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THE CONSTITUTIONALITY OF THE APPOINTMENT OF COPYRIGHT ROYALTY JUDGES BY THE LIBRARIAN OF CONGRESS UNDER THE APPOINTMENTS CLAUSE

John P. Strohm *

In 2006, under the power of a 2004 amendment to the Copyright Act (the Act),¹ the Librarian of Congress appointed the Copyright Royalty Board (the CRB), a panel of three copyright royalty judges to oversee statutory licensing and related royalty rates.² In one of its first major decisions, the CRB, following the so-called “Web II” proceeding that included as parties major commercial and non-commercial internet broadcasters (webcasters), established royalty rates for statutory licenses permitting digital performances of sound recordings.³ Although SoundExchange, a nonprofit performing rights organization charged with collecting and distributing webcasting royalties to sound recording rights holders, retained—and has exercised—the right to negotiate reduced rates for specific webcasters,⁴ webcasters have argued that the default rates established by the Web II proceeding are unreasonable and will likely make it difficult or even impossible for smaller webcasters to continue to play sound recordings.⁵

Webcasters responded to the Web II rate determination in the courts, filing suit against the CRB on a variety of theories.⁶ In one interesting and compelling

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¹ 17 U.S.C. §§ 801–805 (2009).

² Library of Congress, Copyright Royalty Board, <http://www.loc.gov/crb/background> (last visited Nov. 5, 2009).

³ In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, U.S. Copyright Royalty Judges, No. 2005-1 CRB DTRA (Apr. 23, 2007), available at <http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf>.

⁴ See SoundExchange, <http://www.soundexchange.com> (last visited Nov. 5, 2009) (stating that to date SoundExchange has reached agreements regarding royalty rates for sound recordings through 2015 with SIRIUS-XM, College Broadcasters, Inc., the National Religious Broadcasters Music License Committee, and National Public Radio).

⁵ Kellen Myers, Note, *The RLAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 FED. COMM. L.J. 431, 433 (2009).

⁶ See, e.g., *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009) (rejecting commercial webcasters’ objections to the rate determination, which included that the base rates should have been determined based on a “perfectly competitive market” standard; judges presumed that major labels would have superior bargaining power than they would in the actual marketplace, and accordingly provided better terms; and per-performance rates (as

argument pursued in a recent complaint filed against the CRB, commercial webcaster Live365, Inc. (Live365) alleges that the appointment of the copyright royalty judges by the Librarian of Congress represents a violation of the Appointments Clause of the United States Constitution.⁷ The Appointments Clause provides as follows:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in Courts of Law, or in the Heads of Departments.⁸

Were the appointment of the CRB by the Librarian of Congress found to violate the Appointment Clause, the result would bring enormous uncertainty with regard not only to webcasting royalties discussed in this Article, but also to other copyright royalties such as cable royalties paid pursuant to statutory licenses, which have been the subject of extensive proceedings since the appointment of the CRB.⁹ Live365 asserts in its complaint that the members of the CRB are principle officers who must be appointed by the President with the advice and consent of the Senate, or, in the alternative, that the copyright royalty judges are “inferior officers” under the Appointments Clause, and therefore must be appointed by a “Head of Department,” and that the Librarian of Congress does not meet the definition of a Head of Department.¹⁰

The crux of the inquiry as to whether or not the copyright royalty judges are “officers” of the United States concerns whether or not the members exercise “significant authority” pursuant to the laws of the United States.¹¹ Alternatively, copyright royalty judges may be classified as employees, performing ministerial

opposed to rates based on a percentage of gross income) are unfair to small webcasters).

⁷ Plaintiff's Motion/Application For Preliminary Injunction, *Live365, Inc. v. Copyright Royalty Board*, No. 1:09-cv-01662(RBW) (D.C. D. Sept. 2, 2009) [hereinafter *Live365 Complaint*]; see also *Intercollegiate Broad. Sys., Inc.*, 574 F.3d at 755 (*Royalty Logic, Inc.*, a plaintiff in *Intercollegiate Broad. Sys.*, filed a supplemental brief arguing that the appointment of the Copyright Royalty Judges violated the Appointments Clause; however, the court held that *Royalty Logic* forfeited its claim and therefore did not address the substance of the argument).

