No. 11-1083

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERCOLLEGIATE BROADCASTING SYSTEM, Inc.,
a Rhode Island Non-Profit Corporation,
Appellant,

v.

COPYRIGHT ROYALTY BOARD,
Appellee
SOUNDEXCHANGE, Inc.,
Intervenor for Appellee.

APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

William Malone
9117 Vendome Drive
West Bethesda, MD 20817
(301) 365-1175

Christopher J. Wright
Timothy J. Simeone
Mark D. Davis
WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for Appellant
Intercollegiate Broadcasting
System, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY 1

STATEMENT 3

STANDING 6

ARGUMENT 7

I. THE PANEL'S UNPRECEDENTED REMEDY IS IMPROPER UNDER *BUCKLEY* AND INSUFFICIENT UNDER *EDMOND* 7

A. Under *Buckley*, The Panel Should Have Left Amendment Of The Statute To Congress 7

B. Under *Edmond*, The Panel's Remedy Is Insufficient To Cure The Appointments Clause Violation 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) 1, 2, 7, 8, 10, 11

Edmond v. United States, 520 U.S. 651 (1997) 1-2, 3, 4, 10, 12, 13-14, 15

Free Enterprise Fund v. Public Company Accounting Oversight Board, 537 F.3d 667, 699 (D.C. Cir. 2008) 15

Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010) 5-6, 9, 10, 11, 15

Freytag v. Commissioner, 501 U.S. 868, 879-80 (1991) 15

Morrison v. Olson, 487 U.S. 654 (1988) 4, 6

SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220, 1226 (D.C. Cir. 2009) 3

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 580, 568-69 (1985) 6

STATUTES AND OTHER AUTHORITIES

150 Cong. Rec. H9848-01, H9856 (daily ed. Nov. 17, 2004) 9

17 U.S.C. § 802(f)(1)(A)(i) 1, 5, 7

Appointments Clause, U.S. Const., art. II, § 2, cl. 2 ..... 1, 2, 5, 6, 7, 8, 10-11, 12, 14

Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801 *et seq* 1, 9

Tom Campbell, *Severability of Statutes*, 64 Hastings L.J.1495 (2011) 11

INTRODUCTION AND SUMMARY

Review is warranted because this Petition presents a question of exceptional importance and the panel's decision conflicts with *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Edmond v. United States*, 520 U.S. 651 (1997).

Under the Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801 *et seq.*, the Librarian of Congress appoints three Copyright Royalty Judges ("Judges" or "CRJs") to set rates for musical works used by a number of different industries. The panel determined that, under the statute as written by Congress, the Judges are principal officers of the United States who must be appointed by the President under the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. But rather than striking down the statute as unconstitutional, the panel purported to correct the violation by invalidating and severing the provisions in Section 802(i) providing that the Judges may be removed from office only for cause. In the panel's view, that change demoted the Judges to the status of "inferior officers" who do not need to be appointed by the President.

The question presented is whether the panel erred in attempting to remedy the Appointments Clause violation it identified by revising the statutory scheme to authorize the Librarian of Congress to remove the Judges without cause. The remedy was improper under *Buckley* because the Court in that case did not revise the statute at issue to remedy the Appointments Clause violation it found, but

instead stayed the issuance of its judgment for 30 days to permit Congress to revise the statute. 424 U.S. at 142-43. The remedy was insufficient under *Edmond* because, even after the amendment of the statute ordered by the panel, the Judges retain the "power to render a final decision on behalf of the United States," 520 U.S. at 665, which makes them principal officers.

Whether a court that finds an Appointments Clause violation should leave the remedy to Congress or revise the statute itself—and, if so, how it should choose to revise the statute—is a question of exceptional importance that warrants consideration by the en banc Court. Questions relating to how to remedy constitutional violations generally receive scant attention in the briefs and cursory treatment in judicial opinions. The law would profit from detailed examination of the issue by this Court, which should conclude that, as in *Buckley*, Congress should remedy the violation identified by the Court.

Whether the panel's rewriting of the statute cured the constitutional error it identified is also an issue of exceptional importance. A key goal of the Appointments Clause is to make the President accountable for Executive Branch decisions, and it follows that the President should appoint officials who make final decisions on behalf of the United States. Moreover, if the panel's decision stands, Congress could provide for the Librarian to appoint the members of other federal agencies, such as the Federal Communications Commission and the National

Labor Relations Board, as long as the Librarian could remove the members of those agencies without cause. This Court should hold that, under *Edmond*, the members of a tribunal that make final decisions on behalf of the United States are principal officers whether or not they can be removed without cause.

STATEMENT

The panel determined—correctly, in Petitioner's view—that the Copyright Royalty Judges are principal officers of the United States under the statute as written by Congress. The panel first explained that the Judges' decisions "have considerable consequences"—"'billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions.'" Slip op. 9, *quoting SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring). "The CRJs set the terms of exchange for musical works not only on traditional media such as CDs, cassettes and vinyl, but also on digital music downloaded through iTunes and Amazon.com, digital streaming via the web, rates paid by satellite carriers, non-commercial broadcasting, and certain cable transmissions." Slip op. 9. The panel noted that royalty payments may constitute half of a firm's cost of doing business. *Id.*, *citing* Pet.'s Rep. Br. 6-7 (at $62.9 million annually, royalty payments represent more than half of all costs for Pandora Media Inc., the nation's largest webcaster).

