

Because employers may be subject to civil penalties if it is later determined that the termination was involuntary, the Department strongly recommends that notice be provided to individuals who experienced any termination of employment. The Department has updated its model Supplemental Information Notice. Using this model to provide notice to these individuals satisfies the requirements of ARRA, as amended by CEA.

#### *f. Notice of Extended Election Period*

The Notice of Extended Election Period is required to be sent by plans that are subject to COBRA continuation provisions under Federal or State law. It must include the information described above and be provided to ALL individuals who experienced a qualifying event that was a termination of employment from April 1, 2010 through April 14, 2010, were provided notice that did not inform them of their rights under ARRA, as amended by CEA, and either chose not to elect COBRA continuation coverage at that time OR elected COBRA but subsequently discontinued that coverage. This notice must be provided before the end of the required time period for providing a COBRA election notice.<sup>7</sup> The Department has updated its model Notice of Extended Election Period. Using this model to provide notice to these individuals satisfies the requirements of ARRA, as amended by CEA.

### III. For Additional Information

For additional information about ARRA's COBRA premium reduction provisions as amended by CEA, contact the Department's Employee Benefits Security Administration's Benefits Advisors at 1-866-444-3272. In addition, the Employee Benefits Security Administration has developed a dedicated COBRA Web page [www.dol.gov/COBRA](http://www.dol.gov/COBRA) that will contain information on the program as it is developed. Subscribe to this page to get up-to-date fact sheets, FAQs, model notices, and applications.

### IV. Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104-13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid Office of Management and Budget

(OMB) control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number; further, the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 44 U.S.C. 3512.

OMB has approved the Department's no-material, non-substantive change request for the updated notices under OMB Control Number 1210-0123. The public reporting burden for this collection of information is estimated to average approximately 3 minutes per respondent, including time for gathering and maintaining the data needed to complete the required disclosure. There is also an additional \$0.44 average cost per response for mailing costs. Interested parties are encouraged to send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Office of the Chief Information Officer, Attention: Departmental Clearance Officer, 200 Constitution Avenue, NW., Room N-1301, Washington, DC 20210 or e-mail [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov) and reference the OMB Control Number 1210-0123.

### V. Models

The Department has decided to make the model notices available in modifiable, electronic form on its Web site: <http://www.dol.gov/COBRA>.

### VI. Statutory Authority

**Authority:** 29 U.S.C. 1027, 1059, 1135, 1161-1169; Sec. 3001, Pub. L. 111-5, 123 Stat. 115; Sec. 1010, Pub. L. 111-118, 123 Stat. 3409; Sec. 3, Pub. L. 111-144, 124 Stat. 42; Sec. 3, Pub. L. 111-157, 124 Stat. 1116; and Secretary of Labor's Order 6-2009, 74 FR 21524 (May 7, 2009).

Signed at Washington, DC, this 30th day of April 2010.

**Phyllis C. Borzi,**

*Assistant Secretary, Employee Benefits Security Administration.*

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**BILLING CODE 4510-29-P**

## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. RF 2009-1B]

### The Register of Copyrights' and the Copyright Royalty Judges' authority to determine the constitutionality of 17 U.S.C. 114(f)(5)

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Final Order.

**SUMMARY:** Two material questions of substantive law were referred to the Register of Copyrights concerning the authority of the Register of Copyrights and the Copyright Royalty Judges to determine the constitutionality of 17 U.S.C. 114(f)(5). The Register of Copyrights responded by delivering a Memorandum Opinion to the Copyright Royalty Board on April 30, 2010.

**DATES:** Effective Date: April 30, 2010.

**FOR FURTHER INFORMATION CONTACT:** Tanya Sandros, Deputy General Counsel, or Stephen Ruwe, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** In the Copyright Royalty and Distribution Reform Act of 2004, Congress amended Title 17 to replace the copyright arbitration royalty panels with the Copyright Royalty Judges ("CRJs"). One of the functions of the CRJs is to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119 and 1004 of the Copyright Act. The CRJs have the authority to request from the Register of Copyrights ("Register") an interpretation of any material question of substantive law that relates to the construction of provisions of Title 17 and arises during the proceeding before the CRJs. See 17 U.S.C. 802(f)(1)(A)(ii).

