

No. 10-1337

JUN 3 - 2011

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

**BRIEF OF *AMICUS CURIAE*
BROADCAST MUSIC, INC.
IN SUPPORT OF PETITIONER**

MARVIN L. BERENSON
JOSEPH J. DiMONA
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 220-3000

MICHAEL E. SALZMAN
Counsel of Record
JESSICA A. FELDMAN
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000
salzman@hugheshubbard.com

236313



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

Blank Page

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5
I. ALLOWING THE SECOND CIRCUIT’S DECISION TO STAND WILL CAUSE ONGOING SUBSTANTIAL HARM TO SONGWRITERS, COMPOSERS, AND PUBLISHERS.....	5
A. The Decisions of the District Court and Second Circuit Have Already Deprived Songwriters of Millions of Dollars of Income, and, if Allowed to Stand, Will Deprive Them of Many Millions More	5
B. The Second Circuit’s Decision Arbitrarily Deprives Music Creators of Payment for One of the Rights in the Copyright Bundle.....	7
1. Copyright Consists Of A Bundle Of Separate Rights	8

Table of Contents

	<i>Page</i>
2. Separate Rights May Mean Separate Licenses and Fees.....	9
II. THE SECOND CIRCUIT’S DECISION TRUNCATES THE PUBLIC PERFORMING RIGHT PROVIDED IN THE COPYRIGHT ACT.....	11
A. There Is No Basis for the Addition of a Requirement of “Simultaneous” Perceptibility to the Public Performing Right.....	11
B. The Second Circuit’s Decision Defies Congress’ Intent to Create a Broad, Technology-Neutral Public Performing Right	17
C. The Download/Stream Dichotomy is a False and Unworkable Distinction	21
CONCLUSION	23

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Agee v. Paramount Commc'ns, Inc.</i> , 59 F.3d 317 (2d Cir. 1995)	17
<i>Atlantic Recording Corp. v.</i> <i>XM Satellite Radio, Inc.</i> , No. 06 Civ. 3733 (DAB), 2007 WL 136186 (S.D.N.Y. Jan. 19, 2007)	10, 21
<i>Broadcast Music, Inc. v.</i> <i>Columbia Broadcasting System, Inc.</i> , 441 U.S. 1 (1979)	2
<i>Buck v. Jewell-La Salle Realty Co.</i> , 283 U.S. 191 (1931)	18
<i>Buffalo Broad. Co. v. Am. Soc'y of Composers,</i> <i>Authors & Publishers</i> , 744 F.2d 917 (2d Cir. 1984)	10
<i>Coleman v. ESPN, Inc.</i> , 764 F. Supp. 290 (S.D.N.Y. 1991)	15
<i>Columbia Pictures Indus., Inc. v.</i> <i>Redd Horne, Inc.</i> , 749 F.2d 154 (3d Cir. 1984)	18
<i>David v. Showtime/The Movie Channel, Inc.</i> , 697 F. Supp. 752 (S.D.N.Y. 1988)	15

Cited Authorities

	<i>Page</i>
<i>F.B.T. Prods., LLC v. Aftermath Records</i> , 621 F.3d 958 (9th Cir. 2010), <i>cert. denied</i> , 131 S. Ct. 1677 (2011)	10
<i>Hubbard Broad., Inc. v. Southern Satellite Sys., Inc.</i> , 593 F. Supp. 808 (D. Minn. 1984), <i>aff'd</i> , 777 F.2d 393 (8th Cir. 1985)	16
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	20
<i>N.Y. Times Co. v. Tasini</i> , 533 U.S. 483 (2001)	8
<i>Nat'l Cable Television Assoc. v. Broad. Music, Inc.</i> , 772 F. Supp. 614 (D.D.C. 1991)	15
<i>Nat'l Football League v. Primetime 24 Joint Venture</i> , 211 F.3d 10 (2d Cir. 2000)	15, 16
<i>On Command Video Corp. v. Columbia Pictures Indus.</i> , 777 F. Supp. 787 (N.D. Cal. 1991)	15
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	9

