

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,

Defendant.

In the matter of the Application of

AOL LLC, Yahoo! Inc. and
RealNetworks, Inc.

Applicants,

for the Determination of Reasonable
License Fees.

Civil Action No. 41-1395 (WCC)

BRIEF AMICUS CURIAE
OF THE DIGITAL MEDIA
ASSOCIATION, ENTERTAINMENT
MERCHANTS ASSOCIATION,
NATIONAL ASSOCIATION OF
RECORDING MERCHANTISERS,
AND CONSUMER
ELECTRONICS ASSOCIATION

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INTERESTS OF THE AMICI CURIAE

The **Digital Media Association (“DiMA”)** is a trade association composed of 25 member companies that develop and utilize Internet-based digital 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, Netflix and Motorola as well as smaller companies such as Live365, Spatial Audio Solutions, and Ecast. Among other activities, DiMA member companies distribute audio and video content to customers. Apple sells reproductions (commonly known as downloads) of musical works (“phonorecords”) such as single tracks and albums through its iTunes store. Apple and other DiMA members, such as Amazon.com, also sell videos, including television shows, short videos and full-length movies, which are delivered via digital download.

In addition to Applicants RealNetworks and Yahoo!, Napster, Microsoft, and MusicNet (through affiliates) sell downloaded reproductions (“permanent downloads”) and offer subscription services that allow customers to download songs to a personal computer and/or to a portable music device (“conditional downloads”). So long as the user pays a monthly subscription fee, she may continue to enjoy the conditional downloads privately.

All of these innovative activities are ways of doing the same thing that physical “bricks and mortar” stores have been doing for decades -- without paying performance royalties to ASCAP on account of store sales or rentals. The *only* relevant difference is *how* the copy gets to the customer through these services -- not *what* the customer gets. Like the Applicants in this proceeding, other DiMA members -- such as Pandora, Live 365, and others -- also use the Internet to publicly perform musical works via streaming. When these companies provide real-

time streams that are audible to the public -- in the same manner as broadcast radio and television stations do -- they obtain licenses to publicly perform musical works and pay royalties.

The **Entertainment Merchants Association (“EMA”)** is the not-for-profit international trade association dedicated to advancing the interests of the \$32 billion home entertainment industry. Established in April 2006 through the merger of the Video Software Dealers Association (“VSDA”) and the Interactive Entertainment Merchants Association (“IEMA”), EMA represents approximately 600 companies throughout the United States, Canada, and other nations. Its members operate approximately 19,000 retail outlets in the U.S. that sell and/or rent DVDs and computer and console video games. Membership comprises the full spectrum of home entertainment retailers (from single-store specialists to multi-line mass merchants), and other related businesses that constitute and support the home entertainment industry. EMA members include retailers who publicly perform motion pictures to the public and retailers who offer, and who plan to offer, downloadable reproductions of motion pictures containing musical works.

Established in 1958, the **National Association of Recording Merchandisers (“NARM”)** is a not-for-profit trade association that serves the music retailing community in the areas of networking, advocacy, information, education, and promotion. The Association's membership includes music and other entertainment retailers, wholesalers, distributors, record labels, multimedia suppliers, and suppliers of related products and services, as well as individual professionals and educators in the music business field. NARM's retail members operate 7,000 storefronts that account for almost 85 percent of the music sold in the U.S. music market. Many of them are also engaged in the digital delivery of phonorecord reproductions by download.

The **Consumer Electronics Association (“CEA”)** is the preeminent trade association of the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. Its membership consists of over 2,100 corporate members that contribute more than \$140 billion to the U.S. economy, and includes companies that make and distribute devices that allow consumers to download and listen to music.

As leaders in online music and media stores and subscription services, digital devices, and technology, amici and their members recognize the value of creativity and copyright, as well as of intellectual property generally. Many of amici’s members rely on their own valuable intellectual property, including patents, trademarks, and copyrights, and they recognize that royalties must be paid when rights are exploited.

However, amici also appreciate that royalties should be paid only when others’ rights are exploited. Assertions of rights where none exist or none are implicated should be rejected. Amici are relying on the Court to enforce Congress’ direction and limitations so that amici’s members are not forced to pay royalties for rights that are not implicated by their activities. If ASCAP prevails in its overreaching efforts, amici’s members will pay extra royalties, costs to consumers will rise, uncertainty will seep into investment and innovation decisions, and the legal digital music and media industries will suffer.

