UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)**	**Docket No. 16-CRB-0003-PR (2018-2022)**

ORDER DENYING COPYRIGHT OWNERS' MOTION TO DISMISS THE PETITION TO PARTICIPATE OF SONY MUSIC ENTERTAINMENT

On July 27, 2016, the National Music Publishers' Association (NMPA) and the Nashville Songwriters Association International (NSAI) (collectively, Copyright Owners) filed a motion (Motion) seeking dismissal, in part, of the Petition to Participate filed by Sony Music Entertainment (SME).[1] On August 3, 2016, SME filed an Opposition. On August 10, 2016, Copyright Owners filed a Reply.

For the reasons stated herein, the Judges **DENY** Copyright Owners' Motion.

I. Background

The purpose of this proceeding is to determine rates and terms for several compulsory licenses defined by 17 U.S.C. § 115. The existing rates and terms are contained in three regulatory subparts. *See* 37 C.F.R. § 385, Subparts A, B and C. Each regulatory subpart covers several uses, resulting in thirteen different licensing categories.

Subpart A covers three licensing categories, *viz.*, use of a copyrighted musical work for: (i) production and distribution of physical phonorecords of sound recordings; (ii) permanent digital downloads of sound recordings; and (iii) downloaded recorded ringtones. In practice, under Subpart A, the musical works copyright owners are licensors to record companies and their labels, as licensees. *See* 37 C.F.R. § 385.1-.2.

Subpart B covers five additional licensing categories. The Subpart B licenses are for use of a copyrighted musical work in a digital transmission of a sound recording by (i) standalone non-portable subscription – streaming only services; (ii) standalone non-portable subscription – mixed services; (iii) standalone portable subscription services; (iv) bundled subscription services; and (v) free nonsubscription/ad-supported services. *See* 37 C.F.R. § 385.13(a)(1)-(5).

[1] Copyright Owners' styled their Motion as a "Motion to Deny." The Judges find it more accurate to describe a motion seeking to terminate or limit a party's participation as a motion to dismiss (in whole or part) the Petition to Participate.

Subpart C covers another five licensing categories relating to digital use and distribution of sound recordings embodying copyrighted musical works. The license categories are referred to as: (i) limited offerings; (ii) mixed service bundles; (iii) music bundles; (iv) paid locker services; and (v) purchased content locker services. *See* 37 C.F.R. 385.21. To the extent any licensed Subpart C activity overlaps with Subpart A activity, the Subpart C regulations apply, except in the case of a "music bundle." A music bundle user may elect to pay the lower of the Subpart C music bundle royalty or an unbundled per component royalty under Subpart A.

SME appeared in this proceeding through a Joint Petition to Participate (Joint PTP) with Recording Industry Association of America (RIAA), Universal Music Group (UMG) and Warner Music Group (WMG). Every entity that files a PTP must have a "significant interest" in the proceeding. The Judges may dismiss an entity's PTP if, upon a motion of a participant in the proceeding, or *sua sponte*, the Judges determine that the challenged participant "lacks a significant interest in the proceeding …." 17 U.S.C. § 803(b)(2)(C). The Joint PTP described SME's "significant interest" in this proceeding:

> SME is represented on RIAA's Board of Directors. It is one of the largest record companies in the United States, and owns one of the largest catalogs of copyrighted sound recordings. Each year it creates, manufactures and/or distributes a large volume of sound recordings pursuant to mechanical licenses and makes substantial royalty payments tied to Section 115 of the Copyright Act. It invests significant sums of money each year to bring to market recorded versions of the musical works that are the subject of this proceeding. These activities will continue during the period covered by this proceeding.

Joint PTP at 2 (Feb. 4, 2016).

On June 15, 2016, the Copyright Owners, UMG, and WMG filed a Motion to Adopt Settlement.[2] Pursuant to the proposed settlement, the settling parties agreed that "the royalty rates and terms presently set forth in 37 C.F.R. Part 385, Subpart A, should be continued for the rate period[3] at issue in the Proceeding…." Motion to Adopt Settlement at 3. On June 23, 2016, RIAA withdrew its PTP "on its own behalf only." Thus, among the parties to the Joint PTP, only SME continues to participate actively in this proceeding.