Cited Authorities

	<i>Page</i>
<i>WGN Cont'l Broad. Co. v. United Video, Inc.</i> , 693 F.2d 622 (7th Cir. 1982)	16

STATUTES

17 U.S.C. § 101	<i>passim</i>
17 U.S.C. § 106	<i>passim</i>
17 U.S.C. § 111	16
17 U.S.C. § 201	8, 9

LEGISLATIVE MATERIALS

H.R. REP. No. 94-1476 (1976), <i>reprinted in</i> 1976 U.S.C.C.A.N. 5659	8, 9, 15
S. REP. No. 94-473 (1975)	15

OTHER AUTHORITIES

<i>Radio</i> , THE COLUMBIA ENCYCLOPEDIA (Columbia Univ. Press, 6th ed. 2008), <i>available at</i> http:// www.encyclopedia.com/topic/radio.aspx# 4-1E1:radio-full	13
<i>Scope of the Problem</i> , RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/ physicalpiracy.php?content_selector= piracy-online-scope-of-the-problem	20-21

Blank Page

Broadcast Music, Inc. (“BMI”) submits this amicus brief in support of the Petition for a Writ of Certiorari.¹

INTEREST OF *AMICUS CURIAE*

Like petitioner ASCAP, *amicus curiae* BMI is a performing rights society, referred to by name in the Copyright Act, 17 U.S.C. § 101 (definition of “performing rights society”). BMI was founded in 1939 to provide competition to ASCAP in the licensing of performing rights in music. Today, BMI continues to compete with ASCAP to represent the public performing right of songwriters, composers, and music publishers in their musical works.

BMI represents hundreds of thousands of songwriters, composers, and publishers of copyrighted music. BMI licenses the right of public performance in millions of musical works. Roughly half the public performances of music in the United States are of works created and owned by BMI’s affiliated songwriters, composers, and music publishers. Through affiliation with foreign performing rights societies, BMI also represents, in the United States, much of the rest of the world’s writers and publishers of music.

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*’s intention to file this brief.

BMI's repertoire-wide blanket licenses provide music performance outlets with efficient access to public performing rights for the quantity and variety of music the public desires. The crucial role of BMI and ASCAP in giving practical effect to the performing rights granted by Congress to the creators of music in section 106(4) of the Copyright Act is described in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Importantly, performing rights royalties constitute the largest single source of income for many composers, songwriters, and music publishers. The public performing right is, therefore, one of the principal economic pillars supporting the musical life of America. BMI collects nearly one billion dollars in royalties per year from music users in the United States and abroad. The Second Circuit's decision jeopardizes a substantial part of this income. Like ASCAP, BMI's licensing fees are set by a rate court in the Southern District of New York, meaning that the law of the Second Circuit governs BMI as well.

The Internet has radically changed the traditional pattern of music consumption by the public. Consumers spend many millions of dollars per year on billions of performances transmitted to them by download providers. Mobile entertainment services are also increasingly making transmissions of music through wireless networks to smartphones. The variety of ways music is made available through the Internet and wireless networks is continually changing, as new technologies emerge and new business models arise to exploit those technologies.

In the face of these ongoing changes, the livelihood of BMI's songwriters and composers depends on their rights under the Copyright Act, which was designed to accommodate changing technology and new methods of music exploitation without the need for continual amendment.

Respondents and their competitors derive vast revenues from the online transmission of music performances. The Second Circuit's decision that download transmissions are not public performances has deprived songwriters of substantial royalties from services that previously held licenses. That decision has also already undermined BMI's ability to license performing rights across a wide range of new media services. Download providers have uniformly refused to pay BMI license fees in the wake of the court of appeals decision, and new services are being designed to fall on the download side of the stream/download distinction drawn by the court below.

Songwriters and their publishers are entitled to compensation for the public performance of their copyrighted works. The Second Circuit's mistaken decision has greatly impaired their ability to make a living by creating new songs for the public. Only a grant of certiorari on this issue will restore their rights under the Copyright Act in the digital age.

