

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174,
07-1177, 07-1178, 07-1179 (consolidated)

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

INTERCOLLEGIATE BROADCAST SYSTEM, et al.,

Appellants,

v.

COPYRIGHT ROYALTY BOARD,

Appellee,

SOUNDEXCHANGE, INC.; NATIONAL ASSOCIATION
OF BROADCASTERS,

Intervenors.

ON APPEAL FROM A FINAL DETERMINATION
OF THE COPYRIGHT ROYALTY BOARD

**SUPPLEMENTAL SURREPLY BRIEF
FOR THE COPYRIGHT ROYALTY BOARD**

GREGORY G. KATSAS
Assistant Attorney General

SCOTT R. McINTOSH
MARK R. FREEMAN
SARANG VIJAY DAMLE
Attorneys, Appellate Staff
Civil Division, Room 7228
Department of Justice
Washington, D.C. 20530
(202) 514-5714

TABLE OF CONTENTS

| | <u>Page</u> |
|-----------------------------------|-------------|
| INTRODUCTION AND SUMMARY. | 1 |
| ARGUMENT. | 1 |
| CONCLUSION. | 5 |
| CERTIFICATE OF COMPLIANCE | |
| CERTIFICATE OF SERVICE | |

INTRODUCTION AND SUMMARY

Royalty Logic contends for the first time in its reply brief that the Copyright Royalty Judges are not inferior officers, but “principal” officers whose appointment must be vested in the President. See RL Supp. Reply 5-7. This claim has been waived. Royalty Logic not only failed to advance the claim in its opening brief, but affirmatively disavowed the argument. See RL Supp. Br. 6 (“The Copyright Royalty Judges are not ‘Officers of the United States’ * * * who must be appointed by the President with the advice and consent of the Senate.”). As this Court recently told another litigant who “used his reply brief to change course altogether and make a new and contradictory argument,” “[o]ur rules do not allow such bait-and-switch tactics.” United States v. Van Smith, __ F.3d __, 2008 WL 2583026, at *5 (D.C. Cir. July 1, 2008) (citing cases).

The Court should therefore hold appellant’s “principal officer” argument waived. But if the Court does address the issue, it should make clear that Royalty Logic was correct the first time around: the Copyright Royalty Judges are “inferior Officers” whose appointment Congress may lawfully vest in the head of a department.

ARGUMENT

1. “Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’

officer depends on whether he has a superior." Edmond v. United States, 520 U.S. 651, 662 (1997). The Supreme Court has accordingly explained that an inferior officer is an officer "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Id. at 663.

This analysis easily encompasses the Copyright Royalty Judges. The Judges are subordinate to the Librarian of Congress, a principal officer of the United States appointed by the President with the advice and consent of the Senate. 2 U.S.C. § 136. The Judges are expressly required to "act in accordance with regulations issued by * * * the Librarian of Congress." 17 U.S.C. § 803(a)(1). Any procedural regulations issued by the Judges themselves, including rules governing royalty ratemaking proceedings, must be approved by the Librarian. Id. § 803(b)(6). The Librarian is authorized to promulgate binding ethical rules and to enforce those rules against the Judges. Id. § 802(h), (i). Indeed, the Judges lack space or administrative resources of their own, and are wholly reliant on the Librarian for support. Id. § 801(d), (e). And if the Judges find themselves idle between ratemaking proceedings, they may be assigned other duties in the discretion of the Register of Copyrights, who likewise acts under the direction of the Librarian. Id. § 801(b)(8); see 17 U.S.C. § 701(a) (Register of Copyrights

"shall act under the Librarian's general direction and supervision").

Through the Register, the Librarian also has the authority to review and correct the substantive determinations of the Copyright Royalty Judges. In creating the Judges, Congress reserved to the Register – and hence ultimately to the Librarian – the authority to interpret the copyright laws. The Copyright Act accordingly directs the Judges to obtain a written opinion from the Register on all novel and material questions of copyright law, and stipulates that the Judges "shall apply" the Register's conclusions in their ratemaking determinations. 17 U.S.C. § 802(f)(1)(B). Moreover, the Register has the power to "review for legal error" all substantive determinations by the Copyright Royalty Judges and to "correct[]" any errors in the Judges' reasoning or conclusions. Id. § 802(f)(1)(D). Such "correct[ions]" are not only expressly made part of the record in the cases in which they arise, but are also "binding as precedent" on the Judges in future cases. Ibid. Thus, the Copyright Royalty Judges "are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Edmond, 520 U.S. at 663.

