Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Copyright Act defines "[t]o perform . . . a work 'publicly'" in part as "to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process." 17 U.S.C. § 101. The question presented is whether an Internet-based music service "perform[s] . . . a work 'publicly'" when it transmits a performance of a copyrighted musical work to the public by means of a digital download.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, RealNetworks, Inc. and Yahoo! Inc. were applicants below and are respondents in this Court.

The American Society of Composers, Authors and Publishers is an unincorporated membership association. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Society of Composers, Authors and Publishers ("ASCAP") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 627 F.3d 64. Pet. App. 1a. The opinion of the district court is published at 485 F. Supp. 2d 438. Pet. App. 39a.

JURISDICTION

The court of appeals filed its opinion on September 28, 2010, and denied a timely petition for panel rehearing and rehearing en banc on December 2, 2010. On January 20, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 2, 2011. No. 10A715. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Copyright Act and pertinent international agreements are set forth in the appendix to this petition.

STATEMENT

In the decision below, the Second Circuit held that the exclusive right to perform copyrighted works publicly, which is codified in § 106(4) of the Copyright Act, does not apply to the transmission of copyrighted musical works to the public by means of digital downloads—a technology that has already be-

come one of the most important means for the dissemination of American music. In so doing, the court of appeals misinterpreted the plain language of the Copyright Act, placed the United States in violation of its international intellectual-property obligations, and significantly reduced the fair compensation to which songwriters and music publishers are statutorily entitled for the public performance of their copyrighted musical works. This erroneous holding is unlikely to be scrutinized by any other court of appeals because decades-old consent decrees give the Southern District of New York exclusive jurisdiction over the vast majority of disputes regarding copyright owners' rights to perform copyrighted musical works publicly. Before the Second Circuit's flawed decision becomes settled law and drastically curtails copyright owners' public performance rights—to the profound detriment of the American music industry and hundreds of thousands of songwriters and music publishers—this Court should grant review.

A. The Right To Perform Copyrighted Musical Works Publicly

1. The right to perform copyrighted works publicly has been recognized and legally protected for centuries. At common law, authors were granted a right to prevent the unauthorized performance of their unpublished works. *See* 2 William F. Patry, *Copyright Law & Practice* 879 (1994). Congress first codified the right as part of federal copyright law in 1856, conferring on the holders of copyrights in plays and other dramatic works "the sole right . . . to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place." Act of Aug. 18, 1856, 34th Cong., 1st Sess., Ch. 171, 11 Stat. 138, 139. In 1897, Congress extended this public performance right to musical

compositions. *See* Act of Jan. 6, 1897, 54th Cong., 2d Sess., Ch. 4, 29 Stat. 481, 481–82.

Congress significantly revised the copyright laws in the Copyright Act of 1976. Pub. L. No. 94-553, 90 Stat. 2541 (1976). The 1976 act "recast[ ] the copyright as a bundle of discrete 'exclusive rights,' each of which 'may be transferred . . . and owned separately.'" *New York Times Co. v. Tasini*, 533 U.S. 483, 495–96 (2001) (quoting 17 U.S.C. §§ 106, 201(d)(2) (citations omitted)). Section 106 of the Copyright Act grants to the owner of a copyright in a musical work several exclusive rights, including the exclusive right to perform the work publicly (17 U.S.C. § 106(4)) and the exclusive right to reproduce and to distribute the work (including in the form of CDs, vinyl records, cassettes, and digital downloads). *Id.* §§ 106(1), (3). Section 115 of the Act grants users a compulsory license to reproduce and distribute musical works (often referred to as a mechanical license) in exchange for a statutorily prescribed royalty (known as a mechanical royalty).

The Copyright Act defines "[t]o perform or display a work 'publicly'" as:

> (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 at different times.

17 U.S.C. § 101. The statute in turn defines "[t]o '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." *Id.*

2. The scope of the statutory rights afforded to copyright owners is also informed by the international intellectual-property agreements to which the United States is a party. In 1988, for example, the Senate ratified the Berne Convention for the Protection of Artistic and Literary Works, a treaty first signed in 1886 by nine other nations to ensure cross-border copyright protection. *See* Berne Convention art. 5, Sept. 9, 1886 (Paris Text 1971), S. Treaty Doc. No. 99-27 ("Berne Convention"). The convention guarantees that "copyright holders are afforded the same protection in foreign nations that those nations provide their own authors." *Creative Tech., Ltd. v. Aztech Sys. PTE*, 61 F.3d 696, 700 (9th Cir. 1995); *see also* Berne Convention art. 5.