SUMMARY OF ARGUMENT

As a performing rights society, BMI “licenses the public performance of nondramatic musical works on behalf of copyright owners,” 17 U.S.C. § 101, providing much of their royalty income. The Second Circuit’s ruling wipes out a substantial portion of that, resulting in serious financial harm to America’s songwriters, composers, and publishers, and depriving them of compensation for one of the rights specifically provided for them in the Copyright Act.

The Second Circuit’s decision inserts a new requirement of “contemporaneous” or “simultaneous” perception into the Act’s definition of a public performance. This brand-new requirement imposed by the Second Circuit, which appears nowhere in the Act or in earlier case law, erases billions of performances of BMI music each year from the scope of one of the fundamental exclusive rights granted by Congress to songwriters and composers. It is also based on a false scientific premise, because *no* transmissions are actually simultaneously perceptible.

This new requirement undermines decades of well-established copyright law and licensing relationships, and is driving the development of new listening services shaped to fall outside the contours of what the Second Circuit has declared to be the limits of the public performing right, in violation of Congress’ intent that the Copyright Act be technology-neutral. Moreover, the stream/download distinction created below is meaningless and unworkable.

This Court should grant the Petition to correct the error made below.

ARGUMENT**I. ALLOWING THE SECOND CIRCUIT'S DECISION TO STAND WILL CAUSE ONGOING SUBSTANTIAL HARM TO SONGWRITERS, COMPOSERS, AND PUBLISHERS.****A. The Decisions of the District Court and Second Circuit Have Already Deprived Songwriters of Millions of Dollars of Income, and, if Allowed to Stand, Will Deprive Them of Many Millions More.**

The district court and Second Circuit decisions in this proceeding have, over the past four years, choked off numerous revenue streams to songwriters, and are eliminating new ones before they even develop. In 2007, the district court issued its ruling in this case that downloads do not constitute public performances. Immediately thereafter, customers throughout the country began to contact BMI, citing that decision and arguing that they no longer had to pay for these uses of BMI music. The Second Circuit's affirmance only solidified that resistance.

For example, after the district court decision, music users such as Verizon and AT&T began refusing to pay for ringtones on the basis of the district court's holding. BMI ringtone revenue was \$7.5 million in 2006. It was \$0 in 2010.

In another example of lost revenue for songwriters, around the time of the district court decision, major cable television networks were in negotiations with BMI, primarily for performances on conventional cable

and satellite television, but also for the then-emerging transmission of video programming and music over the Internet. Citing the decision, the networks insisted that their license agreements contain riders specifying that they pay BMI no fee at all for downloads from their websites, pending the appeal of the decision. If the Second Circuit's decision is allowed to stand, BMI songwriters will never receive performance royalties for this increasingly popular method of viewing traditional media.

Even more critical for BMI's songwriters, allowing the Second Circuit's decision to stand will deprive them of untold royalties for years and decades to come from new media. Increasing amounts of revenue are derived from BMI's licenses to Internet sites and services for the digital transmission of music to the public. With improved technology, the digital transmission of music has become faster and more commonplace, increasingly replacing traditional analog broadcast modes of performance and sales of physical copies. Indeed, in BMI's current rate-setting proceeding with local television stations to determine their license fees, the stations are arguing for reduced royalties in part on the ground that they are losing audience to new media services.

The music business has changed dramatically in the last decade, with the digital transmission of music constituting an ever-greater proportion of performances. More and more Americans consume music through cellular networks and over the Internet, and new technologies and business models designed to deliver this content arise every year. Allowing the Second Circuit's decision to stand uncorrected means that BMI's affiliates will lose a principal revenue stream from performances delivered as downloads.

B. The Second Circuit's Decision Arbitrarily Deprives Music Creators of Payment for One of the Rights in the Copyright Bundle.

