

Before the  
Copyright Office  
Library of Congress  
Washington, DC

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APR 25 2002

GENERAL COUNSEL  
OF COPYRIGHT

In re

Notice and Recordkeeping for  
Use of Sound Recordings  
Under Statutory License

Docket No. RM 2002-1A

DOCKET NO.

RM 2002.1

COMMENT NO. 2

Reply Comments

Criswell Center for Biblical Studies, a/k/a Criswell Communications, (hereinafter "Criswell") and First Baptist Church of Dallas herewith reply to certain of the Comments filed in this proceeding. Criswell is a non-stock, not for profit corporation organized under the laws of Texas recognized as tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code. Criswell's Board of Directors is elected by and is responsible to the congregation of First Baptist Church of Dallas, Texas. Criswell is the licensee of NCEFM<sup>1</sup> Stations KCBI, Dallas, Texas and KSYE, Frederick, OK and Stations KCRN and KCRN-FM, San Angelo, TX, which are operated non-commercially. The programming of KCBI is streamed over the Internet. Criswell also owns and operates Criswell College, a fully accredited undergraduate and graduate institution in Dallas.

As noted by RIAA "the process of distributing statutory royalties to copyright owners and performers is complex, time consuming and expensive." Comments at 65. What a remarkable understatement. Essentially, for Criswell and

<sup>1</sup> Non-commercial, educational Frequency Modulation

First Baptist it would mean the hiring of at least one reasonably sophisticated and intelligent staff member on a full time basis to hope to comply. Out of the starting gate, that means \$40,000 per annum - a princely sum that cannot be recouped or justified. And, of course, costs do not stop with a base salary; that is where they start. Attached as Exhibit 1 is an article from the Dallas Morning News which got the subject right:

money isn't the only issue. Some small operations, such as the Internet-only station at the University of Texas at Arlington, could be shut down simply by not being able to handle all the paperwork required by the act.

Should the U.S. Copyright Office accept the panel's decision, experts say, it will certainly mean the end for tens of thousands of Webcasters - including such sites as live365.com - that won't be able to afford the royalties.<sup>2</sup>

Station KCBI has a religious format. It has a religious mission. Many of its broadcasts are public worship services, into which are integrated musical selections. Most of the musical selections played on KCBI and streamed on the Internet are subject to the royalties for which the records here in issue are to be gathered and kept.

The proposed rules violate federal law as follows: (1) First Baptist's and Criswell's First Amendment rights to free exercise of religion and peaceable assembly, and the Establishment Clause; and (2) as to them, the Religious Freedom Restoration Act, 42 U.S.C. §2000cc, et seq., (hereafter "RFRA. Plaintiffs have a sincere religious

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<sup>2</sup> Al Brumley, Royalty rates could force small radio shows offline, The Dallas Morning News, March 27, 2002.

belief that it is their duty to ensure that the gospel of Jesus Christ is preached to all people in Dallas and throughout the world: "Jesus came and spoke to [His disciples], saying, 'All authority has been given to Me in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, Teaching them to observe all things that I have commanded you and lo, I am with you always even to the end of the age. Amen.'" Matthew 28:18-20. First Baptist and Criswell exercise and practice this religious belief, known by Christians as the Great Commission, in part, by providing a place for preaching the gospel, prayer, worship, Bible study, Christian education, fellowship, and community outreach at the church and at the college and by broadcasting to the greater Dallas-Ft. Worth Metroplex area and streaming over the Internet to all the world. A critical component of their religious belief is church growth. First Baptist church services draw visitors from other states and from many different countries. Some people visit because family members are students at Criswell College and others visit because they have heard or heard of First Baptist's worship services. Plaintiffs have a sincere religious belief that they must have a facility, i.e., including the Internet, that can accommodate any and all of those who wish to attend Church services, Sunday School classes, prayer meetings, Bible studies, and fellowship and to have an adequate facility to otherwise provide for an outreach to the community and the world to fulfill their

duty to preach the gospel to all who can be reached. The shutting down of the Internet streaming function would result in a significant burden on First Baptist's and Criswell's sincerely-held religious beliefs by thwarting their efforts to ensure that the gospel is preached to all those who they can reach and those who desire to attend First Baptist Church. Their religious beliefs demand that they evangelize in every place human beings occupy or congregate, including the Internet.

