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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2000-9 CARP DTRA 1&2

ORDER

On June 20, 2002, the Librarian of Congress issued his Final Rule and Order ("Order") in the above-captioned proceeding establishing the royalty rates and terms for the statutory license for eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions ("webcasting") under 17 U.S.C. §114 and the statutory license to make ephemeral recordings of sound recordings for use of sound recordings under the statutory license set forth in 17 U.S.C. §112. 67 FR 45239 (July 8, 2002). The Order was the final ruling in a Copyright Arbitration Royalty Panel ("CARP") proceeding conducted to determine the rates and terms for the two statutory licenses. Among other things, the Librarian's Order established royalty fees to be paid based on the number of performances of sound recordings a webcaster transmits and established a minimum royalty fee of $500.00 per year. As required by 17 U.S.C. §114, the Order provided that royalties must be paid for all transmissions that have been made pursuant to the statutory license since October 28, 1998, the date on which the statutory license went into effect. See 37 C.F.R. § 261.3(a); 17 U.S.C. §114(f)(2)(B).

On August 7, 2002, Live365.com, Inc. ("Live365") filed a notice of appeal[1] of the Order with the Clerk of the United States Court of Appeals for the District of Columbia Circuit. On September 30, 2002, Live365 filed with the Register of Copyrights a Motion for Stay Pending Appeal. The motion requested "a stay of the Librarian's Final Rule and Order ("Final Rule"), 67 Fed. Reg. 54240 (July 8, 2002), requiring statutory licensees to make royalty payments, based on stated rates and minimum fees, on October 20, 2002 and monthly thereafter."

On September 30, 2002, a procedural order was issued allowing parties to this proceeding an opportunity to file their oppositions to Live365's motion by October 8, 2002, and allowing Live365 to file a reply to any oppositions on October 11, 2002. Order, Docket No. 2000-9 CARP DTRA1&2 (September 30, 2002). An opposition was filed by the Recording Industry Association of America, Inc. ("RIAA"), the American Federation of Television and Radio Artists ("AFTRA"), and the American Federation of Musicians ("AFM") (collectively "Copyright Owners and Performers"). Intercollegiate Broadcasting System, Inc. ("IBS") and Collegiate Broadcasters Inc. ("CBI") filed statements in support of the motion.[2] Live365 filed a reply.

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[1] Live365 was one of 19 petitioners appealing the Order.

[2] Since IBS was not a party to this proceeding, IBS has no standing to file a statement in support of Live365's motion. CBI's statement in support of Live365's motion contained a separate motion for stay pending appeal. Because Collegiate and its members were not parties to this proceeding, they do not have a right to seek a stay of the Order. See, Order, Docket No. 2000-9 CARP DTRA1&2 (August 8, 2002). Therefore, neither IBS' nor CBI's filings will be addressed in this Order.

RECOMMENDATION

Merits of Live365's Motion

Although, as noted above, we have considered motions to stay the Librarian's statutory license rate determinations on two prior occasions, Order, Determination of Reasonable Rates and Term for the Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA1&2 (August 8, 2002), Order Adjustment of Rates for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA (November 14, 1997), we have never directly addressed whether the Librarian has the power to issue such stays. On the two prior occasions, we have concluded that the movant had not made the case for a stay; therefore, it was not necessary to determine the question of the Librarian's power. For the purposes of this motion, too, we assume without deciding that the Librarian has the power to stay his Order establishing rates for a statutory license. We note, however, that 17 U.S.C. §802(g) provides that "[t]he pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 112, 114, 115, 116, 118, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections." Therefore, a stay would, at the very least, be a departure from the generally applicable rule.

The factors to be considered in determining whether a stay is warranted are: 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. <u>Virginia Petroleum Jobbers Ass'n v. Federal Power Commission</u>, 259 F.2d 921 (D.C. Cir. 1958); <u>Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.</u>, 559 F.2d 841, 843 (D.C. Cir. 1977).

Discussion

A. <u>Likelihood of Success on the Merits</u>

The United States Court of Appeals for the District of Columbia Circuit has said that:

> [t]o justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

<u>Cuomo v. Nuclear Regulatory Comm'n</u>, 772 F.2d 972, 974 (D.C.Cir. 1985). However, a movant is always required to demonstrate more than a mere possibility of success on the merits. <u>Michigan Coalition v. Greipentrog</u>, 945 F.2d 150, 153 (6th Cir. 1991).

