

IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF COLUMBIA

LIVE365, INC.,)	
)	
Plaintiff,)	
vs.)	
)	
COPYRIGHT ROYALTY BOARD;)	
JAMES H. BILLINGTON, in his official)	Case No. 1:09-cv-01662 (RBW)
capacity as Librarian of Congress; and)	
JAMES SCOTT SLEDGE, STANLEY C.)	
WISNIEWSKI, and WILLIAM J. ROBERTS, in)	
their official capacities as Judges of the)	
Copyright Royalty Board,)	
)	
Defendants.)	

**PLAINTIFF LIVE365, INC.’S MOTION/APPLICATION
 FOR PRELIMINARY INJUNCTION**

Plaintiff Live365, Inc. (“Live365” or “Plaintiff”), by and through its undersigned counsel, respectfully moves this Court, pursuant to Federal Rule of Civil Procedure 65(a) and Local Civil Rule 65.1(c), for a preliminary injunction against Defendants Copyright Royalty Board (“CRB”) and James Scott Sledge, Stanley C. Wisniewski, and William J. Roberts, in their official capacities as Judges of the Copyright Royalty Board (collectively the “Copyright Royalty Judges”). Specifically, Live365 seeks an order staying the pending CRB proceeding – *In the Matter of Digital Performance Right In Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 (CRB Webcasting III) – until Live365’s Appointments Clause challenge to the CRB’s makeup (as set forth in the Complaint and in the accompanying Memorandum of Points and Authorities) can be resolved by this Court.

Plaintiff challenges the constitutionality of 2004 amendments to the U.S. Copyright Act that created the CRB to set rates and terms for statutory compulsory licenses for certain copyrighted works. The Copyright Royalty Judges who make up the CRB are appointed by the

Librarian of Congress in violation of the Appointments Clause. Such appointments are not made by the Executive, notwithstanding the fact that Copyright Royalty Judges function in all respects as Principal Officers who must be so appointed (or, even if not Principal Officers, they are Inferior Officers who must be appointed by the head of an Executive Department, which the Librarian is not). Therefore, all powers and authorities exercised by them are null and void, and it is imperative to have this matter, which the CRB cannot itself adjudicate, decided before the CRB conducts any further proceedings or issues rulings that may later have to be vacated.

Issuance of a preliminary injunction pending the resolution of Live365's claim is proper because:

(1) Live365 has a substantial likelihood of success on the merits of its constitutional challenge; (2) Live365 will be irreparably harmed if the injunction is not granted; (3) the CRB will not be prejudiced by the injunction; and (4) the injunction would further the public interest. *See, e.g., Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007).

Pursuant to Local Civil Rule 65.1(d), for the reasons set forth in the accompanying Memorandum of Points and Authorities, and pursuant to Plaintiff's Request For Expedited Relief filed concurrently herewith, Plaintiff respectfully requests a hearing on this motion at the earliest possible date.

Pursuant to Local Civil Rule 7(m), counsel for Plaintiff conferred with Defendants' known counsel, the Department of Justice, in an effort to determine whether Defendants oppose the relief sought herein. Defendants' counsel indicated that such relief is opposed.

Live365 respectfully requests that its motion for a preliminary injunction be granted and that all procedural deadlines, required filings by the parties, and further actions by the Copyright Royalty Board in the "2009 WEB III CRB Proceeding" (*In the Matter of Digital Performance Right In Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 (CRB Webcasting III)) be stayed, pending the resolution of Live365's constitutional claims raised in its Complaint.

DATED: September 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to LCvR 5.3, I hereby certify that, on the 2nd day of September, 2009, I electronically filed with the Clerk of the Court, Plaintiff Live365, Inc's Motion for a Preliminary Injunction and a proposed order, using the CM/ECF system, and I caused copies of the same to be served by hand-delivery upon the following parties at the addresses listed below:

Brian G. Kennedy
United States Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, NW
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/s/ Adam S. Caldwell
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their official capacities as Judges of the)	
Copyright Royalty Board,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
ITS APPLICATION FOR A PRELIMINARY INJUNCTION**

Plaintiff Live365, Inc. (“Live365” or “Plaintiff”), through undersigned counsel, submits this Memorandum of Points and Authorities in support of its motion requesting a preliminary injunction staying the recently-instituted proceedings before the Copyright Royalty Board (“CRB”) and its Judges – Defendants James Scott Sledge, Stanley C. Wisniewski, and William J. Roberts (collectively the “Copyright Royalty Judges”), in *In the Matter of Digital Performance Right In Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 (CRB Webcasting III) (the “2009 WEB III CRB Proceeding”).¹

¹ The instant Application for Preliminary Injunction is brought in conjunction with Live365’s recently-commenced action, which raises a facial constitutional challenge to the formation of the CRB under the U.S. Constitution’s Appointments Clause.

I. INTRODUCTION

The CRB is a constitutionally flawed tribunal insofar as the Copyright Royalty Judges sit in derogation of the “Appointments Clause” to the U.S. Constitution, U.S. Const. art. II, § 2, cl. 2. The Copyright Royalty Judges function in all respects as Principal Officers, who must be appointed by the President of the United States under the Appointments Clause.² Yet the Librarian of the Library of Congress – which sits in the Legislative branch – appoints the Copyright Royalty Judges in plain violation of the Constitution.

Indeed, as one member of the U.S. Court of Appeals for the D.C. Circuit recently noted, “billions of dollars and the fates of entire industries can ride on . . . decisions” by the CRB, which “exercises expansive executive authority analogous to . . . FERC, the FCC, the NLRB, and the SEC,” even though, “unlike . . . those similarly powerful agencies . . . [Copyright Royalty Judges] have not been nominated by the President and confirmed by the Senate.” *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

The 2009 WEB III CRB Proceeding is already underway, and Live365, as a party to the proceeding, has a September 29, 2009 deadline for filing written direct case statements. This proceeding will set rates and terms applicable from January 1, 2011, to December 31, 2015, for the Copyright Act’s statutory licenses under 17 U.S.C. §§ 112 & 114, and will directly affect the viability of Live365’s business as an aggregator of digital radio stations it offers through its website, www.live365.com.

