

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

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In the Matter of: :   
: Docket No. 16-CRB-0003-PR (2018-2022)  
:   
DETERMINATION OF RATES :   
AND TERMS FOR MAKING AND :   
DISTRIBUTING PHONORECORDS :   
(PHONORECORDS III) :   
:   
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**COPYRIGHT OWNERS' MOTION TO DENY, IN PART, THE PETITION  
TO PARTICIPATE OF SONY MUSIC ENTERTAINMENT**

**PUBLIC VERSION**

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Copyright Owners<sup>1</sup> respectfully request that the Copyright Royalty Judges deny Sony Music Entertainment's ("SME") petition to participate in the part of these proceedings (the "Proceedings") concerning the determination of rates and terms for interactive streams and limited downloads addressed in Subparts B and C of the existing regulations (the "Subpart B & C Configurations"). *See* 37 C.F.R. Part 385, Subparts B & C. SME, a major record company, is not a licensee or licensor of rights to make or distribute Subpart B & C Configurations, and it has no direct interest in the royalty rates or terms for those Configurations. Therefore, SME lacks the requisite "significant interest" to participate in the determination of rates and terms related to Subpart B & C Configurations.

Because it is indisputable that SME is neither a licensor nor a licensee of Subpart B & C Configurations, what interest is it that supposedly justifies SME's desire to participate in that aspect of the Proceedings to determine rates and terms for Subpart B & C Configurations? The answer appears to be that SME believes that the payment of royalties is a zero-sum game. The more that the Digital Services are required to pay to the Copyright Owners, the less they will be willing to pay SME for sound recording rights. There is no other logical justification for SME's attempt to insinuate itself into a rate determination in which it holds no interest and the Judges have ruled that a petitioner's interest in "payment availability" is not a "significant interest" justifying participation in a proceeding.

Accordingly, the part of SME's petition relating to rates and terms for Subpart B & C Configurations should be dismissed because it lacks standing to participate in the rate setting process for such Subparts. SME should be precluded from filing a written direct statement, proposing rates and terms, objecting to rates and terms proposed by the Copyright Owners and

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<sup>1</sup> "Copyright Owners" refers to the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI").

the digital music services, offering any evidence, appealing any aspect of this Proceeding with respect to Subpart B & C Configurations, and objecting to any partial or full settlement on rates and terms, should there be any.<sup>2</sup>

### **PRELIMINARY STATEMENT**

On July 15, 2016, SME served on the Copyright Owners its “brief statement of proposed rates and terms” (the “SME Statement”) proposing rates and terms for a Section 115 statutory license as required by this Court’s February 19, 2016 Case Scheduling Order. The SME Statement proposed not only rates and terms to make and distribute physical phonorecords, permanent digital downloads and ringtones covered by Subpart A of the current regulations (the “Subpart A Configurations”), *see* 37 C.F.R. Part 385, Subpart A; *id.* § 385.3, but also rates and terms for interactive streams and limited downloads under the current Subpart B & C Configurations.<sup>3</sup>

As a conceptual matter, Copyright Owners do not contest that SME, as a record label that licenses musical works under Section 115 to make and distribute Subpart A Configurations, has standing to participate in the determination of rates and terms for such Configurations. Whether SME’s participation with respect to Subpart A is necessary or appropriate is a separate question. Copyright Owners, Universal Music Group (“UMG”) and Warner Music Group (“WMG”) have submitted to the Court a motion to adopt as the industry rates and terms for Subpart A

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<sup>2</sup> The Copyright Owner’s request is properly the subject of motion practice. *See 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), Order Granting SoundExchange Motion (April 30, 2014) (“SoundExchange Order”) at 2 (“The Judges may make a determination that a party seeking to participate lacks a significant interest *sua sponte*, or on the motion of another participant.”).

<sup>3</sup> A copy of the SME Statement is annexed hereto as Exhibit A. SME has designated the SME Statement Confidential pursuant to a confidentiality agreement entered into between the Participants pending entry of the proposed Protective Order. For this reason, Copyright Owners have filed this Motion under seal, and have also submitted a redacted version for public filing.

