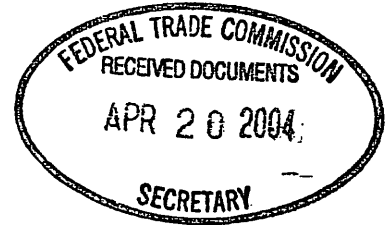


001043

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580



----- x
:
:
In the Matter of :

CAN-SPAM Act Rulemaking :

Project No. R411008

----- x

COMMENTS OF BROADCAST MUSIC, INC.

Broadcast Music, Inc. ("BMI") hereby responds to the advance notice of rulemaking and request for public comments issued by the Federal Trade Commission ("FTC") regarding Definitions, Implementation, and Reporting Requirements Under CAN-SPAM Act, Project No. R411008. See 69 Fed. Reg. 11776 (March 11, 2004), 69 Fed. Reg. 18851 (April 9, 2004) (extension of period to submit comments in response to advance notice of rulemaking).

BMI is a music collective copyright clearance organization that distributes public performing right royalties to its affiliated songwriters, composers and music publishers. BMI represents approximately 300,000 affiliates with a repertory of some 4.5 million musical works, as well as thousands of foreign works through its affiliation agreements with over sixty foreign performing right societies. Approximately half of the music publicly performed on radio and television in the U.S. each day is licensed by BMI. BMI issued the first commercial Internet copyright license for music performed on websites in April 1995 and has continued to provide licensing solutions for the evolving online music marketplace and new media users of music. Today, BMI has completed agreements covering more than 3,000 licensees that engage in online activities relating to the use of music. Many people have taken the position that BMI's model of

mass copyright clearance, operating under the regulations of a consent decree, provides an ideal solution for clearing rights in the digital media.

A. Any decision by the FTC to define the relevant criteria for determining the “primary purpose” of an electronic mail message will be critically important to entities like BMI which seek to administer copyright rights in the online environment. The CAN-SPAM Act, which became effective on January 1, 2004, mandates that the FTC issue regulations “defining the relevant criteria to facilitate the determination of the “primary purpose” of an electronic mail message.” Section 3(2)(C). The FTC is assigned a very significant role because the “primary purpose” definition will determine whether a particular message is a “commercial electronic mail message” and is, accordingly, subject to the CAN-SPAM Act’s requirements and prohibitions.

Increasingly, copyright rights clearance organizations are subjected to a myriad of online activities, some authorized pursuant to license, but many unauthorized and unlawful under the provisions of the Copyright Act (title 17 of the United States Code). It is beyond dispute that in the electronic environment copyright owners are often the subject of rampant infringing activities.

Through its enforcement or licensing offices, BMI identifies an unauthorized public use of musical works. Thereafter, BMI may advise a website owner that the works belong to the person or persons who created them, and that BMI is willing to help music users meet and understand their legal obligations. Generally, BMI’s communications with unlicensed music users are “unsolicited,” and do not include “a transactional or relationship message” as defined by the CAN-SPAM Act. See Section 3(17). The communication may be either by letter (if a physical address is known) or by electronic mail message. Email is the best, most efficient

method of contacting music users and, in certain circumstances, may be the only method for BMI to notify online music users of their legal obligation to obtain licenses to publicly perform copyrighted music.

B. When BMI sends an unsolicited commercial email message to enforce bona fide copyright rights of its affiliates, the “primary purpose” is not for commercial advertisement or promotion of a commercial product or service. The “primary purpose” of electronic messages sent to unauthorized users of copyrighted works is clearly to enforce bona fide legal rights, and to inform and to educate users in a nice way about their rights and responsibilities. Music users are also informed that a BMI license is available to clear the rights to works of music in BMI’s repertoire. However, the promotion of a licensing service is clearly a secondary purpose.

There is no fraud or deception in such messages. Nor is there false or misleading transmission information. If the CAN-SPAM Act was construed by the FTC to prohibit the sending of non-fraudulent legal notices to intellectual property infringers who choose to “opt out” of receiving such messages, the law would have turned itself on its head. Law-abiding songwriters and composers, acting through their representatives, would be prohibited from taking steps to enforce their rights by using common forms of licensing communication. They would be limited to “snail mail” or in some cases would have to bring infringement actions which could have been avoided with a greater opportunity to educate users about their licensing options.

