

expense of an arbitration proceeding conducted under (section 114(f)(2) (1995)). Thus, it is the Committee's intention that in such a case, as under the Copyright Office's current regulations concerning rate adjustment proceedings, the Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding and, if no opposing comment is received from a party with a substantial interest and intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement without convening an arbitration panel.

S. Rep. No. 104-128, at 29 (1995) (citations omitted) (emphasis added). Plainly, for the same reasons that the Librarian must determine whether a petitioner for a rate proceeding has a significant interest in the rates and terms, Congress recognized that a party challenging proposed rates and terms that are the product of a settlement must likewise have a significant, or substantial, interest. Consequently, when the Office published the NPRM in this proceeding, it required any party filing objections to identify its specific interest in the rates and terms to be adjusted to enable the Librarian to determine whether it has a significant (substantial) interest. See 68 FR at 4745 ("[U]nless there is an objection from a person with a significant interest in the proceeding who is prepared and eligible to participate in a CARP proceeding, * * * the Librarian can adopt the rates and terms in the proposed settlement in final regulations without convening a CARP").

The question then remains: what is a significant or substantial interest in a rate proceeding? The inquiry is a factual one and determinations must be made on a case-by-case basis. Clearly, a copyright owner whose works are being used under a statutory license has a significant interest in a rate setting or adjustment of that license, as does the person or entity using those works under the statutory license. Order in Docket No. 99-6 CARP DTRA (June 21, 2000). An entity that collects the royalties generated under a statutory license on behalf of certain copyright owners whose works are used can have a specific interest in a rate proceeding, but only to the extent that such entity is fully authorized by, and acts on the behalf of, those copyright owners to represent their interests in the rate proceeding. It is through the authorization of these copyright owners, however, and not because of its business or personal interest, that a royalty collection entity gains a specific interest in a rate proceeding.

Likewise, an entity that represents users of copyrighted works can have a

specific interest in a rate proceeding, but only gains that specific interest from the authorization of the users it represents. A person or entity that is not a user of a statutory license but expresses a vague or unspecified desire to form a business that would make use of the license or that would benefit indirectly from another's use does not have a specific interest. Order in Docket No. 99-6 CARP DTRA at 2 (June 21, 2000) ("Glaser's interest in what the fees will be is general in that it may affect the profitability of his other businesses, but it is not specific to his person or to his role as a representative of these other businesses."). And a person or entity that proposes or objects to a rate proceeding solely on the basis of espoused public policy or consumer interest concerns does not have a specific interest.

The NPRM in this proceeding specified that parties objecting to the proposed rates and terms identify their interest in the proceeding no later than March 3, 2003. Review of RLI's March 3, 2003, filing reveals that RLI did not represent any copyright owners entitled to collect royalties from preexisting subscription services under the section 112 and 114 licenses. Rather, it states that its "key business objective" is to distribute such royalties in the future and that its participation in this proceeding is necessary to attaining that objective. RLI Objection at 2. This is confirmed in the March 26, 2003, "supplement" to its objection where RLI states that it is "pleased to inform the Copyright Office" that it had entered into affiliation agreements with unspecified copyright owners and performers whose works it purports are used under the section 112 and 114 licenses. RLI Supplement at 2.¹ Since RLI did not represent copyright owners entitled to royalties from preexisting subscription services under the section 112 and 114 licenses at the time that it filed its objection, and did not have authorization from any copyright owners eligible to receive such royalties to lodge the objection and participate in a CARP proceeding on their behalf, RLI does not have a specific interest in this rate adjustment proceeding.

Moreover, even if the information in RLI's March 26 "supplement" were accurate as of March 3, RLI does not even purport to assert that any copyright

owners have authorized RLI to represent them in a CARP proceeding or even to object to the proposed rates and terms on their behalf. RLI states its belief that "[b]y affiliating with RLI and electing to receive their royalties from an agent other than SoundExchange, RLI's client performers and copyright owners are expressing their opposition, through RLI, to the proposed settlement." Supplement at 3 (emphasis added). But it is hardly self-evident that the act of affiliating with RLI and electing to use RLI as their agent to receive royalties constituted an authorization by those unidentified copyright owners for RLI to express opposition on their behalf to the proposed rates and terms or to participate in a CARP on their behalf. Indeed, RLI has failed even to identify a single copyright owner whom it represents in asserting its objection to the proposed rates and terms. If RLI wishes to participate in a CARP as a representative of copyright owners, it must identify the copyright owners whom it represents.

RLI also argues that copyright owners and performers should be given a "competitive choice among agents for the distribution of sound recording performance royalties," Objection at 7, and that in amending 17 U.S.C. 114(g) in the Small Webcaster Settlement Act of 2002, Pub. L. 107-321, Congress (1) "acknowledged and contemplated that more than one entity could serve as a Designated Agent in competition with SoundExchange," and (2) provided that "performers and copyright owners have the absolute right to choose a Designated Agent other than SoundExchange so as to avoid the recoupment of historical litigation and other costs." *Id.* at 8 (footnote omitted).

These arguments do not compel the conclusion that RLI has standing to block a settlement and force the determination of rates and terms to be made by a CARP. The fact that more than one entity could serve as Designated Agents does not mean that there necessarily ought to be more than one Designated Agent,² or that an aspiring candidate for designation has sufficient interest to participate in its own right in a CARP proceeding. The fact that Congress has recognized that

¹ RLI also faxed replies on April 11 and April 24, 2003, to the objections lodged against its March 26 Supplement. Permission was not sought to submit these replies and they are therefore not considered. Moreover, unless otherwise directed by the Librarian, the rules do not provide for the submission of any pleading by facsimile transmission. 37 CFR 251.44(a).

² Indeed, we have expressed skepticism about the benefit of the two-tier structure involving a Receiving Agent and more than one Designated Agent, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient, and fair payments of royalties to copyright owners and performers with a minimum of expense. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 FR 45239, 45267 n.46 (July 8, 2003).