The panel then turned to analysis of the three factors discussed by the Supreme Court in *Edmond* in the course of determining whether the Coast Guard Judges were principal or inferior officers. The first factor involved the level of supervision of the officers in question. With respect to the CRJs, the panel noted that the Librarian of Congress has some supervisory authority over the CRJs, such as issuing ethical rules to govern their conduct, but "[n]one of these seems to afford the Librarian room to play an influential role in the CRJs' substantive decisions." *Id*. at 10. Similarly, the Register of Copyrights provides legal guidance to the CRJs, but the Register's authority "leaves vast discretion over the rates and terms" to the CRJs. *Id*. at 11. "Thus, the Register's control over the most significant aspect of the CRJs' determinations—the rates themselves—is likely to be quite faint." *Id*. at 12. And "it is the rate itself … that is of the greatest importance." *Id*.

The panel then determined that "[t]he second *Edmond* factor, removability, also supports a finding that the CRJs are principal officers" because they can be removed only for cause. *Id*. The panel noted that the independent counsel in *Morrison v. Olson*, 487 U.S. 654 (1988), was found to be an inferior officer even though she could be removed only for cause, but said that the Court in *Morrison* "did not hold that such a restriction on removal was generally consistent with the status of inferior officer." Slip op.12-13.

Third, the panel determined that "the CRJs' rate determinations are not reversible or correctable by any other officer or entity within the executive branch." *Id*. at 13. The panel added that the statute explicitly gives the CRJs "'full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms'" and various other important matters. *Id*., *quoting* 17 U.S.C. § 802(f)(1)(A)(i).

Having analyzed these three factors, the panel determined that "the CRJs as currently constituted are principal officers who must be appointed by the President and confirmed by the Senate, and that the structure of the Board therefore violates the Appointments Clause." *Id*. at 14.

The panel then stated that it "therefore must decide the appropriate remedy to correct the violation." *Id*. Without much analysis, the panel simply imported the remedy from *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010). In that case, the Supreme Court held that the members of the Board at issue were inferior officers because their decisions could be reversed by the Securities and Exchange Commission ("SEC"). But the Court also concluded that the structure of the Board was unconstitutional under separation-of-powers principles because the Board members had two levels of tenure protection—they could be removed only for cause by the Commission, whose members could be removed only for cause by the President. The Court

remedied the separation-of-powers problem by striking the provision stating that Board members could be removed only for cause. *See* slip op. 14, *citing Free Enterprise Fund*, 130 S. Ct. at 3161.

In this case, the panel selected a remedy for the Appointments Clause violation that is modeled on the remedy the Court in *Free Enterprise Fund* used to remedy a separation-of-powers violation. The panel said that "invalidating and severing the restrictions on the Librarian's ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage." Slip op. 14. The panel recognized that "individual CRJ decisions will still not be directly reversible," but concluded "that free removability constrains their power enough to outweigh the extent to which the scope of their duties exceeds that of the special counsel in *Morrison*." *Id*. at 15.

STANDING

Although the panel agreed with Petitioner's argument that the structure of the Copyright Royalty Board is unconstitutional as enacted, Petitioner has standing to challenge the judgment because the panel's remedy requires Petitioner to return to argue before a tribunal that is arguably constitutionally defective. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 580, 568-69 (1985) (a party has standing to challenge a "tribunal's authority to adjudicate the dispute" if it "has been or inevitably will be subjected to" the tribunal's jurisdiction).

ARGUMENT

THE PANEL'S UNPRECEDENTED REMEDY IS IMPROPER UNDER *BUCKLEY* AND INSUFFICIENT UNDER *EDMOND*

A. Under *Buckley*, The Panel Should Have Left Amendment Of The Statute To Congress.

The panel deleted "all of the language in 17 U.S.C. § 802(i) following 'The Librarian of Congress may sanction or remove a Copyright Royalty Judge.'" Slip op. 14. The intended effect of the deletion was to change the status of the Copyright Royalty Judges from principal officers of the United States to inferior officers. The panel should not have taken the unprecedented step of attempting to demote the Judges, but instead should have left the choice of remedy to Congress.

That is the course the Supreme Court took in the only case in which it found an Appointments Clause violation, *Buckley v. Valeo*. After finding that the members of the initial version of the Federal Election Commission had not been appointed in conformity with the Appointments Clause, the Court did not rewrite the statute. Instead, it decided to "stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise duties and powers," explaining that "[t]his limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms." 424 U.S. at 142-43. The Court invoked the *de facto* officer doctrine and precedent from apportionment and voting rights cases as the

basis for its authority to grant this limited relief. *Id*. And, of course, the issuance of a stay is a traditional judicial remedy, unlike the revision of a statute.

The panel should have taken the same course here. Congress reconstituted the Federal Election Commission after the Supreme Court's decision in *Buckley* and Congress can reconstitute the Copyright Royalty Board as well. The panel did not cite *Buckley*—the only precedent governing how to remedy an Appointments Clause violation—or explain why it was not leaving the choice of remedy to Congress. Nor did it acknowledge that it was the first Court to demote officers created by Congress as principal officers to the status of inferior officers. The panel should not have taken this unprecedented step. Moreover, after the Supreme Court's decision in *Buckley*, Congress fixed the problem with the Federal Election Commission by providing that its members are appointed by the President, and that would be the most straightforward remedy here. Congress created the Copyright Royalty Judges as principal officers, principal officers must be appointed by the President, and Congress regularly provides for presidential appointment of the members of tribunals that make important regulatory decisions.

The panel did not say why it did not choose the most straightforward remedy here, but it is likely that it did not do so because such a remedy would have required affirmative rewriting of the statute, which is even more clearly a legislative function than the "mere" deletion of portions of the statute. Plainly, that

is not the best basis on which to make such decisions since considerations such as whether words are added or deleted artificially constrain the choice of remedy. And, of course, Congress is free to make amendments in the most appropriate form.

