

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.*

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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).

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

**DATES:** Requests for copies must be received in writing on or before June 10, 2010. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

**ADDRESSES:** You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

*Mail:* NARA (NWML), 8601 Adelphi Road, College Park, MD 20740-6001.

*E-mail:* [request.schedule@nara.gov](mailto:request.schedule@nara.gov).

*Fax:* 301-837-3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

**FOR FURTHER INFORMATION CONTACT:** Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. *Telephone:* 301-837-1539. *E-mail:* [records.mgt@nara.gov](mailto:records.mgt@nara.gov).

**SUPPLEMENTARY INFORMATION:** Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this

accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

*Schedules Pending:*

1. Department of the Army, Agency-wide (N1-AU-09-10, 4 items, 4 temporary items). Policy and procedures documents, reports, evaluations, requests for information and other information relating to the Total Army Sponsorship Program.

2. Department of Defense, Defense Security Service (N1-446-09-6, 3 items, 3 temporary items). Master files of an electronic information system used for the secure transmission of fingerprints and demographic information submitted by contractors concerning applicants for security clearances.

3. Department of Education, Federal Student Aid (N1-441-09-22, 1 item, 1 temporary item). Master files of an electronic information system used to manage student loans and grants. Files include such information as name of student, type and amount of loan, loan period, and balance.

4. Department of Education, Federal Student Aid (N1-441-09-23, 9 items, 9 temporary items). Master files of electronic information systems used to process student aid applications and payments. Records relate to such matters as the application and selection process, disbursements of funds, and other financial transactions.

5. Department of Education, Office for Civil Rights (N1-441-08-6, 5 items, 4 temporary items). Case files relating to investigating complaints and reviewing educational programs in regard to compliance with laws prohibiting discrimination on the basis of race, gender, age, and other considerations. Included is an electronic case management system. Proposed for permanent retention are records documenting historically significant education discrimination cases.

6. Department of Education, Office of Postsecondary Education (N1-441-09-8, 1 item, 1 temporary item). Records relating to programs that assist educational institutions in providing housing and other facilities for students. Records include information that relates to such matters as applications, disbursements of funds, and the planning and construction of facilities.

7. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1-440-09-12, 1 item, 1 temporary item). Master files of an electronic information system used to account for and manage reimbursements provided to Plan Sponsors for Medicare-eligible retirees.

8. Department of Homeland Security, Directorate for Management (N1-563-09-12, 8 items, 8 temporary items). Records relating to the oversight and management of grant programs. Included are such records as grant

program announcements, grant guidance reference files, grant monitoring review case files, customer service correspondence, debarment and suspension case files, and grant program approval case files.

9. Department of Justice, Bureau of Prisons (N1-129-09-32, 1 item, 1 temporary item). Master files of an electronic information system that contains information on inmate work assignments.

10. Department of Justice, Executive Office for U.S. Attorneys (N1-60-10-9, 2 items, 2 temporary items). Inputs and master files of an electronic information system which contains information used in connection with notifying employees in the event of an emergency.

11. Department of Justice, Federal Bureau of Investigation (N1-65-09-5, 4 items, 3 temporary items). Records relating to agency equal employment opportunity programs, including administrative files and records of special emphasis programs that focus attention on specific employee groups. Proposed for permanent retention are case files relating to historically significant discrimination complaint cases.

12. Department of the Treasury, Internal Revenue Service (N1-58-09-103, 2 items, 2 temporary items). Master files and system documentation of an electronic information system used to automate the tax examination process and provide taxpayers with easily understood audit reports.

13. Department of the Treasury, Internal Revenue Service (N1-58-09-104, 2 items, 2 temporary items). Applications for tax credits for investments in manufacturing equipment used to produce clean energy.

14. Department of Veterans Affairs, Veterans Health Administration (N1-15-10-4, 5 items, 5 temporary items). Records that relate to providing prosthetics and sensory aids to military veterans.

15. National Capital Planning Commission, Agency-wide (N1-328-10-1, 6 items, 5 temporary items). Records relating to the agency Web site (including Web content), litigation files, and a geographic information system used for municipal planning and management that is no longer being created. Proposed for permanent retention are electronic records contained in an automated system that contains information concerning projects submitted to the agency for approval.

Dated: May 4, 2010.

**Michael J. Kurtz,**

*Assistant Archivist for Records Services—  
Washington, DC.*

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## THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Notice of Proposed Information Collection Requests: State Library Administrative Agencies Survey, FY 2011-2013

**AGENCY:** Institute of Museum and Library Services, The National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Service (“IMLS”) as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the continuance of the State Library Administrative Agencies Survey from FY 2011-2013.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before July 8, 2010.

The IMLS is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;

- Enhance the quality, utility and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submissions of responses.

**ADDRESSES:** For a copy of the documents contact: Kim A. Miller, Management Analyst, Office of Policy, Planning, Research, and Communication, Institute of Museum and Library Services, 1800 M Street, NW., 9th Floor, Washington DC 20036. Ms. Miller can be reached by Telephone: 202-653-4762, Fax: 202-653-4600, or by e-mail at [kmiller@imls.gov](mailto:kmiller@imls.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Institute of Museum and Library Services (IMLS) is an independent Federal grant-making agency and is the primary source of federal support for the Nation's 123,000 libraries and 17,500 museums. IMLS provides a variety of grant programs to assist the Nation's museums and libraries in improving their operations and enhancing their services to the public. IMLS is responsible for identifying national needs for, and trends of, museum and library services funded by IMLS; reporting on the impact and effectiveness of programs conducted with funds made available by IMLS in addressing such needs; and identifying, and disseminating information on, the best practices of such programs. (20 U.S.C. Chapter 72, 20 U.S.C. 9108).

##### II. Current Actions

The State Library Administrative Agencies Survey has been conducted by the Institute of Museum and Library Services under the clearance number 3137-0072, which expires 9/30/2010. State library administrative agencies (“StLAs”) are the official agencies of each state charged by state law with the extension and development of public library services throughout the state. (20 U.S.C. Chapter 72, 20 U.S.C. 9122.) The purpose of this survey is to provide state and federal policymakers with information about StLAs, including their governance, allied operations, developmental services to libraries and library systems, support of electronic information networks and resources, number and types of outlets, and direct services to the public.

*Agency:* Institute of Museum and Library Services.