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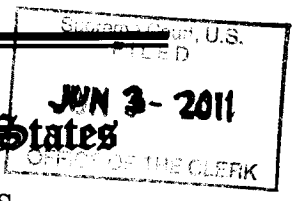

IN THE

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 *AMICUS CURIAE* FOR THE ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, CHURCH MUSIC PUBLISHERS ASSOCIATION, MUSIC PUBLISHERS' ASSOCIATION OF THE UNITED STATES, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, PRODUCTION MUSIC ASSOCIATION, THE SONGWRITERS GUILD OF AMERICA, THE SOCIETY OF COMPOSERS AND LYRICISTS, THE RECORDING ACADEMY, THE GAME AUDIO NETWORK GUILD, THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

Amici represent the interests of songwriters, composers, and music publishers who create, promote and disseminate musical works.[2] Songwriters and composers are the authors of the musical work and those in whom the musical work copyright initially vests. 17 U.S.C. Sec. 201(a). Music publishers, to whom a songwriter typically assigns his or her copyright in exchange for a share of the income received from the work's various uses, help songwriters exploit their musical works, by, among other important activities, promoting the songwriters' works to record companies and performing artists and licensing these works for use in film and television.

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[1] All parties have given written consent to the submission of this brief. The names of *amici* and further details about their activities are included in the Appendix to this brief. 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 *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief.

[2] Two distinct copyrights exist in recorded music: the copyright in the underlying musical work – the interests of *amici* here – and the copyright in the sound recordings of the musical work, that is, recordings by performing artists of the underlying musical composition. *See* 6 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT Sec. 30.01 (2005). Audiovisual works are expressly excluded from the definition of a sound recording in the Copyright Act. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sound accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied," 17 U.S.C. §§ 101 *et seq.*

As a result of the longstanding creative and financial contributions of songwriters and music publishers, the musical work is the 'heart and soul' of American culture. Early in the Twentieth Century, music publishers from New York City's 'Tin Pan Alley' revolutionized popular music by promoting some of the greatest songwriting talent in the United States, including a Russian immigrant known as Irving Berlin, the 19 year-old son of a Manhattan horse stable owner named Jerome Kern, a rehearsal pianist named George Gershwin, the son of a former slave from Missouri named Scott Joplin, and the fledgling songwriting duo of Richard Rodgers and Lorenz Hart. Music publishers critical efforts continue today with their representation of such talented singer-songwriters as Alicia Keys and James Blunt.

To nourish the creation and promotion of musical works and to sustain the resounding achievements of songwriters in the United States, *amici* represent the interests of music publishers (and, through them, songwriters) before Congress and the courts, and in industry-wide negotiations, to ensure that the exclusive rights in the musical work copyright granted by the Copyright Act are recognized and protected as Congress intended, whether in traditional or new media, and that musical work copyright owners are fairly compensated for the exploitation of their exclusive rights.

SUMMARY OF ARGUMENT

If certiorari is not granted, the decision of the United States Court of Appeals for the Second Circuit – failing to recognize the public performance right in digital music downloads – will have far reaching and unintended detrimental effects on songwriters, composers and music publishers and their continued creation of musical works.

The musical work is the foundation of the music industry and has long been the focus of copyright protection. As the Second Circuit acknowledged, the Copyright Act grants to the owners of musical work copyrights several broad exclusive rights, including among others the rights of reproduction and distribution (sometimes known as the "mechanical right") and the right of public performance. *United States v. ASCAP* (*In the Matter of the Application of RealNetworks, Inc., et al.*), 627 F. 3d 64, Pet App 1.a, (2d Cir. 2010). Regarding digital technologies specifically, the Copyright Act expressly confirms that digital transmissions may implicate both the mechanical right and the public performance right.

The Second Circuit nevertheless determined that a digital download was not a public performance because the definition of "perform" in Section 101 of the Copyright Act requires that the action be "perceived contemporaneously." *Id.* at 12a. The Second Circuit's conclusion cannot be reconciled with the plain language of the Copyright Act, which contains no requirement of contemporaneous perceptibility. Indeed, the Second Circuit's decision runs contrary to the expressed intent of Congress to preserve the exclusive rights granted to the musical work copyright owner in digital transmissions – whether "streams" or "downloads" or the next form of digital

delivery – by maintaining both mechanical royalty income *and* performance rights income in those transmissions. Instead, the lower court decisions do just the opposite by eviscerating the public performance right in digital music downloads (and, by extension, the public performance right in audiovisual downloads).

Beyond creating a public performance loophole unintended by Congress, the Second Circuit's decision will have lasting and harmful consequences on musical work copyright owners and potentially work for hire composers and songwriters. The full recognition and protection of their separate and exclusive rights – especially, as new technologies evolve – is essential to the livelihood of all creators of musical works. The failure to recognize the public performance right attendant to downloads sets a dangerous precedent such that the protection of well-established rights that spring from the plain language of the Copyright Act could be eroded in the context of new and developing technologies. For instance, following the lower court decision subsequent license applicants have already contended that the decision is equally applicable to downloads of audiovisual works containing music, further affecting songwriters and composers whose music and lyrics are used in audiovisual works. By contrast, recognition of the performance right in downloads will advance the mandate of the Copyright Clause of the U.S. Constitution, U.S. Const. Art. I, § 8, cl. 8, by providing incentives to songwriters, composers and music publishers to continue creating musical works that are vital to American culture.

