

**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)

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**NOTICE OF INTENTION TO CONDUCT  
PAPER PROCEEDING ON REMAND  
AND  
SOLICITATION OF COMMENTS FROM THE PARTIES**

**Background**

On July 6, 2012, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruled on the appeal of the captioned matter filed by Intercollegiate Broadcasting System, Inc. (IBS), determining that the portion of the Copyright Act dealing with appointment of Copyright Royalty Judges (Judges) violated the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012). The D.C. Circuit dictated a statutory remedy, *id.* at 1340-41, and the Librarian of Congress reappointed the Judges under the statute as modified by the court. The D.C. Circuit did not rule on the merits of the issues raised by IBS on appeal, but remanded the Judges' final determination, *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order*, Docket No. 2009-1 CRB Webcasting

III, 76 FR 13026 (Mar. 9, 2011) (Final Determination), for further action by the re-appointed Judges. *Intercollegiate Broad. Sys.*, 684 F.3d at 1342.

IBS filed a petition seeking a writ of *certiorari* in the United States Supreme Court, which the Supreme Court denied. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 133 S. Ct. 2735 (2013).

In accordance with 37 C.F.R. § 351.15, on July 26, 2013, the Copyright Royalty Judges (Judges) issued an Order for Further Briefing directing the parties to submit proposals and substantive briefing on the legal issues relating to the resolution of the remand.<sup>1</sup> IBS and SoundExchange filed their respective proposals for conduct of the remand and supporting legal memoranda on August 26, 2013. On September 3, 2013, SoundExchange and College Broadcasters, Inc. (CBI) filed responses to the IBS proposal, and IBS filed a response to CBI's October 22, 2012, filing.

### **Proposals of the Parties**

SoundExchange's initial proposal was for the Judges to reinstate the Judges' Final Determination in the captioned matter expeditiously and without further proceedings. *SoundExchange's Response to July 26, 2013 Order for Further Briefing*, Docket No. 2009-1 CRB Webcasting III, at 2 (Aug. 26, 2013); *SoundExchange's Motion Concerning the Conduct of Proceedings on Remand*, Docket No. 2009-1 CRB Webcasting III, at 5 (Oct. 22, 2012) (SoundExchange Proposal).

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<sup>1</sup> In accordance with 37 C.F.R. § 351.15, on October 22, 2012, before the petition for *certiorari*, SoundExchange provided the Judges with a motion concerning the conduct and schedule of the resolution of the remand. IBS opposed the motion. CBI requested that the Judges reaffirm adoption of the settlement CBI reached with SoundExchange, which settlement was incorporated into the Judges' Final Determination now remanded to the Judges. Apart from SoundExchange, before the petition for *certiorari*, no party submitted a proposal for proceedings under 37 C.F.R. § 351.15.

In its response to the IBS proposal, SoundExchange modified (or perhaps clarified) its proposal. Rather than seeking what would amount to summary ratification of the Final Determination, SoundExchange proposed that the Judges “decide the remaining Webcasting issues on the substantial existing record, and . . . reaffirm their prior determination.” *SoundExchange’s Response to IBS’ Proposal for the Conduct of Remand*, Docket No. 2009-1 CRB Webcasting III, at 2 (Sept. 3, 2013). In effect, SoundExchange now proposes that the Judges conduct a paper proceeding, confined to the existing record, and reissue the Final Determination on that basis.

IBS, by contrast, proposes that the Judges allow parties to submit additional written direct statements, conduct additional discovery, hold further hearings and rebuttal proceedings, and allow the parties to submit proposed findings of fact and conclusions of law at the close of the hearings.<sup>2</sup> *IBS’s Proposal for the Conduct of Remand and Supporting Memorandum of Law*, Docket No. 2009-1 CRB Webcasting III, at 1 (Aug. 26, 2013) (IBS Proposal). In essence, IBS proposes (at least with regard to the matters it sought to have reversed on appeal) that the Judges conduct an entirely new proceeding on remand.

