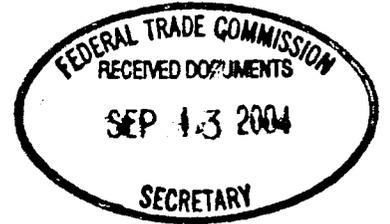


Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580



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In the Matter of :
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CAN-SPAM Act Rulemaking : **Project No. R411008**
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COMMENTS OF BROADCAST MUSIC, INC.

Broadcast Music, Inc. (“BMI”) hereby responds to the Notice of Proposed Rulemaking (“Notice”) and Request for Public Comments issued on August 12, 2004, by the Federal Trade Commission (the “Commission”) regarding Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Project No. R411008. *See* 69 Fed. Reg. 50091 (August 13, 2004). The predicate for the Notice was a previous Advance Notice of Proposed Rulemaking (“Advance Notice”) which solicited comments on a number of issues raised by the CAN-SPAM Act, most importantly for BMI and many other parties, the definition of “primary purpose.” *See* 69 Fed. Reg. 11776 (March 11, 2004), 69 Fed. Reg. 18851 (April 9, 2004).

As stated in BMI’s comments on the Advance Notice, BMI is a music collective copyright clearance organization that distributes public performing right royalties to its affiliated songwriters, composers and music publishers. BMI represents approximately 300,000 affiliates with a repertory of some 4.5 million musical works, as well as thousands of foreign works through its affiliation agreements with over sixty five foreign performing right societies. Approximately half of the music publicly performed on radio and television in the U.S. each day is licensed by BMI. BMI issued the first commercial copyright license for music performed on

Internet websites in April 1995 and has continued to provide licensing solutions for the evolving online music marketplace and new media users of music. Today, BMI has completed agreements covering more than 3,000 licensees that engage in online activities relating to the use of music.

In response to the Advance Notice, BMI explained to the Commission that any definition of the relevant criteria for determining “primary purpose” would be critically important to entities, like BMI, which seek to administer copyright rights in the online environment against individuals and entities with whom they do not already have a transactional relationship. BMI may from time to time send unsolicited-email messages to unlicensed users of music to enforce the copyright rights in the musical works created and/or published by BMI’s affiliates. For such e-mails, BMI requested that the Commission acknowledge that the “primary purpose” is to advise users of music of their rights and obligations under the U.S. copyright law, and should not be considered to have a primary commercial purpose even though BMI may include a reference to the availability of a BMI blanket license in the message. BMI’s comments pointed to the critical importance of enforcing copyright rights in musical works in the digital environment. To accommodate these circumstances, BMI proposed an exemption from CAN-SPAM for specialized messages to enforce bona fide intellectual property rights.

In the Notice, the Commission referred to BMI’s proposal and stated that it could not grant individual exemptions such as the one requested by BMI because that would create “an unwieldy standard”. *See* 69 Fed. Reg. at 50100. The Commission explained that the creation of narrow exceptions is unnecessary in light of the “primary purpose” criteria proposed by the

Commission which apply uniformly to all e-mail messages.¹ While BMI continues to believe that a specific exception for e-mails intended to enforce copyright rights would be preferable for intellectual property owners, BMI nevertheless is pleased with the Commission's general "primary purpose" criteria for all messages that may be subject to CAN-SPAM. BMI believes that the Commission's tripartite "primary purpose" standards, will provide BMI with the protection BMI is seeking and that BMI can meet the test to ensure that its messages will be not be regulated as spam under the CAN-SPAM Act.

Because BMI only sends "unsolicited" emails in the third category – "dual purpose" emails that contain both commercial content and content that is neither commercial nor transactional/relationship – this category is the focus of BMI's concerns. According to the Commission factors to be weighed by a recipient in reasonably interpreting the primary purpose of an unsolicited email are the content of the subject line of the message, or where the placement of commercial content occurs in the body of the message, the proportion of message dedicated to commercial content, and how color graphics, type size, and style are used to highlight commercial content. *See* proposed section 316.3(a)(3).

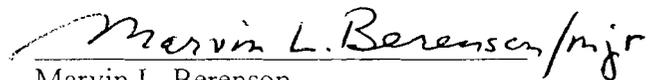
These criteria are adequate to distinguish messages sent by BMI to unauthorized copyright users and should leave no doubt in the minds of recipients of these messages that BMI is primarily seeking to enforce the intellectual property rights of its affiliates rather than to advertise or promote a product.

¹ The Commission explained: "One main advantage of the Commission's proposed 'primary purpose' criteria is that they work well with respect to all messages that may be subject to CAN-SPAM, regardless of the subject matter or the sender of the message." *Id.* at 50100-01.

CONCLUSION

BMI agrees with the Commission's three-category "primary purpose" criteria, particularly the third category that applies to "dual purpose" emails that contain both commercial content and content that is neither commercial nor transactional/relationship. BMI reserves the right to revisit this issue with the Commission in the future if BMI's enforcement efforts are being unduly hindered notwithstanding compliance with the current rules or the rules have unintended consequences.

Respectfully yours,



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September 13, 2004