It is undisputed that downloads are reproductions and distributions of copyrighted works, and that the holders of those particular rights must be compensated for licenses to download their works under sections 106(1) and 106(3). The Government – echoing the music users and the district court – argued below that music users should not have to pay the holders of the public performing right for downloads, because “[t]his would put the applicants in the position of having to pay the same copyright holder for two separate licenses to engage in the same act with respect to a single musical work.” (Br. for the United States filed in the Second Circuit, No. 09-0539, at 7, Aug. 7, 2009.) This argument rests on the faulty assumption that songwriters, composers, and publishers will be adequately compensated through the reproduction right for downloads and therefore do not need compensation for the performing right. This form of analysis is wrong in all respects.

First, the “bundle of rights” concept is central to the Act’s protections of music creators and other authors, and is one of the major ways their rights were enhanced when the 1976 Copyright Act superseded the 1909 Act. The exploitation of separate rights means separate treatment under the Act. Under the Act, the use of multiple rights requires authorization for all of them. Second, the argument that songwriters, composers, and publishers will be adequately compensated through the reproduction right alone is wrong as a matter of music business reality.

1. Copyright Consists Of A Bundle Of Separate Rights.

The right of public performance of a copyrighted work is one of the six exclusive rights granted by section 106 of the Act. These six rights, however, exist concurrently with, and independently of, one another. Indeed, it is a fundamental principle of modern copyright law that the respective rights of a copyright holder are separate and independent. 17 U.S.C. § 201(d)(2) (the section 106 rights may be transferred and owned “*separately*” and “[t]he owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.” (emphasis added)). As this Court has stated, copyright is conceived of as “a bundle of discrete ‘exclusive rights,’ each of which ‘may be transferred . . . and owned separately’” by the copyright holder. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495-96 (2001) (*quoting* 17 U.S.C. §§ 106, 201(d)(2) (1994)). As the legislative history explains, section 201(d)(2) is

the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately.

H.R. REP. NO. 94-1476, at 123 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5738-39.

Further, Congress well understood that the individual rights in the section 106 bundle are not mutually exclusive. Rather, “[t]hese exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright, are cumulative and may overlap in some cases.” H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674; *see also, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169-75 (9th Cir. 2007) (evaluating Google’s secondary liability for conduct that concededly violated Perfect 10’s three rights of reproduction, distribution, and public display). Therefore, although downloading a musical work implicates the reproduction and distribution rights (thus requiring a “mechanical” license), the act of transmitting that musical work over the Internet is nonetheless also a public performance so long as it meets the statutory requirements.

2. Separate Rights May Mean Separate Licenses and Fees.

Downloads implicate more than one section 106 right. Under the Act, it is completely proper for creators of music to be paid for each right in the bundle that is used. Negotiations with users can determine for which transmissions the performing right is more valuable, and for which the reproduction right is more valuable.

Moreover, it is not necessarily the case that it will even be the same person who will be paid for the uses of the separate rights triggered by music downloads, because the different rights can be separately sold, gifted, or bequeathed. 17 U.S.C. § 201(d)(2). In such situations, paying a single fee for a download – despite the fact that it triggers more than one right – would artificially exclude a rights holder.

The different rights can also be subject to radically different economic terms. Thus, for example, composers of music in television programs or films made on a “work for hire” basis typically do not receive royalty payments for sales of copies of the programs containing their compositions, but typically do receive performing right royalties from BMI or ASCAP licenses held by broadcasters. *Cf. Buffalo Broad. Co. v. Am. Soc’y of Composers, Authors & Publishers*, 744 F.2d 917, 921 (2d Cir. 1984) (describing a “typical[]” arrangement for syndicated television programs). *See also, e.g., F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 961 (9th Cir. 2010) (whether permanent downloads were considered licenses or sales determined whether musicians were paid 50% or 12-20% of the sale price under record label contracts), *cert. denied*, 131 S. Ct. 1677 (2011).