On July 15, 2016, pursuant to the Judges' February 19, 2016, Case Scheduling Order, SME served its Preliminary Disclosures, containing its "Brief Statement of Rates and Terms." In that document, SME stated that it expects to propose that the [Subpart A] royalty rates in 37

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[2] Joining in the Motion to Adopt Settlement were three additional participants, Church Music Publishers Association, Songwriters of North America and The Harry Fox Agency LLC. On June 28, 2016, all three withdrew from further participation in the proceeding.

[3] In its response to the Judges' published notice of the partial settlement of this proceeding (81 Fed. Reg. 48371 (Jul. 25, 2016)). SME raised an issue regarding the license period for the rates and terms. The Judges will address that issue in the final rule relating to the Subpart A licenses and in their final determination with regard to Subparts B and C.

C.F.R. § 385.3 be continued. *Id.* at 3. However, in its Preliminary Disclosures, SME also stated that it expected to propose a change in the late fee provisions in Subpart A. *Id.*

II. Issues Raised by the Motion

Copyright Owners raise the following issues in their Motion.

1. Whether SME has a right to proceed as a valid participant in this proceeding given the settlements and withdrawals by all other joint signatories to the Joint PTP.

2. Whether SME has a continuing *bona fide* "significant interest" in the Subpart A aspects of this proceeding in light of the proposed settlement, or whether SME's claimed ongoing interest is merely a subterfuge for its attempt to advocate for lower rates for the Subpart B and C licenses.

3. Whether any of SME's claimed interests in the Subpart B and C aspects of this proceeding constitute the requisite "significant interest."

4. Whether SME has concocted claimed interests in this proceeding in order to *decrease* royalties paid by interactive services to copyright owners under those Subparts, thereby *increasing* the amount of royalty revenue that interactive services can pay to record companies for sound recording licenses negotiated in the unregulated market (the so-called "payment availability" strategy).

5. Whether SME's participation in the Subpart B and C aspects of this proceeding would be wasteful and inefficient given SME's alleged lack of the requisite "significant interest" in those aspects of the proceeding.

In addition to joining the above issues, SME asserts that: (1) Copyright Owners were delinquent in filing their Motion and it should be denied on that basis; and (2) Copyright Owner's service of discovery requests on SME seeking information pertaining to any use by SME of Subpart B and C licenses constitutes an acknowledgement by Copyright Owners of SME's significant interest in the Subpart B and C aspects of this proceeding.

III. SME's Right to Participate in the Subpart A Aspects of this Proceeding

A. The Impact of the Proposed Settlement and Withdrawal by the other Joint Petitioners

Copyright Owners argue that SME can no longer avail itself of the Joint PTP because the other joint participants all have either withdrawn or moved for the adoption of a settlement as to every Subpart A issue. Motion at 12, n.16; *see also Motion to Adopt Settlement* (June 15, 2016) (Motion to Adopt). Additionally, Copyright Owners note that the attorneys who executed the Joint PTP were (in-house) counsel for RIAA, one of the other joint petitioners. *Id.* Accordingly, Copyright Owners assert that the Joint PTP "is no longer a 'joint petition' … because it is not a petition filed by petitioners with similar interests." *Id.*

This argument is meritless. The attorney who signed the Joint PTP certified that counsel had the authority and consent of the joint participants to represent them in this proceeding. Joint PTP at 3.[4] Moreover, when the other joint petitioners filed the Notice to Adopt Settlement and/or withdrew from the proceeding, attorneys from the law firm of Jenner & Block filed a *pro forma* Notice of Appearance by which they became counsel of record for SME. *See* Notice of Appearance (May 26, 2016). Clearly, SME now stands as essentially a single petitioner with substituted counsel.

Therefore, the Judges reject Copyright Owners' assertion that SME's filings are technically insufficient to allow it be a participant in this proceeding.[5]

B. SME's *Bona Fide* "Significant Interest" in the Subpart A Aspects of this Proceeding

Copyright Owners initially question whether SME has a *bona fide* significant interest in the Subpart A aspects of this proceeding. Motion at 15. That is, although Copyright Owners "do not dispute that SME has at least a theoretical interest in Subpart A rates and terms," *id*., they note that the disputes identified by SME reveal its strategy as a "gambit" by which it hopes to insinuate itself into the Subpart B and C aspects of this proceeding. *Id.* at 16. SME's strategy, according to Copyright Owners, is demonstrated by a consideration of its two claimed interests in the Subpart A aspects of this proceeding.