The panel explained its choice of remedy by stating that it "minimizes any collateral damage" and is the same remedy the Supreme Court chose in *Free Enterprise Fund*. Slip op. 14. Minimizing collateral damage suggests making the necessary changes most consistent with Congress's goals in adopting the statute. (The panel surely did not mean that it was deleting the minimum number of words from the statute to render it constitutional *without regard* to the effect on Congress's goals in adopting the statute.) But the panel did not explain why it was confident that its amendment was consistent with Congress's goals, and there is good reason to think it is not. In passing the Copyright Royalty and Distribution Reform Act of 2004, one of Congress's primary goals was to remedy a flaw in the prior system—namely, that copyright royalties were set by "ad hoc" panels that produced "unpredictable and inconsistent" decisions. 150 Cong. Rec. H9848-01, H9856 (daily ed. Nov. 17, 2004) (statement of Rep. Sensenbrenner). Congress's solution was to provide for the appointment of "permanent copyright royalty judges"—*i.e.*, judges who could not be fired on a whim. *Id.* ("Among other things, H.R. 1417 addresses the uniform complaint that CARP decisions are unpredictable

and inconsistent. This is generally accomplished by changing the structure from one featuring ad hoc arbitration panels to one comprised of three permanent copyright royalty judges or CRJs."). In rewriting the statute, the panel ignored this principal goal of Congress.

Moreover, Congress plainly intended to create an expert body to set rates for the exchange of musical works, and an expert board is most likely to result from a presidential appointment requirement. As the Court explained in *Edmond*, "vesting the President with the exclusive power to select the principal (noninferior) officers of the United States … was also designed to assure a higher quality of appointments." 520 U.S. at 659.

It is nevertheless possible that the remedy most consistent with Congress's goals would be for the Librarian of Congress or the Register of Copyrights to have authority to revise the Board's rate decisions. But if Congress wants to demote the Judges from principal officers to inferior officers by making their decisions subject to revision prior to judicial review, Congress rather than a court ought to order the demotions.

As the panel emphasized, the Court in *Free Enterprise Fund* did take the extraordinary step of revising the statute at issue. But unlike *Buckley*, *Free Enterprise Fund* did not involve an Appointments Clause violation. Nor did the Court adopt the extraordinary remedy of demoting principal officers to the status

of inferior officers. And the remedy the Court adopted plainly was the most straightforward remedy for the separation-of-powers problem it addressed—the problem was two layers of tenure and the Court removed one. In this case, in contrast, the problem involves principal officers who were not appointed by the President and the most straightforward remedy would be to require appointment by the President.

Under *Free Enterprise Fund*, it is clear that courts have the authority to revise statutes in some circumstances. (Nevertheless, a former congressman and law professor has criticized the decision on the ground that the Court unconstitutionally acted as a legislative body. *See* Tom Campbell, *Severability of Statutes*, 64 Hastings L.J.1495 (2011).) But *Free Enterprise Fund* did not overrule *Buckley* and *require* courts to rewrite statutes rather than use more traditional judicial remedies and leave amendment to Congress—much less require a choice to demote principal officers to inferior status. To the contrary, in *Free Enterprise Fund* the Court noted that one possible remedy would be to "blue-pencil a sufficient number of the Boards' responsibilities so that its members would no longer be 'Officers of the United States.'" 130 S. Ct. at 3162. But the Court stated that such a remedy "belongs to the Legislature, not the Judiciary." *Id*. Accordingly, in *Free Enterprise Fund* the Court explicitly rejected use of a remedy that had the effect of demoting the officers in question.

Even if judicial revision of a statute is the least bad remedy in some circumstances, the law would profit from consideration by the en banc Court of the principles governing such extraordinary action. Such review should lead to the conclusion that, in an Appointments Clause case where Congress wanted to improve the quality of the judges setting royalty rates, the court should have left the choice of remedy to Congress rather than attempt to demote the CRJs.

B. Under *Edmond*, The Panel's Remedy Is Insufficient To Cure The Appointments Clause Violation.

Even if the statute were amended as prescribed by the panel, the Appointments Clause violation would remain. The CRJs differ from the Coast Guard Judges at issue in *Edmond* in what the Supreme Court described as the most significant respect: The CRJs may render final decisions of the United States that are not reviewable by any Executive Branch officer.

In *Edmond*, the Court held that members of the Coast Guard Court of Criminal Appeals were inferior officers. The Court noted that the Coast Guard Judges were subject to some degree of administrative oversight by the Judge Advocate General, who "'prescribe[s] uniform rules of procedure'" for the Judges and meets with them to "'formulate policies and procedures,'" but has no power to "attempt to influence … the outcome of individual proceedings." 520 U.S. at 664. The Court also noted that "the Judge Advocate General may also remove a Court of Criminal Appeals judge from his judicial assignment without cause." *Id*.

After making those observations, the Court pointed out that the rulings of the Coast Guard Court of Criminal Appeals are reviewable and reversible by the Court of Appeals for the Armed Forces. *Id*. In explaining why the Coast Guard Judges are inferior officers, the Court stated: "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. at 665.

