# Office of the Attorney General
## Washington, D. C. 20530

January 11, 2013

Mr. Morgan Frankel
Senate Legal Counsel
United States Senate
Washington, DC 20510

Re: *Intercollegiate Broadcasting System, Inc.* v. *Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012)

Dear Mr. Frankel:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced case. A copy of the decision of the United States Court of Appeals for the District of Columbia Circuit is enclosed.

The case involves a constitutional challenge to Chapter 8 of Title 17, United States Code, which establishes the offices of the Copyright Royalty Judges (CRJs), a three-member board within the Library of Congress that sets and adjusts the rates and terms for statutory copyright licenses. See 17 U.S.C. 801 *et seq*. The statute provides for appointment of the CRJs by the Librarian of Congress to staggered six-year terms. 17 U.S.C. 801(a), 802(c).

In this case, the appellant challenged a determination by the CRJs that established rates and terms for the statutory license for the transmission over the internet of copyrighted sound recordings. In the course of challenging the merits on direct review to the court of appeals, the appellant contended that the CRJs' appointment was contrary to the Appointments Clause of the Constitution (Art. II, § 2, cl. 2) for two reasons: first, because the CRJs' powers make them principal officers of the United States (who have not been validly appointed by the President with the advice and consent of the Senate); and second, because, even if they are inferior officers, the Librarian of Congress is not a "Head[] of Department[]" and therefore may not be given the power to make such appointments.

In the enclosed decision, the court of appeals held that, under the statutory scheme as enacted, the CRJs must be regarded as principal officers, who must be appointed by the President with the advice and consent of the Senate. In the court's view, this conclusion was required because of the limited supervision over the CRJs' discretionary decisions that the statute allows

to be exercised by the Librarian of Congress and by the Register of Copyrights (an officer within the Library of Congress who is appointed by the Librarian and acts under his general direction and supervision, 17 U.S.C. 701(a)). See 684 F.3d at 1337-1340.

The court of appeals further held, however, that it could remedy the constitutional infirmity by severing the statutory provision (17 U.S.C. 802(i)) that imposes good-cause limits on the Librarian's ability to remove a CRJ. 684 F.3d at 1340-1341. "With unfettered removal power," the court concluded that the Librarian would have sufficient control over the CRJs to make them inferior officers. *Id.* at 1341. In proceeding in that manner to remedy the violation of the Appointments Clause, the court relied on the Supreme Court's decision in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3153-3155, 3161 (2010), which severed restrictions on the removability of the members of the Public Company Accounting Oversight Board by the Securities and Exchange Commission, after holding that those restrictions impermissibly constrained the President's power under Article II to oversee the actions of the Board through the SEC. See 684 F.3d at 1340-1341. The court of appeals also concluded that the Library of Congress is a "Department" for purposes of the Appointments Clause, and that the Librarian is a "Head[] of Department[]" in whom Congress may validly vest the power to appoint inferior officers. *Id.* at 1341-1342. The court vacated and remanded the CRJs' decision in this case, because of the infirmity in their appointments when they made that decision. *Id.* at 1342.

Although the Department defended the constitutionality of the statute in the court of appeals, it has decided not to file a petition for a writ of certiorari seeking review of the court of appeals' decision, but instead to defend that decision against any further challenge by the appellant. The court of appeals' conclusion is consistent with the Supreme Court's case law, which establishes "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." *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). As the court of appeals explained, the statutory framework governing CRJs does not provide for at-will removal of the CRJs by any principal officer, 17 U.S.C. 802(i); it states that the CRJs "shall have full independence in making" rate determinations, 17 U.S.C. 802(f)(1)(A)(i); and, within the Library, those decisions are reviewable only by the Register of Copyrights (who is not appointed by Presidential nomination with the advice and consent of the Senate) and they may be reviewed for legal errors, 17 U.S.C. 802(f)(1)(D).

An additional consideration relevant to the Department's decision not to seek further review of the court of appeals' Appointments Clause ruling, but rather to accept it as correct, is that the various restrictions on the Librarian's oversight of the CRJs in turn diminish the President's ability, through the Librarian, to oversee the actions of the CRJs. Cf. *Free Enterprise Fund*, 130 S. Ct. at 3155-3157; *The Attorney General's Duty to Defend the Constitutionality of*

*Statutes*, 5 Op. O.L.C. 25, 25 (1981) (explaining that the Department appropriately declines to defend the constitutionality of an Act of Congress when it "infringes on the constitutional power of the Executive").

The Department has consulted with the Library of Congress, the Copyright Office, and the CRJs regarding the court of appeals' decision. Based on those consultations, it appears that the decision — finding an Appointments Clause violation and remedying that violation by severing the restrictions on removal of a CRJ but otherwise leaving the statutory scheme intact — is unlikely to have a substantial detrimental effect on either the operation of the copyright ratemaking scheme in Chapter 8 of Title 17 specifically or the operation of the federal copyright laws generally. Nor do we have reason to believe that the court of appeals' decision will have practical ramifications for prior CRJ determinations, of which there have been relatively few.

The Chief Justice has granted two extensions of time for the Solicitor General to file a petition for a writ of certiorari, and that time now expires on January 25, 2013. The appellant has sought and obtained from the Chief Justice two extensions of time, likewise to January 25, 2013, to file a petition for a writ of certiorari seeking review of the adequacy of the court of appeals' remedial holding, which severed the for-cause removal restriction contained in 17 U.S.C. 802(i) and otherwise left intact the rest of the statutory framework applicable to CRJs.

Please let me know if we can be of further assistance in this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General