Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
UNITED STATES DEPARTMENT OF CONGRESS

In the Matter of	:	
	:	
	:	Docket No. 000522150-0150-01
Report to Congress Pursuant to	:	RIN 0660-ZA13
Section 104 of the Digital Millennium	:	
Copyright Act	:	

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers ("ASCAP") hereby submits these reply comments in accordance with the Notice of the Copyright Office and the National Telecommunications and Information Administration of May 16, 2000, 65 Fed. Reg. 35673 (June 5, 2000) announcing this request for public comment pursuant to section 104 of the Digital Millennium Copyright Act ("DMCA") on the effects of the DMCA and the development of electronic commerce on sections 109 and 117 of title 17 of the United States Code, and the relationship between emerging and existing technology and the operation of such sections.

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 100,000 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 creators and 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. Currently, ASCAP has entered licenses with the operators of well over a thousand web sites that perform copyrighted music.

As a licensor of performance rights, ASCAP's interest focuses on those comments that implicate directly or indirectly the section 106(4) exclusive right of performance. Most comments focus on the effects on sections 109 and 117. Numerous comments, however, directly or indirectly reach beyond sections 109 and 117 to other sections of the copyright law that are not presently under consideration. Such commentators are inappropriately using this proceeding as a forum to advocate legislative positions that would benefit their particular

industry. For example, certain comments propose not only an extension of the first sale doctrine to distributions of electronic versions of copyrighted works made by means of transmission, but also advocate the right permanently to archive such materials – the latter being a subject of section 108. See Comments of the Library Associations.

More relevant to ASCAP, one commentator, the Digital Media Association ("DiMA"), suggests amending section 110(7), to extend to online sellers of copyrighted music the exemption that section provides to the section 106(4) right of performance. See Comments of the Digital Media Association at 21. DiMA is an association of operators of dozens of Internet web sites, many of which perform ASCAP music by way of transmissions. ASCAP has entered into performance licenses with many DiMA web sites and ASCAP's members are being compensated for the use of their music by the DiMA sites. DiMA's request to extend the section 110(7) license to web sites would effectively deprive ASCAP's members of their just compensation for the use of the copyrighted works; instead they would get a free pass for performances of music that ASCAP currently licenses. As set forth below, DiMA's comments regarding section 110(7) and all other comments advocating a limitation to the exclusive right of performance should not be considered (and, indeed, have no merit).

This Proceeding is Limited to a Study of Sections 109 and 117 and Comments Implicating Any other Sections of the Copyright Law Should be Ignored.

Congress, in enacting the DMCA, believed that emerging technologies might have effects on certain aspects of copyright law. Accordingly, the DMCA required the Copyright Office, either alone or with the Department of Commerce, to conduct studies and prepare evaluations on the interaction between emerging technologies and certain aspects of the copyright law. First, section 403 of the DMCA directed the Copyright Office to submit to

Congress recommendations on how to promote distance education through digital technologies while maintaining a balance between the rights of copyright owners and users. Second, section 1201(g)(5) directed the Copyright Office and Department of Commerce to report on the effects of the encryption research exemption on the prohibition on unauthorized circumvention of access control measures under section 1201(a)(1)(A). Finally, Congress directed the proceeding at hand to study the effects of the DMCA and electronic commerce on, and the relationship emerging technologies has with, sections 109 and 117.

Congress specifically limited the studies to only specific aspects of emerging technologies and copyright law. The study at hand, as noted by one commentator, was originally proposed as a general review of the copyright law and its relationship to electronic commerce. See Sec. 205(a), H.R. 2281 as originally reported. However, the House revised this provision, limiting the study to focus only on sections 109 and 117, the only two sections that Congress believed might require further evaluation due to emerging technologies and electronic commerce, and as revised it was passed into law. Accordingly, the Copyright Office and Department of Commerce were directed by Congress to limit their evaluation to the effects of the DMCA and the development of electronic commerce on sections 109 and 117 and the relationship between emerging technologies on sections 109 and 117.

