

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC

In the Matter of)	
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Digital Performance in Sound Recordings and Ephemeral Recordings)	Docket No. 2009-1 CRB Webcasting III
)	
)	

College Broadcasters, Inc.'s
Response to Non-opposing Party IBS's Motion to Compel

I. Introduction

College Broadcasters, Inc. submits its response to non-opposing party IBS's motion to compel. This Board should deny IBS's motion.

II. Background

On November 17, 2009, Intercollegiate Broadcasting Systems, Inc. ("IBS"), representing ratepayers, propounded upon College Broadcasters, Inc. ("CBI"), who also represents ratepayers, two instruments of discovery, interrogatories and requests for production of documents, for the instant royalty rate proceeding ("Web III"). CBI responded with objections, both general and specific. In addition to objecting, *inter alia*, to their being overbroad, unduly burdensome, and irrelevant, CBI objected that all of the interrogatories and requests for documents had been improperly propounded on a participant who is not an opposing party. When counsel for both parties met and conferred on January 25, 2010, CBI reiterated its position that the discovery was

improper and thus it would not produce the requested information.¹ IBS then filed the instant motion.

III. Argument

A. Compelling discovery is improper because CBI is not an opposing party to IBS.

1. Discovery may only be compelled of an opposing party.

The CRJs' rules on discovery are clear. It is limited to only two instances: discovery pertaining to an opposing party's direct written statement and that which may produce other relevant information and materials, and in both these instances discovery is limited only to opposing parties. See 37 C.F.R. § 351.5(b) ("A participant in a royalty rate proceeding may request of an *opposing* participant nonprivileged documents that are directly related to the direct written statement or written rebuttal statement of that participant." (emphasis added)) and 37 C.F.R. § 351.5(c) ("[A] participant may ... request of an *opposing* participant or witness other relevant information and materials.") (emphasis added). Chapter 8 of the Copyright Act, which establishes the CRJs' authority to conduct these proceedings, similarly limits discovery to only these two situations, and only to opposing parties. See 17 U.S.C. § 803(b)(6)(C)(v) ("Any participant under paragraph (2) in a proceeding under this chapter [17 U.S.C. § § 801 et seq.] to determine royalty rates may request of an *opposing* participant nonprivileged documents directly related to the written direct statement ... of that participant.") (emphasis added) and 17 U.S.C. § 803(b)(6)(C)(vi) ("Any participant under paragraph (2) in a proceeding under

¹ In its motion IBS somewhat mischaracterizes CBI's position as conveyed during the meet and confer. Motion, at 2-3. CBI indicated then, as it had in its objections, that it was a limited participant in Web III, and noted in the discussions that it had not propounded discovery upon any other Web III party, nor had any other discovery been propounded upon it by any other party. CBI also did not waive its specific objections to any particular interrogatory or document request. CBI did, however, agree that the main sticking point was whether "same-side" discovery -- in other words, discovery upon a non-opposing party -- was proper.

this chapter [17 U.S.C. § § 801 et seq.] to determine royalty rates may ... request of an *opposing* participant or witness other relevant information or materials if, absent the discovery sought, the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired.") (emphasis added). IBS may thus demand discovery only from an opposing party, which CBI is not.

2. CBI is not an opposing party relative to IBS.

i. IBS is an objector to CBI's settlement, not an opponent of it.

IBS argues in its motion that because it disagrees with the settlement CBI reached with SoundExchange, it "opposes" it. However, IBS is an objector, not an opponent, within the meaning of the statute and the CRB's rules. See 37 C.F.R. § 351.2(b) ("If an *objection* to the adoption of an agreement is filed, the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory rates and terms for participants who are not parties to the agreement." (emphasis added)). IBS, representing ratepayers, was not the party with whom CBI negotiated its settlement. On the contrary, it was SoundExchange, representing copyright holders and performers, who acceded to the settlement negotiated by CBI, also representing ratepayers. By their structure and definition, these proceedings are designed to determine the terms by which these two opposing constituencies -- licensees and licensors, those who will pay and those who will be paid -- will license with each other.

ii. Because the CRJs' authority is limited to adjudicating royalty rate proceedings only between licensees and licensors, fellow ratepayers cannot be deemed opposing parties for purposes of royalty rate proceedings.