Live365 asserts that it meets this requirement and that it will succeed in its appeal because "the rates set in the Final Order are arbitrary and capricious in light of the record, clearly frustrate the Congressional intent in establishing a compulsory license for sound recording performance royalties, and eliminate a new, but powerful, engine of free expression for all but the wealthiest, thereby burdening the First Amendment's right of free speech." Motion at 2.

Recommendation: Live365 has little probability of success on the merits for the following reasons.

As a fundamental matter, Live365 fails to discuss the relevant standard upon which the court will review the Librarian's Order. Section 802(g) of the Copyright Act defines the standard and scope of judicial review. It states that:

> [t]he court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner.

17 U.S.C. §802(g).

The D.C. Circuit has carefully considered this standard and found that the standard is "exceptionally deferential," and requires the court to uphold the decision of the Librarian provided that "the Librarian has offered a facially plausible explanation for it in terms of the record evidence." Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528, 532 (D.C. Cir. 1999), citing National Ass'n of Broadcasters v. Librarian of Congress, 146 F.3d 907, 918 (D.C. Cir. 1998). Consequently, the court can only consider evidence that is in the written record before the Librarian.

On this basis alone, Live365's arguments pertaining to alleged violations of its First Amendment rights cannot even be considered by the court. No party to the proceeding, including the movant, made an argument that the webcasters' right to free speech under the First Amendment were violated by the CARP's decision or the Librarian's Order. Indeed, no party to the CARP asserted that the First Amendment is at all relevant to the determination of rates. Consequently, Live365 cannot hope to prevail on its First Amendment argument when it cannot even raise it on appeal.

Moreover, Live365's First Amendment argument is utterly without merit. As an initial matter, the cases cited by Live365 have nothing whatsoever to do with copyright or with any First Amendment restrictions on copyright, but relate to compelled speech required by the "fairness doctrine" formerly applied to broadcasters, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), compelled speech required by cable "must-carry" rules, Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622 (1994); and government restraints on nude dancing, Schad v. Mount Ephraim, 452 U.S. 61 (1981), on dissemination of publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," Winters v. New York, 333 U.S. 507 (1948), on the ability of cable television operators to obtain permission to operate, Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), on the ability of broadcasters that receive public funds to "engage in editorializing," FCC v. League of Women Voters, 468 U.S. 364 (1984), on "indecent transmission" and "patently offensive display" on the Internet, Reno v. ACLU, 521 U.S. 844 (1997), on transmission on the Internet of "material that is harmful to minors," Ashcroft v. ACLU, 122 S. Ct. 1700 (2002), and on newspaper/broadcaster cross-ownership, News America Publ'g v. FCC, 844 F.2d 800 (1988).

The fact that people may wish to communicate their views on music–and that their right to communicate those views is protected by the First Amendment–does not mean that the First Amendment gives them a right to transmit performances of copyrighted music, or that the First Amendment has any role in determining what royalty should be paid when they receive permission to make those transmissions. It was Congress' decision to create a statutory license that allows a person to make digital transmissions of sound recordings *provided that* the licensee pays a fair market rate. Certainly, it is quite clear that Live365 has no inherent right under the First Amendment to make commercial use of a copyright owner's protected works without complying with the law. "The Constitution grants Congress the power to secure for limited times to authors the exclusive right to their works, and this power generally supersedes the first amendment rights of those who wish to use another's copyrighted work." United Video v. FCC, 890 F.2d 1173, 1190 (D.C. Cir. 1989). In United Video, the court rejected a First Amendment challenge to rules governing a statutory copyright license, observing that "[i]n the present case, the petitioners desire to make commercial use of the copyrighted works of others. There is no first amendment right to do so." Id. at 1191. The District of Columbia Circuit's analysis applies equally to Live365's First Amendment challenge to the rates established for the section 114 statutory license.

