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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GENERAL COUNSEL
OF COPYRIGHT

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).)

MOTION TO STRIKE BRIEFS OF CERTAIN PETITIONERS RELYING ON MATERIALS AND FACTUAL ALLEGATIONS OUTSIDE THE RECORD OF THE PROCEEDING

The Librarian of Congress 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") (collectively "Movants") hereby move this Court to strike the briefs submitted by certain Petitioners because those briefs improperly contain factual allegations and supporting materials outside the record of the proceeding below. Consideration of this extra-record material is precluded expressly by Section 802(g) of the Copyright Act, which provides that this "court shall have jurisdiction 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). As grounds for this Motion, Movants state as follows:

Background

1. On June 20, 2003, two groups of Petitioners who are statutory licensees pursuant to the compulsory licenses in sections 112 and 114 of the Copyright Act (referred to collectively herein as "Licensee Petitioners") filed briefs that relied on materials and factual allegations outside the record of this proceeding. One brief was submitted by Salem Communications Corp., the National Religious Broadcasters Music License Committee, and Live 365, Inc.[1] ("Salem Brief"). The other was filed by Petitioners/Intervenors Beethoven.com LLC, Inetprogramming Incorporated, Internet Radio Hawaii, Wherever Radio, and Intervenor Educational Information Corporation (WCPE) ("Beethoven.com Brief").

2. The Licensee Petitioners are seeking review of a decision that was reached by the Librarian of Congress based on a record created in trial-type proceedings before a Copyright Arbitration Royalty Panel ("CARP") under strict procedures designed to afford all parties the right to conduct discovery and cross-examination. Administrative proceedings for the establishment of rates and terms for the section 112 and 114 statutory licenses are governed by the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304 ("Reform Act" or "Act"). The Reform Act created a whole new arbitration scheme that is heavily dependent on the creation of a formal record. Thus, the Act creates ad hoc arbitration panels designed to review the evidence and consider the arguments of concerned parties. See 17 U.S.C. 802(c). Implementing rules of the Copyright Office expressly accord parties discovery rights to obtain and test the evidence,

[1] Live365 moved to withdraw its petition on July 7, 2003. The motion was granted by this Court on July 9, 2003.

37 C.F.R. § 251.45(c), and contemplate a structured, formal trial-type, fact-finding proceeding for the orderly presentation and consideration of evidence and argument. *See, e.g.*, 37 C.F.R. § 251.41; 37 C.F.R. § 251.43; 37 C.F.R. § 251.45(a)-(d).

3. The record of the proceeding before the Copyright Arbitration Royalty Panel ("CARP") closed once all evidence had been submitted by the parties. The last date on which material was submitted for the record of the proceeding before the arbitrators was February 1, 2002. Once the CARP issued its report on February 20, 2002, that record was reviewed by the Librarian of Congress ("Librarian"), whose June 20, 2002 decision (published in the *Federal Register* on July 8, 2002) is the subject of the petitions in this case. Many of the cited references that are outside the record are dated after February 20, 2002.

4. The Salem Brief contains at least two references to material about the Yahoo! agreement – which both the Salem Petitioners and the Petitioners in the group of Movants discuss in their briefs at considerable length – from outside the record. The material is found in footnotes 11 and 12, as well as in Addendum B which consists of two June 2002 articles supporting these references. Addendum B2 contains allegations about Yahoo!'s motivations for entering into a voluntary agreement with RIAA from Mark Cuban, an individual who never testified during the CARP proceeding, and whose statements would have been vigorously contested by the copyright owners and performers if he had made them during the CARP proceeding and suggested that they were an accurate reflection of the deal between RIAA and Yahoo! that resulted after he had left the company.