⁸ U.S. CONST. art. II, § 2, cl. 2.

⁹ See <http://www.loc.gov/crb/proceedings/> (listing pending proceedings before the CRB).

¹⁰ *Live365 Complaint*, *supra* note 7, ¶ 39.

¹¹ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

tasks under the direction of the Librarian of Congress.¹² If it is determined that the copyright royalty judges are inferior officers of the United States, then a determination must be made regarding whether the Librarian of Congress is a “Head of Department,” for purposes of the Appointment Clause, including whether the Library of Congress is a “department.”¹³

This Article will focus on the second alternative argument posed by Live365 in its claim for declaratory relief, specifically whether copyright royalty judges are “inferior officers,” and if so whether the Librarian of Congress is a Head of Department. This Article does not assume that Live365 will necessarily fail under the first argument, positing that copyright royalty judges are primary officers under the Appointments Clause.

In *Freytag v. Commissioner*, the Court held that special trial judges, appointed to assist judges of the United States Tax Court, were inferior officers, rather than employees, of the Tax Court.¹⁴ Although the special trial judges did not have authority to enter a final decision, the office of the special trial judge is established by law and the duties, salary, and means of appointment for the office are established by statute.¹⁵ Furthermore, the special trial judges “perform more than ministerial tasks,” including among other things taking testimony, conducting trials, and enforcing compliance with discovery orders.¹⁶ The Court made clear that the fact that special trial judges sometimes perform ministerial tasks does not affect its determination that they are inferior officers.¹⁷

Under the Court’s reasoning in *Freytag*, the copyright royalty judges should also be regarded as inferior officers of the United States. Copyright royalty judges are also established by law and appointed pursuant to federal law.¹⁸ The duties, salary, and term are established by the Act.¹⁹ In addition to having authority pursuant to the Act to independently set compulsory royalty rates, the CRB can make “any necessary procedural or evidentiary rulings.”²⁰ The Chief Copyright Royalty Judge must have, in addition to seven years of legal experience, at least five years of experience in adjudications, arbitrations, or court trials.²¹

In contrast to the special trial judges analyzed under *Freytag*, the copyright royalty judges are entirely independent, except regarding novel questions of law,

¹² See *Freytag v. Comm’r*, 501 U.S. 868 (1991).

¹³ See *id.* at 885.

¹⁴ *Id.* at 881.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 882.

¹⁸ 17 U.S.C. § 801(a) (2006).

¹⁹ *Id.* § 801.

²⁰ *Id.*

²¹ *Id.* § 802(a).

to which the CRB is required by statute to request an opinion of the Register of Copyrights.²² Decisions of the CRB are subject to appeal by the United States Court of Appeals for the District of Columbia; however, such review by superior officers should not disqualify the CRB as officers. According to an opinion by the Department of Justice's Office of Legal Counsel, the Appointments Clause applies when the officers have "authority to act in the first instance, whether or not that act may be subject to direction or review by superior officers."²³ Under the authority of *Freytag*, the copyright royalty judges of the CRB should, at a minimum, be regarded as inferior officers under the Appointments Clause.

If, accordingly, the CRB is comprised of inferior officers of the United States for purposes of the Appointments Clause, then the appointment is only constitutional if made by the President, the courts of law, or a Head of a Department. The Appointments Clause falls under Article 2 of the United States Constitution, setting forth the powers of the executive branch of the U.S. government. The Library of Congress is not part of the executive branch, but rather the legislative branch.²⁴ Nevertheless, the Library of Congress is not a department for purposes of the Appointments Clause pursuant to *Freytag*.

According to the majority in *Freytag*,

[T]he term Department refers only to a part or division of the executive government, as the Department of State, or of the Treasury, expressly created and given the name of a department by Congress. The term head of a Department means the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet.²⁵

Justice Scalia states in his concurring opinion that heads of departments encompass "heads of all agencies immediately below the President in the organizational structure of the Executive Branch."²⁶ The term does *not* refer to "inferior commissioners and bureau officers."²⁷

²² 17 U.S.C. § 802(f)(1)(B)(i).

²³ *Officers of the United States Within the Meaning of the Appointments Clause*, 21 Op. Off. Legal Counsel No. 3, 2007 OLC LEXIS 3, 60.