Live365 is entitled to preliminary injunctive relief, as there is a substantial likelihood that (1) it will succeed on the merits of its constitutional challenge; (2) it will be irreparably harmed if the injunction is not granted; (3) the CRB will not be prejudiced by the injunction; and (4) the injunction would further the public interest. *See Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157

² Alternatively, as set forth in Section III(A)(2), *infra*, Copyright Royalty Judges are Inferior Officers, who must be appointed by the head of an Executive Department, which the Librarian of Congress is not.

(D.C. Cir. 2007). More specifically, there is a strong, if not certain, likelihood that the Copyright Royalty Judges have been unconstitutionally appointed and that Live365 will prevail on its Declaratory Relief action.³ The burden of proceeding before an unconstitutionally appointed body is *per se* irreparable harm. Moreover, Live365 faces demonstrable irreparable harm from having the 2009 WEB III CRB Proceeding adjudicated by the Copyright Royalty Judges, whose appointments are likely to be ruled unconstitutional under the Appointments Clause. Live365 will incur substantial litigation expenses in trying the 2009 WEB III CRB Proceeding and will have no avenue to recover monetary damages covering those expenses from Defendants, who are clothed in sovereign immunity.⁴

Moreover, the CRB would not be harmed by a brief delay in the 2009 WEB III CRB Proceeding, pending resolution of Live365's Complaint (in the event Live365's constitutional challenge fails and the proceeding is allowed to resume), and it would serve the public interest, judicial economy, and fundamental fairness to definitively ensure that the CRB is lawfully constituted before it is permitted to conduct any further proceedings or render any decisions in them.

Accordingly, for the reasons stated herein, this Court should grant the preliminary relief requested, pending the resolution of Live365's constitutional challenge.

³ The Complaint sets forth a cause of action for Declaratory Relief (together with a cause of action for Injunctive Relief), seeking a declaration that the Librarian's appointment of the CRB Judges is unconstitutional.

⁴ If the 2009 WEB III CRB Proceeding is not stayed, Live365's opponents in the 2009 WEB III CRB Proceeding will effectively have a risk-free attempt to try their case, testing theories of their case and attacks on that of Live365, knowing that the proceeding will likely be for naught. In effect, these parties have the opportunity for a "do-over." If, after this constitutional challenge has been fully heard, the CRB is reconstituted in a constitutional manner and the 2009 WEB III CRB Proceeding is retried, Live365's entire litigation strategy will have been on display, compounding the irreparable harm that will be suffered by Live365.

II. STATEMENT OF FACTS

A. The Copyright Royalty Board

The heart of Live365's challenge to the CRB is whether the CRB's composition of three Copyright Royalty Judges appointed by the Librarian of Congress violates the Appointments Clause to the U.S. Constitution. As both the nation's oldest federal cultural institution and a federal agency, the Library of Congress – the largest library in the world – serves as Congress's research arm by making its resources available and useful to Congress and the American people. *See* About the Library of Congress, <http://www.loc.gov/about>. The Office of the Librarian is tasked to set policy and support programs and activities to accomplish the Library's mission. *Id.* Among these efforts is maintenance of the Copyright Office as a unit of the Library that administers the national copyright system. *Id.*

In 2004, Congress enacted the Copyright Royalty And Distribution Reform Act of 2004, Pub. L. 108-419, 118 Stat. 2341 (2004), which, among other things, created the CRB to set rates and terms under various statutory compulsory licenses contained in the Act. Congress delegated the appointment of the Copyright Royalty Judges to the Librarian, who makes all such appointments "after consultation with the Register of Copyrights." 17 U.S.C. § 701(f). Specifically, under 17 U.S.C. § 801(a) ("Copyright Royalty Judges; appointment and functions"), the Librarian appoints three full-time Copyright Royalty Judges to compose the CRB and to carry out functions specified in 17 U.S.C. §§ 801-804. The Copyright Royalty Judges serve staggered six-year terms, and once appointed, they may be removed by the Librarian only for misconduct, neglect of duty, disqualifying disability, a financial conflict of interest, or impermissible *ex parte* communication under 17 U.S.C. § 802(i) ("Removal or Sanction"). Because the CRB exercises governmental powers and Copyright Royalty Judges exercise significant authority and power under the laws of the United States, they are "officers" of the United States. *See, e.g., U.S. ex rel. New v. Rumsfeld*, 350 F. Supp. 2d 80, 98 (D.D.C. 2004), *citing Buckley v. Valeo*, 424 U.S. 1, 125 (1976) and *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) ("[T]he Supreme Court has defined ['officer of the United States'] as an

‘appointee exercising significant authority pursuant to the laws of the United States.’ Although the phrase ‘significant authority’ is not clearly defined, the term ‘officer of the United States’ has been held to ‘embrace[] the idea of tenure, duration, emolument, and duties [that are] continuing and permanent, not occasional or temporary.’”).

The Librarian appointed the current Copyright Royalty Judges in January 2006. The CRB acts with the “plenary” authority of the Library of Congress, independent of the supervision and control of the Librarian. Under 17 U.S.C. § 802(f), the CRB has broad discretion to conduct hearings, issue subpoenas, render decisions and impose regulations governing the rates and terms of the compulsory licenses that are binding on all applicable copyright owners and users. Copyright Royalty Judges make these determinations of rates and terms under various Copyright Act statutory licenses in an adjudicatory forum in accord with regulations issued by the Copyright Royalty Judges themselves and by the CRB. *See, e.g.*, 37 C.F.R. § 351. In addition, Section 803(c)(5) of the Copyright Act empowers Copyright Royalty Judges to grant protective orders, while Section 803(d)(4) provides for appeals of CRB decisions directly to the United States Court of Appeals for the District of Columbia Circuit. *See* 17 U.S.C. §§ 803(c)(5) & (d)(4). In fact, Section 802(f) is titled “Independences of the Copyright Royalty Judges,” and under subsection (1)(A), the Copyright Act provides that the Judges “shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms. . .” 17 U.S.C. § 802(f)(1)(A).

