UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
Digital Performance Right in Sound Recordings and Ephemeral Recordings	**Docket No. 2009-1 CRB (Webcasting III)**

ORDER DENYING MOTION FOR REHEARING

On July 10, 2013, the Copyright Royalty Judges (Judges) issued a Determination after Remand of Rates and Terms for Royalty Years 2011-2015 in this matter (Initial Determination). Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. Part 353, Intercollegiate Broadcasting System (IBS) filed a motion requesting rehearing (Motion). The Judges now deny that Motion.

The standard for consideration of motions for rehearing is set forth in 17 U.S.C. §803(c)(2)(A), which states that the Judges "may, *in exceptional cases,* upon a motion of a participant in a proceeding ... order a rehearing after the determination in the proceeding is issued ... on such matters as the Copyright Royalty Judges determine to be appropriate." *Id.* (emphasis added). In such "exceptional cases," the movant is required to show that an aspect of the determination may be erroneous. 37 C.F.R. § 353.1. In order to demonstrate that an aspect of the determination may be erroneous, the movant must show that the challenged aspect of the determination is "without evidentiary support in the record or contrary to legal requirements." 37 C.F.R. § 353.2.

Accordingly, rehearing motions should be granted only when (*1*) there has been an intervening change in controlling law; (*2*) new evidence (*i.e.*, evidence that was not available to the moving party while the record was open) is available; or (*3*) there is a need to correct a clear error or prevent manifest injustice. *Order Denying Motions for Rehearing*, Docket No. 2011-1 CRB PSS/Satellite II (January 30, 2013). IBS's Motion does not allege any intervening change in the law or new evidence, so it must necessarily rest on the thirdcriterion.

In applying these standards previously, the Judges have found that rehearing motions "must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered ... by the Board." *Order Denying Motion for Rehearing*, Docket No. 2006-1 CRB DSTRA, at 1 (January 8, 2008) (quoting *Order Denying SoundExchange's Motion to Reconsider the Board's Order Requiring, in Part, the Production of Certain Income Tax Returns,* Docket No. 2005-1 CRB DTRA (May 3, 2006)); *Order Denying Motions for Rehearing*, Docket No. 2011-1 CRB PSS/Satellite II (January 30, 2013). This "strict standard" is

consonant with the Judges' statutory obligation to limit rehearings to "exceptional cases." *Cf. Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D.D.C. 2002).

IBS asserts that a rehearing is warranted because the Judges:

1. Improperly delegated their authority to hold hearings;
2. Failed to establish minimum fees that appropriately distinguish among types of webcasters, as required by statute; and
3. Failed to cure the Appointments Clause violation identified by the DC Circuit in *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Board,* 684 F.3d 1332, 1342 (D.C. Cir. 2012), *cert. denied,* 133 S. Ct. 2735 (2013).

Motion at 1. The Judges consider each of the asserted errors as follows.

Improper Delegation

IBS contends that, by confining its deliberations to the record developed in evidentiary hearings presided over by an earlier panel of Judges, the current panel of Judges improperly delegated responsibility for holding hearings. This conclusion rests on three assertions that the Judges will address in turn.

1. The Judges' decision to reach its determination based on the record that the parties developed in hearings presided over by an earlier panel of Judges constitutes a delegation of authority to that earlier panel. Motion at 2-3.

This assertion confuses "delegation" with "succession." This is not a case where the Judges delegated the job of holding hearings "to a subordinate administrative law judge." *Id.* at 2. The current Judges succeeded to the positions of the earlier Judges and picked up the process where those earlier Judges left off.

The following hypothetical illustrates the weakness of IBS's assertion. Suppose the Initial Determination had been rendered, not by the current panel of Judges, but by the original panel after the Librarian of Congress reappointed the Judges as at-will employees. By IBS's reasoning, that panel's decision to render a determination based on the existing record would have constituted a delegation of authority—to themselves.

The Judges reject IBS's forced analogy. The Judges did not delegate anything to anyone.

2. The purported delegation was improper because the earlier panel of Judges was "not validly appointed at the time" it held hearings and issued the original Determination. Motion at 2 (quoting Initial Determination at 6).

Notwithstanding the judicial finding that the appointment of the prior panel had violated the Appointments Clause, the *parties* to that hearing created the record. The parties had every opportunity to present evidence and argue the applicable law. The prior Judges' weighing of the

evidence and analysis of the law resulted in the original Determination that IBS challenged successfully. The current panel weighed and analyzed the record *de novo*.