Live365 also argues that the Librarian's Order is likely to be reversed due to his failure to consider a settlement agreement between the Recording Industry Association of America ("RIAA") and National Public Radio ("NPR"). Section 114(f)(3) allows one or more parties to negotiate licenses voluntarily at any time, even during the course of a rate setting proceeding, and gives effect to these agreements in place of any determination of the Librarian. However, an agreement reached during the hearing phase of a rate setting proceeding is not part of the written record unless a party to the proceeding offers it into evidence. In the case of the NPR/RIAA agreement, neither party made this offer, nor did the arbitrators request that the agreement be submitted for its consideration.

Live365 evidently thought otherwise, citing to an order issued on December 20, 2001, by the Panel for the limited purpose of admitting into evidence agreed-upon terms. But, as RIAA notes in its opposition, the agreed-upon terms referred to in that order by the CARP were those negotiated by the remaining parties to the proceeding and had absolutely nothing to do with NPR. Copyright Owners and Performers' Opposition at 11. The NPR/RIAA agreement is not in the written record of the rate adjustment proceeding, nor is it in the possession of the Copyright Office or the Librarian. Thus, Live365's allegation that the CARP failed in its purported duty to consider the rates and terms in the NPR/RIAA agreement is without merit.

In addition to these two original arguments, Live365 offers several additional reasons for why the Librarian should have adopted its recommended approach, but spends virtually no time in discussing why the Librarian's determination was arbitrary based upon the record evidence. For example, the law requires that the Librarian adopt rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). Yet, Live365 faults the Librarian for adhering to the law and setting a marketplace rate. It argues instead that the guiding principle for setting rates is that persons wishing to engage in webcasting should have unhampered access to all sound recordings, and it seems to argue that the Librarian must reject a marketplace rate when that rate would be more than some webcasters would be willing to pay. Motion at 11-12. This simply is not the case. In creating the statutory license, Congress balanced the equities between users and copyright owners. The result is a compulsory licensing scheme which eliminates transaction costs associated with negotiating separate voluntary licenses but which at the same time requires licensees to pay a marketplace rate. The court will not set aside a rate which reflects the standard set forth in the law.

Likewise, Live365 maintains that the Librarian acted in an arbitrary manner because the primary evidence he relied on to establish the rates for the statutory license was the Yahoo! agreement. It articulates four reasons for its position: the cost of the proceeding excluded parties who could have provided other useful evidence; the paucity of examples of willing seller/willing buyer transactions; lack of evidence pertaining to purported factors that the Panel had to consider; and the alleged collusion between Yahoo! and RIAA in setting benchmark rates that would "ensure that competitors' costs were prohibitively high." Motion at 13. Yet, none of these rationales offers a firm basis for overturning the Librarian's Order.

Certainly, any party to the proceeding, including Live365, had an opportunity to provide evidence on the standard for setting the rates, including any factors which Live365 thought fundamental to the calculation. Had Live365 found the record lacking, it was in a position to supplement it and bring forth witnesses to support its theories and proposals.

Similarly, had Live365 wished to present evidence from third parties who chose not to participate in the process, it could easily have included such evidence in its own case. Its complaint about cost appears to be a statement more about the statutory process adopted by Congress for setting the rates than the sufficiency of the record evidence. The fact is that the law requires that the parties to the proceeding bear the costs "in such manner and proportion as the arbitration panel shall direct." 17 U.S.C. § 802(c). It may be unfortunate that certain parties chose not to participate in the process because of its cost, but Live365's complaint really relates to the CARP process mandated by Congress rather than the decision the Librarian made based on a review of the CARP report and the evidence in the record.

Live365 also maintains that the Librarian was arbitrary in relying solely upon the Yahoo! agreement in setting the rates for webcasters. Yet, Live365 does not explain why the CARP's application of its criteria for adopting the Yahoo! agreement was unacceptable, especially in light of the fact that it did not think it arbitrary for the CARP to dismiss consideration of the other 25 agreements offered into evidence under the same criteria. Motion at 14; see also 67 FR 45240, 45245-46 and 45247-49. Rather, it merely asserts that Yahoo! wanted rates that would force other small webcasters out of business, then offers no citation to the record evidence for its assertion, other than a reference to the Most Favored Nations ("MFN") clause included in the contract. The Librarian's Order, however, carefully considered the presence of the MFN clause and stated specific reasons why it did not reject the Yahoo! agreement due to that clause and how it accounted for the effect of the clause. Id. at 45249, 45255; see also CARP Report at 62. The fact that Live365 disagrees with the final determination is insufficient for a showing of likelihood of success on the merits. Live365 must demonstrate why that decision was arbitrary, something that it does not even attempt to do.