For these reasons, and those set forth below and in ASCAP's brief, *amici* respectfully submit that this Court should grant review of the Second Circuit's decision.

ARGUMENT

I. CONGRESS INTENDED TO GRANT BROAD EXCLUSIVE RIGHTS IN MUSICAL WORKS AND TO PRESERVE SUCH RIGHTS IN NEW TECHNOLOGIES

A. Congress Intended To Preserve The Musical Work Public Performance And Mechanical Rights In Digital Transmissions

Section 106 of the Copyright Act grants to the owner of a copyright in a musical work several exclusive rights. 17 U.S.C. § 106. Relevant here, the Copyright Act grants to the musical work copyright owner the exclusive rights to reproduce and to distribute the work (including in the form of CDs, vinyl records, cassettes and through digital media) and to perform the work publicly. 17 U.S.C. §§ 106(1), (3), & (4). Section 115 of the Copyright Act grants users a compulsory license to reproduce and distribute musical works (a "mechanical license") in exchange for a statutorily prescribed royalty ("mechanical royalties"). 17 U.S.C. § 115. License fees for the public performance right are either negotiated directly by the music publisher with the music user or, as is more commonly the case, determined through the U.S. performing rights societies, ASCAP, BMI and SESAC.

In defining the exclusive rights set forth in Section 106 at the time of the enactment of the Copyright Act of 1976, Congress used broad terms to ensure that copyright owners' exclusive rights to reproduce, distribute and perform publicly their works would be protected as new technologies evolve. *See generally Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Copyright Law Revision Part 6* at 13-14, 89th Cong., 1st Sess. (Comm. Print 1965) ("A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances. For these reasons, we believe that the author's rights should be stated in the statute in broad terms . . . .").

In 1995, Congress addressed technological change in the music industry by clarifying and extending the rights of performance, reproduction and distribution in both musical works and sound recordings. *See The Digital Performance Right in Sound Recordings Act of 1995*, Pub. L. No. 104-39, 109 Stat. 336, as codified in portions of 17 U.S.C. §§ 101 *et seq.* ("DPRA"). Regarding musical works specifically, Congress confirmed that the Section 115 compulsory mechanical license covered "digital phonorecords deliveries" (or "DPDs"). 17 U.S.C. § 115(a)(1); *see also* S. Rep. No. 104-128, at 37 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356, 384 (emphasis added). In so doing, Congress affirmed its intent that, with regard to digital uses, musical work copyright owners receive the protection and benefit of all of their exclusive rights – reproduction, distribution and public performance alike.

First, the definition of a DPD expressly contemplates that a digital transmission involves the performance right *and* mechanical right. Specifically, a digital phonorecord delivery is defined as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, *regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein*." 17 U.S.C. § 115(d) (emphasis added). Moreover, the statutory language of Section 115 expressly preserves the right of public performance in digital transmissions. 17 U.S.C. § 115(c)(3)(J)(i) ("Nothing in this section annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under Sections 106(4) . . . .").

The legislative history of the DPRA leaves no doubt that Congress intended both a mechanical right and a performance right to coexist in a DPD. As Congress stated:

> The intention in extending the mechanical compulsory license to digital phonorecords deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. *The intention is not 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.*

S. Rep. No. 104-128, at 37 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356, 384 (emphasis added).

Congress did not limit its caution to a particular subset of digital transmissions. On the contrary, at the time, Congress recognized that the technologies then in existence would likely "lead to new systems for the electronic distribution of phonorecords" and that digital transmission of all types was "likely to become a very important outlet for the performance of recorded music." S. Rep. No. 104-128, at 14 (1995). Thus, Congress made plain that where, as here, a transmission, such as a digital download, results in a DPD and constitutes a performance under the relevant statutory criteria, both rights should be fully recognized and protected to preserve the potential income stream to copyright owners and their incentives to create. ASCAP's brief sets forth in detail the legal and technological bases for concluding that the right of public performance exists in digital downloads. *Amici* will not repeat each of those arguments.

In keeping with the statutory language and Congress' intent, an industry agreement among *amicus* NMPA, the Recording Industry Association of America and the Digital Media Association regarding mechanical royalty rates for services offering interactive streams and limited downloads reached and adopted as law in relevant party by the Copyright Royalty Board, recognizes that *both* the mechanical right and the performance right are implicated both limited downloads and interactive streams. *See Mechanical and Digital Phonorecord Delivery Rate Proceeding*, 74 Fed. Reg. 4510-11, 4514-15 (Jan. 26, 2009), *as modified by* 74 Fed. Reg. 6832 (Feb. 11, 2009) (describing and adopting industry agreement); 37 C.F.R. §§ 385.10-17 (codifying industry agreement).

