[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLLEGE BROADCASTERS, INC., Petitioner,	)	
v.	)	No. 09-1276
COPYRIGHT ROYALTY BOARD, Respondent.	)	

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Local Rule 27(g), respondent Copyright Royalty Board moves to dismiss the petition for review for lack of jurisdiction.

Petitioner College Broadcasters, Inc. ("CBI") petitions for review of a rule promulgated by the Copyright Royalty Judges[1] regarding the delivery and format of reports of use of sound recordings for the statutory licenses set forth in sections 112 and 114 of the Copyright Act. See Notice and Recordingkeeping for Use of Sound Recordings Under Statutory License, 74 Fed. Reg.

[1] The Copyright Act authorizes the Copyright Royalty Judges to perform a variety of administrative functions, chief among them the setting of terms and rates of royalty payments for various statutory copyright licenses. See generally 17 U.S.C. § 801(b). Respondent Copyright Royalty Board "is 'the institutional entity in the Library of Congress that ... house[s]' the Judges." Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, 574 F.3d 748, 752 (D.C. Cir. 2009) (per curiam) (quoting 37 C.F.R. § 301.1).

52,418 (Oct. 13, 2009); 17 U.S.C. §§ 112, 114. The purpose of the regulation is to establish recordkeeping requirements by which copyright owners may receive reasonable notice of the use of their sound recordings. 74 Fed. Reg. at 52,419. CBI contends that the rule unreasonably requires certain educational stations to report actual total performances on a monthly basis, rather than reporting sampled data on a quarterly basis. See Pet. for Review at 1-2; Petitioner's Nonbinding Statement of Issues at 1.

"Initial review [of agency decisions] occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." Watts v. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007). In this case, it does not appear that any statute authorizes this Court to review the regulation that CBI wishes to challenge. Congress has authorized this Court to engage in direct review of specified decisions of the Copyright Royalty Judges, but the regulation challenged by CBI does not appear to be among them.

The only provision that authorizes direct review of decisions of the Judges, and the only jurisdictional provision cited by CBI in its petition for review, is 17 U.S.C. § 803(d)(1). Section 803(d)(1) provides that "[a]ny determination of the Copyright Royalty Judges under subsection (c) [of section 803] may * * * be appealed" to this Court. In this case, the

challenged regulation is not itself a "determination * * * under subsection (c)," nor was it issued pursuant to subsection (c). Instead, the regulation was issued under section 114(f), which authorizes the Judges to establish notice and recordkeeping rules. See 17 U.S.C. § 114(f)(4)(A); 74 Fed. Reg. at 52,419 (citing section 114(f) as the basis for the regulation). Accordingly, the terms of section 803(d)(1) do not appear to authorize direct review of regulations issued under section 114(f).

In Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal, et al., 636 F.2d 531 (D.C. Cir. 1980), this Court determined that it had jurisdiction over a challenge to jukebox-related regulations promulgated by the Copyright Royalty Tribunal, a predecessor of the Copyright Royalty Judges. The statutory scheme before the Court in Amusement & Music Operators, however, was different from the one here. The applicable judicial review provision, then-section 810 of Title 17, referred to "[a]ny final decision of the Tribunal in a proceeding under section 801(b)." Id. at 261. Section 801(b), in turn, permitted the Tribunal "to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in section *** 116," the section under which the challenged regulation was issued. Id. This Court thus concluded that "[t]he statute in this matter incorporates section 116 regulations into the

Tribunal's section 801(b) powers," rendering section 810's jurisdictional grant applicable to the challenged regulation. Id.

In contrast, the current judicial review provision, section 803(d)(1), extends only to "determination[s] of the Copyright Royalty Judges" under section 803(c). 17 U.S.C. § 803(d)(1). Section 803(c) "determinations" are royalty rate and term determinations issued at the conclusion of the adversarial administrative proceedings set forth in section 803(a)-(b). See, e.g., id. § 803(c)(1) (The Judges "shall issue their determination in a proceeding not later than 11 months after the conclusion of the 21-day settlement conference period under subsection (b)(6)(C)(x)"); id. § 803(c)(2)(A) (authorizing the Judges to "order a rehearing" upon "motion of a participant in a proceeding under subsection (b)(2)"); id. § 803(c)(2)(C) (discussing participation by "opposing part[ies]" in rehearing). The challenged regulation did not arise out of the proceedings described in section 803, but is instead the product of notice and comment rulemaking under section 114(f)(4)(A).

Section 803(d)(1) therefore does not appear to extend judicial review to rules promulgated under section 114. Nor is the government aware of any other jurisdictional grant that would provide for direct review of the challenged regulation by this

Court. If the Court agrees, the petition must be dismissed for lack of jurisdiction.[2]

CONCLUSION

For the foregoing reasons, the petition should be dismissed for lack of jurisdiction.

Respectfully submitted,

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[2] Although there is no need for this Court to decide whether the challenged regulation would be subject to judicial review in a district court, as a matter of candor we note that district court jurisdiction over the present challenge is also open to question. See 5 U.S.C. § 702 (waiving sovereign immunity for actions against "an agency or an officer or employee thereof"); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985); Intercollegiate Broadcasting System, 574 F.3d at 755-56.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2009, a true and correct electronic copy of the foregoing motion was sent via electronic filing and email to the following counsel of record:

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