1. Subpart A Late Fees

SME raises an issue regarding the late fee regulation that may be adopted for the ensuing rate period. In the *Motion to Adopt Settlement*, Copyright Owners and the other settling parties propose to continue all the terms "presently set forth in 37 C.F.R. Part 385 Subpart A." *Id.* at 3. Accordingly, the proposed settlement would continue the late fee provisions extant in the present regulations. *See* 37 C.F.R. § 385.4.

SME does not now agree with the proposed continuation of the late fee provision. Instead, SME "expects to propose"

> that the late fee provision of 37 C.F.R. § 385.4: (1) apply only if a payment is due under 17 U.S.C. § 115(c) and 37 C.F.R. § 210.16(g)(1); (2) not provide for accrual of late fees before the due date for the accounting for the first full royalty

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[4] This Certification is required pursuant to 37 C.F.R. § 351.1(b)(1)(ii)(D).

[5] SME offers to file an amended petition adding contact information for SME itself, in addition to the information regarding its counsel on the latter's Notice of Appearance. Opposition at 9, n. 3. This additional contact information, although technically required in an initial PTP, is of no additional benefit at this stage of the proceeding, as SME is participating through counsel and its contact information is unnecessary both practically and as a matter of public record.

> period after licensees have access to such information as is necessary to identify and pay the correct recipient(s), as contemplated by 17 U.S.C. § 115(c)(1) and 37 C.F.R. § 210.16(c)(3)(vi) and (g)(1); and (3) not apply if a payment is delayed as a result of circumstances such as (a) the payment being undeliverable (as contemplated by 37 C.F.R. § 210.16(g)(4)), (b) withholding permitted by applicable law (including as contemplated by 37 C.F.R. § 210.16(g)(6) and (7)), and (c) a claim or pending litigation against the licensee affecting the licensee's liability for the payment being held.

SME's Preliminary Disclosures at 3 (*reproduced* at Motion, Ex. A).[6] According to SME, the reason for its alternative rate proposal is that

> [a]fter the Judges adopted 37 C.F.R. § 385.4, SME promptly heard from music publishers that they were, among other things, entitled to receive late fees covering periods of time when SME could not possibly pay a mechanical royalty, because the relevant songwriters and publishers had not yet agreed concerning authorship of the relevant song and their respective ownership shares, and a royalty would not be payable under Section 115 and its implementing regulations…. SME has managed to avoid such issues through industry agreements waiving late fees in various circumstances, and NMPA has apparently agreed to extend such relief to Universal and Warner for the next rate period. *See* Motion to Adopt Settlement, at 3 (June 15, 2016) ("Concurrent with the Settlement, UMG, WMG and NMPA have separately entered into a memorandum of understanding providing for the continuation of certain licensing processes and late fee waivers."). *However, NMPA has not made such an offer to SME*…. In this proceeding, SME fully expects to request certain tailoring of 37 C.F.R. § 385.4 to reflect applicable statutory and regulatory payment requirements and publishers' own wishes concerning the handling of payments in the event of certain disputes.

Opposition at 11, n.4 (emphasis added).

In the Motion, Copyright Owners state summarily they "do not believe that a change in the late fee provision … is warranted." Motion at 15, n. 20. In Reply, however, while still disagreeing with SME's late fee arguments, they retreat from any suggestion that the parties' joinder on the late fee issue is insufficient to allow SME to advocate at the hearing for its desired Subpart A late fee provision. *See* Reply at 15 and n.15.[7]

2. Subpart A Rates

[6] In the newly proposed regulations relating to the section 115 licenses, the Judges shall remove references to 37 C.F.R. § 210, as obsolete.

[7] In its response to the terms of the proposed settlement, SME reiterated its objection to the continuation of the present late fee provision in the forthcoming rate period. *Comments and Objection of Sony Music Entertainment Concerning Proposed Settlement* at 5-6 (Aug. 24, 2016) (SME Comments).

