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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**

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The United States offers an interpretation of the right to perform copyrighted musical works publicly that does not comport with the text of the Copyright Act. Under the plain language of the Copyright Act, a download transmission is a public performance because it “transmit[s] . . . a performance . . . of the work . . . to the public, by means of [a] device or process,” and members of the public are “capable of receiving the performance . . . at the same time or at different times.” 17 U.S.C. § 101. As explained by the twelve foreign performing rights societies that filed in support of the petition, the Second Circuit’s contrary reading of the statute will cause “the United States [to] be internationally perceived as a copyright scofflaw.” Br. of Foreign Performing Rights Societies 5. It will also dramatically impair the ability of composers and publishers to obtain fair compensation for the public performance of their copyrighted musical works. Because the Second Circuit’s decision is unlikely to be examined by another court of appeals, it warrants immediate review by this Court.

I. THE UNITED STATES MISINTERPRETS THE COPYRIGHT ACT.

The United States’ textual argument begins with the proposition that one cannot “perform . . . a work ‘publicly’” within the meaning of the Copyright Act without meeting the separate definition of “to perform . . . a work.” U.S. Br. 8–9. But the definition of “[t]o perform . . . a work ‘publicly’” at issue here does not incorporate the defined term “to perform.” Rather, it requires a person “[t]o transmit or otherwise communicate a *performance*”—which can be accomplished by disseminating a previously rendered per-

formance of a copyrighted work without performing the work again at the time of dissemination. 17 U.S.C. § 101 (emphasis added). For example, the United States explains that “a musical work is ‘played’ when a musical instrument or voice reproduces the notes set forth on a page of sheet music.” U.S. Br. 8. If that “performance”—the playing of the work on a musical instrument or by voice—is “transmit[ted] . . . to the public[] by means of any device or process,” then the work has been performed publicly within the meaning of the Copyright Act—whether or not the member of the public who received the performance could contemporaneously perceive it.

The United States hinges its contrary understanding on “the quotation marks around the word ‘publicly’ and . . . the provision’s placement . . . within the alphabetical list of definitions contained in Section 101.” U.S. Br. 12. According to the United States, those aspects of the definition establish that “[t]he provision does not encompass conduct falling outside the separate definition of ‘perform.’” *Id.*

The United States’ textual inferences reflect a misunderstanding of the statute. The provision in question specifies the manner in which “publicly” modifies *both* “perform” and “display,” two different statutory terms, each with their own definitions. It would have made no more sense to group “[t]o perform or display a work ‘publicly’” with the definition of “perform” than with the definition of “display” in Section 101’s alphabetical list. The emphasis on the word “publicly” underscores that the adverb changes the meaning of two different statutory verbs. But it does not suggest that “publicly” only *contracts*—rather than expands—their respective meanings.

The United States' statutory interpretation is also incompatible with the fact that a work may be performed publicly regardless of "whether the members of the public capable of receiving the performance or display receive it . . . at the same time or at different times." 17 U.S.C. § 101. The fact that the transmission of a given performance can be received by different people "at different times" means that the performance itself need not be rendered simultaneously with the transmittal.

In attempting to reconcile the statutory language with the Second Circuit's "contemporaneous perceptibility" requirement, the United States argues that the phrase "at different times" indicates only that a person performs a work publicly when he plays it repeatedly for different individuals at different times. See U.S. Br. 12-13. To make that interpretation work, one would have to accept that a *series* of performances over the course of some undefined period of time—days, months, even years—constitutes *one* public performance. But that does not accord with the plain meaning of either "[t]o perform . . . a work" or "[t]o perform . . . a work 'publicly'": A single act of rendering or playing a work is quite clearly a single performance, and a single act of transmitting a performance to a member of the public is a single public performance.

The United States also resorts to a 1967 House Report. U.S. Br. 13. In fact, the quotation that the United States lifts from that Report strongly supports ASCAP's statutory interpretation. It states that a public performance occurs where a "transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed *at the initiative of individual*

members of the public.” H.R. Rep. No. 90-83, at 29 (1967) (emphasis added). That is precisely what occurs with a download transmission: The transmission sends data to an “information system” (the recipient’s computer) capable of playing the musical work “at the initiative” of the recipient. And it squarely contradicts the United States’ contention that the right to perform copyrighted musical works publicly is not implicated if the recipient must “undertake[] [a] subsequent act.” U.S. Br. 9.

The United States’ artificially narrow reading of the statutory language is further undermined by the legislative history of the Copyright Act of 1976. Pet. 16–17. The relevant House Report states in no uncertain terms that a work can be performed publicly where a previously rendered performance of the work is transmitted to the public: “[T]he 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.” H.R. Rep. No. 94-1476, at 63 (1976) (emphases added). Contrary to the United States’ argument, the transmittal need not encompass a *new* rendition of the work. The United States points out that “each of the examples [in the House Report] involves conduct that can itself be heard in real time.” U.S. Br. 15. But that may be because technology did not exist in 1976 whereby a performance could be transmitted over wires in a manner that was not contemporaneously perceptible and played back by members of the public at a different time. It does not suggest that Congress intended to incorporate this technological limitation into the definition of “[t]o perform . . . a work ‘publicly.’”