In media industries, the ability to collect multiple revenue streams is often crucial, whether it is both subscription and advertising revenue in cable television, advertising and cable retransmission fees in broadcast television, or successive “windows” of distribution for movie studios. Media companies transmitting downloads have chosen to transmit performances of copyrighted music over the Internet as part of their business models, thereby utilizing an additional section 106 right not implicated by hard copy sales. It is both fair and consistent with the statute that they be required to pay for those multiple uses. *See, e.g., Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ. 3733 (DAB), 2007 WL 136186, at *6 (S.D.N.Y. Jan. 19, 2007) (“XM is both a broadcaster and a distributor, but is only paying to be a broadcaster.”). By choosing to disseminate music online instead of by record store sales, sellers implicate more rights and thus require more licenses than the sale of a CD does. But they are also

avoiding other costs associated with traditional albums, including manufacturing, packaging, and transportation. If they decide that online selling better meets consumer demand, then it is appropriate to require them to pay for this extra privilege.

II. THE SECOND CIRCUIT'S DECISION TRUNCATES THE PUBLIC PERFORMING RIGHT PROVIDED IN THE COPYRIGHT ACT.

In its decision, the Second Circuit undermined the broad public performing right provided for by Congress by upholding the district court's decision to graft a brand-new requirement onto the statute: "simultaneous" or "contemporaneous" perceptibility. The Second Circuit affirmed this new addition to the law despite its conflict with the language and purpose of the statute and prior case law, and its reliance upon a meaningless and unworkable technological distinction.

A. There Is No Basis for the Addition of a Requirement of "Simultaneous" Perceptibility to the Public Performing Right.

The crux of the Second Circuit's decision is that downloads are not "perform[ed]" within the meaning of section 101 of the Act because they are not simultaneously perceived by the listener. Pet. App. 12a. The Second Circuit also ruled that downloads, unlike streams, do not fit within section 101's definition of "[t]o perform or display a work 'publicly,'" because:

“[t]his [streamed] transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived

simultaneously with the transmission In contrast, downloads do not immediately produce sound; only after a file has been downloaded on a user's hard drive can he perceive a performance by playing the downloaded song. Unlike musical works played during radio broadcasts and stream transmissions, downloaded musical works are transmitted at one point in time and performed at another.

Pet. App. 14a (citations omitted).

This ruling rests on false factual and legal premises. In truth, no transmissions are actually simultaneously perceptible, and in any event, it does not matter legally whether they are or not.

As the Government observed in the Second Circuit, “the laws of physics do not permit transmissions to be sent and received in the same instant.” (Br. for the United States filed in the Second Circuit, No. 09-0539, at 18, Aug. 7, 2009.) This is equally true of downloads, streams, and radio broadcasts – the prototypical form of public performance by transmission.

Downloads, streams, and radio broadcasts all transmit inaudible, encoded information from the transmitter to the public, and are then converted into audible sounds at the place of reception. When a radio broadcaster transmits a prerecorded song, the sounds “are converted into electrical signals by a microphone,” and then “used to modulate a carrier wave that has been generated by an oscillator circuit in a transmitter. The modulated carrier is also amplified, then applied to an antenna that converts the

electrical signals to electromagnetic waves for radiation into space.” The “[r]eceiving antennas intercept part of this radiation, change it back to the form of electrical signals, and feed it to a receiver.” *Radio*, THE COLUMBIA ENCYCLOPEDIA (Columbia Univ. Press, 6th ed. 2008), available at <http://www.encyclopedia.com/topic/radio.aspx#4-1E1:radio-full> (last visited June 1, 2011). The modulation of the carrier wave contains information about the timbre, pitch, rhythm, and relative volume of the music recording being broadcast in encoded form – not in audible form. In short, a radio broadcast is a data transmission – albeit in analog rather than digital form. Even more analogous are digital radio broadcasts (*e.g.*, XM satellite radio), which are transmissions of binary code picked up by a receiving set and converted into audible sounds.

