

ORAL ARGUMENT SCHEDULED FEBRUARY 7, 2012

**United States Court of Appeals
for the District of Columbia Circuit**

No. 11-1083

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.
a Rhode Island Non-Profit Corporation,
Appellant,

vs.

COPYRIGHT ROYALTY BOARD; LIBRARY OF CONGRESS,
Appellees.

COLLEGE BROADCASTERS, INC.; SOUND EXCHANGE, INC.,
Intervenors for Appellee

*On Appeal from the Copyright Royalty Board in Docket
No. 2009-ICRB Webcasting III*

**BRIEF OF INTERVENOR FOR APPELLEE
COLLEGE BROADCASTERS, INC.**

CATHERINE R. GELLIS
cbi@cathygellis.com
P.O. Box 247
Sausalito, CA 94966
(202) 642-2849

MITCHELL STOLTZ
mstoltz@constantinecannon.com
CONSTANTINE CANNON, LLP
1201 K Street, NW
Suite 1050 East
Washington, DC 20005
(202) 204-3500

Counsel for Intervenor for Appellee College Broadcasters, Inc.

NOVEMBER 21, 2011

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing before Copyright Royalty Judges and in this Court are listed in the opening brief for appellant Intercollegiate Broadcasting System, Inc. (“IBS”). However, IBS’s characterizations of Intervenor College Broadcasters, Inc. (“College Broadcasters”) are incorrect and unsupported in the record.

B. Ruling Under Review. The ruling under review is a final determination of the Copyright Royalty Judges: *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 76 Fed. Reg. 13026 (Mar. 9, 2011) (Joint Appendix (“JA”) __-__), in Docket No. 2009-1 CRB Webcasting III (“Web III”).

C. Related Cases. This case has not previously come before this Court or any other court. Appellant IBS has another appeal pending before this Court, No. 10-1314, in which it challenges a previous decision of the Copyright Royalty Judges from an earlier rate-setting proceeding. Intervenor College Broadcasters also has an appeal pending before this Court, No. 09-1276, challenging a separate decision of the Copyright Royalty Judges.¹ That case is currently held in abeyance pending the

¹ See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 74 Fed. Reg. 52418 (Final Rule) (Oct. 13, 2009) (JA __).

outcome of the instant case, the result of which may render it moot. Order of July 6, 2011, Case No. 09-1276.

D. Deferred Appendix. The parties are using a deferred appendix.

/s/ Mitchell L. Stoltz
Mitchell L. Stoltz

CORPORATE DISCLOSURE STATEMENT

College Broadcasters, Inc., Intervenor, is a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code, organized under the laws of the State of Delaware, dedicated to representing the interests of students involved in radio, television, webcasting and related media. It has no parent company, and no company owns a 10% or greater ownership interest in it.

Date: November 21, 2011

/s/ Mitchell L. Stoltz
*Counsel for College Broadcasters,
Inc.*

TABLE OF CONTENTS

	<i>Page</i>
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	v
GLOSSARY	vi
STATEMENT OF ISSUES	1
PERTINENT STATUTES AND REGULATIONS.....	1
STATEMENT OF THE FACTS	2
1. Statutory and Regulatory Background	2
2. Factual Background.....	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. IBS Has Presented No Factual Support To Warrant Overturning the Judges’ Adoption of the College Broadcasters- SoundExchange Agreement.....	5
II. Even If The Judges Are Unconstitutionally Appointed, Their Adoption Of The College Broadcasters-SoundExchange Agreement As The Statutory Rates and Terms For NEWs Must Stand.....	6
III. Even If The Judges’ Decisions Are Invalid Because They Are Unreviewable, Their Adoption Of The College Broadcasters- SoundExchange Agreement As The Statutory Rates and Terms For NEWs Must Stand.....	9
IV. Conclusion	9
CERTIFICATE OF COMPLIANCE	11
CIRCUIT RULE 28(d)(4) CERTIFICATE	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

Page(s)

Federal Cases

* <u>Free Enterprise Fund v. Public Co. Accounting Oversight Bd.</u> , 130 S. Ct. 3138, 3161 (2010)	8
--	---

Federal Statutes

17 U.S.C. § 114(f)(5)(A)	3
*17 U.S.C. § 801(b)(7)(A).....	2, 3, 4

Federal Regulations

37 C.F.R. § 380.20	2
37 C.F.R. § 380.21	2

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Term	Description
CBI	College Broadcasters, Inc., Intervenor for Appellee.
IBS	Intercollegiate Broadcasting System, Appellant.
NEW	Noncommercial Educational Webcaster, an entity defined in 37 C.F.R. § 380.21 as a noncommercial webcaster operated by or affiliated with an accredited educational institution and staffed substantially by students.
Web III	<i>Digital Performance Right in Sound Recordings and Ephemeral Recordings</i> , 76 Fed. Reg. 13026 (March 9, 2011), a proceeding before and determination by the Copyright Royalty Judges as to royalty rates and terms for webcasting (Internet radio) for the 2011-2015 period.