The United States also relies heavily on a report that the Copyright Office submitted on a different

provision of the Copyright Act and a paper by a government task force. See U.S. Br. 9–10. Tellingly, however, the United States omits the introductory phrase of the sentence it quotes from the Copyright Office’s report (which is quoted in full in ASCAP’s petition) stating that the question presented here “is an unsettled point of law that is subject to debate.” U.S. Copyright Office, Digital Millennium Copyright Act Section 104 Report to the United States Congress (Marybeth Peters, Register of Copyrights), at xxvii (Aug. 29, 2001). And although the United States characterizes the task-force report as “exhaustive,” the report spends less than a paragraph on the issue presented in this case, with no examination of the text, structure, or history of the Copyright Act, at a time when music downloads were in their infancy. See Information Infrastructure Task Force, Report of the Working Group on Intellectual Property Rights 1, 71 (1995).

Finally, the United States disputes that neighboring provisions of the Copyright Act undercut the Second Circuit’s “contemporaneous perceptibility” requirement. See U.S. Br. 13–14. But as the United States concedes, those provisions make indisputably clear that a download transmission can constitute both a reproduction and a public performance. See Pet. 15–16. Its only explanation is that Congress may have had in mind so-called “progressive” download transmissions in which a musical work is rendered during transmission *and* the recording is saved on the user’s hard drive. When Congress enacted the relevant provisions in 1995, however, progressive download transmissions were not commercially available. It is therefore implausible that Congress was contemplating “progressive” download transmissions when it clarified that a download

transmission may implicate the right to perform a musical work publicly.

II. THE UNITED STATES MISINTERPRETS THE WIPO COPYRIGHT TREATY AND OTHER AGREEMENTS.

ASCAP's *amici*—including a dozen foreign performing rights societies and a former Register of Copyrights—caution that the “decision below creates substantial international tensions” and is “inconsistent with the obligations imposed by international treaties to which the United States is a party.” Br. of Foreign Performing Rights Societies 2; *see also* Br. of Ralph Oman 18 (“[T]he Second Circuit has not afforded songwriters the minimum level of protection required by the WIPO Copyright Treaty . . .”). As a result, the foreign composers and publishers for whom ASCAP and BMI serve as collection agents will lose “substantial” royalties, ultimately “undermin[ing] the United States’ ability to press for greater copyright protection worldwide.” Br. of Foreign Performing Rights Societies 2.

The United States is incorrect when it suggests that the conflict between the Second Circuit’s holding and the Nation’s treaty obligations was not adequately preserved for review in this Court. In the first place, even if the argument had not been raised or passed on below, this Court’s “traditional rule is that ‘[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.’” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)) (alteration in original). ASCAP does not argue that it has an independent basis for relief under international agree-

ments, but rather that the conflict with those agreements demonstrates the importance of this Court's review and the error in the Second Circuit's analysis. That is an argument in support of review and reversal, not a separate claim. In any event, even "if this *were* a claim not raised by [ASCAP] below, [this Court] would ordinarily feel free to address it, since it was addressed by the court below," as the United States concedes. *Id.*; see also Pet. App. 17a n.10.

The United States' primary substantive response is to assert, without pointing to supporting language in the relevant treaties, that the drafters of the WIPO Copyright Treaty adopted an "umbrella solution" whereby "contracting parties are free to implement their obligations under Article 8 through application of a right other than the public-performance right . . . as long as the acts covered by Article 8 are fully covered by *some* exclusive right." U.S. Br. 18. But importantly, the sources that the United States cites for this "umbrella solution" refer only to the "minutes of the Diplomatic Conference"; they do not rely on any treaty language. Mihály Ficsor, *The Spring 1997 Horace S. Manges Lecture—Copyright for the Digital Era: the WIPO "Internet" Treaties*, 21 Colum.-VLA J.L. & Arts 197, 211 & n.35 (1997); see also WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* 209 & n.227 (2003) ("*Guide to WIPO Treaties*").

Moreover, the United States misunderstands what these sources say about the so-called umbrella solution. The umbrella solution would allow nations to grant the WIPO Copyright Treaty's "making available" right "through the application of a right other than the right of communication to the public or through the combination of different rights." Ficsor, *supra*, at 211; see also *Guide to WIPO Treaties*,

supra, at 209. That does not suggest, however, that where the WIPO Copyright Treaty provides that *multiple* rights are implicated by a given act, such as a download transmission, a nation is free to compensate the holder with only *one* right. The disagreement between the United States' position and the position of ASCAP and its *amici* is whether recognition of *only* mechanical rights in download transmissions satisfies the United States' treaty obligations—or whether instead the United States must recognize *both* mechanical *and* public-performance rights.