On March 31, 2010, the Register received an Order from Copyright Royalty Judge William J. Roberts, Jr. referring the following two material questions of substantive law for her consideration:

Does the Register of Copyrights have the authority under Chapter 7, or any other provisions of the Copyright Act, to determine the constitutionality of 17 U.S.C. 114(f)(5)?

Do the Copyright Royalty Judges have the authority under Chapter 8, or any other provisions of the Copyright Act, to determine the constitutionality of 17 U.S.C. 114(f)(5)?

The Register also received the briefs filed with the CRJs by RealNetworks,

occurring during the effective dates of the premium reduction program are not complete if they fail to include information on the availability of the premium reduction.

<sup>7</sup> See note 6 above.

Inc. and SoundExchange, Inc., in connection with a February 12, 2010, motion filed by RealNetworks, Inc. seeking referral of novel material questions of substantive law, which was initially denied by the CRJs.

In the March 31, 2010, Order, Judge Roberts referred the questions to the Register on his own initiative pursuant to 17 U.S.C. 802(f)(1)(A)(ii), which provides in pertinent part that “[o]ne or more Copyright Royalty Judges may, or by motion to the Copyright Royalty Judges, any participant in a proceeding may, request from the Register of Copyrights an interpretation of any material questions of substantive law that relate to the construction of provisions of this title and arise in the course of the proceeding.” Section 802(f)(1)(A)(ii) allows a 14-day response period. However, section 802(f)(1)(B)(i) provides that when the CRJs request a decision by the Register on “a novel material question of substantive law concerning an interpretation of those provisions of this title that are the subject of the proceeding” (emphasis added), the Register shall transmit her decision within a 30-day response period. A novel question of law is one that “has not been determined in prior decisions, determinations, and rulings described in section 803(a).” *Id.* On April 20, 2010, the Register advised the CRJs that she had determined that the material questions of law that are the subject of the Order are novel because they have not been determined in prior decisions, determinations, and rulings described in 17 U.S.C. 803(a). *See* 17 U.S.C. 802(f)(1)(B)(ii).

On April 30, 2010, the Register responded in a Memorandum Opinion to the CRJs that addressed the novel material questions of law. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety, below. The timely delivery of the Register’s response requires that “the Copyright Royalty Judges shall apply the legal determinations embodied in the decision of the Register of Copyrights in resolving material questions of substantive law.” *See* 17 U.S.C. 802(f)(1)(B)(i).

Dated: May 3, 2010

**David O. Carson,**  
General Counsel.

Before the  
U.S. Copyright Office  
Library of Congress  
Washington, D.C. 20559

In the Matter of

Digital Performance Right in Sound  
Recordings and Ephemeral  
Recordings

Docket No. RF 2009–1B  
CRB Webcasting III

**MEMORANDUM OPINION  
ON MATERIAL QUESTIONS OF  
SUBSTANTIVE LAW**

**I. Procedural Background**

On February 12, 2010, RealNetworks, Inc. (“RealNetworks”) filed a motion requesting referral to the Register of Copyrights of what it identified as two novel material questions of substantive law. That motion was denied by the Copyright Royalty Judges on March 30, 2010. *Order Denying Motion Requesting Referral of Novel Material Questions of Substantive Law*, Docket No. 2009–1 CRB Webcasting 111.

The second question proposed in RealNetworks’ motion sought to identify whether the Register of Copyrights (“Register”) or the Copyright Royalty Judges (“CRJs”), or both, have the authority to determine the constitutionality of 17 U.S.C. § 114(f)(5), a provision that inter alia calls upon the CRJs to allow agreements made pursuant to the Webcaster Settlement Acts to be admitted into evidence or otherwise considered *only* if both parties to such agreements authorize submission of the agreements in a CRJ proceeding. While RealNetworks’ motion did not properly frame that question as novel within the meaning of 17 U.S.C. § 802(f)(1)(B), Copyright Royalty Judge William J. Roberts Jr., in an order issued subsequent to the CRJs’ initial denial of RealNetworks’ motion, determined that there were referable questions within the meaning of 17 U.S.C. § 802(f)(1)(A)(ii). That subsection provides, in pertinent part, that “one or more Copyright Royalty Judges may ... request from the Register of Copyrights an interpretation of any material questions of substantive law that relate to the construction of provisions of this title and arise in the course of the proceeding.” On March 31, 2010, pursuant to 17 U.S.C. § 802(f)(1), Judge Roberts referred the following two questions of law to the Register of Copyrights.<sup>1</sup>