STATEMENT OF THE ISSUES

I. Whether IBS has failed to offer any ground for vacating or reversing the Copyright Royalty Judges' adoption of the College Broadcasters-SoundExchange agreement as the generally applicable rates and terms for noncommercial educational webcasting.

II. Whether the adoption of the College Broadcasters-SoundExchange agreement was valid and required by statute notwithstanding the constitutionality of the appointment of the Copyright Royalty Judges by the Librarian of Congress.

III. Whether the adoption of the College Broadcasters-SoundExchange agreement was valid and required by statute notwithstanding the constitutionality of the judicial review scheme articulated in section 803(d)(3) of the Copyright Act.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are set forth in the addendum to appellant IBS's brief.

STATEMENT OF THE FACTS

1. Statutory and Regulatory Background

Under Section 801 of the Copyright Act, one of the functions of the Copyright Royalty Judges is “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among *some or all* of the participants in a proceeding at any time during the proceeding.” 17 U.S.C. § 801(b)(7)(A) (emphasis added).

Part of the regulations at issue in this appeal, 37 C.F.R. § 380.20 et seq., establishes royalty rates and terms for “noncommercial educational webcasters” (“NEWs”), which are defined in part as noncommercial webcasters that are directly operated by, or affiliated with and officially sanctioned by, domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institutions, so long as the digital audio transmission operations are staffed substantially by students. 37 C.F.R. § 380.21.

2. Factual Background

College Broadcasters was a participant in the underlying proceeding before the Copyright Royalty Judges (“Judges”). In 2009, after negotiations, intervenor College Broadcasters and intervenor SoundExchange, Inc. (“SoundExchange”) reached an agreement as to royalty rates for webcasting

of copyrighted music recordings to be paid by NEWs during the 2011-2015 period, under the authority of the Webcaster Settlement Act of 2009, 17 U.S.C. § 114(f)(5)(A). The agreement also included additional terms to be met by NEWs in webcasting these recordings, as permitted under the Webcaster Settlement Act, including recordkeeping requirements or an option to pay a “proxy fee” in lieu of recordkeeping. On August 13, 2009, College Broadcasters and SoundExchange jointly moved the Copyright Royalty Judges (“Judges”) to adopt their agreement under 17 U.S.C. Section 801(b)(7)(A) as the basis for statutory terms and rates for all NEWs as defined by the regulation, regardless of whether or not they are members of College Broadcasters.²

The Judges published the College Broadcasters-SoundExchange agreement for public comment. Twenty-four NEWs submitted comments in support of the agreement. 76 Fed. Reg. 13026, 13042 (JA __). Only IBS filed a comment opposing adoption of the agreement. *Id.* at 13039. In its closing argument before the Judges, however, IBS clarified that it did *not*

² IBS’s suggestion on p. 3 of its brief that the terms of the agreement applied only to “CBI members” is incorrect. The agreement, both as an extrajudicial agreement between College Broadcasters and SoundExchange and as a federal regulation adopted in the Final Order, applies explicitly to any webcaster meeting the definition of a NEW that complies with the regulatory formalities. 76 Fed. Reg. 13026, 13054-55 (JA __). Membership in College Broadcasters or any other organization of webcasters is not a requirement.

actually oppose the adoption of the agreement as rates and terms for NEWS. IBS instead opposed the agreement only inasmuch as it would be applied to *other* categories of webcasters, specifically to the “small and very small noncommercial webcaster” categories that IBS had proposed:

[THE JUDGES]: So you’re just objecting to it on the theory that you just hope that what’s ever in there doesn’t somehow get applied to your case, even though you’re asking for *two completely different services*?

MR. MALONE: That’s essentially correct, Your Honor.

Id. n.19 (emphasis added). Thus, because there was no objection to the adoption of the College Broadcasters-SoundExchange agreement as applied to NEWS, the Judges adopted the agreement as regulations applying to them. 76 Fed. Reg. 13026, 13040 (JA __). Separately, the Judges also declined to adopt IBS’s proposal for two new categories of webcasters. *Id.* at 13042.