Finally, the Librarian enjoys the authority to remove the Copyright Royalty Judges for misconduct or neglect of duty. 17

U.S.C. § 802(i). As the Supreme Court emphasized in Edmond, “[t]he power to remove officers * * * is a powerful tool for control.” 520 U.S. at 664. Although the Judges may only be removed for cause, that was equally true of the independent counsel in Morrison v. Olson, 487 U.S. 654, 663 (1988). Nonetheless, the Court stressed the importance of the removal provision in concluding that the independent counsel was an inferior officer. See id. at 671. And if the independent counsel was an inferior officer, it strains credulity to suggest that the Copyright Royalty Judges are principal officers.

2. Royalty Logic’s arguments to the contrary disregard critical features of the statutory scheme. Royalty Logic observes that members of the former Copyright Royalty Tribunal were appointed by the President with the advice and consent of the Senate. RL Supp. Reply 6. But as we explained in our opening supplemental brief (at 13-14), the Tribunal was wholly unlike the Judges: it was a free-standing agency, not contained within the Library or any other executive department, and the Tribunal members were not supervised by any Executive officer in the performance of their duties. Presidential appointment was thus constitutionally required.

Appellant also cites 17 U.S.C. § 802(f)(1)(A)(i), which provides that the Judges “shall have full independence” in conducting their proceedings. That provision, however, is

expressly "subject to" the Judges' obligation to obey the Register's interpretation of the federal copyright laws. Ibid. Indeed, Royalty Logic makes no effort to reconcile its argument with the Register's power to "review" and "correct[]" legal errors in the Judges' determinations. Id. § 802(f)(1)(D). That power is fundamentally at odds with Royalty Logic's claim that the Judges are "principal officers" akin to Cabinet members.

Finally, Royalty Logic notes that the Librarian may not directly interfere with the Judges' procedural and factual determinations in particular cases. But the Coast Guard judges in Edmond were similarly insulated from interference. As the Supreme Court recognized, the Coast Guard judges (i) could not be directed to decide particular cases in particular ways in the first instance, (ii) could not be removed based on their rulings in individual cases, and (iii) enjoyed highly deferential review from the Court of Appeals for the Armed Forces. See 520 U.S. at 664. The Court nevertheless held that the judges remained "inferior officers" because "[their] work is directed and supervised at some level" by principal officers nominated by the President and confirmed by the Senate. Edmond, 520 U.S. at 663. The same is true of the Copyright Royalty Judges.

CONCLUSION

Royalty Logic's constitutional challenge should be rejected.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

SCOTT R. McINTOSH
MARK R. FREEMAN /s/
SARANG VIJAY DAMLE
Attorneys, Appellate Staff
Civil Division, Room 7228
Department of Justice
Washington, D.C. 20530
(202) 514-5714

JULY 15, 2008

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify pursuant to Fed. R. App. P. 32(a) that the foregoing brief contains 1,103 words, according to the count of Corel WordPerfect 12.

/s/

Mark R. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2008, I caused copies of the foregoing surreply to be filed with the Court by hand delivery, and served upon the following counsel by electronic mail and first-class U.S. mail:

William R. Malone
Matthew Schettenhelm
Miller & Van Eaton
1155 Connecticut Avenue, N.W., Suite 1000
Washington, DC 20036
(202) 785-0600

William B. Colitre
Royalty Logic, Inc.
21122 Erwin Street
Woodland Hills, CA 91367
(818) 955-8900

Jonathan S. Massey
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990

David A. Henderson
Kenneth L. Steinthal
Weil, Gotshal & Manges, LLP
1300 Eye Street, N.W., Suite 900
Washington, DC 20005
(202) 682-7000

David D. Oxenford, Jr.
David Wright Termaine, LLP
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, DC 20006
(202) 973-4256

Seth D. Greenstein
Robert S. Schwartz
Constantine Cannon, PC
1627 Eye Street, N.W., 10th Floor
Washington, DC 20006
(202) 204-3508

Karyn Kay Ablin
Bruce G. Joseph
Wiley Rein LLP
1776 K Street, N.W., 11th Floor
Washington, DC 20006
(202) 719-7000

Carter Glasgow Phillips
James P. Young
Raymond Clark Wadlow
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Paul March Smith
Thomas J. Perrelli
Craig A. Cowie
David A. Handzo
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001-4412
Tel (202) 639-6064

/s/

Mark R. Freeman