In addition to that guarantee of equal treatment, the Berne Convention contains a number of substantive provisions requiring each signatory to provide certain baseline copyright protections. In his letter of submittal to the Senate, President Reagan described one of these "Convention minima" as the exclusive "right to perform publicly dramatic and musical works." S. Treaty Doc. No. 99-27, Letter of Submittal. Article 11 of the Convention provides that "[a]uthors of . . . musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; [and] (ii) any communication

to the public of the performance of their works." *Id.* art. 11(1). President Reagan explained that "the provisions of these articles appear to reflect the basic elements of copyright law common to industrialized countries including the United States." *Id.* Letter of Submittal.

Shortly after Senate ratification, Congress enacted the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. That act made certain amendments to domestic law to comply with the Berne Convention and, echoing President Reagan, declared that "[t]he amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention." *Id.* § 2(3), 102 Stat. at 2853.

Then, in the mid-1990s, the United States joined other countries in urging the World Intellectual Property Organization ("WIPO") to create a copyright framework that would address emerging Internet technologies. In 1996, 160 nations, including the United States, adopted the WIPO Copyright Treaty. *See* WIPO Copyright Treaty, S. Treaty Doc. 105-17 (Dec. 20, 1996) ("WIPO Copyright Treaty"). Article 8 of the treaty governs the application of the Berne Convention's rights to perform publicly and communicate copyrighted works to online media. It states that "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." *Id.* art. 8; *see also* Berne Convention art. 2(1) (defining "literary and artistic works" to include "musical composi-

tions"). The WIPO Copyright Treaty thus made clear that the exclusive right to perform copyrighted works publicly includes so-called "interactive" media that enable members of the public to choose their own content and when to experience that content. *See* Memorandum Prepared by the Chairman of the Committees of Experts, CRNR/DC/4, P 10.10 (Aug. 30, 1996), *in* Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, at 204 (1999) ("[O]ne of the main objectives of the second part of Article [8] is to make it clear that interactive on-demand acts of communication are within the scope of the provision.").

Congress implemented the WIPO Copyright Treaty in Title I of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The legislative history of the act expresses Congress's belief that the treaty did "not require any change in the substance of copyright rights or exceptions in U.S. law," because the Copyright Act already provided the protections required by the treaty. H.R. Rep. No. 105-551(I), at 9 (1998).

B. The Proceedings Below

1. Petitioner ASCAP is a voluntary membership association of more than 400,000 songwriters, composers, and music publishers. Founded in 1914 by Irving Berlin, John Philip Sousa, and other prominent professional music composers, ASCAP serves as an intermediary between copyright owners and music users seeking to perform copyrighted musical works publicly. ASCAP's members grant ASCAP a non-exclusive right to license public performances of their copyrighted musical works, and ASCAP in turn licenses its entire repertory of works to parties wishing to perform them publicly. As this Court has rec-

ognized, ASCAP's function as a "'clearing-house' for copyright owners and users" is critical to the livelihood of hundreds of thousands of songwriters and composers "because those who perform[ ] copyrighted music for profit [are] so numerous and widespread, and most performances so fleeting, that as a practical matter it [is] impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 4–5 (1979).

ASCAP licenses the right to perform publicly the musical works in its repertory to a diverse array of music users, including Internet and network-based sites and services, television and radio stations, restaurants, hotels, and sports arenas. ASCAP negotiates licensing rates with these entities on behalf of both its American members and thousands of foreign songwriters, composers, and publishers whose copyrighted works are performed in the United States through reciprocal agreements with performing rights organizations around the world.

In 1941, ASCAP entered into a consent decree with the Department of Justice to settle an antitrust suit. *See United States v. ASCAP*, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941). As modified in 1950, the consent decree requires ASCAP to distribute royalties to its members primarily based on how often a given musical work is performed. *United States v. ASCAP*, 1950–1951 Trade Cas. (CCH) ¶ 62,595, at 63,755 (S.D.N.Y. 1950).