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Pursuant to the Scheduling Order dated January 22, 2007, entered by the Court in this proceeding, the Digital Media Association (“DiMA”), the Entertainment Merchants Association (“EMA”), the National Association of Recording Merchandisers (“NARM”), and the Consumer Electronics Association (“CEA”) (collectively “amici”) respectfully submit this brief amicus curiae in support of the Motion for Partial Summary Judgment of AOL LLC, Yahoo! Inc., and RealNetworks, Inc., for a determination that the download of a copy of a musical work does not constitute a public performance under the Copyright Act (“the Act”). The Second Circuit has acknowledged that “rate court decisions have effects that reach beyond the litigants involved in the proceedings.” *United States v. Broad. Music, Inc. (Application of Music Choice)*, 426 F.3d 91, 98 (2d Cir. 2005) [hereinafter *Music Choice 4*]. For the reasons set forth below, amici urge the court to find that a download does not constitute a public performance under the Act and is therefore not an activity for which additional royalty payments are due to copyright owners.

INTRODUCTION AND BACKGROUND

The issue in this case is whether the mere downloading, *by itself*, of a file containing a musical work implicates the right of “public performance.” The answer is manifestly no. When digital media companies act like traditional retail stores and deliver downloads to customers, they are responsible for reproduction and distribution royalties. When they act like broadcast radio or television stations, they are responsible for public performance royalties, including payments to ASCAP. ASCAP is seeking to extract additional royalties, in the form of public performance royalties, from downloading activities when there is no basis in law or policy for doing so.^{1/}

^{1/} This brief will refer to downloaded phonorecords and audiovisual works interchangeably because in either case the download does not constitute a public performance of an underlying

The delivery of copies of audio and audiovisual content by digital download to paying customers has revolutionized home entertainment commerce and provided tremendous benefits to copyright owners, who otherwise lose hundreds of millions of dollars to Internet piracy. Amicis' members recognize their obligation to pay content owners for the delivery of downloaded copies to consumers. Amicis' members negotiate for and pay all appropriate royalties pursuant to licenses with copyright owners. The imposition of additional royalties for "public performances" is unwarranted as well as unlawful -- and would be devastating in a market where consumers already have the alternative of getting most music and videos they want for free from illegal pirate Internet sites.

ARGUMENT

Whether in the form of an audio or video file, the download of a musical work does not constitute a public performance under the Act. It is neither a performance nor a "public" performance of a musical work. As set forth below, experts who have studied the issue have consistently rejected arguments by ASCAP and other performing rights societies to the contrary. Accepting ASCAP's arguments would be harmful to competition, consumers, content creators, and users -- and contrary to this Court's role as a safeguard against ASCAP's anti-competitive conduct.

I. A DOWNLOAD OF A MUSICAL WORK DOES NOT CONSTITUTE A PUBLIC PERFORMANCE

Although ASCAP's position in this proceeding has not been made entirely clear, amici understand it to reflect the culmination of years of overreaching by performing rights societies

musical work. ASCAP's argument ostensibly contemplates that the delivery of movies for download would constitute a public performance as well.

with regard to their pursuit of public performance royalties in association with the transmission of digital downloads. ASCAP has for some time taken the unsupportable position that “a transmission of music on the Internet . . . by way of downloading” is a “tak[ing]” that “substitute[s] for other means of performance, such as a broadcast radio station,” and for which a performance fee “must” therefore be paid. Reply Comments of the American Society of Composers, Authors and Publishers, Copyright Office, Docket No. 000522150-0150-01, at 6 (filed Sept. 5, 2000); *see also* JOINT STATEMENT OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS (ASCAP), BROADCAST MUSIC, INC. (BMI), THE NATIONAL MUSIC PUBLISHERS’ ASSOCIATION (NMPA) / HARRY FOX AGENCY (HFA) ON INTERNET USES OF MUSIC (NOV. 2001), *available at* www.ascap.com/legislation/jointstatement.html (arguing that downloads should be treated as public performances).^{2/}

As set forth below, these positions are contrary to law and entirely unjustified and unreasonable. In order for music to be “publicly performed,” there must be a “performance.” A “performance” is something the listener can hear. The plain meaning of the term is straightforward and supported by case law. No case supports the position taken by ASCAP that a performance of music can occur by mere transmission without being made audible to a listener.

