Before the
OFFICE OF STRATEGIC INITIATIVES
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
Section 108 Study Group: Copyright Exceptions For Libraries and Archives	)	Docket No. 07-10802

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers ("ASCAP") hereby submits these comments pursuant to the Notice of a Public Roundtable and Request for Comments ("Notice") issued November 28, 2006 by the Office of Strategic Initiatives and Copyright Office,71 Fed. Reg. 70434 (December 4, 2006) regarding certain issues relating to the exceptions and limitations applicable to libraries and archives[1] (collectively, "Libraries") under the Copyright Act.

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 280,000 songwriter and publisher members on whose behalf ASCAP licenses the nondramatic public performances of their works. ASCAP is also affiliated with over 90 foreign performing rights organizations

around the world and licenses the repertories of those organizations in the United States. 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, universities, municipalities, libraries and museums. 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.

As the Notice explains, Section 108 was enacted as an exception to the Section 106 reproduction and distribution rights as a recognition of the vital role Libraries have in serving the public. Section 108 was enacted on the heels of litigation brought against Libraries for systematic photocopying. see Williams v. Wilkins, 420 U.S. 376 (1975), and the concerns expressed by Libraries regarding their practices of making copies and granting inter-library loans. As such, Section 108 was essentially directed at those practices and set forth exceptions to the reproduction and distribution rights therein implicated. See William F. Patry, Copyright Law and Practice 784-789.

With the advent of the digital age, the Section 108 Study Group was convened to explore current Library practices and recommend updates to Section 108. Included within this study is the manner by which libraries utilize digital materials and the issues surrounding licensing practicalities, including the making of public performances (despite Section 108's focus on the rights of reproduction and distribution). Specifically, Part C, Question 7 of the Notice requests comments as to whether an exception should be added to permit Libraries to perform electronic works in certain circumstances without license. These comments are limited to that question.

[1] The Notice asserts that the study will additionally extend to uses made by museums; accordingly these comments

will likewise address such uses.

For the following reasons, ASCAP believes that no additional or extended exceptions[2] to the performance right are warranted.

1. Current Copyright Law Adequately Covers Library Performances.

The Notice describes the vital role of Libraries to our nation's education and cultural heritage. Nothing in the Copyright Act, however, limits the Section 106(4) right of performance from application to such educational and cultural uses. Under the 1909 Copyright Act, the public performance right was limited to only those that were made "for profit." The 1976 Act, however, eliminated the "for-profit" requirement, instead relying on a system of exemptions and limitations for specific uses. This change was not unanticipated. As the House Judiciary Committee observed in an early version of the current law: "the line between commercial and "nonprofit" organizations is increasingly difficult to draw, that many "nonprofit" organizations are highly subsidized and capable of paying royalties, and that the widespread public exploitation of copyright works by * * * noncommercial organizations is likely to grow." H.R. Rep. No. 90-83, 90th Cong., 1st Sess. 26 (1967). Thus, the Copyright Law was amended to address reality – that many nonprofit, cultural and educational institutions were taking unfair advantage of a free-pass to utilize copyrighted works without benefit to their creators.

Accordingly, unless specifically exempted, performances that are made for noncommercial, cultural or educational purposes require license from the copyright owner. Such exemptions have not been enacted without ample justification. For example, Congress recognized noncommercial broadcasting's important educational and cultural public benefits, but refused to grant it an exemption for public performances of musical works, specifically stating

[2] The terms exception and exemption are hereinafter used interchangeably.

that Congress intended that owners of copyrighted material not be required to subsidize public broadcasting, but rather realize fair compensation for the use of their works. See H.R. Rep No. 94-1976, 94th Cong., 2d Sess. 118 (1976).

And, when an exemption is granted, such exemptions are narrowly tailored to meet the policy needs. For example, exemptions exist for in-class teaching and distant learning. 17 U.S.C. §§110(1), 110(2). Those exemptions, however, are strictly limited in scope to achieve the needs for which they were passed (i.e. to permit classroom and systematic teaching by nonprofit educational institutions) and contain strict conditions for eligibility, such as the requirement that transmitting institutions must apply technological measures to prevent retention of works for longer than the class session and prevent unauthorized further dissemination of the works. Likewise, the exemption for certain live performances where there is no purpose of direct or indirect commercial advantage is strictly conditioned and applies only within a narrow set of circumstances. 17 U.S.C. §110(4).

