

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. 2009-1 CRB
(Webcasting III)

**IBS'S COMMENTS REGARDING JUDGES' NOTICE OF INTENTION
TO CONDUCT PAPER HEARINGS**

In its September 17, 2013 Order, the Board gave notice that on remand it will conduct “only a paper proceeding, consisting of a review of the existing record in this proceeding, and then issuing a determination at the conclusion of that review.” Order at 9. For the reasons stated previously,¹ IBS continues to object to the Board’s proposal merely to *review* the record created by the prior Board, rather than conduct additional proceedings. As IBS has explained, if the Board chooses to review a paper record of the live testimony that was presented to the prior Board, it will essentially put itself in the position of an appellate tribunal, reviewing the prior Board’s findings for clear error, rather than reaching its own independent conclusions. The Board will also abdicate its duty to hear evidence that the prior Board may have improperly excluded. Such a procedure will not cure the constitutional violation identified by the D.C. Circuit.

The Board justifies its decision to review the prior proceedings by a statutory provision authorizing it “to determine issues on the basis of the filing of the written direct statement by the participant, the response by any opposing participant, and one additional response by each such

¹ See IBS’s Proposal for the Conduct of Remand and Supporting Memorandum of Law (filed Aug. 26, 2013); IBS’s Response to CBI’s Proposal for the Conduct of Remand (filed Sep. 3, 2013).

participant.” 17 U.S.C § 803(b)(5). But this provision nowhere authorizes the Board to make determinations based upon transcripts of live testimony presented to a *different* panel. On the contrary, Congress required that the “Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc.” 17 U.S.C. § 803(a)(2). This provision is inconsistent with the Board’s proposal to make a determination based upon hearings at which someone other than the ultimate decision makers presided.

The Board asks the parties to identify “*specific* examples where it believes the outcome of the original proceeding turned on elements, such as witness demeanor, that are not readily determined from a review of the written record.” Order at 9. IBS respectfully submits that the prior panel’s factual findings were *all* unavoidably influenced by its assessment of witness credibility, and as participants in multiple live hearings, the judges inevitably based these credibility determinations upon their assessments of witness’s demeanor. The Board asks for specific examples, but of course, it is impossible to get into the heads of the prior judges to determine the subtle ways in which witness credibility consciously or unconsciously influenced their thinking.

In any event, the Board did not attempt to hide the fact that its determination was influenced by credibility determinations. For example, it rejected IBS’s objection to the minimum fee proposed by SoundExchange and CBI because it found that “IBS has not presented any *credible* testimony that the agreement is unreasonable.”² Similarly, the Board excluded the rebuttal testimony of IBS’s Chief Operating Officer Fritz Kass because, based upon his demeanor at the hearing, it determined that he “did not appear to know what was in his testimony.” 76 Fed. Reg. at 13,041.

² 76 Fed. Reg. 13,026-01 at 13,039 (emphasis added).

These credibility assessments unavoidably tainted the Board's assessments about Mr. Kass's testimony as a whole and seemingly led the Board to disregard Mr. Kass's testimony on a variety of points—both large and small. For example, Mr. Kass testified that there are approximately 1,500 student-staffed webcasting operations affiliated with academic institutions and that “IBS is the largest organization representing such stations” with a membership of “over 1,000 such stations.”³ Yet the Board chose to completely disregard Mr. Kass's testimony, finding that IBS had “never provided any evidence to demonstrate this is true” and claiming that “IBS has never revealed to the Judges how many members it has, let alone their identities.”⁴

More broadly, however, the Board's entire decision to apply the same \$500 minimum fee to *all* webcasters amounted to a determination about the credibility of Mr. Kass's testimony in comparison to that of SoundExchange's Chief Operating Officer, Barrie Kessler. Mr. Kass made clear that a \$500 minimum fee would not prevail in the market because it was beyond the financial means of numerous “small” and “very small” broadcasters.⁵ Yet the Board chose to reject this testimony as insufficiently detailed in favor of the even less detailed testimony of Ms. Kessler,⁶ who testified that SoundExchange would not negotiate a fee below \$500 because its costs of administering a license averaged \$825—even though Ms. Kessler conceded that the costs of administering some licenses were below that number and presented no evidence of SoundExchange's actual costs for administering the license of a very small noncommercial webcaster.⁷

³ Testimony of Frederick J. Kass (IBS Ex. 4) at ¶ 6.

