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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
Defendant-Appellant-Cross-Appellee,

In Matter of the Applications of:

REALNETWORKS, INC., YAHOO! INC.,
Applicants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* DIGITAL MEDIA ASSOCIATION, ENTERTAINMENT SOFTWARE ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF RECORDING MERCHANTISERS, INDEPENDENT FILM AND TELEVISION ALLIANCE, AND ENTERTAINMENT MERCHANTS ASSOCIATION, INC. IN SUPPORT OF APPLICANTS-APPELLEES-CROSS-APPELLANTS, SUPPORTING AFFIRMANCE OF THE DISTRICT COURT'S DECISION THAT DOWNLOADS DO NOT CONSTITUTE PUBLIC PERFORMANCES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, *Amici* state as follows:

The Digital Media Association is a nonprofit trade association devoted primarily to the online audio and video industries, and more generally to innovative digital media opportunities. It has no parent company, and no publicly held company owns 10% or more of its stock.

The Entertainment Software Association is a nonprofit trade association dedicated to serving companies that publish computer and video games for game consoles, personal computers, handheld and mobile devices, and the Internet. It has no parent company, and no publicly held company owns 10% or more of its stock.

The Motion Picture Association of America, Inc. is a nonprofit trade association serving the United States motion picture industry. It has no parent company, and no publicly held company owns 10% or more of its stock.

The National Association of Recording Merchandisers is a nonprofit trade association that serves the music content delivery community. It has no parent company, and no publicly held company owns 10% or more of its stock.

Independent Film and Television Alliance is a nonprofit trade association representing companies that produce and distribute independently made motion pictures and television programming, as well as affiliated financial institutions that

provide funding for independent production. It has no parent company, and no publicly held company owns 10% or more of its stock.

The Entertainment Merchants Association (“EMA”) is the nonprofit trade association of the home entertainment industry. It has no parent company, and no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

The Digital Media Association (“DiMA”) is a trade association composed of 25 member companies that develop and use internet-based technologies to sell, distribute and program lawful, royalty-paying digital music and media products and services. DiMA members include Amazon.com, Apple, Microsoft, MTV Networks, Nokia and Motorola, as well as smaller companies such as Live365 and Spacial Audio Solutions.¹ Among other activities, DiMA member companies transmit downloads² of audio tracks and albums, music videos, television shows, short videos and full-length movies.

The Entertainment Software Association (“ESA”) is the U.S. association exclusively dedicated to serving the companies that publish computer and video games for game consoles, personal computers, handheld and mobile devices, and the internet. ESA’s membership consists of 27 entertainment software companies that create, publish and/or distribute software encompassing literary, musical, and audiovisual works, including such well-known companies as Electronic Arts,

¹ RealNetworks, Inc. is a member of DiMA. Yahoo! Inc. was, but is not currently, a member of DiMA. This brief was not authored in whole or in part by counsel for either of the applicants.

² Throughout this brief, *Amici* use the term “download” as it was defined by the District Court: “the transmission of a digital file over the internet from a server computer, which hosts the file, to a client computer, which receives a copy of the file during the download.” *United States v. American Society of Composers, Authors, and Publishers*, Civ. A. 41-1395 (WCC), Opinion and Order (S.D.N.Y. Apr. 25, 2007) (Special Appendix (“SPA”) 2-8), at SPA 3.

Microsoft, Nintendo of America, Inc., and Sony Computer Entertainment America Inc.

The Motion Picture Association of America, Inc. (“MPAA”) is the trade association that serves as the voice of the American motion picture, home video and television industries. MPAA’s members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc. These companies and their affiliates produce and distribute entertainment works for theatrical distribution, television broadcast, cable and satellite transmission, home video, internet, mobile and digital download, pay-per-view, and a wide variety of distribution platforms that are emerging and many others that will be created through future technological innovation.

The National Association of Recording Merchandisers (“NARM”) is the trade association that serves the music content delivery community. NARM’s members include physical, digital and mobile music retailers, as well as wholesalers, distributors, record labels, multimedia suppliers, technology companies, suppliers of related products and services, and individual professionals and educators in the field of music.

Independent Film and Television Alliance is a nonprofit trade association representing over 155 companies worldwide that produce and distribute independently made motion pictures and television programming, as well as affiliated financial institutions that provide funding for independent production. IFTA members produce more than 400 independent films and countless hours of television programming a year. IFTA is also the owner and operator of the American Film Market.

The Entertainment Merchants Association (“EMA”) is the nonprofit trade association of the home entertainment industry. EMA’s members include companies engaged in the sale, rental and licensed reproduction of entertainment products such as DVDs and video games.

