Constitutionality of Copyright Royalty Board Argued Before the US Court of Appeals - How Will It Affect Future Music Royalty Rate-Setting?

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The **Copyright Royalty Board** makes many important decisions, yet for the last several years, there has been a cloud over its operations, as there have been **questions as to whether its members were constitutionally appointed** (see our articles here, here and here). Well, the question is before the Courts again – this time squarely in front of the US Court of Appeals for the District of Columbia – a Court one step below the Supreme Court. The Copyright Royalty Board sets the royalty rates to be paid by **Internet radio stations for the public performance of sound recordings**, and in doing so, they have made some controversial decisions over the last few years. They also set royalties for other digital non-interactive music services, including **Sirius XM, music services that come with cable and satellite television services**, and **background music services**. The Board also oversees the distribution of funds that are collected for the **retransmission of distant television signals by cable systems**. It also sets the rates under **Section 115 of the Copyright Act for the reproductions of musical compositions** made by record companies when producing musical recordings or downloads, by digital music companies in connection with on-demand music services, and by wireless carriers in selling ringtones.

The case before the Court involves a seemingly small matter – the appeal of Intercollegiate Broadcasting Services from the CRB decision setting default rates for Internet radio services that are not covered by one of the many Webcaster Settlement Act agreements (about which we wrote here and here). IBS essentially is objecting to the fact that the Board would not lower the annual minimum royalty fee paid by some of IBS' smaller members below $500. But, in connection with its appeal, IBS raised the issue of the constitutionality of the appointment of the Judges, and the Court this week heard an oral argument on the issue – mentioning the rate questions only in passing while concentrating on the constitutionality of the appointment of the Judges.

The constitutional issue is a complex one, involving the Appointments Clause of the Constitution, i.e. who can appoint government officials. "Principal Officers" of the United

States have to be appointed by the President, while inferior officers can be appointed by the head of an executive department. Without going into the depths of the constitutional issues under consideration, there was much debate about whether the Copyright Royalty Judges ("CRJs"), who are appointed by the Librarian of Congress, are principal or inferior officers. And there was even some discussion of whether the Librarian is a head of an executive department, as the Library of Congress is theoretically part of the Congress – the legislative not the executive branch of government.

The argument also spent a significant amount of time discussing what would happen if the Court decided that the CRJ's were in fact unconstitutionally appointed. As the Chief Judge asked, if the Court was to decide that the Judge's appointment was unconstitutional, what would be the "least bad" remedy that they could order. In other words, they were looking to see what remedy they could order that was least disruptive to Copyright law. The discussion offered all sorts of alternatives – from ones where the Court could just decide that a very limited section of the law was unconstitutional and strike just those sections (e.g., the sections forbidding the Librarian from removing the Judges except for cause, or the section limiting the Copyright Office's review of any final CRJ decision to an advisory one for future cases, not a binding review of the present case – attempts to make the Judges into inferior officers who could properly be appointed by someone other than the President), to the possibility that the CRJs appointment could simply be voided, leaving to Congress the question of what to do next. There did not seem to be any debate as to whether prior decisions of the CRJs, that were no longer under appeal, would remain binding on the parties to which they apply (e.g. rates already set would remain in place and binding).

One interesting aspect of the argument on potential remedies what the argument of counsel for SoundExchange who contended that any decision that the Court makes should be as limited as possible, as a decision overturning the CRB system would create "chaos" as the statutory royalty is crucial to the effective functioning of the webcasting marketplace. This is interesting as SoundExchange, in CRB proceedings, always contends that the royalty is something that is forced on them and their members, and not something that they believe is necessary.

Look for a decision on this case in the next few months, which may help to once and for all resolve the question of the constitutionality of the CRB. Given that the CRJs

are currently considering new royalties for satellite radio and new rates under Section 115, this is an important decision that could have important ramifications for many segments of the digital music industry and for Copyright law more generally.

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