If the statute at issue were amended as ordered by the panel, the Copyright Royalty Judges would be in the same position as the Coast Guard Judges *except* with respect to what the Supreme Court described as the "significant" factor in *Edmond*. Both sets of judges are subject to some degree of administrative oversight and both sets of judges may be removed without cause—in the case of the CRJs, only after judicial amendment of the governing statute. But the CRJs still may "render a final decision on behalf of the United States" without review by any Executive officer. This difference is enough to make the CRJs principal officers even if the statute were amended as provided by the panel. Otherwise there would have been no point to the Supreme Court's statement in *Edmond* that "[w]hat is significant" is that the Coast Guard Judges lack the power to "render a final decision on behalf of the United States." If judges who are subject to some degree of administrative oversight and may be removed without cause are inferior

officers, it would not have mattered in *Edmond* that they lacked power to render a final decision on behalf of the United States—but it was the deciding factor.

In the case of tribunals such as the Copyright Royalty Board, it makes practical sense to emphasize whether their members render final decisions on behalf of the United States in determining whether they are principal or inferior officers. An officer who does not render final decisions is plainly inferior as a practical matter. In contrast, an officer who renders final decisions that are binding law in the absence of invalidation by a court has no superior in the Executive Branch. The President should appoint officers who render final decisions on behalf of the United States because a key purpose underlying the Appointments Clause is to make the President accountable for decisions of the Executive Branch. *See Edmond*, 520 U.S. at 660 (quoting Alexander Hamilton's observation that, under the Appointments Clause, "The blame of a bad nomination would fall upon the president singly and absolutely").

Otherwise, it would be possible for Congress to move many of the federal agencies whose members currently are appointed by the President—such as the Commodity Futures Trading Commission, the Consumer Financial Protection Bureau, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Trade Commission, the National Labor Relations Board, and the Securities and Exchange Commission—into a larger agency (perhaps an

agency closely associated with Congress, such as the Library of Congress), and have their members appointed and removable by someone other than the President. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("upholding the PCAOB here would green-light Congress to create a host of similar entities"). It is entirely possible that some Presidents might not oppose such incursions on Executive authority, since a President who did not appoint an official is not clearly to blame for the official's decisions. *See Free Enterprise Fund*, 130 S. Ct. at 3155 ("Perhaps an individual President might find advantages in tying his own hands"). But constitutional principles do "not depend on the views of individual Presidents." *Id.*, *citing Freytag v. Commissioner*, 501 U.S. 868, 879-80 (1991).

Some officers who do not issue decisions that have the force of law nevertheless may be principal officers. For example, the Solicitor General "may well be a principal officer." *Edmond*, 520 U.S. at 668 (Souter, J., concurring). But for the many tribunals like the Copyright Royalty Board that issue final decisions on behalf of the United States, the law under *Edmond* is and should be that they are principal officers of the United States who must be appointed by the President, whether or not they can be removed without cause.

CONCLUSION

The Court should grant the petition for rehearing or rehearing en banc.

Respectfully submitted,

/s/ Christopher J. Wright

Christopher J. Wright
Timothy J. Simeone
Mark D. Davis
WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W. Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for Appellant Intercollegiate Broadcasting System, Inc.

William Malone
9117 Vendome Drive
West Bethesda, MD 20817
(301) 365-1175

August 20, 2012

Addendum A

Opinion of the Court

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 2012 Decided July 6, 2012

No. 11-1083

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
A RHODE ISLAND NON-PROFIT CORPORATION,
APPELLANT

v.

COPYRIGHT ROYALTY BOARD AND LIBRARY OF CONGRESS,
APPELLEES

COLLEGE BROADCASTERS, INC. AND SOUNDEXCHANGE, INC.,
INTERVENORS

On Appeal from a Final Order of the Copyright Royalty Board

Christopher J. Wright argued the cause for appellant. With him on the briefs were *Timothy J. Simeone* and *William Malone*.

Kelsi Brown Corkran, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Tony West*, Assistant U.S. Attorney General, and *Scott R. McIntosh*, Attorney.

Michael B. DeSanctis argued the cause for intervenor SoundExchange, Inc. in support of appellees. With him on

the brief were *David A. Handzo*, *William M. Hohengarten*, and *Garrett A. Levin*.

Catherine R. Gellis was on the brief for intervenor College Broadcasters, Inc. in support of appellee.

Before: GARLAND and GRIFFITH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Intercollegiate Broadcasting, Inc. appeals a final determination of the Copyright Royalty Judges ("CRJs" or "Judges") setting the default royalty rates and terms applicable to internet-based "webcasting" of digitally recorded music. We find we need not address Intercollegiate's argument that Congress's grant of power to the CRJs is void because the provision for judicial review gives us legislative or administrative powers that may not be vested in an Article III court. But we agree with Intercollegiate that the position of the CRJs, as currently constituted, violates the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. To remedy the violation, we follow the Supreme Court's approach in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010), by invalidating and severing the restrictions on the Librarian of Congress's ability to remove the CRJs. With such removal power in the Librarian's hands, we are confident that the Judges are "inferior" rather than "principal" officers, and that no constitutional problem remains. Because of the Appointments Clause violation at the time of decision, we vacate and remand the determination challenged here; accordingly we need not reach Intercollegiate's arguments regarding the merits of the rates and terms set in that determination.

* * *

Intercollegiate is an association of "noncommercial" webcasters who transmit digitally recorded music over the internet in educational environments such as high school and college campuses—a technologically updated version of "closed circuit" campus radio stations. As with traditional radio, such digital transmissions are "performances" under the Copyright Act and thus entitle the owner of a song's copyright to royalty payments. See 17 U.S.C. § 106(6). And since 1998, the act has provided a "statutory license" for webcasting—a set of provisions that encourage voluntary negotiations over licensing terms but provide, if the parties cannot agree, for proceedings before the CRJs to establish reasonable terms. See *id*. § 114(d)(2), (f)(2)-(3); see also *id*. § 112(e)(4) (similar licenses for "ephemeral recordings").