Although SME declined to join formally in the Settlement or the related Motion to Adopt, it has proposed rates for Subpart A that are exactly as set forth in the Settlement. *See id.* at 15; *compare* SME Proposal at 3 *with* Motion to Adopt at 3. Copyright Owners assert that SME can obtain the Subpart A rates it proposes either by filing a comment in support of the rates proposed in the settlement, or by simply doing nothing. *Id.* at 15-16.

SME notes, however, that in this proceeding (the settlement rates notwithstanding) Copyright Owners have proposed rates for Subpart A configurations that are *differ from the settlement rates*. *Compare* Copyright Owners *Brief Statement of Proposed Rates and Terms* at 3 (Opposition, Ex. 1) ([redacted] cents per song or [redacted] cents per minute for physical phonorecords and permanent downloads, and [redacted] cents per ringtone) *with* 37 C.F.R. § 385.3(a) (greater of 9.1 cents per song or 1.75 cents per minute for physical phonorecords and permanent downloads, and 24 cents per ringtone). Thus, Copyright Owners' initial proposed rates (as opposed to the rates in the proposed settlement) would [redacted] the present mechanical royalty rates for physical phonorecords and permanent downloads in the ensuing rate period by [redacted]% and for ringtones by [redacted]%.

It remains uncertain at present whether SME will be bound by the proposed Subpart A settlement rates and terms.[8] If SME is not so bound, Copyright Owners indicate that they are reserving their right to pursue their preliminarily proposed Subpart A rates *vis-à-vis* SME. *See* Reply at 16 ("Copyright Owners are not seeking to prevent SME from challenging the Subpart A rates they have preliminarily proposed (assuming SME does not opt in or support the Settlement)."). *Id.* at 16.

Based on the foregoing, the Judges cannot conclude that SME's Subpart A proposals are mere subterfuges upon which SME seeks to bootstrap its Subpart B and C arguments. Rather, SME's Subpart A arguments stand alone as raising *bona fide* issues as to which SME has a "significant interest." Moreover, whether SME perceives the stand-alone value of its positions as to those Subpart A issues as greater or less than their value as a gateway for insinuating itself into Subpart B and C issues is of no moment; SME's "significant interest" in the discrete Subpart A issues is sufficient to support its participation in the Subpart A aspects of this proceeding.[9]

IV. SME's Asserted "Significant Interest in the Subpart B and C Aspects of the Proceeding

Copyright Owners contend that SME has no "significant interest" in rates and terms to be established under Subparts B and C. Motion at 9. Without apparent detailed current knowledge

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[8] Also in its response to the terms of the proposed settlement, *S*ME recommends that the Judges extend the royalty rates specified in 37 C.F.R. § 385.3 in the upcoming rate period. *See* SME Comments at 2-4. However, at present, the Judges have not yet ruled on the proposed settlement and therefore it remains undecided as to whether they will adopt the proposed settlement and whether, if they adopt it, the settlement will extend to all licensees (including SME) or only to the settling licensees (UMG and WMG).

[9] In light of the Judges' decision (discussed *infra*) that SME has "significant interests" in the Subpart B and C aspects of this proceeding as well, the issue of whether a participant's "significant interest" in *one* Subpart is sufficient to allow it to participate in *all* Subparts is moot.

or information, Copyright Owners summarily declared in their Motion that SME's business activities were antithetical to a legally sufficient interest in Subparts B and C rates and terms. Motion at 9. However, in its Opposition, SME asserted several commercial bases to demonstrate its "significant interest" in the Subparts B and C rates and terms to be established in this proceeding.

A. SME's Reliance on the Subpart B "Zero Rate" for Promotional Uses

SME asserts that it regularly relies upon the "zero rate" contained in Subpart B for certain "promotional uses." Pursuant to 37 C.F.R. § 385.14, a licensee under Subpart B pays "a royalty rate of zero" for certain promotional streaming activities and promotional limited downloads. More specifically, SME asserts that it has authorized such promotions on more than [redacted] occasions." Opposition at 14. Further, SME claims to rely on streaming mechanical licenses under Subpart B "to cover promotional streaming on websites operated by SME, as contemplated by 37 C.F.R. § 385.14(c)." Opposition at 14-15; Declaration of Andrea Finkelstein, SME's Exec. V.P. of Global Business Affairs Operations ¶ 18 (Aug. 2, 2016) (Finkelstein Decl). In their Brief Statement of Proposed Rates and Terms, Copyright Owners propose to eliminate the zero promotional rate and to substitute the same rates as would apply to other uses. *See id.* at 4.