Amici’s members are leading copyright owners and/or distributors of a wide range of copyrighted entertainment products. Many of their products incorporate musical works and are delivered by means of online transmission. *Amici*’s members negotiate and obtain rights and licenses directly from musical work creators and copyright owners authorizing reproduction and distribution of those musical works, and pay substantial fees and royalties to those musical work creators and copyright owners. ASCAP is seeking to require them to pay twice for the distribution of their products whenever that distribution is accomplished by means of virtually any online transmission, including downloads – once in the

form of a reproduction/distribution fee or royalty and again in the form of a performance royalty. Such a requirement is contrary to clear and settled principles of copyright law, and would distort settled, customary industry practices in the areas of music rights acquisition and licensing. *Amici* thus respectfully urge this Court to conclude that the downloading of a digital file that incorporates musical works in and of itself does not constitute a “public performance” within the meaning of the Copyright Act, and to affirm the District Court’s decision in this respect.

Amici received consent from all parties to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the past, when copies of copyrighted works were distributed only by transferring possession of physical objects such as DVDs, CDs and packaged software, there was no doubt about the distinction between distributions of copies of copyrighted works and performances of copyrighted works. When copies of a work were distributed to consumers, individuals possessed physical copies that they could play again and again (or not at all) at their discretion. Conversely, transmitted public performances such as radio and television broadcasts communicated the relevant works, enabling members of the public to listen to or view a work as it was being transmitted.

Electronic transmission is a new and increasingly important mode of both distribution and performance of entertainment products, but even in the current world of new media, there still should be no doubt about the distinction between distribution of copies and transmission of performances. ASCAP and other performing rights organizations have benefited greatly from the growth of the internet, as they collect royalties from vast numbers of websites where music is actually performed. Moreover, the songwriters³ and music publishers who are ASCAP's members have also benefited greatly from new media, as they create (and are paid for) original music for new outlets, and license pre-existing music for

³ This brief uses the term “songwriters” to refer to composers, lyricists and other authors of musical works.

downloads and other forms of distribution, at fair market royalty rates. ASCAP is seeking to tip the balance of a working free market system by attempting to collect royalties not only for broadcasts, streams and other transmissions that constitute public performances, but also for downloads that merely reproduce and distribute copies to consumers. The Court should reject this attempt to conflate the performance and reproduction/distribution rights, and should not impose additional costs on consumers who ultimately will bear the cost of any additional royalties tacked onto the purchase of products containing music.

As the District Court properly concluded, expanding the scope of the performance right to cover virtually all online transmissions, including digital downloads, runs counter to the clear language of the Copyright Act. *See, e.g.*, SPA 4-5. A series of statutory definitions circumscribes the scope of the public performance right. Under those definitions, a transmission is only a public performance if what is transmitted is a performance – and a performance occurs only if it is “designed for contemporaneous perceptibility.” SPA 5. There is “no construction of [the definition of perform] that extends it to the copying of a digital file from one computer to another in the absence of any perceptible rendition.” *Id.* The District Court’s conclusion is reinforced by the explication of the statutory language in the Act’s legislative history, analysis by expert agencies, and an unbroken string of judicial decisions. *See, e.g.*, SPA 5-7.

While the transmission of a performance may in some cases occur simultaneously with the delivery of a copy,⁴ there typically is a clear distinction between transmissions designed to deliver copies and those designed to deliver performances. In this proceeding, the District Court correctly determined that the downloads provided by the applicants, and other, similar downloads typical today, constitute only a transmission of a copy and not a transmission of a performance. *See id.* A download is not like a broadcast, where a rendering, playing or showing is transmitted so that a musical work is capable of being heard while the transmission is being received, as designed by the broadcaster. Instead, the purpose of a download is to transfer a copy to the consumer who, after downloading a product incorporating a musical work, can play it (or not play it) again and again as he or she sees fit, just as when the consumer has acquired a physical copy such as a DVD, CD or software disc.⁵ Downloads as such do not in any way communicate or perform works any more than trucks transporting DVDs,

⁴ *See Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ. 3733, 2007 WL 136186, at *6 (S.D.N.Y. Jan. 19, 2007) (satellite radio service is both a broadcaster of performances capable of contemporaneous perception and also a distributor of copies of sound recordings).

⁵ Downloads are different in this respect from on-demand streams, where a *service provider* (not the *consumer*) transmits a work (perhaps multiple times) when requested by the consumer.

CDs or software discs could be said to be communicating or performing the works on those discs.