The Librarian has no effective oversight over the CRB. He has, for example, no day-to-day control over the CRB, no control over the conduct of the hearings before the CRB, and no input into the fact-finding decisions of the CRB, save for the Register of Copyrights’ (the “Register”) mandate to rule on so-called “Novel questions of Law” when the CRB requests such a ruling, 17 U.S.C. § 801(f)(1)(B), and the statement that CRB *may* consult with the Register “on any matter other than a question of fact.” *Id.* § 801(f)(1)(A). While the Register has authority to review CRB conclusions for legal error, any finding of legal error simply becomes part of the record of the CRB proceeding, and such decisions regarding statutory errors are only binding as

precedent upon the CRB in subsequent proceedings; thus, such a finding does not “reverse” CRB determinations. *Id.* § 801(f)(1)(D). In fact, the statute merely authorizes the Register to intervene in its own right in any appeal of a CRB decision in the event that the Register has concluded there was an error of law. *Id.* § 801(f)(1)(D).

Among the Copyright Royalty Judges’ duties are setting rates and terms for statutory compulsory licenses under 17 U.S.C. §§ 112 and 114, which govern “webcasting,” and, thus, directly affect the viability of Plaintiff’s business and that of the other participants in Section 112 and 114 proceedings. In addition to participating as described below in the 2009 WEB III CRB Proceeding along with other participants, such as RealNetworks, Inc. and SoundExchange, Inc., Live365 participated in previous CRB webcasting rate proceedings under 17 U.S.C. §§ 112 and 114. Declaration of N. Mark Lam (“Lam Decl.”) ¶ 9. Such proceedings involved the CRB’s setting of royalty rates paid under statutory license for the public performance of sound recordings by digital audio services by means of eligible non-subscription transmissions and subscription transmissions.⁵ Under statute, every five years, the CRB must convene a proceeding to set the royalties to be paid by webcasters under the statutory licenses of Sections 112 and 114.⁶ The 2009 WEB III CRB Proceeding (sought to be enjoined by Live365’s

⁵ See 17 U.S.C. § 114(b)(2)(c). These services are commonly referred to as “Internet Radio” or “Webcasting.” Sound recordings are “works that result from the fixation of a series of musical, spoken or other sounds.” *Id.* Most commonly, a sound recording is a song as performed by a particular artist and released as a CD or digital download. Sound recordings are used by many webcasters to provide a service to the public much like over-the-air radio, only provided via the Internet rather than by transmission of radio waves. In making their Internet transmissions of sound recordings, these webcasting services also make transitory or “ephemeral” copies of the sound recordings that they transmit. The making of these copies is also subject to a statutory license, the royalty for which is set by the CRB. 17 U.S.C. § 112(e).

⁶ 17 U.S.C. § 804(C)(3)(A). The CRB recently completed its first proceeding to set these royalties, commonly referred to as the “Web II” proceeding (“Web I,” also known as “Webcaster I,” was conducted prior to the creation of the CRB by a panel of arbitrators. See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,244-45 (July 8, 2002); see also *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005)). In separate proceedings, the CRB sets public performance royalties under Section 112 and 114 for other digital music services, including those for “preexisting subscription services” (principally digital cable radio)

Complaint and this motion) constitutes the third round of such rate-setting under Sections 112 and 114, and the second before the CRB.⁷

B. The 2009 WEB III CRB Proceeding And The Impact On Plaintiff

On January 5, 2009, in accordance with 17 U.S.C. § 803(b), *et seq.*, and 37 C.F.R. § 351, *et seq.*, the CRB announced commencement of the 2009 WEB III CRB Proceeding to set rates and terms for the compulsory licenses under 17 U.S.C. §§ 112 and 114 to run from January 1, 2011, through December 31, 2015, by issuing a request for Petitions to Participate in the proceeding *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 74 Fed. Reg. 318 (2009). The Act requires that the 2009 WEB III CRB Proceeding be completed by the Copyright Royalty Judges no later fifteen (15) days before the expiration of the current statutory rates, *i.e.* by December 16, 2010. 17 U.S.C. § 803(c)(1).

Live365 is an aggregator of digital radio stations that operates in reliance on compulsory licenses established under 17 U.S.C. §§ 112 and 114. Lam Decl. ¶ 2. For example, since 2005, Live365 has paid approximately one million dollars per year in royalties for use of copyright works governed by Sections 112 and/or 114. Lam Decl. ¶ 3. Live365, accordingly, will be directly affected by the rates and terms established in the 2009 WEB III CRB Proceeding.

On or about January 28, 2009, Plaintiff, together with numerous other parties, filed Petitions to Participate in the 2009 WEB III CRB Proceeding. Lam Decl. ¶ 4. Certain procedural actions in connection with the appearances of the parties have occurred in this case.

and “preexisting satellite digital audio radio service” (Sirius XM radio). The CRB also sets rates for the payments of royalties under other statutory licenses and establishes how royalties collected under certain other statutory copyright licenses are distributed.

⁷ The CRB’s last decision under Sections 112 and 114 was appealed, and the constitutional question regarding appointment of CRB Judges was raised, but the Court declined to reach the issue. The issue was also mentioned, but not decided, in another recent case. *See Intercollegiate Broadcast Sys., Inc. v. CRB*, No. 07-1123, 2009 WL 2422729 *4-6 (D.C. Cir. Aug. 7, 2009); *SoundExchange*, 571 F.3d at 1226 (Kavanaugh, J., concurring). In both cases, the constitutional issue was not reached, as the Court found in the first case that it was not timely raised, and in the second case, it was not argued by any of the parties to the appeal.