The 1950 amendment also established a "'rate court' mechanism" for resolving fee disputes between ASCAP and prospective licensees, and designated the Southern District of New York as the exclusive

forum for setting a reasonable royalty rate when ASCAP and a prospective licensee are unable to reach an agreement. *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 172 (2d Cir. 2001). The consent decree was amended in 2001, preserving the rate court mechanism and the exclusive jurisdiction of the Southern District of New York to establish a reasonable rate for the licensing of ASCAP's musical works. *United States v. ASCAP*, 2001 WL 1589999, at *7 (S.D.N.Y. June 11, 2001). ASCAP's principal competitor, Broadcast Music, Inc. ("BMI"), has entered into a similar consent decree with the United States, which also designates the Southern District of New York as the exclusive jurisdiction for resolving its royalty disputes. *Broadcast Music, Inc.*, 275 F.3d at 172.

2. Respondents Yahoo! Inc. and RealNetworks, Inc. offer consumers a number of services, including the ability to download performances of copyrighted musical works to computers and mobile devices. In a download transmission, respondents transmit a digital file containing a performance of a copyrighted musical work to a customer's computer for playback at a time of the customer's choosing. Respondents also offer "streaming" transmissions, in which playback may begin while the file is being transmitted.

After the 2001 amendment to ASCAP's consent decree, respondents entered into negotiations with ASCAP to license the right to perform publicly the copyrighted musical works in ASCAP's repertory. The parties were unable to reach an agreement, in part because they disagreed over whether the transmission of a performance of a copyrighted musical work to the public by means of a digital music download constitutes a public performance of that work within the meaning of the Copyright Act. 17

U.S.C. § 106(4). They also disagreed over rate calculation issues not implicated here.

In accordance with the terms of its consent decree, ASCAP applied to the Southern District of New York for a determination of reasonable license fees to be paid by respondents for their services. On April 25, 2007, the district court granted respondents partial summary judgment on the question whether download transmissions qualify as public performances under § 106(4) of the Copyright Act. The court concluded that the transmission of a copyrighted musical work to the public by means of a digital download is not a public performance because recipients do not hear the musical work until the digital file has been copied to their computer hard drive. The statutory term "'perform,'" the district court reasoned, could not "extend[ ] . . . to the copying of a digital file from one computer to another in the absence of any perceptible rendition." Pet. App. 46a–47a. Instead, the court continued, "the downloading of a music file is more accurately characterized as a method of *reproducing* that file." *Id.* at 47a (emphasis in original). It is "the simultaneously perceptible nature of a transmission," the court stated, "that renders it a performance under the Act." *Id.* at 53a.

The Southern District of New York also relied on a 2001 advisory report by the U.S. Copyright Office to support its reading of the Copyright Act. In that report, the Office stated that, although "'it is an unsettled point of law that is subject to debate, we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place.'" Pet. App. 48a (quoting U.S. Copyright Office, Digital Millennium Copyright Act Section 104 Report to the United

States Congress (Marybeth Peters, Register of Copyrights), at xxvii-xxviii (Aug. 29, 2001)).

3. The Second Circuit affirmed in relevant part. Pet. App. 1a. In analyzing the scope of the right to perform copyrighted works publicly, the court focused almost exclusively on the definition of "to 'perform' . . . a work" in § 101 of the Copyright Act—"to recite, render, play, dance, or act it"—rather than the separate definition of "to perform a . . . work 'publicly'" in that same section of the Act. The Second Circuit emphasized that each of the relevant verbs in the definition of "perform" ("recite," "render," and "play") "refer[s] to actions that can be perceived contemporaneously." *Id.* at 10a (citing Webster's Third New International Dictionary 1895 (1981)). The court stated that the "downloads at issue in this appeal are not musical performances that are contemporaneously perceived by the listener" because "the user must take some further action to play the songs after they are downloaded," and that "such a download" therefore "is not a performance of that work." *Id.* at 12a. And because download transmissions do not meet the definition of "to 'perform . . . a work,'" the court held that they necessarily cannot meet the definition of "to perform . . . a work 'publicly.'" *See id.* at 14a.

The court rejected ASCAP's argument that the relevant statutory provision is the distinct definition of "[t]o perform . . . a work 'publicly.'" 17 U.S.C. § 101. ASCAP had argued that the plain text of this provision does not require that the transmission of the performance to the public itself constitute a performance; it is sufficient that a previously rendered performance be transmitted to the public by means of a digital download. The Second Circuit, however, concluded that the definition of "to perform . . . a

work 'publicly'" is merely a "definition of 'publicly'" that "does not define the meaning of 'performance.'" Pet. App. 13a. "Transmittal without a performance," the court concluded, "does not constitute a 'public performance.'" *Id.* at 14a.