College Broadcasters moved to intervene in this appeal for the limited purpose of ensuring that the Judges’ adoption of College Broadcasters’ settlement with SoundExchange is affirmed, regardless of what other actions this Court might take with respect to the issues raised by IBS.

SUMMARY OF ARGUMENT

The College Broadcasters-SoundExchange agreement setting rates and terms for NEWs should stand regardless of the outcome of IBS's appeal. To the extent that the constitutional and statutory concerns IBS has raised regarding the Judges' authority to render its determination and this Court's ability to review it are even ripe for consideration, they do not affect adoption of the agreement, because adoption was required by the Copyright Act and was not subject to the Judges' discretion. Nor has IBS stated any other basis warranting this court to overturn the adoption of the agreement.

ARGUMENT

I. IBS Has Presented No Factual Support To Warrant Overturning the Judges' Adoption of the College Broadcasters-SoundExchange Agreement.

In its appeal IBS does not explicitly challenge the Judges' adoption of the College Broadcasters-SoundExchange agreement as the applicable royalty rates and terms for NEWs. Rather, the decision that IBS appears to be challenging in Part III of its brief is the Judges' rejection of IBS's proposal for two new categories of webcasters ("small and very small noncommercial webcasters") under Section 114 of the Copyright Act. However, to the extent IBS's challenge extends to the adoption of the College Broadcasters-SoundExchange agreement, this challenge is devoid of

any factual or legal support. Even accepting IBS's argument that Section 114(f)(2) of the Copyright Act requires the Judges to adopt IBS's proposal for small and very small noncommercial webcasters, IBS does not suggest how or why that statute would also require the Judges to reject College Broadcasters and SoundExchange's proposal for NEWs, a different category of webcasters.³ IBS's counsel conceded at oral argument that NEWs are a separate and distinct category from those that IBS proposed. 76 Fed. Reg. 13026, 13039 n.19 (JA __). Thus, the Court should affirm the Judges' adoption of the College Broadcasters-SoundExchange agreement.

II. Even If The Judges Are Unconstitutionally Appointed, Their Adoption Of The College Broadcasters-SoundExchange Agreement As The Statutory Rates and Terms For NEWs Must Stand.

As its appeal represents, IBS is dissatisfied with the result of the Web III proceeding. It cannot, however, point to a defect in the judgment of the Judges with respect to the College Broadcasters-SoundExchange agreement as the reason for its dissatisfaction. The Judges' decision with respect to that agreement was predicated on the record before it, which IBS had ample

³ To the extent IBS bases its argument on assertions that it is "the largest association of webcasters at colleges, universities, academies, and high schools," IBS Br. iv, that College Broadcasters' members "principally have paid faculty and staff," *id.* at ii, and that their "budgets/finances are on average much larger" than those of IBS members, *id.*, these assertions are not supported by any evidence or citation to the record.

opportunity to develop, and on the lack of objection to the agreement. No other Judges or similar authority, however appointed, could have reached a different decision with respect to the agreement. Thus this Court need not contemplate the merits of IBS's argument.

Yet even if this Court were to accept IBS's contention that the Judges' lacked the authority to render its decision, the court must nonetheless affirm the Judges' adoption of the College Broadcasters-SoundExchange agreement. Such adoption was mandatory under Section 801(b)(7)(A) of the Copyright Act and not contingent on any discretionary authority of the Judges.

Section 801(b)(7) requires the Judges to "adopt" an agreement between "some or all" of the participants in a proceeding "as a basis for statutory terms and rates." They may only decline to do so *if*, after "provid[ing] to those that would be bound" an "opportunity to comment," a party objects *and* the Judges "conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates." 17 U.S.C. § 801(b)(7)(A)(ii) (emphasis added). If no objections to the agreement are made, then clause (ii) does not apply, no determination of reasonableness is required, and the Judges *must* adopt the agreement.

In Web III IBS did initially file what it described as an objection to the College Broadcasters-SoundExchange agreement, but IBS's counsel later clarified that IBS objected *only* to the extent of that agreement being applied to the *separate* categories of webcaster that IBS had proposed – not to the agreement by its own terms. 76 Fed. Reg. 13026, 13039 n.19 (JA __). That clarification effectively withdrew the objection, thus relieving the Judges from any duty to consider any aspect of the agreement prior to adopting it as the rates and terms for NEWS.⁴ Therefore the Judges' function in this instance was entirely ministerial and not a discretionary exercise of power subject to constitutional scrutiny. Even if the Copyright Royalty Judges as currently established were abolished, or their functions given to other Federal officers, Congress's directive regarding unopposed royalty agreements would remain “fully operative as a law.” *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3145 (2010) (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)). The adoption of the agreement should therefore stand even if IBS's challenge in other respects were to succeed. *Id.*

⁴ 76 Fed. Reg. 13026, 13040 (JA __). “Finding neither a proper nor a credible objection to the SoundExchange-CBI agreement, nor other grounds requiring rejection, we adopt the agreement”

III. Even If The Judges' Decisions Are Invalid Because They Are Unreviewable, Their Adoption Of The College Broadcasters-SoundExchange Agreement As The Statutory Rates and Terms For NEWS Must Stand.

