UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEETHOVEN.COM LLC, *et al.*, Petitioners, v. LIBRARIAN OF CONGRESS, Respondent.	Case No. 02-1244 (Consolidated with case nos. 02-1246, 02-1247, 02-1248, and 02-1249 (consolidated petitions).)

REPLY IN SUPPORT OF MOTION TO STRIKE

The Librarian of Congress ("Librarian") and Joint Petitioners the Recording Industry Association of America, Inc. ("RIAA"), the America Federation of Television and Radio Artists ("AFTRA"), and the American Federation of Musicians ("AFM")[1] hereby reply to the oppositions of Salem Communications Corp. and the National Religious Broadcasters Music License Committee ("Salem Petitioners") and Beethoven.com LLC, Inetprogramming Incorporated, Internet Radio Hawaii, Wherever Radio, and Intervenor Educational Information Corporation (WCPE) ("Beethoven.com Petitioners") (collectively "Licensee Petitioners").

Both oppositions illustrate the central principle underlying the Motion to Strike ("Motion"): factual allegations and supporting materials outside the record of the proceeding below have no place in an appeal to this Court pursuant to Section 802(g) of the Copyright Act. This Court's clear jurisdictional mandate to "modify or vacate a decision of the Librarian *only* if it finds, *on the basis of the record before the Librarian*, that the Librarian acted in an arbitrary manner," 17 U.S.C. 802(g) (emphasis added), leaves no room for extra-record evidence. The extra-record factual allegations made by both groups of petitioners involve hotly contested issues

[1] The RIAA, AFTRA, and AFM are referred to herein as "Owner and Performer Movants."

of fact, which the Owner and Performer Movants would contest with both documentary evidence and witnesses were this case still in trial-type proceedings before the CARP.

I. A MOTION TO STRIKE IS APPROPRIATE WHERE EXTRA-RECORD EVIDENCE IS INCLUDED IN BRIEFS CONTRARY TO THIS COURT'S JURISDICTIONAL MANDATE.

Relying on *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981), Licensee Petitioners assert that motions to strike are "disfavored." However, *Stabilisierungsfonds* relied on authority construing Fed.R.Civ.P. 12(f) (a court may strike an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter") and denied a motion to strike because the "points raised in the motion might have been presented, concisely, in the reply brief" and "[t]here was no need for appellants to burden this court with a motion to strike." (647 F.2d at 201.) This case is quite different. It arises under Section 802(g), which sharply limits this Court's direct review jurisdiction "only" to "the record before the Librarian." The issue is jurisdictional and thus must be raised by parties and considered by the Court. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

Furthermore, unlike *Stabilisierungsfonds*, if a ruling on this Motion is deferred, Movants would be forced to respond to the Licensee Petitioners' use of extra-record material by including in their brief more extra-record material. This would improperly place this Court in the position of a trier of fact, a result that undermines the administrative process and perverts the limited scope of judicial review allowed by Section 802(g). A motion to strike is therefore the only way in which this issue can be properly raised under this statutory scheme for it is the only way to limit the material before the Court to the record before the Librarian, consistent with the demands of Section 802(g). Granting the motion to strike will also serve as strong notice to future litigants

under Section 802(g) that this Court will not tolerate attempts to go outside the record, thereby potentially saving this Court the burden of dealing with this issue in future cases.

II. NONE OF THE REASONS PROFFERED FOR RELYING ON EXTRA-RECORD MATERIAL JUSTIFY ITS CONSIDERATION IN THIS PROCEEDING.

A. Licensee Petitioners Cannot Rely on Extra-Record Material for Any Purpose.

Licensee Petitioners struggle to distance themselves from reliance on extra-record material as the basis for their arguments. The Salem Petitioners argue that they only note that post-hearing developments tend to "confirm" arguments based on the record of the proceeding. Opp. at 4. The Beethoven.com Petitioners claim that many of their extra-record references are "background," Opp. at 5, and are "not evidence per se," Opp. at 2, and that while they may "refer[] to" extra-record citations that are "mere quotations" in the statement of facts, they are not in fact "relying" on them or "citing [them] as evidence." Opp. at 6. These distinctions do not stand up to scrutiny. However characterized, extra-record references are obviously being submitted for consideration by this Court in some manner. The Owner and Performer Movants are prejudiced by the inability to rebut extra-record statements that they believe are incorrect or inaccurate, whether those statements are offered as evidence or for another purpose. The Librarian and the CARP are prejudiced by never being accorded an opportunity to consider this evidence and any rebuttal evidence in the trial-type administrative proceedings created by this statutory scheme.