The Second Circuit also rejected the argument, raised both by ASCAP and foreign performing rights organizations participating as *amici curiae*, that the district court's decision places the United States in violation of treaties governing international intellectual-property rights. Pet. App. 17a n.10. The Second Circuit did not dispute that Article 8 of the WIPO Copyright Treaty on its face requires signatories to guarantee a public performance right in the transmission of a copyrighted musical work to the public through a digital download. The court nevertheless held that its reading of the Copyright Act was consistent with the treaty because copyright owners would still be granted the distinct right "to control the reproduction and distribution of their musical works over the Internet." *Id.*

REASONS FOR GRANTING THE PETITION

The Second Circuit's holding—that transmitting a performance of a copyrighted musical work to the public by means of a digital download does not constitute a public performance under the Copyright Act—is flatly at odds with the plain language of the Act and the legislative objectives it was designed to promote. The Second Circuit rested its decision on a "contemporaneous perceptibility" requirement that appears nowhere in the Copyright Act. By invoking this "contemporaneous perceptibility" requirement to restrict the scope of the right to perform copyrighted works publicly, the court of appeals created an unworkable and inequitable statutory scheme that fails

to account for emerging technologies used to disseminate music to the public.

The decision below also places the United States in violation of numerous treaties and international agreements, including the Berne Convention, the WIPO Copyright Treaty, NAFTA, and a number of bilateral free-trade agreements. Those agreements require the United States to guarantee copyright owners, as part of the right to perform copyrighted works publicly, a right of "communication of the work to the public." In the Internet context, that right includes the right to "mak[e] available to the public . . . their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." That language makes clear that the United States is obligated to protect copyright owners' public performance rights in digital downloads.

The necessity of this Court's review is underscored by the vital importance of the question presented to the future of the American music industry. It is exceedingly unlikely that another court of appeals will have the opportunity to consider the question presented because the ASCAP consent decree (and a similar consent decree binding its major competitor) require all rate proceedings to occur in the Southern District of New York. Thus, if the Second Circuit's decision stands, songwriters and music publishers across the Nation will be denied their statutory right to receive royalties for public performances when their works are downloaded over the Internet—which is already one of the most prevalent means for the dissemination of copyrighted musical works. By denying songwriters this much-needed income, the decision will inevitably make the profession far less attractive for young talent and drive

veterans into other work, in direct contravention of the Copyright Act's fundamental objective of promoting the Nation's artistic vitality. As this Court recognized nearly a century ago in a case brought by ASCAP, "[i]f music did not pay it would be given up." *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917).

I. THE DECISION BELOW IMPROPERLY NARROWS THE STATUTORY RIGHT TO PERFORM COPYRIGHTED MUSICAL WORKS PUBLICLY.

The Second Circuit's decision is inconsistent with the text, structure, and legislative history of the Copyright Act, and rests on an untenable contemporaneous-perceptibility requirement that will be unworkable in practice.

A. The statutory right to perform copyrighted works publicly plainly encompasses download transmissions. In relevant part, the Act defines "[t]o perform . . . a work 'publicly'" as "to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process." 17 U.S.C. § 101. A download transmission is a public performance because it transmits a previously rendered performance of a musical work to the public by means of an electronic file sent from the service that provides the download to the member of the public who requests the download.

Despite this unambiguous statutory language, the Second Circuit held that a download transmission cannot be a public performance because the performance being transmitted is not "contemporaneously perceived by the listener." Pet. App. 12a. The court reasoned that "when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission,

not simply to transmitting a recording of a performance." *Id.* at 13a (internal quotation marks omitted). According to the Second Circuit, download transmissions are not public performances because "the downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded." *Id.* at 12a.

That reasoning finds no support in the statutory definition of "[t]o perform ... a work 'publicly,'" which nowhere states that the transmission must itself be contemporaneously perceived by the recipient. The Second Circuit relied primarily on the definition of "[t]o perform" in § 101 of the Copyright Act, which states that "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process." 17 U.S.C. § 101. The separate definition of "[t]o perform ... a work publicly," however, encompasses a broader range of activity than the definition of "[t]o 'perform.'" The second clause of the definition of "[t]o perform ... a work publicly" does not require that the transmission itself involve a rendering of the copyrighted work. Rather, it requires that the sender *"transmit or otherwise communicate a performance* ... of the work" to members of the public. *Id.* (emphasis added). That language requires only that the data being transmitted or otherwise communicated constitute a "performance." There is no question that the data transmitted by a digital download constitute a "performance" of a musical work—the transmitted file contains a sound recording of the work as rendered by the recording artist in the studio or at a live concert.