^{2/} BMI for its part takes a similarly exaggerated and unsupportable view. *See* COPYRIGHT OFFICE AND NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, JOINT STUDY OF 17 U.S.C. §§ 109 AND 117, Transcript of Hearings of Nov. 29, 2000 at 198-201 (arguing that transmitting a download is a public performance even if it is *never heard* by the recipient) [hereinafter JOINT STUDY TRANSCRIPT]. The basis for BMI’s contention appears to be nothing less than arguing that a download implicates a non-existent “making available” right, which in turn the societies consider (without justification) to be a public performance under U.S. law. *See* Statement of Marvin Berenson, JOINT STUDY TRANSCRIPT at 196-97 (“our contention is that download or not, *if there’s a transmission, the public performance right is implicated* along with other rights”) (emphasis supplied); *see also id.* at 163 (“Digital transmissions on the Internet for downloading music . . . implicate several copyright rights including the public performing right, the public display right, the reproduction right in addition to the distribution right.”); *id.* at 164 (“Digital transmissions on the Internet constitute public performances of the underlying musical work under Section 106(4) of the Act when made to the public.”).

Moreover, distributing a copy of a work to a new owner is not a “public performance” of the work. ASCAP’s position is clearly wrong.

A. A Digital Download Is Not A “Performance”

The download of a musical work is not a public performance as defined in the Act because digital downloads are not made perceptible to their recipients, as radio or television programming is. Statutory analysis begins with the text and plain meaning of the statutory language itself. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337-38 (2d Cir. 2006). The essence of a public performance of a musical work is that it is a perceptible, audible rendering of a song to an audience. The Copyright Act specifically defines “to perform” as follows:

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 or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

§ 101. The “recit[ation],” “render[ing]” and “play[ing]” of the work to make it perceptible (visible or audible) to the intended audience is the central and indispensable element of the definition.^{3/} *See Woods v. Bourne Co.*, 60 F.3d 978, 983 (2d Cir. 1995) (music performed when made audible in television and radio broadcasts); *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981) (music performed when radio played); *see also Nat’l Cable Television Ass’n, Inc. v. Broad. Music, Inc.*, 772 F. Supp. 614, 651 (D.D.C. 1991) (music performed when cable television programming seen and heard). The legislative history of the Act confirms that the

^{3/} The court’s holding in *NFL v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000) that constituent steps in the process of delivering a performance could not be isolated is not to the contrary. Defendants in that case were retransmitting live telecasts of NFL games into Canada without permission from the copyright owners. The instant case involves the authorized transmission of inaudible data files containing copies of musical works. Because a download is a copy -- not a performance -- and offered to individuals for individual use, the steps in the process of delivering a download are not performances either.

provision of “images or sounds” is a necessary predicate to a performance. See H.R. Rep. 94-1476, at 63-64 (1976) (giving as examples of “performance,” the singing or playing of music, the showing of movies, and the aural performance of sounds); see also *id.* at 64 (noting that a “performance” is comprised of sounds).^{4/} The transmission of an inaudible data file containing a musical work bears no resemblance to the conventional understanding of the term “perform.” Nor does anything in the definition implicate the sort of substitutional, generalized “making available” right that ASCAP seems to believe is inherent in the term. See *infra* I.B.

In the case of a musical work, to perform a work has no other meaning than to make the work audible to its intended recipient. Indeed, “the interpretation of ‘play,’ as used to define ‘perform’ in § 101 of the Copyright Act, has generally been limited to instances of playing music or records.” *Allen v. Academic Games League of Am.*, 89 F.3d 614, 616 (9th Cir. 1996); see also *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986) (performing by playing a video cassette); *Columbia Pictures Indus., Inc. v. Redd Horne*, 749 F.2d 154, 158 (3d Cir. 1984) (same).^{5/} No court has ever found a “performance” where the copyrighted work is not being made audible or visible to the recipient.

ASCAP may claim that the mere transmission of a musical work constitutes a performance of that work, but it has no basis to do so. The Act defines “to transmit a performance” as “to communicate it by any device or process whereby *images or sounds are received* beyond the place from which they are sent.” § 101 (emphasis supplied). Nowhere does

^{4/} The statutory definition is consistent with the conventional understanding of the words, focusing on the importance of being made perceptible to an audience. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE: FOURTH EDITION (2006) (defining “perform” consistently as, *inter alia*, “to enact (a feat or role) before an audience” or “to present a dramatic or musical work or other entertainment before an audience”).