Configurations a settlement (such settlement, the “Settlement,” and such motion, the “Motion to Adopt”) that was reached by those parties relating to the rates and terms for those products.

[REDACTED]

[REDACTED]

[REDACTED]<sup>4</sup>

In contrast, the Copyright Owners *do* contest the propriety of SME’s proposal of rates and terms for Subpart B & C Configurations because SME has no cognizable interest in those rates, much less a “significant interest” as defined by the Judges. SME does not license mechanical rights in Subpart B & C Configurations from the Copyright Owners. Rather, it is the digital music services, such as participants, Apple, Amazon, Google, and Spotify (collectively, the “Digital Services”), that license and pay royalties for those mechanical rights. (*See* Declaration of David Kokakis, dated July 25, 2016, submitted in connection with this motion (“Kokakis Decl.”) ¶¶ 9-13.) It appears clear that SME is attempting to use its status as a Subpart A licensee [REDACTED]

[REDACTED] to bootstrap itself into a position to meddle in rate setting for the Subpart B & C Configurations, in which it has no significant interest.

In sum, SME has no significant interest in rates and terms for Subparts B and C because they do not directly affect SME. SME’s only interest in Subparts B and C is payment availability and the Judges have already established that an interest in payment availability is not a

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<sup>4</sup> [REDACTED]

significant interest, or even a legally protectable interest to justify participation in rate setting. SME should not be permitted to participate in discrete aspects of these Proceedings in which it has no significant interest, namely, Subparts B and C, based on the thinnest of interests [REDACTED] [REDACTED] Subpart A. Accordingly, SME's petition to participate in the Subpart B and C part of these Proceedings should be denied.<sup>5</sup>

### **RELEVANT FACTS**

#### **A. Licensing Categories Under Section 115**

The current version of Section 115's implementing regulations embrace thirteen different licensing categories which, themselves, are subdivided into three separate groups: Subparts A, B & C. *See* 37 C.F.R. § 385. Licensees seeking to avail themselves of the compulsory license must comply with the regulations corresponding to the relevant Subpart. *See* 37 C.F.R. § 385.1(b) ("Licensees relying upon the compulsory license set forth in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this [Subpart A], and any other applicable regulations."); *see also* 37 C.F.R. § 385.10(b) (same with respect to Subpart B); 37 C.F.R. § 385.20(b) (same with respect to Subpart C).

***Subpart A.*** Subpart A covers physical phonorecord deliveries, permanent digital downloads, and ringtones. 37 C.F.R. § 385, Subpart A. In practice, the Subpart A regulations codify the long-standing practice – dating back to the age of player piano rolls – of record labels licensing musical works for embodiment in copies of sound recordings made and distributed by

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<sup>5</sup> Perhaps in recognition of its lack of interest in the rates and terms for Subpart B & C Configurations, SME has evidenced an unwillingness to fully engage in the preliminary discovery required by the Judges' February 19, 2016 Scheduling Order. For example, SME has not provided responses and objections to the Copyright Owners' requests for production which all participants had agreed would be exchanged by July 14, 2016.

the record label itself. (Kokakis Decl. ¶ 7); *see also* Al Kohn & Bob Kohn, *Kohn on Music Licensing* 719 (4th ed. 2010). The Copyright Owners do not dispute the propriety of SME participating in the Proceedings with respect to the Subpart A Configurations [REDACTED].

*Subparts B & C.* Subparts B and C cover interactive streams and limited downloads made through various product offerings.