If there were need for further textual confirmation, the final words of the relevant definition of "[t]o

perform . . . a work 'publicly'" would supply it. That language clarifies that the transmission of a performance constitutes a public performance of the work "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time *or at different times*." 17 U.S.C. § 101 (emphasis added). Because a public performance can occur even if the recipients of the transmission of the copyrighted musical work receive the performance "at different times," it cannot be the case that the statute requires a simultaneous rendering of the work. If it did, recipients of a single digital transmission would never receive the performance at different times.

B. Neighboring provisions of the Copyright Act confirm that the Second Circuit's narrow construction of the right to perform copyrighted works publicly is erroneous. In 1995, Congress addressed technological changes in the music industry specifically with respect to the rights of performance, reproduction, and distribution in both musical works and sound recordings. *See* Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995). In so doing, Congress extended the public performance right, which already applied to musical compositions, to sound recordings that are performed by means of a "digital audio transmission." 17 U.S.C. § 106(6). In turn, Congress defined a "digital audio transmission" as a "digital transmission . . . that embodies the transmission of a sound recording." *Id.* § 114(j)(5).

The plain language of the 1995 act confirms that Congress views "digital audio transmissions" (whether of a recording or a composition) as a way to perform a work publicly. In fact, a related section—also added by the 1995 act—makes explicit that mu-

sical compositions, not just sound recordings, are performed publicly when they are transmitted to the public by means of a digital transmission: "Nothing in this section annuls or limits in any way . . . the exclusive right to publicly perform a musical work, *including by means of a digital audio transmission*, under section 106(4)." 17 U.S.C. § 114(d)(4)(B)(i) (emphasis added). Because a download transmission is a form of "digital audio transmission[ ]," a download transmission of a file containing a musical work is a public performance of that musical work.

This conclusion is underscored by § 115(d) of the Copyright Act, which sets out the parameters for compulsory licenses of the rights to copy and distribute nondramatic musical works, including by means of a "digital phonorecord delivery." 17 U.S.C. § 115(d). The final subsection of § 115 defines a "digital phonorecord delivery" as a "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.* (emphasis added). The meaning of this language is unmistakable: A download transmission can constitute a public performance under the Copyright Act.

C. The Second Circuit's holding also conflicts with the Copyright Act's legislative history. The House Report accompanying the 1976 act reaffirms that the definition of "[t]o perform . . . a work 'publicly'" reaches the transmission of a *previously rendered* performance to the public. "[T]he concept[ ] of public performance," the report states, "cover[s] not only the *initial rendition* . . . but also any further act

by which *that rendition* . . . is transmitted or communicated to the public." H.R. Rep. No. 94-1476, at 63 (1976) (emphases added). Thus, "any act by which *the initial performance* or display is transmitted, repeated, or made to recur would itself be a 'performance.'" *Id.* (emphasis added). The Second Circuit offered no response to this clear congressional guidance.

D. In conflict with the text and history of the Copyright Act, the Second Circuit's decision establishes an artificial and unworkable framework that fails to account for emerging technologies that do not fit comfortably within the Second Circuit's "contemporaneous perceptibility" standard.

Notably, the Second Circuit conceded that streaming transmissions—in which the audio file is played for the recipient at the same time it is transferred to the recipient's computer—constitute public performances of copyrighted musical works. *See* Pet. App. 14a ("This transmission . . . is a performance because there is a playing of the song that is perceived simultaneously with the transmission."). But the distinction between streaming transmissions and download transmissions is wholly artificial. In both cases, a transmitted file is saved on the recipient's computer. In both cases, given modern Internet speeds, the recipient's computer may translate the transmitted file into perceptible sound within a matter of seconds after the transmission has begun. Indeed, contrary to the Second Circuit's reasoning, not even a streaming transmission is truly "contemporaneously perceptible" because playback is inevitably subject to some delay during the delivery, reception, and rendering processes. The only relevant difference is that to hear the work, the recipient of a download transmission is sometimes required to

click "play" on his Internet music player after completion of the seconds-long process by which the audio file is transmitted to his computer, while a streaming transmission includes a piece of code that initiates the process automatically. It is inconceivable that Congress intended copyright owners' ability to obtain fair compensation for the use of their works to turn on whether the downloaded musical work is contemporaneously perceptible by the recipient or is perceptible a few seconds later.