For similar reasons, the Court must affirm the adoption of the College Broadcasters-SoundExchange agreement even if IBS succeeds in demonstrating that the judicial review standard of section 803(d)(3) is unconstitutional. As explained above, the Judges had no discretion to decline adoption of the agreement in the absence of an objection to it. Because adoption of an unopposed agreement under section 801(b)(7) is not subject to the Judges' discretion, it is not a "determination of the Copyright Royalty Judges," under section 803(d)(3) for which this Court may "enter its own determination." Thus, IBS's challenge to section 803(d)(3) does not reach the adoption of the College Broadcasters-SoundExchange agreement.

IV. CONCLUSION

Even if IBS were to succeed on all three of its arguments in this appeal, the adoption of the College Broadcasters-SoundExchange agreement as the royalty rates and terms for all Noncommercial Educational

Webcasters would remain valid. Therefore, the Court should affirm the portion of the Final Order adopting that agreement.

Dated: November 21, 2011

Respectfully submitted,

COLLEGE BROADCASTERS INC.

By: /s/ Mitchell L. Stoltz

Mitchell L. Stoltz

D.C. Bar No. 978149

CONSTANTINE | CANNON LLP

1301 K St NW Ste. 1050 East

Washington, DC 20005

Tel: (202) 204-4523

mstoltz@constantinecannon.com

Catherine R. Gellis, Esq.

California Bar No. 251927

P.O. Box 2477

Sausalito, CA 94966

Phone: (202) 642-2849

cbi@cathygellis.com

Counsel for College Broadcasters, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief was printed using a 14 point Times New Roman font.

Dated: November 21, 2011

/s/ Mitchell L. Stoltz
Mitchell L. Stoltz

CIRCUIT RULE 28(d)(4) CERTIFICATE

College Broadcasters, Inc. and SoundExchange, Inc. are both intervenors on behalf of the Appellee in this case due to their shared interest in maintaining the adoption of their agreement as the statutory rates and terms for NEWs for the 2011-2015 period. However as a rate-payer and the representative of copyright holders, respectively, the two parties' interests will inherently be adverse in future webcasting rate setting proceedings. It is thus necessary for College Broadcasters to file a separate brief in this case both to preserve the appearance of independence from SoundExchange and its ability to state its own positions with respect to the existing agreement. Additionally, counsel for SoundExchange has informed the undersigned that SoundExchange has a policy of not submitting joint briefs with users of the statutory licenses that SoundExchange administers.

Dated: November 21, 2011

/s/ Mitchell L. Stoltz
Mitchell L. Stoltz

**United States Court of Appeals
for the District of Columbia Circuit**
INTERCOLLEGIATE BROADCASTING v. CRB, No. 11-1083

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by CONSTANTINE CANNON, LLP, counsel for Intervenors for Appellee College Broadcasters, Inc. to print this document. I am an employee of Counsel Press.

On **November 21, 2011**, counsel for Intervenors has authorized me to electronically file the foregoing **Brief of Intervenor for Appellee College Broadcasters, Inc.** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

KELSI BROWN CORKRAN
kelsi.corkran@usdoj.gov
SCOTT R. MCINTOSH
scott.mcintosh@usdoj.gov
TONY WEST
tony.west@usdoj.gov
US DEPARTMENT OF JUSTICE
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2000
Counsel for Appellees

MICHAEL B. DESANCTIS
mdesanctis@jenner.com
DAVID A. HANDZO
dhandzo@jenner.com
GARRETT A. LEVIN
glevin@jenner.com
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412
(202) 636-6000
*Counsel for Intervenor
SoundExchange, Inc.*

WILLIAM R. MALONE
malone@ieee.org
LAW OFFICE OF WILLIAM R.
MALONE
9117 Vendome Drive
Bethesda, MD 20817
(301) 365- 1175
Counsel for Appellant

Unless otherwise noted, the original and 5 paper copies have been
filed with the Court on the same date via Express Mail.

November 21, 2011

/s/ Robyn Cocho
Robyn Cocho
Counsel Press