

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

COLLEGE BROADCASTERS, INC.,

Petitioner,

v.

COPYRIGHT ROYALTY BOARD,

Respondent.

Appeal No. 09-1276

Petition for Review

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

I. Introduction

The Copyright Royalty Board ("CRB") recently promulgated recordkeeping requirements for users of the statutory licenses set forth in Sections 112 and 114 of the Copyright Act that negatively impact stations represented by Petitioner College Broadcasters, Inc. ("CBI"). *See* Final Rule, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 74 Fed. Reg. 52418 (Publication Date: October 13, 2009) (Effective Date: November 12, 2009) ("Final Rule"). CBI petitioned this Court to review this rule under Section 803(d)(1) in order to obtain appellate relief that would not be obtainable via any other avenue. Such an appeal meets the criteria of the statute because the recordkeeping requirements promulgated by the CRJs constitute a determination of a mandatory term of the statutory licenses. Review by this Court provides affected license users the only opportunity for redress of this unjustifiably onerous term. Jurisdiction by this

Court over this appeal is therefore statutorily proper and necessary, and thus this Court should deny the CRB's Motion to Dismiss for Lack of Jurisdiction.

II. Argument

- a. This Court has jurisdiction over this appeal because it is an appeal of a determination of a rate or term by the Copyright Royalty Board.
 - i. The Copyright Royalty Board is empowered only to make determinations of rates and terms.

The CRB is comprised of Copyright Royalty Judges ("CRJs"). Chapter 8 of the Copyright Act establishes the purpose of the CRJs and confers upon them the authority to "make *determinations* and adjustments of reasonable *terms* and rates of royalty payments as provided in Sections 112(e), 114, 115, 116, 118, 119, and 1004." 17 U.S.C. § 801(b)(1) (emphasis added); *see also* Copyright Royalty and Distribution Reform Act, H.R. 408, 108th Cong. at 22 (2004). No other subpart within that chapter addresses a function of the CRJs that pertains to Sections 112 or 114 of the Copyright Act.¹

Section 114(f)(4)(A) does give the CRJs the ability to "establish requirements by which copyright owners may receive reasonable notice of the use

¹ Other functions include making determinations pursuant to other sections, (see 17 U.S.C. Section 801(b)(2) regarding determinations for section 111), authorizations for distributions under other sections (see, e.g., 17 U.S.C. Section 801(b)(3)), accepting or rejecting royalty claims under other sections (see 17 U.S.C. Section 801(b)(4)), accepting or rejecting of rate adjustment petitions (see 17 U.S.C. Section 801(b)(5), making determinations of the status of digital audio devices (see 17 U.S.C. Section 801(b)(6)), adopting for statutory purposes rates and terms separately negotiated by parties affected by statutory licenses (see 17 U.S.C. Section 801(b)(7)), and performing other unenumerated duties as assigned by the Register of Copyrights within the Library of Congress when not otherwise engaged in their other duties (see 17 U.S.C. Section 801(b)(8)).

of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings." It is, however, silent as to the mode of establishing these requirements. They could have been established as part of a proceeding described in Section 803, and indeed, in the "Webcasting II" proceeding, the CRJs did address recordkeeping as part of their rate setting proceeding. *See* Final Determination of Rates and Terms, § V.C.4.d.i, Digital Performance Right in Sound Recordings and Ephemeral Recordings (Docket 2005-1 CRB DTRA) ("Webcasting II"). Section 114(f)(4)(A) thus should be read in light of the CRJs powers as established as part of Chapter 8, and not as a separate grant of authority to produce anything other than a "determination" of a "rate" or "term," especially in this case where the end result of the CRJs' recordkeeping rulemaking was, in fact, a "determination" of a "term" that is the very basis of the method used to calculate royalty payments by those performing sound recordings under 112 and 114.

1. The recordkeeping rulemaking is a determination.

In the case cited by the CRB, *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal, et al.*, 636 F.2d 531 (D.C. Cir. 1980), a rulemaking was found to be a determination by the Copyright Royalty Tribunal (an early predecessor to today's CRB). In that case the Tribunal had promulgated regulations pertaining to Section 116 of the copyright law then in place. Noting that "Section 801(b) permits the Tribunal ... 'to make determinations concerning

the adjustments of reasonable copyright royalty rates as provided in section 115 and 116," the court found that the regulations the Tribunal promulgated under Section 116 were inherently "incorporate[d]" into the Tribunal's 801(b) powers. *Amusement*, 636 F.2d at 533. Here, the current language of 801(b) parallels that of the version cited in *Amusement*, except it references the CRJs instead of the Tribunal, and in this case the rulemaking was pursuant to Section 114 instead of Section 116. Thus, in the instant case, where the CRJs promulgated regulations as a result of a rulemaking for Section 114, its power to do so must similarly be incorporated in the CRJs' current powers under Section 801(b) to make determinations.