Moreover, the distinction between streaming and download transmissions—and the "contemporaneous perceptibility" requirement on which it rests—will be utterly unworkable in practice. New technologies collapse the distinction entirely. For example, many online music services available on mobile devices such as iPhones employ a process called "caching" to provide users with continuous access to music when their devices are taken out of range of a wireless network or live Internet connection. The services at one time transmit a number of musical works to the storage facility of the mobile device, which then plays those works back to the user, stream-style, even when the user is not connected to a wireless network or the Internet. The user may not know whether he is listening to a live stream or a cached stream—the listening experience is the same no matter the type of delivery involved.

Relying on the Second Circuit's decision, several music services have already claimed that the public performance right is not implicated by cached streams and that an ASCAP license therefore is not required for such performances. But there is no legal or practical distinction between performances that are streamed via Internet or wireless connection and those that are streamed from a cached copy, and

Congress could have had no plausible basis for distinguishing between the two types of transmissions (especially before the technology that enables such transmissions even existed). The unworkable and inequitable nature of the Second Circuit's rule is a strong indication that the court of appeals misinterpreted the Copyright Act and that this Court's review of that decision is warranted.

II. THE DECISION BELOW PLACES THE UNITED STATES IN VIOLATION OF INTELLECTUAL PROPERTY TREATIES AND OTHER INTERNATIONAL AGREEMENTS.

The Second Circuit's refusal to recognize that a download transmission implicates the right to perform copyrighted musical works publicly also violates the international treaty obligations of the United States. *See* C.A. Br. of Confédération Internationale des Sociétiés d'Auteurs et Compositeurs; C.A. Br. of Society of Composers, Authors and Music Publishers of Canada. Particularly in light of the fact that Congress has repeatedly declared that the Nation's domestic copyright law comports with the treaties that the United States has ratified in this area, the Court should review a decision that, through interpretive error, creates a conflict between domestic and international law.

Under the Berne Convention's "[r]ight of public performance and of communication to the public of a performance," the United States must guarantee "[a]uthors of . . . musical works . . . the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; [and] (ii) any communication to the public of the performance of their works." S. Treaty Doc. 99-27, art. 11(1). The Convention's

public performance and communication rights thus track the two-pronged definition of "to perform . . . a work 'publicly'" under U.S. copyright law, with the Berne Convention's right of "communication to the public of [a] performance" embodying the U.S. right to "transmit or otherwise communicate a performance . . . to the public." *See* 2 William F. Patry, *Copyright Law & Practice* 1281 n.242 (1994) ("In U.S. copyright law, the § 106(4) right covers all forms of performance covered in Articles 11, 11*bis*, and 11*ter* of the Berne Convention.").

The Berne Convention's capacious language was written in 1971, and the drafters and ratifiers obviously could not have envisioned how it might apply to Internet downloads. To update the Convention to account for new technologies, the United States and other countries adopted the WIPO Copyright Treaty. Article 8 of the treaty addresses the application of the Berne Convention's "right of communication to the public" to Internet downloads. It explains in unambiguous terms that the right extends to download transmissions: "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.*" WIPO Copyright Treaty art. 8 (emphasis added). The Second Circuit's "contemporaneous perceptibility" requirement cannot be reconciled with that authoritative description of the right granted to copyright owners under the Berne Convention, which is implicated even where works are transmitted to the public in a manner that permits playback at the time of the recipient's choosing.

The Second Circuit dismissed the conspicuous conflict between its decision and the WIPO Copyright Treaty on the ground that the reproduction and distribution rights set forth in § 106(1) and § 106(3) of the Copyright Act satisfy the obligation to protect copyright owners' right of communication to the public. Pet. App. 17a n.10. But Article 6 of the treaty *separately* provides that "[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership," and that "the reproduction right, as set out in Article 9 of the Berne Convention[,] . . . fully appl[ies] in the digital environment." WIPO Copyright Treaty art. 6 & n.1. Thus, like U.S. law, the treaty differentiates between the right to perform a copyrighted work publicly and the separate rights of reproduction and distribution, and makes clear that a download transmission that permits playback at a time of the listener's choosing *and* that creates a copy of the work on the listener's computer implicates *both* of those rights.