⁴ 76 Fed. Reg. at 13,039 n.18.

⁵ *See, e.g.*, Testimony of Frederick J. Kass (IBS Ex. 4) at ¶ 9 (noting that some stations have budgets as small as \$250); 76 Fed. Reg. at 13,040 (quoting Mr. Kass).


⁶ 76 Fed. Reg. at 13,040.

⁷ *See* Hearing Tr. Volume III at 525 (Apr. 21, 2010).

If, despite IBS's objections, the Board decides to hold paper hearings, IBS respectfully requests the opportunity to supplement the written record. And regardless of whether the Board allows the parties to supplement the written record, IBS respectfully requests that the Board allow the parties to submit legal briefs to guide the Board in its review of the record. If the Board simply reviews the prior briefing in this case without the benefit of additional submissions from the parties, it will necessarily waste time on questions that may no longer be at issue, and it may miss issues that will be raised on appeal.

Respectfully submitted,

September 27, 2013


Christopher J. Wright (D.C. Bar No. 367384)
Mark D. Davis (D.C. Bar No. 987597)
Jared P. Marx (D.C. Bar No. 1008934)

WILTSHIRE & GRANNIS LLP
1200 18th St., NW
Suite 1200
Washington, DC 20036
(202) 730-1300
cwright@wiltshiregrannis.com

Of Counsel: William Malone
9117 Vendome Drive
West Bethesda, MD 20817
(301) 365-1175

Counsel for Intercollegiate Broadcasting System

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, copies of the foregoing were sent via electronic mail, with a copy by First Class Mail, to the following:

Ara Hovanesian
Abraham Yacobian
Angus MacDonald
HOVANESIAN & HOVANESIAN
301 E. Colorado Blvd. Suite 514
Pasadena, CA 91101
hovanesian@earthlink.com
P) 626-795-0247
F) 626-795-8900

Counsel to LIVE365

David D. Oxford
Adam S. Caldwell
Ronald G. London
DAVIS WRIGHT & TREMAINE LLP
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
davidoxenford@dwt.com
adamcaldwell@dwt.com
ronaldlondon@dwt.com
P) 202-973-4256
F) 202-973-4499

Counsel to LIVE365

William B. Colitre
ROYALTY LOGIC, LLC
21122 Erwin Street
Woodland Hills, CA 91367
Bcolitre@RoyaltyLogic.com
P) 818-955-8900
F) 818-558-3484

Michael Huppe
Sound Exchange, Inc.
1121 14th Street, NW, Suite 700
Washington, DC 20005
mhuppe@SOUNDEXCHANGE.COM
P) 202-640-5858
F) 202-640-5883

Counsel to SoundExchange

David A. Handzo
Michael DeSanctis
Jared Freddman
Steven Englund
JENNER & BLOCK LLP
733 10th Street, N.W., 10th Floor
Washington, DC 20001
dhandzo@jenner.com
mdesanctis@jenner.com
jfreedman@jenner.com
senglund@jenner.com
P) 202-639-6000
F) 202-639-6066

Counsel to SoundExchange

Catherine Gellis
CONSTANTINE/CANNON LLP
P.O. Box 2477
Sausalito, CA 94966
cbi@cathygellis.com
P) 202-642-2849

Counsel for College Broadcasters, Inc.

Kenneth L. Steinthal
WEIL GOTSHAL & MANGES, LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Kenneth.steinthal@weil.com
P) 650-802-3100
F) 650-802-3100

Counsel for Yahoo!, Inc.

Brandon Casci
LOUDCITY LLC
197 Highland Avenue #1
Sommerville, MA 02143
brandon@loudcity.net
brandon.casci@gmail.com

Wendy Halley
2700 Pennsylvania Avenue
Santa Monica, CA 90404
whalley@yahoo-inc.com
P) 310-526-3411
F) 310-526-4400

Counsel for Yahoo!, Inc.

Suzanne Head
Associate General Counsel
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036
shead@nab.org
P) 202-429-5430



Jared P. Marx