Copyright Owners do not dispute that the promotional zero rate is contained in Subpart B. They also do not deny that they are pursuing an elimination of the promotional rate. However, they note that the zero rates in question, although intended to promote the sale of sound recordings, reduces to zero rates that the digital services would otherwise pay, not that SME *would* pay. Reply at 8. Moreover, Copyright Owners claim that SME has failed to specify the number of such promotional uses. *Id.* at 9, n.9. For these reasons, Copyright Owners assert that SME lacks the requisite "significant interest" to participate in the Subpart B aspects of this proceeding.

The Judges find and conclude that, on the present motion record, SME has established a "significant interest" in the Subpart B aspect of the proceeding.

In reaching this result, the Judges begin with an application of the "significant interest" standard to SME's stated interest in the zero promotional rate. In order for a person or entity to be a *bona fide* participant, it must have a "significant interest in the proceeding." 17 U.S.C. § 803(b)((2)(C). The statutory requirement is restated in the Judges' regulations: "A petition to participate will be deemed to have been allowed … unless the … Judges determine the petitioner *lacks a significant interest in the proceeding* …." 37 C.F.R. § 351.1(c) (emphasis added).

However, the phrase "significant interest" is not defined in the Act or in the Judges' regulations. The Judges therefore look, as they have on previous occasions, to the pertinent legislative history, to determine whether that history provides useful guidance. That legislative history, contained in a 2004 House Judiciary Committee Report (House Report), provides that "the Committee intends the 'significant interest' requirement to restrict participation to those who have *a stake in the outcome of the proceeding*." H.R. Rep. No. 108-408 at 27 (2004) (emphasis added).

The House Report identifies such stakeholders with the requisite "significant interest" as including, *by way of example rather than as an exhaustive list,* copyright owners, copyright users, and entities involved in the collection and distribution of royalties. *Id.* Nothing in any other portion of the legislative history indicates that Congress intended these examples to comprise the entire universe of entities with a "significant interest" that would permit them to participate in royalty rate-setting proceedings.

When the (interim) Chief Copyright Royalty Judge adopted the regulation requiring a participant to have a "significant interest," he noted the regulatory history of the application of the statutory "significant interest" standard:

> [I]t is a term of art that had been used in the CARP program to screen petitions. See, 37 CFR 251.62. In past practice, the Copyright Office has required a putative participant to show *some financial stake in the outcome of the proceeding* in order to present a 'significant interest.'

Procedural Regulations for the Copyright Royalty Board, 70 Fed. Reg. 30901, 30902 (May 31, 2005) (emphasis added).

As the Judges have previously noted, the inquiry into whether a putative participant's stake in the proceeding constitutes a "significant interest" is a factual inquiry that must be made on a case-by-case basis. *Final Rule, In re Determination of Reasonable Rates and Terms for The Digital Performance of Sound Recordings by Preexisting Subscription Services (PSS II*), Docket No. 2001-1 CARP DSTRA, 68 Fed. Reg. 39837, 39838-39 (Jul. 3, 2003). In making that factual inquiry, the Judges have also noted that "there is *no categorical bright-line test* to determine whether a party has a significant interest in a given proceeding…." *Order Granting SoundExchange Motion to Deny the Petition to Participate of National Music Publishers' Association* at 3, *In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings ("Web IV"),* Docket No. 14-CRB-0001-WR (2016-20) (Apr. 30, 2014) (*Web IV NMPA Order).*

Under this analytical framework,[10] SME clearly has a "significant interest" in the Subpart B aspect of the proceeding by virtue of its reliance on the "promotional royalty rate" now contained in 37 C.F.R. § 385.14 that SME seeks to continue in the forthcoming rate period. The Judges find unavailing Copyright Owners' two arguments questioning SME's "significant interest."