On June 24, 2009, the CRB issued an order setting a deadline of September 29, 2009, for the parties to file their written direct statements in the 2009 WEB III CRB Proceeding. Lam Decl. ¶ 5.⁸ Since the release of that Order, a motion has been filed requesting the CRB to issue an order that parties intending to file a direct case statement identify themselves. Other than these largely ministerial actions, as of the date of the Complaint, no other actions have taken place in this proceeding.

As set forth in the attached Declaration of N. Mark Lam, preparing and presenting a case before the Copyright Royalty Judges is an intricate and time-consuming process. Lam Decl. ¶ 6-9. Most significantly, Live365 must locate and retain expert witness(es) to support its economic theories for its rate case before the Copyright Royalty Judges. Lam. Decl. ¶ 6. Then, Live365 must prepare written statements to support its case, including an expert statement, all to be filed by the CRB's September 29, 2009 deadline for written direct statements. Lam Dec. ¶ 5, 6.

These are not ordinary briefs. In the last CRB webcasting proceeding, one party's direct case filing alone exceeded 2,000 pages with over 500 exhibits. These filings consume hundreds of hours of attorney time to prepare. Copying and delivery costs alone are significant, as the full set of exhibits have to be copied and delivered to each party in the proceeding by the September 29 deadline. Lam Decl. ¶ 7. Where proprietary information is included in the exhibits, "public" copies redacting that information must be prepared and served, along with "restricted" copies marking but not redacting the proprietary information. *Id.* If the 2009 WEB III CRB Proceeding is not preliminarily enjoined, then the Copyright Royalty Judges will be required to set a discovery schedule, 17 U.S.C. § 803(b)(6)(C)(ii) and (iv), and to schedule lengthy hearings in Washington, D.C., leading to its determination, which must be rendered on or before December 16, 2010. Lam Decl. ¶ 8. The ensuing discovery period is labor-intensive, with attorneys on all sides exchanging reams of documents and conducting many depositions throughout the United States to develop the factual record for witnesses who will appear to give live testimony at the

⁸ By statute, the CRB Judges could have set the deadline for filing written direct statements up to and including October 24, 2009. *See* 17 U.S.C. § 803(b)(6)(C)(i).

actual hearing. *Id.* In the last proceeding, oral testimony at the hearing alone took 48 days. In that same proceeding, the group with which Live365 was associated spent millions of dollars on litigation fees. *Id.* Live365 is not currently part of a group in this proceeding and would thus expect to spend more than one million dollars if forced to litigate this case. *Id.* at ¶ 9.

Against this backdrop, the Appointments Clause issue sits as the proverbial “elephant in the room,” threatening to invalidate the 2009 WEB III CRB Proceeding, which will involve millions of dollars and months of the parties’ and the CRB’s time, at the expense of the parties and the United States taxpayers. As discussed below, while the CRB and the Copyright Royalty Judges exercise significant authority and power under the laws of the United States – indeed, the Judges act as “Principal Officers” of the United States – Copyright Royalty Judges are not empowered to rule on the constitutionality of their own appointment or the CRB’s composition; they have neither the statutory authority to decide the issue nor may they pass on the constitutionality of their own appointment. Accordingly, unless the constitutional issue is addressed here, Live365 would not be able to raise it until after a decision is issued in the 2009 WEB III CRB Proceeding and it can be appealed to the D.C. Circuit. *See* 17 U.S.C. § 803(d)(4).

III. ARGUMENT

A preliminary injunction staying the 2009 WEB III CRB Proceeding while the Court considers Live365’s Appointments Clause challenge to the CRB should issue because Live365 can demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable injury if preliminary relief is not granted; (3) any burden on others’ interests from an injunction does not outweigh the harm Live365 would suffer; and (4) the public interest favors granting relief. *See Electronic Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 35-36 (D.D.C. 2006) (*citing Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)). Under a traditional equitable analysis, these factors interrelate on a sliding scale, and relief may be afforded “where there is a particularly strong likelihood of success of the merits even if there is a

relatively slight showing of irreparable injury.” *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *see also Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (justifying injunction with “either a high probability of success and some injury, or *vice versa*.”); *see also Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1505, 1506 (D.C. Cir. 1995) (*citing Wagner v. Taylor*, 836 F.2d 566, 575 (D.C. Cir. 1987)); *National Wildlife Fed’n v. Burfurd*, 835 F.2d 305, 318 (D.C. Cir. 1987). As demonstrated below, under the undisputed facts and law applicable to this case, Live365 meets the applicable standards for the issuance of injunctive relief, and this Court should therefore grant the requested injunction to prevent the 2009 WEB III CRB Proceeding from going forward until this matter is resolved by this Court.

A. Live365 Is Likely To Succeed On The Merits Of This Action

Live365 is likely to succeed on the merits of its Complaint in the instant matter because the 2004 Copyright Royalty and Distribution Reform Act’s creation of a CRB composed of Judges appointed by the Librarian of Congress violates the Appointments Clause of the U.S. Constitution. The Appointments Clause provides that:

[The President] by and with the advice and consent of the Senate . . . shall appoint ... all other 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. Thus, only the President may appoint “Principal Officers,” and, for purposes relevant here, only the President or a “Head of Department” may appoint Inferior Officers. *See, e.g., Intercollegiate Broadcast Sys., Inc. v. CRB*, No. 07-1123, 2009 WL 2422729 *4 (D.C. Cir. Aug. 7, 2009). Thus, while Congress may create offices and prescribe the manner of appointment, the power to appoint individual officers was removed from the Legislative branch, which includes the Librarian of Congress, and

any appointment must be made by either the President, the “Courts of Law” or the “heads of departments” of the Executive Branch of government. *Id.*

The Appointments Clause not only guards against encroachment of one branch of government upon another, but also “preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.” *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991). Furthermore, it “prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint,” and it “reflects our Framers’ conclusion that widely distributed appointment power subverts democratic government.” *Id.* at 880, 885. As set forth below, the Librarian cannot constitutionally appoint the Copyright Royalty Judges no matter which type of Officers they are, because either: (i) the Copyright Royalty Judges are Principal Officers who must be appointed by the President of the United States, or (ii) the Copyright Royalty Judges are Inferior Officers that must be appointed, *inter alia*, by a Head of Department, but the Librarian of Congress, as an officer in the Legislative Branch, is not a Head of Department. *See Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (4th Cir. 1978) (“[T]he Office of the Librarian of Congress is codified under the legislative branch [and] receives its appropriation as part of the legislative appropriation.”).