To be sure, neither the Berne Convention nor the WIPO Copyright Treaty is self-executing. But Congress made that choice specifically because it determined that U.S. copyright law already complied with the treaties' requirements. *See* Berne Convention Implementation Act, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853, 2853 (1988); H.R. Rep. No. 105-551(I), at 9 (1998). And even if Congress had not expressed that view, "[i]t has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

The Second Circuit completely ignored that principle in construing the Copyright Act.

Moreover, the Second Circuit's decision violates not only the Berne Convention and WIPO Copyright Treaty, but also a series of bilateral and multilateral free-trade agreements to which the United States is a party. For example, NAFTA requires adherence to the Berne Convention, including by ensuring the right of "communication of a work to the public." North American Free Trade Agreement, art. 1705(2)(c), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289. And a number of bilateral free-trade agreements signed between 2004 and 2009 track the language of the WIPO Copyright Treaty and require the United States to "provide to authors the exclusive right to authorise or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[1] Like the WIPO Copyright Treaty, these free-trade agreements *separately* guarantee "the right to authorise or prohibit the

[1] *See* United States-Australia Free Trade Agreement, U.S.-Australia, art. 17.5, May 18, 2004, K.A.V. 7141; United States-Bahrain Free Trade Agreement, U.S.-Bahrain, art. 14.5, Sept. 14, 2004, 44 I.L.M. 544; United States-Chile Free Trade Agreement, U.S.-Chile, art. 17.5.2, June 6, 2003, K.A.V. 6375; United States-Dominican Republic-Central America Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., art. 15.6, Jan. 28, 2004, 43 I.L.M. 514; United States-Morocco Free Trade Agreement, U.S.-Morocco, art. 15.6, June 15, 2004, 44 I.L.M. 544; United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 16.5.4, Apr. 12, 2006.

making available to the public of the original and copies" of their copyrighted works.[2]

The conflict with international law generated by the Second Circuit's erroneous construction of the right to perform a copyrighted work publicly has more than merely theoretical importance. The United States' membership in the World Trade Organization independently requires it to adhere to Article 11 of the Berne Convention. *See* Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299, art. 9 (Apr. 15, 1994) ("[WTO] [m]embers shall comply with Articles 1 through 21 of the Berne Convention."). Other WTO members may therefore seek relief against the United States for Berne Convention violations on behalf of their own songwriters and music publishers before a WTO Panel. Indeed, in 1999 European nations brought a proceeding against the United States alleging that two provisions of U.S. copyright law violated the Berne Convention, including the right of communication to the public set forth in Article 11. A WTO panel agreed with respect to one of the provisions, holding that the United States was not in compliance with its international obligations. *See, e.g., United States – Section 110(5) of the US Copyright Act*, 2000 WL 816081, at ¶¶ 3.1, 7.1 (WTO Panel June 15, 2000). That result may be repeated here if the Second Circuit's decision is allowed to stand. This Court should grant review before such potentially significant international ramifications come to pass.

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[2] *See, e.g.*, United States-Australia Free Trade Agreement, U.S.-Australia, art. 17.4, May 18, 2004, K.A.V. 7141; United States-Bahrain Free Trade Agreement, U.S.-Bahrain, art. 14.4, Sept. 14, 2004, 44 I.L.M. 544.

III. THE QUESTION PRESENTED HAS PROFOUND IMPLICATIONS FOR THE AMERICAN MUSIC INDUSTRY.

A. The Second Circuit's constricted interpretation of the right to perform copyrighted musical works publicly has far-reaching implications for hundreds of thousands of songwriters, composers, and music publishers—and for the American music industry as a whole. ASCAP's repertory encompasses 50% of musical works copyrighted under U.S. law. Its membership includes hundreds of thousands of songwriters and composers—some famous, some struggling to make it, some veterans counting on royalties to fund their retirement. The Second Circuit's decision dramatically reduces the royalties to which ASCAP's members are entitled for the public performance of their copyrighted musical works. In sheer monetary terms, ASCAP estimates that the decision will cost its members tens of millions of dollars in potential royalties each year. *Cf. Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari").

And that's just for the time being. The amount of lost royalties will inevitably grow as online media overtake older forms of entertainment-content distribution in the coming years. *See* Ben Sisario, *Gone Digital: Music Man Stays in the Game*, N.Y. Times, Sept. 14, 2010, at C1. With the growing prevalence of online piracy, songwriters and publishers have already suffered a severe diminution in their income in past years. *See* Johnny Ryan & Allègre L. Hadida, *One Way to Save the Music Industry*, BusinessWeek, July 29, 2010 ("Global music revenues suffered a

10th year of decline in 2009, with sales and performance rights falling to $17 billion."). The Second Circuit's decision will only exacerbate the toll that the transition to new technology has taken on music-industry professionals.

