

Good afternoon. I wish to thank the members of this distinguished panel for the opportunity to testify today.

My name is Marvin L. Berenson. I am Senior Vice President and General Counsel of Broadcast Music, Inc. ("BMI"). 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 music 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 one 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.

The first sale doctrine in Section 109 of the Copyright Act permits the owner of a copy of a copyrighted work like a CD to redistribute that property without violating the exclusive right set forth in Section 106(3) of the Act. Digital transmissions on the Internet for downloading music are different from distributions of physical media because they implicate several copyright rights – including the public performing right, the public display right and the reproduction right in addition to the distribution right. Digital transmissions by downloading invariably result in a reproduction – that is – a copy retained by the recipient. Moreover, the Internet permits multiple copies to be sent simultaneously by the sender to different recipients. Applying the first sale doctrine to digital transmissions involving downloads would violate the reproduction right, which is not covered by the first sale doctrine.

The first sale doctrine should not be applied to digital transmissions because doing so could also adversely impact the public performing right in musical works. Digital transmissions on the Internet constitute public performances of the underlying musical works under Section 106(4) of the Act when made to the public. For example, when Napster enables users to make their music collections available to the public for downloading without authorization of the copyright owners, the copyright owners' public performance right in those songs is implicated. The first sale doctrine does not apply to the public performing right. Such transmissions require authorizations, which normally take the form of public performing right licenses. It should be noted that BMI issued the first commercial Internet copyright license for music in April 1995. Since

then, BMI's licensing has covered both downloading and streaming activities of over a thousand licensed web sites.

DiMA and HRRC are seeking an exemption that would enable not one truck but rather a fleet of trucks to drive through. They base their arguments on the fear that e-commerce in music will be stunted unless the first sale limitation applies to digital distributions. However, there is little evidence to support this claim. In fact, in the past five years, there has been a continued explosion in transmissions of music on the Internet. The Internet is literally awash with transmissions of unauthorized, unlicensed music in the form of digital MP3 files. According to Napster, there are as many as 10,000 files transmitted per second on the Napster network. Yet, even in the face of this rampant piracy, digital downloads are expected to result in a \$1.5 billion commercial market by the year 2005. In view of this,

it is hard to make a factual case that Section 109 is inhibiting digital transmissions.

DiMA claims that new Digital Rights Management tools will soon enable copyright owners to transmit secure, encrypted files that will protect against unauthorized multiple copying by consumers. Digital Rights Management tools are in a developmental stage and are not yet in widespread use in the market. Moreover, when owners do implement encryption tools, they are susceptible to being hacked. This is evidenced by the claim that hackers claim to have broken the SDMI security codes.

Recent experience has shown that licensing is the best solution to deal with unauthorized transmissions of music on the Internet. MP3.com has negotiated agreements for public performing rights, mechanical rights and sound recording rights. Napster itself has

reached an agreement with a major record label, and has approached BMI and music publishers about licensing. Looking at this developing market shows that there is a strong demand for music online. It is not yet known, however, which of several business models will emerge as commercially viable. In the circumstances, it seems premature to consider enacting a new copyright exemption that would affect the online music delivery market at this time.

It is important in this environment for the Copyright Office and the NTIA to send a strong signal to the internet community that copyright law still is alive and well and applies to e-commerce transmissions. Indeed, the Berne Convention and the WIPO Copyright Treaty require that the marketplace for new uses of copyrighted works has the opportunity to develop. These treaties prohibit limitations on copyright that interfere with copyright owners'

legitimate business opportunities. Accordingly, the proposal to extend Section 109 to digital transmissions should be rejected.

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 joint copyright owner comments that no change to Section 117 is warranted at this time. Section 117 is a limited exemption aimed at computer software that has nothing to do with the broadcasting of music. There is no indication in Section 104 of the DMCA that Congress intended that this inquiry should involve music broadcasting-related issues on the Internet. In view of the growth of webcasting since 1998, it is difficult to see how a brand new

exemption is necessary to foster webcasting over the next several years.

DiMA went well beyond the scope of this inquiry by suggesting that Section 110(7) of the Act should be amended to apply to online music “stores”. The Copyright Office and the NRIA should not consider this proposal for a new exemption to the public performing right in this proceeding. BMI contends that this issue is not properly before this panel and is not contemplated by Section 104 of the DMCA. BMI, through its written statement, has made its position clear.

It is clear that we have entered into the era of globalization. Realizing this fact, BMI has entered into agreements with other Performing Rights Organizations for the global licensing of performing rights on the Internet. Obviously, transmissions over the

Internet are global in nature, therefore, whatever we do here will have an effect on the rest of the world. The U.S. should not become a haven for entities that want to avoid liability from copyright liability.