PUBLIC — [ORAL ARGUMENT NOT YET SCHEDULED]
No. 19-1028
(consolidated Nos. 19-1058, 19-1059, 19-1060, 19-1061 & 19-1062)

In the United States Court of Appeals for the District of Columbia Circuit

GEORGE JOHNSON,
Appellant,

v.

COPYRIGHT ROYALTY BOARD and LIBRARIAN OF CONGRESS,
Appellees,

AMAZON DIGITAL SERVICES LLC; GOOGLE LLC;
PANDORA MEDIA, LLC; SPOTIFY USA INC.;
NATIONAL MUSIC PUBLISHERS' ASSOCIATION;
and NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL,
Intervenors.

On Appeal from a Final Determination of the Copyright Royalty Board
Docket No. 16-CRB-0003-PR (2018-2022) *(Phonorecords III)*

FINAL REPLY BRIEF FOR APPELLANT GEORGE D. JOHNSON

George D. Johnson ("GEO")
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Pro Se Songwriter & Publisher
d/b/a George Johnson Music Publishing ("GJMP")

TABLE OF CONTENTS **Page**

GLOSSARY

CRB	Copyright Royalty Board
CRJs	Copyright Royalty Judges
Phonorecords I	Determination of Royalty Rates and Terms for Making and Distributing Phonorecords *(Phonorecords I)* Docket No. 2006-3 CRB DPRA
Phonorecords II	Determination of Royalty Rates and Terms for Making and Distributing Phonorecords *(Phonorecords II)* Docket No. Docket No. 2011-3 CRB
Phonorecords III	Determination of Royalty Rates and Terms for Making and Distributing Phonorecords *(Phonorecords III)* Docket No. 16-CRB-0003-PR (2018-2022)
SDARS III	Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III) Docket No. 16-CRB-0001—SR/PSSR (2018-2022)
GEO	George D. Johnson, a *pro se* songwriter, music publisher, singer, recording artist, and copyright author whose works are subject to 17 U.S.C. §115

The Licensees or Services	*Phonorecords III* licensee participants such as Pandora, Spotify, Amazon, and Google
SME (SMG)	Sony Music Entertainment or Sony Music Group (Japan)
WMG	Warner Music Group (Russia)
UMG	Universal Music Group (France)
WDS	Written Direct Statement(s)
Copyright Owners	Term fashioned by NSAI and NMPA, that falsely suggests that they represent *all* copyright owners, rather than a significant market share
DiMA	Digital Media Association — Lobbyist who has traditionally represented Google, but now represents Apple, Pandora, Spotify and Amazon against the interests of songwriters and music publishers
RIAA	Recording Industry Association of America
SONA	Songwriters of North America
MAC	Music Artists Coalition
A. Br.	A*mici Curiae* Brief by SONA/ MAC

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other

Additional CRB Authorities **Page**

Phonorecords

SUMMARY OF THE ARGUMENTS

(A.) $.000198 or any "nano-penny" rate is not a "reasonable" rate under 801(b) for songwriters or for any profession. [J.A. A183, Letter C, Column 1 — *See* 17 U.S.C.801(b)(7)(A)(iii)] When I refer to "zero" or "zero cents", it's the $.000 rate, not §385.31. [J.A. A498, No. 18, GEO Ex. 4085] [J.A. A276, No. 3, Apple $.00091] [J.A. A210, Letter C, Apple $.00091] [J.A. A130, No. 6, iHeart $.0005] [J.A. 350, Lines 21 to 25] [J.A. A131, No. 8 and 10] [J.A. A194, Footnote 62] [J.A. A607, GEO Ex. 4082] [J.A. A606, GEO Ex. 4081 also A10] [J.A. A126] [J.A. A540, GEO Ex. 4024] [J.A. A141, Par. 4]

(B.) $.000198 or any "nano-penny" rate is not an "equitable division of music industry profits between the copyright owners and users" [J.A. A218, Section VI, Column 2] [J.A. A278, Section VII, Column 2] under 801(b) and precedent, while employees of Services are paid huge salaries and executives *transfer billions of dollars in copyright value* to themselves. This inequity is one of the worst errors when the CRB "weighs" profits. [J.A. A256, Column 1, Par. 3] [J.A. A130, No. 5] [J.A. A142, Section E] [J.A. A409, Line 16] [J.A. A196, Par. 2] [J.A. A128, No. 3] [J.A. A205, Column 1, Par. 2] [J.A. A140, Footnote 5] [J.A. A260, Column 2, Par. 2] [J.A. A195, Column 3, Section 3, Par. 3] [J.A. A188, Footnote 44]