1. **The Copyright Royalty Judges Are “Principal” Officers And The Librarian Cannot Appoint Them**

Empowering the Librarian of Congress to appoint Copyright Royalty Judges violates the Appointments Clause because the Copyright Royalty Judges function independently, without supervision by the Librarian, and are therefore “Principal Officers,” who may be appointed only by the President. This is precisely the concern raised by Judge Kavanaugh in *SoundExchange v. Librarian*, when he observed that, like FERC, the FCC, the NLRB and the SEC – the impact of whose decisions are national in scope and far-reaching in their economic implications – the Copyright Royalty Judges exercise expansive authority. *See* 571 F.3d at 1226 (Kavanaugh, J., concurring). However, unlike those agencies, the Judges are not nominated by the President and then confirmed by the Senate. *See id.* In expressing these concerns, Judge Kavanaugh noted

several factors indicating that Copyright Royalty Judges are Principal Officers, including the facts that: “they are not removable at will;” they are “apparently unsupervised by the Librarian . . . or any other Executive Branch official;” and “their decisions regarding royalty rates are not reversible by the Librarian . . . or any other Executive Branch Official.” *Id.* at 1227 (“If the members of the Board are in fact Principal Officers, then the present means of appointing Board members is unconstitutional.”).

Judge Kavanaugh’s observations are in accord with Supreme Court precedent on this point. As the Court explained in *Morrison v. Olson*, 487 U.S. 654, 671-73 (1988), “inferior” officers are those having limited duties, limited jurisdiction, “temporary” tenure, and the ability to be removed by an appointing officer. Officers not limited in this regard cannot be Inferior Officers, but rather must be Principal Officers. *Id.* Similarly, in *Edmond v. United States*, 520 U.S. 651, 662-65 (1997), the Court explained that Inferior Officers are assigned responsibilities in which they are directed and supervised by others.⁹

As stated above, the relevant provisions of the Copyright Act contain several indicia that compel the conclusion that the Copyright Royalty Judges are “Principal Officers.” *See* 17 U.S.C. § 802(f) (titled “Independence of Copyright Royalty Judges”). These indicia include:

- Copyright Royalty Judges shall have “full independence” in making their determinations under the act, except that they *may* “consult” with

⁹ The U.S. Supreme Court recently granted a petition for *certiorari* in the case *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378, 77 U.S.L.W. 3431 (U.S. May 18, 2009) (No. 08-861). There, the plaintiff, a non-profit organization, argued that Title I of the Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7211-19, violates the Appointments Clause of the Constitution and separation of powers because it does not permit adequate Presidential control of the Public Company Accounting Oversight Board. Although the court affirmed the district court’s grant of summary judgment for the Public Company Accounting Oversight Board and the United States, it did so only after finding that there were extensive checks and controls exercised by the SEC, which could overturn any action of the Challenged Board. These checks and controls are not evident here, as the CRB has no such checks and controls over its actions by any executive authority. The U.S. Supreme Court’s grant of *certiorari* indicates that the issues arising in that case are significant issues which cannot be ignored.

the Register of Copyrights on nonfactual matters. *Id.* § 802(f)(1)(A)-(C).

- Copyright Royalty Judges do not receive performance appraisals from anyone and cannot be removed or sanctioned except for misconduct, neglect of duty, a disqualifying disability, or a financial conflict of interest and impermissible *ex parte* communications. *Id.* § 802(i).
- The Librarian of Congress may not comment on or reassess the evidentiary and procedural rulings or the factual determinations of the Copyright Royalty Judges, whose decisions in this regard are final, subject only to appeal before the D.C. Circuit Court of Appeal. *Id.* § 803(d).
- The Copyright Royalty Judges are directed to act with the “plenary” authority of the Library of Congress, independent of supervision and control by the Librarian of Congress. *Id.* § 802(f)(1)(A)-(C).
- CRB regulations, which the Copyright Royalty Judges issue themselves, subject to approval of the Librarian (*see* 17 U.S.C. § 802(a)(1)), give the Copyright Royalty Judges, among other things, power to monitor the discovery process, 37 C.F.R. § 351.5; to issue subpoenas and rule on the admissibility of evidence, 37 C.F.R. §§ 351.9 & 351.10; to limit the questioning of witnesses and rule on objections to questions, 37 C.F.R. § 351.10(b); and to conduct rebuttal proceedings, 37 C.F.R. § 351.11.
- Copyright Royalty Judges can grant protective orders. 17 U.S.C. § 803(c)(5).
- Even where the Register of Copyrights has the limited ability to review a decision of the CRB for legal error, any finding of such error is binding as precedent only on subsequent CRB proceedings. If the

Register wants to press a legal issue in the current proceeding, it is authorized only to intervene in any appeal of the CRB decision, not to overturn the CRB decision. *Id.* § 802(f)(1)(D).

In this regard, it is telling that these well-defined duties and obligations render Copyright Royalty Judges similar to the Judges of the CRB's predecessor royalty-setting body, the Copyright Royalty Tribunal ("CRT"), which was established with the update of copyright law set forth in the Copyright Act of 1976. At that time, Congress provided that the CRT's Judges were "Principal Officers," who had to be appointed by the President. *See* 1976 Copyright Act, Pub. L. No. 94-553, § 802(a) (1976).