CBI, both in its October 22, 2012, submission and in its September 3, 2013, response to the IBS proposal, proposed that the Judges summarily readopt the settlement that it reached with SoundExchange. *College Broadcasters, Inc.’s Motion*

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<sup>2</sup> In addition, IBS proposes that the Judges hold this proceeding in abeyance until the D.C. Circuit remands the appeal in *Webcasting II*, so that the Judges may conduct a consolidated proceeding on the remands of *Webcasting II* and *Webcasting III*. The Judges will not delay this proceeding (which concerns rates and terms for a period that is more than half over) any longer in order to consolidate it with the proceeding in *Webcasting II* (which concerns rates and terms for a period that expired nearly three years ago). The Judges will consider the question of consolidation if and when the D.C. Circuit remands the *Webcasting II* Determination.

to Govern Remand Proceedings, Docket No. 2009-1 CRB Webcasting III, at 2 (Oct. 22, 2012); *College Broadcasters, Inc.'s Reply to Intercollegiate Broadcasting and SoundExchange's Responses to July 26, 2013 Order*, Docket No. 2009-1 CRB Webcasting III, at 2 (Sept. 3, 2013). In the latter filing, CBI expressly requests that the Judges bifurcate the proceedings on remand by readopting the CBI-SoundExchange settlement first, and addressing the matters raised by IBS thereafter. *Id.*

### **Discussion**

As a threshold matter the Judges must determine the scope of the matters that are before them in this remand proceeding. The only portion of the Final Determination that IBS challenged on appeal was the minimum fee for small and very small non-commercial webcasters.<sup>3</sup> However, in its decision the Court of Appeals stated that “we vacate and remand *the determination*,” not merely those portions challenged by IBS. *Intercollegiate Broad. Sys.*, 684 F.3d at 1342 (emphasis added). The Judges conclude, therefore, that the entire Final Determination in the captioned matter has been vacated by the D.C. Circuit and is before the Judges on remand.

While the D.C. Circuit vacated and remanded the entire Final Determination, it did not address any of IBS's arguments on the merits. There is nothing in the D.C. Circuit's opinion that intimates that any of the Judges' legal or factual determinations were in error or that the Final Determination suffered from any procedural defect (notwithstanding IBS's suggestions to the contrary, *see, e.g., IBS Proposal*, at 4

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<sup>3</sup> On remand IBS has also objected (apparently for the first time) to the \$100 “proxy fee” for those small and very small non-commercial webcasters that choose not to conduct census reporting – *i.e.*, reporting of every performance of sound recordings covered by the section 112 and 114 statutory licenses during the relevant reporting period. *IBS Proposal*, at 3 (Aug. 26, 2013).

("[t]he Court apparently thought it likely that the newly constituted Board would reach a different decision"). That leaves open the possibility that the Judges could, after an appropriate process, issue a new final determination that substantively makes the same findings and reaches the same conclusions, in whole or in part, as the prior Final Determination.. *See, e.g., FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) (upholding commission decision to ratify an earlier decision that had been rendered when the commission's composition was unconstitutional). The Judges are also free to reach completely different conclusions in their new final determination, again after an appropriate process.

The D.C. Circuit's opinion provides no guidance as to what constitutes an appropriate process under the circumstances. The Judges' rules merely require the parties to file written proposals for the conduct and schedule of the resolution of the remand. 37 C.F.R. § 351.15.

Unsurprisingly, the parties' positions differ sharply on what process should be conducted in the instant circumstances. SoundExchange argues that precedents from the D.C. Circuit and other Courts of Appeals demonstrate that the required process is minimal. *See, e.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). IBS distinguishes those cases, and argues that nothing short of new hearings would suffice for the Judges to reach a decision that is sufficiently independent from that reached by the Judges before the D.C. Circuit cured the

Appointments Clause violation. CBI argues that the Judges have no discretion to reject their settlement, and should readopt it summarily.

The cases cited by SoundExchange support neither a conclusion that the Judges may merely “rubber stamp” the Final Determination, nor (as IBS argues) a conclusion that a complete “do over” of the entire original process is required. *Free Enterprise Fund* did not involve actions taken to ratify a decision by an entity that had been found to be unconstitutional, and is therefore not on point. In the decisions under review in the NLRB cases cited by SoundExchange,<sup>4</sup> the NLRB acted as an appellate body, reviewing decisions by Administrative Law Judges. Those decisions are distinguishable from the instant proceeding in which the Judges conducted evidentiary hearings and acted as finders of fact.

By contrast, *Legi-Tech* and *Doolin* are both on point as they involve ratification by an entity or individual of an earlier action taken by an entity or individual whose authority was later determined to be deficient. In each case the later action was taken after substantive review of the record. In neither case did the process consist of going back to the beginning and repeating all of the administrative or adjudicatory steps that had been taken in the first instance. See *Legi-Tech*, 75 F.3d at 708-09; *Doolin*, 139 F.3d at 213-14 & n.11.