Finally, Live365 argues that the Librarian acted arbitrarily when he adopted the Panel's recommendation to reject the musical works benchmark and set the minimum fee at $500 for all licensees. However, it falls short of demonstrating that it has any likelihood of prevailing on these points. The Order sets forth a detailed discussion of the musical works benchmark and why it accepted the Panel's recommendation to reject the model. See 67 FR at 45246-47. Similarly, the Librarian carefully considered the $500 minimum and concluded that a rate calculated to cover administrative costs and which is actually less than the $673 per year webcasters pay for use of the musical works under a separate license is not on its face arbitrary. See 67 FR at 45259, 45262-63. Instead of addressing the Librarian's reasons for adopting the CARP's recommendation on these points, Live365 again makes an offer of new evidence in the form of affidavits to support its contention that the minimum gives the copyright owners a "ridiculous windfall." However, such new evidence cannot be considered either by the Librarian in weighing the likelihood of success on the merits or by the court of appeals in an appeal from the Final Rule and Order. The CARP (and the court of appeals) can only consider the record evidence. Moreover, the Librarian did consider the rates that webcasters pay for use of musical works on the Internet and used it to assess the reasonableness of the proposed minimum fee. Thus, Live365's contention that the final rate was arbitrary because it was based solely upon a single agreement is simply inaccurate. Nor does Live365 point to other evidence in the record to demonstrate just what the rate should have been and why it was arbitrary for the Panel not to adopt this documented alternative rate.

All in all, Live365 offers little to support a finding that it has a possibility of success on the merits of its appeal. Thus, this factor weighs heavily against the granting of a stay.

B. Irreparable Harm

Irreparable harm is determined according to its substantiality, likelihood of occurrence, and adequacy of proof. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "[T]he injury must be both certain and great; it must be actual and not theoretical." Id. The party requesting the stay must show that the "[i]njury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976).

> Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

Wisconsin Gas, 758 F.2d at 674.

Further, it is "well established that economic loss does not, in and of itself, constitute irreparable harm." Id.

> [T]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not

> enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974), citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas, 758 F.2d at 674, citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Live365 argues that absent a stay it will suffer "severe and irreparable" harm, as it will have to pay "in excess of one million US dollars" in royalties on "approximately 1.4 billion sound recording performances." Motion at 24. This payment "threatens to put Live365 out of business." Id. In addition, Live365 submits that the Librarian's Order will increase its operating costs by $100,000 per month and that it will be "required to pay 90% of its revenue for July 2002 for royalties alone." Id.

Recommendation: As Cuomo makes clear, "[a] stay may be granted with either a high probability of success [on the merits] and some injury, or vice versa." Cuomo, 772 F.2d at 974. Because the probability of success on the merits of its appeal is low, Live365 must demonstrate a high probability of irreparable harm in order to sustain a stay of the Librarian's Order. Live365 has failed to meet that burden.

Irreparable harm is determined according to its substantiality, likelihood of occurrence, and adequacy of proof. Wisconsin Gas, 758 F.2d at 674. The injury must be "both certain and great," and bare allegations of what is likely to occur are of no value since the decisionmaker must decide whether the harm will in fact occur. Id.

Live365's arguments are insufficient to show irreparable harm. First, Live365 has not shown that paying the royalties due on October 20, 2002, threatens the very existence of its business; it merely alleges such an outcome. Motion at 24. Live365 provides no evidence that paying "in excess of one million" dollars, paying "90% of its revenue for July 2002 for royalties alone," or having its operating costs increased by $100,000 per month will be the death knell of its business. See Jeffrey Declaration at ¶¶ 14, 20. Indeed, Live365 provides no evidence for its claim that it will have to pay "in excess of one million U.S. dollars" on October 20, apart from the bare allegation of its executive vice president. Assuming that this figure is correct, Live365 fails to provide any evidence of its current financial situation to illustrate that the payment of royalties on October 20 will have a devastating effect on its business. See, Copyright Owners and Performers' Opposition at 14. On the contrary, Live365 states that it will "pay the royalties for transmissions by individual programmers using our service," seeming to imply that although it may be a hardship, Live365 will be able to make the payments. Motion at 25; Jeffrey Declaration at ¶ 15. Accordingly, Live365 has not shown that its harm is both certain and great, actual and not theoretical as required under Wisconsin Gas. 758 F.2d at 674.