5. The Beethoven.com brief relies on and cites to even more material outside the record, and makes multiple references to materials that never were introduced into the record of the CARP proceeding and are dated after February 2002. A partial list of these materials follows:

- Most items in the list of "Other References" on page ix are dated after the close of the record and the issuance of the CARP report in February 2002 and are cited in support of factual allegations in the brief at pages 5-7 and 12. These items include a July 1, 2002 article, congressional hearing testimony from 2003, a letter from Members of Congress from April 2002, a statement to Congress from June 2002, and another article from July 12, 2002 (date is found on page 7). None of this material was presented to the CARP arbitrators, and participants in the hearings had no opportunity to test the material or the witnesses sponsoring it through cross-examination, or to introduce additional contextual material on redirect examination. The copyright owners and performers would certainly have done so had the materials been created before the close of the record and been properly introduced into the CARP proceeding – for instance, they would have been able to offer another letter from Members of Congress emphasizing that the proceeding should be permitted to run its congressionally mandated course, as well as testimony and statements from other witnesses in the cited congressional hearings who supported their views.
- Page ix also includes a section for "URLs" with a list of six websites, which were never introduced into the record of the CARP proceeding, and are likely to contain

content that changes frequently.[2] The arbitrators never saw these websites during the course of the proceeding, and none of the hearing participants had the opportunity to conduct cross-examination about their contents.

- There are also frequent references to material from outside the record within the text of the Beethoven.com brief. For instance, post-record e-mail correspondence from Mark Cuban about the Yahoo! deal is quoted on pages 5-6 to support various factual allegations, such as the allegation that the deal was built around multicasting to 250 viewers using a single stream of programming – an allegation that the evidence from the record would demonstrate is false.[3] *See generally* the testimony of Steven Marks and David Mandelbrot; RIAA Exhibit No. 075 DR (RIAA/Yahoo! agreement). Had the copyright owners and performers been given the opportunity to cross-examine Mr. Cuban and refute this testimony on the record, they would certainly have done so.

Argument

6. Consideration of this extra-record material is precluded expressly by Section 802(g) of the Copyright Act, which provides that this "court shall have jurisdiction 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). The record before the Librarian consists of "the record

[2] For this very reason, the CARP decided that parties could not demonstrate websites during the CARP proceeding, although they were permitted to introduce static screen shots, which were subject to advance review and cross-examination by all parties. *See, e.g.*, Tr. at 4025 (Comedy Central), 4554 (MTV), 4776 (Listen.com), 5017 (AOL/Spinner), 6917 (BET.com).

[3] Mr. Cuban sold Broadcast.com to Yahoo! in 1999, and the final deal between RIAA and Yahoo! was not reached until late 2000. In fact, no aspect of the agreement was finalized when Yahoo! took over negotiations. *See* Tr. 11242:8-14 (Mandlebrot).

created in the arbitration proceeding," *id.* at 802(f), and certainly does not include materials that were not even in existence when the case was submitted to the Librarian for review. The Reform Act mandates that the CARP "act on the basis of a fully documented written record," 17 U.S.C. 802(c), requiring that decisions of a CARP must be provided in a written report setting forth "the facts that the arbitration panel found relevant to its determination." 17 U.S.C. 802(e). The emphasis in the Reform Act on the creation and consideration of a formal record at every stage of the proceeding obviously would be undermined if parties were permitted to appeal the record-based decision by relying on untested, extra-record evidence.

7. These provisions for review based on the formal record must be strictly construed and applied because Section 802(g) contains a waiver of sovereign immunity. According to well-established principles, "[j]urisdictional grants waiving sovereign immunity are strictly construed and may not be expanded beyond the terms expressly set forth in the grant." *Ramey v. Bowsher*, 9 F.3d 133, 135 (D.C. Cir. 1993). *See also Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *St. Louis Fuel and Supply Co. v. F.E.R.C.*, 890 F.2d 446, 449-50 (D.C. Cir. 1989) (noting that "we are bound to honor the canon that waivers of the sovereign's immunity must be strictly construed"). This matter goes to the Court's jurisdiction because sovereign immunity is jurisdictional, *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994), and thus should be resolved prior to addressing the merits of the issues before the Court. *See Ruhrgas AG v. Marathon Oil*

