[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 BRIEF FOR THE COPYRIGHT ROYALTY BOARD

GREGORY G. KATSAS
Acting 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

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INTRODUCTION AND SUMMARY

In its supplemental brief, appellant Royalty Logic contends that Congress exceeded its power under the Constitution by vesting the right to appoint the Copyright Royalty Judges in the Librarian of Congress. That claim confuses statutory labels with constitutional authority. Although the Library is often described as a "legislative agency," in the eyes of the Constitution it is an executive Department headed by a principal officer appointed by the President and removable at his will. 2 U.S.C. § 136. The Librarian has been a Presidential appointee

for as long as there has been a Library of Congress: the first Librarian was appointed by President Thomas Jefferson in 1802. Moreover, Congress in 1897 specifically debated the constitutional status of the Library and resolved to place it under the control of the President.

Congress thus acted entirely within its power by assigning to the Librarian, as the "Head" of the Library, the authority to appoint inferior officers such as the Register of Copyrights and the Copyright Royalty Judges, who are charged with administering the federal copyright laws.[1] U.S. Const. Art. II, § 2, cl. 2; see 17 U.S.C. § 701(a) (Register of Copyrights); id. § 801(a) (Copyright Royalty Judges).

As SoundExchange argues in its supplemental brief, appellant's constitutional challenge is untimely and the Court

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[1] There is no dispute that the Copyright Royalty Judges are "inferior Officers" under the Constitution. RL Supp. Br. 6. The Judges are "officers" because they exercise "significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976). At the same time, the Judges are inferior to the Librarian, who enjoys the authority, inter alia, to remove or sanction the Judges, to issue regulations governing the Judges' ratemaking proceedings, and to approve the Judges' rules and procedures. 17 U.S.C. §§ 802(h), 802(i), 803(a)(1), 803(b)(6)(A). In addition, all legal determinations by the Judges are subject to review by the Register of Copyrights, see id. § 802(f)(1), who in turn acts pursuant to "the Librarian's general direction and supervision," id. § 701(a). See generally Edmond v. United States, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' 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.").

should not address it. But if the Court entertains the claim, it should make clear that Congress did not violate the Constitution by authorizing the Librarian to appoint inferior officers.

ARGUMENT

CONGRESS CONSTITUTIONALLY VESTED THE POWER TO APPOINT THE COPYRIGHT ROYALTY JUDGES IN THE LIBRARIAN OF CONGRESS.

A. The Librarian Of Congress Is A Principal Officer Of The United States Subordinate To The President.

The Librarian of Congress is "appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 136. No statute limits the President's oversight of the Librarian, nor has Congress reserved to itself the power to review or influence the Librarian's conduct in office. Cf. Bowsher v. Synar, 478 U.S. 714, 730-31 (1986). The Librarian "make[s] rules and regulations for the government of the Library," 2 U.S.C. § 136, and in discharging that responsibility he is accountable to the President alone.

Nor are there any limitations on the President's power to remove the Librarian, which is an incident of the power of appointment. Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839); Kalaris v. Donovan, 697 F.2d 376, 389 (D.C. Cir. 1983). It has long been recognized that the Librarian is removable by the President at will. See, e.g., 29 Cong. Rec. 378 (1896) (Rep. Bingham) ("President Cleveland to-day can by a mere stroke of his

pen change or remove the Librarian of Congress for any cause or reason good to himself, or for a more efficient administration of the Library.”). President Andrew Jackson in fact removed the Librarian of Congress in 1829 after the Librarian publicly criticized President Jackson and his family. 29 Cong. Rec. 378.

Indeed, the President’s power to appoint and remove the Librarian of Congress is as venerable as the Library of Congress itself. The first Librarian was appointed by President Thomas Jefferson in 1802. See Act of January 26, 1802, 2 Stat. 128. The 1802 Act called for “a librarian to be appointed by the President of the United States solely, [to] take charge of the said library.” Id. § 3, 2 Stat. 129. After Congress assigned to the Librarian responsibility for the administration of the federal copyright laws, see Copyright Act of 1870, § 85, 16 Stat. 212, Congress enacted additional legislation requiring Senate confirmation of the Librarian’s appointment. See Act of February 19, 1897, 29 Stat. 544.