^{5/} In these cases, the performances were held to be “public” because of the nature of the business involved, as the performances took place as part of an offer of performances to the public, not resulting in the distribution of copies. See *infra*.

the definition provide that mere transmission is the equivalent of performance and nowhere do cases support such an extreme view. Streaming an audible version of a song to anyone with a personal computer and an Internet connection may implicate the public performance right (in the same way that broadcasting that song over radio airwaves does). *See Video Pipeline, Inc. v. Buena Vista Home Entm't*, 192 F. Supp. 2d 321 (D.N.J. 2002), *aff'd on other grounds*, 342 F.3d 191 (3d Cir. 2003). But there is no support for the view that the digital transmission of a copy of a musical work to a user's computer implicates the public performance right. *See Freeplay Music, Inc. v. Cox Radio, Inc.*, 404 F. Supp. 2d 548, 551 (S.D.N.Y. 2005) (distinguishing between reproduction and public performance in a transmission); *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (distinguishing between distribution and public performance in a transmission). Similarly, one prominent treatise notes that, while "the act of broadcasting a work is itself a performance of that work . . . the mere act of input into a computer or other retrieval system would not appear to be a performance" 2-8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.14[B][1] (2006) [hereinafter NIMMER ON COPYRIGHT].

When amici members transmit a digital download, they are doing nothing more than "sending a copy" -- delivering a reproduction to the recipient's computer for subsequent playback. That download is a phonorecord (in the case of a musical work) or a copy (in the case of other works) delivered via transmission. The transmitter pays royalties for copying and distributing a copy of the work, not publicly performing it. A performance is implicated only where one "transmit[s] or otherwise communicate[s] a performance or display of a work." If Congress had meant to say that any transmission of a musical work constitutes a performance of that work, the statute would have said that a performance occurs whenever one "transmit[s] or

otherwise communicate[s] a performance or display of a work, *including by way of distribution of a copy or phonorecord of the work.*” Congress, however, did no such thing.

The “transmission” clause in the definition of “public performance” simply makes clear that a performance to the public can be *furthered* by a device or process that allows it to be received publicly, or “beyond the place from which [the performance is] sent.” 17 U.S.C. § 101.

Under the definitions of “perform,” “display,” “publicly” and “transmit” in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting 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.

H.R. Rep. 94-1476, at 63 (1976). The common thread in each of those examples is that sounds are being rendered audible by the acts or transmissions described. Thus, while a transmission can be a manner of delivering a performance, it can only be such when it entails the rendering of sounds and/or images.

B. A Digital Download Is Not A “Public Performance”

The delivery of a download cannot be considered a “public performance” under the Act either. Under the Copyright Act, a performance is a “public performance” only in two specific circumstances: either because (1) the performance occurs at a “public” place (*i.e.*, a place open to the public or any place where a substantial number of persons outside a normal circle of friends and family) or (2) the performance is transmitted to a public place or to the public. 17 U.S.C. § 101. The provision of a digital download to an individual in his or her home is not a performance of a musical work in a “public place.” Nor is it the transmission of a performance to a “public place” or the “public.” A digital download can be considered a “public

performance” only if it constitutes a transmission of a performance -- which it does not. *Accord* H.R. Rep. 94-1476, at 65 (audience may be dispersed geographically or temporally but an actual performance must still be made or offered to the public).

Of critical import to the instant analysis is the fact that dominion and control of the content transmitted as a digital download is transferred from the transmitter to the recipient, whereas transmitting a performance to the public is *limited* to rendering the work. The reasoning in *Video Pipeline* illustrates this distinction. There, the court determined that a public performance of a movie trailer occurred because “any member of the public” could select a clip to be “shown” to them from the file server. *Video Pipeline*, 192 F. Supp. 2d at 331 (*citing Columbia Pictures Indus. v. Redd Horne*, 749 F.2d at 158)). By contrast, as with the reproduction and sale of a physical CD, a download of a musical work is a transaction that results in the reproduction of a copy that is under the recipient’s dominion and control, not a performance of the work. *Compare* NIMMER ON COPYRIGHT at § 8.14[C][3] (“*if the same copy . . . of a given work is repeatedly played (i.e., ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance*”). A download is not a performance, or a public performance, of a musical work.