Co., 526 U.S. 574 (1999); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 101-02 (1998).[4]

8. Strict adherence to these principles is especially important in this case, where many of the contentions of these briefs are founded on extra-record material. The reliance on extra-record material is not only impossible to reconcile with the scope of review authorized by Section 802(g), it is also unfairly prejudicial to the Movants. The material was not part of the record below, and thus there was no opportunity to present opposing evidence or to test it through cross-examination. Movants are now placed in the untenable position of adhering to this Court's rules and limiting their briefs to the contents of the record, thus allowing the extra-record material to go unrefuted. Even if they attempted to refute the material, addressing factual allegations based on websites that might have changed since the Beethoven.com brief was written would be almost impossible. And if the record for this proceeding were somehow expanded to include congressional testimony from Mr. Mandelbrot (Beethoven.com Brief at 6 n.3) that was never introduced into the record below, in fairness Movants would also want the ability to present the Court with the congressional testimony of other witnesses at congressional hearings on CARP matters, including Ms. Rosen of RIAA. Allowing the parties to repeatedly expand beyond the record in this way would lead to a nearly impossible task

[4] Licensee Petitioners' references to material outside the record are also contrary to Rule 28(a)(7) of the Federal Rules of Appellate Procedure, which requires "a statement of facts relevant to the issues presented for review *with appropriate references to the record.*" (Emphasis added.) Rule 28(a)(9)(A) goes on to specify that the argument section of the brief must contain "appellant's contentions and the reasons for them, *with citations to the authorities and parts of the record.*" Fed. R. App. Pro. 28(a)(9)(A). *See National Petrochemical & Refiners Ass'n v. E.P.A.*, 287 F.3d 1130, 1149 (D.C. Cir. 2002).

for this Court in trying to sort out and evaluate the Librarian's decision based on material that was before neither the CARP nor the Librarian.

9. There is no provision for including in briefs factual allegations based on material outside the record. Were this practice to be permitted, the process of briefing appeals, especially in cases like this one that reflect rapidly evolving industries, would be unwieldy and difficult to control. There are many developments in the marketplace and statements made by various parties that the Movants would like to bring to the attention of this Court, both to support their arguments and to place the extra-record materials relied on by the Licensee Petitioners in proper context, but of course if all parties were allowed to expand the scope of appeal in this fashion, it would be impossible to determine where the material relevant to a particular appeal ends. Instead, this Court has said that "the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997); *see also Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, (1971)).

10. While there is a limited category of material of which judicial notice may be taken pursuant to Federal Rule of Evidence 201(f), the material introduced by Licensee Petitioners from outside the record does not fit into this category, which is limited to 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 be reasonably questioned." The factual allegations made in the extra-record materials introduced and cited by Licensee Petitioners fall into neither category and must be stricken. Indeed, were citation to extra-record material and additional factual development on appeal permitted, Movants would strongly dispute the accuracy of the facts alleged in this material.

Relief Requested

11. Movants request that this Court instruct the Licensee Petitioners to submit amended versions of their briefs from which all references to material outside the record and any text or argument based on such references have been removed. While Movants have noted the most obvious references to extra-record material, they find it difficult to determine all instances in which a statement in one of the Licensee Petitioner briefs is affected by such material, and they should not be put to the burden of trying to do so. Instead, Licensee Petitioners, who are in the best position to know when they relied on material outside the record, should remedy their error by submitting amended briefs.

Conclusion

For the foregoing reasons, this Court should strike all material from outside the record from the briefs of Licensee Petitioners, and order them to submit amended versions of their briefs from which all such material, all references to it, and any text or argument based on such references have been removed.

Respectfully submitted,

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July 18, 2003

CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served two copies of the foregoing Motion to Strike Briefs of Certain Petitioners Relying on Materials and Factual Allegations Outside the Record of the Proceeding, this 18th day of July, 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 July 18 by email, and two copies will be hand-delivered on July 21.