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 MOTION FOR REHEARING

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. §§ 353.1-5, Intercollegiate Broadcasting System, Inc., ("IBS") moves the Board for a rehearing on the Board's Initial Determination in this proceeding.[1] IBS respectfully submits that rehearing is warranted because the Board (1) improperly delegated its authority to hold hearings to judges who had not been properly appointed as Copyright Royalty Judges, (2) failed to establish minimum fees that appropriately distinguish among types of webcasters, as required by statute, and which were supported by record evidence, and (3) failed to cure the Appointments Clause violation identified by the D.C. Circuit.

ARGUMENT

I. THE BOARD UNLAWFULLY DELEGATED 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

[1] *Determination After Remand of Rates and Terms for Royalty Years 2011-2015*, Dkt. 2009-1 CRB (Jan. 9, 2014) ("Initial Determination).

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 one of the Copyright Royalty Judges who will actually be making the rate determination to proceed 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 a subordinate administrative law judge—even if the Copyright Royalty Judges were to review that judge's findings before issuing a final determination.

But that is essentially what the Board has done here. Although the Initial Determination repeatedly suggests that "the Judges convened the hearing" and that "[t]he Judges heard evidence for seven days in April 2010 in the direct case and three days in July 2010 in the rebuttal case,"[4] that is not actually what happened. As the Initial Determination concedes, the hearings held in 2010 took place before a panel of judges who "were not validly appointed at the time they issued the challenged determination" and held the hearings.[5] The current Copyright Royalty Judges—who have been legally appointed—then chose to issue a determination "based upon a *de novo*

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2 17 U.S.C. § 803(a)(2).

3 *Id.*

4 Initial Determination at 4.

5 Initial Determiation at 6; *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1342 (D.C. Cir. 2012).

review of the substantial record"[6] created by a panel of judges who had not been properly appointed as Copyright Royalty Judges. In doing so, the Copyright Royalty Judges improperly delegated their authority to hold hearings.

The Board appears to believe that this delegation was permissible because it 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 must 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). The Board cannot, however, do what it has chosen to do here—delegate the power to hold hearings to a group that has not been legally appointed as Copyright Royalty Judges and then simply exercise a review function over the hearings conducted by that group.

II. THE BOARD IMPROPERLY FAILED TO DISTINGUISH AMONG TYPES OF BROADCASTERS IN ESTABLISHING A MINIMUM RATE AND RELIED ON INSUFFICIENT EVIDENCE IN IMPOSING A $500 MINIMUM FEE ON SMALL AND VERY SMALL WEBCASTERS.

By statute, the Judges are required to "distinguish among the different types of eligible nonsubscription transmission services then in operation" and to "include a minimum fee for *each such type of service*, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings." 114(d)(2)(B) (emphasis added). IBS presented evidence that, unlike many noncommercial stations that operate full-time, whose purpose is to deliver recorded music as a product to listeners, and who rely on the statutory license for the bulk of their programming, a subset of its members is different.[7] Unlike these

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[6] Initial Determination at 7.

[7] IBS Proposed Findings of Fact and Conclusions of Law at 4-6 (citing record).

other noncommercial stations, who are essentially in the business of selling music to their listeners, this subset of stations operates solely for the purpose of educating student webcasters.[8] These stations often have only part-time and constantly changing staff; they frequently rely on the statutory license for only a small portion of their programming; and their average instantaneous listernship is small in comparison to other types of stations.[9]

The Initial Determination ignores this evidence, focusing largely on whether IBS members have the ability to pay a $500 minimum fee and whether $500 reasonably approximates the costs incurred by SoundExchange for administering the statutory license of small and very small webcasters. While these factors are no doubt among the relevant factors that the Board may consider, they actually cut against the conclusions reached in the Initial Determination.

First, although the Initial Determination claims there was no record evidence demonstrating that a certain subclass of noncommercial webcasters is unable to afford the minimum fee, this was incorrect. Fritz Kass testified that some IBS members have "annual operating budgets of only $250.00 or less."[10]

Second, the Initial Determination similarly asserts that "[t]he only testimony that mentions any specifics about the finances of smaller webcasters is a reference by Captain Kass to a survey that showed that IBS members had an annual operating budget of $9,000."[11] But this is wrong for the same reason.