IBS's second assertion appears to be substantively identical to its third argument—that the Judges failed to remedy the Appointments Clause violation by declining to hold new hearings. The Judges address this argument below.

3. The purported delegation was improper because "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." Motion at 1.

This assertion proceeds from an incorrect reading of the Copyright Act (Act). Section 803(a)(2) of the Act states "The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc." From this statement IBS derives the conclusion that "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." Motion at 1.

Section 803(a)(2) requires all three Judges to preside at hearings, and permits individual Judges to preside over other specified actions as the Chief Judge deems appropriate. The provision is concerned with the *number* of Judges required to carry out specific activities, not the *identity* of the individual Judges.[1] The Act contemplates the possibility of turnover among the individuals who serve as Copyright Royalty Judges every two years, *see* 17 U.S.C. § 802(c) (Judges appointed for staggered six-year terms, ensuring potential vacancies every two years), or less, *see* 17 U.S.C. § 802(d)(1) (Librarian authorized and directed to fill vacant judgeships expeditiously for remainder of unexpired term), even though rate and distribution proceedings have a timeline that often exceeds two years. Under IBS's theory, the Judges would have to abandon proceedings that are ready, or nearly ready, for a determination and hold new hearings whenever a new Judge is appointed to fill a vacancy. This would have a disastrous impact on the ability of the Judges to carry out the duties assigned to them by Congress within the timeframe that Congress established. In the absence of any specific Congressional directive that the individuals who render a determination must be the same individuals who presided over the hearings, the Judges will not read such an intent into the more general statutory language concerning the number of Judges who must preside at hearings.

Failure to Distinguish among Types of Webcasters

IBS contends that the Judges erred by failing to recognize and establish different minimum fees for the categories of webcasters that they proposed. IBS argues that the Act requires the Judges to distinguish among different types of webcasters, and that the record supports the distinctions they propose. While IBS's reading of the statute is sound, its reading of

[1] It is axiomatic that when the Judges carry out their responsibilities under the Act, they act in their institutional capacity and not their individual capacity. A decision of the Judges is a decision of the institution, not the individuals who happen to occupy the position at the time. In this way the Copyright Royalty Board is no different from any other agency of government.

the record is not. IBS did not introduce sufficient evidence to establish that the categories it proposed should be recognized by the Judges. IBS's Motion does not allege that any new evidence has come to light that would warrant reconsideration of the Judges' determination.

As the proponent for differential treatment for certain categories of webcasters, IBS bore the burden of proving that those categories "constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than" those adopted for other categories. *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order*, 72 FR 24084, 24097 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009) (*Web II*).

In its Motion, IBS first seeks to demonstrate that statements in the record concerning the educational nature of its members' activities and lack of any commercial motivation support adoption of its proposed categories of webcasters. These statements demonstrate the distinction between educational and non-educational webcasters as well as the distinction between commercial and noncommercial webcasters. Both distinctions are unnecessary since the Judges have recognized noncommercial webcasters and noncommercial educational webcasters as distinct categories in this proceeding. In addition, IBS's stress on the educational nature of its members' activities is irrelevant, since an educational nature is not a distinguishing characteristic of IBS's proposed categories. IBS's proposed categories are for "small" and "very small" noncommercial webcasters. *See* Initial Determination at 72-74 (describing IBS proposal). These categories would include noncommercial webcasters with no educational purpose or nature.

IBS then takes issue with the Judges' findings concerning affordability of the $500 minimum fee. IBS cites to one piece of record evidence—a statement by Captain Kass that "some IBS members have 'annual operating budgets of only $250.00 or less,'" Motion at 4 (footnote omitted)—as support for its contention that the $500 fee is beyond the reach of the webcasters in IBS's proposed categories. IBS then seeks to show that the evidence that the Judges cited in the Initial Determination was either refuted by this evidence, or irrelevant.

The cited testimony does little to assist IBS, even if the Judges accept such an imprecise statement as evidence. Critically, Captain Kass did not testify that any of those IBS members would fall into either of IBS's proposed categories of "small" and "very small" noncommercial webcasters (which are defined based on their ATH usage, not on the size of their operating budgets). Nor did IBS present any evidence as to how many IBS members had similarly small operating budgets. Nor did IBS disclose the basis for this statement. A single anecdotal reference to "some" webcasters with miniscule operating budgets is insufficient to demonstrate the existence of a "distinct segment of the noninteractive webcasting market . . . ." *Web II*, at 24097.

