

[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.	)	
	)	
	)	
	)	

**REPLY IN SUPPORT OF GOVERNMENT'S MOTION TO DISMISS**

This Court has authority to directly review the final decision of a federal regulatory body only when a statute specifically grants it such jurisdiction. See Watts v. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007); Bombardier Corp. v. Nat'l R.R. Passenger Corp., 333 F.3d 250, 253 (D.C. Cir. 2003). In the present challenge, the only jurisdictional provision relied upon by petitioner College Broadcasters, Inc. ("CBI") is section 803(d)(1) of the Copyright Act, which provides for judicial review by this Court of "[a]ny determination of the Copyright Royalty Judges under subsection (c)" of section 803. 17 U.S.C. § 803(d)(1). As explained in the government's dismissal motion, the terms of this provision do not appear to vest this Court with jurisdiction in this case because the challenged regulation was not promulgated pursuant to section 803(c), but is instead the

product of notice and comment rulemaking under 17 U.S.C. § 114(f)(4)(A). See 74 Fed. Reg. 52,418, 52,419 (Oct. 13, 2009).

CBI's attempts to characterize the regulation as a section 803(c) determination fail because section 803(c) by its terms applies only to royalty rate and term determinations and distribution determinations issued through and at the conclusion of the adversarial administrative proceedings set forth in section 803(a)-(b). See, e.g., 17 U.S.C. § 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 notice and comment rulemaking authorized by 17 U.S.C. § 114(f)(4)(A) involves entirely different proceedings. See 74 Fed. Reg. at 52,418-52,420 (explaining that the promulgation of the challenged regulation was preceded by a Notice of Proposed Rulemaking and a comment period).

Although CBI is correct that the Copyright Royalty Judges could have established the challenged recordkeeping requirements as part of the proceedings described in section 803, it remains the case that the regulations were not issued in such a

proceeding, but instead were promulgated via notice and comment rulemaking under section 114(f)(4)(A). To the extent that CBI suggests that section 114(f)(4)(A) rulemaking must occur as part of the proceedings described in section 803, that suggestion is misplaced, for section 114(f)(4)(A) expressly states that "new regulations are promulgated under this subparagraph." 17 U.S.C. § 114(f)(4)(A) (emphasis added). In other words, section 114(f)(4)(A) constitutes a grant of rulemaking authority that is separate and independent from the authority to make royalty rate determinations under section 803(c).<sup>1</sup> While Congress could have chosen to vest this Court with jurisdiction over final agency action under both statutory provisions, and did not identify any reason for distinguishing between the two, the fact remains that section 803(d)(1)'s jurisdictional grant refers only to determinations under section 803(c).

The government has moved to dismiss the appeal not because it wishes to insulate the present regulation from judicial

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<sup>1</sup> CBI is mistaken when it suggests that granting this motion would allow to Judges to "make nearly all of [their] proceedings immune to appellate review." CBI Response at 8. Section 114(f)(4)(A) authorizes rulemaking only with respect to notice and recordkeeping requirements. Moreover, the Judges' actual practices provide no basis for the suggestion that they would engage in the gamesmanship envisioned by CBI. Indeed, since the inception of the Copyright Royalty Board in 2005, the Judges have only exercised their section 114(f)(4)(A) rulemaking authority twice, including promulgation of the challenged regulation. See 74 Fed. Reg. 52,418 (Oct. 13, 2009); 71 Fed. Reg. 59,010 (Oct. 6, 2006).

review, but rather because it is obligated to bring apparent jurisdictional defects to the attention of the Court. If the Court believes that the language of section 803(d)(1) can fairly be read to cover challenges to regulations promulgated under section 114(f)(4)(A), the appeal can and should go forward. Otherwise, however, the appeal must be dismissed.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of January, 2010, a true and correct electronic copy of the foregoing reply was sent via electronic filing and email to the following counsel of record:

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