The Copyright Royalty Judges, unlike the Independent Counsel in *Morrison, supra*, the Coast Guard Judges in *Edmond, supra*, or the oversight board in *Free Enterprise Fund, supra*, are free-standing, independent, and unsupervised fact finders who weigh evidence, regulate discovery, call witnesses, issue subpoenas, and make final decisions subject to direct judicial review. Therefore, they are "Principal Officers" whose appointment by the Librarian of Congress is unconstitutional, as only the President can appoint (upon confirmation by the Senate) such officers under the Appointments Clause. *See, e.g., Buckley*, 424 U.S. at 132 ("Principal Officers are selected by the President with the advice and consent of the Senate. Inferior Officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary."); *see also* U.S. Const. art. II § 2, cl. 2.

2. **Alternatively, If The Copyright Royalty Judges Are "Inferior" Officers, The Librarian Of Congress Is Not A "Head Of Department" Who May Appoint Them**

If this Court were to determine that the Copyright Royalty Judges are not "Principal Officers" but rather are "Inferior Officers," their appointment by the Librarian of Congress remains unconstitutional under the Appointments Clause. Inferior Officers must, for present purposes, be appointed by the President or by the Head of a Department. As the Librarian is not the "Head of a Department" within the meaning of the Appointments Clause, the CRB is

unconstitutionally created, regardless of whether its Judges are “Principal” or “Inferior” Officers. U.S. Const. art. 2 § 2, cl. 2 (“[The] Congress may by law vest the Appointment of . . . inferior officers . . . in the Heads of Department.”); *see also Freytag*, 501 U.S. at 886 (“This Court for more than a century has held that the term ‘Department’ refers only to ‘a part or division of the *executive* government”) (internal citations omitted).

The Supreme Court has held that “[a]ny appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States and must, therefore, be appointed in the manner prescribed” by the Appointments Clause. *Freytag*, 501 U.S. at 881 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)) (internal quotes omitted). At a minimum, the powers discussed in the previous section of this Application constitute “significant authority” that the CRB exercises under the Copyright Act. Indeed, as noted in the *SoundExchange* concurrence, the CRB Judges exercise “expansive” authority akin to that wielded by other federal officials, and no one would suggest that they are not at least Inferior Officers. 571 F.3d at 1226 (Kavanaugh, J., concurring). Though the *Intercollegiate Broadcast* court failed to reach the constitutional Appointments Clause issue due to the late stage at which it was raised,¹⁰ it nonetheless observed that “Inferior Officers [is] a category that all of the parties agree includes the [Copyright Royalty] Judges.” *Intercollegiate Broadcast*, 2009 WL 2422729, at *4. Significantly, “all the parties” in that case included appellees CRB and Library of Congress, as represented by the Department of Justice. *Id.*

Thus, even if considered Inferior Officers, the appointment of Copyright Royalty Judges by the Librarian of Congress can be constitutional only if the Librarian of Congress is a “Head of Department.” U.S. Const., art II, § 2, cl. 2. The problem lies in the fact that, for Appointments Clause purposes, a Head of Department must be a cabinet-level department head in the *executive*

¹⁰ *See Intercollegiate Broadcast*, 2009 WL 2422729 at *5-6. The extent to which having to wait until the next appeal of a CRB decision to the D.C. Circuit in order to raise this issue, if the Court does not grant injunctive relief in this case, factors into the irreparable harm Live365 suffer is discussed *infra* at III(B).

branch of government who reports and is directly accountable to the President. *See Freytag*, 501 U.S. at 886. The Library of Congress, however, is in the *legislative* branch. 2 U.S.C. §§ 131 *et seq.*, 136 *et seq.* In this regard, *Freytag* noted that these Cabinet-level departments “are limited in number and easily identified,” with “[t]heir heads [] subject to the exercise of political oversight” insofar as they “share the President’s accountability to the people.” *Id.* Even Justice Scalia’s more expansive reading of “department” in his concurrence in *Freytag* – that heads of non-Cabinet level departments that report directly and are directly accountable to the President should be considered “Heads of Department,” in addition to Cabinet-level departments – would not lead to a different result. *Id.* at 918 (Scalia, J., concurring). Even if Scalia’s interpretation were controlling, the Department Head would still have to fall “*below the President in the organizational structure of the Executive Branch.*” *Id.* (emphasis added). The Librarian simply does not.

The Library of Congress is not in the executive branch, but rather is in the legislative branch. This is plainly evident from binding precedent from the D.C. Circuit. *See e.g.*, *Washington Legal Found. v. U.S. Sentencing Comm’n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (Library is exempt from the Administrative Procedure Act because its provisions “do not apply to Congress” – that is, the legislative branch); *Judd v. Billington*, 863 F.2d 103, 105 (D.C. Cir. 1988) (former Library employee could not bring Rehabilitation Act claim because statute “applies only to employees in the executive branch”); *Keeffe v. Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985) (“[T]he Library of Congress [] is a *congressional* agency”) (emphasis added); *United States v. Brooks*, 945 F. Supp. 830, 833 (E.D. Pa. 1996) (“Library of Congress is clearly . . . part of the legislative branch”).

In this regard, the Librarian reports to Congress, not to the President, *see* 2 U.S.C. § 132b; the legislative branch funds the Library, *see, e.g.*, Legislative Branch Appropriations Act of 2010, S.1294, H.R.2918 (appropriating funds to the Library of Congress); and the Librarian cannot be removed without cause by the President because the statute is silent as to removal, *cf.* *Federal Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993)

(given statutory silence on the point, President needs “good cause” to remove).¹¹ Add to this the Library of Congress’ own view, as set out on its webpage, which indicates that it considers itself an “agency of the legislative branch of the U.S. government,” and it is clear that the Library falls in the legislative – not the executive – branch of government. *See* About the Library of Congress, <http://www.loc.gov/about>. Because the Librarian of Congress sits atop this legislative unit that is not under the Executive Branch, the Librarian cannot be a “Head of Department” as that term is used in the Appointments Clause. Accordingly, even if the Copyright Royalty Judges are Inferior Officers, the Librarian’s appointment of the Copyright Royalty Judges is unconstitutional.

