

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)	
)	
EXEMPTION TO PROHIBITION)	Docket No. RM-99-7
ON CIRCUMVENTION OF)	
COPYRIGHT PROTECTION SYSTEMS)	
FOR ACCESS CONTROL TECHNOLOGIES)	

REPLY COMMENTS OF BROADCAST MUSIC, INC.

On November 15, 1999, the Copyright Office (“Office”) issued a Notice of Inquiry in the above-referenced rulemaking proceeding to request written comments from interested parties in order to elicit information and views on whether non-infringing uses of certain classes of works are, or are likely to be, adversely affected by the prohibition against circumvention, a technical measure that controls access to a copyrighted work. *See* 64 Fed. Reg. 66139-43 (1999) (“Notice”). In accordance with 17 U.S.C. § 1201(a)(1), which was enacted by the 105th Congress in the Digital Millennium Copyright Act (“DMCA”), Public Law 105-304, 112 Stat. 2860 (1998), the Notice provides that the Librarian of Congress (“Librarian”) may make a determination based on the recommendation of the Register of Copyrights (“Register”) as to what classes of works are excepted from the prohibition. The Librarian is not required to make exceptions. On February 8, 2000, the Office extended the comment period and the reply comment period in this proceeding, the latter due on March 20, 2000. *See* 65 Fed. Reg. 6573-74 (2000). On March 14, 2000, the

Office extended the deadline until March 31, 2000, and instructed parties about how to request to testify at public hearings. *See* 65 Fed. Reg. 14505-06 (2000) (“March 14th Notice”).

This written statement is submitted on behalf of Broadcast Music, Inc. (“BMI”). BMI has also joined in the reply comments of the Joint Commenters which represent most of the U.S. copyright industries.

I. DESCRIPTION OF BMI.

BMI licenses the public performing right in approximately four and one-half million musical works on behalf of its 250,000 songwriter, composer and publisher affiliates, as well as the works of thousands of foreign songwriters, composers and publishers through BMI’s affiliation agreements with over sixty foreign performing rights organizations. BMI’s repertoire is licensed for use in connection with performances by broadcast and cable television, radio, concerts, restaurants, stores, Internet sites, background music services, passenger vessels, trade shows, corporations, colleges and universities, and a large variety of other venues.

BMI has played an important role in the development of the U.S. copyright law, in particular the 1976 Copyright Act as well as the 1998 DMCA. BMI’s President, Frances W. Preston, served on the United States Advisory Council on the National Information Infrastructure (“NIIAC”) which reported its findings to President Clinton in January of 1996. During the 105th Congress, BMI representatives participated in the numerous legislative activities that led to enactment not only of OSP liability reform (Title II of the DMCA) but also of other provisions in the DMCA, including those relevant to the educational arena. For example, BMI participated in the April 27-28, 1998 intensive discussions on distance learning conducted by the Register and requested by Senators Orrin G. Hatch, Patrick J. Leahy and John Ashcroft. Judith M. Saffer,

BMI's Assistant General Counsel, was a member of the Steering Committee of the Conference on Fair Use ("CONFU").

In addition, BMI has been very active in international fora that have been and are considering issues related to copyright and digital technologies. Marvin L. Berenson, BMI's General Counsel, served as a member of the U.S. delegation to the World Intellectual Property Organization's (WIPO) Conference on Certain Copyright and Neighboring Rights Questions, which successfully adopted the two treaties – the WIPO Copyright Treaty (which supplements the Berne Convention for the protection of Literary and Artistic Works ("Berne Convention")) and the WIPO Performances and Phonograms Treaty – that are implemented by Title I of the DMCA and were ratified by the U.S. Senate on October 21, 1998.

Finally, BMI has been actively involved in issues raised in the wake of enactment of the DMCA. In late 1998 and early 1999, BMI participated in the Office's request for comments and public hearings on promotion of distance education through digital technologies required by section 403 of the DMCA. In July 1999, BMI also filed comments in response to the request for public comment conducted by the U.S. Department of Commerce and the U.S. Copyright Office on section 1201(g) of the DMCA concerning the role of technology in protecting the transmission of copyrighted works on the Internet.