IBS's efforts to refute the evidence on affordability that the Judges cited are unavailing. Even if the Judges were to agree with IBS's arguments they would not be able to accept IBS's proposed categories. IBS has still failed to meet its burden of demonstrating that a $500 minimum fee is unaffordable to webcasters that fall within its proposed definitions for "small" and "very small" noncommercial webcasters.

IBS makes an additional argument in this context that appears to be misplaced. IBS argues that the Judges relied improperly on the agreement between College Broadcasters Inc. (CBI) and SoundExchange (CBI/SoundExchange Agreement) and the testimony of Barrie Kessler as support for the $500 minimum fee. This evidence does not relate to the Judge's rejection of IBS's proposed categories of webcasters. As discussed above and at length in the Initial Determination, the Judges rejected IBS's proposal because of the paucity of supporting evidence in IBS's case. The Judges cited the CBI/SoundExchange Agreement and the testimony of Barrie Kessler as evidence that supports *SoundExchange's* proposed rate structure for noncommercial webcasters.

Failure to Cure Appointments Clause Violation

IBS contends that "[t]he only cure for" the Appointments Clause Violation identified by the D.C. Circuit "is for a properly appointed panel to reexamine the issues afresh." Motion at 6. That is precisely what has happened. The current panel of Judges, each of whom was appointed in accordance with the D.C. Circuit's decision, conducted a thorough review of the entire record in this proceeding, including all of the parties' written and oral testimony. The Judges then rendered the Initial Determination based on that fresh review of the evidence.

Nevertheless, IBS states that the Judges' review of the record was "not an adequate substitute for attending hearings, hearing live testimony, and making truly independent evidentiary decisions." *Id.* at 7. In essence, IBS's position is that the only way to cure the Appointments Clause violation would have been for the Judges to hold entirely new hearings.

The Judges addressed this contention in their September 17, 2013 Notice of Intention to Conduct Paper Proceeding on Remand (Notice). The Judges concluded that new hearings are unnecessary under applicable D.C. Circuit precedent: "As the D.C. Circuit decisions in *Legi-Tech*[2] and *Doolin*[3] demonstrate, a complete repetition of the adjudicatory process is not required to remedy the constitutional violation that resulted in a remand of the instant proceeding."

In addition, the Judges point out (as they did in the Notice) that the Act and the Judges' rules grant the Judges discretion to conduct proceedings on the papers alone, without holding evidentiary hearings at all. 17 U.S.C. § 803(b)(5); 37 C.F .R. § 351.3(c). There is no basis to conclude that the Judges lack this same discretion in a remand proceeding.[4]

At bottom, IBS's Motion rehashes arguments that IBS advanced prior to the Initial Determination, and that the Judges considered and rejected in the Notice. The Judges reject IBS's arguments again for the reasons set forth in the Notice.

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[2] *FEC v. Legi-Tech, Inc.,* 75 F.3d 704 (D.C. Cir. 1996).

[3] *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision,* 139 F.3d 203 (D.C. Cir. 1998).

[4] Apart from 37 C.F.R. § 351.15, the Act and the Judges' rules are silent as to the conduct of remand proceedings. The Judges, therefore, apply the statutory provisions and rules governing proceedings in general to the extent that they are applicable in the circumstances of a particular remand proceeding, taking into consideration the proposals submitted by the parties under section 351.15 of the rules.

The Judges understand that, given the paucity of evidence in the existing record for IBS's rate proposal, IBS would prefer a new hearing. As we stated in the Notice, however, doing so "would be neither fair, nor efficient, nor economical . . . ." Notice, at 7-8. The Judges were not required by the Act, the Judges' rules or D.C. Circuit precedent to hold new hearings. To the contrary, when, as in this case, the Judges find no need for evidentiary hearings, the Act directs that paper proceedings "shall" be utilized. 17 U.S.C. § 803(b)(5)(A). The Judges' decision to render a determination without holding new hearings, therefore, is not a basis for granting a rehearing.

Conclusion

For the foregoing reasons, the Judges conclude that none of IBS's arguments demonstrate that the Initial Determination was erroneous and that the instant proceeding presents any exceptional circumstances which would justify a rehearing. Accordingly, IBS's Motion is **DENIED.**

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

David R. Strickler
Copyright Royalty Judge

Jesse M. Feder
Copyright Royalty Judge

Dated: February 4, 2014