Contrary to ASCAP's suggestion, ASCAP Br. at 46-48, it is not necessary to ignore or blur this clear distinction to ensure fair compensation for music authors. When *Amici's* members want to use music in the products they distribute, they negotiate reproduction/distribution rights and associated compensation. When compensation is finally agreed on, the songwriters are paid for those rights, either directly or by their publishers in accordance with their contracts. ASCAP is seeking to elbow its way into the licensing of transmissions designed to deliver copies in order to boost its own revenues and to seek duplicative payments for its members, not because of any failure of the law or the marketplace to allow music creators and copyright owners to bargain for fair compensation for reproductions and distributions.

Thus, just as in the case of entertainment products distributed on physical media, musical work copyright owners should continue to receive compensation for downloads under licenses for the reproduction and distribution of their works. ASCAP should not be able to obtain through this proceeding additional compensation for itself and its members that its members did not bargain for when they granted *Amici's* members reproduction and distribution rights and accepted substantial compensation therefor. Accordingly, this Court should affirm the

District Court's decision refusing to extend the definition of performance so far as to encompass downloads.

ARGUMENT

I. Downloads are Transmissions of Copies, Not Transmissions of Performances

In the absence of contemporaneous perceptibility, a download is not a public performance. Instead, as the District Court correctly concluded, a download is simply the reproduction and distribution of a copy of a copyrighted work, much like the manufacture and sale of a DVD, video game or CD. ASCAP seeks to confuse what should be a simple question by focusing not on whether a party has engaged in a *performance*, but rather on whether there has been a *transmission* of a recorded prior performance of the copyrighted work. It argues that any transmission of a file incorporating prerecorded music is a performance, regardless of whether such transmission is designed for contemporaneous perception, because the music was performed and recorded at some point in the past (maybe decades ago). *See* ASCAP Br. at 23-24 & n.6. Thus, in ASCAP's view, the only transmissions of music that do not need to be licensed as public performances are transmissions of sheet music or other textual lyrics and graphic notations. *Id.* at 24 (referring to "a schedule of meters, stanzas, and notes").

Such an interpretation is contrary to the language and legislative history of the Copyright Act, analysis by expert agencies and relevant judicial decisions. As

the District Court correctly concluded, a copyrighted work is performed publicly by means of a transmission only if a recitation, rendering, playing, dancing, or acting of the copyrighted work is “transmitted in a manner designed for contemporaneous perception.” SPA 5. In the case of an audiovisual work, its images must be shown or its accompanying sounds made audible. 17 U.S.C. § 101 (definition of perform).

Downloads are the functional equivalent of the delivery of physical products, such as the purchase of DVDs, CDs and video games. In either case, the consumer rather than the vendor ultimately decides whether and when to play, render, or show the work using his or her copy, and in fact may never make any use of the copy at all. There is no rendering, playing, or showing of images or sounds as the download process takes place. Thus under the relevant statutory provisions, no transmission or other communication of a *performance* occurs in the download process. Just as the post office performs a *delivery* function rather than a *communication* function, downloads likewise deliver content to the end user and in no way communicate this content through a rendering, playing or showing.⁶

⁶ A postal carrier would have to read a letter to the recipient to accomplish a performance rather than a delivery of the content, just as a transmission must be designed to render, play or show the copyrighted content to the recipient for it to be a performance of that content.

Absent transmission of a contemporaneously perceptible performance, downloads simply do not implicate the performance right.⁷

The types of downloads made by the applicants in this proceeding are not transmitted in a manner designed for contemporaneous perception. Accordingly, they are not performances. Instead, they are transmissions of copies of works that can be played (or not) by the consumer at some point only after being received. As such, they fall beyond the scope of the public performance right.

A. The Plain Language of the Copyright Act Makes Clear that a Transmission Is Not a Performance Unless It Is Designed to Deliver a Rendering, Playing or Showing Capable of Contemporaneous Perception

The question whether a download is a public performance is primarily one of statutory construction. Thus, any analysis of this question “starts with the language of the statute itself.” *United States v. Kinzler*, 55 F.3d 70, 72 (2d Cir.

⁷ ASCAP’s argument that downloads and streams are indistinguishable because both are capable of “near-simultaneous playback,” ASCAP Br. at 41, misses the distinction drawn in the statutory provisions. Although certain technology can be used to enable playback of the first part of some downloads delivered in a piecemeal manner, while the remainder of the download is progressing, as the District Court correctly found, there is a stark difference between a vendor’s delivery of a *copy* which the consumer can keep and play, render or show (or not), and delivery of a performance where the vendor provides the playing, rendition, or showing itself. SPA 7; *see also* RealNetworks Br. at 36-37. As the District Court further stated, the “availability of prompt replay” through use of such technology (even before a file has been fully downloaded) would not change the fact that the download was in fact a transmission of data, rather than a streamed performance. SPA 7.