Similarly, a streamed performance is a transmission of inaudible data – the timbre, pitch, rhythm, and relative volume of the recording – in binary code that is received on a computer for conversion to audible form. Both streams and downloads of songs currently typically take several seconds first to be heard, because a stream transmission is first “buffered” before it can be heard. Uncontested evidence was submitted in the district court showing that on Respondent RealNetworks’ Rhapsody service,² a customer could start listening to a performance of “Moon River” 3.6 seconds after requesting it by stream, and 7 seconds after requesting it by download. (Supplemental Decl. of Matthew J. DeFilippis ¶¶ 7-9, March 27, 2007.) Under either method of delivery, there is a delay, and the perception of the song is not simultaneous with the transmission.

2. RealNetworks apparently spun off Rhapsody as an independent venture in 2010. Pet. App. 4a n.2.

The Second Circuit is simply incorrect as a matter of science that radio broadcasts and streams are transmitted and perceptible simultaneously. Just like downloaded musical works, they are transmitted at one point in time and heard by listeners at another.

The lower courts' conception that a public performance must be "contemporaneously" or "simultaneously" perceptible also has no basis in the law. This requirement appears nowhere in the Act, and has never appeared in prior copyright case law. Nor is there any other evidence that Congress ever intended such a requirement to be read into the Act. Yet the Second Circuit concluded, in direct contradiction to clear legislative history, that downloads are not performances because they cannot be perceived simultaneously as they are transmitted. Pet. App. 10a-12a.³

3. Under the plain language of the Act, the transmission to the public of a prior-existing performance *itself* constitutes a public performance. This is spelled out very clearly in the legislative history of the Copyright Act:

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*) . . . Although **any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill,** it would not be actionable as an

In actuality, prior case law makes clear that it does not matter to the public performance analysis whether the transmission is audible, or whether there is a time lag between a transmission of a performance and the consumer's listening to that performance.

Courts have repeatedly found that other inaudible transmissions constitute public performances. *See, e.g., Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 294 (S.D.N.Y. 1991) (“Transmissions by a cable network or service to local cable companies who in turn transmit to individual cable subscribers constitute ‘public performances’ by the network”); *Nat’l Cable Television Assoc. v. Broad. Music, Inc.*, 772 F. Supp. 614, 651 (D.D.C. 1991) (transmission from cable programmers to cable system operators and retransmission from cable system to home viewers constitute two separate public performances); *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 758-59 (S.D.N.Y. 1988). Similarly, in *Nat’l Football League v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000), the Second Circuit held that transmission of television programming from a satellite carrier’s uplink facility in the United States to a satellite constituted a public performance, separate and apart from the

infringement unless it were done ‘publicly,’ as defined in section 101.

H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676-77 (emphasis added). *See also* S. REP. NO. 94-473, at 59-60 (1975) (same). The Second Circuit simply ducked this contradiction of its interpretation of “perform” and “perform or display a work ‘publicly’” by asserting that the legislative history could be ignored because the statute was unambiguous. Pet. App. 10a n.8.

subsequent transmission of that programming from the satellite to actual viewers in Canada. In the case at bar, the Second Circuit attempted to distinguish its holding in *NFL* “on the basis that in that case the final act in the sequence of transmissions was a public performance.” Pet. App. 16a. But the final transmission in *NFL* was to Canada (*NFL*, 211 F.3d at 12) – and therefore not a public performance under U.S. copyright law.

In other cases, although specifically exempted by section 111 of the Act from copyright infringement, courts have found that a passive secondary carrier performs publicly when it picks up a television transmission from an initial transmitter and transmits that signal to a cable system that then transmits directly to the public. See *Hubbard Broad., Inc. v. Southern Satellite Sys., Inc.*, 593 F. Supp. 808, 813 (D. Minn. 1984) (“The court agrees that under the broad definitions found in § 101 of the Act, a transmission is a public performance whether made directly or indirectly to the public and whether the transmitter originates, concludes or simply carries the signal.”), *aff’d*, 777 F.2d 393 (8th Cir. 1985). See also *WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) (Posner, J.) (finding the transmission of a television show from a satellite common carrier to a cable system, before the cable system sent the show on to its subscribers, was a public performance because “the Copyright Act defines ‘perform or display . . . publicly’ broadly enough to encompass indirect transmission to the ultimate public”). In these cases no one saw or heard the transmissions of the performances until the cable or satellite operator ultimately retransmitted the signal to viewers.