II. THE FIRST ROUND OF COMMENTS.

The sole focus of this proceeding is 17 U.S.C. § 1201(a)(1)(A), the prohibition on the act of circumventing access controls. This Inquiry turns on a potential finding by the Register that persons who are users of a "particular class" of copyrighted works are "adversely affected" by virtue of an anticircumvention prohibition "in their ability to make non-infringing uses of that particular class" and, if so, the Librarian may decide that the effective date of section

1201(a)(1)(A) – October 28, 2000 – should be delayed with respect to the particular class(es) of works, so identified. 17 U.S.C. § 1201(a)(1)(B)-(D).

In its Notice, the Office ably and accurately discusses the mandate for this proceeding and its “background.” Two points deserve reiteration. The Office recognizes that it must decide whether persons who use works that fall within a particular class are likely to be adversely affected in their ability to make non-infringing uses of those works during a three year period that follows after October 28, 2000. In fulfillment of this assignment, the Office poses twenty-nine detailed questions about the state of affairs that “is likely to exist during the period between October 28, 2000 and October 28, 2003. . . .” 65 Fed. Reg. at 66142.

The meaning of the statutory words “adversely affect” is plain. Resort to the dictionary reveals that the words mean “affected . . . in an adverse or hostile manner; with hostile effect.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986). Construing the meaning of identical words in other statutes, courts have found it is not enough to merely raise the possibility of adverse effect or to raise a bald claim without some element of proof. *See, e.g., Alaska Legislative Council v. Babbitt*, 181 F. 3d 1333, 1340 (D.C. Cir. 1999); *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F. 2d 793, 799 (10th Cir. 1993).

Implicitly, the Office understands that the burden lies squarely on the shoulders of proponents of an exception for their particular class of works. Based on BMI’s years of experience in licensing the public performing right to educational and other institutions and participation in the process that led to the WIPO treaties and enactment of the DMCA, BMI has reviewed the 235 comments submitted during the first round. Our review reveals that this burden clearly has not been met. Most of the comments express strong emotions about the DMCA but fail to even address the time-window in question. Others attempt to shift the burden on to

copyright owners to show why their works should be protected by the Act's anticircumvention provisions. A few expansively conclude that the "particular class" of copyrighted works is "all" copyrighted works or "all" DVDs. Others do not identify a particular class at all. Any showing or proof of actual adverse effect, or likelihood of adverse effect, is notably absent.

Not a single comment specifically addresses the public performance of musical works or identifies any class of such performed works as deserving of an exception. Even if such a category had been identified, the Office would still have to find that persons who use works in the category are, or are likely to be, "adversely affected" in making lawful uses of those works. No record evidence exists that the lawful licensing of the public performance of musical works has been affected, adversely or otherwise, by the availability of anticircumvention protections to musical works.

III. THE OPPORTUNITY TO TESTIFY.

In response to the Office's final question, whether parties would like to testify at Office public hearings in connection with this rulemaking, BMI would be grateful for the opportunity to present testimony but reserves the right to so request until the April 14, 2000 deadline. *See* 65 Fed. Reg. at 14506. If musical works and the public performing right are not implicated in the reply comments, as was the case in the initial round of comments, BMI does not expect to request the opportunity to testify. However, if the converse is true, BMI will comply with the Office's March 14th Notice. *Id.*

CONCLUSION

Accordingly, BMI looks forward to working with the Office to satisfy its regulatory assignment, and also looks forward to monitoring developments in this new area of law during the

next three years. In the meantime, the effective date of a provision of law that has not yet taken effect should not be further delayed.

Respectfully,

Marvin L. Berenson
General Counsel
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019
Tel.: 212-830-2533
Fax: 212-397-0789
Email: mberenson@bmi.com

Joseph J. DiMona
Assistant Vice President
Legal and Regulatory Affairs
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019
Tel.: 212-83-3847
Fax: 212-397-0789
Email: jdimona@bmi.com

Michael J. Remington
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005
Tel.: 202-842-8839
Fax: 202-289-5390
Email: remingmj@dbr.com