1995). The Court must “read a statute applying the ordinary, contemporary, common meaning of the words used. . . . When the language of the statute is clear and does not contradict a clearly expressed legislative intent, [the Court’s] inquiry is complete and the language controls.” *Id.* (internal quotation marks omitted).

Section 106(4) of the Copyright Act grants copyright owners of musical works the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). The scope of this right is determined by a series of definitions in Section 101 of the Act. First, under the Act, to “perform or display a work ‘publicly’ means –”

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a *performance* or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.

Id. § 101 (emphasis added). There is no dispute that paragraph (1) applies to performances made to a physically-present “live” audience and thus is not relevant here. Rather, it is paragraph (2) (the “transmit clause”) and the scope of its application to electronic delivery that is at issue here.

Interpretation of the transmit clause depends in turn upon the definitions of “perform” and “transmit”:

To “perform” a work means to recite, *render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture of other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.*

....

To “transmit” a performance or display is to communicate it [the performance or display] by any device or process whereby *images or sounds* are received beyond the place from which they are sent.

Id. § 101 (emphasis added).

The Copyright Act contains one other definition critical to understanding the error of ASCAP’s position in this case, particularly with respect to sound recordings. Section 115 provides a compulsory license for the use of musical compositions in the reproduction and distribution of audio copies of musical works. It includes specific provisions concerning copies delivered by means of transmission – such as the downloads at issue here. These are called “digital phonorecord deliveries” or “DPDs,” which are defined in Section 115(d):

A “digital phonorecord delivery” is each individual delivery of a phonorecord by digital *transmission* of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, *regardless of whether the digital transmission is also a public performance* of the sound recording or any nondramatic musical work embodied therein.

Id. § 115(d) (emphasis added).⁸

From the foregoing definitions, it is very clear that the only transmissions that qualify as performances are those that communicate a contemporaneously perceptible rendering, playing or showing of the work so as to allow images or sounds to be received beyond the place from which they are sent.

First, if Congress had intended all transmissions to be performances, Congress would have added “transmit” to the list of activities within the definition of “perform” (*e.g.*, “recite, render, play, *transmit*, dance, or act it . . .”). Congress did not do that. Instead, Congress provided that a public performance is a transmission *of a performance* of a work, and supplied a separate definition of “transmit.” That definition, in turn, requires that observable images and/or audible sounds (not copies of prior performances that the recipient can choose to play or not) be received at a remote location. This language is much more consistent with the District Court’s conclusion that only transmissions that involve “perceptible rendition” are public performances, SPA 5, than it is with the interpretation ASCAP invites this court to adopt: that every transmission is a performance.

Second, if all transmissions of prerecorded music were performances, the statutory definition of DPD would not indicate that certain transmissions of sound

⁸ No one disputes that downloads qualify as DPDs. *See* 37 C.F.R. §§ 385.2 (defining a “permanent digital download” as a form of DPD), 385.11 (defining a “limited download” in terms that echo the statutory definition of DPD).

recordings are DPDs “regardless of whether the digital transmission is also a public performance.”⁹ Construing a statute requires that a court “give effect, if possible, to every word Congress used.” *Watt v. Alaska*, 451 U.S. 259, 278 (1981) (quotation marks omitted). Application of that principle here compels the conclusion that not all transmissions of prerecorded music are performances, and that downloads and performances are two entirely different things.

The legislative history further confirms that a performance must convey a rendering, playing or showing that allows for contemporaneous listening or viewing of sounds or images. As Congress explained:

[A] singer is performing when he or she sings a song; a broadcast network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

⁹ Legislative history further illustrates the clear and intentional distinction between DPDs and performances. See H.R. Rep. No. 104-274 at 28 (1995) (a DPD “*may* also constitute a public performance”) (emphasis added); S. Rep. No. 104-128, at 27 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356, 374 (speaking conditionally of the case “where a digital audio transmission is a digital phonorecord delivery as well as a public performance . . .”). ASCAP seems to read the relevant statutory language backwards. See ASCAP Br. at 27-28, 45-46. While it is true that a single transmission may be both a DPD and a performance, this in no way signifies that *all* transmissions constitute both.