As the historical record makes clear, Congress crafted the 1897 legislation specifically to satisfy the requirements of the Constitution. Members of Congress debated the constitutional status of the Library, including explicit consideration of the Appointments Clause. See, e.g., 29 Cong. Rec. 315 (1896) (Rep. Quigg); id. at 319 (Rep. Dockery); id. at 386 (Rep. Cannon). Some proposed that the Library should be under the control of

Congress, with its employees appointed by congressional committees. E.g., 29 Cong. Rec. 385 (Rep. Cummings). Others insisted that "with respect to an office of this kind," Congress "should not depart from the constitutional provision that the President shall nominate and by and with the advice and consent of the Senate appoint." Id. at 389 (Rep. Richardson).

The latter view prevailed. Congress in the 1897 Act expressly acknowledged the Librarian's executive functions, see 29 Stat. 545 (appropriating funds for activities "under the direction of the Librarian of Congress, necessary for the execution of the copyright law"), and accordingly directed that the Librarian shall "be appointed by the President, by and with the advice and consent of the Senate," 29 Stat. 544. The implications of this decision were not lost on Congress. One opponent of the 1897 legislation warned: "By this bill, when enacted into law, Congress forever puts it out of their power to control the Library. It now loses its name and function of a Congressional Library, and becomes a national or Presidential Library, beyond the control of Congress, except by the President's consent." 29 Cong. Rec. 977 (1897) (Sen. Call).

The 1897 statute, now codified at 2 U.S.C. § 136, reflects Congress's recognition that the Library is not, in the eyes of the Constitution, an organ of Congress itself. Rather, it is an executive Department led by a principal officer who "exercis[es]

significant authority pursuant to the laws of the United States" and must therefore be appointed in conformity with the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976). Compare 2 U.S.C. § 287a (House Parliamentarian "serve[s] at the pleasure" of Speaker of the House); id. § 288(a) (Senate Legal Counsel appointed by President pro tempore of Senate); id. § 601(a)(2) (Director of Congressional Budget Office appointed by Speaker of the House and President pro tempore of Senate).

B. The Library of Congress Is A "Department" Under The Appointments Clause.

Congress's deliberate choice to vest the appointment of the Librarian in the President, subject to confirmation by the Senate, leaves little doubt as to the constitutional status of the Library itself. At the time of the framing, the term "Department" referred to a "'separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.'" Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 920 (1991) (Scalia, J., concurring in part and concurring in the judgment) (quoting 1 N. Webster, American Dictionary 58 (1828)). As used in the Appointments Clause, the term "has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power." United States v. Germaine, 99 U.S. 508, 510 (1878); see Buckley, 424 U.S. at 127 ("Departments" in the Appointments Clause "are themselves in the

Executive Branch or at least have some connection with that branch").

The Library possesses all of the features that traditionally distinguish the executive departments. It is a free-standing entity, not contained within any other administrative agency. It performs executive functions, including in particular the administration of the copyright laws — and has been accorded deference from the courts for its interpretations of those laws. E.g., Mazer v. Stein, 347 U.S. 201, 211-13 (1954); Cablevision Systems Dev. Co. v. Motion Picture Ass'n of America, Inc., 836 F.2d 599, 608-10 (D.C. Cir. 1988) (Copyright Office regulations are entitled to Chevron deference). And most importantly, the Library is headed by a principal "Officer[] of the United States" who is appointed by the President and removable at his will. The Library is accordingly "subject to the exercise of political oversight and share[s] the President's accountability to the people." Freytag, 501 U.S. at 886.