The Subpart B regulations embody “rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115.” 37 C.F.R. § 385.10(a).<sup>6</sup> Subpart B Configurations are subject to a completely different set of licensing practices from Subpart A Configurations. SME has not licensed and does not license musical works for use in Subpart B Configurations. (Kokakis Decl. ¶¶ 10-11.) The Digital Services, not the record companies, are the licensees under Subpart B. (*Id.*)

The Subpart C regulations embody “rates and terms of royalty payments for certain reproductions or distributions of musical works” through a separate set of five licensing categories.<sup>7</sup> Licensed activity as it pertains to Subpart C Configurations also implicates interactive streams, limited offerings and activity unrelated to the Subpart A Configurations.<sup>8</sup> 37

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<sup>6</sup> Subpart B presently covers interactive streams and limited downloads made and distributed via the following five service types: 1) standalone non-portable subscription—streaming only services; 2) standalone non-portable subscription—mixed services; 3) standalone portable subscription services; 4) bundled subscription services; and 5) free nonsubscription/ad-supported services. *See* 37 C.F.R. § 385.13(a)(1)-(5) (defining service categories). SME is engaging in none of these service types.

<sup>7</sup> Subpart C presently covers the following five categories of digital music service offerings: “[1] limited offerings, [2] mixed service bundles, [3] music bundles, [4] paid locker services and [5] purchased content locker services.” 37 C.F.R. § 385.20(a); *see also id.* § 385.21 (defining Subpart C licensing categories). SME is not engaged in any of these offerings.

<sup>8</sup> The Subpart C regulations provide that to the extent any licensed Subpart C activity overlaps with Subpart A activity, the Subpart C regulations control, with a limited exception allowing a compulsory

C.F.R. § 385.21 (defining “Licensed subpart C activity”). Here, too, SME has not licensed, and does not license, musical works for use in Subpart C Configurations. (Kokakis Decl. ¶¶ 12-13.)

The Digital Services, not the record companies, are the licensees under Subpart C. (*Id.*)

***Pass-Through Licensing.*** While Section 115 gives the compulsory licensee the right to authorize third parties to distribute a phonorecord embodying a musical work for which a compulsory license has been obtained, SME has not issued “pass-through” licenses to Digital Services for Subpart B or C Configurations. (Kokakis Decl. ¶¶ 11, 13.)<sup>9</sup> Rather, again, the Digital Services have themselves obtained the necessary mechanical licenses to use musical works in these products directly from the copyright owners and administrators and/or their licensing agent; or have themselves obtained compulsory licenses through the Section 115 licensing process. (*Id.*) Those licenses have not been “passed through” SME or the other labels. (*Id.*)<sup>10</sup> Indeed, SME and the other labels have not issued “pass through” licenses for Subparts B & C Configurations since the implementation of Subpart B over a decade ago and, because they have not done so, the RIAA has even advocated eliminating the right in this context.<sup>11</sup>

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licensee under the “music bundle” category to elect whether to pay royalties under Subpart A or C. See 37 C.F.R. § 385.20(a).

<sup>9</sup> See also Ari Herstand, *Why Exactly Is Spotify Being Sued and What Does This Mean?*, Digital Music News (Dec. 30, 2015), <http://www.digitalmusicnews.com/2015/12/30/why-exactly-is-spotify-being-sued-and-what-does-this-mean/> (emphasis added) (“iTunes doesn’t need to send mechanical royalties directly to publishers because, in the US, the mechanical royalties are built into the sale. iTunes sends all of the money for the sale AND the mechanical royalty to the label. It’s the labels’ responsibility to pay the publishers the correct mechanical royalties. ***But streaming is different. Streaming services (yes, Apple Music too) are required to pay publishers mechanical royalties directly.***”)

<sup>10</sup> Moreover, even if SME were to suddenly avail itself of the right to “pass through” a compulsory license with respect to Subpart B & C Configurations – despite never having done so and never having even indicated any objective intent to do so – it would be the Digital Services that would be paying the royalties at the statutory rate to SME for remittance to the owners of the rights in the musical works, and SME would have no entitlement to retain or deduct any amounts therefrom. In short, SME would still have absolutely no interest in the Subpart B & C rates and terms themselves. (Kokakis Decl. ¶ 14.)