H.R. Rep. No. 94-1476, at 63 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5676-77. In each case, the activity cited is exactly the type of activity one would expect to constitute a performance – activity (including transmission) involving real-time rendering of sounds and/or images.

Conversely, legislative history indicates that uses of works that do not convey a rendering, playing or showing that allows for contemporaneous listening or viewing of sounds or images were excluded from the definition of performance. During the process leading to the general revision of the Copyright Act in 1976, the definition of perform was specifically modified to delete the term “represent,” which had been included in earlier drafts of the definition of “perform.” This deletion was made so that reproduction of copies within computer systems would not be considered performances. *See* Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision Part 6, at 22 (House Comm. Print 1965). Specifically, “[a] computer may well ‘perform’ a work by *running off* a motion picture or *playing* a sound recording as part of its output, but its internal operations do not appear to us to fall within this concept.” *Id.* (emphasis added). Through this change, Congress clearly intended to limit the definition of perform to the commonsense meaning of rendering, playing or showing a work for contemporaneous perception and to avoid the type of counterintuitive results that

would derive from a definition that would encompass technical performances within computer systems.

ASCAP argues that downloads are performances, regardless of whether there is a performance that is transmitted in a manner designed for contemporaneous rendition, because prerecorded music of the kinds embodied in audio files, music videos, video games, TV shows and movies was previously performed and recorded – perhaps in a studio decades ago – and that recorded performance, rather than sheet music, is transmitted. *See* ASCAP Br. at 23-24. However, that is simply an argument that all transmissions of prerecorded music are performances, and it runs flatly counter to Section 115(d), which could not be clearer in indicating that Congress did not intend for all transmissions of sound recordings to be performances.

In the case of audiovisual works such as music videos, TV shows, movies or the output of video game software, the statutory language is clear that a performance takes place only when the images constituting the work are *shown* in a sequence or the sounds in the work are *made audible*. *See* 17 U.S.C. § 101 (definition of perform). Mere delivery of the audiovisual work through a download would not constitute a performance because there is no contemporaneous viewing of the images or hearing of the sounds. Yet, because a musical work – the notes and lyrics of a song – must first be recorded to be

included in an audiovisual work, ASCAP's argument is that the audiovisual download constitutes a performance of the *musical work* incorporated therein, even though the statutory language clearly states that it is not a performance of the *audiovisual work*. There is no evidence that Congress intended such a strange gerrymandering of rights as between types of works.

Moreover, if ASCAP were right that an antecedent studio performance is sufficient to implicate the public performance right for any later communication of a recording or copy of that studio performance, it is not evident why distribution of physical products such as DVDs, packaged software or CDs would not also implicate the performance right. Such a result is, of course, "absurd."¹⁰ ASCAP itself admits that "[s]ales of sound recordings in brick-and mortar stores cannot qualify as public performances." ASCAP Br. at 43-44. ASCAP's argument would render the statute's distinction between the distribution of a copy and the transmission or communication of a performance meaningless. Because ASCAP is obviously correct that physical product sales do not transmit or otherwise communicate a performance, this Court must reject ASCAP's attempt to characterize any transmission or other communication of a product incorporating prerecorded music as a public performance.

¹⁰ 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 8.14[C][3], at 8-192.1 (2009).

B. When Expert Agencies and Congress Considered This Issue in the 1990s, They Understood That a Transmission Is Not a Performance Unless the Work Is Capable of Being, and Intended to Be, Heard as the Transmission Is Received

Federal agencies charged with creating, analyzing, and implementing copyright policy have also considered the question of whether a transmission of a copyrighted work constitutes a performance. As the District Court noted, these “responsible authorities” collectively determined that a transmission is not a performance unless the performance being transmitted is delivered in a manner designed for contemporaneous perception. SPA 5. Congress accepted and adopted that interpretation when it enacted Section 115(d), described above.

In the 1990s, the federal government’s Information Infrastructure Task Force (“NII Task Force”), consisting of high-level representatives of “the Federal agencies that play a role in advancing the development and application of information technologies,” engaged in a comprehensive analysis of the intellectual property implications of the Internet. Working Group on Intellectual Property Rights, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure*, at 1 (1995) [hereinafter “NII Report”], available at <http://www.uspto.gov/web/offices/com/doc/ipnii/> (last visited July 21, 2009). The NII Task Force’s Working Group on Intellectual Property Rights exhaustively analyzed legal issues related to intellectual property and the Internet

and ultimately released an over 200-page final report with a definitive analysis of these issues. *See id.* at 3-4.