Second, Live365 has not shown that its alleged harm would directly result from its obligation to make royalty payments. As Live365 and Mr. Jeffrey state, "[t]he company in its fifth year . . . is still losing money every month and will continue to lose money for the foreseeable future, with the most significant cost relating to the licensing of music." Motion at 25; Jeffrey Declaration at ¶ 11. Thus, Live365 has been losing money even without having had to pay any royalties under the section 114 statutory license. Consequently, Live365 has failed to show the requisite causality between the alleged harm–the threat that it may go out of business–and the action–the Librarian's Order–for which it seeks a stay. Wisconsin Gas, 758 F.2d at 674.

Even assuming that Live365 will suffer harm, such harm is not irreparable. As an appeal has been filed in this case, a favorable ruling for Live365 would render any harm reparable. If Live365 is successful on appeal, then the court can order refunds with interest that would provide Live365 with an adequate remedy at law. See 17 U.S.C. §802(g).

Live365 also asserts that "[i]f the royalty rate remains unchanged, it is difficult to calculate how Live365 will ever be able to achieve profitability without charging listeners to access the content available on Live365.com." Motion at 24-25; Jeffrey Declaration at ¶ 11. Even if being compelled to charge listeners for its service might constitute irreparable harm, the assertion about threats to Live365's future profitability ignores the fact that the rates that are the subject of this motion are for the period ending December 31, 2002–less than three months from now–and therefore a stay of the Librarian's Order would have little impact on the long-term profitability of Live365 or any other webcaster.

Finally, the timing of Live365's motion calls into question whether Live365 is really in danger of suffering irreparable harm in the absence of a stay. The Librarian issued his Order setting the royalty rates on June 20, 2002. Live365 filed its notice of appeal on August 7, 2002.[3] Yet, Live365 waited to file its motion for stay pending appeal until September 30, 2002, over three months after the Librarian issued his order, 54 days after Live365 filed its notice of appeal in the D.C. Circuit, and only 20 days before the due date for the first royalty payments. Live365's failure to seek a stay sooner "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Citibank, N.A. v. Citytrust, 756 F.2d 273, 277 (2d Cir. 1985), quoting Le Sportsac, Inc. v. Dockside Research, Inc., 478 F. Supp. 602, 609 (S.D.N.Y. 1979); see Bourne Co. v.Tower Records, Inc., 976 F.2d 99, 101 (2d Cir. 1992); Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975)(finding 44-day delay in seeking relief "inexcusable"). Surely, Live365 was just as aware of the "severe and irreparable" harm it allegedly would suffer as a result of the Librarian's Order when it filed its appeal on August 7 as it was on September 30, less than three weeks before the allegedly irreparable harm was going to occur.

For the reasons set forth above, we cannot ascertain a probability of irreparable harm sufficient to warrant a stay of the Librarian's Order.

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[3] Section 802(g) of title 17 of the United States Code states that the Librarian's decision with respect to a CARP report may be appealed to the D.C. Circuit within 30 days after publication of the decision in the Federal Register. The Librarian's Order was published in the Federal Register on July 8, 2002; therefore, the period for appealing the decision ended on August 7, 2002.

C. Harm to Copyright Owners and Performers

Any irreparable harm suffered by the movant in absence of a stay must be balanced against any harm suffered by other interested parties if a stay is granted. Cuomo, 772 F.2d at 977; Virginia Petroleum, 259 F.2d at 925. Harm to others in the event a stay is granted is also evaluated according to its substantiality, likelihood of occurrence and adequacy of proof. Cuomo, 772 F.2d at 977; see Wisconsin Gas, 758 F.2d at 674.