Libraries certainly perform copyrighted musical works publicly. Most performances made by Libraries do not warrant exemption from licensing requirements. Live performances are commonly made in museums and libraries. Mechanical music (i.e. over speakers) is performed in libraries and museums; for example, as background music in gift shops or other spaces. Clearly, these types of performances do and should require licensing (and as discussed below, are licensed by ASCAP); indeed the Notice does not appear to request comment as to this obvious conclusion. The Notice appears to be concerned with other types of public performances that occur at Libraries – those occurring as part of multimedia exhibits or those that occur when visitors are permitted to listen to archived recordings at private listening terminals or rooms.

However, there is no need for an additional exemption as these types of performances are adequately addressed within current law. Despite their cultural and educational clothing, multimedia exhibits certainly compete with other forms of commercial and noncommercial entertainment. Such exhibits are often widely marketed to the public in commercial media and often charge entrance fees. No reasonable justification exists to create a copyright exclusion for these types of performances.

The Notice refers to Section 109(c) – which permits display of a physical copy without license from the copyright owner -- as a possible analogous basis for an exemption for performances occurring in such exhibits. This analogy is misplaced, mainly due to an inherent difference between the Section 106(5) right of display and the Section 106(4) right of performance. Section 109(c) was enacted as an extension of the exhaustion doctrine applied to distribution (i.e. the first sale doctrine) currently codified as Section 109(a). In other words, when a copyright owner sells or transfers a copy of the work, he "exhausts" his ability to display that particular copy. Such exhaustion cannot be said to occur with the Section 106(4) performance right and therefore a comparison is inappropriate. An analogous extension of Section 109(c) to performances would seemingly permit anyone who legally owned a copy or phonorecord of a song to publicly perform that song without license at the premises where such copy or phonorecord is played. Such an extension would eviscerate the performance right, a result that surely is not intended in this proceeding.

As to performances that occur as part of Libraries' archive listening services, which would include any digital transmission occurring during streaming, again, no justification exists to permit such performances to occur unlicensed, at least when such uses are not for purely academic and research purposes. See Columbia Pictures Indus., Inc. v. Redd Horne, 749 F.2d

154 (3d Cir. 1985). There is little difference between the effects of listening stations set up commercially and those set up in Libraries. Those with an appetite for music appreciation will receive the same gratification in both venues. To the extent there is a difference – for example, listening stations limited to the study of older unavailable sound recordings or audiovisual works that would be found in archives but not commercially available elsewhere -- exclusions already exist to address such uses. Section 107 fair use specifically includes "scholarship" and "research" and Section 108(h) provides an exclusion for the performance by Libraries of copyrighted musical works in the final 20 years of the copyright for "purposes of preservation, scholarship, or research." Finally, certain proposals to allow use of "orphan works" are already before Congress, which would permit use of those types of works. Adding an additional exemption would serve little purpose other than denying creators fair compensation for the use of their works.

2. ASCAP's Licensing Practices Obviates Any Need for an Exclusion.

ASCAP's repertory contains millions of musical works, and licenses from ASCAP and the other United States performing rights organizations ("PROs") cover nondramatic public performance rights in, for all intents and purposes, every copyrighted musical work. ASCAP (like the other PROs) issues a bulk, collective license, which give access to the entire repertory for one fee, and importantly, does not require music users to contact individual copyright proprietors for permissions. A music user who holds licenses from ASCAP, BMI, and SESAC is certain to have cleared the nondramatic public performance rights to, for all intents and purposes, all copyrighted musical works, without needing to locate or identify the authors or copyright proprietors.

As discussed above, Libraries make numerous licensable public performances of copyrighted music. Live concerts are held in museums and libraries. Mechanical music is used on the premises. Library telephone systems use music on-hold. Exhibits incorporate public performances. As a result, ASCAP has long negotiated blanket licenses with Libraries to cover all such uses. Similarly, ASCAP enters into blanket licenses with municipalities; such licenses include performances occurring in their Libraries. Furthermore, ASCAP has negotiated licenses with colleges and universities that invariably, again, include performances made in their Libraries.

Thus, even if it were found that a limited exemption for certain electronic public performances made by Libraries was warranted (and, again, ASCAP, does not believe that this is the case), an exemption to include the public performance of musical works in such instances would be practically meaningless, as all such uses would already be licensed under ASCAP's blanket licenses.

Accordingly, ASCAP believes that any additional or expanded exclusion for the public performance by Libraries of musical works in electronic transmissions is unwarranted.

Respectfully submitted,

Dated March 9, 2007

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