First, while the Judges acknowledge that the zero promotional rate contained in § 385.14 benefits digital services who would otherwise pay a positive statutory rate, the schema of § 385.14 also provides an economic benefit to SME as a record company (and, for that matter, a

[10] This is the same analytical framework the Judges applied in a prior Order in this *Phonorecords III* proceeding. *See Order Denying Copyright Owners' Motion to Deny the Petition to Participate of Pandora Media, Inc.* at 1-4 (May 10, 2016) (*Pandora Media Order*).

benefit to the underlying owners of the promoted musical work).[11] That is, the promotional royalty rate of zero in § 385.14 is applicable "to a musical work when a *record company* transmits or authorizes the transmission of interactive streams or limited downloads of a *sound recording* that embodies such musical work only if (i) [t]he primary purpose of *the record company* … is to promote the sale or other paid use of sound recordings by the relevant artists …." 37 C.F.R. § 385.14(a)(i) (emphasis added).[12] Thus, the promotional rate process begins with a record company's promotion intended to provide an economic benefit to the record company (and, as noted, to digital services and potentially copyright owners) through increased retail purchases of downloads or other phonorecords, or increased subscriptions to, and/or plays on, interactive services.[13]

Second, the Judges reject Copyright Owners' assertion that SME cannot establish a "significant interest" because it has not specified the number of times it has utilized Subpart B's zero promotional rate. Copyright Owners do not point to any authority that requires a participant to provide detailed information regarding the extent to which it has used a license in order for that participant to demonstrate its "significant interest" in the proceeding.

Therefore, SME, as a record company that utilizes promotions that implicate § 385.14, has a "significant interest" sufficient to permit its participation in the Subpart B aspects of this proceeding.

B. SME's Locker Service.

SME claims to rely on Subpart C rates in its offering of a "Purchased Content Locker Service."[14] More particularly, SME asserts that it has partnered with an unnamed contractor to operate that service "in connection with approximately [redacted] SME vinyl LP album product offerings. In addition to taking advantage of the nostalgia for vinyl LPs, SME marries with that retro demand[15] a service that permits purchasers of the vinyl LPs, at no incremental charge, to download digital copies of the sound recordings on the vinyl LPs. Opposition at 16. According

[11] Copyright Owners may not agree that such promotional activities constitute a net benefit to them because the cost of the "zero rate" may not be offset by the economic benefits flowing from the promotions. That issue of course would be the subject of a contested proceeding.

[12] There are other requirements that must be satisfied pursuant to § 385.14 in order for the zero promotional rate to apply. Those requirements need not be spelled out here.

[13] To state the obverse, if the zero promotional rate were to be eliminated in the forthcoming rate period and digital services were required to pay a positive rate to copyright owners for promotional plays, the digital services might balk at participating in record company promotions, or decide to participate in fewer promotions. That would constitute a loss to the record companies arising from a change in the regulations – a loss that would demonstrate a record company's "significant interest." (To be clear, the Judges express no opinion in this Order as to whether the zero rate is an appropriate promotional rate under the applicable standards for rates and terms in the forthcoming rate period.)

[14] The definition of a "Purchased Content Locker Service" is at 37 C.F.R. § 385.21.

[15] "Modern day music fans are rediscovering the vintage gadgets and music formats of yesteryear, incorporating vinyl record players ….") http://www.sony.com/electronics/retro-music-vintage-record-player (accessed Aug. 30, 2016). "Sony's new LP player will allow users not only to play their vinyl LPs but also to store them as high-resolution audio files." http://blogs.wsj.com/japanrealtime/2016/01/07/sony-unveils-lp-turntables-for-high-resolution-audio-era/ (accessed Aug. 30, 2016).

to SME, though, "pursuant to 37 C.F.R. § 385.23(a)(5), [it] is not required to pay a mechanical royalty for this usage beyond the mechanical royalty associated with the physical product offering." *Id.*

Copyright Owners, in their *Brief Statement of Proposed Rates and Terms*, propose replacement of this provision with one that would apply the same Subpart C mechanical rates to this locker service as would be applicable to all Subpart C licenses. *See id*. at 4 ("These rates and terms shall apply to all Licensed Activity, whether accessible via a subscription or advertiser-supported or other free to the user or "promotional" basis, on a … '*locker*' service; *or whether bundled with any other Licensed Product or other music or non-music product or service*. For the avoidance of doubt, *the rates and terms shall not differ based on offering type as is currently the case under 37 C.F.R.§ 385 Subparts B and C.*") (Opposition, Ex. 1) (emphasis added).