The CRJs authority is limited to setting the rates and terms between statutory license licensees and licensors. See 17 U.S.C. § 801(b)(1)(B) and (C) ("[The function[s] of the Copyright Royalty Judges [shall be] to make determinations ...of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, [et al., ... and] shall be calculated to ... afford the copyright owner a fair return for his creative work and the copyright user a fair income ... [and] to reflect the relative roles of the copyright owner and the copyright user ...") "In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing *buyer* and a willing *seller*." 17 U.S.C. § 114(f)(2)(B) (emphasis added). The CRJs do so only when these two oppositional constituencies have otherwise not reached an agreement *with each other*. See 17 C.F.R. § 351.3. ("If a settlement has not been reached within the voluntary negotiation period, the Copyright Royalty Judges will issue an order declaring that further proceedings are necessary."); see also 17 U.S.C. § 803(b)(3)(C). That fellow licensees might disagree about what the statutory terms should be does not make them opponents for purposes of this proceeding because even if they did agree, such accord would be meaningless for purposes of establishing these statutory rates. The CRJs establish statutory rates only when, and to the extent, the ratepayers and rate payees cannot bridge their respective positions on opposite sides of the license. Thus CBI and IBS, both representing ratepayers, cannot be construed as opponents within the meaning of the statute.

B. Compelling discovery is improper because resolution of this proceeding would not be substantially impaired without it.

Even when discovery between parties is permissible it is nonetheless limited. The CRJs' authority to compel discovery is limited to situations where, absent the discovery, the CRJs' resolution of the proceeding would be "substantially impaired." 17 U.S.C. § 803(b)(6)(C)(vi)(I). No such impairment would arise in this case.

1. IBS does not need the information it seeks from CBI to make its case.

In its motion IBS says it seeks discovery from CBI to discover the extent to which CBI represents users of the license, the general characteristics of any unknown users on whose behalf CBI purportedly had negotiated, and on what authority CBI signed its agreement. IBS does not need any of this information to make its case. Motion, at 2. IBS argues that because CBI represented in its direct written testimony that it believes the agreement it struck with SX in its settlement was a fair rate between a willing buyer and a willing seller, IBS should now be able to get access to all this information about CBI's membership and operations, ostensibly so it can do its own analyses on whether it was a fair rate or not. Motion, at 3. But what CBI may believe is fair has no bearing on what *IBS* believes is fair. IBS knows whom *it* represents. Its analyses can, and should, be based entirely on the rates and terms it deems suitable for *its* stations, and it is free to present that evidence to the CRJs.

IBS could argue that because both parties represent educational broadcasters their interests are similar. By that reasoning, IBS could just as easily demand information from any other ratepayer representative in the proceeding if it thought any of their

interests might align as well.² But whether or not any of these interests are similar is immaterial. If IBS believes the terms CBI negotiated are unsuitable for *its* interests it is free to object and advocate for an alternative rate that better suits its own, which only IBS has information on. Even if the CRJs were to adopt the settlement CBI and SoundExchange jointly submitted, the CRJs can still exempt from its rates and terms those who object to it. See 37 C.F.R. § 351.2(b)(2) ("If an objection to the adoption of an agreement is filed, the Copyright Royalty Judges may decline to adopt the agreement as a basis for the statutory terms and rates for participants that are not parties to the agreement..."). Ultimately nothing about CBI's independent participation in the rate setting process impugns IBS's position to seek a royalty rate it prefers.

2. The probative value of the information IBS seeks does not outweigh the burden to CBI in having to produce it.

In its requests for production of documents IBS demanded extensive information, including non-public information, about its corporate structure, board members, and board activities. Motion, at 8, 9. In its interrogatory it demanded even more specific, non-public information about CBI's internal operations, membership, and personnel. Motion, at 16. CBI is a non-profit entity representing non-commercial broadcasters and the physical costs in complying with the discovery order would be significant. Moreover, to the extent that IBS and CBI share interests, it is because they are rival entities. The more important IBS argues this information to be, the more important it is for CBI not to have to expose it, because it allows IBS to use this proceeding as an opportunity to learn about its competitor. This would indeed be a tremendous burden, even with a protective

² A key distinction between the motions to compel third party discovery submitted by Live365 *et al* and the instant Motion is that in the former instance the information sought from the third parties is alleged to be necessary to defeat assertions made by opposing party SoundExchange. Here IBS seeks evidence from a fellow ratepayer representative, not an opposing party.

order in place³, and must be carefully weighed against the limited probative value this information would offer in assisting the CRJs reach a just resolution of the proceeding. IBS is still free to introduce any evidence about it or its own membership to demonstrate for the CRJs what a just rate should be.