There can be no dispute, after all, that download transmissions implicate multiple rights guaranteed by international law. Although the United States takes issue with ASCAP's interpretation of Article 6's distribution right, the United States does *not* dispute that the WIPO Copyright Treaty also separately guarantees that a reproduction right applies to download transmissions, or that the right of communication to the public set forth in Article 8 of the Treaty is analogous to the U.S. public-performance right and encompasses download transmissions. See U.S. Br. 18–19 & n.5. Indeed, other nations compensate songwriters and publishers for *both* the reproduction right and the “communication to the public” right (*e.g.*, the public-performance right) when their copyrighted musical works are downloaded. See Br. of Foreign Performing Rights Societies 8–13.

The Second Circuit's decision makes the United States an international outlier because it relegates copyright owners to collecting a royalty based on only *one* subset of the rights guaranteed by the WIPO Copyright Treaty, contrary to the Treaty's plain terms. That the Second Circuit based this conclusion on a “contemporaneous perceptibility” requirement

found nowhere in the Copyright Act's text demands further review by this Court.

III. THE QUESTION PRESENTED IS VITALLY IMPORTANT TO THE MUSIC INDUSTRY.

The decision below substantially reduces the ability of U.S. copyright owners to obtain the fair compensation to which they are statutorily entitled for the public performance of their musical works. In so doing, it “threatens to undermine the reciprocal relationships among nations in copyright protection and administration, and could cause real harm to U.S. interests.” Br. of Foreign Performing Rights Societies 21. The inevitable result will be international disharmony and a substantially diminished incentive for songwriters and composers to create new musical works.

The United States downplays the financial impact of the decision below by observing that, under the Second Circuit's holding, ASCAP's “members are . . . paid each time a copyrighted work is lawfully downloaded” under the Copyright Act's reproduction and distribution rights. U.S. Br. 21 (emphasis omitted). According to the United States, the only consequence of the decision is that a “different agent” will collect the royalties. *Id.*

The United States' argument badly miscomprehends the bundle of exclusive—and distinct—property rights that the Copyright Act vests in a copyright owner. If the Second Circuit had correctly interpreted the right to perform copyrighted musical works publicly, songwriters and publishers would receive royalties *both* for reproduction and distribution *and* for public performance when their copyrighted works are downloaded. The Second Circuit's flawed construction of the Copyright Act means that

ASCAP's members must accept a lower royalty rate from respondents that does not reflect public-performance royalties for download transmissions. And, with respect to composers for film and television, the Second Circuit's decision effectively denies them *any* royalty when audiovisual works are downloaded because those composers are compensated exclusively through the public-performance right. *See* Pet. 25–26.

In fact, elsewhere in its brief, the United States recognizes that the Second Circuit's decision denies ASCAP's members a distinct royalty entirely separate from the royalties they receive under the mechanical rights (if they are entitled to mechanical royalties at all). U.S. Br. 9. According to the United States, that denial is “sound copyright policy” because a download transmission is the equivalent of a CD, for which composers and publishers receive only reproduction and distribution royalties. *Id.* at 8–9. That analogy is inapt. With the emergence over the last decade of services such as conditional download transmissions, which may permit a user to download unlimited songs for a specified period (say, a week or a month), today's music consumers use download transmissions as the equivalent of *both* an on-demand radio station *and* a CD. *See BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005). As discussed in BMI's *amicus* brief, it takes approximately 7 seconds to play a download transmission after requesting it, compared to 3.6 seconds for a streaming transmission. *See* Br. of BMI 13. It is entirely artificial—and completely nonsensical—to treat only the latter as a public performance.

The United States also attempts to minimize the importance of the question presented by observing that there is a theoretical possibility that the ques-

tion could arise in another circuit. See U.S. Br. 20–21. It points to the existence of a “third performance rights organization (SESAC, Inc.)” that is not subject to a consent decree. *Id.* at 20. But SESAC has an extremely small repertory and thus is a far less frequent litigant than either ASCAP or BMI. Indeed, this Court has acknowledged that “[a]lmost every domestic copyrighted composition is in the repertory either of ASCAP . . . or of BMI.” *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 5 (1979).

The United States also argues that this issue could arise outside the context of rate-setting. See U.S. Br. 20–21. But the very reason that ASCAP and BMI exist is that songwriters typically do not have the financial resources to litigate royalty issues with large companies like Yahoo! and RealNetworks. As this Court has explained, “ASCAP . . . provides the necessary resources for blanket sales and *enforcement*, resources unavailable to the vast majority of composers and publishing houses.” *Broadcast Music, Inc.*, 441 U.S. at 21 (emphasis added).

In light of the far-reaching implications for songwriters and publishers, and the remote possibility that other circuits will consider the issue, this Court should grant review and authoritatively resolve this important question of copyright law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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