Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2005-1 CRB DTRA (Webcasting II)

IBS'S COMMENTS ON JUDGES' PROPOSAL TO CONDUCT PAPER HEARING ON REMAND

In its January 10 Order, the Copyright Royalty Judges propose to conduct the remand in this proceeding by engaging in "a *de novo* review of the record relevant to the issue for determination in this proceeding, *viz.*, the propriety of the $500 minimum fee."[1] IBS respectfully submits that proceeding in that way is unlawful for two reasons. First, the proposal would improperly delegate the Copyright Royalty Judges' authority to hold hearings to judges who have not been properly appointed as Copyright Royalty Judges. Second, it would not cure the Appointments Clause violation identified by the D.C. Circuit in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012). Finally, it bears emphasis that however the Board proceeds, the Board should not impose a $500 minimum fee on small and very small noncommercial webcasters. As was true in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 767 (D.C. Cir. 2009), there simply is not sufficient evidence in the record to sustain such a fee.

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[1] Notice of Intent to Conduct Paper Proceeding on Remand and Solicitation of Comments from Parties at 3 (January 10, 2014).

ARGUMENT

I. THE PROPOSAL UNLAWFULLY DELEGATES AUTHORITY TO CONDUCT HEARINGS.

In passing the Copyright Royalty and Distribution Reform Act of 2004, Congress created the position of the Copyright Royalty Judge and authorized the Copyright Royalty Judges to issue rate determinations such as the ones at issue in this proceeding. In doing so, Congress made clear that it intended for the same people who would be making the rate determinations to preside over the hearings at which any evidence would be heard: "The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc."[2] Although Congress permitted the Chief Copyright Royalty Judge to "designate a Copyright Royalty Judge to preside individually over" certain "collateral and administrative proceedings" and over other certain limited other types of hearings, even in that case the statute requires that a properly appointed Copyright Royalty Judges preside over the hearing.[3]

Congress required the Copyright Royalty Judges to "preside over hearings in proceedings under this chapter en banc" for a reason—because it intended for the people who were legally responsible for determining rates to fully participate in any live hearings—*i.e.*, to have the opportunity to ask questions and observe testimony, to make decisions about the admissibility of evidence, and to otherwise direct the flow of the proceedings. Congress plainly prohibited Copyright Royalty Judges from delegating the job of holding hearings to another administrative law judge—even if the Copyright Royalty Judges were to review that judge's findings before issuing a final determination.

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2 17 U.S.C. § 803(a)(2).

3 *Id.*

But the Board's present proposal would do essentially that. It would effectively delegate the authority to hold and preside at hearings to individuals who were not validly appointed at the time they held the hearings.

It is true, of course, that the Board has authority to conduct paper hearings under 17 U.S.C. § 803(b)(5). IBS does not believe that paper hearings are appropriate in this case, as explained in previous filings. Nevertheless, to the extent that the Board now wishes to hold paper hearings rather than live testimony, it should give IBS the opportunity to submit a written direct statement in lieu of the evidence that it presented at the prior hearings. 17 U.S.C. § 803(b)(5).

II. THE PROPOSAL WOULD NOT CURE THE APPOINTMENTS CLAUSE VIOLATION IDENTIFIED BY THE D.C. CIRCUIT.

As IBS has explained in its prior filings on the issue, which are incorporated by reference, the proposal also would not cure the Appointments Clause violation identified by the D.C. Circuit.[4] The remand was necessary because the judges who conducted the prior proceedings were not appointed in accordance with the Constitution. That defect should be presumed to have affected the Board's decisions.[5] The only cure for such a problem is for a properly appointed panel to hold a new proceeding to examine the issues afresh.

Although the Board proposes to conduct a "*de novo* review" of the record created by the prior Board, such a review is not an adequate substitute for attending hearings, hearing live testimony, and making truly independent evidentiary decisions. The prior panel heard days of

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[4] *See* IBS's Comments Regarding Judges' Notice of Intention to Conduct Paper Hearings, Docket No. 2009-1 CRB DTRA (filed Sep. 27, 2013).

[5] *See Intercollegiate Broad. Sys., Inc. II*, 684 F.3d at 1342; *cf. Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (noting that factors like "whether the Commission is independent of the President because he cannot remove the commissioners . . . have some impact (even though the extent of which may be impossible to measure) on how the [Federal Election] Commission decides matters before it.").

live testimony and had the opportunity to evaluate the demeanor of the witnesses and to ask questions of its own. Proceeding solely on a written record deprived the Board of these opportunities and led the Board to give undue deference to the decisions of the prior panel, which had the benefit of questioning and evaluating witnesses firsthand.

CONCLUSION

For these reasons, the Board should either conduct further live hearings or allow the parties to submit further written testimony.

Respectfully submitted,

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