

An important part of the services offered by ASCAP and BMI is the commencement of infringement suits on behalf of their respective members and affiliates against unlicensed users of copyrighted musical works in their repertoires. The uses for which ASCAP and BMI file infringement suits include performances that are audio only (e.g. music performed by a radio station) as well as those that are audiovisual in nature (e.g. music in a movie performed by a television station). Regardless of the type of performance, as with all copyright infringement suits, it is crucial that proper copyright registrations have been obtained by the copyright owner members and affiliates so as to permit ASCAP and BMI to commence legal actions. It is to this specific point that ASCAP and BMI submit these comments.

Pursuant to the Artists' Rights and Theft Prevention Act of 2005 (the "ART Act"), Title I of the Family Entertainment and Copyright Act, Pub. L. No. 109-9, 119 Stat. 218, preregistration of works will permit infringement actions of certain unpublished works but only if a timely registration is filed for the work, i.e. within three (3) months of first publication or within one (1) month of the copyright owner's having learned of the infringement, whichever comes first. Failure to file the follow-up registration will foreclose a lawsuit for infringements occurring before publication or within the first two (2) months after first publication. That foreclosure is what particularly concerns ASCAP and BMI.

BMI and ASCAP commend the Copyright Office for reading the ART Act narrowly and consistently with its legislative history:

"By its express terms, the prohibition on infringement suits contained in Section 408 (f) does not apply to suits concerning infringements commencing later than 2 months after first publication of a copyrighted work that had been preregistered with the Copyright Office. Therefore, notwithstanding a failure to meet the deadlines set forth in Section 408 (f) (A) and (B), a copyright owner of a

preregistered work can register his or her work under current law and bring infringement actions for infringements occurring more than 2 months after first publication.”

H.R. Rep. 109-33, pt. 1, at 5 (2005). This narrow approach also comports with the Copyright Office’s longstanding principle of narrowly construing statutes that derogate from protecting authors and authorship.

The Copyright Office has announced and proposed as regulation §202.16(b)(iii) that the class of works to which preregistration applies includes nondramatic musical works “performed¹ in a sound recording subject to a contract for distribution of physical phonorecords with an established distributor of phonorecords.”² The Copyright Office correctly pointed out that certain musical works may share common copyright ownership with the sound recording in which such work is incorporated. And, as is permitted by Copyright Office procedures, one registration application may be made by that owner for both the musical work and the sound recording. For these commonly-owned works, the proposed rules permit that only one preregistration application need be filed. For noncommonly-owned works (where the musical work is owned by a publisher and the sound recording is owned separately by the record label), the owner of the musical work must file a separate preregistration application in order to gain the benefit of the preregistration procedure.

¹ The notice and proposed regulation use the term “performed.” We presume, and the Copyright Office should make clear, that the usage of the term “performed” is not as defined in Section 101 of the Copyright Act, but is used as a general term to describe the usage of a musical work in the making of a phonorecord. The type of usage in such an instance, i.e., the incorporation of a musical work in a sound recording, has generally been deemed to be a “reproduction”.

² We note that the type of copyrighted works which incorporate musical works are not limited to phonorecords. As set out in the comments of the National Music Publishers’ Association (“NMPA”) and the Harry Fox Agency, Inc. (“HFA”), musical works are incorporated through synchronization into motion pictures and other audiovisual works. We support Section II of the Comments of NMPA and HFA which asserts the definition and scope of musical works eligible for preregistration is under-inclusive.

Stated differently, if a preregistration is made by an entity that does not own the rights in certain of the musical works that are incorporated in the collective work for which preregistration is filed, then the preregistration does not cover such musical works.

A problem arises from this dichotomy: in cases where the record label owns less than all of the musical works on an album, those musical works that are not commonly-owned will not be covered by the record label's preregistration. The independent musical work owners who must file independently to benefit from the statute, will not be likely to know, without notification by the label, that the label has filed for preregistration. In other words, unless the record label provides notice to the independent musical work owner(s), there may be a disconnect which could result in an irreparable loss of rights. The musical work owner will not know if the label actually plans to use the song in the album it will preregister.³ We therefore believe a notice of preregistration by the record label (or motion picture company) should be required to be given to the musical work owner.

On the other side of the coin, where one preregistration is filed by a common-owner, it is imperative that the musical work owner not be discriminated against in the event that common ownership is broken. Thus, if a record label spins off its publishing assets between preregistration and registration, the record label should be similarly required to notify the new owner of the musical work of the preregistration. Moreover, an assignee of a noncommon preregistered musical work prior to registration may be unaware of the preregistration without proper notice, thereby affecting its ability to bring an infringement suit. While we anticipate that the Copyright Office database will be publicly available electronically, it is unlikely that a musical work owner without such notice would be aware of the preregistration. The burden should not be placed on the owner of the musical work

³ No special distribution agreement must be entered between the publisher and the record label; a section 115 mechanical license is enough.

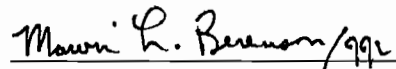
to monitor the Copyright Office database continuously so as to discover any relevant preregistrations.⁴

Again, the PROs' interest is to insure that the ART Act does not create traps for the unwary and that there is no loss of rights resulting from preregistration. The failure to timely register after a preregistration could affect the PROs' ability to bring infringement suits. Therefore, we respectfully hope that the Copyright Office will take these comments into consideration and will not create a regulatory structure that would chill authorship.

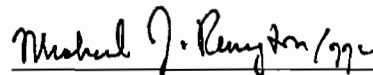
Additionally, ASCAP and BMI respectfully reserve their rights to file reply comments on other issues related to and or arising from preregistration.

Respectfully submitted,

BROADCAST MUSIC, INC.



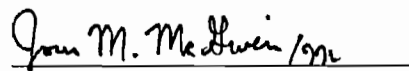
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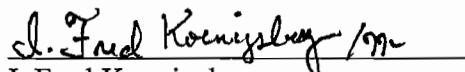
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⁴ ASCAP and BMI reserve the right to reply on the issue of whether the filing system proposed by the Copyright Office and the availability of data (presumably open to the public through electronic search capabilities) satisfies the principle of public availability.

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