B. Live365 Has Suffered And Will Continue To Suffer Irreparable Harm If A Preliminary Injunction Is Not Granted

When an alleged deprivation of a constitutional right is involved, many courts have found that no further showing of irreparable injury is necessary. *See* Wright Miller Kane, Fed. Prac. & Proc., 11A, § 2948.1 (1995). Given the clear constitutional infirmity present here, requiring Live365 to continue to litigate a proceeding before an unconstitutionally-created body should in and of itself satisfy the irreparable harm test.¹²

¹¹ The Library of Congress’ placement in the Legislative Branch is not a meaningless label. *See* The United States Government Manual Chart: The Government of the United States (2007), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2008_government_manual&docid=214669tx_xxx-3.pdf. The Librarian is neither a cabinet-level nor an Executive Branch appointment (as opposed to the SEC, FTC, FCC, and Postal Service, which are indicated as independent agencies in the Executive Branch in the aforementioned chart).

¹² In *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006), the D.C. Circuit held that there was *per se* irreparable harm when existing policies were alleged to violate the First and Fifth Amendments. The Court held that “[t]he harm inflicted by religious establishment is self-executing and requires no attendant conduct on the part of the individual.” *Id.* at 302-04; *see also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (irreparable harm with allegation of violation of First Amendment right to free speech); *Parents’ Ass’n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986) (Establishment Clause allegation is irreparable harm); *Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo*, 743 F. Supp. 977, 995-96 (N.D.N.Y. 1990) (alleged Fourteenth Amendment violation under equal protection clause constitutes irreparable harm); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp.

But, whether or not the constitutional harm is *per se* irreparable, it is clear that Live365 will suffer actual irreparable harm. In *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 50 (D.D.C. 2008), the court noted that, when “the plaintiff in question cannot recover damages from the defendant due to the defendant’s sovereign immunity, any loss of income suffered by a plaintiff is irreparable *per se*” (internal citations omitted). Here, if a preliminary injunction does not issue and Live365 must participate in the 2009 WEB III CRB Proceeding before Copyright Royalty Judges who are later determined to have been unconstitutionally seated in derogation of the Appointments Clause, there is no legal avenue for the recovery of monetary damages from Defendants. As set forth above, if the 2009 WEB III CRB Proceeding is not stayed by this Court, Live365 will have to prepare and submit by September 29, 2009, its written direct case on 2011-2015 webcasting royalty rates and will have to litigate that case, spending potentially over one million dollars. *See* Lam Decl. ¶ 9. Denial of the preliminary injunction may mean that Live365 will have to continue to litigate the entire 2009 WEB III CRB Proceeding because it is “hardly open to . . . an administrative agency . . . to entertain a claim that the statute which created it was in some respect unconstitutional.” *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995); *see also Ryan v. Bentsen*, 12 F.3d 245, 247 (D.C. Cir. 1993) (“the constitutionality of a statutory provision is an issue beyond [the agency’s] competence to decide”).

Putting Live365 in a position where it will need to incur extensive costs in connection with litigation before an unconstitutionally-appointed body constitutes irreparable harm, as its loss is not compensable under the present circumstances. Preparing and presenting a case before the Copyright Royalty Judges is an intricate and time-consuming process that requires incurring hundreds of thousands of dollars in attorneys’ fees and other costs, not least of which is locating, retaining and paying expert economic witnesses, preparing written statements to support the case

1560, 1564 (C.D. Cal. 1987) (irreparable harm from alleged Fourteenth Amendment violation); *Greater Baltimore Bd. of Realtors v. Hughes*, 596 F. Supp. 906, 924 (D. Md. 1984).

in chief, and all the other ensuing costs of discovery, cross-examination, briefing, preparing and presenting testimony, and so forth. *See generally* Lam Decl.

The costs of one year or more in such litigation, if the 2009 WEB III CRB Proceeding is not stayed, can never be recovered and thus constitute irreparable harm. Live365 can never be made whole by the kind of after-the-fact recovery of damages that may make preliminary relief improper in other cases. Under the Eleventh Amendment's grant of immunity from suit for monetary damages, Live365 will be unable to recover the expense of the 2009 WEB III CRB Proceeding from these Defendants. *See, e.g.*, U.S. Const. amend. XI; *see also Puerto Rico Ports Authority v. Federal Maritime Com'n*, 531 F.3d 868, 871-72 (D.C. Cir. 2008) ("The text of the Eleventh Amendment does not expressly provide for state sovereign immunity; the text merely denies federal court jurisdiction over suits against one State by citizens of another State. But under long-standing Supreme Court precedent, the Constitution has been interpreted to encompass a principle of state sovereign immunity and to largely shield States from suit without their consent"), *cert. denied*, 129 S. Ct. 1312 (Feb. 23, 2009); *see also Johnstone v. United States.*, 980 F. Supp. 148, 151 (E.D. Pa. 1997) (citing *FDIC. v. Meyer*, 510 U.S. 471, 485-86 (1994)) ("sovereign immunity bars such actions against the United States or agencies thereof."); *see also Quern v. Jordan*, 440 U.S. 332, 338-45 (1979). *Cf. Bowen v. Massachusetts*, 487 U.S. 879, 893-95 (1988) (APA does not waive sovereign immunity for actions seeking "monetary damages").

