sup>23</sup> See the Pandora inset for GGV Capital in Exhibit GEO2861. [http://songwritersunited.co/charts/world\\_map.jpg](http://songwritersunited.co/charts/world_map.jpg)

<sup>24</sup>“GGV Capital was a tremendous growth stage investment partner for Pandora,” said Tim Westergren, founder of Pandora Media. “The GGV team played a key role in helping us think through scaling one of the world’s largest consumer media platforms, evaluating global expansion, executing the IPO and growth as a public company.” <http://www.ggvc.com/blog/ggv-capital-closes-620-million-fund-v> - “Venture Capital Across the US and China”

own Congress and U.S. government who's job it is to protect American citizen's private property and copyrights).

So, it's clearly in the Chinese owned and run GGV Capital's self-interest for Pandora's American attorneys to introduce so-called "free-market benchmarks" with their **one** Merlin deal that is lower than the current U.S. statutory rates — to *only help* Pandora Media Inc.'s stock price, Pandora executives like Tim Westergren<sup>25</sup> who deserves more stock disbursements in the 10's of millions, but also Pandora investors including GGV Capital of China who's only concerned about their return on their investment — **not American music copyright creators who Chinese GGV Capital investors get to use for free, literally free, while we American creators subsidize GGV Capital's investments and their stock price increases, which only substitutes for and cannibalizes American phonograph/download sales.**

While it may seem off topic for a §114 rate hearing, what GEO argues here is similar foreign control of American §115 copyrights. The foreign investors who profit from and help finance the rate setting and control of ALL §115 American musical works copyrights includes the United Arab Emirates government created<sup>26</sup> "Mubadala Development Co. owned by the Abu Dhabi government"<sup>27</sup> which owns a large percentage of Sony/ATV Publishing, which will help

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<sup>25</sup> Who is only worried about his Pandora stock disbursements - see GEO's RESPONSE to PANDORA'S OBJECTIONS to WRITTEN DIRECT STATEMENT

<sup>26</sup> "In 2002, Mubadala - the Arabic word for 'exchange' - was established by the Government of Abu Dhabi as a principal agent in the diversification of Abu Dhabi's economy. His Highness Sheikh Mohamed bin Zayed Al Nahyan, Abu Dhabi's Crown Prince and Deputy Supreme Commander of the UAE Armed Forces, is Chairman of the Board of Directors." <https://www.mubadala.com/en/who-we-are/overview>

<sup>27</sup> "In 2012, Sony paid \$2.2 billion for the larger EMI Music Publishing, along with investors including Jackson's estate, Blackstone Group's GSO Capital Partners LP, Geffen and Mubadala Development Co. owned by the Abu Dhabi government. Sony/ATV administers EMI on behalf of the investors." December 23, 2014 <http://www.bloomberg.com/news/articles/2014-12-23/sony-planned-to-sell-music-publishing-unit-owning-beats>

set rates for ALL American songwriters and music publishers and their American investors the next 2 years.

It's comforting to know that literally, a United Arab Emirates government corporation run by their military "supreme commander" is helping set the rates for all American songwriters and music publishers next year - and Russian, French and Japanese government/corporations in this hearing will be helping set all American sound recording copyright rates. Yet, unless GEO participates in a 2 year rate hearing at his own expense. GEO has no say in setting the price for my private property and creations. Thanks Congress.

The \$64,000 question is how is legal or lawful for officials, literally from the United Arab Emirates and the Abu Dhabi government, Swedish streaming companies, Chinese Pandora Investors, and 3FMLs in France, Russia and Japan, SET THE RATES FOR ALL AMERICAN MUSIC COPYRIGHT OWNERS?

As the Copyright Office stated in the executive summary of it's most recent copyright reform study, which GEO participated in, "There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works"<sup>28</sup> - that includes foreign investors, foreign corporations, foreign governments, foreign licensees or foreign licensors, not matter how big or small they are.

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 protects

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<sup>28</sup> Copyright and the Music Marketplace <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>

individual<sup>29</sup> artistic creations<sup>30</sup> through of The Progress of Arts and Sciences, my work<sup>31</sup>, my speech<sup>32</sup>, my art, and not to benefit foreign governments and foreign corporations and licensees.

Why would anybody in Russia, France, Japan, China, Luxembourg, Sweden, England or Abu Dhabi *care* about American singers, songwriters or music copyright creators making a profit for their music? Especially when it's legal for Vivendi, Access Ind. or Sony (and others) to free ride on American copyrights creators, subsidizing themselves where these 3 make all the profit, which then heads overseas, instead of paying for American music royalties?

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<sup>29</sup> “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.’” *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) “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).

<sup>30</sup> The 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).

<sup>31</sup> “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.

<sup>32</sup> “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).

It's actually brilliant, simple and as anti-competitive as it gets, having the RIAA price-fix all the 3FML's "American music competition" products (songs) at \$.00 cents, literally.

The foreign majors then gave away all their music for free, which destroyed the download sale, while the foreign majors continue taking direct payments on the side, now called "non-royalty income" and "digital breakage".

We American copyright creators pray for Your Honors to restore the control and profits of our personal private property and rightful creations, allegedly secured by the U.S. Constitution.

Thank you for your thoughtful consideration on this matter and respectfully submitted.

### III. CONCLUSION

For these reasons, George Johnson (GEO) respectfully requests that the Copyright Office answer a resounding “NO” to the Referred Novel Question of Law.

Dated: Friday, October 16, 2015

Respectfully submitted,

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*George D. Johnson (GEO), an individual  
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**V. TABLE OF AUTHORITIES**  
**George Johnson (GEO)**

**Cases**

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*Kelo v. City of New London*, 545 U.S. 469 (2005)

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**CONSTITUTIONAL PROVISIONS**

U.S. CONST., art. I, § 8, cl. 8

U.S. CONST., amend I

U.S. CONST., amend V

Dec. of Independence

**STATUTES**

17 U.S.C. § 106

17 U.S.C. § 114

17 U.S.C. § 115

## **REGULATIONS**

37 C.F.R. § 385.1 through 385.26

37 C.F.R. § 385.3

37 C.F.R. § 385.11

37 C.F.R. § 385.13

37 C.F.R. § 385.14

## **LEGISLATIVE MATERIALS**

Copyright Act of 1909 - Pub. L. 60-349 (July 1, 1909)

Copyright Act of 1976 - Pub. L. 94-553 (Oct. 19, 1976)

“Music Licensing Under Title 17: Part Two”

U.S. House Judiciary Committee, June 25, 2014 NAB Testimony (Serial No. 113-105)

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## **OTHER AUTHORITIES**

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<http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>

The Federalist No. 43, p. 272 (C. Rossiter ed. 1961)

The Federalist No. 78

*The Copyright Act of 1790* (repealed)

*President George Washington’s Inaugural Address*

British *Statute of Anne*, Article IV (c.19) (1710)

**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 REPLY BRIEF TO NOVEL MATERIAL QUESTION OF LAW REFERRED TO THE REGISTER has been served this 16th day of October, 2015 by electronic mail upon the following parties:

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