Furthermore the CRJs' decision is structured like a determination. *See* Final Rule. Section 803(c)(3) says that "A determination of the Copyright Royalty Judges shall be supported by the written record and shall set forth findings of fact relied on by the Copyright Royalty Judges." 17 U.S.C. § 803(c)(3). Moreover, "[a]mong other *terms* adopted in a *determination*, the Copyright Royalty Judges may specify notice and recordkeeping requirements..." *Id.* (emphasis added). Here, the CRB sought evidence and made a determination of a term based upon it, albeit imperfectly.

2. Recordkeeping is a "term" of royalty payments.

Recordkeeping requirements are a "term" of the Section 112 and 114 statutory licenses and go hand-in-hand with the monetary rates that are set. A user

of the statutory licenses must consider both the monetary rate and the cost of complying with the recordkeeping requirement to calculate the cost of using the licenses because the user will be in breach of the license and subject to copyright infringement liability if they do not conform to the recordkeeping requirements promulgated by the CRB. *See* 37 C.F.R. § 380.1(b). The license user and the Collective can, however, reach an alternative arrangement governing recordkeeping when they reach alternative accords on the rates. The Small Webcaster Settlement Act of 2002 ("SWSA"), Pub. L. 107-321, 116 Stat. 2780 (2002), the Webcaster Settlement Act of 2008 ("WSA 2008"), Pub. L. 110-435, 122 Stat. 4974 (2008), and the Webcaster Settlement Act of 2009 ("WSA 2009"), Pub. L. 111-36, 123 Stat. 1926 (2009), each allowed for rate settlements outside the normal Chapter 8 proceedings to include recordkeeping rules as part of the their terms.²

ii. This Court has appellate review jurisdiction over determinations of rates and terms.

Because notice and recordkeeping requirements are terms of the statutory licenses under Sections 112 and 114, this Court has appellate jurisdiction arising

² CBI reached settlements under two of these acts (SWSA and WSA 2009) and incorporated recordkeeping rules in both. *See, e.g.*, the Joint Motion to Adopt Partial Settlement submitted by CBI and the [collective] SoundExchange under the Webcaster Settlement Act of 2009, Pub. L. No. 11-36, Exhibit B at § 380.1, available at <http://www.copyright.gov/fedreg/2009/74fr40614.pdf>.

from determinations of those requirements pursuant to Section 803(d), regardless of the procedure the CRJs chooses to use in making those determinations.³

As this Court confirmed in *Amusement*, determinations under then-section 801(b) are reviewable by this Court of Appeals. *Amusement*, 636 F.2d at 533. Today's Section 803(d) yields the same result, giving this Court jurisdiction over an appeal of a determination made by the CRJs under Section 803(c). 17 U.S.C. Sections 803(c) and (d). In the instant case, if the recordkeeping rulemaking is a valid promulgation by the CRJs it *must* constitute a determination because the CRJs would not have had the power to render anything else. See discussion at II.A.i, *supra*. Furthermore, this determination inherently addressed a term, the recordkeeping term, which could have also been addressed within the purview of the Webcaster II or other such 803 proceedings.

- b. Even if the recordkeeping rulemaking does not qualify as an appealable determination under 803(d), jurisdiction by this Court is still proper because Congress intended for affected participants to have an avenue for appeal.
 - i. When Congress amended the statute, it intended to give this Court appellate jurisdiction over the Copyright Royalty Board.

³ The CRB did not raise the appellate requirements of section 803(d)(1) in its motion. Nonetheless, CBI's appeal satisfies them. This appeal was timely made and by an aggrieved party pursuant to section 803(b)(2): one who had fully participated in establishing the record and who would be bound by the promulgated rule. In this case no filing fee was paid by CBI because the CRJs did not establish procedures within its rulemaking requiring one. However, CBI did pay to participate in the Webcaster II proceedings, where the recordkeeping term could have been established. That the CRJs spun the recordkeeping rulemaking off as a separate proceeding should not waive the appellate rights aggrieved parties such as CBI would have.