Moreover, just as selling a CD or DVD in a physical retail outlet does not constitute performing a work to “the public,” the provision of a digital download is an individual transaction that provides the recipient -- and only the recipient -- with the capacity to “render” that particular work on a device. While the capability to render that particular work -- and any and all other musical works in a digital music provider’s retail catalog -- is offered to the public in the form of a digital download, the *performance* of that work is not so offered. The transmission of a public performance consists of the provision of content in a perceptible form

that is simultaneously rendered (or intended to be rendered) to members of the public. By contrast, the offering to the public of the mere capability to render content -- and the individualized transmission of such capability to consumers upon request -- does not constitute a public performance.

In light of the foregoing, the language Congress added to the Act in the 1995 amendments regarding the statutory license for making and distributing phonorecords is appropriately understood as not altering the traditional definition or meaning of what constitutes a “public performance.” *See* Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) [hereinafter the DPRA], *codified at scattered sections of* 17 U.S.C. Specifically, Section 4 of the DPRA clarified that the existing “mechanical license” covered certain digital transmissions, called “digital phonorecord deliveries.” 17 U.S.C. §§ 115(c)(3)(A), 115(d). But the DPRA did not amend Section 101 nor did it expand the definition of a “public performance” to include every digital transmission. *See* S. Rep. 104-128, at 37 (1995) (DPRA intended to “confirm and clarify” the existing rights of copyright owners, not to expand them); *id.* (DPRA not intended “to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers”).^{6/} ASCAP cannot rely on these amendments to justify an unwarranted expansion of the right of public performance.

^{6/} Interpreting Section 115 consistently with the entire Act as well as the body of law at the time of its amendment, it cannot be read to have created new public performance rights by at most acknowledging uncertainty. The implication of ASCAP’s argument for an expanded public performance right would be that Congress intended movie and record companies to obtain performance licenses for making and distributing CDs and DVDs -- clearly an absurd result. *Accord Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (statutes should be construed to avoid absurd results).

Nor is there any basis for recognizing the generalized right of “communication to the public” or of “making available” contained in international treaties separately from the specific exclusive rights enumerated in the Act. *See* 17 U.S.C. § 104 (“No right . . . may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.”); *see also Edison Bros. Stores, Inc. v. Broad. Music, Inc.*, 954 F.2d 1419, 1426 (8th Cir. 1992) (“Congress was emphatic that the United States’ participation in the Berne Convention should not give rise to an expanded claim of copyright protection.”); U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, 94 (2001) (United States implemented “making available” right through the distribution right) [hereinafter SECTION 104 REPORT].

C. There Is No Support For ASCAP’s Overreaching From Those Who Have Previously Considered The Argument

Expert agencies entrusted to study copyright issues in the digital environment agree that a correct understanding of the statute precludes the sort of double payment ASCAP seeks. For example, during the Senate’s consideration of the DPRA, the Information Infrastructure Task Force’s Working Group on Intellectual Property Rights issued a comprehensive report on the changing landscape of intellectual property law. *See* INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995) [hereinafter NII REPORT]. In the NII Report, the Working Group concluded that there must be a distinction between transmissions of works and transmissions of performances or displays of works. *See* NII REPORT at 71. The NII Report further explained that “[w]hen 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.*” *Id.* (emphasis supplied).

The Register of Copyrights has been equally clear in her conclusion that the transmission of a download of a musical work does not constitute a public performance. *See* SECTION 104 REPORT, at xxvii (“[W]e do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place.”); *see also* HEARING ON THE INTERNET AND INTELLECTUAL PROPERTY BEFORE THE SUBCOMMITTEE ON COURTS, 52 Cong. 8 (2001) (Statement of Mary Beth Peters, Register of Copyright) (downloads are “the equivalent of going to a record store and buying a CD . . .”).

II. THE COURT MUST APPROACH ANY ARGUMENT TO EXPAND THE DEFINITION OF THE PUBLIC PERFORMANCE RIGHT WITH EXTREME CAUTION

ASCAP’s argument to expand the scope of the public performance right by applying it to music downloads would have anticompetitive effects by tilting the playing field unfairly in favor of those who manufacture CDs and DVDs in a factory rather than deliver them digitally to customers in the home. The result would be to stifle innovation and competition, to the detriment of consumers as well as copyright owners and users. This Court should be skeptical of ASCAP’s arguments for another reason, as well, because it represents an expansion of ASCAP’s market power and a potential violation of the consent decree governing these proceedings (“AFJ2”). Indeed, where ASCAP’s argument that a download constitutes a public performance violates AFJ2, the Court should be particularly skeptical of the claim.