Does the Register of Copyrights have the authority under Chapter 7, or any other

provisions of the Copyright Act, to determine the constitutionality of 17 U.S.C. § 114(f)(5)?  
Do the Copyright Royalty Judges have the authority under chapter 8, or any other provisions of the Copyright Act, to determine the constitutionality of 17 U.S.C. § 114(f)(5)?

The order referring the two questions was accompanied by the briefs that had been submitted by the parties as part of the pleading cycle on RealNetworks’ motion for referral.

As required by 17 U.S.C. § 802(f)(1)(B)(i), the Register hereby provides her response to the novel material questions of substantive law that were referred to her by Judge Roberts.

**II. Summary of Parties’ Arguments**

In its motion requesting referral of novel material questions of law, RealNetworks argues that the CRJs and the Register lack authority to determine that section 114(f)(5) is unconstitutional. In doing so, it observes that the Supreme Court has repeatedly stated that “adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). Additionally, RealNetworks notes the D.C. Circuit’s observation that agencies may lack the institutional competence to resolve certain issues, such as the constitutionality of a statute. *Hettinga v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009) (citing *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992)).

SoundExchange Inc. (“SoundExchange”) filed a brief opposing RealNetworks’ motion requesting referral of novel material questions of law in which it echoed RealNetworks’ views that the CRJs and the Register lack authority to determine that section 114(f)(5) is unconstitutional. In doing so, SoundExchange notes that RealNetworks does not attempt to argue that the present circumstances offer an exception to the general rule, set forth in *Thunder Basin*, that agencies do not have the authority to determine the constitutionality of congressional enactments.

In RealNetworks’ reply in support of its motion for referral of novel material questions of law, it observes that RealNetworks and SoundExchange both cited *Thunder Basin* for the proposition that adjudication of the constitutionality of congressional enactments is generally beyond the jurisdiction of an administrative body. RealNetworks

<sup>1</sup> On April 20, 2010, the Register informed the CRJs that the referred questions are novel questions of law because they have not been determined in prior decisions, determinations or rulings (17 USC § 803(a)).

asserts that while the private parties agree that the general rule should apply in this case, the Court held in *Thunder Basin* that the general rule did not apply in that case, explaining: “This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent Commission” that “has addressed constitutional questions in previous enforcement proceedings.” *Thunder Basin*, 510 U.S. at 215 (1994).

### III. Register’s Determination

The Register acknowledges the rule set forth in *Thunder Basin* that adjudication of the constitutionality of congressional enactments is generally beyond the jurisdiction of administrative agencies. *Thunder Basin*, 510 U.S. at 215 (1994) (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies)); See also *Motor & Equipment Mfrs. Assn. v. Environmental Protection Agency*, 627 F.2d 1095, 1115 (D.C. Cir. 1979).<sup>2</sup> The parties are in agreement that this general rule applies to foreclose the Register and the CRJs from determining the constitutionality of 17 U.S.C. § 114(f)(5). However, in order to determine whether the Register or the CRJs do not have the authority under the provisions of the Copyright Act to determine the constitutionality of 17 U.S.C. § 114(f)(5), the exceptions to the general rule must be considered.

While the case law regarding exceptions to the general rule against agency adjudication of the constitutionality of congressional enactments is slim, in *Thunder Basin*, the general rule was not found to apply because the reviewing body was not the agency itself. Rather the Federal Mine Safety and Health Review Commission was an independent Commission established exclusively to adjudicate disputed enforcement measures undertaken by the Mine Safety and Health Administration pursuant to the