If the “primary purpose” test applied to common licensing letters, e-mail messages would be limited to stark and stern cease and desist letters identifying monetary liability for substantial statutory damages. By opting-out, infringers would be empowered by the Act to turn the tables

on rights holders. Moreover, any unauthorized music user who opts out would also, perhaps unintentionally, deprive itself of critical information about licensing options.¹

As the FTC knows well, the copyright law grants songwriters, composers and music publishers an exclusive “public performing right,” allowing them compensation for the use of their musical compositions including via online transmissions. Copyright law is essentially a self-enforcing statutory scheme with a bundle of rights. Exclusive rights are separate and distinct from each other. 17 U.S.C. §106. The creator of a musical work can license each right separately. The public performing right is a copyright right that has been a mainstay revenue stream for creators of musical works.

Further, the United States is a signatory to the WIPO Copyright Treaty (“WCT”). One of the provisions of the WCT concerns the right of communication to the public, the equivalent to the U.S. public performing right. This provision provides:

“[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

Article 8, the WIPO Copyright Treaty. This treaty provision recognizes that in the digital age copyrights are implicated whenever the work is made available online to the public, including when members of the public have access to these works at a time and place they choose.

C. The CAN-SPAM Act should not be read to have amended copyright laws that authorize, and indeed encourage, rights holders to send unauthorized electronic mail

¹ BMI’s experience shows that it often takes a series of letters and/or phone calls before a music user ultimately comprehends the nature of the legal rights that he/she is using and the clearance needs associated therewith.

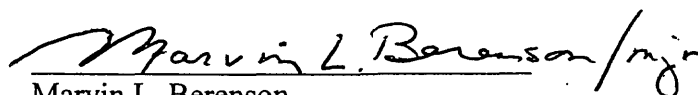
messages to enforce rights. Prior to U.S. adherence to the WCT, Congress enacted the Digital Millennium Copyright Act (“DMCA”) (Public Law 105-304) which encourages intellectual property owners to send unsolicited electronic notifications to internet service providers, with digital signatures, to “take down” infringements. See 17 U.S.C. §512(c)(3) and (d). The CAN-SPAM Act did not amend the DMCA nor did it repeal any of its provisions by implication. Furthermore, the Copyright Act sets forth a bifurcated system of monetary damages. An infringer of a copyright is liable for either: (1) actual damages and any additional profits; or (2) statutory damages. 17 U.S.C. §504. To obtain statutory damages, the copyright owner must sustain the burden of showing that infringement was committed willfully. *Id.* at §504(c). To show willfulness, the sending and receipt of a notification is often necessary. It is BMI’s common practice to send multiple letters and make several attempts to contact unlicensed users before resorting to litigation. The FTC should not construe the CAN-SPAM Act to make it impractical to prove willfulness nor should the FTC read the Act in a manner that would eviscerate the “notice and take-down” provisions of the DMCA.

BMI submits that any electronic mail message sent by or on behalf of one or more owners of intellectual property rights to an unauthorized user of protected material notifying such user that the use is unauthorized and requesting that the use be terminated or that a license for such use be obtained from the appropriate rights holder or holders not fall within the “primary purpose” test. Enforcement of copyright rights should not be considered to be mere “commercial advertisement or promotion of a commercial product or service.” Accordingly, the FTC should identify the criteria “enforcement of copyright rights” as material to a determination of the “primary purpose” of a commercial electronic mail message.

CONCLUSION

Based on the foregoing, BMI hereby requests that the FTC identify “enforcement of bona fide intellectual property rights” as a criteria for determination about the “primary purpose” of a commercial electronic mail message, and the FTC should rule that letters sent by a performing right licensing organization to unlicensed music users should not fall within the “primary purpose” definition under the CAN-SPAM Act.

Respectfully yours,



Marvin L. Berenson
Senior Vice President and General Counsel
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019
(212) 830-2533

Counsel:

Michael J. Remington
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005-1209
(202) 842-8839