<sup>11</sup> The Copyright Office has noted: “Stakeholders appear largely to agree that the pass-through approach – which mimics the traditional physical model where record labels ship product to stores and report sales

The only licensing function SME provides to Digital Services using the Subpart B & C categories is to license the use of sound recordings on their respective platforms. (Kokakis Decl. ¶ 15.) These rights are separate and distinct from rights in the musical works embodied in such sound recordings, and are licensed through free market negotiations, not compulsory licenses. (*Id.*) It is obvious that the “interest” that SME is seeking to protect through its attempt to insinuate itself into the Subpart B & C categories is the payments it hopes to secure for the licensing of its sound recordings. That is not an interest providing it with standing to participate in the fixing of the rates and terms for Subparts B & C.

**B. RIAA’s Joint Petition to Participate in the Proceedings**

Consistent with the governing statute and regulations, the notice announcing the commencement of these Proceedings called for “[p]arties with a significant interest” to file a Petition to Participate. *Determination of Rates and Terms for Making and Distributing Phonorecords (“Phonorecords III”)*, Docket No. 16–CRB–0003–PR (2018–2022), 81 Fed. Reg. 255, 256 (Jan. 5, 2016); 37 C.F.R. § 351.1(b)(ii)(C) (requiring a petition to participate to include “[a] description of the participants’ significant interest in the subject matter of the proceeding”). SME did not file its own petition. Rather, SME, UMG and WMG joined in a “Joint Petition” filed by the Recording Industry Association (“RIAA”) and signed only by RIAA’s in house counsel. Thereafter, RIAA withdrew from the Proceedings, and UMG and WMG withdrew from

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back to publishers – is unnecessary in the digital environment, since it is feasible for music owners to have a direct relationship with consumer-facing distributors. Significantly, even RIAA, a presumed beneficiary of the section 115 pass-through license, appears to favor the end of this pass-through licensing: “The major record companies generally support in principle the elimination of pass-through licensing . . . within the context of a structure that makes it unnecessary.” U.S. Copyright Office, *Copyright and the Music Marketplace* 132 (Feb. 2015), available at <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (quoting *In re Music Licensing Study*, Docket No. 2014-03, RIAA Second Notice Comments, at 19 (Sept. 12, 2014), available at [http://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/extension\\_comments/Recording\\_Industry\\_Association\\_America\\_Inc\\_RIAA.pdf](http://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/extension_comments/Recording_Industry_Association_America_Inc_RIAA.pdf)).

the Proceedings after settling with the Copyright Owners.<sup>12</sup> SME never filed its own petition. It is attempting to rely on the RIAA's Joint Petition from which all other parties have withdrawn.

The Joint Petition alleges a handful of facts regarding SME's role within the U.S. recording industry, but states no interest whatsoever in the licensing of musical works to Digital Services under the Section 115 compulsory license. (Joint Petition at 2.) While the Joint Petition states in conclusory fashion that SME "has a significant interest in this proceeding," *id.*, it makes no effort to distinguish between the types of activities licensable under Section 115 in which SME has an interest (i.e., Subpart A Configurations, which SME licenses, "manufactures and/or distributes," and "makes substantial royalty payments tied to Section 115," *see* Joint Petition at 2), and those in which it has no interest (i.e., the Subpart B & C Configurations, which are licensed by the Digital Services who make royalty payments tied to Section 115). Quite simply, SME has not stated and cannot state a significant interest to participate in all aspects of the Proceedings.

**C. The Settlement and the Motion to Adopt**

On June 15, 2016, UMG and WMG, along with the NMPA and NSAI, filed the Motion to Adopt seeking to adopt the Settlement by and among those participants as the proposed basis for statutory rates and terms for the Subpart A Configurations pursuant to 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2)).<sup>13</sup> UMG and WMG own two of the largest recorded music businesses in the United States. (Motion to Adopt at 2.) NMPA represents the U.S. music publishing and songwriting industry, and works owned or controlled by its members account for

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<sup>12</sup> The Copyright Owners, UMG and WCM filed the joint Motion to Adopt and UMG and WCM withdrew from the Proceeding "except as to prosecution of the Settlement, or if the Settlement is not adopted, any other matters respecting the adoption of royalty rates and terms for Subpart A Configurations made and distributed by them or under their authority." (Motion to Adopt at 2.)