<sup>2</sup> Various administrative agencies have come to the same conclusion when confronted with questions regarding their authority to determine the constitutionality of statutory provisions. 63 Fed. Reg. 6614, 6620 (February 9, 1998) (Department of Labor finding that, as the agency given the administrative authority to implement a statutory provision, it has no authority to question the constitutionality of the statute); 56 Fed. Reg. 11653, 11660 (March 20, 1991) (Federal Trade Commission finding that it does not have authority to determine the constitutionality of the statutes it enforces); 50 Fed. Reg. 35418, 35422 (August 30, 1985) (Federal Communications Commission finding that administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute, citing *Johnson v. Robison*, 415 U.S. at 368).

statute in question. The court also observed that even if the agency or independent Commission were not authorized to determine the constitutionality of congressional enactments, the constitutional claims could be meaningfully addressed in the Court of Appeals, thus avoiding the “serious constitutional question” that would arise if an agency’s organic statute were construed to preclude all judicial review of a constitutional claim. *Id.*

Case law reveals additional considerations that are relevant in determining whether it is proper to apply the general rule against agency adjudication of the constitutionality of congressional enactments. For instance, the general rule “is subject to Congress’s allocation of adjudicative responsibility.” *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995) (citing *Thunder Basin*, 510 U.S. at 215 (1994)). Additionally, a finding that the agency lacks jurisdiction to decide constitutional questions is especially likely when the constitutional claim asks the agency to act contrary to its statutory charter. *Riggin*, 61 F.3d at 1569; See also *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Johnson v. Robison*, 415 at 367; *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958). In the *Riggin* case, the general rule was not applied in part because the constitutional issue did not require the agency to question its own statutory authority or to disregard any instructions Congress had given it.

In the case at hand, the established exceptions to the general rule against agency adjudication of the constitutionality of congressional enactments are not applicable. Nowhere in title 17 are either the Register or the CRJs allocated any adjudicative responsibility to determine the constitutionality of statutory provisions. Additionally, the CRJs are not the type of independent Commission at issue in *Thunder Basin*, which was established to review agency actions. While it is true that 17 U.S.C. § 802(f)(1) calls upon the Register to, in certain circumstances, offer either “an interpretation of any material questions of substantive law that relate to the construction of provisions of this title and arise in the course of the proceeding” or “an interpretation of those provisions of this title that are the subject of the proceeding,” these provisions address interpretation of statutory provisions themselves and do not authorize determinations as to the constitutionality of such provisions. 17 U.S.C. § 802(f)(1)(A)&(B). Similarly, the

Register’s authority to review the CRJs’ final determinations for errors of law is also directed toward material questions of substantive law under title 17, not toward the constitutionality of such provisions. 17 U.S.C. § 802(f)(1)(D). Like the Mine Safety and Health Administration (“MSHA”) in *Thunder Basin*, the CRJs are tasked with carrying out statutory duties prescribed by Congress. However, unlike the independent Commission in *Thunder Basin*, which had broad authority to review the actions of the MSHA, the Register, as indicated above, has a narrower authority in these proceedings, which allows her only to determine issues of substantive law under title 17. Finally, unlike the constitutional claim in *Riggin*, a determination by the CRJs that 17 U.S.C. § 114(f)(5) is unconstitutional would necessarily require the CRJs to act contrary to their statutory charter, which pointedly directs the CRJs to act in accordance with the provisions of section 114(f)(5).<sup>3</sup> Under that provision, the CRJs may allow agreements made pursuant to the Webcaster Settlement Acts to be admitted into evidence or otherwise considered only if both parties to such agreements authorize submission of the agreements in a CRJ proceeding.

As neither the Register nor the CRJs have any specific authority under Chapter 7, or any other provisions of the Copyright Act, to determine the constitutionality of 17 U.S.C. § 114(f)(5), and because no other established exceptions to the general rule against agency adjudication of the constitutionality of congressional enactments are applicable, the Register concludes that neither the Register nor the CRJs have the authority under the Copyright Act to determine the constitutionality of 17 U.S.C. § 114(f)(5).

April 30, 2010

**Marybeth Peters,**

*Register of Copyrights.*

[FR Doc. 2010–11116 Filed 5–10–10; 8:45 am]

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## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Schedules; Availability and Request for Comments

**AGENCY:** National Archives and Records Administration (NARA).

<sup>3</sup> 17 U.S.C. § 801(b)(1) calls upon the CRJs to “make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004.” (emphasis added).