CRB Developments Concerning Board Appointments
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In May, 2008, I noted that appointments to the Copyright Royalty Board (CRB) by the Librarian of Congress had been belatedly challenged, based on John Duffy's views of the Appointments Clause. *See Limits to Administrative Appointments* [5/27/08 link?].

Intercollegiate Broadcast System, Inc. v. CRB, 2009 WL 2422729 *1 (D.C. Cir. 2009), recently rejected that challenge as untimely. As to that, the court writes, "At oral argument, Royalty Logic's counsel explained that the issue simply had not occurred to him until, several months after filing his opening brief…. But these cases were not new. [T]he most recent case cited in Royalty Logic's supplemental brief dates from 2003." *Id.* at *5. Also because the issues were incompletely briefed and not all parties views were considered, "Were we to decide the constitutional question without thorough, considered briefing from all interested parties, we would run "the risk of an improvident or ill-advised opinion on the legal issues tendered,'" *id.* (citation omitted).

The court nevertheless touches on the merits, echoing my observation that it would be difficult to find the Librarian's appointment of CRB members under 17 U.S.C. § 801(a) unconstitutional without similarly viewing his appointment of the Register of Copyright under § 701(a). "To hold that the Librarian is not the head of a department within the meaning of the Appointments Clause would invalidate the Judges' determinations and call into question the status of every registered American copyright. We decline to resolve this 'important question[ ] of far-reaching significance,'" *id.* at *6 (citation omitted).

The stakes are enormous. As Judge Kavanaugh points out in another, essentially coterminous, case, "billions of dollars and the fates of entire industries can ride on the [CRB]'s decisions. The Board thus exercises expansive executive authority analogous to that of, for example, FERC, the FCC, the NLRB, and the SEC. But unlike the members of those similarly powerful agencies, since 2004 [CRB] members have not been nominated by the President and confirmed by the Senate." SoundExchange v. Librarian of Congress, 2009 WL 1930180 *6 (D.C. Cir. 2009) (concurring). As he goes on to note, "Board members are appointed by the Librarian of Congress alone. Board members are removable by the Librarian, but only for cause." *Id.*

But it is unclear when or how the issue came to be raised. Nothing was seen in partiy briefs, nor was Judge Kavanaugh on the panel asked to resolve the above-mentioned challenge by Royalty Logic.

He nevertheless asks whether Copyright Royalty Judges are *principal,* rather than *inferior,* officers who must be nominated by the President and

confirmed by the Senate "because they are not removable at will and their decisions regarding royalty rates apparently are not reversible by the Librarian of Congress or any other Executive Branch official." *Id.*

He concludes by stating: "If [they] are in fact principal officers, then the present means of appointing Board members is unconstitutional. But no party here has timely raised a constitutional objection. We therefore may resolve the case without deciding whether the Board is constitutionally structured, and so I join the opinion of the Court." *Id.*

Were Judge Kavanaugh's instinct correct, the consequences would be far more serious than he seems to appreciate. First, everything said about the CRB is equally true of the Copyright Register, thus likewise bringing "into question the status of every registered American copyright." *Intercollegiate Broadcast System,* 2009 WL 2422729 *6.

Moreover, it would bring into question every decision of the BPAI and TTAB. As discussed most notably by In re Alappat, 33 F.3d 1526 (1994), such decisions are unreviewable by the PTO Director, Also, as held in Butterworth v. U.S. ex rel. Hoe, 112 U.S. 50 (1884), absent explicit statutory authority, those decisions are unreviewable by "any other Executive Branch official." *SoundExchange,* 2009 WL 1930180 *6. Thus, amendments to Lanham Act § 17(b) and 35 U.S.C. § 6(a), made last August [8/1/08-link?], would accomplish nothing insofar as Board appointments by the Secretary of Commerce are far short of presidential appointment subject to Senate confirmation. The scope of those consequeces will fail to hinder further, presumably timely, challenges based on that proposition, but it should deter courts from finding them viable.