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<sup>4</sup> *NLRB v. St. George Warehouse, Inc.*, 645 F.3d 666 (3d Cir. 2011); *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475 (1<sup>st</sup> Cir. 2011); *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8<sup>th</sup> Cir. 2011); *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011). Each of these cases arose out of the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), which upheld a challenge to the NLRB’s authority to issue orders with only two members. The cases cited above each upheld later decisions by the NLRB (now comprised of an adequate number of members) to reinstate decisions rendered when it had only two members. The decisions are silent as to the procedures adopted by the NLRB to review their earlier decisions before reinstating them.

In light of the applicable precedent, and considering that none of the current Judges was involved in issuing the Final Determination, the Judges conclude that IBS is entitled to an independent review of the written record in this proceeding by a constitutionally-appointed panel of Judges. Since the D.C. Circuit remanded the entire Final Determination, this review shall extend to the entire record.

The Judges are not persuaded, however, by IBS's arguments that new evidentiary hearings are necessary. As the D.C. Circuit decisions in *Legi-Tech* and *Doolin* 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. IBS argues that the Judges who rendered the original Determination excluded relevant evidence and had an opportunity to observe and evaluate the demeanor of the witnesses. IBS fails, however, to point to any instance of an exclusion of relevant evidence that affected the outcome of the proceeding, or to any portion of the Final Determination that turned on witness credibility. Moreover, the IBS contention that hearings are required is inconsistent with the Copyright Act and the Judge's rules, both of which specifically permit the Judges to conduct proceedings on the papers alone, without any evidentiary hearing. 17 U.S.C. § 803(b)(5); 37 C.F.R. § 351.3(c). There is no basis to conclude that remand proceedings are excluded from these provisions.

The Judges conclude that no party has provided any specific reason why it is necessary to reopen the record and take further evidence. Each party has had ample opportunity to present its case. It appears to the Judges that it would be neither fair,

nor efficient, nor economical to proceed as proposed by IBS with additional submissions, discovery, and evidentiary hearings.

Accordingly, in light of the vacatur of the entire decision in Web III by the D.C. Circuit, it is the intention of the Judges to confine their review to the voluminous existing record in Web III that was created by all of the parties, including IBS, with regard to all issues.

With regard to adoption of settlement agreements in Webcasting III, the Judges propose to reconsider one and re-adopt the other. CBI has pointed out correctly that under 17 U.S.C. § 801(b)(7)(A) the Judges are directed to adopt such a settlement if no participant objects to it. They argue, therefore, that the Judges should readopt the CBI-SoundExchange settlement summarily because the Judges' original adoption of the settlement was not discretionary. However, IBS did, in fact, object to the settlement. *Final Determination*, 76 FR at 13039. As part of the Final Determination, the Judges concluded that the objection was not proper and adopted the settlement. *Id.* The Judges will consider IBS' objection as part of their review of the overall record.

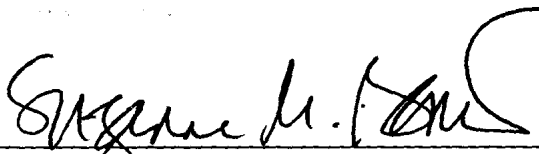
By contrast, the Judges received no objection to the other settlement agreement that they adopted in the Final Determination – that between SoundExchange and NAB – and are persuaded that no purpose would be served by subjecting the SoundExchange-NAB settlement to further review. The Judges will readopt the SoundExchange-NAB agreement as part of the determination on remand.



## Conclusion and Order

There is no reason in the present record to preclude the Judges from conducting 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. There is also no reason in the present record to allow further discovery or evidentiary hearings. However, to the extent that any party disagrees, that party should identify in its comments to this notice *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.

In accordance with 17 U.S.C. § 803(b)(5)<sup>5</sup>, the Judges hereby solicit comments from all parties on the Judges' notice of intention to conduct paper proceedings. Any party that wishes to file such comments is ordered to do so by 5:00 pm on September 27, 2013. Except for such comments, no further submissions will be accepted unless, after consideration of the comments, the Judges issue a subsequent Order allowing further submissions.

  
Suzanne M. Barnett  
Chief Copyright Royalty Judge

DATED: September 17, 2013

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<sup>5</sup> Section 803(b)(5)(A) requires paper proceedings in cases in which there is no genuine issue of material fact. Section 803(b)(5)(B) permits paper proceedings in circumstances the Judges consider appropriate.