Section 109, the "first sale doctrine" is a limitation on the section 106(3) right of distribution, and section 117 is a limitation on the section 106(1) right of reproduction. Neither section invokes or limits in any manner the right of performance – the only right which is the subject of section 110(7). Section 110(7) is therefore not under consideration

and DiMA's comments relating to it and any other comments proposing to limit section 106(4), should be ignored.[1]

Section 110(7) Should Not be Expanded to Cover Internet Performances

DiMA's argument that the section 110(7) retailer exemption to the right of performance can and should be extended to online music retailer music businesses marketing and selling copyrighted music is not only inappropriate in this proceeding, but also has no merit. Section 110(7) is a limited exemption. It only applies if certain conditions are met: First, the exemption is limited to record stores – "vending establishments open to the public at large without any direct or indirect admission charge." Second, the purpose of the performance can only be to demonstrate the recordings being sold -- the "sole purpose" of the performance must be to promote the retail sale of recordings.[2] Third, the performance must occur at the physical place where the retail store is located (and in the department where recordings are sold) -- the performance must "not [be] transmitted beyond the place where the establishment [must be] located and is within the immediate area where the sale is occurring."[3]

DiMA is advocating a radical expansion of the exemption to allow Internet services which sell recordings to transmit performances of those recordings. Currently,

[1] Some commentators advocate an amendment that would serve to preempt contractual license terms that limit use of a copyrighted work in any way. See Comments of the Library Associations at 23. ASCAP believes that such an amendment to Section 301(a) is not under consideration in this proceeding and would be completely inappropriate and unnecessary. Open and free voluntary licensing is the core of our copyright system. Indeed, ASCAP has entered into licenses with well over a thousand Internet web sites. Appropriate remedies for copyright misuse currently exist; legislative action as has been suggested is inappropriate.

[2] It should be noted that DiMA's comments misleadingly omit from the quotation of the language from section 110(7) the phrase "sole purpose."

[3] In 1998, the exemption was amended to include appliance stores that sold devices which played music, such as stereos, under the same conditions and limitations. Pub.L. No. 105-298, 112 Stat. 2827, 2830.

ASCAP licenses well over a thousand Internet web sites, including sites within DiMA's membership. Included within these sites are web sites that sell music files to the public and permit free sampling of such music (e.g. Emusic.com) as well as sites that supply such samples to the online retailers (e.g. Discovermusic.com). There is no justification for an expansion of the section 110(7) exemption to these web sites. Rather, it would be a "free pass" for those selling performances of music to avoid paying ASCAP's members, the creators and owners of the intellectual property from whom they were profiting.

The reason why Congress did not allow any exemption for transmissions of musical performances under section 110(7) applies with equal force to physical and "virtual" record stores: When a performance is given at a record store, it cannot be used by the store or the customer for any other purpose. The customer cannot "take" the performance away from the store, nor can the store profit from the performance in any way other than to demonstrate the sale of the record.

But just the opposite is true for a transmission of music on the Internet. Either by way of downloading or streaming the music, the "customer" can listen to the music at home, as a substitute for other means of performance, such as a broadcast radio station, an on-line audio Webcaster, or any other transmission entity which must pay performing rights fees to the creators and copyright owners of the music performed. There is nothing to stop a "customer" of a "virtual" record store from using the performances of music as a source of music without ever buying a record. In a physical record store, that possibility is meaningless, for the performance cannot be "used" away from the premises – and Congress, by refusing to extend the exemption to transmissions, insured that it would not

be so misused. An "online" record store is, however, no different from a radio station. Indeed, there would be noting to prevent the "online" record store from benefiting from the performances without any sale of records; such benefits are routinely gained by sites so performing music (as, for example, a means of attracting "hits" from Websurfers to support advertising sales on the Website). Like a radio station, it should pay for the intellectual property it is using by performance.

Congress knew what it was doing when it refused to extend the exemption to transmissions. There is no good reason to allow expansion of that exemption now.

Conclusion

For the above reasons, the Copyright Office and the National Telecommunications and Information Administration should give no weight to DiMA's comments regarding section 110(7) and any other comments which indirectly or directly serve to limit the section 106(4) right of performance.

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Respectfully Submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

I. Fred Koenigsberg
White & Case LLP
1155 Avenue of the Americas
New York, N.Y. 10036

Tel. (212) 819-8806
Fax (212) 354-8113
e-mail--Fkoenigsberg@ny.whitecase.com

Joan McGivern
Samuel Mosenkis
ASCAP
One Lincoln Plaza
New York, N.Y. 10023

Tel. (212) 621-6204
Fax (212) 787-1381
e-mail – Jmcgivern@ascap.com
Smosenkis@ascap.com