The administrative body responsible for setting these terms has changed in name and structure over time, but the Copyright Royalty Board (the regulatory name for the collective entity composed of the CRJs and their staff, see 37 C.F.R. § 301.1) was established in its current form in 2004 and is composed of three Copyright Royalty Judges who are appointed to staggered six-year terms by the Librarian of Congress. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified at 17 U.S.C. § 801 *et seq*.). When a ratemaking proceeding is initiated, the Judges are tasked with "mak[ing] determinations and adjustments of reasonable terms and rates of royalty payments," 17 U.S.C. § 801(b)(1), where "reasonable" means payments that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," *id*. § 114(f)(2)(B); see also *id*. § 112(e)(4).

SoundExchange, Inc. (an intervenor here) is a non-profit clearinghouse for musicians' webcast royalty payments. In 2008 it initiated ratemaking proceedings before the CRJs to set the default webcasting licensing rates for the years 2011-2015. The Judges initiated proceedings and received 40 petitions to participate, mainly from webcasters. Over the next two years, SoundExchange entered voluntary settlements with almost all of the participants, leaving only two webcasting participants, Intercollegiate and one other licensee, Live365 (a commercial webcaster). (Live365 originally appealed the CRJs' determination as to commercial webcaster rates but reached a settlement with SoundExchange before the filing of opening briefs.) Intervenor College Broadcasting, Inc., an association of educational webcasters similar to Intercollegiate, participated in cooperation with SoundExchange, providing the CRJs their settlement agreement as a reference for market rates.

After reviewing the evidence and testimony from the remaining participants, the CRJs issued a final determination in which they adopted as statutory rates the royalty structure agreed to in the settlement between SoundExchange and College Broadcasting. See 76 Fed. Reg. 13,026, 13,042/1 (Mar. 9, 2011). Those terms include a $500 flat annual fee per station for both "educational" and other noncommercial webcasters whose "Aggregate Tuning Hours" stay below a monthly threshold separating them from commercial webcasters. See *id*. at 13,039/1, 13,040/1. The CRJs rejected Intercollegiate's proposal to establish different fee structures for "small" and "very small" noncommercial webcasters. See *id*. at 13,040/2-13,042/1. Intercollegiate appealed the CRJs' determination pursuant to 17 U.S.C. § 803(d)(1).

* * *

Intercollegiate first argues that all determinations made by the CRJs are void because the relevant appeal provision purports to ask Article III courts to take actions of a kind beyond their constitutional jurisdiction. Specifically, 17 U.S.C. § 803(d)(1) provides for appeals of the CRJs' determinations to the D.C. Circuit, and § 803(d)(3) states:

> Section 706 of title 5 shall apply with respect to review by the court of appeals under this subsection. If the court modifies or vacates a determination of the Copyright Royalty Judges, *the court may enter its own determination* with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).

17 U.S.C. § 803(d)(3) (emphasis added). Intercollegiate claims that this provision vests us with powers unsuitable for an Article III court, citing *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930). There the Court addressed a provision vesting in the courts of the District of Columbia a power to substitute their own "determination" for that of an agency; it found the power to be legislative or administrative rather than judicial. Because the courts of the District were then legislative in character, their exercise of such a power presented no problem, but the Court regarded its review of such a legislative or administrative decision as beyond *its* authority under Article III. *Id.* at 469. As Congress clearly meant to provide an avenue for appeal, yet

specified an invalid one, Intercollegiate argues, we must throw out the whole regime.

We conclude that we need not address this objection because it has no bearing on Intercollegiate's case. So far as the substance of the CRJs' decision is concerned, no party has asked us to enter our own determination, but rather to review the decision for compliance with 17 U.S.C. § 114(f)(2)(A). See Appellant's Br. 17-18 (seeking vacation and remand for lack of compliance with that provision); Appellees' Br. 43 (seeking affirmance). That challenge is evaluated under the familiar APA arbitrary and capricious standard, 5 U.S.C. § 706(2)(A), which is incorporated by direct reference in § 803(d)(3). Intercollegiate insists that § 803(d)(3) is "facially unconstitutional" and therefore brings down the whole CRJ determination process even if the defective provision is not applicable in this case. Appellant's Reply Br. 29. But as the government points out, Intercollegiate has made no attempt to satisfy the common standard for a facial constitutional challenge, Appellees' Br. 16 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)), or justify the non-application of that standard, or explain why the allegedly offensive language wouldn't be severable, see *id*. at 19-20. Intercollegiate offers nothing in reply. See Appellant's Reply Br. 29-30. We note, incidentally, that power to make our "own determination" would appear to present no problem on an issue as to which the law permitted only one option.

* * *

Intercollegiate argues that the Copyright Royalty Board as currently structured violates the Constitution's Appointments Clause, art. II, § 2, cl. 2, on two grounds: (1) the Judges' exercise of significant ratemaking authority, without any effective means of control by a superior (such as unrestricted removability), qualifies them as "principal"

officers who must be appointed by the President with Senate confirmation; and (2) even if the Judges are "inferior" officers, the Librarian of Congress is not a "Head of Department" in whom Congress may vest appointment power. We have discussed these issues in prior cases, but we never resolved them because they were not timely raised by the parties. See *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (per curiam). Now that they are properly presented, we agree with Intercollegiate on the first claim but not the second, and accordingly provide a remedy that cures the constitutional defect with as little disruption as possible.

The Appointments Clause provides that

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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 the Courts of Law, or in the Heads of Departments.