In urging that the Library is nonetheless not a "Department," appellant relies on the Supreme Court's decision in Freytag. RL Supp. Br. 10. But neither the Court's holding nor its reasoning supports that contention. The Court in Freytag refused to hold that the term "Department" is limited to the Cabinet agencies, and it expressly reserved the question whether the heads of non-Cabinet "principal agencies" may appoint

inferior officers. 501 U.S. at 886-87 & n.4. Moreover, as Justice Scalia explained for four concurring Justices, it would be a "most implausible disposition" to hold that a principal agency like the Library is not a "Department" under the Appointments Clause. 501 U.S. at 919-20 (Scalia, J., concurring in part and concurring in judgment). Under such a regime, the Librarian would lack the authority to appoint not only the Copyright Royalty Judges, but <u>any</u> inferior officers within the Library. These officers would instead have to be appointed "by the President, the courts of law, or the 'Secretary of Something Else.'" <u>Ibid</u>. Such a result would make little sense, and the Constitution does not require it.

Certainly the congressional sponsors of the 1897 legislation believed the Library to be a "Department" under the Constitution. As one member argued: "This Library of Congress is a department of the Government. It is an executive department and should be under the control of the executive branch. * * * * [It] is an executive bureau, and as such should be presided over by some executive officer with authority to appoint and remove its employees." 29 Cong. Rec. 318-19 (1896) (Rep. Dockery). Another member urged rejection of a proposal for Congress to take control of the Library, explaining: "[W]e have various Departments of the Government. The Presidents and the heads of these Departments make appointments of subordinates. Their action is

reported to Congress. We haul them up, 'drag them over the coals,' if they fail to perform their duty. We have the powers of impeachment; we criticize and investigate. And that is as it ought to be." Id. at 386 (Rep. Cannon).

The Fourth Circuit thus correctly held, in the only appellate decision to address the constitutional status of the Library of Congress, that Congress did not violate the Appointments Clause by vesting the Librarian with the power to appoint the Register of Copyrights. See Eltra Corp. v. Ringer, 579 F.2d 294, 298-301 (4th Cir. 1978). The panel unanimously concluded that the Librarian's appointment of the Register satisfies the Constitution because "the Copyright Office is an executive office, operating under the direction of an Officer of the United States and as such is operating in conformity with the Appointments Clause." Ibid. The same is true of the Copyright Royalty Judges.

C. Appellant's Contention That The Library Is Inherently "Legislative" Mistakes Statutory Labels For Constitutional Authority.

The gravamen of appellant's argument is that the Library of Congress cannot be a "Department" under the Constitution because the Library is "not under the Executive Branch." RL Supp. Br. 12. But that contention is self-evidently false. It is the President, not Congress or any congressional agent, who appoints the principal officer of the Library, and the President may

remove him at will. 2 U.S.C. § 136. Appellant makes no attempt to reconcile its argument with this provision, nor with the two-hundred-year history of the Librarian's accountability to the President.

Notwithstanding its name, nothing about the Library of Congress is uniquely "legislative" in the constitutional sense. The Library was originally established to hold Congress's books. See Act of January 26, 1802, § 1, 2 Stat. 128-129. Even in that first Act, however, Congress provided for appointment of the Librarian by the President, and authorized the President and Vice President to borrow books. Id. §§ 3, 4, 2 Stat. 129. Thereafter, Congress assigned the Librarian principal responsibility in the federal government for the administration of the copyright laws. See 16 Stat. 212 (1870). Congress also directed the Library to serve the Judicial Branch. 2 U.S.C. § 137 (power of Supreme Court Justices to issue regulations for the use of the Library's law department); id. § 137c (right of Judges of the D.C. Circuit to withdraw books). Furthermore, Congress has charged the Library with public archival and preservation functions similar to those of the National Archives, an executive agency. Compare 2 U.S.C. § 179p (national film registry collection); id. § 1711 (national sound-recording preservation program), with 44 U.S.C. § 2114 (preservation of films and sound recordings by the Archivist). Thus, as Congress

recognized in 1897 when it conformed the Librarian's appointment to the requirements of the Appointments Clause, "it is a misnomer to call it the Congressional Library. It is a great national Library and belongs to the Government of the United States." 29 Cong. Rec. 318-19 (1896) (Rep. Dockery); accord id. at 387 (Rep. Stone); ibid. (Rep. Fairchild).[2]