The Salem Petitioners argue that this Court "can be relied upon not to give [post-hearing statements] more weight than is appropriate." Opp. at 3. The Beethoven.com Petitioners argue that discrepancies between the record and certain extra-record statements only relate to the weight this Court should give those statements. Opp. at 6. But that is exactly the problem. The appellate court is not the appropriate forum in which to weigh evidence and make credibility determinations. Those functions are reserved for the trier of fact, which in this case is the CARP as reviewed by

the Librarian. *National Ass'n of Broadcasters v. Librarian of Congress,* 146 F.3d 907, 930 (D.C. Cir. 1998) ("[I]t is emphatically not our role to independently weigh the evidence or determine the credibility of witnesses – two duties entrusted solely to the Panel and, before it, the Tribunal."). To give one example, even if this Court were to attempt to determine the weight attributable to post-record material, there is no factual, record basis on which to determine the appropriate weight of the hotly disputed, allegedly confirmatory post-hearing statements about the Yahoo! agreement. The evidence that Owner and Performer Movants would offer to challenge those statements is nowhere in the record of this proceeding, and cannot be developed consistent with the appellate process.

B. The Cited Extra-Record Material is Not Appropriate for Judicial Notice.

The extra-record material in the briefs of the Licensee Petitioners does not fall within the recognized categories of information to which this Court may accord judicial notice. The suggestion that statements of opinion in the media and unfounded allegations are subject to judicial notice simply because they were published is a distortion of that doctrine, which permits notice to be taken of facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

The quotations from Mark Cuban in an article posted on an Internet website subsequent to the Librarian's ruling – cited by both sets of Petitioners – clearly fail the test. The Beethhoven.com Petitioners also cite an article referring to Mr. Cuban's comments. Both groups suggest that Mr. Cuban's factual assertions have some relationship to the actual agreement reached between RIAA and Yahoo! – an agreement that is central to the issues before this Court. It is this

basic premise that is heavily contested by the Owner and Performer Movants. This Court is being asked to take notice of highly controversial allegations of fact to which the Owner and Performer Movants could respond only by reference to further extra-record material, some of which has not been reported in the media and would have to be provided through affidavits or witness testimony.

The Salem Petitioners make similar use of an article discussing Yahoo!'s cessation of certain streaming operations after the CARP decision was issued. Although the quoted fact may not be in dispute, the context surrounding it clearly is disputed. The Salem Petitioners' use of this information to "confirm" their views of the impact of the CARP rates is *not* a generally accepted fact showing "whether the [Librarian's] decision was correct or not," Opp. at 1 (citation omitted),[2] and *is* subject to significant question. The asserted relationship of Yahoo!'s action and the CARP rates would be strongly disputed by the Owner and Performer Movants if they were able to introduce witnesses and other evidence about Yahoo!'s significant later webcasting activities before a trier of fact.

C. Licensee Petitioners' Reliance on Legislative Materials is Misplaced.

Similarly, the other extra-record material cited by the Beethoven.com Petitioners is not properly before this Court. Mr. Mandlebrot's testimony is cited based on his role in the CARP proceeding. Beethoven.com Opp. at 8. But Beethoven.com is citing the witness statement of Mr. Mandlebrot at a legislative hearing – not his record testimony from the CARP proceeding – for the truth of the matters he asserts. That is manifestly improper.

[2] The cases cited by the Salem Petitioners in support of the ability of this Court to look at extra-record information indicating whether or not a decision was correct, Opp. at 1, involve appeals of agency action under the Administrative Procedure Act. Here, this Court's authority is based on a specific, narrow statutory provision allowing review "only . . . on the record before the Librarian." 17 U.S.C. 802(g).

Given the opportunity, the Owner and Performer Movants would vigorously cross-examine Mr. Mandlebrot and offer evidence countering his statements, but there is no procedure for them to obtain and place such evidence before this Court. Absent this opportunity, the Owner and Performer Movants are prejudiced because his hearsay statements go to the core of one of the disputed issues in this case – the use of the Yahoo! agreement as a benchmark. And the Librarian is prejudiced by the inability, as the decision-maker, to consider such "evidence" developed through the adversarial fact-finding procedures mandated by statute.

The Beethoven.com Petitioners interpret the statement made by the Register at a legislative hearing as contradictory to certain other statements the Librarian made in this case. Opp. at 8. The Librarian's statements in this case that these Petitioners had every opportunity to participate in the underlying CARP proceeding, made in the previously filed Motion to Dismiss, are not contradicted by the Register's report to Congress on the statements from certain entities on the alleged reason for their lack of participation. The Register does not say that these entities in fact were unable to participate in the proceeding, but rather that they said they failed to participate in CARP proceedings because they did not feel they could afford the arbitrator fees. The record reflects that the Librarian and the Copyright Office provided plenty of notice about all phases of the proceeding through Federal Register publications and their other orders. The circumstances surrounding the failure of certain Petitioners to take advantage of the opportunity to participate would have to be developed in the record, but there is no procedure for such factual development in appellate proceedings.

The extra-record letter from certain Members of Congress to the Librarian raises similar concerns. The assertion (Beethoven.com Opp. at 11) that this letter is cited for the undisputed point that the rates and terms in the proceeding are critical to the survival of certain webcasters is

clearly incorrect. The Owner and Performer Movants would dispute these allegations with respect to many webcasters, and have had no opportunity to test the validity of this assertion based on discovery and consideration of evidence on the financial situation of the webcasters to whom this point allegedly applies. They will not have that opportunity before this Court.