This case is governed the District of Columbia Circuit's recent opinion in *Henderson v. Kennedy*, 253 F.3d 12 (DC Cir. 2001) implementing the Supreme Court's decision in *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990): "the proper free exercise inquiry was whether 'the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" There, RFRA was examined at length. RFRA "incorporates the 'substantial burden' standard. It prohibits any 'branch, department, agency, instrumentality, [or] official" of a state or federal government or 'other persons acting under color of law' from 'substantially burden[ing] a person's exercise of religion' unless the government demonstrated that the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that ... interest." 42 U.S.C. s 2000bb-1. *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000)."

253 F3d at 7. We submit the regulations proposed cannot survive RFRA, the free exercise clause or the freedom of assembly clause.

Respectfully submitted,



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Story:

[Image] [Image]  
Royalty rates could force small radio shows offline

03/27/2002

By AL BRUMLEY / The Dallas Morning News

Internet radio can't catch a break.

And in a few months, unless something dramatic happens, broadcasting on the Web might be broken for good - at least for the little guys.

The first blow came last year when actors demanded more money for commercials airing on the Internet.

That caused hundreds of radio stations to stop simulcasting on the Web.

Now comes the Digital Millennium Copyright Act.

In February, a three-member Copyright Arbitration Royalty Panel (CARP) that was convened to set royalty rates shocked Webcasters by recommending a rate more than 10 times higher than they had expected.

According to one calculation, a small Webcaster that has had an average audience of 1,000 listeners over the last three years would owe more than \$500,000 in royalties retroactive to October 1998. Kurt Hanson, publisher of the Radio and Internet Newsletter, estimates that if broadcast stations had to pay the same rate, it would come to more than \$3.3 billion a year.

And money isn't the only issue. Some small operations, such as the Internet-only station at the University of Texas at Arlington, could be shut down simply by not being able to handle all the paperwork required by the act.

Should the U.S. Copyright Office accept the panel's decision, experts say, it will certainly mean the end for tens of thousands of Webcasters - including such sites as live365.com - that won't be able to afford the royalties.

The Copyright Office must make its recommendation to the Librarian of Congress by May 21. It can accept the panel's decision, modify it, come up with new terms, or call for a new panel. Should any changes be made, the deadline will be pushed back to June 20.

Differing views

Shortly after the rates were announced, National Association of Broadcasters president and chief executive Edward O. Fritts issued a statement saying that "the ruling from the Copyright Arbitration Royalty Panel may have the effect of unintended consequences, in that many radio broadcasters may re-evaluate their streaming strategies. If the powerful record company interests' goal was to strangle a fledgling new service to radio listeners, it may have succeeded beyond its own expectations."

[\*]  
IRWIN  
THOMPSON  
/ DMN  
UTA  
students  
(from  
left)  
Melissa  
Tafoya,  
Travis  
Russell  
and John  
Engleman  
work at  
the  
school's  
radio  
station.

Royalties Add Up  
For streaming, a  
torrent of cost:  
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Arbitration  
Royalty Panel  
ruling recommends  
that Internet-only  
broadcasters pay  
.0014 cent per

But the Recording Industry Association of America - the driving force behind the higher rates - disputes those claims and says Webcasters are merely crying wolf.

In fact, the RIAA had asked for royalties three times higher than what the panel recommended, said Steven Marks, the group's senior vice president of legal affairs.

"I think it's a young industry, it's a maturing industry, but they should pay a fair rate for the music just like they pay for everything else in the business," Mr. Marks said.

But even the RIAA agrees that should the rates stand, at least some Internet stations will fold, although "some of the companies that may go out of business would have gone out of business anyway," Mr. Marks said.

Regardless, nearly everyone agrees that this is one of the messiest, most complex issues ever to face the radio industry.

#### Arbitron opposes

On Tuesday, radio and Web ratings service Arbitron Inc. took a strong stand against the panel's proposals, saying the fees "will dramatically reduce the consumer's choice of streaming content, limit the diversity of streaming 'voices' on the Internet, stifle competition among content providers, and impede the growth of a popular new medium."

"If the proposed fees are enacted, we foresee that very few if any companies will be able to pay the cost," wrote Bill Rose, vice president and general manager of Arbitron Webcast Services, in a letter to Rep. James Sensenbrenner Jr. (R-Wisc.), chairman of the Committee on the Judiciary

Mr. Rose said Internet broadcasting "does not pose a significant threat to retail sales," and he also recommended a five-year moratorium on the fees the panel recommended.