The expert agencies represented on the NII Task Force embraced the interpretation articulated above and in the District Court’s decision in no uncertain terms. Describing existing law concerning the application of the public performance right to the Internet, the NII Task Force found (in a passage cited by the District Court) that:

A distinction must be made between transmissions of copies of works and transmissions of *performances* or *displays* of works. When a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user’s computer, without the capability of simultaneous “rendering” or “showing,” it has rather clearly not been performed. Thus, for example, a file comprising the digitized version of a motion picture might be transferred from a copyright owner to an end user via the Internet without the public performance right being implicated. When, however, the motion picture is “rendered” – by showing its images in sequence – so that users with the requisite hardware and software might watch it *with or without copying the performance*, then, under the current law, a “performance” has occurred.

Id. at 71 (italics in original; underlining added).

In discussing the distribution right, the NII Task Force noted that a transmission of a copy might also constitute a performance: “If a copy of a motion picture is transmitted to a computer’s memory, for instance, and in the process, *the sounds are capable of being heard and the images viewed as they are received in*

memory, then the public performance right may well be implicated as well.” *Id.* at 214 n.536 (emphasis added).

Describing the need to distinguish between transmissions of copies and of performances, the NII Task Force added:

To delineate between those transmissions that are communications of performances or displays and those that are distributions of reproductions, one may look at both ends of the transmission. Did the transmitter intend to communicate a performance or display of the work or, rather, to distribute a reproduction of the work? Did the receiver simply hear or see the work or rather/also receive a copy of it? Did the receiver simply receive a copy or was it possible for her to hear or see it as well? License rates and terms will assist in determining the intent of the parties.

Id. at 218 n.544.¹¹

Regarding sound recordings, Congress was well aware of the NII Task Force’s analysis when it enacted the DPD provisions of Section 115, including the Section 115(d) definition described above. *See* S. Rep. 104-128, at 17, 1995 U.S.C.C.A.N. at 364. If Congress had wanted to address the NII Task Force’s interpretation of the *performance* right (e.g., to specify that all DPDs are performances), as Congress addressed the NII Task Force’s interpretation of the

¹¹ The Copyright Office likewise has resisted ASCAP’s position on this matter, stating that “we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place.” U.S. Copyright Office, A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act, at xxvii (2001).

distribution right in Section 115, Congress certainly could have done so. Instead, as described above, it adopted statutory language in Section 115(d) that is completely consistent with the NII Task Force’s conclusions concerning the scope of the performance right. Accordingly, the DPD amendments to Section 115 must be understood as Congressional affirmation of the NII Task Force’s conclusions. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 599-602 (1983) (finding validation of IRS decision in congressional acquiescence in the decision).

C. Case Law Supports the Conclusion that Downloads Involve Only Rights of Reproduction and Distribution, Not Public Performance

As the District Court rightly concluded, “characterization of a download as a reproduction of a musical work” – rather than a performance – “is consistent with the holdings of those courts that have addressed copyright infringement suits in the context of the unlicensed downloading of music over the internet using peer-to-peer file transfer programs.” SPA 5. Without exception, the courts have consistently found that unlicensed downloads violate copyright owners’ *reproduction* and *distribution* rights.¹² None of these cases concludes or even

¹² *See, e.g., New York Times Co. v. Tasini*, 533 U.S. 483, 498, 503-04, 506 (2001) (electronic databases disseminating literary works by means of transmission infringe reproduction and distribution rights); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights. Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”); *UMG Recordings, Inc. v. Green*, 2009 WL 1310457, *1 (N.D.N.Y. May

suggests that copyright owners' performance rights are likewise violated by unlawful downloading.¹³ And *Amici* are aware of no court that has held that a download is a performance.

The cases that ASCAP relies upon are not to the contrary. ASCAP Br. at 25. In each case cited by ASCAP, the transmission found to be a public performance involved a rendering or showing of the work capable of being heard or seen by the public in real time. See, e.g., *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000) (satellite transmission of football broadcasts); *Columbia Pictures Indust., Inc. v. Redd Horne Inc.*, 749 F.2d 154 (3d Cir. 1984) (transmission of motion picture in video store); *David v. Showtime/The Movie*