A. Amici, Consumers and Copyright Owners Themselves Would Be Harmed By The Adoption Of ASCAP's Extreme View

Amicis' member companies are at the forefront of the digital revolution. The competitive environment is brutal. It is not easy to build legitimate, royalty-paying businesses when hundreds of millions of songs and videos are available for free. Yet amicis' members have invested hundreds of millions of dollars to create a new, legitimate marketplace, delivering value to consumers and copyright owners alike. By offering new ways for consumers to search for, select, organize, experience, and enjoy content in a manner that also compensates copyright owners, amicis' members are helping to create economic opportunity in an environment that has been radically altered -- and is constantly threatened -- by rampant copyright piracy. Amicis' members unlock value for content creators by weaning consumers away from illegal copies and by encouraging them to explore and buy more than the top songs or most popular movies. Music that would never make it to retail shelves sells on digital platforms. Songwriters and publishers earn money where they otherwise would lose access to the market and forgo revenue.

None of these efforts to build a legitimate marketplace are inexpensive or guaranteed success. While digital distributors may not need a warehouse for physical inventory, they do need to spend money on marketing new business models, on bandwidth, engineering and software development, and credit card fees. Because of claims like those made in this proceeding by ASCAP, the copyright licensing environment remains unsettled and unduly expensive and burdensome. In the meantime, hundreds of millions of copyrighted works are available for free on illegal file-sharing sites. In light of these challenges, it takes creativity, innovation, investment, and continuous effort to make these new business models work.

Amicis' members have expended hundreds of millions of dollars to enable their services, and once established, capital is continually invested to enhance and update them. Ongoing

investments in research and development, marketing, licensing, bandwidth, subscription management costs, and digital rights management are all substantial. A large portion of amicus' members' revenues are already consumed by royalty payments, representing a very substantial percentage of revenues. In addition, variable costs include direct customer support, bandwidth/hosting costs, credit card fees, hardware and software to operate back office and customer interfaces, data warehousing, and engineering to keep these interfaces secure and reliable and prevent on-line fraud and identity theft. For the music download business, industry projections are available:

Jupiter Research Estimates
US Music Forecast, 2005-2010, p.11

	<u>CDs</u>	<u>Downloads</u>	<u>Subscription</u>
Consumer spend	\$14.00	\$0.99	\$10/month
Distribution/payment	11%	30%	2%
Marketing	7%	3%	50%
Manufacturing	11%	4%	2%
Rights Holders	30%	65%	55%
Retailer	20%	-2%	-9%

Comparable estimates are not available for movie downloads -- but are likely similar. Simply stated, there is no room for additional and unjustified payments to performing rights societies, especially of the magnitude proposed by ASCAP.

A decision to shoehorn downloads into the statutory definition of a "public performance" would confer a windfall on copyright owners at the expense of licensees such as amicus' members. The immediate impact would be to reward ASCAP -- and other performing rights societies -- not for the reasonable value of their works, but for the bargaining power they possess. This would establish a "technology tax" applicable to digital media companies that is not imposed on physical media distributors or paid by digital media pirates. The manufacturer of a CD or DVD, for example, may receive the file via download over the Internet for reproduction

into millions of discs that are then distributed in physical delivery channels to make their way into the hands of consumers who perform them privately -- an act wholly beyond the reach of the performing rights societies and without further compensation to them.⁷¹ No one pays ASCAP a royalty for those mass-produced discs, even though the file from which they were made may have been downloaded from the master through the Internet. The mere fact that the phonorecords or copies were manufactured one-by-one in individual consumer homes rather than in a factory does not change the logic. Both require a license to reproduce, and both may involve the transmission of the file over wires, but neither implicate the public performance right.

Imposing public performance rights costs on amicus' members who sell copies of musical works via download would be extremely harmful. Digital retailers would be subject to an unprecedented triple royalty obligation whenever they sell a song: a mechanical royalty payment to songwriters and publishers for the right to distribute a digital copy of the work; a sound recording payment to the record labels; and an unprecedented third payment in the form of a performance royalty to songwriters and publishers. No music distributor has ever been subject to a triple royalty obligation in connection with the retail sale of a song or CD to consumers. Sanctioning such a scheme would inflict an unfair and discriminatory cost burden on amicus' members that would inhibit -- and perhaps reverse -- the ongoing evolution of a lawful, copyright-compliant, and consumer-friendly digital music marketplace. It would make the digital distribution of music less efficient, which would ultimately harm copyright owners.