U.S. Const., art. II, § 2, cl. 2. To qualify as an "Officer of the United States" within the meaning of the clause, i.e., not simply an "employee," a person must "exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976); see *Freytag v. Commissioner*, 501 U.S. 868, 880-82 (1991). Intercollegiate contends that the CRJs not only exercise significant authority, but are "principal" rather than "inferior" officers, so that Congress's decision to vest their appointment in the Librarian

rather than the President (with Senate approval) violates the text of Article II.

The government concedes that the CRJs meet this initial threshold of significant authority. If significance plays no role *beyond* that threshold, i.e., has no bearing on whether an officer is principal or inferior, then we may pass on to the major differentiating feature, the extent to which the officers are "directed and supervised" by persons "appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). But there is in fact some conflict over whether there are relevant degrees of significance in the authority of officers, so we first briefly examine the conflict and then consider the significance of the CRJs' authority.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court held that an independent counsel appointed by the Attorney General was an inferior rather than principal officer. *Id*. at 671-72. The counsel was removable "only for good cause," see *id*. at 663, but the Court also stressed that she was "empowered by the Act to perform only certain, limited duties," with no "authority to formulate policy for the Government or the Executive Branch," and that her office was not only "limited in jurisdiction," but also "'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated," see *id*. at 671-72. The deprecatory language about the independent counsel's duties seems to rest on a premise that levels of significance may play some role in the divide between principal and inferior.

But in *Edmond* the Court, once satisfied that the persons in question exercised significant authority and were thus officers, 520 U.S. at 662, went on to discuss only direction and supervision. And it observed that the exercise of

significant authority "marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer." *Id*.

In any event, assuming that significance of authority has any import beyond setting the threshold for officers, it is a metric on which the CRJs score high. Their ratemaking decisions have considerable consequences—as our colleague put it, "billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions." *SoundExchange*, 571 F.3d at 1226 (Kavanaugh, J., concurring). The CRJs set the terms of exchange for musical works not only on traditional media such as CDs, cassettes and vinyl, but also on digital music downloaded through iTunes and Amazon.com, digital streaming via the web, rates paid by satellite carriers, non-commercial broadcasting, and certain cable transmissions. See 17 U.S.C. §§ 115(c)(3)(C)-(D) (phonorecords), 114(f)(1) & (f)(2)(A)-(B), (subscription and non-subscription digital transmissions and satellite radio services), 112(e)(3)-(4) (ephemeral recordings), 118(b)(4) (non-commercial broadcasting), 111(d)(4) (secondary transmissions by cable systems). Even though the CRJs affect Intercollegiate only in regard to webcasting, *Freytag* calls on us to consider all the powers of the officials in question in evaluating whether their authority is "significant," not just those applied to the litigant bringing the challenge. 501 U.S. at 882; *Tucker v. Commissioner*, 676 F.3d 1129, 1132 (D.C. Cir. 2012).

Of course one might see these authorities of the CRJs as primarily addressing "merely rates." But rates can obviously mean life or death for firms and even industries. Intercollegiate calls our attention, for example, to a firm for which royalty expenses constitute half its costs. See Appellant's Reply Br. 6-7; see generally *id*. 4-11.

As we noted, *Edmond* accepts officers' classification as "inferior" if their "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. In concluding that the judges of the Coast Guard Court of Criminal Appeals were inferior officers, the Court emphasized three factors: (1) the judges were subject to the substantial supervision and oversight of the Judge Advocate General (who in turn was subordinate to the Secretary of Transportation), see *id*. at 664; (2) the judges were removable by the Judge Advocate General without cause, see *id*. ("The power to remove officers, we have recognized, is a powerful tool for control." (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers v. United States*, 272 U.S. 52 (1926))); and (3) another executive branch entity, the Court of Appeals for the Armed Forces, had the power to reverse the judges' decisions so that they had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." *Id*. at 664-65.

As to *Edmond*'s first concern, the CRJs are supervised in some respects by the Librarian and by the Register of Copyrights, but in ways that leave broad discretion. The Librarian (who is appointed by the President with advice and consent of the Senate, see 2 U.S.C. § 136) is entrusted with approving the CRJs' procedural regulations, 17 U.S.C. § 803(b)(6); with issuing ethical rules for the CRJs, *id*. § 802(h); and with overseeing various logistical aspects of their duties, e.g., *id*. §§ 801(d)-(e) (providing administrative resources), 803(c)(6) (publishing CRJs' decisions), 801(b)(8) (assigning CRJs additional duties). None of these seems to afford the Librarian room to play an influential role in the CRJs' substantive decisions.

The Register (who is appointed by the Librarian and acts at his direction, see *id*. § 701(a)) has the authority to interpret

the copyright laws and provide written opinions to the CRJs on "novel material question[s]" of law; the CRJs must abide by these opinions in their determinations. See *id.* § 802(f)(1)(B). The Register also reviews and corrects any legal errors in the CRJs' determinations. *Id.* § 802(f)(1)(D). Oversight by the Register at the direction of the Librarian on issues of law of course is not exactly direction by a principal officer, *Edmond*, 520 U.S. at 663, but it is a non-trivial limit on the CRJs' discretion, and the Librarian may well be able to influence the nature of the Register's interventions.

But the Register's power to control the CRJs' resolution of pure issues of law plainly leaves vast discretion over the rates and terms. If one looks to market conditions, as one statutory provision governing webcasting directs, see 17 U.S.C. § 114(f)(2), each copyright owner and would-be user are in something akin to a bilateral monopoly—a situation where the seller has no substitute purchaser (here, because each purchaser represents a distinct channel to end-users) and the buyer no exact substitute supplier (assuming each creative work is in some sense unique). (It is not a strict bilateral monopoly, as many songs, etc., may have fairly close substitutes.) In such a case, the range of possible market prices is likely to be very wide: the floor is likely to be very low (adding a user will commonly cost the copyright holder nothing) and the ceiling relatively high, especially for creative material that has few close substitutes.