Just as the case law shows that there is no requirement that a transmitted performance be simultaneously audible, the degree of time lag between a transmission of a performance and the consumer's listening to that performance should be of no import. *See, e.g., Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 323-26 (2d Cir. 1995) (when a television show containing a sound recording was transmitted first to the television stations and then to the public "later that day," the transmission to the television stations was a public performance (albeit not actionable because there was no right of public performance in the sound recording at the time)). The Second Circuit's focus on simultaneous perceptibility is at cross-purposes with section 101's express mandate that a transmission should be treated as a public performance whether different members of the public receive it "at the same time or at different times."

B. The Second Circuit's Decision Defies Congress' Intent to Create a Broad, Technology-Neutral Public Performing Right.

The language of section 101 provides that the transmission of a public performance can be "by means of any device or process," evidencing Congress' intent to create a broad right not favoring any particular transmission technology. Yet the Second Circuit's decision clearly discriminates between the technology of downloads and the technology of streams. Either way, the customer gets to listen to the song on his computer when he wants, but according to the Second Circuit, one method of electronic delivery is a public performance, and the other is not. Under this ruling, with a few technological adjustments, music services can simply avoid paying a

public performance license fee for their use of songwriters' creative works. This threatens to undermine decades of case law and settled expectations about what customer classes need BMI licenses, and creates an artificial incentive to engineer around the public performing right.

There are many decades of federal case law defining what constitutes a public performance. But with the Second Circuit's decision in hand, music users now have an incentive to use download technology (or indeed, any technology under which the transmission is not simultaneously perceptible) to replace methods that have long been deemed public performances.

For example, it is well-established that disseminating music or videos to individual hotel rooms, or providing booths to members of the public to view films, constitutes public performances within the meaning of the Act, even if the customer views or listens to the work by himself. *See, e.g., Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931) (dissemination of music by wire to individual hotel guest rooms was a public performance); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (in case involving the exhibition of copyrighted films in private booths, "the transmission of a performance to members of the public, even in private settings . . . constitute[d] a public performance"); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (on-demand transmissions of movies available to viewers in private hotel rooms were public performances).

Yet the Second Circuit's decision invites entertainment service providers simply to reconfigure their transmissions

as downloads and stop paying public performance fees. For example, if the movie is sent to the guest's hotel room as a "conditional" download (meaning it may be accessed by the user for a limited duration or number of uses), and the hotel guest watches the movie in his room (beginning right after he ordered the movie), then according to the Second Circuit, that is presumably no longer a public performance. The Second Circuit's decision threatens to upset well-settled expectations on the part of all parties as to what constitutes a public performance, and to deprive songwriters of revenue streams they have long depended on, far beyond the already-significant facts of this case.

In addition to its potentially disastrous impact on revenue from existing customer classes, the deleterious effect of the decision will be even greater as new technologies develop. Despite the Act's protection for transmissions by "any device or process," the Second Circuit has made clear that it is to music sellers' advantage to encode song transmissions as downloads rather than as streams.

A legal difference between public and private performances that hinges on whether there is some slight delay between the transmission of a musical work to a consumer's computer and the consumer's listening to that transmitted work creates incentives for Internet music providers to artificially introduce legally sufficient delays into Internet transmissions, simply to avoid paying copyright owners for the use of those owners' public performing rights.