"Little would be lost by giving the industry the breathing room it needs to grow since streaming media has not yet generated significant revenues and since the streaming of music on the Internet does not pose a threat to retail music sales," Mr. Rose wrote. Arbitron has estimated that under the panel's plan, the radio industry would pay about \$2.4 billion a year in fees, equal to "approximately 13 percent of radio's total advertising revenue for 2001," Mr. Rose wrote.

"This is a very, very complicated issue on so many fronts," said Dan Halyburton, senior vice president and general manager of group operations for Dallas-based Susquehanna Radio Corp. "It goes back to the DMCA," the Digital Millennium Copyright Act of 1998.

"They passed that, and that was very complex, and there are a lot of interpretations, as there always are," Mr. Halyburton said. "And things happening today were not things envisioned by people who wrote the bill."

The 1998 act was passed primarily to protect recording artists from what was perceived as the looming threat of perfect digital copies.

song per listener - which adds up quickly. If a site, for instance, played 15 songs in an hour and had 2,000 listeners, the tab would equal \$42. A site that maintained that many listeners since October 1998 - the retroactive date determined by Congress - would owe more than \$1 million.

[Image]

Commercial stations that simulcast over the Internet would have to pay .0007 cent per song.

[Image]

Noncommercial radio simulcasts would have to pay .0002 cent per song.

[Image]

Webcasters already pay composers' royalties, as do over-the-air broadcasters. SOURCE: Dallas Morning News research

To make up for that, the act requires that in addition to royalties they already pay to songwriters, Webcasters also pay royalties to recording artists and labels, with the money to be split evenly among them.

By contrast, broadcast stations only pay royalties to songwriters. Congress ruled about 75 years ago that the artists were compensated enough by the publicity they received from having their songs played on the air and therefore weren't owed royalties.

But as Mr. Halyburton and many others have noted, Webcast transmissions are far from "perfect digital copies."

"The audio that goes out today is not a good copy," Mr. Halyburton said. "And if you were able to rip those songs that came out of the stream, they still wouldn't sound very good."

The problem, say broadcasters, is that the copyright panel based its decision primarily on an earlier deal between the RIAA and Yahoo Inc. that allows Yahoo Inc. to play songs on the Web.

The amount of money Yahoo Inc. pays to the RIAA has not been made public, but it's acknowledged that the deal heavily influenced the copyright panel.

Webcasters have known since 1998 that at some point they would have to start paying royalties. Record companies first asked for 15 percent of revenues, while Webcasters wanted to pay only 3 percent - the amount they were paying composers. The Copyright Office convened the panel last summer after negotiations broke down.

#### Reporting rules

The panel's recommendation would also require extensive bookkeeping to note exactly how many people are listening to a given song.

At the University of Texas in Arlington, that, more than the money, would probably bring an end to UTA Radio, the university's Internet-only station.

"The problem we have is more with the reporting than with the fees," said Ron Bland, faculty adviser to UTA Radio and a university lecturer. "They're asking for 25 pieces of information on every song we play so that they can find out who to pay the money to. I don't know how to do that without hiring a couple of staff people to put the logs together. It's the little fish that are going to get eaten up. The big people have full-time lawyers and 500 stations, and they're going to work out a deal. But we just can't comply with all this stuff."

Mr. Bland said about 60 students participate in the station, which broadcasts UTA sporting events as well as music.

"It just seems to me there ought to be some kind of exemption for people who are nonprofit - people who are using it for education," he said. "I don't see how you can charge people if the fee for the licensing is more than they make off the service."

Not about money?

Others wonder why the RIAA would want to limit the number of outlets in which its artists' music could be heard, especially when so many Internet stations feature links to sites where listeners can buy the albums.

An official familiar with the negotiations who asked not to be identified said that "the RIAA is never happy. The RIAA and record labels aren't interested in money - they're interested in controlling the use of their work. And this way, they're getting rid of their competition."



Mr. Marks of the RIAA said that it's too early to know what effect, if any, the Internet is having on record sales. He said that the United States is the only Western country that doesn't require radio stations to pay royalties to artists.

He also noted that because of the diversity of music played on the Internet, "in a lot of cases this money will go to artists that don't get a lot of money from traditional sources. So this money is meaningful to a lot of people."

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