<sup>13</sup> Additional parties The Harry Fox Agency LLC, Church Music Publishers Association and Songwriters of North America joined the Motion to Adopt, but have since withdrawn from the Proceedings.



work copyright owners to include their songs in Subpart B & C Configurations, either by obtaining compulsory licenses or by licensing directly from a music publisher or agent thereof. The Digital Services are the entities that then pay for those rights, in the case of compulsory licenses, at the statutory rate, or at a negotiated rate, directly to the musical work copyright owners.

As the CRJs have recognized, “[w]hether a person or entity has a ‘significant interest’ in a particular proceeding is ultimately a factual inquiry to be conducted on a case-by-case basis.” SoundExchange Order at 3. While neither the Copyright Act nor the Judges’ rules define what constitutes a “significant interest,” the decisions of the Judges, as well as the legislative history and practices of the Copyright Office, offer guidance.<sup>15</sup> As the Judges have recognized, the House Report accompanying the Copyright Royalty and Distribution Act, which added the significant interest requirement, “describes the purpose of the significant interest requirement as ensuring that ‘only parties with [] legally protectable and tangible interests may take part’ in proceedings” before the Copyright Royalty Board. *Id.* (quoting H.R. Rep. No. 108-408 (2004), at 27 (“House Report”)). The House Report further confirms the legislative intent that “the ‘significant interest’ requirement [restricts] participation to those who have a stake in the outcome of the proceeding. *In other words, to have a significant interest in a royalty rate, the participant must be a party directly affected by the royalty fee.*” *Id.* (emphasis added).

The legislative history offers some illustrative examples of those who have such a stake in the outcome of a royalty rate proceeding:

[1] As a copyright owner, one has a significant interest in a royalty rate because the rate determines how much the owner will receive in compulsory license fees

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<sup>15</sup> Where a statute is silent, the Judges “may examine the statute’s legislative history in order to ‘shed new light on congressional intent . . . .’” *Nat’l Rifle Ass’n v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000) (quoting *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995)).

from the use of his or her works. [2] As a copyright user, one has a significant interest in a royalty rate because the rate determines how much that party must pay for the use of copyrighted works. [3] Included in these categories are organizations and societies that represent the rights and interests of copyright owners and users.

House Report at 27.

In addition, the Judges have recognized guidance from the Copyright Office providing that: “A person or entity that is not a user of a statutory license but . . . that would benefit indirectly from another’s use does not have a specific interest.” *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 DSTRA2, 68 Fed. Reg. 39837, 39839 (Jul. 3, 2003). In light of these standards, SME cannot show the requisite “significant interest” to participate in the Subpart B & C categories.

**A. SME Has No Direct Licensing Interest in Subparts B & C**

With respect to Subpart B & C Configurations, SME is not a “copyright owner.” It licenses its sound recording rights to the Digital Services at royalty rates voluntarily agreed to in license agreements with those services, and those services separately obtain the musical work rights from the owners of those rights, either via the Section 115 licensing process at the compulsory rate, or through direct agreements made in the context of the compulsory rate. (Kokakis Decl. ¶¶ 11, 13-15.) Nor is SME a “copyright user.” The Digital Services, as the licensees (*id.* ¶¶ 11, 13), are the “copyright users” and they are the entities that have a significant interest in the Subpart B and C rates because those rates either directly determine (in the case of a compulsory license) or influence (through direct licenses) how much they must pay for their use of copyrighted works. Nor is SME an organization or society that represents the rights and interests of copyright owners and users. SME is, at bottom, plainly not directly affected by rates





economic interest in the rate or terms because it would be a mere conduit of the license fees, not a recipient.<sup>18</sup>

**C. SME’s Indirect “Payment Availability” Interest is Insufficient**

SME cannot establish the existence of a significant interest in Subparts B and C based on an argument that the more Digital Services pay to the owners of the musical work rights, the less those Services may be willing to pay SME for sound recording rights. Indeed, this “payment availability” theory has been rejected by the Copyright Royalty Judges as it is not a “legally protectable and tangible interest” justifying participation in a rate-setting proceeding. SoundExchange Order at 3.