(C.) The CRB did not enter GEO's evidence into the record which makes it impossible to prevail "according to the record". [J.A. A128-A129, No. 3] [J.A. A305-A306] [J.A. A139, Section II and Section E] [J.A. A140, Footnote 5]

(D.) The entire 2 year CRB rate proceeding and $.000 Subpart B rate structure under 37 C.F.R. §385 *are already Rube-Goldberg-esque* [J.A. A230, Section E] [J.A. A198, Column 1, Par. 2] [J.A. A185, Column 3, Par. 1] [J.A. A186, Column 1, Par. 2] [J.A. A225, Section 6] [J.A. 230, Section E, Par. 2] [J.A. A156, Par. 5] [J.A. A226, Section VIII, Par. 2] [J.A. A416, Line 11] [J.A. A619, Section 2.2, Line 2] [J.A. A263, Column 3, Par. 3] [J.A. A510, Par. 3, Line 1] [J.A. A188, Section 1, Par. 2] [J.A. A245, Column 2, Line 1 and Par. 2] *enough without a TCC total content cost prong*, compared to a clear and transparent 2 or 9.1 cent mechanical for 69 or 110 years for Subpart A.

(E.) GEO did give a basis to set aside (Br. 87) Subpart A, lost *inflation,* [*See* Exhibit A [J.A. A539, GEO Ex. 4023 - green line, and A6] [J.A. A140, Letter C and Footnote 5] [J.A. A514-A514, GEO Ex. 4004] [J.A. A586-A587, GEO Ex. 4065] [J.A. A129] [J.A. 351, Lines 1 to 10] [J.A. A387, Lines 22 to 25 and A388, Lines 1 to 18] [J.A. A345, Lines 23 to 25 and A346, Lines 1 to 4] [J.A. A524, GEO Ex. 4010] [J.A. A326, Lines 20 to 25 and A327, Lines 1 to 3] [J.A. A349, Lines 18 to 25 and

A350, Lines 1 to 6] [J.A. A341, Lines 21 to 25 and A342, Lines 1 to 5] [J.A. A311, Lines 18 to 25 and A312, Lines 1 to 11] *rates not set de novo,* [J.A. A127-A128, No. 2] [J.A. A307, Lines 22 to 25] [J.A. A321, Lines 19 to 25] [J.A. A649, §383.8] [A.A. A583, GEO Ex. 4063] [J.A. A183, Column 1, Par. 1] [J.A. A619, No. 3] [J.A. A157, Par. 4 and Footnote 13] [J.A. A646, No. 4] [J.A. A207, Column 3, Par. 1] [J.A. A139, Letter A, Par. 2] *and no hearing in the sunshine.* [J.A. A127, No. 1] [*See* J.A. A126 to A132, GEO Motion for Rehearing]

ARGUMENT

(A) If you're an American songwriter or music publisher, there is nothing reasonable about the "zone of reasonableness"[1]. [J.A. A612, GEO Ex. 4085] [J.A. A395, Lines 14-17] [J.A. A305, Lines 1-5] [J.A. A308, Line 25 to J.A. 309, Lines 1-6] [J.A. A403, Line 17-25 to J.A. 404, Lines 1-3] [J.A. A210, Column 2, Par. 3] [J.A. A217, Column 1, Par. 2] [J.A. A237, Column 3, Par. 1] [J.A. A235, Column 2 and 3] [J.A. A218, Column 3, Par. 1 and 2] [J.A. A278, Section VII, Par. 3 and 4]

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[1] *See* term "zone of reasonableness" in Public Initial Brief For Appellees — Pages 35, 40, 63, 70, 71, 79 citing *RIAA v. Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C. Cir. 1981), 662 F.2d at 9. Also see "reasonable" in light of 17 U.S.C. §§ 115(c)(3)(D), 801(b)(1). (Br, Page 27)

$.00055[2] cents per-stream, then split 4 ways to $.0001375 per-songwriter, is clearly an unreasonable rate to pay anybody for their labor, in any profession. How is it "reasonable" for the government to force songwriters to accept literally $.00055 cents for their own songs?

