

September 26, 2012

To Whom It May Concern:

My name is Thaddeus S. Kirk, and I am a third-year law student at Villanova University School of Law in Villanova, Pennsylvania. As a student in Professor Tuan Samahon's Federal Courts course, I have been made aware of the Copyright Office's study regarding the possibility of creating a non-Article III tribunal to adjudicate small copyright claims. I limit my comment to the constitutional issues, particularly separation of powers, set forth in Paragraph 27(a) of the Notice of Inquiry published in the Federal Register on August 23, 2012.

Whether Congress may establish a non-Article III tribunal to adjudicate small copyright claims depends largely on the exact contours of the proposed system. As an initial matter, such a tribunal would not qualify under the traditional exceptions to Article III adjudication, namely territorial courts, military courts martial, and public rights cases. Since an ordinary copyright infringement action would not involve a government party, it would be considered a private law dispute.

When Congress creates a non-Article III court to deal only with a "particularized area of law" and the court's orders are enforceable only by order of a district court, subject to *de novo* review, Congress has not overstepped the bounds of its Article I court-creating powers. In *Commodity Futures Trading Commission v. Schor*,¹ the Supreme Court held that the CTFC was able to hear counterclaims arising within an agency scheme.² It emphasized the CTFC's concentration in a "particularized area of law," in addition to the fact that the CTFC did not

¹ 478 U.S. 833 (1986).

² *Id.* at 851-52.

exercise “all ordinary powers of district courts.”³ Similarly, in *Thomas v. Union Carbide Agricultural Products Co.*,⁴ the Court upheld a provision for binding arbitration, again subject to Article III review, under the auspices of the Environmental Protection Agency for valuation of compensation claims under the Federal Insecticide, Fungicide, and Rodenticide Act.⁵

Here, the proposed creation of a non-Article III tribunal to hear small copyright claims would not exceed Congress’s court-creating power, provided that *de novo* review in the district courts is available. The limited subject-matter jurisdiction satisfies the *Schor* requirement that the tribunal’s scope be limited to a “particularized area of law” and in fact goes a step further by including only claims under a certain amount in controversy. The proposed tribunal can thus be shaped to serve the purpose of increasing judicial efficiency without overstepping constitutional bounds.

Sincerely,

Thaddeus S. Kirk

³ *Id.* at 852-53. *Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality op.) (invalidating bankruptcy courts with jurisdiction to hear all claims ordinarily adjudicated by district courts).

⁴ 473 U.S. 568 (1985).

⁵ *Id.* at 594.