3. IBS has alternate means to obtain the information it seeks.

Some of the information IBS requests is publicly available on CBI's website. There is no need to wield the discovery process against a fellow ratepayer representative in order to obtain it. In the spirit of cordiality CBI would be willing to help direct IBS to URLs on CBI's site if IBS is not otherwise able to navigate it, but it would do so outside the discovery process and only with regard to the information IBS seeks that is suitable for public view.

C. Compelling CBI to produce discovery defeats the purpose of encouraging settlements.

Compelling CBI to produce discovery would run contrary to the policy values encapsulated in the laws establishing the royalty rate proceedings and the CRJs' own procedures. The Copyright Act strongly encourages settlement, and rightly so, as settlements minimize the costs for all involved -- rate payer, payee, and the CRB -- when rates can be established early on in the proceeding. *See* 17 U.S.C. § 803(b)(3)(A)(i) (establishing voluntary negotiation period); § 803(b)(6)(C)(x) (requiring the CRJs to "order a settlement conference among the participants"); § 801(b)(7)(A) (specifying one of the CRJs' functions is to consider adoption of settlement agreements; *see also* opposing party *SoundExchange's Opposition to RealNetworks' and Live365's Motions for*

³ Although there is a protective order in place, it applies only to discovery. *See Order Granting Joint Motion to Adopt Protective Order* (Sept. 23, 2009). While the order may extend to other phases of the proceeding, there is no guarantee information would not become public later on, either purposefully or inadvertently.

Issuance of Subpoenas to Nonparty Witnesses (Dec. 17, 2009). In this case, by reaching its settlement, CBI has realized an economy not only for itself but also for actual opposing party SoundExchange, as well as the CRJs themselves, who now have a more streamlined adjudication before them. This accord spared both copyright holders and copyright users the costs of propounding discovery on each other because it rendered it unnecessary: instead of needing to present evidence to the CRJs in a subsequent adversarial hearing, they instead jointly submitted their settlement for the CRJs' adoption pursuant to 37 C.F.R. § 351.2(b).

CBI necessarily remains in the proceeding in order to seek grant of its Motion to Adopt Partial Settlement submitted to the CRJs, as the rules seem to require.⁴ If the CRJs were to now compel discovery from CBI because it remains a participant it would put parties like CBI in an untenable position: either they would need to withdraw from royalty rate proceedings and leave their settlements vulnerable to not being adopted by the CRJs, or they would make themselves vulnerable to the costs and burdens associated with the adversarial aspects of the proceeding, such as discovery. Either choice would negate the value of ever pursuing settlement.

IV. Conclusion

Because CBI is not an opposing party to IBS and the probative value of the information sought does not outweigh the burden on CBI, this board should deny IBS's motion to compel discovery.

⁴ In its direct written testimony CBI reiterated its submission in the Joint Motion to Submit Proposed settlement that the CRJs should adopt the terms of the settlement and remains in the proceeding to assert that position. As long as the rules are silent as to the necessity or timing of withdrawing from the proceeding following settlement, and before the CRJs decide to either accept or reject the settlement pursuant to 37 C.F.R. § 351.2(b), CBI must remain a participant so as not to abandon its submission.

Respectfully submitted,

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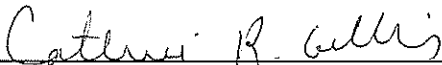
Dated: February 2, 2010

CERTIFICATE OF SERVICE

I, Catherine Gellis do hereby certify that copies of the foregoing filing were sent via email and first class mail this 2 day of February, ~~2009~~₁₀ to the following:

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