Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION
U.S. DEPT. OF COMMERCE
Washington, D.C.

In the Matter of NOTICE OF INQUIRY REGARDING SECTIONS 109 AND 117 OF THE U.S. COPYRIGHT ACT	Docket No. 000552150-0150-01

REPLY COMMENTS OF BROADCAST MUSIC, INC.

On May 16, 2000, the U.S. Copyright Office ("Office") and the National Telecommunications and Information Administration ("NTIA") 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 the effect of electronic commerce on the operation of sections 109 and 117 of the U.S. Copyright Act (the "Act"), in accordance with Section 104 of the Digital Millennium Copyright Act of 1998 ("DMCA"). See 65 Fed. Reg. 35673-75 (June 5, 2000) ("Notice"). See also Pub. L. No. 105-304, 112 Stat. 2860 (1998). The Notice provides that the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce are to issue a report to Congress with respect to the relationship between emerging technology and the operation of these statutory

sections. On or before August 4, 2000, numerous parties submitted initial comments.

These reply comments are submitted on behalf of Broadcast Music, Inc. ("BMI"). BMI's comments primarily address the comments of the Digital Media Association ("DiMA") and The Home Recording Rights Coalition ("HRRC") and others who are proposing unwarranted new exemptions in the copyright law affecting music licensing.

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

In the initial comments three amendments to the Act were proposed that would, if adopted, adversely affect the interests of copyright owners. All three of these amendments should be recognized for what they are: efforts by music-using new media entities to preempt the legitimate commercial interests of music copyright owners in an evolving marketplace. DiMA and HRRC offer no evidentiary support for their arguments, and it is doubtful whether their proposals would be compatible with either the Berne

Convention or the WIPO Copyright Treaty. BMI therefore supports the comments of the Copyright Industry Organizations ("CIO") that no changes to Sections 109 and 117 are required, and further urges the Office and the NTIA to reject DiMA's invitation to amend Section 110(7) of the Act. In any case, whatever is done concerning the first sale doctrine must not affect the public performing right in digital transmissions of musical works.[1]

I. The First Sale Doctrine Should Not Be Expanded to Digital Transmissions.

BMI is concerned that if Congress were to enact an exemption to the distribution right in Section 106(3) of the Act for digital transmissions of musical works, such an exemption would be claimed by users to cover all other copyright rights in the "exempt" transmissions, including the right of public performance. As stated above, BMI does not support an expansion of the first sale doctrine. However, should the first sale doctrine be extended in any way, such extension must expressly provide that it in no way affects the public performing right in such transmissions.

Today, digital networked transmissions on the Internet for downloading are different from distributions of physical media because they implicate more copyright rights -- including the public performing right, the public display right and the reproduction right in addition to the distribution right. As copyright owners point out, digital transmissions by downloading

[1] This includes musical works embodied in sound recordings, audiovisual works or multimedia works.

invariably result in a reproduction retained by the recipient. CIO Comments at 4. This is so whether the sender keeps his or her copy or discards it. Moreover, the Internet permits multiple copies to be sent simultaneously by the sender to different recipients. Time Warner Comments at 1. As the copyright owners point out, reproduction rights are not exempted by the first sale doctrine. Id.

Digital transmissions on the Internet when made to the public also constitute public performances of the underlying musical works under Section 106(4) of the Act. For example, when a Napster user makes his or her music collection available to the public for downloading without authorization of the copyright owners, the copyright owners' public performance rights in those songs are implicated.[2] The first sale doctrine in Section 109 does not apply to the public performing right. 2 Nimmer § 8.12[D]. Such transmissions require public performing rights licenses. The first sale doctrine should not be extended to digital transmissions if doing so would adversely impact the public performing right in musical works in any way.

When Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Congress clarified the

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[2] The court confirmed the "public" nature of the activities of Napster users in a case involving reproduction rights. A & M Records, et al. v. Napster, Inc., No. C99-5183 MHP (N.D. Cal.), Slip op. at 20, 2000 U.S. Dist. LEXIS 11862 (p. 16) ("Sampling on Napster is not a personal use in the traditional sense that courts have recognized..."); preliminary injunction issued by district court stayed, 2000 U.S. App. LEXIS 18688 (9th Cir. 2000).

applicability of the mechanical compulsory license to digital phonorecord deliveries. In so providing, it preserved the applicability of the public performing right to digital transmissions. 17 U.S.C. § 115(d).[3] In reviewing the DPRA, Nimmer observes that "the prudent course would seem for purveyors of the new digital services to pay royalties under both theories [i.e., performance and mechanical]. Perhaps, sub rosa, that is the intent underlying this legislation." 2 Nimmer § 8.24[B]. See also Kohn on Music Licensing (Second Edition) 1999 Supplement at page 101 ("Under current law, in our view, all transmissions constitute either a performance or a display (some of which may be to the public).") (emphasis in original).[4]

DiMA's proposed exemption covering digital transmissions is based primarily on an argument for "consumer convenience." DiMA Comments at 13. When presented with similar fair use arguments

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[3] See also 17 U.S.C. § 115(c)(3)(K) ("Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of digital transmission…."). The Copyright Office regulations reflect the statute in this regard. See 37 CFR § 255.8.

[4] In a recent decision the Second Circuit confirmed that each step in the process by which a protected work wends its way to its audience constitutes a public performance. NFL v. PrimeTime 24 Joint Venture, 211 F.3d 10 (2d Cir. 2000). Moreover, Section 101 of the Act states that it does not matter whether members of the public receive the transmission in the same place or in separate places, or at the same time or at separate times. 17 U.S.C. § 101 (definition of perform "publicly"). Transmissions to a single person (including on demand transmissions) therefore can be public performances under the Act. See, e.g., On Command Video Corp. v. Columbia Pictures Industries, 777 F. Supp. 787 (N.D. Cal. 1991); see also WIPO Copyright Treaty, Art. 8 ("making available right").

about "space shifting" music, federal courts have rejected such arguments. For example, in granting an injunction against MP3.com, the Southern District of New York stated: "Copyright… is not designed to afford consumer protection or convenience but, rather, to protect the copyrightholders' property interests." UMG Recordings, Inc., v. MP3.com, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

DiMA and HRRC premise their arguments for this new exemption on the fear that e-commerce in music will be stunted without legislative "clarity" on the scope of the first sale limitation. DiMA Comments at pp. 2-3; HRRC Comments at 3. DiMA's comments in this proceeding contain little evidence to support this claim. DiMA itself observes that there has been an explosion in webcasting since DiMA submitted its congressional testimony in 1998 and since the Ashcroft and Boucher-Campbell bills were first proposed. DiMA Comments at pp. 1-2 and 4-6. It cannot be denied that the Internet is literally awash with transmissions of unauthorized, unlicensed music in the form of digital MP3 files.[5] Yet, even in the face of this rampant piracy, Jupiter Communications reports digital downloads are expected to result in a $1.5 billion commercial market by the year 2005 (DiMA Comments at 7), notwithstanding the different treatment in the

[5] Napster Slip op. at 37, 2000 U.S. Dist LEXIS 11862 (p. 26) ("Any destruction of Napster, Inc. by a preliminary injunction is speculative compared to the statistical evidence of massive, unauthorized downloading and uploading of plaintiffs' copyrighted works - as many as 10,000 files per second, by defendant's own admission").

Act for digital embodiments. Accordingly, it is hard to make a factual case that Section 109 is inhibiting digital transmissions.

