

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

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In the Matter of :
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 : Docket No. RM 99-7
Exemption to Prohibition on Circumvention :
Of Copyright Protection Systems for Access :
Control Technologies :
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**REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS ON THE EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF
COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES**

The American Society of Composers, Authors and Publishers (“ASCAP”) hereby submits these reply comments in response to the Notices of the Copyright Office of November 15, 2000, 64 Fed. Reg. 66139 (November 24, 2000), February 8, 2000, 65 Fed. Reg. 6573-6574 (February 10, 2000) and March 14, 2000, 65 Fed. Reg. 14505-14506 (March 17) announcing and scheduling this rulemaking, commenced pursuant to 17 U.S.C. §1201(a)(1)(C), as adopted in the Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). That section directed the Librarian of Congress, to determine whether users of copyrighted works are likely to be adversely affected in their ability to make noninfringing uses of that particular class of works by virtue of the prohibition against circumvention of technological measures that control access to copyrighted works, 17 U.S.C. §1201(a)(1)(A), and therefore exempted from the prohibition under 17 U.S.C. §1201(a)(1)(B).

ASCAP submits these comments on its own behalf as a supplement to reply comments being filed by a larger group of copyright owners that includes ASCAP. In these supplemental comments, ASCAP wishes to stress the following two points regarding copyrighted musical works as a group of works in reply to initial comments filed with the Office: (1) access control technologies increase the availability of copyrighted musical works in digital form and therefore effectively increases total access to such works and (2) no evidence exists that the prohibition will limit access to musical works in the next three years.

ASCAP's Interest in this Proceeding.

ASCAP is the oldest and largest musical performing rights society in the United States with a repertory of millions of copyrighted works and more than 90,000 songwriter and publisher members. ASCAP is also affiliated with over 60 foreign performing rights organization around the world and licenses the repertories of those organizations in the United States.

ASCAP members, as owners of copyrighted musical works, enjoy exclusive rights in those works as are granted under section 106 of the Copyright Act. These rights include the right to perform the works publicly, the right to produce the works in copies and the right to distribute such copies. On behalf of its members and affiliated foreign performing rights societies, ASCAP licenses only their non-dramatic public performance rights.

The types of users to whom ASCAP grants public performance licenses are wide and varying, and include, for example, television and radio broadcasters, hotels, nightclubs and college and universities. As new means of technology have been created to transmit music,

ASCAP has sought to offer new forms of licenses appropriate to these mediums. Thus, as transmission of copyrighted musical works became possible over the Internet, ASCAP became the first performing rights organization to license these transmissions.

Factors to be Examined

The Copyright Office posed 29 questions in its Notice that are generally organized and grouped under the five factors listed in section 1201(a)(1)(C) to be examined in making its recommendation. Such factors --

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate,

-- focus on the exception – whether the prohibition adversely effects users of a particular class of works in their ability to make noninfringing uses of such works. As will be discussed below, no evidence exists that users of musical works will be adversely affected at all by the prohibition in the next three years. It is therefore premature to consider granting an exemption to musical works. Furthermore, the Notice is clear that the Librarian’s focus should additionally look to the “positive impacts of technological access control measures.”

As set forth more fully below, access control measures not only permit copyrighted musical works to be securely transmitted and performed digitally, they have the effect of increasing and fostering access, not impeding access as some commentators argue. Accordingly, the 1201(a)(1)(B) exceptions should not apply to musical works.

A. Technological Measures

As the Copyright Office is aware, ASCAP has sought to represent its members' concerns over the impact of digital transmission on their rights as copyright owners in the recent studies conducted by the Copyright Office, at the direction of Congress. Indeed, ASCAP participated in the Copyright Office's recent studies on the matter of notice to libraries and archives of normal commercial exploitation or availability at a reasonable price, see 63 Fed. Reg. 71785 (Dec 30, 1998) (Copyright Office Notice for Comments), in the study of the promotion of distance education through digital technologies, see 63 Fed. Reg. 63749 (Nov. 16, 1998) (Copyright Office Notice for Request of Information), and in the study on the effects of the Digital Millennium Copyright Act on encryption research and development of encryption technology, see 64 Fed. Reg. 28802 (May, 27, 1999) (Notice for Comments). With regard to the study on distance education, ASCAP's contributions to the Copyright Office's study were acknowledged in the Office's report. That study culminated in recommendations given to Congress which supported an "updating" of copyright law to permit the use of digital technologies to provide distant education, while still taking into account the need to employ appropriate technologies to secure copyright owners' rights. See Report on Copyright and Digital Distance Education at www.loc.gov/copyright/disted.