Moreover, a 44% increase of $.00055 cents or $.0001375 cents is literally insignificant and the result of an *unreasonable rate structure*:

1.) 44% of $.00055 = $.000242 cent increase

so $.00055 + $.000242 = **$.000792 total per-stream**

2.) 44% of $.0001375 = $.0000605 cent increase

so $.0001375 + $.0000605 = **$.000198 total per-writer**

What's the difference? *How is one rate so much more reasonable than the other rate?* Common sense tells us that a $.0000605 cent raise in pay is not only unreasonable, but unbelievable, and unsustainable.

Would doctors, nurses, law enforcement, military, government employees or teachers consider $.0001375 per-hour reasonable?

The evidence is clear that the $.000 per-stream rate structure is unreasonable, inequitable by any standard, and not in the public interest.

As I have argued through 3 CRB rate proceedings and as re-stated in the *amici curiae,* which also expertly supports our 9.1 to 50 cents

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[2] *Amici Curiae* by Jennine Nwoko and Jacqueline Charlesworth.

inflation argument[3] (*See* A. Br. 5, 10, 12), should attorneys be paid $.000198 cents per-brief (A. Br. 7) set by an administrative proceeding? [J.A. A546-547, GEO Ex. 4030-4031]

Would counsel in this proceeding consider a $.0000605 increase per billable-hour "reasonable" or "fair"?

In fact, over the past 110 years mechanical royalty rates *have dropped from 2 cents to $.000 cents*. (*See* Exhibit A [J.A. A539] - red line] Unfortunately, the CRB can't always "predict the future of the music industry", but a free-market can.

(B) There are also no "equitable division of profits" [J.A. A218, Section VI, Column 2] [J.A. A278, Section VII, Column 2] under 801(b)(1) which the government also claims as part of setting "reasonable rates" at $.0001375 per-stream, which is not a fair return nor a fair income.

The government cites that (Br.1) Judges must "exercise legislative discretion in determining copyright policy in order to achieve an equitable division of…profits between the copyright owners and users."[4]

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[3] "the original 2-cent rate established by Congress…has risen to only 9.1 cents, which is well below the 50-plus cent rate that would apply today if adjusted for inflation."

[4] *SoundExchange v. Librarian of Congress*, 571 F.3d 1220, 1224 (D.C. Cir. 2009) (quotations omitted) (quoting *Recording Indus. Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C. Cir. 1981)).

In 2013, Pandora had paid 14 executives approximately a *half-a-billion dollars* ($500 million) in stock options and bonuses, but argued that the company was losing money, then insisted that they would go out of business, or be "disrupted" if the zero-cent royalty rate was raised.

Is it an *equitable division of profits* between the 7,446,327 million-dollars a year Pandora CEO Tim Westergren [J.A. A604, GEO Ex. 4079] is still taking[5] from the company *compared to the $.000 cents* Pandora still "pays" each songwriter — transferring the value of songwriter copyrights to him and top Pandora executives? $42,503,792 million dollars to be exact for fiscal year 2018.

So, the CRB could have exercised their legislative discretion and determined a.) that a long overdue inflation increase for Subpart A was in order and b.) that the limited download should be abolished since it is nothing more than a lost sale, but also steals property from the copyright owners without their permission.

(C.) The government's brief falsely claims (Br. 14) that "Johnson offered "no evidence" other than his personal opinion that his proposals were reasonable. Id. at 1924-25."

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[5] https://www1.salary.com/PANDORA-MEDIA-INC-Executive-Salaries.html

In fact, I did offer plenty of evidence [J.A. A505 to A616, GEO Ex. 4001 to 4086, plus additional evidence] but *it just wasn't entered into the record as evidence by the CRJ's,* which makes it impossible to prevail "according to the record". This is self-explanatory and the CRJs should have entered my evidence into the record, which I hope this Court can remedy.

(D.) To songwriters and any normal person, streaming rate structures at $.000 and 2 year CRB rate proceedings are *already extremely confusing* and complicated. (NOTE: Same as Section D under Rube-Goldberg-esque [J.A. A230, Section E] [J.A. A198, Column 1, Par. 2] [J.A. A185, Column 3, Par. 1] [J.A. A186, Column 1, Par. 2] [J.A. A225, Section 6] [J.A. 230, Section E, Par. 2] [J.A. A156, Par. 5] [J.A. A226, Section VIII, Par. 2] [J.A. A416, Line 11] [J.A. A619, Section 2.2, Line 2] [J.A. A263, Column 3, Par. 3] [J.A. A510, Par. 3, Line 1] [J.A. A188, Section 1, Par. 2] [J.A. A245, Column 2, Line 1 and Par. 2])

The government even concedes (Br. 1, 2) "until this proceeding, this license was governed pursuant to settlement agreements that *created a complicated mechanism (or "rate structure") for calculating mechanical royalties*." "The settlements adopted (Br. 4) *a complicated framework for calculating mechanical royalties*" and that "the process of

selecting reasonable rates and terms *is a complex and arduous one, and that reasonable minds may differ as to the best approach*" (Br, Page 2).