This has already begun to happen. For example, many potential licensees have approached BMI in recent months,

claiming that the Second Circuit's decision means that as long as they structure their transmissions as "progressive downloads" (which allow the consumer to hear or view content as it is being downloaded) instead of as streams, they do not need public performance licenses. Moreover, the music subscription service industry, which includes the Rhapsody service offered by Respondent RealNetworks,⁴ is one of the fastest-growing categories of BMI licensees, and currently brings in between \$2 million and \$3 million annually for BMI's songwriters and publishers. But an increasing number of these services are migrating towards the use of progressive downloads instead of streams in an attempt to avoid BMI fees. Despite the fact that to the consumer, progressive downloads look just like streams, music users (although BMI disagrees) are interpreting the Second Circuit's decision to mean that they do not have to pay for them.

The *Grokster* case illustrates the perils for the music world when technology is allowed to develop unchecked by the Court's guidance. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). By the time of this decision finding copyright infringement, numerous fortune-seekers had set up peer-to-peer services, and an entire generation had become accustomed to downloading music for free from the Internet. Thus, while the ruling put a halt to Grokster's infringement, it did little to abate illegal file-sharing as a whole. Indeed, in the period 2004 through 2009 (primarily after the 2005 *Grokster* decision), approximately 30 billion songs were illegally downloaded on file-sharing networks. In 2009, U.S. consumers paid for only 37 percent of the music they acquired. *Scope of the*

4. See *supra* note 2.

Problem, RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem (last visited June 1, 2011). An early Court decision addressing the download issue would correct the course before harmful patterns become established.

C. The Download/Stream Dichotomy is a False and Unworkable Distinction.

At bottom, the court of appeals decision can be understood as a flawed exercise in reasoning by analogy. The court believed that only streams are analogous to radio broadcasts (Pet. App. 14a), and apparently reasoned that downloads are like record store sales because the end user (sometimes) retains a copy on his computer. While this has the virtue of simplicity, the analogy does not hold.

As a result, another major flaw in the Second Circuit's ruling is that, contrary to its reasoning, there is no bright line that distinguishes streaming from downloading. Therefore, the rule is unworkable in practice.

Rather than a bright, defined line between streams and downloads, there is in reality a broad continuum of transmissions with a mix of characteristics that resemble old media broadcasting or purchases at a record store. New forms of Internet and wireless transmission are constantly developing, such as progressive downloads, time-limited conditional downloads, and services that buffer large portions of digital transmissions to allow a user to decide to download a song in the middle of a streamed performance of the song. *See Atlantic Recording*, 2007 WL 136186, at *2.

Because of these varied types of transmissions, the Second Circuit's decision cannot be applied in a consistent way. As discussed above, some downloads now have the ability to begin playing in audible form even while being transmitted. How should such a download be treated under a "contemporaneous" perceptibility requirement if the transmission is completed faster than it takes for the complete song to be heard by the listener (and thus is not truly "contemporaneous")? How should music transmissions that can, at the option of the end-user, be either listened to at the time of transmission *or* stored for later listening be treated under a contemporaneous perceptibility requirement? As another example, consider a situation where one person has a high-speed Internet connection and can download a song within seconds and immediately begin listening to that song. A second person streaming a song with a slower Internet connection may have to wait a longer time than the downloader because of the time necessary for the stream to be buffered. Why should the stream be considered contemporaneously perceptible and the download not? A test requiring decisions about how much delay will transform an otherwise compensable public performance into a non-event is unpredictable, highly fact-specific and therefore impractical for BMI and its potential customers to live by.

The Second Circuit reluctantly acknowledged the evidence that the stream/download dichotomy it hypothesized is at odds with reality, adding a footnote to paper over that problem. "Our opinion does not foreclose the possibility, under certain circumstances not presented in this case, that a transmission could constitute both a stream and a download, each of which implicates a different right of the copyright holder." Pet. App. 17a

n.10. The footnote only serves to illustrate the flawed reasoning behind its holding, and the incoherence of the test it prescribed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL E. SALZMAN
Counsel of Record
JESSICA A. FELDMAN
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000
salzman@hugheshubbard.com

MARVIN L. BERENSON
JOSEPH J. DiMONA
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 220-3000

Attorneys for *Amicus Curiae*
Broadcast Music, Inc.

Dated: June 3, 2011

Blank Page