Live365 argues that the only harm that copyright owners and performers will suffer if a stay is granted is "a short delay" in receiving royalties. Motion at 36. Such delay will be a "minimal inconvenience." Id. Further, if the Librarian's Order is upheld on appeal, Live365 contends that copyright owners can be "compensated for the delay in collecting payments by assessing reasonable post-judgment interest." Id.

Recommendation: Having determined that Live365 has not made a sufficient showing of likelihood of success on the merits and irreparable harm, this factor is not dispositive. However, after examining the harm to Copyright Owners and Performers in terms of its substantiality, likelihood of occurrence and adequacy of proof should a stay be granted, we find that this factor weighs against Live365. Cuomo, 772 F.2d at 977; see Wisconsin Gas, 758 F.2d at 674.

If a stay is granted, the harm to Copyright Owners and Performers will be substantial, as no royalties will be paid until the D.C. Circuit renders its decision. Moreover, there is no question that such harm will occur to Copyright Owners and Performers in the event a stay is granted as the stay would delay payment of the royalties until the court issues its decision.

We recognize that such losses are recoverable once the D.C. Circuit renders its decision; however, we see no reason to delay receipt of the royalties in light of Live365's failure to demonstrate a likelihood of success on the merits and to show irreparable harm. Copyright Owners and Performers have received absolutely no royalties under the statutory license even though webcasters have been transmitting performances of their sound recordings under the license for almost four years. Moreover, webcasters' claims of financial distress actually raise the spectre that further delays in payment may mean that webcasters, who allegedly continue to lose money even without having had to pay the statutory royalties, will be even less able to pay what they owe if the obligation to make payments is deferred to some point in the future.[4] We conclude that the harm that a stay is likely to cause Copyright Owners and Performers is at least as great as the harm that denial of a stay is likely to cause to Live365 and others.

D. Public Interest

Live365 asserts that the public interest would be served by granting a stay because webcasting provides access to a diversity of music and fills a need that is not met by terrestrial

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[4] See Motion at 37 (Copyright owners "are never going to be paid anyway, or will be paid pennies on the dollar, because these payers will be bankrupt."). Allowing such licensees to continue webcasting without paying royalties when they allegedly will never be able to pay those royalties clearly will harm Copyright Owners and Performers.

radio for many listeners. Motion at 38. In addition, Live365 asserts that the harm that would come to college webcasters, recording artists whose works are played on Internet radio, and companies that benefit from Internet radio should be considered as factors in determining whether a stay is in the public interest. Id. at 25 n.12.

Copyright Owners and Performers counter that harm to these entities has no place in the analysis of Live365's motion for stay, as they are not parties to the appeal; therefore, "they have no possibility at all of prevailing on appeal." Copyright Owners and Performers' Opposition at 14 n.10. They urge that if any of the "stay analysis" is applied to those third parties, then the entire analysis should be applied. Id. They also argue that the Congressional directive that royalty payments be made pending appeal would be thwarted by the granting of a stay. Id. at 19.

Recommendation: At the outset, we agree with Live365 that harm to third parties absent a stay, if it is to be considered at all, should be examined as part of the analysis whether the issuance of a stay is in the public interest. Having said this, we determine that Live365 has failed to show that any alleged harm to third parties–college webcasters, recording artists whose works are played on Internet radio, or companies that benefit from Internet radio–overrides the public interest in ensuring that Congress' intent that copyright owners be compensated when their sound recordings are streamed over the Internet is carried out. We reach this conclusion for several reasons.

First, Live365 asserts that college webcasters will suffer severe, irreparable harm absent a stay. However, Live365 fails to make its case. Nowhere in the declarations provided to support this contention does a declarant state that his college Internet radio station will be unable to make the royalty payments or that doing so will put it out of business. On the contrary, William C. Robedee, general manager of KTRU (Rice University), affirmatively states that KTRU "can afford to pay the back royalties due on October 20." Motion at 27; Robedee Declaration at ¶ 18.[5] He states that "going forward," KTRU may not be able to pay its webcasting royalties in addition to the royalties it owes to the performing rights organizations for use of the musical works, "especially as its audience increases." Motion at 27-28; Robedee Declaration at ¶ 18. Such alleged future harm is speculative, especially because the period covered by the rates set forth in the Librarian's Order ends on December 31, 2002, less than three months from now. In addition, expenses (such as those incurred in complying with notice and recordkeeping requirements being considered in a separate rulemaking) other than the royalties due under the Librarian's Order are not considered in determining whether irreparable harm will occur now absent a stay. Likewise, Joel R. Willer, faculty supervisor at KXUL (University of Louisiana at Monroe), never asserts that KXUL cannot make the royalty payments; he merely asserts that to do so would be onerous. See Willer Declaration at ¶¶ 16, 20-24.