²⁴ See *Judd v. Billington*, 863 F.2d 103, 104 (D.C. Cir. 1988) (citing 2 U.S.C. § 171(1)).

²⁵ *Freytag*, 501 U.S. at 886.

²⁶ *Id.* at 918 (Scalia, J., concurring). Scalia argues that the majority opinion correctly determined that the trial judges are "inferior officers" pursuant to the Appointments Clause; however, he disagrees with the conclusion because the Tax Court is a "Court of Law" under the Clause and is therefore empowered to make the appointment.

²⁷ *Id.* at 886.

The analysis a court must apply, therefore, in considering whether the appointment of the copyright royalty judges is constitutional, is whether the Library of Congress is a Cabinet-level division such as the State Department or Treasury, or whether it is an “inferior commission or bureau.” In his influential article, *Are Administrative Patent Judges Unconstitutional?*, John Duffy, a professor of law with George Washington University, applied a similar analysis with regard to administrative patent judges of the Board of Patent Appeals and Interferences, who are appointed by the Director of the United States Patent and Trademark Office (PTO).²⁸

Professor Duffy determined that the PTO is an agency of the United States within the Department of Commerce, and is therefore “subject to the policy direction of the Secretary of Commerce.”²⁹ Therefore, under Scalia’s Appointments Clause analysis in *Freytag*, the director of the PTO, technically the Under Secretary of Commerce, “is not a constitutionally acceptable appointing authority for officers of the United States”³⁰

In the 2009 case *In re DBC*, an appellant patentee challenged the appointment of two administrative patent judges on a panel that rendered a decision, basing its argument largely on the analysis presented in Professor Duffy’s article.³¹ The *DBC* court declined to hear the Appointments Clause challenge, because the appellant did not timely raise the challenge, and because of action taken by Congress since the publication of Duffy’s article to provide a legislative solution.³² In its appellate petition to the Supreme Court, the *DBC* appellant asserts that, among other errors, the *DBC* court erred because any retroactive legislative solution to correct the Appointments Clause violation at issue requires Supreme Court review.

Retroactive legislation to correct an Appointments Clause violation undermines its very purpose. The Appointments Clause is to be strictly applied,³³ as the Clause is critical in maintaining separation of powers. In the case of administrative patent judges, a finding that their appointment by the Director of the PTO was unconstitutional would yield potentially catastrophic results: many of the decisions since the Director of the PTO began appointing the administrative patent judges would be rendered invalid. The brief in support of the *DBC* appellant notes that courts have previously avoided hearing Appointments Clause challenges on procedural grounds. In the case of a challenge to the constitutionality of the appointment of administrative patent

²⁸ John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904 (2009).

²⁹ *Id.* at 911.

³⁰ *Id.*

³¹ 545 F.3d 1373 (Fed. Cir. 2008).

³² *Id.* at 1380.

³³ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

judges, it stands to reason that courts would go to great lengths to avoid rendering a substantive decision on this apparently very clear issue.

With regard to copyright royalty judges, it is similarly clear that their appointment by the Librarian of Congress violates the Appointments Clause, as interpreted in *Buckley* and *Freytag*. It is also apparent that federal courts are not eager to resolve the substantive issue.³⁴ A prospective and retroactive legislative solution would be convenient; however, a retroactive solution would undermine the purpose of the Appointments Clause.

The United States District Court recently rejected Live365's prayer for a temporary injunction to stop all CRB proceedings, including the so-called "Web II" proceeding to determine statutory rates for sound recordings through 2015 pending the resolution of the Appointments Clause issue.³⁵ Therefore, it remains likely that the default rates will be established through 2015 before courts or Congress address this crucial constitutional issue.

³⁴ See, e.g., *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755 (D.C. Cir. 2009) (stating that it was "within [the court's] power" to hear the challenge; however, declining to hear the challenge on the basis that it was not timely raised). Under *Freytag*, courts are only obligated to hear an Appointment Clause challenge that is timely.

³⁵ Order, *Live365, Inc. v. Copyright Royalty Board*, No. 1:09-cv-01662-RBW (D.C. D. Sept. 28, 2009), available at <http://www.scribd.com/20377680/order-denying-preliminary-injunction-in-Live-365-v-CRB>.