

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

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In the Matter of )  
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REPORT TO CONGRESS PURSUANT )  
TO SECTION 104 OF THE DIGITAL ) Docket No. 000522150-0287-02  
MILLENNIUM COPYRIGHT ACT )  
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**REQUEST TO TESTIFY**

On October 23, 2000, the U.S. Copyright Office (“Office”) and the National Telecommunications and Information Administration (“NTIA”) issued a Notice of Public Hearing in the above-referenced proceeding to solicit written requests to testify from interested parties. See 65 Fed. Reg. 63626 (October 24, 2000) (“Notice”).

In conformity with the Notice, Marvin L. Berenson requests to testify on behalf of BMI. Contact information is set forth in the signature block:

Set forth below is a one-page summary of the intended testimony.

Respectfully yours,

\_\_\_\_\_  
Marvin L. Berenson  
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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, through Mr. Berenson's membership on the U.S. delegation, participated in the drafting of the WIPO Treaties in 1998 and BMI also played an important role in the enactment of the Digital Millennium Copyright Act of 1998. BMI's testimony would discuss three points made in its written reply comments already submitted in this proceeding.

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

If Congress were to extend the exemption in Section 109 of the Copyright Act to the distribution right in Section 106(3) of the Act for digital transmissions of musical works, as was proposed by the Digital Media Association ("DiMA") and the Home Recording Rights Coalition ("HRRC"), and also proposed in Section 4 of H.R. 3048, 105<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1997), a serious problem could arise because several exclusive rights in Section 106 are implicated by digital transmissions. BMI is concerned that such an exemption would be claimed by users to cover all other copyright rights in the "exempt" transmissions, including the right of public performance. Because this problem would be averted by leaving the section unchanged, BMI does not support an expansion of the first sale doctrine.

II. Section 117 Should Not Be Amended To Exempt The Reproduction Rights In Streaming Music.

In written comments submitted by one organization (DiMA), it was proposed that Section 117 of the Copyright Act be amended to exempt the reproduction right in streaming media, where a portion of the material is captured in a temporary "buffer" at the user's computer. BMI would testify that no change to Section 117 is warranted at this time.

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

In written comments, at least one party (DiMA) inappropriately exceeded the scope of this inquiry by suggesting that Section 110(7) should be amended to "clarify" that it applies to online music "stores." The NTIA and the Office should not consider this proposal. In the event that testimony on this proposal is permitted (bearing in mind that the Notice asks no questions about it), 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 lost if the exemption were to be enacted.