Appellant stresses that the provisions creating the Library are codified in Title 2 of the United States Code. RL Supp. Br. 12. But as the Fourth Circuit recognized in Eltra, such statutory labels have little bearing on the status of the Library under the Constitution. See 579 F.2d at 301 ("It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation."). If codification in Title 2 alone were determinative, the Supreme Court's opinion in Buckley would have been much shorter: the Federal Election Commission was codified in the legislative branch. 424 U.S. at 144. Indeed, on appellant's theory, the FEC is still unconstitutional today, because the amended provisions creating

[2] In Keeffe v. Library of Congress, 777 F.2d 1573, 1574 (D.C. Cir. 1985), a First Amendment case, this Court described the Library in dicta as a "congressional agency." The Court cited 2 U.S.C. § 171(1), which states that Congress in 1800 "established for itself a library." As already discussed, however, the Librarian from the outset has been a Presidential appointee, and in 1897 Congress removed any doubt that the Library is, for constitutional purposes, an executive Department.

the agency remain in Title 2. 2 U.S.C. §§ 431 et seq.; see Eltra, 579 F.2d at 301.

The same is true of the Library's classification as a legislative entity for various statutory purposes, such as the APA and the FOIA. Cf. Washington Legal Foundation v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (Library is exempt from the APA as legislative entity). Just as Congress can define the "government" for statutory purposes but not constitutional ones, see Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995), and just as Congress's definition of "executive departments" in 5 U.S.C. § 101 does not limit the term "Department" in Article II, see Freytag, 501 U.S. at 886-87 & n.4, statutory classifications of this kind do not impede the Librarian's exercise of executive power under the Constitution. What matters is that the Librarian is accountable only to the President and is appointed in conformity with the Appointments Clause. See Buckley, 424 U.S. at 128 n.165 (an officer appointed by and accountable to the President is an executive officer under the Constitution "irrespective of Congress' designation" to the contrary).

Nor is it significant that certain components of the Library of Congress — notably the Congressional Research Service — have no executive functions and are affirmatively charged with serving Congress. 2 U.S.C. § 166. The same was true of the FEC in

Buckley. See 424 U.S. at 137-38 (noting that many "powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees"). The Court did not suggest that if the Commissioners were properly appointed in conformity with the Appointments Clause, the Commission would be forbidden from performing such "legislative" functions. Indeed, like many federal agencies, the FEC today performs both executive and quasi-legislative functions. 2 U.S.C. § 437d. No constitutional difficulty is presented by statutory schemes of this kind.

Appellant claims that Congress "got it right" in the Copyright Act of 1976, which provided for appointment of the members of the Copyright Royalty Tribunal (CRT) by the President with confirmation by the Senate. RL Supp. Br. 13. This contention underscores the error of appellant's arguments. As an initial matter, the 1976 Act established the CRT as an agency "in the legislative branch." Pub. L. No. 94-553, § 801, 90 Stat. 2541, 2594 (1976). If appellant's arguments here were correct, that statutory label by itself would have rendered the Tribunal invalid, notwithstanding that its members were appointed in conformity with the Appointments Clause.

More fundamentally, the Tribunal was a free-standing administrative agency, not subject to supervision by the

Librarian or any other principal officer. See ibid. Appointment by the President was therefore constitutionally required. Congress could have established the Copyright Royalty Judges on the same model. Instead, it opted to make the Judges inferior officers appointed by the Librarian, the "Head" of the Library, who in turn is subject to plenary oversight by the President. That is exactly the sort of choice that the Appointments Clause permits Congress to make.

CONCLUSION

For the foregoing reasons, appellant's constitutional challenge should be rejected.

Respectfully submitted,

GREGORY G. KATSAS
Acting 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

JUNE 23, 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 2,971 words, according to the count of Corel WordPerfect 12, and consequently complies with the 3,000 word limit established in this Court's order dated June 6, 2008.

/s/
____
Mark R. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2008, I caused copies of the foregoing brief 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
601 Thirteenth Street, N.W.,
Suite 1200 North
Washington, DC 20005
(202) 639-6000

/s/
____
Mark R. Freeman