In reply to SME's locker service assertions, Copyright Owners note the vagueness of SME's claim that it has partnered with an unidentified contractor to operate a "purchased content locker service" for a handful of SME's vinyl offerings. More particularly, Copyright Owners note that SME does not name the partner or the locker service, nor does it provide a copy of the agreement, even in a redacted form, as provided for in the Protective Order. Rather, all SME has provided is a list of five records (out of over 800,000 releases) that it alleges were "released last month." (Finkelstein Decl. ¶ 19 & Ex. C.)

Additionally, Copyright Owners note that, for a service to qualify as a "purchased content locker service," it must meet several requirements including that the party that sold the vinyl record is a "qualifying seller" under the definition of "purchased content locker service" in 37 C.F.R. § 385.21. According to Copyright Owners, SME has failed to provide any evidence from which the Judges can determine whether the service SME has generally described is actually a qualifying Subpart C "purchased content locker service."

Finally, Copyright Owners note that because SME claims it does not pay a mechanical royalty rate in connection with its locker service offering that locker service "is hardly a basis to participate in this Proceeding …." Reply at 9, n.9.

The Judges find Copyright Owners' Subpart C arguments to be unavailing. It is noteworthy that Copyright Owners do not disagree with SME's assertion that under Copyright Owners' proposed § 385.23(a)(5) it would be required to pay a mechanical royalty in conjunction with the purchased content locker service made available with the purchase of the new vinyl records. However, SME is essentially paying a zero rate to provide this locker service now, and SME seeks to preserve that zero rate in the forthcoming rate period. As with the zero promotional rate, SME thus has an economic stake and a "significant interest" in maintaining this zero rate in the next rate period. Clearly, SME and Copyright Owners have joined this issue, as the latter have proposed elimination of a lower (essentially zero) rate for purchased content locker services.

The Judges also do not find persuasive Copyright Owners' argument that SME has asserted only a *de minimis* level of use of the Subpart C locker service rate provision. As the

Judges noted *supra* regarding the Subpart B promotional issue, Copyright Owners do not refer the Judges to any authority that suggests a participant must meet a certain threshold of use in order for its otherwise undisputed financial interest to qualify as a "significant interest." [16]

V. The Conduct of the Hearing

Finally, the Judges reject Copyright Owners' suggestion that the Judges should pick and choose as to which licenses SME may present evidence and testimony. The Judges agree with SME that such an attempt runs the real risk of being "inefficient and unworkable." Opposition at 28.

The Judges do not dismiss out of hand Copyright Owners' concern that a party might utilize a Part 385 proceeding to inject itself into aspects of that proceeding in which it has little or no interest, thereby "wast[ing] valuable time and resources." Reply at 17. Rather, on balance, in the exercise of their statutory discretion under 17 U.S.C. § 801(c), the Judges find it more efficient to avoid potential repeated battles among participants regarding those areas of Part 385 as to which they may provide evidence and testimony. Additionally, to the extent SME, or any participant, might attempt to utilize the proceeding to promote interests not implicated by § 385, as the Judges have noted before, they "can weigh the merits of the parties' proposals and determine whether the rates and terms are consistent with the appropriate standard and factors set forth in 17 U.S.C. § 801(b)(1)." *Pandora Media Order* at 8, n.16.

VI. Conclusion

In light of the foregoing analysis, the Judges find that SME has a separate "significant interest" pertaining to each of the three Subparts (A, B, and C) of 37 C.F.R., Part 385, and therefore, based on the motion record, SME is qualified to participate in this proceeding.

SO ORDERED.

Digitally signed by Suzanne Barnett
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Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: September 1, 2016.

[16] Although Copyright Owners challenge whether SME meets the regulatory requisites to qualify as a purchased content locker service, the Judges do not intend to transform motions seeking dismissal of a participant into a hearing-within-a-hearing. Pursuing such a process would constitute an inefficient use of scarce judicial and administrative resources. If, after discovery, Copyright Owners identify factual prerequisites that SME has failed to satisfy in order to pursue any of its arguments in this proceeding, Copyright Owners can bring the issues to the attention of the Judges by way of further motion practice.