Consequently, Live365 would be irreparably harmed if the 2009 WEB III CRB Proceeding continued while this case proceeded simultaneously, forcing Live365 to incur unrecoverable damages just to protect its interests and the ability to raise the Appointments Clause issue – months or years later – in the Court of Appeals. This Court has held that such irrecoverable expenses constitute irreparable harm. *Feinerman*, 558 F. Supp. 2d at 51. Other courts have concurred. *See United States v. New York*, 708 F.2d 92, 93-94 (2d Cir. 1983). *See, e.g., Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 893 F. Supp. 301 (D.N.J. 1995) ("Where the Eleventh Amendment bars recovery of

monetary damages from state entities, legal remedies are inadequate and the plaintiff has shown the irreparable harm necessary for injunctive relief”); *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991) (“As to the inadequacy of legal remedies, the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth . . . clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature.”); *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, No. 3:01 CV 7334, 2001 WL 1916730, at *4 (N.D. Ohio, July 6, 2001) (“A significant issue is the absence of a remedy available to the Plaintiffs if no injunction issues, if the Plaintiffs ultimately prevail, and if some or all of the Plaintiffs can demonstrate financial damage as the result of enforcement of the subject Regulation. Because the Defendants are undoubtedly immune as governmental agencies from an action for damages, the absence of such remedy appears to rise to the level of irreparable injury.”). This clear precedent must dictate the outcome here – that the unrecoverable expenses due to the constitutional violation constitute irreparable harm.

C. Defendants Will Not Be Harmed By A Preliminary Injunction

Defendants can in no way argue that they would be injured by a preliminary injunction that would briefly delay the 2009 WEB III CRB Proceeding pending resolution of Live365’s action in this Court. First, the next deadline the Copyright Royalty Judges have imposed on Plaintiff and the other participants in the 2009 WEB III CRB Proceeding is the September 29, 2009 deadline for filing the written Direct Case statements under 17 U.S.C. § 803(b)(6)(c). Lam Decl. ¶ 5. However, the statute did not require that the Copyright Royalty Judges request the Direct Case statements that soon; in fact, the Copyright Royalty Judges have until October 24, 2009, to receive the Direct Case statements. *Id.*¹³ Therefore, a preliminary injunction to stay those requirements and permit this Court to address the threshold constitutional issue would not

¹³ 17 U.S.C. § 803(b)(6)(c) states: “The written direct statements of all participants . . . shall be filed by a date specified by the Copyright Royalty Judges, which may be not earlier than 4 months, and not later than 5 months, after the end of the voluntary negotiation period.”). September 29, 2009, is the date which is 4 months from the end of the voluntary settlement negotiation period, which ended on May 24, 2009.

harm the Copyright Royalty Judges. Further, the Copyright Royalty Judges are not statutorily required to render their final decision on the merits until December 16, 2010, so there is time for this Court to rule on the present matter. 17 U.S.C. § 803(c). Even though the statute suggests this date for a decision, in the prior two proceedings establishing webcasting royalties, decisions were not reached until well after the next statutory royalty period began. As the statute provides for the continuing payment of royalties under the former rates if new rates are not set by the end of a statutory period,¹⁴ artists will receive royalties with a retroactive obligation to the first day of the new royalty term. Thus, artists will suffer no harm from delay in setting new royalties which may be imposed by this stay even if a CRB decision is delayed beyond the statutory period. Obviously, if the CRB is indeed unconstitutional, no valid decision can be reached by that statutory date in any event.

D. A Preliminary Injunction Will Also Further the Public Interest By Ensuring That the CRB Proceedings Are Constitutional

The public interest would be served by precluding a federal body that has been appointed in violation of the Appointments Clause from conducting a proceeding that will potentially implicate “billions of dollars and the fates of entire industries.” *SoundExchange*, 571 F.3d at 1226 (Kavanaugh, J., concurring). As this Court has held, “it is clearly in the public interest to ensure that governmental agencies . . . fully comply with the law, especially when” there is the prospect that the law that may be violated is of constitutional importance. *Pearson v. Shalala*, 130 F. Supp. 2d 105, 119 (D.D.C. 2001). Indeed, courts routinely have held that immediate judicial intervention is necessary to deal with an issue as fundamental as an agency’s competence to sit, going so far, for example, as to dispense with the usual need to satisfy such prerequisites as exhausting administrative remedies or awaiting a “final agency action.” *See Free Enter. Fund*, 537 F.3d 667, *supra* at fn. 9; *Ryan v. Bentsen*, 12 F.3d at 247; *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962); *Standard Oil Co. v. FTC*, 475 F. Supp. 1261 (N.D. Ind. 1979). In addition, the public interest is served though the judicial economy of not forcing

¹⁴ 17 USC § 803(d)(2)(A).

Live365 (and others) to litigate a full round of CRB rate-setting, with the public bearing the CRB's costs of conducting the proceeding, only to have the fruits of the proceeding – the CRB's determination – set aside because the Copyright Royalty Judges have been unconstitutionally appointed. *See, e.g., Lowden v. T-Mobile USA, Inc.*, No C05-1482, 2006 WL 1896678, at *2 (W.D. Wash. July 10, 2006) (“[Defendant] contends that the public interest would be best served by issuing a stay because it would promote judicial economy. The Court agrees.”); *see also Ciba-Geigy Corp. v. Minnesota Min. & Mfg. Co.*, 439 F. Supp. 625, 630 (D.R.I. 1977) (noting that there is a “public interest in judicial economy”).

IV. CONCLUSION/ REQUESTED RELIEF

For the foregoing reasons, Live365 respectfully requests that its motion for a preliminary injunction be granted and that all procedural deadlines, required filings by the parties, and further actions by the Copyright Royalty Board in the “2009 WEB III CRB Proceeding” (*In the Matter of Digital Performance Right In Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 (CRB Webcasting III)) be stayed pending the resolution of Live365's constitutional claims raised in its Complaint.

DATED: September 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to LCvR 5.3, I hereby certify that, on the 2nd day of September, 2009, I electronically filed with the Clerk of the Court, Plaintiff Live365, Inc's Memorandum of Points and Authorities in Support of its Motion for A Preliminary Injunction and a supporting declaration, using the CM/ECF system, and I caused copies of the same to be served by hand-delivery upon the following parties at the addresses listed below:

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