The services operated by amicus' members expand output and stimulate competition by making more music available to a larger audience, helping both highly successful copyright

⁷¹ Of course, anyone who owns a CD can perform the work publicly from the CD, but the mere *ability* to do so has never meant that the reproduction of the CD itself *necessarily* implicates the right of public performance.

owners as well as those struggling to gain exposure of their works to consumers. ASCAP's proposed triple royalty scheme would cripple these efforts, harm the market for selling legitimate, royalty-bearing works, and reduce output, to the detriment not only of amici but copyright owners and consumers as well.

B. ASCAP's Argument That A Download Constitutes A Public Performance Violates The Second Amended Final Judgment.

There is no basis for concluding that downloading a copy of a musical work implicates the public performance right. However, *even if the Court concluded otherwise* -- which amici strongly believe would be unsupportable as a matter of law -- AFJ2 forbids ASCAP's attempt to collect license fees for uses of music in its repertory whose use has *already been compensated*.^{8/} Although the question of whether downloads command a public performance royalty has not previously been presented to this Court, the prohibition against double payment was most recently upheld in *United States v. Am. Soc'y of Composers, Authors and Publishers (Application of Fox Broadcasting Company)*, 870 F. Supp. 1211, 1217 (S.D.N.Y. 1995) (rejecting ASCAP argument that separate public performances are separately "licensable" when

^{8/} Typically, this requirement has been made manifest in the "through-to-the-audience" requirement now codified in AFJ2 at Article V ("through-to-the-audience" license requirement). *United States v. Am. Soc'y of Composers, Authors and Publishers, et al.*, 1940-43 T.C. (CCH) ¶56,104 (S.D.N.Y.), modified by 1950-51 T.C. (CCH) ¶62,595, 1960 T.C. (CCH) ¶69,612 and 2001 T.C. (CCH) ¶73,474 ("AFJ2"), at Article V; *see also United States v. Am. Soc'y of Composers, Authors and Publishers (Application of Turner Broadcasting)*, 782 F. Supp. 778, 794 (S.D.N.Y. 1991) (Dolinger, Mag. J.), *aff'd*, 956 F.2d 21 (2d Cir. 1992) (ASCAP cannot "split" its performance licensing). The policy underlying Article V is that ASCAP is not entitled to a get paid twice for a single compensable use of its works. The policy is also evidenced in the obligation imposed to "carve out" works that are licensed directly by the copyright owner from double payment under a blanket license. *See United States v. Broad. Music, Inc. (Application of Muzak L.L.C.; AEI Music Network)*, 275 F.3d 168, 177 (2d Cir. 2001) (rate court may set blanket license fee reflecting direct licensing by applicant).

their value is already compensated).^{9/} In particular, this Court recognized that the linchpin of ASCAP's argument for additional compensation was contrary to the bedrock requirement that "each broadcast of a program is licensed only once . . ." *Fox Broad.*, 870 F. Supp. at 1220. The same obligation prevents ASCAP's affiliates to whom royalties are owed for downloads from collecting fees "based on the revenue for one public broadcast." *Id.* at 1221.

C. This Court Must Safeguard Against ASCAP Overreaching

The market for musical public performance rights is not a normally functioning market. It is dominated by two co-monopolists, ASCAP and BMI. *Accord Am. Soc'y of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990). Even individual songs can have some market power, *id.* at 570, and ASCAP has aggregated copyrights in a manner that increases that power exponentially. *See United States v. Am. Soc'y of Composers, Authors and Publishers (Applications of Capital Cities/ABC, Inc.)*, 157 F.R.D. 173, 181 (S.D.N.Y. 1994) ("[B]ecause the relevant market at issue, i.e., music use licenses comparable to those offered by ASCAP and BMI, involves only two principal licensors, the market is inherently non-competitive.").