D. General Citations to Website URLs Are Not the Proper Subject of Judicial Notice.

The Beethoven.com Petitioners simply ignore the concern Movants raised about the Petitioners' citation to URL addresses for various websites. None of the parties to the proceeding knows what is on these websites on a given day, so it is not possible for Movants to respond to any information potentially contained therein. The practice followed in the proceeding below was to use fixed screen shots of web pages that could be reviewed by all parties and subjected to cross examination. It is too late to adopt that practice here.

III. THE PURPORTED CONSTITUTIONAL CLAIMS OF THE BEETHOVEN.COM PETITIONERS DO NOT PERMIT THEM TO IGNORE THE JURISDICTIONAL LIMITS OF SECTION 802(g).

The Beethoven.com Petitioners, who failed to participate in the proceeding below, argue at length that this Court should basically ignore the clear mandate of Section 802(g) to review the Librarian's decision "only" on "the basis of the record before the Librarian" because such extra-record material is (according to these non-parties) essential "to avoid depriving petitioners of due process and violating the separation of powers." Opp. at 12. The Beethoven.com Petitioners say this Court has "discretion" to ignore the mandate of Section 802(g) and "consider facts outside the record as needed to provide meaningful judicial review." *Id.* These contentions are meritless.[3]

[3] Contrary to the assertions of the Beethoven.com Petitioners, Opp. at 1, the Motion does not raise standing issues. Movants only seek to have the Beethoven.com Petitioners use material within the extensive record of the proceeding in support of their constitutional arguments.

As noted, the language of Section 802(g) expressly allows judicial review of the Librarian's decision "only" on "the basis of the record before the Librarian." This language is a condition to the waiver of sovereign immunity contained in Section 802(g) and thus must be strictly construed. "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Supreme Court has made clear that "[a] necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 287 (1983). *See also Lane v. Pena*, 518 U.S. 187, 192 (1996) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"), *quoting Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Under these principles, this Court has no "discretion" to set aside this Congressionally imposed limitation on the waiver of sovereign immunity contained in Section 802(g).

Contrary to the contention of the Beethoven.com Petitioners, there is a judicial forum – other than this Court – in which these non-party petitioners can present their constitutional arguments without being limited to the record before the Librarian. Specifically, these challenges to the arbitration costs statutorily imposed on participants by 17 U.S.C. 802(c) and 17 U.S.C. 802(h)(1), and the participation requirements imposed by the Librarian's regulations, can be brought in district court in a suit seeking "non-statutory" judicial review. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328-29 (D.C. Cir. 1996) (holding that non-statutory judicial review was available to review allegedly *ultra vires* Presidential decisions not subject to review under the APA); *see also Five Flags Pipe Line Co. v. Department of Transportation*, 854 F.2d

1438, 1439-40 (D.C. Cir. 1988) (explaining that non-statutory review is available initially in district court). *Cf. Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, 535 U.S. 635 (2002) (relying on *Ex Parte Young* doctrine to allow equitable review of constitutional claims despite a claim of Eleventh Amendment immunity). Requiring the Beethoven.com Petitioners to litigate such claims in district court would permit the creation of a proper factual and legal record based on their contentions, a record that is wholly absent before this Court because of the complete failure of these entities to participate in the administrative proceedings below. In light of this availability of district court review, there is no need for this Court to consider the extra-record materials that these non-parties seek to introduce for the first time in this Court.[4]

IV. RESOLUTION OF THIS MOTION PRIOR TO CONTINUATION OF BRIEFING IS ESSENTIAL TO THE ORDERLY CONDUCT OF THIS APPEAL.

Movants strongly disagree with the suggestion by the Salem Petitioners that any issues related to extra-record material in their briefs can be resolved by the merits panel in the context of deciding this entire matter. Opp. at 4. Proceeding in that manner would put the Movants in the untenable position of having to choose whether to allow factual allegations that they dispute to go unrefuted, or to include responsive material refuting the allegations in their opposition and reply briefs despite their belief that such material is improper. Instead, the Motion should be resolved prior to the resumption of briefing so that the Movants will know the scope of the arguments to which they must respond.

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[4] Of course, such a district court suit could not challenge the Librarian's Section 802(f) decisions reviewable in this Court under Section 802(g). Review of such Section 802(f) decisions lies solely within this Court's exclusive jurisdiction under Section 802(g). *See, e.g., Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute").

Conclusion

For the foregoing reasons and the reasons stated in their initial Motion to Strike, Movants ask this Court to strike all extra-record material from the briefs of Licensee Petitioners, and order them to amend their briefs to remove all such material, all references to it, and any text or argument based on such references.

Respectfully submitted,

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August 14, 2003

CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served two copies of the foregoing Reply in Support of Motion to Strike, this 14th day of August, 2003, by first class mail, to the following counsel of record:

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* Due to problems with U.S. mail delivery to government offices, the motion has been served on August 14 by email, and two copies will be hand-delivered on August 15.