One question baffles me and many others is why NSAI and NMPA *would fight as hard as they could* in *Phonorecords III* to keep the 9.1 cent mechanical *at 9.1 cents*? (*See* CRB Filing No.'s CRB63, CRB68, CRB82a, CRB88, CRB89, and CRB102 [J.A. A6, A8, A9, A10]) [J.A. A52-54] [J.A. A183, Columns 1 and 2] Shouldn't NSAI and NMPA as our "songwriter advocates" be fighting *to raise* the 9.1 cents, not filing motions to keep it at 9.1 cents? Why are major publishers so opposed to raising the 9.1 cents to 50 cents *and* abolishing the limited download?

The point is that the *market share* of the 3 major foreign publishers [J.A. A545, GEO Ex. 4023] is what determines their ability to dictate rates and terms in these CRB proceedings and that is extremely detrimental to all the other thousands of independent American songwriters, who are still *subject to* the statutory rate and compulsory licenses.

(E.) Contrary to the government's claim, GEO did provide a basis to set aside (Br. 87) Subpart A — the CRB ignored clear *inflation over 69 years plus, rates are still at the 2006 rate of 9.1 cents, so rates were not set de novo as required, with no hearing in the sunshine, no evidence, behind closed doors, and the CRB did not enter my evidence into the*

record — were all a basis to set aside, as outlined in my April 9, 2018 Motion for Rehearing. (*See* J.A. references above on Pages 2 and 3, Letters E and C)

The government is also incorrect in its assertion (Br. 89) that "Johnson's request is that this Court prohibit the operation of interactive streaming" which I have never said nor written.

Also on Page 14 the government clearly distorts my position, making it seem like I want 84% of the Services' revenues, but this was a new rate structure I was proposing [J.A. A187 to A188, No. 5, Columns 1, 2, and 3) to pay all music copyright owners, since the Services and the government were just giving away sales.

As Nobel Prize winning economist Milton Friedman famously said, "If you put the federal government in charge of the Sahara Desert, in 5 years there'd be a shortage of sand." and that is what we have here, a shortage of songwriters and mechanical royalties on Music Row.

The result of over 100 years of central economic planning [J.A. A650] [J.A. 616] [J.A. A628] and price-fixing [J.A. A623-627 sig] under a compulsory license and statutory rates from 2 to 0 cents. [J.A. A539] As Mr. Friedman also said, "governments never learn, only people learn."

From my own direct experience, legendary songwriter Dewayne Blackwell (*Mr. Blue* and *Friends In Low Places*) quit the business 10 years ago because of these meager payouts designed in 2008.

Just last month I met a hit country songwriter with a major publishing company who told me one of his songs "has 250 million streams and I haven't seen a dime".

So, how is that reasonable or an equitable division of profits?

CONCLUSION

Accordingly, the Determination of the CRB Judges should be reversed, with the Court either determining GEO's A.) Subpart A inflation and B.) abolishing limited downloads issues or directions to conduct an additional hearing.

Respectfully submitted,

/s/ George D. Johnson

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Date: February 4, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font. I further certify that, according to the count of Apple Pages and excluding the parts of the brief exempted under Fed. R. App. P. 32(f), (820 words for new Joint Appendix references totaling 2320 words) this brief contains 1,500 words, which is within the limit of 1,500 words specified in the order issued by this Court on June 25th, 2018.

/s/ George Johnson
George Johnson, pro se

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-1028 **Caption: George Johnson**
v. Library of Congress and Copyright Royalty Board

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant=s Opening Brief, Appellee=s Response Brief, and Appellant=s Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee=s Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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(s) George Johnson, Pro Se
Dated: February 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 04, 2020, I caused to be filed via the USPS and electronically the final reply brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that to my knowledge all participants in the case are registered CM/ ECF users so service will be accomplished through the appellate CM/ ECF system.

/s/ George Johnson
George Johnson, pro se