Because a single author, or single group of authors, is vested with both the right of reproduction and the right of public performance, a form of intellectual property "stacking" occurs where different representatives of the same copyright owners demand payment that

^{9/} ASCAP sought to place Fox in the untenable position of having to choose between being unlicensed or paying "extra" to cover transmissions it made to its stations. *Fox Broad.*, 870 F. Supp. at 1217. In the absence of a license, ASCAP argued, the Fox network's "substantial revenues [would] not be accounted for in the licensing fees paid to ASCAP." *Id.* At the time, there were in fact several billion dollars in Fox network revenues at stake. *See, e.g.*, BROADCASTING & CABLE YEARBOOK, 1992 (\$1.4 billion estimated revenue); BROADCASTING & CABLE YEARBOOK, 1993 (\$1.3 billion estimated revenue); BROADCASTING & CABLE YEARBOOK, 1994 (\$1.5 billion estimated revenue); BROADCASTING & CABLE YEARBOOK, 1995 (\$1.7 billion estimated revenue).

exceeds the face value of the bundle of rights conveyed. See Michael A. Heller, *The Tragedy of the Anticommons*, 111 HARV. L. REV. 621 (1998) (where too many individuals have the right to exclude, output can be inefficiently restricted). As the Register of Copyrights has noted, ASCAP's demands appear to be:

driven as much by the structure of the administration of copyright rights in the music industry as by technology. The issue simply would not seem to arise in other industries where the public performance and reproduction rights are exercised by the same entity.

SECTION 104 REPORT at 147. A single copyright owner would never negotiate the payment of royalties for all rights for an activity (downloading) and then, once the negotiation is complete, claim that the bargained-for rights (reproduction and distribution) are insufficient and the parties must re-negotiate for *new and additional rights they claim are required to engage in the exact same activity*. The reason the issue is before this Court is not that the copyright owner's interests are impaired in any way, but that copyright owners administer their rights through different agents who are engaged in rent-seeking behavior.

The blanket license ASCAP offers is supposed to expand output, reduce costs and further competition. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-21 (1979). Instead, ASCAP is here seeking unlawfully to restrict output -- by *overstating* the scope of the rights it represents. In doing so, it is engaged in anti-competitive copyright "stacking" and *overstepping and violating* the prohibition against "split licensing." This is the sort of exclusionary behavior against which the Court is the primary safeguard. See Susan A. Creighton, et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005) (outlining monopolization by low-cost, exclusionary strategies including abusive litigation).^{10/}

^{10/} See *Broad. Music, Inc.*, 441 U.S. at 24 (rate court intended to ensure licensees have "real choice"); *Showtime*, 912 F.2d at 570 (ASCAP consent decree "disinfected" ASCAP); *Buffalo Broad. v. Am. Soc'y of Composers, Authors and Publishers*, 744 F.2d 917, 927 (2d Cir. 1984)

The fact is, ASCAP's songwriter and publisher members *already get paid* for downloads. Thus, ASCAP can expand the scope of its claim in this proceeding without making any sacrifice, since its affiliates will continue to be paid. On the other hand, music users are at risk of paying twice for the same activity as a result of ASCAP's claim, which injects uncertainty and instability into the marketplace. ASCAP leverages this cost asymmetry to its advantage. Although premised on a (fallacious) legal argument, ASCAP's attempt to expand the scope of its monopoly is an example of exclusionary and anti-competitive conduct that must be constrained by this Court. Music users operate under "inherently anti-competitive conditions" imposed by ASCAP. *Music Choice 4*, 426 F.3d at 93. Because ASCAP already exercises "disproportionate power over the market for music rights," caution is warranted before acceding to ASCAP's claims for expanding the scope of the public performance right and creating a higher barrier to competition by licensed users against unlawful infringers. *Id.* at 96.

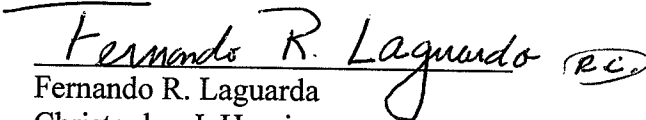
(rate court guards against monopoly abuse); *United States v. Am. Soc'y of Composers, Authors and Publishers (Application of Salem Media)*, 981 F. Supp. 199, 203 (S.D.N.Y. 1997) (consent decree intended "to limit ASCAP's ability to exert undue control of the market . . .") (citing *Capital Cities/ABC, Inc.*, 157 F.R.D. at 177).

CONCLUSION

For the foregoing reasons, the download of a musical work does not constitute a public performance. Applicants' Motion for Partial Summary Judgment should be granted, and ASCAP's cross-motion denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2007, I caused a true and correct copy of the Brief Amicus Curiae of the Digital Media Association, the Entertainment Merchants Association, the National Association of Recording Merchandisers, and the Consumer Electronics Association to be served upon the following parties by hand delivery:

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