Moreover, the CRJs also apply ratemaking formulas that are even more open-ended. For example, § 801(b)(1) directs the CRJs to set "reasonable terms and rates of royalty payments" with reference to four factors: (1) to "maximize the availability of creative works"; (2) to provide a "fair" return to both the copyright owner and the copyright user; (3) to "reflect the relative roles" of the owner and user as to "creative contribution, technological contribution, capital

investment," and the like; and (4) to "minimize any disruptive impact" on industry structure. 17 U.S.C. § 801(b)(1)(A)-(D). As we have previously stated, because these "factors pull in opposite directions," there is a "range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees." *RIAA v. Copyright Royalty Tribunal*, 622 F.3d 1, 9 (D.C. Cir. 1981). Thus the Register's control over the most significant aspect of the CRJs' determinations—the rates themselves—is likely to be quite faint. Even in the realm of rates required to be based on "cost," the ratemaker typically has broad discretion. See *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 278 (1976) ("[T]here is no single cost-recovering rate, but a zone of reasonableness: 'Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.'" (quoting *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951))). And while we have recognized that an obligation to follow another's legal opinions creates a genuine supervisory limit, see *Tucker*, 676 F.3d at 1134, here the law does not provide much constraint on the rate, and it is the rate itself—not the answer to the pure questions of law that the Register can address—that is of the greatest importance.

We find that, given the CRJs' nonremovability and the finality of their decisions (discussed below), the Librarian's and Register's supervision functions still fall short of the kind that would render the CRJs inferior officers.

The second *Edmond* factor, removability, also supports a finding that the CRJs are principal officers. Unlike the judges in *Edmond*, the CRJs can be removed by the Librarian only for misconduct or neglect of duty. See 17 U.S.C. § 802(i). And while the presence of a "good cause" restriction in

Morrison did not prevent a finding of inferior officer status, it clearly did not hold that such a restriction on removal was generally consistent with the status of inferior officer. Instead, as *Edmond* explains, *Morrison* relied heavily on the Court's view that the independent counsel also "performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited [to performance of a 'single task']." *Edmond*, 520 U.S. at 661.

Finally, the CRJs' rate determinations are not reversible or correctable by any other officer or entity within the executive branch. As we have mentioned, their procedural rules are reviewed by the Librarian, and their legal determinations by the Register. But the Judges are afforded

> full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact.

17 U.S.C. § 802(f)(1)(A)(i); see also *id.* § 802(f)(1)(A)(ii) (Register's authority "under this clause shall not be construed to authorize the Register . . . to provide an interpretation of questions of procedure . . . [or] the ultimate adjustments and determinations of copyright royalty rates and terms"). Thus, unlike the judges in *Edmond*, 520 U.S. at 664-65, the CRJs issue decisions that are final for the executive branch, subject to reversal or change only when challenged in an Article III court.

Having considered all of these factors, we are in agreement with the view suggested by Judge Kavanaugh in

SoundExchange that the CRJs as currently constituted are principal officers who must be appointed by the President and confirmed by the Senate, and that the structure of the Board therefore violates the Appointments Clause. 571 F.3d at 1226-27 (concurring opinion). We therefore must decide the appropriate remedy to correct the violation.

In *Free Enterprise Fund*, the Supreme Court reviewed the structure of the Public Company Accounting Oversight Board, whose members were appointed and removable by the Commissioners of the Securities and Exchange Commission. The Court held that in the circumstances of that case the "for-cause" restriction on the Commissioners' removal power violated the Constitution's separation of powers by impeding the President's ability to execute the laws. See 130 S. Ct. at 3151-54. Rather than finding all authority exercised by the PCAOB to be unconstitutional, however, the Court held that invalidating and severing the problematic for-cause restriction was the solution best matching the problem and preserving the remainder intact. *Id*. at 3161 (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006)).

We likewise conclude here that invalidating and severing the restrictions on the Librarian's ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage. Specifically, we find unconstitutional all of the language in 17 U.S.C. § 802(i) following "The Librarian of Congress may sanction or remove a Copyright Royalty Judge . . . ." Without this restriction, we are confident that (so long as the Librarian is a Head of Department, which we address below) the CRJs will be inferior rather than principal officers. With unfettered removal power, the Librarian will have the direct ability to "direct," "supervise," and exert some "control" over the Judges' decisions. *Edmond*, 520 U.S. at 662-64. Although

individual CRJ decisions will still not be directly reversible, the Librarian would be free to provide substantive input on non-factual issues via the Register, whom the Judges are free to consult, 17 U.S.C. § 802(f)(1)(A)(i). This, coupled with the threat of removal satisfies us that the CRJs' decisions will be constrained to a significant degree by a principal officer (the Librarian). We further conclude that free removability constrains their power enough to outweigh the extent to which the scope of their duties exceeds that of the special counsel in *Morrison*. Cf. *Free Enterprise Fund*, 130 S. Ct. at 3162 ("Given that the [SEC] is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the [PCAOB] members are inferior officers . . . .").

In sum, the inability of the Librarian to remove the CRJs, coupled with the absence of a principal officer's direction and supervision over their exercise of authority, renders them principal officers—but obviously ones not appointed in the manner constitutionally required for such officers. Once the limitations on the Librarian's removal authority are nullified, they would become validly appointed inferior officers—at least if the Librarian is a Head of Department, the issue to which we now turn.