As the technological landscape is radically changing, copyright owners have been struggling to take advantage of the new possibilities technological advancements offer, while still protecting against unauthorized and unlicensed uses. For example, in its comments to the Copyright Office with regard to digital distance education, ASCAP strongly recommended that any legislation with regard to the digital delivery of distance education include guidelines that safeguard against abuses; and, specifically recommended that such guidelines include technological safeguards to protect against the unauthorized use of ASCAP's members' copyrighted works. ASCAP likewise stressed the necessity for technological controls against unauthorized copying of digital transmissions of copyrighted musical works in its recent comments on encryption research.

ASCAP has always heralded the advancement of technology. Such advancement acts to encourage and advance our members' creative process and output. Nevertheless, at the same time, ASCAP strives to ensure that its members are duly compensated for the use of that creative output. It is for this reason ASCAP supported the enactment of section 1201(a).

To help implement secure digital transmissions of copyrighted musical works, ASCAP has been exploring on behalf of its members various technologies such as watermarking technology and other means of "digitally marking" a copyrighted work so that the public performance of a work so marked if digitally transmitted can be tracked and the owner of such work properly compensated for the work's performance. ASCAP has also taken part in the Secure Digital Music Initiative, a means whereby music and technology industries can work together to implement secure digital transmissions of music.

Comments filed with the Office claim to recognize the interests copyright owners have in protecting their works, but argue that without an appropriate exception their access to

copyright works will be negatively impeded. Such commentators fail to appreciate, or even understand, that it is actually the exception to the prohibition, and not the prohibition, which will impede and slow access. Again, it is the content – the copyrighted works – which drives the rule. It is the *content* that is being accessed. And, as we have stated in the past, creators of musical works are reluctant to and fearful of putting their music out in digital form without an assurance that such music is secure and access is limited. An exception to the rule would only serve to limit the number of musical works that is being made available.

ASCAP's keen interest in ensuring that its members are well protected is not news to the Copyright Office. We have repeated this message numerous times, and will continue to do so. But as the Copyright Office must also focus on the positive impacts of access control technology, we feel compelled to again bring such concerns to the forefront.

B. Availability of Copyrighted Musical Works.

The crux of the rulemaking focuses on the predicted availability of classes of copyrighted works in light of the prohibition. ASCAP certainly understands the need for access to copyrighted works. However, the implementation of access control technologies and the prohibition on its circumvention will not impair access to copyrighted musical works, as a particular class of works, in the near future. ASCAP acknowledges that the dissemination of copyrighted materials in digital form has been growing steadily, and, as a licensing organization, ASCAP has embraced the rapid movement of technology. Indeed, as mentioned earlier, such increase is due in part to the fact that security measures have been made available to the copyright owners and are used as a matter of course. However, despite such increased growth, musical works continue to be available in forms not secured by

access control technologies and will continue to be so available for the next three years. Records, cassettes, sheet music and accessible compact disc, for example, all contain the copyrighted music and lyrics to which users seek access, and are still not only widely available, but are the main means by which users of copyrighted musical works have access to such works. Not one of the comments filed with the Office presented any shred of evidence that without an exception users would be adversely affected in their ability to make noninfringing uses of musical works during the next three years. And, the burden clearly falls on their shoulders to bring such evidence to the Librarian.

Accordingly, users of copyrighted musical works may continue to make noninfringing uses of such works regardless of the owners' use of access control technologies. Whether the landscape will change in ten, twenty or fifty years is not relevant to this rulemaking – as it is limited to the three-year period ending October 28, 2003.

Conclusion

Access control technologies are a necessary part of the oncoming digital era. Without such technologies, copyright owners of copyrighted musical works will not be ensured secure dissemination of their works, and will, as a result, shy away from using the digital world as a means of such dissemination – thereby impeding, not increasing access to their works. Moreover, it is clear that in the near future, copyrighted musical works will be accessible through numerous other channels and therefore an exemption to section 1201(a)(1)(A) should not include copyrighted musical works as a particular class of works.

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Respectfully Submitted,

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