7, 2009) (downloading and sharing sound recordings “constitute an unlawful reproduction . . . and a violation of Plaintiffs’ exclusive right to distribute their recordings”); *Warner Bros. Records, Inc. v. Hegr*, 2009 WL 175082, *2 (E.D. Cal. Jan. 14, 2009) (Maj. Op.) (same), *adopted by* 2009 WL 530900 (E.D. Cal. Mar. 3, 2009); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 165 (D. Mass. 2008) (the rights at issue in case alleging unlawful download and distribution of music files are those of distribution and reproduction); *Sony Pictures Home Entm’t Inc. v. Lott*, 471 F. Supp. 2d 716, 722 (N.D. Tex. 2007) (“it is well-established that unauthorized downloading and uploading of copyrighted media files . . . is a violation of the copyright holders’ exclusive rights to reproduce and distribute the files”); *Maverick Recording Co. v. Goldshteyn*, No. Civ. A. 05-4523 (DGT), 2006 WL 2166870, at *3 (E.D.N.Y. July 31, 2006) (same); *UMG Recordings, Inc. v. Stewart*, 461 F. Supp. 2d 837, 842 (S.D. Ill. 2006) (same).

¹³ The Copyright Office has likewise described these infringement cases as involving violations of copyright owners’ *reproduction* and *distribution* rights, not performance rights. See U.S. Copyright Office, *Copyright and Digital Files*, available at <http://www.copyright.gov/help/faq/faq-digital.html> (last visited July 21, 2009).

Channel, Inc., 697 F. Supp. 752 (S.D.N.Y. 1988) (broadcast of musical compositions through local cable channels). These cases do not stand for the proposition that *all* transmissions are public performances, whether or not the recipient of the transmission can hear or see the performance at the time of transmission, and ASCAP has suggested no logical basis for making that dramatic leap.

There are numerous other cases where courts have applied the performance right to transmissions of copyrighted works,¹⁴ as well as other ASCAP rate proceedings involving public performances by means of transmission.¹⁵ The

¹⁴ See, e.g., *Woods v. Bourne Co.*, 60 F.3d 978, 983 (2d Cir. 1995) (television and radio broadcasts); *Agee v. Paramount Communications, Inc.*, 59 F.3d 317 (2d Cir. 1995) (television broadcast and satellite transmission of program from network to television stations for broadcast); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321 (D.N.J. 2002), *aff'd on other grounds*, 342 F.3d 191 (3d Cir. 2003) (internet streaming); *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ. A. 00-121, No. Civ. A. 00-120, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000) (internet transmissions); *Infinity Broadcasting Corp. v. Kirkwood*, 63 F. Supp. 2d 420 (S.D.N.Y. 1999) (dial-up listen line for radio broadcasts); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789-90 (N.D. Cal. 1991) (transmission from central console to hotel guest's room); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290 (S.D.N.Y. 1991) (transmissions by a cable network to local cable companies).

¹⁵ See, e.g., *United States v. American Soc'y of Composers, Authors & Publishers*, 309 F. Supp. 2d 566 (S.D.N.Y. 2004) (background music services); *United States v. American Soc'y of Composers, Authors & Publishers*, No. 41 Civ. 13-95 (WCC), 1999 WL 335376 (S.D.N.Y. May 26, 1999) (local cable systems); *United States v. American Soc'y of Composers, Authors & Publishers*, 981 F. Supp. 199 (S.D.N.Y. 1997) (radio stations); *United States v. American Soc'y of Composers, Authors & Publishers*, No. Civ. 13-95 (WCC), 1997 WL 346735 (S.D.N.Y. June

common thread connecting these cases – and what distinguishes them from the question here – is that the object of the transmission in each instance was a playing, rendering, or showing of a work in a manner designed for contemporaneous perception, and thus qualifying as a performance. While the District Court below may be the first to have addressed directly the question of whether a download constitutes a performance, its decision fits squarely into a large body of related case law, and no case suggests the District Court reached the wrong result.

D. In Other Contexts, ASCAP Has Acknowledged the Distinction Between Transmissions of Copies and Transmissions of Performances

In 2001, faced with the widespread perception that the claim that all transmissions are performances was overreaching and just plain wrong, ASCAP joined with other major musical work licensing organizations in a joint statement to Congress, acknowledging the difference between downloads and performances.

They stated:

[W]e wish to respond to the suggestion by the proponents of these changes that certain economic rights expressly granted under the Copyright Act have no value in the digital domain. We appreciate that different uses of different rights may be valued differently in the

24, 1997) (WTBS); *United States v. American Soc’y of Composers, Authors & Publishers*, 870 F. Supp. 1211 (S.D.N.Y. 1995) (satellite transmission by network to affiliates).

marketplace. At opposite ends of the spectrum, for example, it can be said that *“pure” audio-only downloads should not require payment for the public performing right* and that *“pure” audio-only webcasts should not require payment for the mechanical right*. *In between those examples, however, both rights may be implicated.*

Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. On Courts, the Internet and Intellectual Property of the H. Comm. On the Judiciary, 107th Cong. 84 (Dec. 2001) (Prepared Statement of the American Soc’y of Composers, Authors & Publishers, Broadcast Music, Inc., and the National Music Publishers’ Assn./Harry Fox Agency) (footnote omitted) (emphasis added). This statement remains available on ASCAP’s website. <http://www.ascap.com/legislation/jointstatement.html> (last visited August 10, 2009). Having embraced the proposition that “pure” downloads do not implicate performance rights in order to avoid congressional action, ASCAP should not now be heard to argue a contrary position.