In the *Web IV* proceedings, the NMPA filed a petition to participate on the ground that royalty rates under Section 114 would “directly impact the royalties available to be paid by digital services to music publishers for performance of the underlying work.” *Web IV*, NMPA Pet. to Participate, at 1-2. The Judges rejected this theory as a basis for a “significant interest” required for participation, concluding that “[w]hile it is true that every dollar that a webcaster spends on sound recording royalties is a dollar that it cannot spend on musical works royalties, it is equally true that the same dollar cannot be spent on rent, utilities, stationery, and myriad other business expenses. NMPA’s payment availability theory would permit any of a webcaster’s vendors to participate in a rate proceeding.” SoundExchange Order at 3. The Judges determined that the NMPA’s “payment availability” theory was, at best, an indirect interest that did not rise

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<sup>18</sup> Were SME to “pass through” musical work rights to a Digital Service, the Digital Service would still be the entity paying royalties at rates to be established in this Proceeding (where the license is compulsory or based on the compulsory rates) and even if the Digital Service paid SME rather than paying the Copyright Owner directly, SME would have to remit the royalties to the owners of the rights in the musical works without setoff or deduction. The distribution of Subpart A digital downloads are treated by the record labels as the digital version of the corresponding physical phonorecords as to which they have always been the compulsory or direct licensee. That has never been the case for Subpart B & C Digital Services.

to the level of a significant interest as required to participate under the Copyright Act. *Id.* The same reasoning requires dismissal of SME’s petition to participate in the Subpart B & C Proceedings based on a payment availability theory. As with the NMPA on the facts of the *Web IV* proceedings, SME can state no “legally protectable and tangible interest” and should be precluded from participating with respect to Subparts B & C.

**D. SME’S Rate Proposal On Subpart A Further Confirms Its Lack Of Interest In Subpart B & C Rates and Terms**

As noted above, the Copyright Owners do not dispute that SME has at least a theoretical interest in Subpart A rates and terms. However, it is clear that SME is seeking to use a feigned interest in Subpart A solely as a means of participating in this Proceeding with respect to the Subpart B & C Configurations as to which it plainly has no interest.

By the Motion to Adopt, UMG, WMG, NMPA and NSAI requested that the Copyright Royalty Judges adopt their Settlement as the rates and terms to apply to Subpart A Configurations made by all licensees.<sup>19</sup> The Settlement provides that the rates and terms presently set forth in Subpart A should be continued for the period at issue in the Proceeding. SME declined to formally join in the Settlement or the Motion to Adopt. [REDACTED]

[REDACTED]

[REDACTED]<sup>20</sup> [REDACTED]

[REDACTED]

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<sup>19</sup> As noted above, the Copyright Royalty Judges have published for comment the proposed regulations set forth in the Motion to Adopt. *See Phonorecords III*, 81 Fed. Reg. 48731.

<sup>20</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SME's gambit is obvious and improper and

should be rejected.

**II. SME'S FULL PARTICIPATION WILL UNDERMINE THE JUST ADMINISTRATION AND EFFICENCY OF THESE PROCEEDINGS**

By operation of the compulsory license, the Copyright Owners are required to issue licenses for all activities covered under Section 115. From the perspective of the Copyright Owners, limiting SME's participation to only those activities for which it takes a license will greatly economize these Proceedings. By count of the Copyright Owners, five remaining petitions purport to represent the interests of Digital Services – the actual licensees of Subpart B & C mechanical rights that pay royalties under Section 115 – in the Proceedings.<sup>21</sup> There is simply no benefit or purpose served by also enabling SME to participate with respect to the Subpart B & C categories in which it has no interest.