Third, the Initial Determination also suggests that small and very small webcasters can afford a $500 minimum fee because "some of these entities" allegedly pay IBS close to $500

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8 Kass Testimony at ¶ 8.

9 Kass Testimony ¶¶ 10, 13; IBS Proposed Findings of Fact and Conclusion of Law at 4-6 (citing record).

10 Kass Testimony ¶ 9.

11 Initial Determination at 77.

annually to attend conferences.[12] Once again, however, IBS made clear that there was a large disparity among its members' ability to pay;[13] that *some* members who are not "small" or "very small" webcasters can afford to pay $500 is simply irrelevant.

Finally, the Initial Determination purports to reject IBS's testimony regarding a financial survey of its members under 37 C.F.R. § 351.10(e), which applies "[i]f studies or analyses are offered in evidence." IBS did not, however, offer the survey into evidence; it sought to introduce Mr. Kass's testimony about what the survey found. And while that testimony may have been hearsay, "Hearsay may be admitted to the extent deemed appropriate by the Copyright Royalty Judges." 37 C.F.R. § 351.10(a). If the Board intended to reject Mr. Kass's testimony because it was hearsay, it should have made that ruling on the record and given IBS an opportunity to introduce the survey itself.

While ignoring IBS's evidence, the Initial Determination relied on two pieces of evidence to support the $500 minimum fee for noncommercial webcasters. First, it relied on the agreement between College Broadcasters Inc. ("CBI") and SoundExchange.[14] Second, it relied on the testimony of SoundExchange's Chief Operating Officer, Barrie Kessler, who testified that the *average* cost of administering statutory licenses for *all* users was more than $500. Neither piece of evidence supports a minimum fee for small or very small broadcasters. First, there is no evidence that CBI members are small or very small webcasters of the sort at issue in this proceeding. On the contrary, IBS had always maintained that CBI's members have "significantly different characteristics from the small and very small noncommercial webcasters"

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[12] *Id.*

[13] IBS's Reply Findings and Conclusions ¶¶ 6-9 (quoting record).

[14] Initial Determination at 79.

at issue here.[15] Therefore, the agreement with CBI simply isn't probative of the willingness and ability of small or very small webcasters to pay.

Second, Ms. Kessler's testimony is similarly unhelpful. Although she testified that SoundExchange's *average* cost of processing licenses was more than $500, she conceded that this was only an average and that her estimate did not take into account the actual differences in the cost of processing the reports of different types of entities.[16] There was simply no evidence that *those entities*—some of whom have budgets of less than $500—would agree to pay such a fee for their *de minimus* use of sound recordings.

In short, the Initial Determination's decision to adopt a $500 minimum fee fails for the same reason that the D.C. Circuit struck down the $500 minimum fee in 2009: there simply isn't sufficient evidence to support it. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 767 (D.C. Cir. 2009).

III. THE INITIAL DETERMINATION DOES NOT CURE THE APPOINTMENTS CLAUSE VIOLATION IDENTIFIED BY THE D.C. CIRCUIT.

Finally, as IBS has explained in its prior filings on the issue, the Initial Determination does not cure the Appointments Clause violation identified by the D.C. Circuit.[17] The Court determined that the prior panel had been appointed through a process that was inconsistent with the Constitution, and those defects are presumed to have affected the Board's decisions.[18] The only cure for such a problem is for a properly appointed panel to reexamine the issues afresh.

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[15] IBS Proposed Findings of Fact and Conclusions of Law at 17.

[16] *See* III Kessler Tr. at 525.

[17] *See* IBS's Comments Regarding Judges' Notice of Intention to Conduct Paper Hearings (filed Sep. 27, 2013);.

[18] *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

Although the Initial Determination purports 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 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. Moreover, because the prior Board elected to exclude relevant evidence, the contents of the record are not complete. In short, merely evaluating the current record did not allow the Board to make a sufficiently independent decision.

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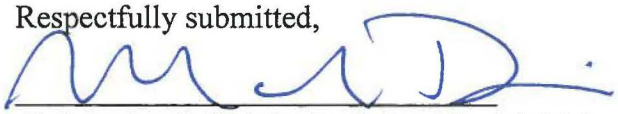
commissioners . . . have some impact (even though the extent of which may be impossible to measure) on how the [Federal Election] Commission decides matters before it.").

CONCLUSION

For these reasons, the Board should order a rehearing in this proceeding.

Respectfully submitted,



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