
Court Says Copyright Royalty Board Can Legally Set Webcasters' Royalty Payments

by Lauren Lynch Flick and Cydney A. Tune

The U.S. District Court for the District of Columbia has ruled that the Copyright Royalty Board is constitutional. The decision ends for now a long-running controversy over the legitimacy of the CRB, which sets royalty rates that webcasters pay to copyright owners—rates that webcasters see as excessively high and a threat to the industry.

The CRB is comprised of three judges appointed by the Librarian of Congress. It meets once every five years to establish the royalty rates that webcasters must pay copyright owners when using their music on the Internet. In the past, the rates set by the CRB were decried by webcasters as excessive, which ultimately led to the passage of the Webcasters Settlement Acts of 2008 and 2009. Pursuant to these statutes, several classes of webcasters, including small commercial webcasters, microcasters, and noncommercial webcasters, have been able to negotiate settlement agreements with SoundExchange, which represents the copyright holders, and agree to rates that, while still unpopular with webcasters, are nonetheless lower than those set by the CRB.

Live365 is an Internet radio aggregator that has not entered into any special agreement with copyright holders with respect to the rates it will pay them for use of their music on its site. Accordingly, Live365 and other webcasters in the same position who wish to influence their royalty rates must participate in a proceeding before the CRB to establish such rates, which would then be binding for the five-year period from 2011-2015. As submissions in the proceeding were coming due early last fall, Live365 sought a declaratory ruling from the U.S. District Court for the District of Columbia that the CRB was established unconstitutionally, and requested an order essentially staying that proceeding until the constitutionality issue is resolved. The constitutionality of the CRB has been in question for a number of years. In *Intercollegiate Broadcast System v. Copyright Royalty Board*, 574 F.3d 748 (D.C. Cir. 2009), parties questioned, but the U.S. Court of Appeals for the District of Columbia Circuit did not rule on, the constitutionality of the CRB while hearing an appeal of rates set by the CRB.

Live365 argued that, under the Appointments Clause of the Constitution, the three judges on the CRB must be appointed by the President and confirmed by the Senate (if they are, in the language of the Constitution, “principal” officers of the United States), or failing that, must be appointed by the President, a Court of Law, or Head of Department (if they are “inferior” officers of the United States). Live365 argued

that the CRB was illegally constituted because its members' appointments do not meet the requirements for either principal or inferior officers. Under the Copyright Act, the judges are appointed by the Librarian of Congress, who is clearly not the President or a Court of Law. Therefore, to be constitutional, the Librarian of Congress must be considered a "Head of Department." Live365 argued that the Librarian cannot be a Head of Department because the Library of Congress is assigned to the legislative branch, not the executive branch, in the U.S. Code.

On Tuesday, the court ruled in *Live365, Inc. v. Copyright Royalty Board*, No. 09-01662 (D.D.C. February 23, 2010) that CRB judges are not "principal" officers requiring Presidential appointment and Senate confirmation. The judge also ruled that the Librarian of Congress can be a Head of Department because the Library fulfills functions that are both legislative and executive and could have been categorized as either in the U.S. Code. The roles that the Librarian fulfills are similar to those of other agency heads, and, like other agency heads, the Librarian was appointed by the President and confirmed by the Senate.

Barring an appeal, this decision removes the constitutional cloud over the CRB's decisions with respect to webcaster royalty rates. Therefore, the recourse that Live365 and other webcasters who have not reached an agreement with copyright holders have is to try persuade the CRB to reevaluate the methods it has used in the past to calculate webcaster royalty rates. Alternatively, they will need to consider how best to conduct their operations in the face of higher rates for the use of copyrighted music on the Internet, which may present a considerable financial hurdle to their business plans.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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