II. Musical Work Copyright Owners Are Fairly Compensated for Downloads Under Reproduction/Distribution Licenses

ASCAP is simply wrong when it contends that “without performance rights [in downloads], music authors will not be fairly compensated.” ASCAP Br. at 46. This statement obscures the real result that ASCAP is trying to achieve: a new and additional fee to itself, and double payment to songwriters and publishers, for a single activity.

The distinction between transmissions of performances and transmissions of copies is important as a practical matter only in the context of musical works, where copyright owners have bifurcated the licensing of their rights. Based on the traditional clear distinction between reproductions/distributions and performances, musical work copyright owners have historically licensed reproduction and distribution rights directly or through administrators or licensing agencies, while they have historically licensed performance rights through performance rights organizations such as ASCAP. ASCAP (unlike its members) does not receive any fees for licenses of reproduction/distribution rights, only performance rights. Now, ASCAP is attempting to license as a public performance the same activity that its members have already licensed directly or through a different licensing agent as a reproduction and distribution. *See RealNetworks Br. at 37-38.*

When *Amici's* member companies and other legitimate companies distributing entertainment products through online and mobile distributors want to

use pre-existing musical compositions for reproduction and distribution, they negotiate licenses and compensation with the copyright owners. When they wish to use original musical compositions, they commission songwriters and negotiate fees directly with the authors or their representatives. In both cases, fair consideration is paid.

In the case of audiovisual works and video game software with audiovisual outputs, the copyright owners or the songwriters are at liberty to decline license requests or commissions, or to seek whatever compensation the market will bear. When negotiated and agreed upon, “synchronization” licenses for pre-existing musical compositions (which authorize the reproduction and distribution of musical works in synchronization with audiovisual content) often require payment of thousands – or in the case of major motion pictures and some video games, tens of thousands – of dollars. And for original music, songwriter agreements, which include reproduction and distribution rights among other rights, often provide for payment in the range of hundreds of thousands of dollars – sometimes well over a million dollars for major motion pictures. All of these fees are negotiated at the outset, without regard to whether or not the audiovisual product ever actually makes a profit for the producer.

In the case of audio files, “mechanical” licenses are typically granted pursuant to voluntary, negotiated agreements, albeit against the backdrop of

Section 115 of the Copyright Act, which provides a compulsory license for such uses, subject to payment of “reasonable rates.” 17 U.S.C. § 115(c)(3)(C).

For both audiovisual and audio-only products, when compensation is finally agreed and paid, the songwriters are paid, either directly or through their publishers, in accordance with their contracts. ASCAP essentially asks this Court to rewrite a huge body of existing agreements to include greater compensation. But there is no justification for giving music publishers and songwriters the benefit of extra royalties beyond those for which they originally bargained when they authorized the relevant activity as a reproduction and distribution. ASCAP’s attempt in this matter to change – mid-stream – the understanding of copyright law that has fostered a long-working business model for payment of songwriters and music publishers is both wrong, for the many reasons set forth herein, and patently unfair.

Accordingly, where there is no contemporaneous rendering or playing capable of being heard, performance rights organizations should not collect additional royalties. Requiring performance licensing for downloads would simply enable musical work licensing agents to whipsaw copyright users with duplicative requests for payment for the same activity. This Court should not permit such an outcome.

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully urge this Court to affirm the ruling of the District Court, concluding that downloads of musical works made by the applicants in this proceeding, and other similar downloads, do not constitute public performances where there is no contemporaneous rendering, playing, or showing so that the musical work may be heard and/or seen at the time the transmission is received.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

Amicus Curiae certify that they complied with the above-referenced rule and that according to the word processor used to prepare this brief, Microsoft Word 2002, this brief, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 6,906 words, and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2009, I caused the foregoing brief to be filed with the Court as an email attachment submitted to civilcases@ca2.uscourts.gov, along with ten paper copies sent via express mail.

I further certify that on this 17th day of August, 2009, I mailed two copies of the foregoing document by U.S. mail to the following:

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