Practically speaking, allowing SME's participation with respect to Subparts B & C is contrary to the Judges' goal of ensuring "efficient and just administrative proceedings. . . ." 37 C.F.R. § 350.6. If the Judges permit SME to participate, the Copyright Owners and the other participants will have to expend time and resources dealing with a party that neither licenses nor issues licenses in the categories. It does not even pass through licenses and has identified no intent to do so (and if it did so, it would still have no interest to protect). Given the rigorous schedule required to meet the Judges' deadline for the Issuance of a Determination, SME's

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<sup>21</sup> No less, these participants include some of the largest digital and technology companies in the world, including Apple, Google and Amazon. See *Phonorecords III*, Petitions to Participate, available at <https://www.loc.gov/crb/proceedings/16-crb-0003/>.

participation is an unnecessary and unproductive diversion. As the Copyright Office established long ago, “[r]ate proceedings . . . are lengthy, complex, and expensive. It would make no sense to allow an entity with a tentative or collateral interest in the rates to invoke a . . . proceeding.” *PSS II*, 68 Fed. Reg. at 39838.

An order precluding SME from participation on the Subpart B & C Categories is well within the Judges’ discretion to make “any necessary procedural or evidentiary ruling[] in any proceeding. . . .” 17 U.S.C. § 801(c). Segmenting participants in rate-setting proceedings before the Judges is familiar practice. In the recently concluded proceedings under Section 114 of the Copyright Act, for instance, the Judges reaffirmed their practice of distinguishing between different categories of licensees on a single statutory license. In setting different rates for commercial and noncommercial webcasters, the Judges acknowledged that they

have recognized noncommercial webcasters as a separate rate category from commercial webcasters in prior proceedings. . . . [I]n accordance with the Judges’ reasoning from *Web II* and *Web III*, the Judges adopt a separate rate structure for noncommercial webcasters than the one applicable to commercial webcasters.

*Web IV*, Determination of Rates and Terms (Final), at 9-10 (Mar. 4, 2016). To the best of the Copyright Owner’s knowledge, the Judges did not solicit or accept participation from commercial webcasters in setting the rates for noncommercial webcasters or vice versa. *See id.* at 177-80 (accepting statements by noncommercial webcasters with respect to noncommercial rates). Thus, to deny SME participation with respect to the determination of rates and terms for Subpart B & C Configurations would be consistent with controlling standards set forth in the Section 114 proceedings wherein participants were limited to participation in only those categories where they have made use of the compulsory license. The Judges need not permit SME to participate in the Proceedings with respect to rates and terms for Subpart B & C Configurations – as to which they have no interest – just because [REDACTED]

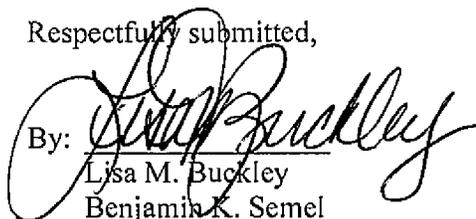
████████████████████ SME's participation should be confined to the area of its actual arguable interest.

**CONCLUSION**

Copyright Owners respectfully request that the Judges deny, in part, SME's Petition to Participate in the Proceedings, and find that SME may not further participate in the Proceedings with respect to the Subpart B & C licensing categories promulgated under Section 115 at 37 C.F.R. § 385.10 to .26. SME should, at a minimum, be precluded from filing a written direct statement, proposing rates and terms, objecting to any settlement, offering any evidence or appealing any aspect of this Proceeding with respect Subpart B & C Configurations. Copyright Owners also respectfully request that, only if the Judges determine that it is still timely for SME to file its own petition, that they require SME to file a new petition, and preclude SME from objecting to the Settlement in accordance with 37 C.F.R. 351.1(d).

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Respectfully submitted,

By: 

Lisa M. Buckley  
Benjamin K. Semel  
7 Times Square  
New York, New York 10036-6569  
Phone: (212) 421-4100  
Facsimile: (212) 326-0806  
Email: lbuckley@pryorcashman.com  
bsemel@pryorcashman.com

*Attorneys for Copyright Owners*