* * *

Intercollegiate argues that even if the CRJs are inferior officers, the Board's structure is unconstitutional because the Librarian is not a "Head of Department" within the meaning of the Appointments Clause. The Supreme Court addressed the same challenge as to the SEC Commissioners in *Free Enterprise Fund*; it ultimately held: "Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such

component, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause." 130 S. Ct. at 3163. See also *Freytag*, 501 U.S. at 915-22 (Scalia, J., concurring in part and concurring in judgment); *Buckley*, 424 U.S. at 127 ("Departments" referred to in the Appointments Clause "are themselves in the Executive Branch or at least have some connection with that branch"). Intercollegiate notes that we have referred to the Library of Congress as a "congressional agency," see *Keeffe v. Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985), and argues that it is not an executive department that can satisfy the "Head of Department" definition in *Free Enterprise Fund*.

Despite our language in *Keeffe*, the Library of Congress is a freestanding entity that clearly meets the definition of "Department." *Free Enterprise Fund*, 130 S. Ct. at 3162-63. To be sure, it performs a range of different functions, including some, such as the Congressional Research Service, that are exercised primarily for legislative purposes. But as we have mentioned, the Librarian is appointed by the President with advice and consent of the Senate, 2 U.S.C. § 136, and is subject to unrestricted removal by the President, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Kalaris v. Donovan*, 697 F.2d 376, 389 (D.C. Cir. 1983). Further, the powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators. In this role the Library is undoubtedly a "component of the Executive Branch." *Free Enterprise Fund*, 130 S. Ct. at 3163. It was on this basis that the Fourth Circuit rejected a similar charge that the Librarian was not a "Head of Department" for purposes of appointing the Register. *Eltra Corp. v. Ringer*, 579 F.2d 294, 300-301 (4th Cir. 1978). We too hold that the Librarian is a Head of Department who may permissibly appoint the Copyright Royalty Judges.

* * *

We hold that without the unrestricted ability to remove the Copyright Royalty Judges, Congress's vesting of their appointment in the Librarian rather than in the President violates the Appointments Clause. Accordingly we invalidate and sever the portion of the statute limiting the Librarian's ability to remove the Judges. Because the Board's structure was unconstitutional at the time it issued its determination, we vacate and remand the determination and do not address Intercollegiate's arguments regarding the merits of the rates set therein.

So ordered.

Addendum B

Certificate as to Parties, Rulings, and Related Cases

Certificate as to parties, rulings, and related cases

Counsel for Appellant IBS, in accordance with D.C. Cir. R. 28(a)(1)(A), hereby certifies the following:

A. Parties and Amici.

1. The parties, intervenors, and amici who appeared before the Copyright Loyalty Board were as follows:

a. Parties

Intercollegiate Broadcasting System, Inc.
SoundExchange, Inc.
College Broadcasters, Inc.
Live 365, Inc.

b. Intervenor and Amici

No intervenors or amici appeared before the Copyright Loyalty Board.

2. The parties before this Court are as follows:

Appellant in No. 11-1083, Intercollegiate Broadcasting System, Inc., is a trade association of mostly volunteer student broadcasters and webcasters, located predominantly on high school and college campuses and operated largely by student volunteers from those institutions. IBS has been incorporated as a non-profit corporation in Rhode Island since 1940. As such it has no stakeholders.

Appellee Copyright Royalty Board is a governmental entity within the Library of Congress pursuant to the Copyright Act of 1976, as amended.

Intervenor SoundExchange, Inc. (in support of the Copyright Royalty Board) is a non-profit trade association comprised of performing artists and the record companies ("labels"), which are for-profit corporations incorporated here and abroad. It was spun off from the RIAA (Record Industry Association of America) in 2003. It has been designated the exclusive royalty collection and disbursement agent for the beneficiaries of the Act, *viz*., the labels and artists, pursuant to Section 114(g) of the Copyright Act of 1976, as amended by the Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419, 17 U.S.C. § 114(g), and as applied by the Board in Web II, 72 Fed. Reg. 24084 (May 1, 2007), *affirmed on this issue by this Court*, 574 F.3d 748 (2009).

Intervenor College Broadcasters, Inc. (CBI) (in support of the Copyright Royalty Board) is a non-profit association of educational stations that principally have paid faculty and staff comprised of members of College Media Advisors (CMA) and related full and part time staff of their sponsoring educational institution. CBI Members' budgets/finances are on average much larger than the student stations represented by the Intercollegiate Broadcasting System, Inc.

Addendum C

Disclosure Statement

Statement under Circuit Rule 26.1

The parties to this appeal are appellant IBS; appellee Copyright Royalty Board in the Library of Congress; and Intervenors SoundExchange, Inc. ("SoundEx") and College Broadcasters, Inc. ("CBI").

IBS is the largest association of webcasters at colleges, universities, academies, and high schools, a large number of which are obliged to make payments to Soundex for their transmission of digitally recorded music. By and large, these non-commercial stations are staffed by student volunteers. IBS was incorporated as a non-stock, not-for-profit Rhode Island corporation in 1940. IBS has no parent companies or subsidiaries.

The Board is a government agency, which is located in the Library of Congress and which has neither stockholders, nor related parent entities within the meaning of Rule 26.1.

SoundEx is a non-profit corporation that administers and collects royalties for certain record labels - principally foreign members of the Record Industry of America ("RIAA") - and individual performers of digitally recorded music.

College Broadcasters, Inc. ("CBI") is an association of college webcasters. Typically, CBI member stations have a paid College Media Advisor, and other paid staff such as a paid engineer and support staff.