Nor has Live365 established a causal connection between the Librarian's Order and the cessation of webcasting by certain college webcasters. Live365 asserts that Mr. Robedee has personally confirmed that 70 stations have already stopped webcasting because of the Librarian's Order and has heard from "credible" sources that many more have also stopped. Motion at 30;

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[5] Page 2 of William C. Robedee's declaration was not filed with the Copyright Office or served on any of the parties to this proceeding. Counsel for Live365 was notified of the defect but failed to correct it.

Robedee Declaration at ¶¶ 23-24. However, Mr. Robedee has provided no evidence to show that these stations were compelled by the Librarian's Order to cease webcasting, or that a stay would result in their resumption of webcasting, even though there is a likelihood that the Court of Appeals ultimately will affirm the rates established by the Librarian. At most, Mr. Robedee's declaration merely shows that these college webcasters have chosen to cease webcasting, perhaps because they do not wish to pay the royalties.

Next, Live365 asserts that recording artists whose works are played on Internet radio will be severely, irreparably harmed absent a stay because many such artists do not receive exposure on terrestrial radio stations. Motion at 31. Again, Live365 fails to make its case. Recording artists, like Emilie Autumn, who own the copyrights to their works can decide to forego their royalties and license their work to webcasters royalty free. See Autumn Declaration ¶ 8. Other recording artists, like Janis Ian, who choose to sign with a record label are thereby bound by the deal they signed with the record label. If such an artist is dissatisfied with the amount of airplay given to his/her work, and wishes to permit her work to be performed for little or no royalty, the artist must address those concerns to the record label to which she has assigned the copyright. Thus, the declarations of Ms. Ian and Ms. Autumn do not evidence irreparable harm absent a stay of the Librarian's Order.

Finally, Live365 asserts that companies, like XSVoice, that benefit from Internet Radio will be harmed absent a stay. Live365 describes XSVoice as "a technology company that has developed a platform which enables mobile access to virtually any type of live and on-demand media content, including Internet-based streaming audio, radio, television or other audio source." Motion at 34; Coble Declaration at ¶ 2. XSVoice licenses this platform to wireless services like Nextel and Cingular as well as to third-party service providers. Id. Live365 asserts that absent a stay, Internet radio stations will go silent, which in turn will have "a severe impact" on XSVoice's "ability to attract new users" and its "ability to motivate existing users to continue using its service." Motion at 35; Coble Declaration at ¶ 11. We find this argument tenuous at best; as such, it does not warrant further discussion.

The purpose of section 114(a) is to compensate copyright owners when their sound recordings are publicly performed as part of a nonexempt eligible nonsubscription transmission. 17 U.S.C. §114(a). Because Live365 has not demonstrated a high probability of success on the merits of its appeal or that it will suffer irreparable harm absent a stay of the Librarian's Order, the public interest in ensuring that copyright owners are compensated for the use of their works overrides any countervailing public interest proffered by Live365. Therefore, after balancing all of the factors, we conclude the granting of a stay in this case would be contrary to the public interest.

Accordingly, it is recommended that the Librarian deny Live365's motion for a stay.

SO RECOMMENDED.

/S/

David O. Carson,
Acting Register of Copyrights.

ORDER OF THE LIBRARIAN OF CONGRESS

Having duly considered the recommendation of the Acting Register of Copyrights in the matter of the motion of Live365.com, Inc. for a stay pending appeal of the Final Rule and Order in this proceeding, 67 FR 45239 (July 8, 2002), the Librarian adopts the recommendation to deny the motion for the reasons stated in the recommendation.

SO ORDERED.

/S/

James H. Billington,
The Librarian of Congress.

DATED: October 18, 2002