The Second Circuit's decision harms foreign songwriters and publishers as well. ASCAP and BMI serve as collection agents for foreign performing rights organizations and forward royalties to them when foreign songwriters' and publishers' works are performed in the United States. Foreign songwriters and publishers reasonably expect that the rights guaranteed in the Berne Convention and the WIPO Copyright Treaty will be honored by the United States. The Second Circuit's decision upends that expectation and erodes this Nation's protection of intellectual property rights.

The potentially devastating implications of the Second Circuit's decision for songwriters and music publishers are not diminished by the fact that the decision preserves copyright owners' right to recover reproduction royalties. The public performance and reproduction rights are *distinct* aspects of the bundle of rights granted to copyright owners. Historically, songwriters and publishers could count on royalties from *both* public performances *and* reproductions to make a living in the entertainment business. The Second Circuit's decision significantly restricts the ability of songwriters and music publishers to recover one of the two principal royalty payments available to them.

Moreover, many current songwriters and composers have entered into long-term contracts that have been rendered virtually worthless by the Second Circuit's decision. For example, composers for

television typically receive a small flat fee upfront from the production company in exchange for their reproduction right. The intention is that these composers will be compensated primarily by receiving royalties for the right to perform the work publicly each time the television program is aired. Today, however, users are increasingly receiving television and film content by means of download transmissions through services such as iTunes. Under the Second Circuit's decision, these songwriters and composers will receive no back-end compensation for download transmissions and thus will forfeit a substantial amount of the earnings that they expected to receive for a lifetime's work.

The ramifications of the Second Circuit's decision are not only economic but also artistic and cultural. As those who write and compose music see their annual compensation diminish, there will be much less incentive for them to create new music and for new talent to enter the profession. The Copyright Act recognizes the necessity of providing songwriters and composers with a reasonable royalty for their work in order to stimulate artistic creativity and enrich the Nation's cultural life. As this Court has explained, the "primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994). The Second Circuit's decision profoundly undermines this statutory objective.

B. This Court's review is warranted now because the Second Circuit's flawed interpretation of the Copyright Act is unlikely ever to be considered by another court of appeals. American songwriters, composers, and music publishers receive the vast majority of royalties for public performances through

either ASCAP or its primary competitor BMI. As this Court has recognized, "[v]irtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 30 (1979).[3] Both ASCAP and BMI are subject to consent decrees that require all disputed rate determinations to be made by the Southern District of New York. As a result, it is highly unlikely that another circuit will have an opportunity to answer the question presented.

In other contexts, this Court often grants petitions for certiorari where no circuit split is likely to develop. In cases arising under the exclusive jurisdiction of the Federal Circuit, for example, this Court regularly grants certiorari even though no division of authority exists. *See, e.g.*, *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). In those cases, this Court's decisions to grant certiorari have "turn[ed] largely on the importance of the question presented." Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 4.21 (8th ed. 2002).

Similarly, this Court has granted review of matters within the exclusive jurisdiction of the Court of Appeals for the Armed Forces since the establishment of certiorari jurisdiction over decisions from that court in 1983, even though no division of authority could arise. *See* Stern & Gressman, *supra*, § 4.23; *see also, e.g.*, *Edmond v. United States*, 520 U.S. 651 (1997); *Weiss v. United States*, 510 U.S. 163 (1994).

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[3] There is one other performing rights organization in the United States, SESAC, which has a substantially smaller repertory than either ASCAP or BMI.

Nor has this Court hesitated to grant certiorari in the past where an important issue arose out of the ASCAP and BMI consent decrees (*see Broadcast Music, Inc.*, 441 U.S. 1) or where an interpretation of the Copyright Act profoundly threatened the rights of ASCAP members. *See Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151 (1975); *Herbert v. Shanley Co.*, 242 U.S. 591 (1917). In light of the importance of the question presented—which asks this Court to interpret the application of the Copyright Act to the most important new medium for the distribution of American music—and the deep flaws in the Second Circuit's analysis, this Court should do so again here. The Second Circuit should not have the final word on a question with such vast legal, economic, and cultural implications.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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