DiMA attempts to buttress its argument for an expansion of Section 109 with claims that new digital rights management (DRM) tools will soon enable copyright owners to transmit secure, encrypted files that will protect against unauthorized multiple copying by consumers. In fact, DiMA claims that passing a copyright exemption will force owners to create better DRM tools that ensure deletions of users' files, or that transfer encryption keys along with files. DiMA Comments at 7. This is scant comfort to copyright owners, as DRM tools are at a nascent stage of development and not yet in widespread use in the market. Moreover, when owners do implement encryption tools such as DeCSS, they are susceptible to being hacked. See Universal City Studios, et al. v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000)

In summary, while it is clear that there is a strong demand for music online, it is not yet known which of several business models will emerge as commercially viable. In these circumstances, it seems at a minimum quite premature to consider enacting a new copyright exemption to the distribution right that would affect the online music delivery market at this time. Indeed, the Berne Convention and the WIPO Copyright Treaty require that the market be given an opportunity to develop. These treaties prohibit limitations on copyright that interfere with copyright owners' legitimate business opportunities, whether they are established licensing practices or prospective in

nature. Accordingly, the proposal to extend Section 109 to digital transmissions should be rejected. It is of critical importance that in the event that some action is taken to extend the first sale doctrine to digital transmissions it must not affect the public performing right in digital transmissions of musical works.

II. Section 117 Should Not Be Amended to Exempt the Reproduction Rights in Streaming Music

DiMA's second proposed amendment -- to Section 117 of the Copyright Act -- involves exempting the reproduction right in streaming media, where a portion of the material is captured in a temporary "buffer" at the user's computer. BMI agrees with the CIO comments that no change to Section 117 is warranted at this time. Section 117 has nothing to do with the broadcasting of music and any attendant reproduction rights issues, and there is no indication in Section 104 of the DMCA that Congress intended that this inquiry should involve music or broadcasting-related issues on the Internet. In view of the explosion of webcasting since 1998 cited by DiMA, it is difficult to see how a brand new exemption is necessary to foster webcasting over the next several years. The Office and the NTIA should therefore decline the DiMA's invitation to address these matters in the context of this proceeding.

III. The Record Store Exemption in Section 110(7) Should Not Be Extended to Online Record Stores.

DiMA inappropriately exceeded the scope of this DMCA inquiry by suggesting that Section 110(7) of the Act must be amended to "clarify" that it applies to online music "stores" (DiMA Comments at 21), and the Copyright Office should not consider this proposal for a new exemption to the public performing right in this proceeding. As DiMA's comments reveal, Section 110(7) clearly has no application whatsoever to Internet uses. As currently in effect, it is limited to brick and mortar establishments. This exemption in the Act provides a limitation on the copyright owner's exclusive right in a very specific context. The only time an exempted performance can be given is to promote the retail sale of a phonorecord at a "vending establishment...without any direct or indirect admission charges...". Furthermore, the performance cannot be "transmitted beyond the place where the establishment is located". Under DiMA's amendment, the location of the establishment would be co-extensive with the Internet itself - i.e., *the world.*

In addition, as currently written, for the exemption to apply the sole purpose of the performance must be to promote the retail sale of copies or phonorecords of the work, or of the audiovisual, or other devices utilized in such performances. 17 U.S.C. § 110(7). If, as in Chappell & Co. v. Middletown Farmers Market and Auction Co., 334 F.2d 303 (3d Cir. 1964), there is a dual purpose of sales promotion and entertainment, Section 110(7) would not protect the user in any event. BMI contends that

"online record stores" have dual entertainment and promotion purposes that are prohibited under Section 110(7).

Furthermore, virtually all web sites with music can provide links to record retailers like CD Now and can claim that their music is "related" to the promotion of a sale. BMI believes that licensing music rights online is a more appropriate solution to the issue raised by DiMA. For example, BMI currently licenses a music service which provides music clips to online record stores, and this market would be disrupted (if not outright lost) if DiMA's exemption were to be enacted. Accordingly, the Office and the NTIA should reject the DiMA proposal on both procedural and substantive grounds.

IV. CONCLUSION

The exemptions sought in Sections 109, 117 and 110(7) of the Act should be rejected at this time. BMI looks forward to working with the Office and the NTIA to assist them with their statutory directive, including testifying on these issues, and also looks forward to monitoring developments in the area of emerging technologies and their impact of various aspects of U.S. copyright law.

Respectfully submitted,

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