When Congress amended the Copyright Act in 2004 it purposefully chose this Court as the most appropriate venue for appellate review:

(1) Appeal. Subsection 803(d)(1) mandates that any determination by a CRJ may within 30 days after publication of the determination in the Federal Register, be appealed to the United States Court of Appeals for the District of Columbia Circuit by any aggrieved participant in the proceeding who fully participated in the proceeding and who would be bound by the determination. If no appeal is brought within that 30-day time period, the determination of the CRJs is final and the royalty fee or distribution determination is to take effect as set forth in subsection 803(d)(2). *The United States Court of Appeals for the District of Columbia Circuit has historically been the court of review for many agency actions. The judges on that court are familiar with the standard of review for agency determinations and the often intricate body of law to which agencies are subject. As such, the Committee believes that these judges are best suited to review CRJ's determinations.*" Copyright Royalty and Distribution Reform Act, H.R. 408, 108th Cong. at 37 (2004) (emphasis added).

There is no discussion in the record suggesting that Congress, in establishing this appeals process, intended to create the dichotomy that the CRB now posits in its motion, between reviewable terms and non-reviewable notice and recordkeeping requirements.

- ii. The CRB has previously argued that this Court should have jurisdiction over the decisions of the CRJs.

In its response to Live365's Motion for Preliminary Injunction in *Live365 v. Copyright Royalty Board, et al.*, No. 09-01662 (D.D.C. 2009), the CRB argued that this Court was indeed the appropriate venue for appeals from "a final decision of the Copyright Royalty Judges." Response of CRB to Motion for Preliminary Injunction at 2, *Live365 v. Copyright Royalty Board*, No. 09-01662 (D.D.C. 2009)

(Dkt. No. 16). *See also* Response at 10, No. 09-01662 (Dkt. No. 16) ("Any determination' of the Copyright Royalty Judges in the Webcaster III proceeding is subject to judicial review before the United States Court of Appeals for the District of Columbia Circuit."). In that case Plaintiff Live365 had moved to enjoin the CRJs from proceeding with the Section 803 rate and term proceeding of 2009-1 CRB Webcaster III. Plaintiff's Motion for Preliminary Injunction, *Live 365 v. CRB*, No. 09-01662 (D.D.C. 2009) (Dkt. No. 5). In its opposition, the CRB had argued that Live365 must instead wait for a final determination by the CRJs, and then bring that appeal to this Court. Response at 10, No. 09-01662 (Dkt. No. 16). In this case CBI has done just what the CRB has asked: brought a final decision by the CRJs to this Court of Appeals.

- iii. If this Court were not to have appellate jurisdiction in this case, there would be no avenue for appellate review of the Copyright Royalty Board's recordkeeping rulemakings.

If this Court were to grant the CRB's motion, the CRB would be able to make nearly all of its proceedings immune to appellate review by shifting more of its determinations of "terms" into rulemakings, instead of the 803(c) proceedings otherwise entitled for this Court's review. And that cannot be what Congress intended in establishing the CRB and subjecting it to appellate review. If the CRB could shield itself from appellate review with this semantic trick, it would leave the Board unaccountable for the rules it makes. Chapter 8 makes clear that the purpose of statutory licenses are to lend equitability, transparency, and

accessibility to the use and remuneration of copyrighted works. 17 U.S.C. § 801(b)(1)(A-D); *see also* Copyright Royalty and Distribution Reform Act, H.R. 408, 108th Cong. at 23 (2004); Webcasting II at V.A. ("[I]t is an axiom of the copyright laws that statutory licenses are designed to achieve efficiencies that the marketplace cannot," citing H.R. Rep. No. 94-1476, at 89 (1976)). As the CRB itself noted, "Adopting a set of terms whose operation is not practical, or creates additional unjustified costs and/or inefficiencies, is inconsistent with the precepts of statutory licensing, and we must avoid such circumstances." Webcasting II at V.A. Denying appellate review to an aspect so integral to the use of the statutory license would frustrate their purpose by having a disruptive impact on the industries involved. *See* H.R. 408 at 23 (2004). Because for small webcasters, like those CBI represents, recordkeeping is as much of a cost as the rate itself, rates and recordkeeping are inseparable terms of the license. For these licenses to be as useful as Congress intended, it could not have intended for so much of the ultimate rate to be shielded from appellate review.

III. Conclusion

For the forgoing reasons, Respondent's motion should be denied and this Court should retain jurisdiction over CBI's appeal.

Date: January 19, 2010

Respectfully submitted,

By: /s/ Catherine R. Gellis

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CERTIFICATE OF SERVICE

I, Catherine Gellis, hereby certify that I today caused a true and accurate copy of the PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS to be served electronically via the Court's Electronic Case Filing system, which will send notification of such filings to all counsel of record.

_/s/ Catherine R. Gellis__

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