March 16, 2007

VIA E-MAIL: section108@loc.gov

Mary Rasenberger
Director of Program Management
National Digital Information Infrastructure and Preservation Program
Office of Strategic Initiatives
Library of Congress

RE: Notice of a public roundtable with request for comments, 71 Fed. Reg. 70434 (2006)

Person making comment: Keenan Popwell
Organization represented: SESAC, Inc.
Address: 55 Music Square East, Nashville, TN 37203
[redacted]

Dear Ms. Rasenberger:

By this letter, I am submitting the following comments on behalf of SESAC in response to the Notice of a Public Roundtable with Request for Comments issued by the Office of Strategic Initiatives and Copyright Office, Library of Congress, on December 4, 2006, 71 Fed. Reg. 70434 (2006). These comments are based in part on discussions at the public roundtable held in Chicago on January 31, 2007 (hereinafter "Roundtable").

INTRODUCTION

Founded in 1930, SESAC is the second oldest and the smallest of the three domestic music performing rights organizations. In recent years, SESAC, the only for-profit PRO, has grown exponentially while serving as a constant source of innovation in such areas as state-of-the-art performance monitoring for its affiliated songwriters and music publishers. In addition to its core performing rights business, SESAC represents the mechanical and synchronization rights of a limited number of music publishers.

First and foremost, as a representative of the public performance rights in thousands of its affiliated songwriters and publishers' musical compositions, SESAC is apprehensive at the prospect of any exemption of the public performance right in musical compositions for libraries,

archives, and museums (hereinafter "libraries"). SESAC is also concerned by any amendment of subsection 108(i) that would extend the coverage of subsections (d) and (e) to musical works, especially considering the attendant issues regarding digital copies of musical works.

TOPIC B: AMENDMENTS TO SUBSECTION 108(i)

Should any or all of the subsection (i) exclusions of certain categories of works from the application of the subsection (d) and (e) exceptions be eliminated?

Sufficient evidence has not been provided to justify an elimination of the exclusion of musical works in subsection (i). Subsections (d) and (e) were designed with literary works in mind. In light of the predominant use of music as entertainment, the "don't ask, don't tell" use standards in (d) and (e) are insufficient to ensure that even a small fraction of patrons will actually use the copies of musical works embodied in sound recordings (hereinafter "musical works," or "musical compositions") made under subsections (d) and (e) for "private study, scholarship, or research."

Additionally, we do not believe that the added educational value, if any, deriving from library patrons' retention of copies of musical works justifies the concomitant harm to the market for exploitation of musical compositions, especially considering the existing licensing options available to libraries. Section 109 exempts libraries from its ban on the rental of musical works, thus allowing library patrons widespread access to musical compositions regardless of their commercial availability. Furthermore, published musical works may be reproduced and distributed under a section 115 compulsory license at minimal transaction costs.

What are the concerns presented by modifying the subsection (i) exclusions and how should they be addressed?

As highlighted above, the removal of musical works from the exclusions in subsection (i) would present a number of problems. Due to the increased opportunities and incentive to exploit obscure musical compositions, especially through online marketing to nationwide niche markets, the commercial availability inquiry under subsection (e) is not determinative of market failure. Whereas in 1976, when section 108 was first enacted, the costs of national distribution constituted a significant barrier to entry for many low-demand copyrighted musical compositions, such works can now be efficiently distributed globally online. As a result, 108(e) will have a significant effect on the emerging online markets for previously out-of-print musical compositions.

One possible alternative solution to minimize the harm to developing online business models while increasing access to hard-to-find works for library patrons would be to supplement the current rental model with an exception whereby a library can maintain in its collection up to three copies of a musical work for which a copy cannot be found at a reasonable price.

Under subsection (d) as currently drafted, the removal of musical compositions from 108(i) could adversely affect the market for individual songs because an album could be construed to be a "copyrighted collection," thus allowing a copyrighted song to be provided to users without any

showing of commercial unavailability. Especially if the work is allowed to be digitally delivered under a revised section 108, this could be highly disruptive to one of the musical works rightsholders' core markets. At the very minimum, any revised section 108 should address this anomaly.

TOPIC C: LIMITATIONS ON ACCESS TO ELECTRONIC COPIES, INCLUDING VIA PERFORMANCE OR DISPLAY

Are public performance and/or display rights necessarily exercised in providing access to certain unlicensed digital materials? For what types of works? Does the copyright law need to be amended to address the need to make incidental copies in order to display an electronic work? Should an exception be added for libraries and archives to also perform unlicensed electronic works in certain circumstances, similar to the 109(c) exception for display? If so, under what conditions?

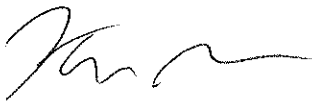
There is not a sufficient public policy imperative for extending the section 108 exception to public performances of musical compositions, especially considering that libraries can currently obtain public performance rights to the vast majority of U.S. musical compositions at reasonable prices through blanket licenses from the three performing rights organizations, SESAC, BMI, and ASCAP. In contrast, there is no such "three-stop shop" for the reproduction and distribution rights. In fact, the blanket license is ideal for archive-held collections that are too large to completely categorize.

While an extension of section 108 to the public performance right in musical compositions is not something that we recommend or endorse, at the minimum, any extension of the exemption to public performance should not go beyond performances "made without any purpose of direct or indirect commercial advantage" as section 108(a)(1) currently limits the reproduction and distribution exemption, and should also not go beyond performances for which no compensation is paid to any involved party, as in section 110(4).

Finally, we contend that an extension of the library exemption to museums, and in turn the extension of a public performance exemption to museums, conflicts with the "normal exploitation" of musical works under the Berne Convention, especially considering the wide variety of copyright holders that are regularly compensated by museums for uses of their works in the current market.

Respectfully submitted,

SESAC, Inc.



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