The Second Circuit decision stands at odds with the Copyright Act, Congress' intent and the understanding of music industry participants. If review of the Second Circuit decision is not granted, the decision will leave a legal loophole in copyright protection that may encourage copyright users to favor one technology – the one for which performance royalties would not be owed – over another. And such a loophole – abolishing an exclusive right in musical works contrary to statutory language and congressional intent – will be to the detriment of the creators of musical works whose rights the Copyright Act is designed to protect.

II. THE SECOND CIRCUIT'S DECISION WILL HAVE ADVERSE CONSEQUENCES FOR SONGWRITERS, MUSIC PUBLISHERS AND THE CREATION OF MUSICAL WORKS

Recognizing the existence of each and every right implicated by digital downloads – including the performance right – is critical to the economic well-being of songwriters, music publishers and the entire music industry.

The creators of musical works face grave financial struggles in pursuit of their creative endeavors. Songwriters, in particular, live a perilous existence pursuing a financially trying profession. *Mechanical and Digital Phonorecord Delivery Rate Proceeding*, 74 Fed. Reg. 4510-11, at 4523 (Jan. 26, 2009), *as modified by* 74 Fed. Reg. 6832 (Feb. 11, 2009) ("the songwriting occupation is financially tenuous for many songwriters").

Performance royalties – always a significant stream of income for many copyright owners – are increasingly important in the digital marketplace. Failing to recognize that digital music downloads implicate the performance right would thus not only eviscerate an exclusive right bestowed upon musical work copyright owners by the Copyright Act, but could also undermine a crucial source of financial support for songwriters and music publishers and impair their ability to continue their creation of music works.

Beyond depriving songwriters and music publishers of their rights and fair remuneration, the Second Circuit's failure to recognize the performance right at stake sent a signal to the entire creative community that certain enumerated copyright protections that are strictly enforced in more traditional media will not be fully enforced in the existing, or future, digital media. As the distribution of media shifts rapidly and decisively to digital outlets, the Second Circuit's decision could have significant adverse consequences for songwriters and music publishers upon whom the music industry relies for the creation of musical works.

The potential danger of the lower court's ruling is highlighted in the context of digitally-distributed audiovisual works. Music publishers and composers have long received performance royalties from the broadcast performances of their compositions incorporated in movies and television shows, among other audiovisual formats, but under the express terms of the Copyright Act, they do not receive Section 115 mechanical royalties from such uses.

The Second Circuit's failure to recognize the performance right in the context of music downloads has led subsequent license applicants to argue that the

performance right in audiovisual downloads should be similarly abandoned. Tellingly, since the lower court's decision, copyright owners have received notices from several internet companies stating their position that the decision implicates not only music downloads, but also television and movie downloads. If the Second Circuit's decision is extended to audiovisual downloads, the consequences for composers and music publishers will be extreme. As the transmission of audiovisual works migrates increasingly to digital platforms using download technologies, this extension would effectively eliminate the only ongoing royalty income that copyright owners currently enjoy for performances of their works in television shows and movies.

Moreover, the extension of the Second Circuits decision to audiovisual works would affect not just copyright owners, but also have profoundly negative effects on composers of "works for hire." In fact, the majority of composers of music and lyrics for audiovisual works labor under work for hire contracts. As authors of a "work for hire," composers of music and lyrics in audiovisual works do not own the copyright to their music works, but instead are compensated through a onetime, front-end fee contractually negotiated with movie and television production companies. These composers do not receive the "mechanical royalty" stream of income to which they would be entitled if they had composed the song as a songwriter for use in a sound recording. Importantly, however, composers are contractually allowed to receive the writer's share of public performance royalties, even though the producer—under the work for hire arrangement—is the legal author and owner of their music. And, with negotiated front-end fees continuing to decrease, composers have become in-

creasingly reliant on the back-end public performance royalties as their primary source of income. This contractual provision is only meaningful, however, if public performance royalties are paid for the exhibition, broadcast, or transmission to the public of the film or television programs.

Today, films and television programming are expanding from their traditional forms of transmission (such as broadcast, cable and satellite television) to online transmission of audiovisual works. Composers and songwriters whose music and lyrics are used in audiovisual works could not survive economically without the performance royalty income attributable to these digital transmissions. To preserve the critical contributions of songwriters, composers and music publishers to audiovisual works such as movies, television shows and even video games, it is imperative that the public performance right be recognized in all transmissions of audiovisual works.

CONCLUSION

By refusing to recognize the public performance right in digital music downloads, the Second Circuit's decision runs contrary to the intent of Congress, the clear language of the Copyright Act and understanding of the music industry. If the Second Circuit's decision is permitted to stand, the inevitable result of such a precedent will be the chilling of creation by songwriters, composers and music publishers, who have relied for decades on music copyright protection to safeguard their works and reward their creative pursuits.

For the reasons set forth above, and those set forth in ASCAP's brief, *amici* respectfully submit that this

Court should grant review of the Second Circuit's decision.

Respectfully submitted,

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