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Show-Down In District Court

Internet radio network tries to take down Copyright Royalty Board

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“Billions of dollars and the fates of entire industries can ride on...decisions [by the Copyright Royalty Board (CRB), which] exercises expansive executive authority analogous to...FERC, the FCC, the NLRB, and the SEC [even though] unlike those similarly powerful agencies...[CRB Judges] have not been nominated by the President and confirmed by the Senate.”

If these words seem familiar to you, then you're either a regular reader of www.CommLawBlog.com or a fan of Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia. He wrote them in a concurring opinion (which was described in a post on our blog – www.CommLawBlog.com – back in July) in which he, seemingly without provocation, questioned the constitutionality of the CRB.

Those words are also found in the opening paragraph of a complaint filed in the U.S. District Court for the District of Columbia in early September by Live365 which seeks:

- a declaration that the statute providing for appointment of the CRB's judges is unconstitutional and, therefore, they really have no power or authority at all; and
- a preliminary and permanent injunction staying all further proceedings before the CRB – including the proceeding to set webcasting rates for the years 2011-2015 which is just starting up before the CRB.

Neither Judge Kavanaugh nor Live365 pulled this one out of thin air. In his opinion issued last July, he was called upon to consider challenges to the CRB's March, 2007 decision setting the 2006-2010 webcasting rates. Kavanaugh, who concurred with the majority's rejection of those challenges, wrote a separate concurring opinion suggesting serious constitutional problems with the CRB. (Kavanaugh's two compatriots on the three-judge panel elected to slide past that argument, saying that the thorny constitutional issue needn't be addressed because it hadn't been raised soon enough.)

So the table was set for this type of challenge; Live365 was just the first to answer the dinner bell.

Live365's argument, which draws from the reasoning advanced in both of the earlier cases, goes something like this.

The Constitution (Article II, to be precise) permits the President to appoint "officers of the United States", as long as such appointments are subject to the advice and consent of the Senate. The same provision also permits Congress to designate certain "inferior officers" who can be appointed without the one-two punch of presidential appointment and Senate confirmation – BUT the Constitutional power to appoint those "inferior officers" is limited to the President, the courts, and "heads of departments".

So there appear to be two types of U.S. "officers" identified in the Constitution: those which we can call "principal officers", requiring Presidential appointment *and* Senate confirmation; and those which the Constitution refers to as "inferior officers". But the appointment process to which CRJs are subject does not satisfy the Constitutional criteria for *either* type. CRJs are appointed by the Librarian of Congress. They thus cannot be "principal officers" (inasmuch as the President is not the appointer). And since the Librarian of Congress is not a "head of department", so the argument goes, CRJs cannot be "inferior officers", either. Accordingly, CRJs cannot be deemed to be validly-appointed U.S. "officers", and their actions – including, for example, orders establishing royalty schedules – must be deemed to have no lawful effect.

Based on this line of argument, the Live365 case will hinge on:

- © Whether the District Court agrees that the CRJs rise to the level of "officers" of either type; and
- © The proper characterization of the Library of Congress as a "department" whose "head" (*i.e.*, the Librarian of Congress) may be given the power to appoint "inferior officers" under Article II of the Constitution.

Live365's complaint also argues that, because there is a high likelihood that the District Court will find the CRJs to be unconstitutional and without authority, the District Court should immediately order the CRB to terminate the upcoming proceeding to set the rates for 2011-2015. According to Live365, that proceeding is "a costly, intensive, year-long proceeding that may later be deemed null and void by a judicial determination that the CRB was constituted and sat in contravention of the Appointments Clause [of Article II]."

Live365 makes a very strong initial argument. But that's easy to do in a complaint. So it will be interesting to see what the government argues in response. The District Court may also be tipping its hand shortly, if it chooses to rule on Live365's request for

preliminary injunction to stop the CRB webcasting proceeding. That next phase of that proceeding is currently teed up to start at the end of this month.